Pretoria University Law Press
PULP

ISSN: 1609-073X

AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 23 No 1 2023

PULP

AFRICAN HUMAN RIGHTS LAW JOURNAL

THIS JOURNAL SHOULD BE CITED AS (2023) 23 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).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 23 No 1 2023

Pretoria University Law Press
PULP

2023

African Human Rights Law Journal **Volume 23 No 1 2023**

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.

For more information on PULP, see: www.pulp.up.ac.za

To order, contact:

Centre for Human Rights
Faculty of Law
University of Pretoria
South Africa
0002
pulp@up.ac.za
www.pulp.up.ac.za

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.

Contents

Case note

Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

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

AFRICAN HUMAN RIGHTS LAW JOURNAL

http://dx.doi.org/10.17159/1996-2096/2023/v23n1a10

Editorial

This issue of the *Journal* contains contributions straddling the regional (continental), sub-regional and national layers of human rights promotion and protection in Africa.

These are times of much talk and anxiety around 'institutional reform' in the African Union (AU). This ongoing institutional reform process departs from the premise that the AU and its organs are not fully 'fit for purpose', and is framed by the 2017 Report by Rwandan President Paul Kagame, 'The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union'. A major aim of this process is to improve the ability of AU organs and institutions to deliver efficiently on their mandates. Among the issues to be addressed as part of the reform process are the elimination of bureaucratic bottlenecks and inefficiencies that impede service delivery. The overarching aim of the reform is to better position the AU to drive and achieve the vision in Africa's Agenda 2063 of inclusive economic growth and development.

Five key transformation challenges have been identified to be addressed as part of the review process. The first challenge arises from the the need for the AU to focus on key priority areas that by nature are continental in scope. The second priority area is operational efficiency and effectiveness, which may require a review of the structure and staffing needs of the bodies making up the African human rights architecture. The third area is the need for sustainable financing to reduce over-reliance on development partners. The fourth is the need to review the structure and operations of the AU and ensure institutional alignment for better service delivery. Specific reference is made to the need for assessing the progress to date of the AU's quasi-judicial and judicial organs. The fifth is the need to connect the AU with the African citizenry, including by establishing women and youth quotas.

While this process has been ongoing for a few years now, very little is known about the details. In our view it is imperative to have broad inclusive and transparent consultations about any concrete proposal that may be put forward. The process has been too protracted to be rushed to a conclusion. The objective of changing the AU into a more people-centred organisation will be achieved only if the process of the change, itself, is people-centred.

The first article in this volume, by Zouapet, fits into this landscape. Zouapet argues that the African human rights framework needs to be re-imagined as a 'system' that is more relevant, coherent, efficient and effective in achieving the goal of promoting and protecting fundamental rights. He makes a number of concrete proposals, among them the potentially controversial suggestion that the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) be amalgamated into the African Commission on Human and Peoples' Rights (African Commission).

Against the background of General Comment 25 adopted by the United Nations Committee on Economic, Social and Cultural Rights, the next article, authored by Shawa, Coomans, Cox and London, argues that the application of the right to enjoy the benefits of scientific progress requires a balancing act between the rights of researchers or scientists and the rights of users of the scientific knowledge they generate. The authors maintain, when applied to health, that the right to enjoy the benefits of scientific progress has the potential to improve access to better prevention, diagnosis and treatment of diseases. Of most relevance to Africa, it is also likely that focus on this right may bring to the forefront neglected diseases.

Moving to the sub-regional level, Bernard interrogates the regional harmonisation of child labour within three African regional economic communities, the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC).

Ncame focuses on a recent decision by the International Criminal Court (ICC) emanating from the situation in Côte d'Ivoire involving Simone Gbagbo, the first woman to be charged by the Court. Ncame examines how the ICC has employed the principle of complementarity to find the right balance between the principles of state sovereignty and international criminal justice.

The last five contributions have a narrower national focus.

In the first contribution with a country-specific focus, Coleman, Ako and Kyerematen deliver an effective and considered criticism of a draft Bill before the Ghanaian Parliament, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill (Anti-LGBTIQ+ Bill). This Bill is part of the 'second wave' of criminalisation of sexual and gender minorities in African states, most prominently in Uganda and Nigeria. Their view is that the Bill is unnecessary and misconceived and, if adopted, would derail the democratic gains Ghana has made over the years. They conclude that the Bill falls short of the minimum threshold for limiting the constitutional rights of persons in Ghana.

The next article, authored by Kachika, looks through the prism of developments in rural Malawi at the tension between community laws and international human rights jurisprudence on the protection of women and girls from harmful practices. Kachika calls for states to prioritise legislative and administrative measures, and to adopt policy and undertake capacity building, training, and awareness raising to ensure that different duty bearers internalise international standards on eliminating harmful practices.

Ecoma undertakes a post-mortem assessment of the #EndSARS protest and police brutality in Nigeria during October 2020, when many Nigerians took to the streets to protest against the illicit and inhumane activities and brazen brutality of the Special Anti-Robbery Squad (SARS), a special unit of the Nigerian police force. The article assesses whether the protest led to a reduction in the level of police brutality. It examines the culture of police brutality, precursors to the protest, the demands by protesters as well as the responses and promises by government, and appraises the extent to which such promises and proposed policy reforms by the federal government have translated into significant and sustainable changes in policing.

In 'Leveraging technology to deliver basic education to children in conflict areas of Northern Nigeria', Mutu argues that the insecurity in Northern Nigeria does not absolve the government of its obligation to enable children to access basic education, and recommends that the government explores leveraging technology as a method of enabling access to basic education to children in the affected areas.

The final contribution is a discussion of a judgment by the Zimbabwean High Court in *Mangwende v Machodo* (2015 ZWHHC 755). The judgment deals with the bride price, specifically with the fact that an unfaithful wife's bride price may be withheld by the husband if he has not already paid it in full or, where it has been paid, he may be refunded in full. However, in the case of the husband

being unfaithful, the wife does not have similar recourse. The author recommends that customary law around the bride price must be developed to meet the constitutional demands of gender equality.

Editors
June 2023

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Koagne Zouapet 'From "puzzling" to comprehensible and efficient: Reform proposals to the African human rights framework through a "system" lens' (2023) 23 *African Human Rights Law Journal* 1-29
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a1

From 'puzzling' to comprehensible and efficient: Reform proposals to the African human rights framework through a 'system' lens

*Apollin Koagne Zouapet**
Associate Legal Officer, International Court of Justice, The Hague, The Netherlands
https://orcid.org/0000-0002-1228-8027

Summary: *Forty years after the adoption of the African Charter on Human and Peoples' Rights, the African architecture for the promotion and protection of human rights in Africa has been enriched both at the normative and institutional levels. This enrichment has led in legal analyses both to the affirmation of the existence of an 'African human rights system', on the one hand and, on the other, to the criticism of an unnecessarily complex and not always efficient mechanism. After highlighting the specific logic of the emerging African system, this article indicates the avenues for institutional and methodological reform that should lead to the construction of a truly coherent, effective and efficient African human rights system.*

Key words: *African human rights system; coherence; African Union reform; complementarity; interaction*

* PhD (Geneva); apollinkoagne@gmail.com. The views expressed in this article are those of the author and in no way represent a position of the ICJ or its Registry.

1 Preliminary remarks: are we really facing a system?

The 'systemic' reading and analysis of the African human rights protection machinery is now commonplace in the legal literature. A search for the terms 'African human rights system' in any search engine will bring up a long list of works and books that contain the terms in their titles. However, this systemic reading of the African human rights architecture has emerged without any consideration of the reality of the emergence of a 'system' for the protection and promotion of human rights at the African level.[1] There are two main reasons for this. First, the *rapprochement* of the African apparatus with its predecessors on the European and American continents: as these have been understood and analysed as 'systems', it seemed obvious that the architecture set up around the African Charter on Human and Peoples' Rights (African Charter) could itself only be a 'system'. The second, more general reason undoubtedly is the ease of language decried by Combacau. He points out that the word 'system' is one of these dubious verbal utensils that fashion introduces at close intervals into the frivolous world of the humanities and social sciences.[2] In the sphere of law, in particular, the word has been used carelessly by guileless authors to cover anything: an institution, a device, a loose bundle of rules and bodies or, more generally, anything slightly composite and still unnamed to which a less trivial qualification must be found.[3]

It seems to me, therefore, before looking at the coherence and reform of the system, that we should ask ourselves, at the very least, about the existence of an African 'system'. Does the reading of the African mechanic for the promotion and protection of human and peoples' rights as a 'system' result from a simple fashion trend, from a rapid qualification lack of better? If the 'system' seems 'puzzling', is it not because we are trying to bring it into a framework for which it was not designed? As we all know, beauty lies in the eye of the beholder … Indeed, the 'African system' seems to have always suffered from comparison to its disadvantage with other regional systems of protection of human rights. As was pointed out 20 years ago, but this is still true today, '[n]o regional human rights system

1 See AD Olinga 'L'émergence progressive d'un système africain de garantie des droits de l'homme et des peuples' in AD Olinga (ed) *La protection internationale des droits de l'homme en Afrique. Dynamique, enjeux et perspectives trente ans après l'adoption de la Charte africaine des droits de l'homme et des peuples* (2012) 13-14.

2 J Combacau *Le droit international: bric-à-brac ou système?* (1986) 31 *Archives de philosophie du droit* 85.

3 As above.

attracts as much suspicion, even disdain, as the African regional system'.[4] The African apparatus and the machinery for the protection of human and peoples' rights thus are rarely analysed and assessed on their own merits, but always in a comparative approach, with models considered as representations of an ideal to be achieved.[5] Of course, such comparison might be deemed unfair, considering that the African Charter was drafted to take account of the unique African culture and legal philosophy and, hence, was directed towards addressing particular African needs and concerns.[6] It seems to me, therefore, that while this approach may be satisfactory from a theoretical point of view for the designation of an ideal framework for the protection of human rights, it may lack operational interest in that it refuses to take into account the philosophy of the architecture put in place. Before making suggestions on how to improve the system, one should first make sure that it exists and, second, identify the springs on which it is built.

A system has been defined as a set of which the elements do not aggregate at random but constitute an 'order' in that they are linked to one another and to the set itself by such links that one cannot consider one of these elements isolated from its surroundings without analysing it falsely.[7] Based on this definition by Combacau, Olinga proposes four elements indicating that we are dealing with a regional system of human rights protection: a normative statement of the material rights to be guaranteed; an institutional architecture specially dedicated to the protection of norms at the regional level; a coherent articulation of the normative elements between them and the elements of the institutional framework between them; and the capacity of the institutional framework dedicated to the regional guarantee of rights to act in a controlled dual movement of autonomy and complementarity with the other international mechanisms for guaranteeing rights.[8] If the first two elements are found in the African human rights protection architecture, that is, a statement of guaranteed rights and the establishment of institutions

4 CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 229.

5 See the excellent analysis on that sense of OC Okafor *The African human rights system. Activist forces and international institutions* (2007). See also AB Fall 'La Charte africaine des droits de l'homme et des peoples: entre universalisme et régionalisme' (2009) 2 *Pouvoirs* 77; M Mutua 'The African human rights system. A critical evaluation' prepared for United Nations development Programme, Human Development Report (2000).

6 JC Mubangizi 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains' (2006) 6 *African Human Rights Law Journal* 148.

7 Combacau (n 2) 86.

8 Olinga (n 1) 16.

dedicated to the protection, it must, however, be recognised that we are far from a rigorous coherence of the whole, which would make it impossible to remove one piece without seeing the whole edifice crumble.

If one can only ascertain the point of view that 'la Charte africaine constitue aujourd'hui le pilier d'un veritable système regional de protection des droits de la personne',[9] it must also be admitted that the philosophy and logic of developing a 'system' as defined above was not part of the original intentions of the designers of the African Charter. What we call 'African system', which today goes well beyond the Charter to include other legal instruments both at the continental level and at the level of regional economic communities (RECs), has not been the subject of a particular original elaboration as a system. There has, therefore, been no logic, no initial guideline, no upstream coherence, no rational project to build a system or strategy for the realisation of human and peoples' rights in Africa.[10] Its elaboration and construction have been carried out gradually under the influence of various factors: needs of African peoples; political or democratic changes at the internal level of states; multifaceted pressures from the international environment; Africa's need to be part of the dynamic of the emergence of an international order of civility, of a common heritage of shared values within the community of nations. The result is a twofold phenomenon: on the one hand, significant densification of normative instruments protecting human rights and, on the other hand, diversification of institutional tools (national, regional and continental) responsible for the realisation or preservation of these rights. This exuberance and diversity create a new environment, which creates a need for order, a need for coherence and a better articulation of things in order to be more effective in respecting the dignity of the women and men who live in Africa. If the African Charter was 'the best that could be achieved' at the time, times have changed and today more should and can be achieved.[11]

It is in this context of the gradual emergence of an African system for the protection of human rights that this reflection is intended to take place. While the contribution builds on existing knowledge and reform ideas, it imagines and proceeds from a 'systemic' thinking about the African human rights framework. Such a 'helicopter view'

9 M Kamto 'Introduction générale' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme. Commentaire article par article* (2011) 2.
10 Olinga (n 1) 14-15.
11 C Heyns 'The African regional human rights system: In need of reform' (2001) 1 *African Human Rights Law Journal* 157.

of the design, interrelations and workings of the framework is long overdue, in view of the struggles and challenges it has been facing.

The basic premise is that the drafters of the African Charter had no intention of laying the foundations of the current complex architecture. If a system has thus undoubtedly emerged, it has not been thought of as such, but rather has developed by fits and starts according to historical circumstances and convolutions. The result, therefore, is this heterogeneous assemblage of institutions and norms that can only be called a system from a finalist perspective, that is, to indicate that the machinery instigated by the African Charter must eventually give rise to a genuine system for the protection and promotion of human rights. It thus is a teleological reading that aims at a systemic understanding of the legal architecture of human rights protection in Africa. The key departure point of the contribution thus is that the African human rights framework needs to be (re) imagined as a system, and reformed in view of advancing the relevance, coherence, efficiency and effectiveness of the framework to promote and protect fundamental rights. My approach, therefore, is a reasoning based on the aims of the system under construction, namely, better protection and promotion of human rights on the continent, in the context of a decentralised legal order.[12]

On this point, it is important to underline the difference between the broader African human and peoples' rights system and the narrower African Charter's machinery for its implementation and enforcement. The emerging African system for the protection and promotion of human and peoples' rights incorporates not only the African Charter and the institutions created by it, but also the numerous legal instruments elaborated to complement the Charter, as well as those which, although not explicitly linked to the Charter, nevertheless are aimed at the protection of human and peoples' rights in Africa, elaborated within the continental regional framework and at the level of the RECs.[13] As the framework of the present reflection focuses specifically on the institutional architecture,[14] it will reflect on the distribution of tasks and roles within the African structure of human and peoples' rights to ensure at the same time the coherence, efficiency and effectiveness of the system, that is, the capacity of the set-up as a whole to achieve the assigned objective

12 On the virtues and interest of such an approach, see JY Chérot 'Le droit dans un ordre juridique faiblement ordonné. Le cas de l'Union Européenne' in *Le dialogue des juges. Mélange en l'honneur du Président Bruno Genevois* (2008) 9.

13 See in the same vein Odinkalu (n 4) 226-227.

14 See for general studies on this issue KJ Alter *The new terrain of international law: Courts, politics, rights* (2014); Y Shany *Assessing the effectiveness of international courts* (2014).

satisfactorily by making rational use of the available resources both at continental and regional levels within the RECs. Although national institutions (judiciary, national human rights institutions, and so forth) undoubtedly are part of the institutional architecture of the system, they will not be discussed in this article for reasons of space. It will only highlight here the central and primary role they must have for an effective, efficient and efficient promotion and protection of human dignity in Africa.[15] Indeed, the supranational system is only complementary to the national legal systems. The effectiveness of the African human rights system would be weakened if the provisions relating to the rights and freedoms of individuals are not effectively implemented by national institutions. National institutions remain the essential link for the effective protection of human rights and the only 'secular arm' capable of giving life to the African norm of protection. The RECs and continental bodies must, for that reason, not replace but strengthen the protection of human rights and the effectiveness of protection norms at the national level.

In general, the reform suggested in this article will fall within the framework defined by the African human rights strategy, a guiding framework for collective action by African Union (AU), RECs and member states aimed at strengthening the African human rights system. Part 2 of the article will explore the ways and means of ordering the pluralism induced by the superposition of the different supranational legal orders that constitute the RECs and the continental legal order. To this end, particular emphasis will be placed on the role that judges must play within these different legal orders in order to ensure the coherence of the system. Part 4 will focus on the continental level by examining the division of tasks that needs to be made between the different organs and institutions of the AU in order to both rationalise resources and avoid conflicts of competence. The rationalisation of competences is also addressed in part 5, this time between various so-called technical bodies at the continental level. The suggestion is to implement functional specialisation backed by close cooperation in order to ensure the efficiency of the various mechanisms involved in the promotion and protection of human rights on the African continent. Part 6

15 On the issue, see among others JF Flauss & E Lambert-Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* (2004); SP Zogo Nkada 'Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens: cas du Cameroun et du Sénégal' (2012) 4 *Revue Française de Droit Constitutionnel* 1-17 ; F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1-17; EO Ekhator 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253-270.

will provide concluding remarks on the desired evolution of the emerging system.

2 The necessary articulation between the continental and regional levels: Order pluralism

There is a close relationship between any integration process and human rights: The integration process is a vehicle for the expansion and vector of achievement of human rights, and human rights are a vehicle for regulating the process integration. It undoubtedly is in consideration of this reality that the constitutive acts of practically all the RECs in Africa stipulate their endorsement and attachment to the rule of law and human rights, in general, and to the African Charter, in particular. Indeed, human rights are a common basis for integration processes in Africa.[16] Almost all the constitutive texts of REC organisations incorporate the African Charter as a pillar of community law, and among the fundamental principles guiding the achievement of the community's objectives.[17]

Parallel to this integration into the community law of the African Charter as a pillar of the economic integration process, the state parties to the African RECs link economic integration to the existence of a jurisdictional body, undoubtedly inspired by the European model. The institutional architecture of almost all these organisations includes a jurisdictional body as a guarantor of the respect of the legal order deriving from the normative corpus defined by the community. Since human rights and the African Charter are part of this corpus, these jurisdictional bodies have competence, affirmed or implied, in matters of human rights and the application of African norms relating to them.[18] The Economic Community of West African States (ECOWAS) Court of Justice recalled this in 2008:[19]

> In stating in art 4(g) of the Revised Treaty that ECOWAS Member States declare their adherence to the principles of 'recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights', the

16 See F Viljoen *International human rights in Africa* (2012) 481-484.

17 See, eg, art 6(e) of the Common Market for Eastern and Southern Africa (COMESA) Treaty; art 6 of the Treaty establishing the East African Community (EAC); art 1 of the Protocol on Democracy and Governance of the Economic Community of West African States (ECOWAS).

18 A Koagne Zouapet 'Les instances judiciaires du système africain de protection et de promotion des droits de l'homme' in Olinga (n 1) 128-131. See also ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 79-101.

19 *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (ECOWAS Court 2008).

> Community legislature simply wanted to integrate this instrument into the law applicable before the ECOWAS Court of Justice.

Indeed, even though the envisaged human rights are yet to be conferred on the East African Court of Justice (EACJ), this Court had engaged in a creative judicial practice to adjudicate on matters touching on human rights.[20] In the case of the *Democratic Party*, the EACJ explicitly held that it has jurisdiction to interpret the African Charter in the context of the EAC Treaty. According to the EACJ Appellate Division, articles 6(d) and 7(2) of the Treaty endow the Court to apply the provisions of the African Charter, the Vienna Convention, or any other applicable international instrument, to guarantee the partner states' adherence to the provisions of the Treaty, and provisions of other international instruments to which the Treaty refers. The role of the Court is to determine the partner states' adherence to, observance of, and/or compliance with the Treaty provisions as well as the provisions of any other international instruments incorporated in the Treaty, whether directly as in article 6(d), or indirectly as in article 7(2).[21]

The advantage and benefit of granting such powers to the jurisdictions of the RECs cannot be disputed. Ebobrah has made this clear:[22]

> From the angle of implementation, proximity between states and the possible spill-over effect of conflicts resulting from disregard for human rights provide some motivation for collective implementation of human rights at the sub-regional level. Further, the economic and cultural ties between states in the same sub-region amplify the chances of sanctions for failure to comply with decisions of supervisory bodies commonly established. Similarly, the 'mobilisation of shame' as a tool for implementation is stronger at the sub-regional level where closer political ties exist as against the global system from which states are 'separated by vast geographical and psychological divides' … Other

20 See among others *James Katabazi & 21 Others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* (2007); *Honourable Sitenda Sibalu v the Secretary General of the EAC, Attorney General of Uganda, Honourable Sam Njumba, and the Electoral Commission of Uganda* (2011); *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2012); *Independent Medico Legal Unit v Attorney General of Kenya* (2013); *Omar Awadh & Six Others v Attorney General of Kenya and Attorney General of Uganda* (2013). See the analysis of ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 223-253 230-238; MT Taye 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the Court' (2019) 25 *African Journal of International and Comparative Law* 359-377.

21 *Democratic Party v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, The Attorney General of the Republic of Kenya, The Attorney General of the Republic of Rwanda and The Attorney General of the Republic of Burundi* [2015] Appeal 1 of 2014.

22 Ebobrah (n 20) 87.

> reasons that justify resort to sub-regional courts for the protection of human rights include the comparative cost advantages as compared to the use of African regional mechanisms and the UN mechanisms. Sub-regional courts are closer to applicants in the given sub-region and therefore it is relatively cheaper to access these institutions. It can also be argued that litigation before sub-regional courts is bound to be quicker than litigation at the regional and global level … Finally, it could be argued that the flexibility of sub-regional courts with respect to their sittings allows indigent and other challenged applicants to enjoy the possibility of accessing the courts as the courts are able to move to different locations within the sub-region.

On the other hand, it should be noted that nothing prohibits the African Court on Human and Peoples' Rights (African Court) from interpreting or applying RECs' human rights instrument such as the ECOWAS Protocol on democracy and governance. Indeed, this instrument makes a clear interdependence link between democracy and human rights, in particular by prescribing respect for human rights and the jurisdictional sanction of human rights.[23] It thus is in line with the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the Resolution of the United Nations (UN) General Assembly on the rule of law at the national and international levels.[24] Besides, following article 3(1) of the Ouagadougou Protocol establishing the African Court, the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application not only of the Charter or the Protocol itself but also 'any other relevant human rights instrument ratified by the states concerned'. The African Court, therefore, has jurisdiction to apply any legal instrument to which the state in dispute is a party if, in the Court's opinion, it is a relevant instrument for the protection of human rights, beyond the particular denomination of that instrument. Thus, there is nothing to prevent a litigant before the African Court, as long as the latter has jurisdiction *ratione personae*, from invoking both the African Charter and any legal instrument of a REC, as long as that instrument expressly enshrines human rights.

While there is no doubt that the multiplication of jurisdictional bodies is an asset for the protection of human rights in Africa,[25] there also is a real risk of concurrent, divergent or even contradictory

23 Preamble, arts 1 & 32-39 of the Protocol.
24 See Preamble and arts 4, 6, 8 & 10 ACDEG; Resolution adopted by the UN General Assembly on the rule of law at the national and international levels, 6 December 2010, Doc. A/RES/65/32.
25 See A Rachovitsa 'On new "judicial animals": The curious case of an African court with material jurisdiction of a global scope' (2019) 2 *Human Rights Law Review* 255-289.

application and interpretation of the same legal instruments by regional and continental jurisdictions. The cacophony and the danger to the coherence of the system are all the greater in that there is no hierarchy between these different legal orders, and that all of them claim both a certain autonomy and a direct, or even mandatory, effect of their decisions in the internal legal orders of the member states. Beyond the possibility of forum shopping, there is a real risk that the national judge will find himself or herself torn between contradictory solutions indicated by judges from two different economic areas (some states in fact are members of several RECs) or between a community judge and the continental judge. According to Reinold, the absence of an overarching authority almost always produces norm collisions, which in turn undermine legal certainty.[26] Therefore, it is necessary to order pluralism, following the now-famous expression of Mireille Delmas-Marty.[27]

The term 'pluralism' has been used to give an accurate account of the relationship between the legal orders (originally between the internal and community legal orders) taking into account both their independence and their close interweaving. The aim is to describe situations, such as that between the RECs and the continental level in Africa, where non-hierarchical legal orders coexist, but interact with one another without any of the systems denying the independence or normativity of the other; a situation in which the 'network' rather than the hierarchy dominates, and where '*comme on le voit pour les organismes vivants, séparation et intégration des tâches sont coordonnées*'.[28] Thus, underlines Brunet, pluralism does not refer to a fixed situation but to a movement of harmonisation of the legal orders tending towards a common law which would not go as far as merging the legal orders. The legal orders are in a relationship of peaceful coexistence: separate, distinct, but linked to one another.[29] It is this dynamic of the multiple while remaining one, of diversity within unity, that must guide the construction of the African human rights system.

To achieve this famous *pluralisme ordonné* and to have harmonious system relations, it is necessary both to define the legal framework of the relations between the systems, on the one hand, and, on the other,

26 T Reinold 'When is more more? The proliferation of international courts and their impact on the rule of law in Africa' (2019) 23 *International Journal of Human Rights* 1348.
27 M Delmas-Marty *Le pluralisme ordonné. Les forces imaginantes du droit* (2006) 2.
28 Delmas-Marty (n 27) 29.
29 P Brunet 'Pluralisme des ordres juridique et hiérarchie des normes' in P Brunet & FJ Arena (eds) *Questions contemporaines de théorie analytique du droit* (2011) 54-55.

that the judges adopt an approach and a working methodology in accordance with a system logic: the famous dialogue of the judges.[30] On the first aspect, it would undoubtedly be necessary to organise the relations between the various sub-systems of the system under construction, to create an operational synergy in the articulation of the continental and regional levels of the system.[31] It is unfortunate from this point of view that the Protocol on Relations between the African Economic Community and the RECs[32] did not settle possible conflicts of jurisdiction between jurisdictions or divergences in the interpretation of legal norms. At most, article 5 of the said Protocol calls on the RECs to 'take steps to review their treaties to provide an umbilical link to the Community'. This provision could be translated into concrete terms by opening up specific legal remedies to harmonise case law. The first could be the establishment of a mechanism for preliminary references, *renvoi préjudiciel,* enabling regional courts to refer cases to the African Court for interpretation of all or part of a text. Such a procedure has played an important role in the construction of the European legal order. According to the European judge in Luxembourg, this procedure allows in

> the special field of judicial cooperation … which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.[33]

This preliminary ruling mechanism would thus make it possible for the relationship between the regional courts and the continental court not to be based on a formal or legal mode of subordination since the latter cannot annul the decisions of the former. Moreover, this procedure would also allow regional courts, under certain conditions, to express their dissatisfaction with a previous interpretation or to suggest an interpretation of the text under debate.[34] This dialogue is important to stimulate African judicial cooperation, to enable national courts to apply African law correctly, but also to preserve

30 On the issue, see B Bonnet 'Le dialogue des juges, un non concept' in *Les droits de l'homme à la croisée des droits. Mélanges en l'honneur de Frédéric Sudre* (2018) 81-88.

31 It should be recalled here that as the present reflection only deals with institutional dynamics, I will not address the issue of normative inflation, which also needs to be rationalised as part of the development of a coherent system. On this issue, see Olinga (n 1) 23-26; Ebobrah (n 20) 93-94.

32 Protocol on Relations Between the African Economic Community and the Regional Economic Communities, 25 February 1998.

33 Case 16/65 Schwarze [1965] ECLI:EU:C:1965:117.

34 See S Adam, B Cheynel & F Rolin 'La Cour de justice, acteur multifonctionnel du développement du droit économique de l'Union' (2015) 29 *Revue internationale de droit économique* 513-532. On a critical examination of the issue, see in particular SJ Priso-Essawe 'Un dialogue préjudiciel entre juridictions régionales africaines' in *Les droits de l'homme à la croisée des droits* (n 30) 613-623.

the effectiveness and uniformity of human rights law throughout the continent.

The second possibility would be the establishment of a possibility of requesting an advisory opinion, on the model of Protocol 16 to the European Convention on Human Rights,[35] open not only to national courts of African states but also to regional courts. Of course, article 4(1) of the Ouagadougou Protocol establishing the African Court on Human and Peoples' Rights (African Court Protocol) opens the possibility for organisations 'recognised' by the AU) to request the Court's opinion. However, this formulation poses at least two problems.[36] On the one hand, it is questionable whether it covers organisations 'not recognised' by the AU as part of the African Economic Community (as the Economic and Monetary Community of Central Africa (CEMAC), West African Economic and Monetary Union (WAEMU)) or technical organisations such as the Organisation for the Harmonisation of Business Law in Africa (OHADA) or the African Intellectual Property Organisation (OAPI). On the other hand, by simply referring to recognised organisations, the provision leaves unclear whether the Community Court may put the question directly to the Arusha judge, or whether it must first go through a mechanism of 'endorsement' of its question by the executive of the Community. This may give rise to some difficulties. That is why I believe it is necessary, in the context of building a coherent African human rights system, to open up this possibility explicitly and clearly to national courts, and all African supranational courts.

To circumvent any reluctance on the part of national and regional courts to use these new legal remedies (references for preliminary rulings and requests for advisory opinions) the continental court could be endowed with a self-referral capacity, an 'appeal in the interest of the law' as found in some legal orders.[37] Such self-referral, which should remain exceptional and subject to strict conditions, should enable the continental judge to put an end to the misinterpretation or misapplication of a text or its case law by national supreme courts

35 Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol allows the highest courts and tribunals of a high contracting party, as specified by the latter, to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

36 See AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 27.

37 Such recourse is found in countries with a civilist tradition. The framework for this remedy is developed by French case law. See Ministre de l'intérieur [1823] S. 1822-1824. 2. 185; Ministère de la santé publique et de la population [1954] Lebon 593; Ministre d'Etat chargé des DOM-TOM c. Barnabé [1969] Lebon 143 (Conseil d'Etat).

and regional courts. As a means of 'pure law', the purpose of the appeal in the interest of the law is to allow the final decision not to be considered as a precedent and not to be taken into account in future cases. Given the purpose of this remedy, the sanction for irregularity must remain purely doctrinal and should not in any way influence the situation of the parties to the initial proceedings: The aim is not to transform the continental judge into a judge of cassation of the decisions of regional and national courts, but to enable him to ensure consistency in the interpretation of the standards of the African human rights system. The establishment of such a legal remedy requires the institution within the Court of a kind of public prosecutor's office, a general principle of law preventing a court from seizing itself. The institution of a public prosecutor's office should naturally be imposed within the future African Court of Justice, Human and Peoples' Rights: The latter should initiate prosecutions at least before the chamber in charge of the repression of international crimes. In the meantime, and in the absence of a public prosecutor's office, this 'appeal in the interest of the law' could be devolved to the African Commission.

In addition to these textual reforms and the development of a legal framework conducive to a better articulation between the jurisdictional bodies of the African system, the coherence of the latter depends first of all on the attitude of judges. Like national judges, regional and continental judges must be aware of their membership of this system and the need to preserve the coherence of the whole and the synergy of action of its components. It is a question of overcoming the natural tendency of each legal order to assert itself as sovereign and, in the case of relations between systems, superior to the other.[38] Harmonisation, or at least consistency, of legal orders, consists of choices of values, and only judges can carry out this task. As has been pointed out, any application of a text (the judge's primary function) requires interpretation. The choice of a method of interpretation is not dictated by reason but by the aim that one wishes to achieve: Methods of interpretation are not dictated by the texts that judges must apply but by the norms they wish to derive from them; they serve to justify their interpretative choices. To order the pluralism of the African system, the judges (national, community and continental) must adopt a systemic interpretation of the texts.

38 Brunet (n 9) 56; Combacau (n 2) 94. For a critique of the practice of some judges on this point, see A Koagne Zouapet 'L'activisme judiciaire des juridictions supranationales en Afrique. Un essai de systématisation' (2020) 28 *African Journal of International Law* 23.

This should place these institutions in a position to anticipate and respond to unwarranted forum shopping.[39] This requires the judges of the RECs to adopt as far as possible, for the interpretation of community texts, and even though no text obliges them to do so, an interpretation in line with that given by the continental jurisdiction of the African Charter and other texts of the African system. In concrete terms, this means choosing the meaning of the text subordinate to the attribution of its purpose, that is, the coherence of the system.

For the REC judge, and of course also for the national judge, this means acculturation in the sense of Bonnet: a transport of ideas resulting from the contact between different and autonomous legal orders with their own logic that can lead to major cultural changes.[40] This 'acculturation' takes place in four stages. First, the stage of knowledge: The judge must consider the existence of the other legal system. Next, the acceptance stage, that is, the identification of another order that is autonomous, that is different but that will interact with its own legal order; this corresponds, for the judge, to the idea of accepting the notion of interpenetration and integration, the idea that its own legal order can evolve as a result of influences from the other legal order. The third stage is that of understanding the other legal order, which requires not only taking an interest in it but also undertaking an analysis of that order, the norms that stem from it, its own logic to understand that order, the rules that it generates and the impact that it may have on its own legal order. The fourth and last stage is appropriation. Once the other legal system has been identified, its rules understood and mastered, as well as their effects on its integrated legal system, the judge can appropriate these rules and mobilise them autonomously and participate himself or herself in the construction of the rules that are integrated into his or her legal system: he or she becomes an actor of the other legal system, which is also his or her own.[41]

This 'acculturation' operation not only concerns national and community judges, but also the continental judge. The latter must be aware that 'legal traditions and the language of law differ across Africa',[42] and to ensure that its interpretation and application of the law does not, in fact, result in subordinating certain cultural values to others, and in the disappearance of cultural differences. The continental court must then not ignore the lack of a formal hierarchy between the legal orders and must recognise the power

39 See Viljoen (n 16) 451-456.
40 Bonnet (n 30) 87.
41 As above.
42 Viljoen (n 16) 462.

of the community and national courts to suggest an interpretation of the common rules and to adapt these rules to national law using consistent interpretation. Indeed, the dialogue between judges imposes the acceptance by each judge of the identity and singularity of the guarantee of fundamental rights in each legal order while maintaining the coherence of the system. It is a mutual dialogue between judges that induces mutual respect for the fundamental features of their respective legal orders and institutional systems.[43] A similar approach should also be observed among AU organs and institutions.

3 End the operational bottleneck at the continental level

If the issue of human rights was little addressed in the framework of the Organisation of African Unity (OAU), mainly because of the youthfulness of African states focused on the consolidation of their national unity and the nature of the regimes,[44] it has been integrated as a central issue, a pillar of pan-Africanism in the framework of the AU. Contrasting sharply with the OAU Charter, the AU Constitutive Act provides extensively for human rights in its Preamble, objectives and founding principles. One of the objectives of the AU is the promotion and protection of human and peoples' rights under the African Charter. Six of the 16 guiding principles of the AU refer to human rights either implicitly or explicitly. Article 4(h) of the Constitutive Act enshrines the organisation's commitment to human rights by recognizing the right of the AU to intervene in the event of war crimes, genocide or crimes against humanity in a member state, following a decision of the Assembly of Heads of State and Government.[45] To reflect this commitment, the AU and its member states have assigned to several organs of the organisation, an explicit or implicit mandate to promote and protect human rights on the continent.

De facto many political organs of the organisation have a human rights mandate: either that the mandate stems from the Constitutive Act of the AU; either it comes out of the texts governing the functioning of the organs or specific instruments adopted in the

43 See L Potvin-Solis 'Le dialogue entre la Cour européenne des droits de l'homme et la Cour de justice de l'union Européenne dans la garantie des droits fondamentaux' in *Les droits de l'homme à la croisée des droits* (n 30) 591-602.

44 See K M'Baye *Les droits de l'homme en Afrique* (2002) 301-302 71-86; Viljoen (n 16) 156-163; F Ouguergouz 'Organisation panafricaine et la question des droits de l'homme: un regard rétrospectif' (2013-2014) 20 *African Yearbook of International Law* 25.

45 See Viljoen (n 16) 164-169.

field of human rights. Indeed, all actors in the African governance architecture (AGA) have a direct or indirect human rights mandate. [46] The actors of the AGA system are organised in concentric circles: the first level being constituted by institutional actors with a formal governance mandate; the second integrating the main African institutions mandated in the sectoral areas of governance.

The first circle includes the African Union Commission; the African Court; the African Commission; the Pan-African Parliament (PAP); the African Peer Review Mechanism (APRM); the Economic, Social and Cultural Council (ECOSOC); the African Union Advisory Board on Corruption (AUABC); the regional economic communities (RECs); the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee); the Peace and Security Council of the AU (PSC); the Permanent Representatives' Committee of the African Union (PRC); the African Development Bank (AfDB); and any other future or mandated organ by the AU Commission to promote governance, democracy and human rights. The second circle includes the United Nations Economic Commission for Africa (ECA); the African Institute for Economic Development and Planning (IDEP); the African Institute of Governance (AIG); the United Cities and Local Governments of Africa (UCLGA); the United Nations Programme for the Development/Regional Office for Africa (UNDP/ARO); and the Council for the Development of Social Science Research in Africa (CODESRIA).

Through this breakdown of competencies, there is a kind of inter-organic transversality of human rights within the AU. To build a coherent and efficient African human rights system, the mandates of these bodies in the field of human rights and international humanitarian law must be brought into line with one another to make this transversality more readable, effective and efficient in its deployment.

The first orientation is to avoid as much as possible the multiplication of institutional mechanisms and to make optimal and efficient use of existing mechanisms. As proposed by Olinga, a distinction can be made between political institutions, administrative and strictly operational institutions and institutions of a technical nature with judicial or quasi-judicial competence. This would make it possible to avoid, for example, entrusting technical tasks to political-administrative or essentially operational institutions. A

46 For a detailed discussion of the human rights competences of some of these bodies, see Viljoen (n 16) 169-204.

counter-example of a practice to be banned is that of article 37 of the Charter for the Cultural Renaissance of Africa, which entrusts the interpretation of the Charter to the Conference of the Heads of State and Government of the AU. Similarly, one may legitimately question the maintenance of the role conferred on the Assembly of Heads of State and Government in cases of serious violations (article 58(1) of the African Charter) after the establishment of the African Court. This role should be removed from this political organ and entrusted exclusively to the African Court and the African Commission working together. Conversely, tasks with a political or diplomatic connotation should not be entrusted to mechanisms with a technical vocation. Thus, the mission of promoting human rights entrusted to technical bodies must be carried out in such a way as not to encroach on the general policy domain of political bodies, or the domain of normative production of states. Broadly speaking, one could have political and administrative mechanisms intervening upstream of the technical mechanisms (for the production of norms) and downstream (for the implementation of technical decisions or defined programmes of action), the technical mechanisms (in particular the courts) being responsible for interpreting and assessing compliance with the principles and rules.[47]

The second orientation would be a clear division of tasks between the organs. The political organs must retain their current powers of general orientation, adoption of norms, general coordination of African human rights policy, operational decision making, follow-up to the decisions of the technical organs, and sanction. The technical bodies should deal with the normative development that will be submitted to the political bodies for adoption, and jurisdictional control/sanction of obligations in the African system according to the scheme proposed below (see point 5 below). It would be useful from this point of view to introduce into the system a principle of subsidiarity, making it possible to distribute institutional roles according to the capacity to carry them out. The search for coherence necessitates, for example, defining clearly the different levels of intervention and the different mandates: production of norms, promotion, protection, monitoring, implementation of rights, up to the possible exercise of the right of intervention enshrined in the AU Constitutive Act. Another key to the distribution of competences could be the distinction between normal and emergencies, peaceful situations and situations of conflict or violence. Whatever the case may be, the same body should not cumulate too many functions

47 Olinga (n 1) 29-30; M Hébié 'L'exécution des décisions de la Cour africaine des droits de l'homme et des peuples' (2017) 121 *Revue Générale de Droit International Public* 689-726 722-724.

at the same time, or perform potentially contradictory functions in their deployment.[48]

Better articulation between the organs also requires the implementation of cooperation frameworks: Existing provisions requiring synergy of action between organs must be effectively implemented and their operational framework clearly defined. The following are some examples: article 58 of the African Charter on the report of the African Commission to the Assembly of Heads of State and Government in case of systematic violations; article 19 of the Protocol Establishing the Peace and Security Council on close cooperation between the PSC and the African Commission; article 8(3) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) on information sharing between the AU Commission and the African Commission; article 45 of the African Democracy Charter on relations between the AU Commission, the African Commission and the African Court of Justice, Human and Peoples' Rights; articles 46(4) and (5) and 57 of the Sharm-El-Sheik Protocol as amended by the Malabo Protocol on the relationship between the AU Assembly and the African Court of Justice and Human Rights. Currently absent from the collaboration framework, the African Peer Review Mechanism (APRM) must be included in the institutional architecture of the AU by defining its articulation with the other institutions of the African human rights system in particular.

Established within the framework of the New Partnership for Africa's Development (NEPAD), the APRM is a mechanism for evaluating the actions undertaken by African states in four areas of intervention: democracy and political governance; economic governance; corporate governance; and socio-economic development. Whether it concerns political and economic governance or socio-economic development, the assessment includes questions concerning participation in and implementation of international and regional instruments for the promotion and protection of human rights.[49] One can see the similarity with the reports submitted to the African Commission and the duplication of efforts by states on certain points. However, for the moment, there is a lack of articulation between the APRM and the other mechanisms of the system which would, for example, have allowed an exchange of information between institutions and the saving of resources. It is, therefore, formally and explicitly appropriate, in the interests of rationalisation and coherence

48 See Olinga (n 1) 30-31.
49 H Kembo Takam Gatsing *Le système africain de protection des droits de l'homme. Un système en quête de cohérence* (2014) 111; Mubangizi (n 6) 152-153.

of the system, to establish such a framework for cooperation. It has been suggested that, on the model of the Universal Periodic Review (UPR) mechanism, APRM should take into account the results of the work of other institutions as a basis for its intervention without having to carry out a new evaluation on the same issues.[50]

However, this division of tasks, the articulation of competencies can only produce results if, alongside the technical bodies, the political bodies play their role to the full, and cease to be a trade union defending the vicissitudes of each of its members, and take to heart the true and effective protection of the dignity of the human person in Africa. As Viljoen decried, the Executive Council and other inter-state organs such as the PRC, has increasingly adopted an obstructionist stance particularly towards the African Commission, or in monitoring the implementation of the decisions of the African Court.[51] In this regard, African states and AU organs should bear in mind the resolutely humanist and protective vision of human rights, which they have placed at the heart of the African integration project and the development of their countries. To that end, they must, in particular, provide the technical organs for the promotion and protection of human rights with the necessary means to carry out the missions they have entrusted to them.

4 A specification of the competences of the technical bodies at the regional level: More complementarity and less competition

The African Commission, the main, if not the only, institution for the promotion and protection of human rights in the architecture originally set up by the African Charter, has gradually seen new institutions emerge alongside it, in parallel with the normative development of a system under construction, without necessarily the creating states having ensured that the mandates and missions of all these institutions are consistent. In addition to the African Commission, the African system now includes an African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) created by the eponymous Convention of 11 July 1990, and an African Court on Human and Peoples' Rights (African Court) created by the Ouagadougou Protocol of 9 June 1998. The latter

50 Kembo Takam Gatsing (n 49) 111.
51 Viljoen (n 16) 564. See also RI Maikassou *La Commission africaine des droits de l'homme et des peuples. Un organe de contrôle au service de la Charte africaine (*2013) 233-246 256-270; Review of the African Union *Building a more relevant African Union*, AU (2017) 15-16 32; Heyns (n 11) 163.

will itself be replaced, after numerous reforms, by the African Court of Justice, Human and Peoples' Rights, when the Sharm El-Sheikh Protocol of 1 July 2008, itself amended by the Malabo Protocol of 27 June 2014, enters into force.[52] Although complementarity has been established as a principle organising the relations between these institutions, the articulation between them remains unclear and many grey areas remain, with real risks of competition, for example, concerning the interpretation of the African Charter, or advisory jurisdiction.[53] Effective complementarity, therefore, should be organised and ensured by removing the risks of competition and avoiding duplication of effort. To achieve this, my proposals are based on two axes.

First, the rationalisation of the organs to take into account the scarcity of the AU's resources. As several authors have pointed out, it does not seem necessary to maintain the African Children's Committee next to the African Commission.[54] My proposal, therefore, is to abolish the former so that the African Commission inherits all its functions in the logic of rationalisation of the organs of the AU:

> The proliferation of STAs (specialised technical agencies) requires the AU to develop principles to determine their creation, adoption and funding. STAs that are ineffective and overlap other institutions on the continent should be dissolved. Those that work on similar themes should merge, align their priorities and improve collaboration with AUC departments.[55]

Second, to ensure a functional specialisation already underlined above for the political organs: to entrust specific tasks to the organ that is best suited to fulfil the purposes assigned to the mission. This specialisation also requires, for efficiency, avoiding mixing promotion and protection tasks, while thus preserving the original logic, specific to the African system from its beginnings.[56] As Kéba M'Baye stated, the promotion of human rights is any action tending to encourage

52 See A Koagne Zouapet 'L'Union Africaine à la recherche de son introuvable juridiction' in L Zang & G Mvelle (eds) *L'Union Africaine quinze ans après* (2017) 279-298.

53 See ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) 22 *European Journal of International Law* 663-688; SSZ Yerima 'La Cour et la Commission africaines des droits de l'homme et des peoples: noces constructives ou cohabitation ombrageuse?' (2017) 1 *Annuaire Africain des Droits de l'Homme* 357-385; CVN Kemkeng 'Les complémentarités interinstitutionnelles dans le système africain de protection des droits de l'homme' in Olinga (n 1) 281-310.

54 Ebobrah (n 53) 672; Kembo Takam Gatsing (n 49) 52-53 108-109.

55 Review of the African Union (n 51) 31.

56 S Doumbé-Billé 'La Juridictionnalisation des droits de l'homme en Afrique: «Much ado about nothing»' in JF Akandji-Kombé (ed) *L'homme dans la société internationale. Mélanges en hommage au professeur Paul Tavernier* (2013) 693-706 697-698.

the development of respect for human rights, while protection, conceived as a remedy, aims to restore order when it is disturbed by an act that violates human rights. While promotion is resolutely forward looking, has a mainly preventive role and attempts to prevent human rights violations, protection is more concerned with what has been or is being done and has a curative purpose.[57] This distinction does not call into question the interdependence between these two essential functions of any human rights system. Consequently, any attempt to establish any hierarchy between them, and hence between the Court and the Commission, should be avoided.[58] To these bodies with a direct technical mandate to protect and promote human rights on the continent, it seems necessary to me to add the African Union Commission on International Law (AUCIL) which will have an essential role to play in ensuring the normative coherence of the African human rights system under construction.

4.1 Extensive promotion with non-judicial protection mandate for the African Commission

The human rights promotion mandate of the African Commission has been classically defined as comprising study functions, information functions, quasi-legislative functions and cooperation functions in the African human rights system.[59] The idea proposed is to develop these missions by extending them to all the normative instruments relating to the protection of human rights in Africa (including the African Charter on the Rights and Welfare of the Child (African Children's Charter)) and by strengthening its role in the evaluation of state reports and cases of serious and systematic human rights violations on the continent.

As part of its information mission, the African Commission must be a documentation centre for human rights in Africa. It will, therefore, be responsible for collecting, classifying and preserving all information relating to human rights, in general, and the African human and peoples' rights system, in particular. It should thus encourage and support the work of national human rights institutions in popularising African instruments and the system. On this point, the African Commission could be a space for coordination and exchanges between national institutions, for the definition of common policies and actions, as well as a place for sharing experiences. It would

57 M'Baye (n 44) 88-89.
58 A debate in which, unfortunately, scholars have sometimes become bogged down. See Ebobrah (n 53) 681-682; Zime Yérima (n 53) 369-372.
59 Art 45(1) African Charter.

also remain the forum for African human rights non-governmental organisations (NGOs) to express their views, avoiding any conflict of competence with ECOSOC, of which the field of concern goes beyond the sphere of civil society interested in human rights.

It is the African Commission that should receive the reports of states under the various conventions (centralisation in a single biannual state report for all instruments) and then provide the relevant information to other interested pan-African bodies with its observations where appropriate. This report should also take an assessment of states' compliance with and implementation of the decisions of regional and continental judicial bodies, the implementation of which it should ensure and monitor. It will thus be incumbent upon it to present to the Assembly of Heads of State and Government an annual report on human rights in Africa, summarising all the elements relating to the question and managed by the various African institutions acting in the field of human rights, as well as, where appropriate, country reports according to a pre-established timetable or thematic reports.[60] It is also up to the African Commission, and not the African Court, as is the current practice, to carry out missions to popularise the Statute of the African Court and encourage its ratification.

As part of its promotional mandate, the African Commission would be responsible for carrying out studies and research directly or by competent persons on issues relating to the African human rights system. The current practice of working groups and committees within the Commission, comprising external experts in addition to the members of the Commission, should be continued.[61] It could also support research programmes in African universities and training institutes, organise or support the organisation of competitions, mock court competitions, create prizes (especially for the media), award distinctions in the field of human rights in Africa.[62] It would also be incumbent on the Commission to support the initial training of African judges and lawyers on the African system by assisting states in the design of training programmes and then in continuing training through regular seminars. Similarly, it should participate in and support dialogue between the various judges by facilitating the circulation of jurisprudence and organising the annual judicial dialogue.

Article 45(1) of the African Charter gives the African Commission competence 'to formulate and lay down principles and rules aimed

60 Olinga (n 1) 30.
61 See Viljoen (n 16) 377-378.
62 M'Baye (n 44) 258.

at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations'. Based on this quasi-legislative power, the Commission has elaborated numerous resolutions, directives and guidelines that have enriched and complemented the African Charter.[63] It should retain this competence and continue to adopt such instruments and propose model laws based on studies carried out, debates with civil society and national human rights institutions and drawing on the jurisprudence of regional and continental courts. Similarly, it should not hesitate to suggest ideas for conventions or codification in the field of human rights to the AUCIL (see below). The Commission's task must in particular, in that domain, consist to discipline the process of production of African human rights norms: examination of any new normative project; opinion on the appropriateness of its adoption with regard to the existing law; appropriate articulation with the existing instruments.

The African Commission should also continue to carry out protection activities outside the judicial field. While recognising the importance of jurisdictional protection for the effectiveness of the African Charter, one should not lose sight of the importance of non-jurisdictional modes in advancing the cause of human rights so far in Africa. Thus, it should continue to be the operational framework for conciliation and amicable dispute settlement between states for human rights disputes, following article 52 of the African Charter. This conciliation mission should be explicitly extended to disputes between individuals and states when victims request such a procedure and provided that case is not related to serious and systematic violations.[64] This presupposes *a contrario* to withdraw such a possibility from the African Court, as currently provided for in article 9 of the Ouagadougou Protocol. It seems difficult to me to reconcile such competence with the judicial function of the Court. While the Court may in some cases suggest a friendly settlement in the interests of justice, it is not its role to provide a framework or conduct such a process. This could call into question the neutrality and impartiality of those who, frustrated at having invested themselves in an unsuccessful negotiation or conciliation that they thought was the appropriate solution, must then decide the dispute in law. In both the European and the Inter-American systems, such attempts of any amicable settlement have been undertaken by the relevant commissions.[65]

63 See M Mubiala *Le système régional africain de protection des droits de l'homme* (2005) 63-68.
64 See art 109 of the Rules of Procedure of the African Commission.
65 Ebobrah (n 53) 680.

In its current functioning, in addition to undertaking promotional visits, members of the African Commission also undertake missions in response to specific allegations of human rights violations. These missions may be termed 'on-site investigative', 'protective', 'fact-finding' or 'high-level missions'.[66] This practice needs to be institutionalised and organised. It should be automatic in the case of allegations of serious and systematic violations of human rights in a state, with no possibility for that state to evade and oppose it. Indeed, one of the reasons why these missions have been little used in practice by the Commission is the need for the prior consent of the state concerned. In line with the logic that underpinned the inclusion of a right of intervention in the Constitutive Act of the AU, the African system should be able to prevent or rapidly halt potential serious violations of human dignity in Africa, by conducting *in situ* visits or fact-finding missions, and to be able, if necessary, to refer the matter to the Court or another political body (PSC, for example) for appropriate action.

4.2 To the Court, an exclusive mandate of judicial protection at the continental level

The birth of the African Court has been hailed by practitioners, researchers and NGOs alike as a significant step forward in the protection of the human person on the continent and the efficiency of the African human and peoples' rights system.[67] It undoubtedly marks a willingness on the part of African states to ensure more effective sanctioning of violations of human dignity in Africa.

After coming close to being a stillborn judicial body, the African Court now is a judicial body in suspension or in transit. The Ouagadougou Protocol creating the Court had just been signed, and even before the Court was set up, African states decided to make the African Court a 'stillborn' by merging it with the Court of Justice of the African Union.[68] On 27 June 2014 an amendment to the Maputo Protocol gave life to the African Court of Justice and Human and Peoples' Rights (ACJHPR), which thus replaced the African Court of Justice and Human Rights still in gestation. The new court will be required to exercise, in an unprecedented way in international law,

66 Viljoen (n 16) 344; G Baricako 'La mise en œuvre des décisions de la Commission africaine des droits de l'homme et des peoples par les autorités nationales' in Flauss & Lambert-Abdelgawad (n 15) 213-216.

67 M'Baye (n 44) 188-189; Koagne Zouapet (n 25) 118; Kembo Takam (n 49) 53-56.

68 Protocol of 1 July 2008 on the Statute of the African Court of Justice and Human Rights adopted in Sharm El-Sheikh.

a heterogeneous range of judicial powers: It will have to be at the same time a classic court for the settlement of inter-state disputes, an international administrative court, a human rights court and an international criminal court, in addition to other powers that may be conferred on it by the regional economic communities and international organisations recognised by the AU.[69]

Much has already been said and written about the broad competencies enjoyed by the current continental jurisdiction both in terms of applicable instruments and powers.[70] Thus, the African Court is the one of the three regional systems that have the greatest freedom to order all appropriate measures it deems necessary to remedy a violation.[71] An additional advantage that comes with adjudication before the Court is the wider scope of instruments applicable before it. As already noted, article 7 of the Ouagadougou Protocol allows the Court to apply not only the African Charter but also any human rights instrument to which the relevant state is a party. This should thus enable the Court to fill any possible normative gaps in the Charter and enable the efficient protection of human rights on the continent. It is, therefore, a question of ensuring that these advances will not be lost with the institutional developments of the continental jurisdiction. It must always be able to indicate the most appropriate measure for the cessation and reparation of the violations found, and the application of all relevant instruments to the case in question. It should be stressed that the exclusive jurisdiction of the African Court at issue here is an exclusive jurisdiction at the continental level. On the one hand, this means that it does not deprive the courts of the RECs of their human rights jurisdiction where applicable. On the other hand, this exclusivity at the continental level is the logical consequence of what has been suggested above: to remove from the African Commission all quasi-judicial competence, to put an end to the existence of the African Children's Committee, and to remove the competence to interpret the texts attributed in certain instruments to the political organs of the AU.

To ensure exclusive continental jurisdiction of the African Court (whatever its name and structure) for the judicial protection of human rights, the interpretation of the African Charter and other

69 Art 3 of the Malabo Protocol amending the African Court of Justice and Human Rights.

70 See AK Diop 'La Cour africaine des droits de l'homme et des peoples ou le miroir sthendhalien du système africain de protection des droits de l'homme' (2014) 55 *Les Cahiers de droit* 529-555.

71 Art 27(2) African Court Protocol. See by way of comparison art 41 of the European Convention on Human Rights and art 63(1) of the American Convention on Human Rights.

continental human rights protection instruments requires ensuring the universality of the said jurisdiction. On the one hand, it is necessary to ensure that all African states are parties to the instrument establishing the Court, and, on the other hand, that individuals have access to it. On the first point, accession to the Statute of the continental jurisdiction should be made automatic for any state that is a party to the AU. The Statute of the Court should be made an integral part of the Constitutive Act of the AU, on the model of what exists between the International Court of Justice (ICJ) and the UN,[72] with the specificity that, unlike the ICJ, an AU member state would not have to later consent to the jurisdiction of the continental jurisdiction. The latter would be automatic as soon as a state is a member state of the AU. The alternative, more flexible solution would be to link the Court's jurisdiction instead to the African Charter. Any state party to the Charter would have to accept the jurisdiction of the Court. The danger of such an option is the risk of denunciation of the Charter by those states reluctant to accept any jurisdictional settlement related to human rights. This is why the first solution seems to me more favourable given both the AU's proclaimed attachment to the ideals of human rights and the greater difficulty that African states would have in leaving the pan-African organisation.

On the second point, the lock that article 34(6) of the Ouagadougou Protocol has so far constituted should be broken. This paragraph makes the Court's jurisdiction *ratione personae* to receive complaints by individuals and NGOs against a state subject to a prior declaration by that state recognising such jurisdiction. This approach dilutes the effectiveness of the continental judicial system and is contrary to the provisions on access to justice in several international human rights instruments, including the African Charter. Such a restriction indeed is a limitation to the protection of human rights in that it limits access to the African Court to those most likely to bring to light the most flagrant violations of human rights. To avoid any clogging of the continental jurisdiction, the complementarity mechanism with national and regional jurisdictions as mentioned above should first be made effective and, second, a filter of complaints should be put in place to reject, after a summary examination, manifestly inadmissible complaints or those for which the Court manifestly is incompetent. My proposal is to establish within the African Court, present or future, one or more chambers composed of three judges each, to play this role.

72 See arts 92 & 93 of the Charter of the United Nations.

In this perspective, the African Court will have to develop a jurisprudential policy in harmony with this approach and the system's logic of complementarity: 'The Court can act neither as a forum of first instance nor as the mandatory court of appeal for all cases.'[73] The ability of the pan-African jurisdiction to impose itself in the legal landscape will thus depend on its capacity not only to apply the law but also to educate states. It is, therefore, necessary for the Court to engage in a fruitful debate with African states to put an end to the current movement of mistrust manifested by an increased withdrawal of declarations under article 34(6) of the Ouagadougou Protocol.[74] As Reinold wrote,

> [i]nternational courts are 'fragile creatures' whose survival critically depends on their ability to cultivate their legitimacy by striking a middle ground between asserting their autonomy from political interference on the one hand, and anticipating sensitive political implications of their rulings on the other hand, thus avoiding highly contentious cases in early stages of their existence.[75]

4.3 A clear role for the African Union Commission on international law

The African Union Commission on International Law (AUCIL) is an advisory body of the AU whose main objective, on the model of the United Nations International Law Commission, is to carry out activities relating to the progressive development and codification of international law on the continent. According to articles 5 and 6 of its Statute, the AUCIL shall identify and prepare draft legal instruments, conduct studies on subjects not yet regulated by the African human rights system or sufficiently developed through state practice. Similarly, it should be able to formulate precisely and systematise the rules deemed necessary for better protection of human rights based on the concordant practice of states, the jurisprudence of the African system, as well as doctrinal opinions on the improvement of the system.

With the support of the African Commission, the AUCIL should make an exhaustive inventory of existing conventions in the field of human rights at both regional and continental levels and analyse

73 Mutua (n 4) 32.
74 See A Koagne Zouapet '"Victim of its commitment … You, passerby, a tear to the proclaimed virtue": Should the epitaph of the African Court on Human and Peoples' Rights be prepared?' *EJILTalk* (2020), https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/ (accessed 20 June 2021).
75 Reinold (n 26) 1345.

their various interactions. This approach will make it possible to give clarity to the normative dynamics of the system under construction, and to propose, if not provide, a logical explanation for the choices made; or at least to make the different normative initiatives taken at each level of the African human rights system coherent.[76] The AUCIL should then be the laboratory for the maturation of norms with a view to their adoption, and an observatory of the changes that may govern the revision of the adopted norms. The Commission should thus substantially support the African Commission on two main points: the preparation of model national laws for the implementation of ratified treaties, taking into account the legal tradition of member states; and cooperation with universities, institutions and other educational and research centres as well as with bar associations and other associations of lawyers to encouraging the teaching, study and dissemination of African human rights law.

5 Concluding remarks: The birth of a system, between Darwinism and Sfumato

The keywords for the existence of a system are known: interaction, articulation, synergy, coherence. On these criteria, it is difficult to affirm the existence of an African system of human and peoples' rights. As has rightly been noted, the endeavour to realise the dignity of the human person living in Africa has been carried out, by force of circumstance and at the whim of political and international circumstances, in a piecemeal, opportunistic and relatively fragmented manner. The interactions between the various secret norms and the various institutional mechanisms have not always been defined in such a way as to allow for systemic readability, in particular through the avoidance of mandate overturning and conflicts of competencies.[77] The logic that has hitherto guided the African architecture for the promotion and protection of human rights does not, therefore, seem to have been defined in advance in terms of priority actions, but has sought to respond to emergencies as they arise and become objective. This can undoubtedly be seen as system logic: the construction of an architecture that will end up being coherent as a result of slow development and structural constraints. This refers to a kind of 'architectural Darwinism' that will gradually push the institutions of the system, under the unstoppable pressure of social contingencies, to adapt or disappear. Only the most appropriate and efficient elements that meet the needs of

76 Kembo Takam (n 49) 74.
77 Olinga (n 1) 15.

African societies will then survive to gradually give birth to a coherent African system.

However, this approach seems a little too fatalistic and negative to me. It is possible to build a coherent and effective system more proactively and dynamically by following the key elements indicated above. If the current process of reform and rationalisation within the AU leads to a redefinition of the roles of each actor in a common synergy for the protection of human dignity in Africa, then a real system will emerge. This approach will make it possible to correct the original shortcomings and defects while delicately succeeding in giving the desired shape to the whole. The image that comes to mind is that of *Sfumato*, the painting technique developed by Leonardo da Vinci, the effect of which, obtained by superimposing several extremely delicate layers of paint, gives the contours of the subject an evanescent appearance. Certainly, because of the way it has been gradually constructed, the African system will remain 'unusual', 'strange', 'disconcerting' – but it will also have the charm that its effectiveness and efficiency in the protection of human rights in Africa will confer on it. The Mona Lisa proves it to us every day: Something can at the same time be puzzling, disturbing, mysterious and perfect.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: R Shawa, F Coomans, H Cox & L London 'A promising potential: Using the right to enjoy the benefits of scientific progress to advance public health in Africa' (2023) 23 *African Human Rights Law Journal* 30-47
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a2

A promising potential: Using the right to enjoy the benefits of scientific progress to advance public health in Africa

*Remmy Shawa**
Faculty of Health Sciences, Department of Public Health and Family Medicine, University of Cape Town, South Africa
https://orcid.org/0000-0001-9623-8272

*Fons Coomans***
Department of International and European Law, Maastricht University, The Netherlands
https://orcid.org/0009-0006-6734-1741

*Helen Cox****
Division of Medical Microbiology and Institute of Infectious Disease and Molecular Medicine, University of Cape Town, South Africa
https://orcid.org/0000-0002-6538-7192

*Leslie London*****
Division of Public Health Medicine, University of Cape Town, South Africa
https://orcid.org/0000-0003-1297-2758

Summary: *In 2020 the United Nations Committee on Economic, Social and Cultural Rights published its 25th General Comment on the right to enjoy the benefits of scientific progress (REBSP). The General Comment describes the normative content of the right, including the obligations*

* BA (Zambia) MPH PhD (Cape Town); remmyshawa@gmail.com
** BA MA (Amsterdam) PhD (Maastricht); fons.coomans@maastrichtuniversity.nl
*** BSc MPH PhD (Melbourne); helen.cox@uct.ac.za
**** MB ChB MMed Public Health (Cape Town) DOH (Witwatersrand) BSc Hons (Stellenbosch) MD (Cape Town); Leslie.london@uct.ac.za

of the state and the entitlements of rights holders. It addressed the major gap in the REBSP, which was the lack of internationally-accepted interpretations of what the right entails. This article aims to shed light on the REBSP, and to demonstrate how it can be applied to advance public health. The article argues that the application of the REBSP requires a balancing act between the rights of researchers or scientists and the rights of users of the scientific knowledge they generate. It further argues that, when applied to health, the REBSP has the potential to improve access to better prevention, diagnosis and treatment of diseases, and could draw attention to neglected diseases, which mostly affect developing countries.

Key words: *human rights; science; public health*

1 Introduction

The International Covenant on Economic, Social and Cultural Rights (ICESCR) proclaims the right of everyone to 'enjoy the benefits of scientific progress and its applications' (article 15(1)(b)). However, until recently there was widespread uncertainty about the precise meaning of this right and its legal ramifications.[1] In 2020 the Committee on Economic, Social and Cultural Rights (ESCR Committee) published General Comment 25 on science and economic, social and cultural rights. For the first time, the treaty body responsible for monitoring and guiding the implementation of economic, social and cultural rights provided its general interpretation of the right to enjoy the benefits of scientific progress (REBSP), marking the beginning of some form of international consensus on what this right entails, and the specifics around corresponding entitlements and obligations.

Suffice to note that this is only the beginning of what may be a long journey towards the full realisation of the REBSP. Realising the REBSP is difficult primarily because the right itself is complex and includes multiple spheres, such as science, intellectual property and international cooperation, and has far-reaching consequences for global politics and international trade. It is further complicated by the context in which the production of science takes place, often stretching beyond national borders and national jurisdictions,[2] thereby raising questions of extraterritorial obligations.

1 JM Wyndham & M Weigers 'The right to science – Whose right? To what?' (2015) 4 *European Journal of Human Rights* 431.

2 S Besson 'Science without borders and the boundaries of human rights: Who owes the human right to science?' (2015) 4 *European Journal of Human Rights* 462.

Access to the benefits of scientific progress in public health has received less attention than ensuring the protection of scientific discoveries. The latter has been a topic of thorough discussion and debate under intellectual property rights and law,[3] which arguably has led to more attention being paid to scientific knowledge for the benefit of innovators.[4] In the same way, public health problems of significant magnitude have been neglected or, if pursued, the scientific discoveries have been too costly to benefit the majority in need.[5] A good example is the case of tuberculosis, which remains a major problem in poor countries, but has seen limited scientific progress. In fact, until 2012 there had not been any new treatment for tuberculosis in over 40 years.[6]

The article containing the REBSP in ICESCR has three parts: Paragraph 1(a) speaks to the 'right to participate in cultural life'; paragraph 1(b) speaks to the REBSP; and paragraph 1(c) speaks to the 'right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is an author'. Paragraphs 1(b) and 1(c) often lead to tensions regarding human rights and intellectual property rights, respectively. Therefore, it is important that efforts to realise the REBSP maintain a balance of the two. This is to ensure that profits of the authors do not compromise the benefits of the users, or that benefits of users should not make it difficult for authors to reap benefits from their innovation. In fact, the second part of article 15, which speaks to rights of the author, does not apply to corporations, as the claim that corporations have rights is contested.[7] On the other hand, corporations can rely on intellectual property rights found in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). However, when using the terms 'authors of science', 'researchers' or 'scientists', this article includes in general terms both institutions (such as corporations) and individual or independent researchers.

3 As above.
4 G Yamey 'Excluding the poor from accessing biomedical literature: A rights violation that impedes global health' (2008) 10 *Health and Human Rights* 21.
5 As above.
6 S Tiberi et al 'The challenge of the new tuberculosis drugs' (2017) *La Presse Médicale* 46.
7 A Kulick 'Corporate human rights?' (2021) 32 *European Journal of International Law* 537.

As a human right, the REBSP is a 'fundamental, inalienable and universal entitlement belonging to individuals and, under certain circumstances, groups of individuals and communities'.[8] The premise is that because this is a human right, it is different from, and should not be superseded by, intellectual property rights which are essentially private ownership rights. However, there are arguments for and against intellectual property rights as human rights. Derclaye, for example, argues that there is no intrinsic conflict between human rights and intellectual property rights because intellectual property rights in fact are human rights,[9] while others, including the ESCR Committee, argue that unlike human rights, intellectual property rights usually are temporary, can be 'revoked, licensed or assigned to someone else'. This article posits that there is a need for a balancing act where corporate behaviour is limited when it threatens human rights, under circumstances where intellectual property rights prevent people from accessing treatment or decent livelihoods.

In this article we seek to draw attention to the REBSP, a little-known but theoretically powerful right with substantial potential to impact positively on public health. We ask the question of how the REBSP can advance public health, and attempt to link this right to the elements of the right to health in ICESCR, as well as the ESCR Committee's interpretation of the right to health in General Comment 14. General Comment 25 on the REBSP in section two provides guidance into the normative content of the right, including its minimum core obligations on state and non-state actors, and the entitlements it presents on rights-holders. However, for the purposes of this article we limit our discussions to how the REBSP can advance public health, and do not discuss its normative content.

2 Right to enjoy benefits of scientific progress

The REBSP is considered an important right linked to the attainment of other social and economic rights, such as the right to health, food and technology.[10] However, until recently it had not been well

8 ESCR Committee 'General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author' (2006).

9 E Derclaye 'Intellectual property rights and human rights: Coinciding and cooperating' (2008) *Common Market Law Review* https://ssrn.com/abstract=1116010 (accessed 20 March 2023).

10 S Besson 'Introduction – Mapping the issues' (2015) 4 *European Journal of Human Rights* 403-410.

conceptualised,[11] and lacked universal interpretation.[12] Previous human rights discourse in science focused on ethics and doing no harm, but not necessarily advancing science for the benefit of people. Within the human rights framework, the REBSP brings to the fore not only elements of scientific advancement and its benefits, but also critical issues of legislation, such as adopting a framework law as a means of strengthening the implementation of the REBSP at the domestic level.

What makes the REBSP even more difficult to implement or monitor is its object and, consequently, its corresponding obligations. In most international human rights instruments, the REBSP seems to be aimed at addressing the following interests: (i) non-discriminatory access to the benefits of scientific progress and its applications;[13] (ii) the opportunities for all to contribute to the scientific enterprise;[14] and (iii) the protection from adverse effects of science.[15] These objects can be grouped into two distinct categories: the protection of the interests of producers of scientific knowledge (the authors); and protecting the interests of the beneficiaries (the users). However, these two interest groups do not always work together and, in many cases, their interests can be in opposition.

Much work has been done to understand and elaborate on both the benefits and potential dangers of science in society, although not particularly in the context of human rights. Despite the opportunity that the REBSP presents to look more closely at science and its relation to human rights, this particular right, which has been less theorised, only started to receive more attention in the early 2000s.[16] Further, neither the Universal Declaration of Human Rights (Universal Declaration) nor ICESCR has any 'explicit formulation about the ideological or philosophical direction that science should take'[17] or what is meant by scientific progress. As noted earlier, General Comment 25 of 2020 attempts to address the aspect of the REBSP most often neglected, which is access to scientific benefits.

11 L Shaver 'The right to science: Ensuring that everyone benefits from scientific and technological progress' (2015) 4 *European Journal of Human Rights* 411.
12 AR Chapman 'Towards an understanding of the right to enjoy benefits of scientific progress and its applications' (2009) 8 *Journal of Human Rights* 1-36.
13 Shaver (n 11) 411-431.
14 Besson (n 2) 462-486.
15 Human Rights Council 'Report of the Special Rapporteur in the field of cultural rights' (2012) A/HRC/20/26 1-24.
16 Y Donders 'The right to enjoy benefits of scientific progress: In search of state obligations in relation to health' (2011) 14 *Medicine, Health Care and Philosophy* 371-381.
17 WA Schabas 'Looking back: How the founders considered science and progress in their relation to human rights' (2015) 4 *European Journal of Human Rights* 504-519.

Previously, where the REBSP had been interpreted, the emphasis was often placed on ensuring that science is not used to the 'detriment of human rights and freedoms and the dignity of the human person'.[18]

The same concerns were raised earlier at the World Conference on Human Rights, which cautioned against the possible adverse impact of biomedical sciences and technology on people's human rights.[19] This interpretation of the right is limiting because it appears to focus on the need to protect people from the negative effects of science, rather than seeing science as a means to advance the rights of people or, in this case, to improve people's health outcomes.

This new interpretation of the REBSP by the ESCR Committee makes a case for scientific progress, and access to benefits arising from such progress. Further, it provides many vulnerable populations, especially from developing countries, with the basis to demand the provision of better health interventions and medicines from their governments. With so many health challenges facing developing countries, including the COVID-19 pandemic, scientific progress in alleviating major causes of, or discovering cures for diseases, can potentially be utilised to save many lives. Currently, the world's poorest remain excluded from the benefits of scientific progress in many ways, or, as observed in efforts to provide COVID-19 vaccines, wealthier countries receive preferential treatment in accessing and enjoying scientific breakthroughs, simply through greater purchasing power.

3 Unpacking scientific progress and access to benefits

3.1 Scientific progress

Traditionally, science has been perceived as a study that seeks to discover new knowledge or to further existing knowledge about phenomena that occur in nature or society.[20] The United Nations Educational, Scientific and Cultural Organisation (UNESCO) reports that 'every dollar invested in research and development (R&D) generates nearly two dollars in return', underscoring the importance

18 Chapman (n 12) 1-36.
19 OHCR 'Vienna Declaration and Programme of Action' adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
20 J Sellin & F Coomans 'Extraterritorial human rights obligations and the transfer of technology for local production and research and development for essential medicines' (2016) Maastricht Faculty of Law Working Paper 2016/7.

of R&D in driving economic growth.[21] While the use of science for economic development can indirectly contribute to public health and well-being, technological advancements such as the development of mechanical or biological weapons can adversely infringe on human rights.[22] Even when the application of science is used for economic advancement, it can very easily fail to meet the minimum human rights requirements,[23] such as equal and non-discriminatory access.

It is from R&D that new and better treatment regimens or prevention methods are discovered and, therefore, it is important to understand how scientific research plays out in modern societies. In practice, research can either be for profit or not, regardless of whether it is meant to add value to people's health. For example, research done by or with government support is often used for non-profit purposes, while private institutions engage in scientific research with future profit in mind. Some authors have argued that the two can co-exist and that the difference is not fundamental but based on the skills and interests of the researchers.[24] It therefore is not uncommon for publicly-financed research to be used to advance largely private interests. Private researchers are able to apply and access government funding for their research, yet not every government has systems and protections in place to ensure that results of or benefits from such research actually benefit the public.[25] Wouters and colleagues have demonstrated the extent to which public funding has underwritten the development of current vaccines for COVID-19, almost all of which have been patented under intellectual property protections afforded by patent law.[26]

3.2 Access to benefits (enjoying the benefits)

Regarding access to the benefits of scientific progress, states face a challenge in their obligation to respect the REBSP. This challenge comes from the complex nature and circumstances in which the production of science and its benefits occur.[27] This is because science in itself is an unbounded or broad field that commonly does not occur within the confines of one country. This is also referred to as

21 UNESCO Institute for Statistics 'Global Investment in R&D' (2017).
22 Chapman (n 12) 1-36.
23 As above.
24 C Carraro & D Siniscalco 'Science versus profit in research' (2003) 1 *Journal of the European Economic Association* 576.
25 OJ Wouters et al 'Challenges in ensuring global access to COVID-19 vaccines: production, affordability, allocation, and deployment' (2021) 397 *The Lancet* 1023.
26 As above.
27 J Rahko 'Internationalisation of corporate R&D activities and innovation performance' (2015) 25 *Industrial and Corporate Change* 1019.

'the 'universal' or 'global' nature of science.[28] As a result, science's unlimited nature may conflict with the confined nature of human rights. Human rights by their nature need to be domesticated and applied within national jurisdictions[29] because, in essence, human rights apply to the territories of states. And persons who are within the jurisdiction of a state are entitled to the protection of these rights. However, when the conduct of a state has negative effects on the enjoyment of the rights of people living in another country, such a state may be bound by its human rights obligations outside its territory (extra-territorial obligations).

Furthermore, a state may be required to regulate the foreign conduct of multinational companies that are domiciled in its territory.[30] For example, South Africa, being a country with a high prevalence of HIV, tuberculosis and COVID-19, and a strong research infrastructure, has become a destination for HIV, tuberculosis and COVID vaccine and treatment trials. It is important to consider the interplay between such research occurring in South Africa and the obligations of the countries in which the pharmaceutical companies are domiciled. Also, the responsibilities of the companies themselves are crucial in understanding access to the benefits of science.

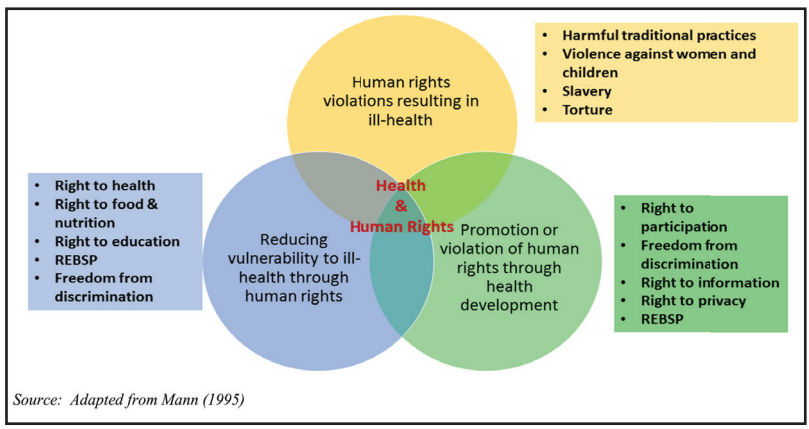
A classic example of the conflict between the unbounded nature of science and the bounded nature of human rights is the case of the patent battle involving South Africa, India and the United States in the manufacturing of generic drugs for HIV.[31] On one hand, South Africa and India wished to fulfil the right to health for their citizens by manufacturing generic drugs and improving access to low-cost drugs (the bounded nature of human rights). On the other hand, the production of science (generic drugs) had far-reaching implications that involved international and national pharmaceutical companies, and international agencies such as the World Trade Organisation (WTO) (the unbounded nature of science). This is a conflict between asserting the intellectual property rights of some versus the right to benefit from scientific progress for others or, to put it simply, balancing between the right of the authors, and that of the users of science.

28 Besson (n 2).
29 European Commission for Democracy Through Law 'Venice Statement on the Right to Enjoy Benefits of Scientific Progress and its Applications' (2009).
30 Besson (n 2); ESCR Committee General Comment 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.
31 H Hestermeyer *Human rights and the WTO: The case of patents and access to medicines* (2007).

With this conflict in mind, the application of the REBSP cannot simply end at domestic laws and policies, but also needs to extend to extraterritorial obligations, specifically, how extraterritorial obligations can shift the relationship between human rights and science. Simply defined, extraterritorial obligations are

> obligations relating to the acts and omissions of a state within or beyond its territory, that have effects on the enjoyment of human rights outside of that state's territory; and obligations of a global entity that are set out in the Charter of the United Nations and human rights instruments to take action.[32]

Figure 1: Linkages between human rights and health



Source: Adapted from Mann (1995)

3.3 REBSP potential for public health in Africa

The discourse on the relationship between health and human rights has received much attention in recent years. Previously, health policies were developed without much consideration of their impact (positive or negative) on human rights. Similarly, the human rights community seldom engaged in public health discourse or scholarship. However, through a considerable body of scholarship over the last two decades,[33] it has become clear that there is a very strong relationship between health and human rights, from three points of view as seen in figure 1: (i) the impact of health policies on

32 Sellin & Coomans (n 20); see also Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) www.etoconsortium.org (accessed 20 March 2033).

33 EK Mpinga et al 'Health and human rights: Epistemological status and perspectives of development' (2011) 14 *Medicine, Health Care and Philosophy* 237.

human rights; (ii) the impact of human rights on health; and (iii) the inextricable link between the protection and promotion of health on the protection and promotion of human rights.[34] The discussion on access to health care as a human right is one of the ways in which health and human rights are linked and has led to the strengthening of the conceptualisation and implementation of the right to health.

The constitution of the WHO defines health as a 'state of complete physical, mental, and social wellbeing, and not merely the absence of disease or infirmity'.[35] Health is not limited to disease prevention and access to healthcare services, but includes the social and economic conditions necessary for people to enjoy good health. The Alma Ata Declaration on Primary Health Care adopted at the World Health Assembly in 1978 states that health is a 'social goal whose realisation requires the action of many other social and economic sectors in addition to the health sector'.[36] Some underlying social determinants of health include 'access to clean water, sanitation, food, nutrition, housing, healthy occupational and environmental conditions, education, information, decent work, and livelihood'. These social determinants of health are explicitly spelled out in the framing of the right to health in the Universal Declaration and ICESCR.

ICESCR expands on the right to health in article 12, where it states that 'the State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. ICESCR articulates some of the steps that states need to take to ensure the full realisation of the right to health. These steps include 'reduction in infant and child mortality, environmental and industrial hygiene; prevention, treatment and control of epidemics; and provision of medical services'.[37]

Despite progress made in the conceptualisation and application of the right to health, inequalities in public health persist. The glaring differences between health outcomes of the rich and the poor within countries, or between low and high-income countries, are evidence of inequality in health outcomes.[38] Health inequality not only presents in the form of inequitable access to health care and other social services critical to health, but also presents itself in the

34 J Mann et al 'Health and human rights' (1994) 1 *Health and Human Rights* 6.
35 FP Grad 'The preamble of the constitution of the World Health Organisation' (2002) 80 *Bulletin of the World Health Organisation* 981.
36 Declaration of Alma-ata 'International Conference on Primary Health Care' (1978) 6 *USSR* 12.
37 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993.
38 World Health Organisation 'Closing the gap in a generation: Commission on Social Determinants to Health' (2008).

different types of diseases experienced by the rich and the poor. For example, diseases such as tuberculosis are prevalent in low-income populations that experience poor housing and living conditions. Despite the large numbers that such 'diseases of the poor' affect, attention to these diseases is often scant.[39] These health problems are less likely to see scientific progress in the development of innovative ways to eliminate them. In similar ways, COVID-19 has highlighted these differences between wealthier and poor countries, where the race towards access to a vaccine was dominated by high-income countries.

As of April 2021 only 4 per cent of the global population had received at least one dose of the COVID-19 vaccine.[40] Vaccine coverage is higher among developed countries, with Africa having less than 1 per cent coverage. On the other hand, North America and Europe have achieved vaccine coverage of above the global average, with 21,09 and 13,57 per cent respectively.[41] While this data refers to actual vaccine coverage, most developed countries have already pre-ordered vaccines that are in development. An estimated 11 billion doses of the COVID-19 vaccine are needed globally to be able to inoculate 70 per cent of the world's population, based on the assumption that a person would need two doses. As of April 2021, orders of over eight billion doses had been confirmed, but six billion of these doses have already been reserved by developed countries, while middle-income and low-income countries have only secured 670 million doses (less than one-third),[42] although developing countries account for 80 per cent of the world's population. How, then, should scientific progress be understood and how can the REBSP contribute to better health outcomes for the poor?

The link between the REBSP and public health has in recent years sparked interest from public health and human rights scholars.[43] Access to medicines has been at the centre of this interest, highlighting the need to look beyond investing in research and development, and to ensure that R&D is translated into knowledge and products accessible to those who need them. Human rights activists and

39 P Hotez & B Pecoul 'Manifesto for advancing the control and elimination of neglected tropical diseases' (2010) 4 *PLoS Neglected Tropical Diseases* e718.

40 M Shrotri et al 'An interactive website tracking COVID-19 vaccine development' (2021) 9 *Lancet Global Health* E590.

41 Coronavirus (COVID-19) Vaccinations, https://ourworldindata.org/covid-vaccinations (accessed 7 April 2021).

42 'It's time to consider a patent reprieve for COVID vaccine' (2021) 592 *Nature Editorial* 7, https://doi.org/10.1038/d41586-021-00863-w (accessed 7 April 2021).

43 L London et al 'Multidrug-resistant TB: Implementing the right to health through the right to enjoy benefits of scientific progress' (2016) 18 *Health and Human Rights: An International Journal*; Sellin & Coomans (n 20); Donders (n 16) 371.

health practitioners, however, have battled with skewed market mechanisms and little investment in research and development for diseases that predominantly affect poor countries. Inadequate and, in some cases, sheer lack of investment in diseases affecting the poor results in a lack of effective health technologies such as vaccines, drugs and diagnostics.[44] Despite an increase in the protection of intellectual property rights through patents, markets have failed to fill the gap since patents are not an effective incentive to invest in diseases that affect the poor who generally cannot afford to pay for their medicines.[45]

In Africa, the REBSP is intricately connected to public health in several ways. First, in order for people to enjoy good health, it is necessary to continuously invest in newer and more effective scientific research that can make health and its social determinants accessible and affordable to everyone, particularly the most vulnerable. While progress has been made in the health status of sub-Saharan African countries, the health status of the region remains one of the worst in the world.[46] In this respect, the REBSP could become a vehicle for facilitating public health. Second, the REBSP has implications on how scientific advancements are produced, shared and utilised. Because authors of scientific knowledge, if they are corporations, are protected through intellectual property rights, the REBSP can assist in making sure that these rights are not realised at the expense of the human rights of the users. The REBSP becomes a significant mediator between a human right (the right to health) and a property right (intellectual property right). This is important considering that intellectual property rights should support, and not hinder, human rights.[47]

Further, to appreciate the REBSP, and its role in advancing public health, one ought to turn to the tenets of the right to health as presented in international human rights law. Article 12 of ICESCR recommends four steps that the state can take to realise the right to health. By taking a closer look at these proposed steps, it is clear to see how the REBSP is essential to facilitating public health in that, for all these steps to be successful, scientific progress becomes indispensable in more ways than one. Below, we highlight the four

44 London et al (n 43).
45 J Lanjouw 'A patent policy proposal for global diseases' (2006) 1 *Innovations: Technology, Governance, Globalisation* 108-114.
46 D Sanders et al 'Public health in Africa' (2003) 1 *Global Public Health: A New Era* 135.
47 G Rajvanshi & R Gupta *Intellectual property rights vs human rights: A need to re-examine the relationship between the two to enhance social being* (2011).

steps highlighted in ICESCR that states need to take, and show how the REBSP is critical to each one of them.

3.3.1 The reduction of stillbirth rate and infant mortality

Preventing stillbirth and infant mortality requires, among other things, the development of new vaccines to prevent diseases that affect infants, better pregnancy monitoring and care to prevent pre-term or post-term births, and earlier detection of complications; in other words, more effective diagnostic techniques. Technology is also key to enhancing prevention efforts, as has been found in South Africa where the government has introduced mHealth strategies such as MomConnect. MomConnect is an initiative by the South African National Department of Health aimed at supporting and promoting maternal and child health by way of mobile technology. mHealth is the use of 'mobile computing, medical sensor, and communications technologies used for the delivery of health-related services and the support of medical and public health practice'.[48] All these measures require science and R&D. For example, the discovery of and access to vaccines have significantly reduced the burden of disease caused by measles, polio and tetanus, and eradicated smallpox, demonstrating the role of science and R&D in reducing child mortality and morbidity.

3.3.2 Environmental and industrial hygiene

The prevention of occupational and environmental disease requires science to detect and control hazards. Methods to rehabilitate asbestos dumps, for instance, require research to identify the safest and most cost-effective options. Similarly, science is used to generate better tools to screen employees at workplaces for early detection of lung impairment arising from exposure to workplace hazards. By using science to detect and mitigate environmental hazards, employers would be safeguarding the health and well-being not only of their employees, but also of the communities around them. In this regard, the REBSP becomes critical to the advancement on public and environmental health.

3.3.3 Prevention, treatment and control of epidemic, endemic, occupational and other diseases

Science can prevent, treat and control epidemics, and yield new knowledge to develop vaccines, explore more effective public

48 South African National Department of Health 'Health Strategy 2015-2019'.

health practices, and develop more effective treatments and ways of managing diseases. The COVID-19 pandemic has highlighted this invaluable contribution of science to public health. Unfortunately, even when high quality science exists, the acceptance and application of such scientific knowledge are marred by politics and personal agendas,[49] as it has been observed through the emergence of anti-vaccine groups across the globe. However, this does not take away the fact that the conduct of quality science is crucial in protecting public health from such global pandemics.

3.3.4 Assurance of medical service and attention in the event of sickness

Science assures medical service and medical attention from the most basic medical service to more complex ones. The use of ambulances, which are now equipped with advanced medical technology, is a result of scientific research. In South Africa, for instance, a community-based mobile clinic model scored successes in delivering treatment for HIV to adolescent girls and young women.[50] Similarly, to facilitate better health care, healthcare facilities need to be equipped with modern technology, from treating common illnesses, to more uncommon ones. The magnetic resonance imaging (MRI), for instance, is a crucial part of health, and although it is still costly, demonstrates the possibility that scientific advancement can bring to public health and well-being. Similarly, the use of digital X-ray technology has significantly improved diagnosis of tuberculosis and increased its early detection.

3.4 REBSP beyond borders

Although only now being strengthened in international law, the REBSP in fact is very complex as it requires not only a specific state to respect, protect and fulfil it, and not only in its territory, but also through international cooperation and, where necessary, extraterritorial obligations by one state in another territory or country. Because resources vary from one state to another, there are huge disparities between states in the implementation of this right, particularly between developed and developing countries. This calls for the need to clearly define the REBSP and situate state

49 RH Brown & EL Malone 'Reason, politics, and the politics of truth: How science is both autonomous and dependent' (2004) 22 *Sociological Theory* 106.

50 E Rousseau 'A community-based mobile clinic model delivering PrEP for HIV prevention to adolescent girls and young women in Cape Town, South Africa' (2021) 21 *BMC Health Services Research* 1-10.

obligations within a global political economy in which both state and non-state actors have significant influence over the laws, policies, and economies. This is why ICESCR in categorical terms demands 'international assistance and cooperation'.

Thus, the legislative obligations on governments are not only to adopt a framework law as a means of strengthening the implementation of the REBSP at the domestic level, but also relate to the transfer of scientific knowledge to benefit developing countries, pursuant to the Development Agenda Recommendation 25 of the World Intellectual Property Organisation (WIPO). The Recommendation emphasises the need to

> promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.[51]

Therefore, the failure to respect, protect or fulfil the REBSP cannot be limited to prevailing social or economic challenges but should include the state's own actions, omissions and accountability under international and national law. Further, the TRIPS Agreement in article 66(2) requires developed countries to provide incentives to institutions in their territories so as to promote and encourage knowledge and technology transfer to least developed member states.

The most promising and widely-used Coronavirus vaccines were developed by institutions domiciled in developed countries. These include the Moderna vaccine by US institutions; the Pfizer-BioNTech vaccine by a German and a US company; the Johnson&Johnson vaccine by a US company; and the Oxford-AstraZeneca vaccine by UK companies. Therefore, one may argue that in accordance with the TRIPS Agreement, developed countries, among them the US, UK and European Union (EU) countries, have a responsibility to facilitate the transfer of benefits from the scientific advancement in COVID vaccines to developing and least developed countries. Although some developed countries have pledged to donate or have already donated to the COVAX[52] facility, a global suspension of patents on

51 World Intellectual Property Organisation – An Overview (2007.
52 COVID-19 Vaccines Global Access, abbreviated as COVAX, is a global initiative aimed at equitable access to COVID-19 vaccines led by UNICEF, Gavi, the Vaccine Alliance, the World Health Organisation, the Coalition for Epidemic Preparedness Innovations, and others.

all COVID vaccines until the pandemic is under control would be a game changer.[53]

South Africa and India have tabled a patent waiver proposal for COVID-19 vaccines, medicines, diagnostics, and medical technologies at the WTO TRIPS Council. The proposal seeks to secure patent reprieves on COVID-19 vaccines by developers, in order to allow the production of generic products. However, while developing and least developed countries are in support of the proposal, some developed countries are still opposed to this proposal, making it highly unlikely that a consensus in the affirmative will be reached.[54] This may be interpreted as developed countries' failure to facilitate the transfer of both knowledge and products to least developed countries. This inaction amounts to non-compliance with article 66(2)[55] of the TRIPS agreement.[56]

Just as in the case of any international human right, the enforceability of the REBSP depends largely on the domestication of the right at the national level through legal and judicial measures. These measures are not limited to adopting the right in the national constitution, but may also include the development of new, and the enforcement of existing policies and acts, including a clear framework law for the domestic application of the right. However, a lack of clarification of both normative entitlements and obligations has hindered the domestication of the REBSP and presents a difficulty in measuring a violation. This is why the articulation of the REBSP in the 2020 General Comment 25 by the ESCR Committee presents a very significant leap towards a globally-recognised right, with clear obligations and entitlements.

In terms of unpacking cultural rights (article 15 of ICESCR) only one dimension seems to receive much attention, namely, the right of a person to benefit from ideas of which he (*sic*) is the author (article 15(c)) and having the freedom to engage in scientific discoveries. Without a similar emphasis on the rights of the user, or beneficiary

53 F Coomans 'Responding to COVID-19: The extraterritorial human rights obligations perspective' (2020), https://gchumanrights.org/preparedness/article-on/responding-to-covid-19-the-extraterritorial-human-rights-obligations-perspective.html (accessed 14 May 2023).

54 K Zaman 'The proposal to the WTO for a new patent waiver on COVID-19 Vaccines and pharmaceuticals: Is it necessary under TRIPS?' (2021) 43 *European Intellectual Property Review* 645.

55 Art 66(2) of the TRIPS Agreement instructs developed country members to incentivise domestic enterprises and institutions 'for the purpose of promoting and encouraging technology transfer to least-developed country members'.

56 A Nawarat 'Exploring the COVID-19 vaccine IP waiver proposal at the WTO', https://www.pharmaceutical-technology.com/features/wto-ip-waiver-proposal-covid19-vaccine/ (accessed 13 April 2021).

of scientific progress and discoveries, it becomes difficult to use this right to advance public health. This bias towards implementing only article 15(c) on the rights of authors negatively affects the human rights of the population and compromises their access to the benefits of scientific progress critical to the enjoyment of their health.

Framing problems of access to diagnosis as a human rights issue would require a strong linkage between an argument for enhancing access to medicines and the state's mandate in both national and international human rights law. Currently, this linkage exists mainly through the right to health. However, even within the rights framework, a rights-based approach to health must not only look at the right to health but also at other rights that have implications for health. This is relevant based on the principles of the indivisibility and interdependence of rights, for within the rights-based approach, discriminatory treatment disparities have already been framed as 'rights violations', and the REBSP broadens the claims and suggests that the state, as well as non-state entities, must bear the responsibility.

Having a right is no guarantee that the right will be realised, nor does the REBSP guarantee good public health. However, with this responsibility should come corresponding measures of accountability that allow scrutiny of the efforts of government in the realisation of the right. If well conceptualised, the international norms relating to the REBSP would assist in developing measures of accountability for both governments and non-state actors such as transnational corporations.

4 Conclusion

For public health to be safeguarded, states need to meet their obligations under article 12(2)(c) of ICESCR – which include the prevention, treatment and control of epidemics and occupational diseases. In this regard, scientific progress is expected to result in new, advanced and better ways of providing for health needs such as epidemic prevention or treatment. It is, after all, scientific research that has led to breakthroughs in managing diseases from prevention to diagnosis, to treatment. In the case of tuberculosis, for example, the contribution that investment in tuberculosis research brings includes advances in better preventive treatment, enhancing timely access to current treatment through better diagnostics and improved treatment regimens for drug-resistant tuberculosis. Scientific research also has the potential to discover safer, more

effective and affordable medicines to prevent and treat different diseases, including COVID-19.

For the REBSP to bring about meaningful impact in public health, there needs to be deliberate systems and strategies to ensure that both the rights of authors of science and the users are protected. However, should a conflict arise between these two categories, the rights of users, being human rights, should be prioritised over the rights of authors to their intellectual property. Importantly, a global discourse is required to re-evaluate the place of profits and global markets in public health and re-imagine a world where public health research becomes driven more by public health needs than by the need for profit. Political and legal debates around the human rights obligations of transnational corporations currently are ongoing, to clarify the role of business in realising human rights.[57]

The REBSP is not a novel right. It has long been enshrined in various regional human rights treaties and in two of the most fundamental human rights instruments, namely, the Universal Declaration and ICESCR. Further, the REBSP is closely related to other human rights enshrined in ICESCR, such as the right to health' and, therefore can facilitate and accelerate the realisation of these rights, as a 'facilitatory' and an 'enabling' right. For example, by pursuing the REBSP in public health, such as developing better medical technologies and affordable treatment, states would also be ensuring the realisation of the right to health. Similarly, many other rights would be better realised if there was adequate scientific advancement, for the benefit of communities and populations.

Having outlined the evident potential of the REBSP in public health, we submit that it is high time that international agencies, both public and private, paid more attention to the REBSP, and use it to guide the discourse around access to medicines for neglected diseases in poorly-resourced communities. The General Comment on the REBSP has created a starting point for this this level of international attention, but there now is a need for further application of the right through national laws.

57 P Werhane 'Corporate moral agency and the responsibility to respect human rights in the UN Guiding Principles: Do corporations have moral rights? (2016) 1 *Business and Human Rights Journal* 5-20.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: RB Bernard 'The regional regulation of child labour laws through harmonisation within COMESA, the EAC and SADC' (2023) 23
African Human Rights Law Journal 48-74
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a3

The regional regulation of child labour laws through harmonisation within COMESA, the EAC and SADC

*Rowena B Bernard**
Lecturer, School of Law, Howard College, University of KwaZulu-Natal, South Africa
https://orcid.org/0009-0001-3048-7943

Summary: *Child labour results in children working under dangerous and hazardous conditions, which affects their growth and development, as well as their health and safety. It also results in the abuse (physical and mental) and violation of the rights of a child. It is important to note that not all forms of work undertaken by a child are considered child labour. The highest incidence of child labour in the world is in Africa and, therefore, this requires better regulation and monitoring. It is argued that the banning of child labour in Africa currently is not achievable given the socio-economic factors, cultural perspectives and beliefs about childhood and the role of the child. This article looks at child labour in the African context and argues for the harmonisation of child labour laws, in the Common Market for Eastern and Southern Africa, the East African Community and Southern African Development Community through regional integration. There are several benefits to the legal harmonisation of child labour laws: uniformity and certainty in the law, which facilitates better regulation; consistency in the interpretation and application of the law; and sharing of resources and capacity development, to highlight a few. The article concludes that the sub-regional integration of child labour laws through legal harmonisation currently is a viable option for these regions.*

* LLB LLM PhD (KwaZulu-Natal); bernardr@ukzn.ac.za

Key words: *child labour; regional integration; harmonisation; Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Southern African Development Community (SADC); children; protection; rights*

1 Introduction

Child labour is considered a disturbing and widespread problem. According to Brown, child labour is practised throughout the world, which includes First World countries, but is a common occurrence in developing countries.[1] It is estimated that an average of 160 million children are involved in child labour globally, of which 79 million were engaged in hazardous work.[2] Between 2016 and 2020 there was a global surge in the number of children involved in child labour from 151,6 to 160 million. In respect of the regional prevalence, Asia and the Pacific, and Latin America and the Caribbean showed a downward trend since 2016. However, the same cannot be said for sub-Saharan Africa, where there has been an increase since 2012. According to the International Labour Organisation (ILO) there are now more children engaged in child labour in sub-Saharan Africa than in all other regions combined.[3] Some of the noted reasons for the high rate of child labour in Africa include the fact that '[t]he region has the majority of fragile and conflict-affected countries; at least one quarter of all countries were fragile or in conflict in every year from 2015 to 2020'.[4] Africa also has an estimated 39 per cent of 'the world's refugees, asylum seekers, returnees, stateless persons and internally displaced persons, a higher share than any other region'.[5] These are but a few factors that have resulted in the increase of child labour in sub-Saharan Africa.

---

1 S Brown 'Protecting the children: The need for a modern-day balancing test to regulate child labour in international business' (2010) *Journal of Transnational Law and Policy* 129 at 133. Global estimates of child labour: Results and trends, 2012-2016 International Labour Organisation (ILO), Geneva, 2017 ISBN: 978-92-2-130152-3 (print); ISBN: 978-92-2-130153-0 (web pdf) 5 13, https://www.ilo.org/global/publications/books/WCMS_575499/lang--en/index.html (accessed 16 September 2020).

2 International Labour Organisation and United Nations Children's Fund 'Child Labour: Global estimates 2020, trends and the road forward, ILO and UNICEF' (2021). Licence: CC BY 4.0, https://www.ilo.org/ipec/ChildlabourstatisticsSIMPOC/lang--en/index.htm, (accessed 10 December 2021).

3 As above.

4 World Bank 'Classification of fragile and conflict-affected situations' July 2020, www worldbank.org/en/topic/fragilityconflictviolence/brief/harmonizedlist-of-fragile-situations (accessed 10 December 2021).

5 United Nations General Assembly 'Assistance to refugees, returnees and displaced persons in Africa: Report of the Secretary-General' A/75/322, United Nations, New York, 24 August 2020, https://digitallibrary.un.org/record/3886099 (accessed 10 December 2021).

This article looks at child labour in the African context and argues for the harmonisation of child labour laws, in the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). COMESA, EAC and SADC are referred to as regional economic communities (RECs). These sub-regions were selected due to their link with the Tripartite Free Trade Area (TFTA) which binds the three sub-regions. The article starts off by conceptualising child labour. This is followed by looking at the impact of child labour on a child at an international and regional level. Lessons and challenges encountered by the Organisation for the Harmonisation of Business Law in Africa (OHADA) in implementing its business laws through legal harmonisation are analysed.[6] OHADA is examined to draw on the experiences to support the need for the sub-regional regulation of child labour through harmonisation.

2 Conceptualisation of child labour

The ILO defines child labour as

> children permanently leading adults' lives, working long hours for low wages under conditions damaging to their health and physical and mental development, sometimes separated from their families, frequently devoid of meaningful educational and training opportunities that could open up to them a better future.[7]

Child labour is regarded as work that 'children should not be doing because they are too young to work, or – if they are old enough to work – because it is dangerous or otherwise unsuitable for them'.[8] Child labour is used in two different ways. The first refers to a child who is below a certain age, and any work done by such child is prohibited.[9] The second finds child labour acceptable if it is done on family establishments as a way of economic contribution by the child.[10]

Children are also trapped in various forms of slavery, armed conflicts, forced labour and debt bondage as well as in commercial sexual exploitation and illicit activities, such as drug trafficking and

6 A detailed analysis follows in the article below.
7 http://www.ilo.org (accessed 16 September 2019).
8 http://www.un.org/en/globalissues/briefingpapers/childlabour/intlconvs.shtml (accessed 21 February 2021).
9 TC Nhenga-Chakarisa 'Who does the law seek to protect and from what? The application of international law on child labour in an African context' (2010) 10 *African Human Rights Law Journal* 161 at 178.
10 Nhenga-Chakarisa (n 9) 179.

organised begging, as well as many other forms of labour.[11] These are considered the Worst Forms of Child Labour (WFCL) as it impacts the physical and mental development of a child and goes against the good morals of society.

According to Duncan and Bowman, finding a definition to child labour is a challenge because the 'usage of and the connotations attached to the term depends substantially on the socio-cultural contexts in which it is deployed'.[12]

Distinguishing between child labour and child work has been problematic as these terms are usually used interchangeably. The term 'work' relates to the earning of wages in the labour market. Child labour, on the other hand, occurs both in the labour market (formal sector) and outside the labour market (informal sector) which can be paid or unpaid labour. When determining whether an unpaid activity is regarded as work, the question is asked as to whether the activity contributes to production.[13]

Determining when work becomes child labour is a serious challenge for African societies, despite attempts by international law to devise a criterion. As pointed out by Nhenga-Chakarisa, 'the criteria used to determine child work and child labour change across time, place and culture and vary according to different conceptions of childhood'.[14] It is essential to draw clear definitions on child work that is acceptable and work that is considered harmful.

3 Impact of child labour

The impact of child labour takes several forms. Child labour results in the violation of many of the fundamental rights of a child. Children are exposed to various forms of abuse, including poor pay, hazardous working conditions, physical, mental and verbal abuse as well as poor working conditions, all detrimental to their health, growth and development.[15]

---

11 RA Mavunga 'A critical assessment of the Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999' (2013) 16 *Potchefstroom Electronic Review* 122.

12 B Bowman & N Duncan 'Educational aspirations, child labour imperatives and structural inequalities in the South African agricultural sector' (2008) 26 *Perspective in Education* 29 at 30.

13 K Basu 'Child labour: Cause, consequence, and cure, with remarks on international labour standards' (1999) 37*Journal of Economic Literature* 1085.

14 Nhenga-Chakarisa (n 9) 181.

15 BM Celek 'The international response to child labour in the developing world: Why are we ineffective?' (2004) 11 *Georgetown Journal on Poverty Law and Policy*

Child labour is regarded as a global human rights issue that impacts on all members of the international community.[16] According to Celek, there are several consequences for children engaging in work that is hazardous or likely to cause harm. The first relates to the physical development of a child, in that children are not as strong as adults and, therefore, are susceptible to injuries.[17] Second, the body of a child has weaker 'anatomical, physiological and psychological systems' than adults and, therefore, they more likely to be adversely affected by chemical toxins.[18] Third, children are exposed to physical dangers and exploitative working conditions due to working long hours for low wages. The physical detriment caused by child labour depends on the type of employment and the conditions of the workplace.[19] The type of work in which children engage affects the psychological progress of a child.[20] Fourth, children who engage in work instead of attending school compromise their hope for a better quality of life.[21] Kern suggests that child labour places tremendous mental strain on the child by having to work extremely long hours under poor working conditions without being able to attend school.[22] This diminishes the mental development of the child and reduces the chances of improving their economic situation.[23] Kasper indicates that there are serious health risks associated with child labour. The type of work entails hazards that impact on the health of a child. The hazards are biological, chemical, physical, mental, injury, pesticides, poisoning and diseases.[24]

90; VN Muzvidziwa 'Child labour or child work? Whither policy' (2006) 22 *Research Review NS* 26.

16 J Kasper & DL Parker 'Child labour international encyclopaedia of public health' (2008) 481; CM Kern 'Child labour: The international law and corporate impact' (2000) 27 *Syracuse Journal of International Law and Commerce* 180.

17 Kasper & Parker (n 16) 481; Kern (n 16) 189.

18 Kasper & Parker (n 16) 481; Kern (n 16) 180.

19 As above.

20 As above.

21 Celek (n 15) 95.

22 Kern (n 16) 177; H Choma, R Peter & S Pumzile 'The impact of child labour in agricultural sectors in Limpopo Province (South Africa)' (2019) 9 *Journal of Politics, Economics and Society* 64.

23 Kern (n 16) 181.

24 Choma, Peter & Pumzile (n 22) 64; Kasper & Parker (n 16) 483.

4 Role of the International Labour Organisation in relation to child labour

The ILO was founded together with the League of Nations in 1919 by the Versailles Peace Treaty.[25] Since its inception, the ILO has adopted 189 Conventions and recommendations.[26]

The Minimum Age Convention and Minimum Age Recommendation146 of 1973 are generally read together and are considered to be the most relevant instruments regulating the minimum age for employment of children. The purpose of the Minimum Age Convention is for member states to 'pursue a national law which is designed to abolish child labour and to progressively raise the minimum age of employment or work which is consistent with the physical and mental development of young persons'.[27] This Convention deals primarily with age in respect of employment as well as the carrying out of light work and hazardous work. The Convention was not ratified by many member states, especially by states where child labour was widespread. Developing countries used explosive population growth, endemic poverty and lack of infrastructure[28] as reasons for not ratifying the Convention. These countries found that the Convention failed to 'identify immediate priorities and a methodology for achieving the goal of child labour abolition'.[29]

During the 1990s the ILO shifted its attention towards the elimination of the Worst Forms of Child Labour (WFCL) as children were exposed to several abuses and violation of their rights. The WFCL Convention was adopted in 1999 to supplement the Minimum Age Convention.[30] This Convention lists certain types of

25 J Langan 'Did your jeans enslave children? Child labour in international trade' (2002) 2 *Asper Review of International Business and Trade Law* 159; L Swepton 'Adoption of standards by the International Labour Organisation: Lessons and limitations', International Council on Human Rights Policy & international Commission of Jurists Workshop, Geneva, 13-14 February 2005 1; A Trebilcock & G Raimondi 'The ILO's legal activities towards the eradication of child labour: An overview' in G Nesi, L Nogler & M Pertile (eds) *A legal analysis of ILO action* (2008) 18.

26 According to Swepton, '[c]onventions are drafted as treaties, and may be ratified, creating binding obligations. Recommendations are what the name suggests, and are drafted as guidance. They may be adopted independently of each other, but often are adopted together, in which case the Recommendation supplements the Convention and adds additional provisions to help understand or add to the ideas in the Conventions'; Swepton (n 25) 6.

27 Art 1 Minimum Age Convention.

28 A Kornikova 'International Child Labour Regulation 101: What corporations need to know about treaties pertaining to working youth' (2008) 34 *Brooklyn Journal of International Law* 209.

29 As above.

30 Preamble to the WFCL Convention.

child labour as WFCL and requires member states to take immediate action to eliminate these. It recognises the importance of free basic education, the need to prevent children from engaging in WFCL, and to provide such children with adequate rehabilitation and social integration.[31] The WFCL Convention sets out the action that must be taken by member states to achieve its objectives. It focuses on various criminal activities related to child labour, such as the sale and trafficking of children and the economic exploitation of children through prostitution and recruitment into the military.[32]

The two Conventions aim to prohibit, reduce and eliminate child labour and, at the same time, seek to protect the child from abuse and neglect.[33] As a result, member states that have ratified the Conventions have passed national legislation and adopted programmes to prohibit child labour. Despite these efforts, child labour practices continue, implying that problems and challenges persist. According to Celek, governments have worked with the international community to implement programmes to prevent children from entering the workplace.[34] However, a lack of political power and the will to monitor these programmes and the challenges in enforcing the law have led to the ineffective elimination of child labour.[35] Thus the effectiveness of the current systems is questionable, and this then begs the question as to whether there is a need to review the current systems.

5 The need for harmonisation of child labour in the three regional economic communities

While the ILO provides hard laws for the banning of child labour, there are many flaws in these instruments. Member states within COMESA, EAC and SADC have ratified these hard laws and have implemented these into national legislation, thereby complying with their obligations. However, several issues and challenges remain regarding their national laws. These laws have several shortcomings,

31 As above.
32 Kornikova (n 28) 209.
33 The Minimum Age Convention and the Worst Forms of Child Labour Convention provide children with numerous protections. The Minimum Age Convention sets out the following protections: art 1: minimum age for employment; art 2(3): minimum age for employment should not be less than the age of completion of compulsory schooling; art 3: prohibits work that may jeopardise the health, safety or morals of a child; and art 7: permits children between 13 and 15 years to engage in light work provided such work is not harmful to their health or development and attendance at school is not impacted on. The Worst Forms of Child Labour Convention offers the following protection: art 3: sets out the worst forms of child labour; art 7: requires penal sanctions be imposed.
34 Celek (n 15) 90.
35 As above.

are vague, and are poorly regulated and implemented, making harmonisation a possible solution.

Within these three sub-regions child labour is regulated at national level, and there is no sub-regional regulation. Children in these RECs engage in many different forms of work in the different economic sectors, which may pose serious harm to their mental, physical and emotional well-being. While there are similarities, the categories of work differ according to the production and economic needs of each country. Agriculture, mining, domestic services and sexual exploitation and trafficking of children are common and, therefore, there should be sub-regional regulation as these are cross-border issues. According to the ILO, agriculture plays the most important role in sub-Saharan Africa: Four out of every five children are engaged in child labour in this sector.[36] According to the International Programme on the Elimination of Child Labour (IPEC), 80 per cent of domestic workers are girls, are from rural areas, and enter the sector aged younger than 15 years.[37] This is further supported by the ILO 2020 statistics, which indicate that 4,4 million girl children aged five to 17 years are engaged in child labour globally.[38] Regional integration through legal harmonisation may be beneficial for the protection of children in these RECs as it will allow for enforcement and uniform regulation on critical issues affecting children. Matters such as illegal cross-border crossings, the sexual exploitation of children and child trafficking may be better controlled, which may ensure that the rights of children are enforced. While it may be argued that national law can be amended to rectify the gaps identified, had this been possible, national governments would already have done so.

Vambe and Saurombe highlight the fact that there are many children who enter South Africa from Zimbabwe, Zambia and even Mozambique.[39] This indicates that the coordination between these countries is a concern. Vambe and Saurombe further note that

> border officials are easily bribed and allow children to cross the border into South Africa where these children find work as cheap labourers on white-owned commercial farms, especially in the Limpopo province. When the children complain about low wages, the white farm owners

36 ILO and UNICEF (n 2).
37 Emerging good practices on child domestic labour in Kenya, Tanzania, Uganda and Zambia. Publications of the ILO enjoy copyright under Protocol 2 of the Universal Copyright Convention (2006) 2 3.
38 ILO and UNICEF (n 2).
39 B Vambe & A Saurombe 'Child labour laws in South Africa, Zambia and Zimbabwe: A comparative analysis' (2019) 16 *Commonwealth Youth and Development* 5, https://doi.org/10.25159/1727-7140/3317 (accessed 17 May 2021).

> threaten to call the police to deport the children back to their countries of origin.[40]

Another noted concern that may be regulated by regional integration is the lack of relevant documentation such as birth certificates. Children who do not possess the relevant documents to legally move between countries face several consequences. They are exploited, encounter both physical and mental abuse, their rights relating to safe working conditions are violated, and sometimes they are separated from their parents when it is found that they illegally entered a country.[41] Vambe and Saurombe argue that Zambia's approach to addressing the problem of child labour is fragmented. Mushota observes and recommends that

> there is need for the Zambian Government, through the legislation, to harmonize the different pieces of legislation concerning children into a comprehensive body of child-related laws to avoid confusion of such things as definition of a child and also to ensure conformity with instruments such as the CRC, as regards upholding all children's rights.[42]

Zimbabwe, like Zambia, Malawi and Tanzania, has several laws relating to child labour that have shortcomings. According to Loewenson, cited in Vambe and Saurombe, 'Zimbabwe's legal framework lacks legal controls and enforcement of safe working conditions and poor rates of pay for child workers. As a result, child labour is prone to exploitation.'[43]

These are but a few cross-border issues that require regulation in these three sub-regions. Regional integration through harmonisation aims to ensure better coordination and collaboration between member states.[44] There is a clear gap in regional laws as there are no benchmarks to guide the drafting of national laws. The sub-regional regulation of child labour, therefore, is needed and could be a possible solution to the scourge of child labour.

Specific to child labour and cross-border issues is child trafficking. Child trafficking and sexual exploitation of children are unlawful activities that have been criminalised by international law and are

40 As above.
41 2019 Findings on the Worst Forms of Child (Kenya) Bureau of International Labour Affairs 2, https://www.dol.gov/agencies/ilab/resources/reports/child-labor/kenya (accessed 17 May 2021).
42 C Mushota 'Is the existing Zambian legislation adequate for curbing child-labour and work-family conflict: An analysis of the legal framework in Zambia' LLB dissertation, University of Zambia, 2006 51.
43 As above.
44 I Mwanawina 'Regional integration and *pacta sunt servanda*: Reflections on South African trans-border higher education policies' (2016) 19 *PER/PELJ* 1 2.

not regulated at regional level. Mavunga classifies child trafficking as a form of child slavery, where children are used to obtain a profit through violence, abuse and threats.[45] In Uganda, children are trafficked internally as well as to parts of Central, East and North Africa.[46] Further, children from the Democratic Republic of the Congo (DRC), Kenya, Rwanda and Tanzania are trafficked to Uganda, illustrating that child trafficking is a cross-border issue requiring sub-regional regulation.[47] Literature indicates that Uganda has several laws preventing the trafficking of children, which appear comprehensive. However, the problem lies with the enforcement of the legislation.[48] The first notable challenge is the lack of information on the magnitude of child trafficking at national level; a second challenge is the superficial understanding of trafficking in persons; another challenge is the government's failure to provide victims with adequate care, depending on non-governmental organisations (NGOs) and international institutions to assist; the last is the lack of financial resources and political will to fight child trafficking.[49] The problem highlighted by Mavunga is that of implementation, which is affected by the lack of resources and training of the labour inspectors who are responsible for the enforcement of the laws.[50] Further problems that pose a challenge to implementation of the laws are the dire socio-economic conditions; corruption wherein resources are diverted; and the fact that the implementation of the laws are violated by those meant to be responsible for their enforcement (law enforcement officials and members of the judiciary).[51]

Another issue is the lack of regional regulation of sexual exploitation of children (SEC) as a cross-border issue.[52] Mavunga in passing raises the need for governments to enhance cross-border 'prevention, protection and prosecution'.[53]

Mavunga reflects on the laws of Uganda to illustrate the key deficiencies in the definition of SEC: the failure of the sentencing provisions to consider aggravating factors such as the risk of the offender to society or the severity of the perpetrator's criminal record.[54] Other shortcomings noted are that the legislation focuses

45 RA Mavunga 'The prohibition of child slavery in South Africa, Uganda and Zimbabwe: Overcoming the challenges of implementation of legislation' (2018) LI 1 *Comparative and International Law Journal of Southern Africa* 19 at 22.
46 Mavunga (n 45) 33.
47 As above.
48 As above.
49 Mavunga (n 45) 35.
50 Mavunga (n 45) 37.
51 As above.
52 Mavunga (n 45) 40.
53 As above.
54 As above.|

on the adult as a perpetrator and does not foresee the possibility of children being offenders; it does not criminalise online grooming.[55] Zimbabwean writers suggest that their laws tend to deal more with the immorality of the issue than with the actual exploitation and abuse of SEC; the laws do not criminalise pornography associated with children, which is not in line with international law.

6 A general overview of child labour in COMESA, EAC and SADC

6.1 COMESA

COMESA's vision, mission and objectives place minimal emphasis on the protection and enforcement of the rights of children. Article 143 of the COMESA Treaty requires the adoption of a Social Charter.[56] The key areas of focus in the Charter relevant to this study are that of employment and working conditions, labour laws, the well-being of the child and education, training and skills development.[57]

While article IX relates to the well-being of the child, there is no mention of the prohibition on child labour. This section requires that special protection be given to a child as well as opportunities created to allow a child to develop to his or her full potential.[58] It does not elaborate on what these special protections are and how it should be afforded to children. This is very broad and leaves much discretion to member states.

The concern regarding this Charter is the lack of solid regulation on the issue of children. The Charter itself is weak as it does not prohibit the engagement of children in employment, which is a major concern as children engage in not only child labour but WFCL. It neither places an obligation or duty on member states to implement such provisions, nor does it establish guidelines on how to enforce, review or monitor child labour laws. Regional regulation is lacking within COMESA on the issue of child labour.

55 RA Mavunga '"Bring back our innocence". Protecting children from commercial sexual exploitation: A case study of three African countries' (2020) 35 *Southern African Public Law* 6412.
56 Preamble to the COMESA Social Charter.
57 As above.
58 Art IX(a) COMESA Social Charter.

6.2 EAC

Article 120(c) of the EAC Treaty places a duty on its member states to co-operate with one another in respect of social welfare, to further develop a common approach towards the disadvantaged and marginalised groups of people, in particular children.[59] As a result, the EAC Council of Members established the Sectoral Council on Gender, Youth, Children, Social Protection and Community Development.[60] At the first children's rights conference held in Bujumbura in September 2012, the Bujumbura Declaration on Child Rights and Wellbeing was adopted, which called for an EAC Child Policy.[61]

Its mission is to promote the realisation of the rights of the child to survival, development, protection and participation.[62] The policy does not offer guidance on core issues such as the age of a child and child labour. However, it does in articles 4(4) and 4(6) deal with cross-border childrens rights, violations and education. Cross-border violations relate to sexual abuse, commercial sexual exploitation and child trafficking, among other issues.[63] Furthermore, the policy does not set guidelines but offers vague strategies on how to address these issues.

While it is a positive step in the right direction, the policy is vague and ambiguous in many respects. There is no prohibition on the employment of children, which is a grave concern given the magnitude of the issue. The policy does nothing more than provide in broad terms the need for the protection of the child. One must then question the need for this regional policy as it is unclear, and much is left to the interpretation and implementation by member states.

6.3 SADC

The Code of Conduct on Child Labour (2000) deals with the issue of child labour. The Code recognises that laws and regulations are fundamental to the elimination of child labour. It requires national legislation to fix a minimum age of employment for children,[64] but

59 Art 120(c) EAC Treaty; EAC Child Policy (2016) 1.
60 EAC Child Policy 1, https://bettercarenetwork.org/sites/default/files/Final%2BEAC%2BChild% 2BRights%2BPolicy%2B%282016%29.pdf (accessed 17 May 2021).
61 As above.
62 Art 3(2) Child Policy 2016.
63 EAC Child Policy (n 60) 22.
64 Art 4.2 Code of Conduct on Child Labour 2000.

neither prescribes an age, nor does it offer guidance to member states on how to determine an appropriate age. It prescribes that a list of work considered to be hazardous should be created,[65] but again little guidance is given. The Code, however, does call for a review of existing legislation. However, it fails to mention how the review is to occur, who is to review the legislation, who the member state will be accountable to and which structure within the SADC organ will be responsible.

SADC has been pro-active in addressing the issue of child labour. The Code is a step in the right direction, but has numerous gaps. It attempts to advise member states on the requirements needed but does not provide guidance and places the onus on member states to develop laws. There is an over-reliance on the international legal framework and not enough on the regional legal framework which is lacking considerably.

7 Regional integration and harmonisation

The history of the formation of regional schemes can be traced back to the colonial era, where regional schemes were created to preserve the interests of colonial powers over Africa.[66] These regional schemes resulted in the oppression of people and led to the development of a fragmented and disjointed continent. Later on, as states began to gain independence, the focus of the states shifted to developing a consolidated African continent to eliminate the socio-economic inequalities and to focus on development.[67] Despite the shift in focus, many African states experienced several challenges that hampered the progress of developing a consolidated African continent. These included being landlocked with small populations and small markets, which also made economic development problematic.[68] According to Ake, colonialism forced on African states a redistribution of land, forced labour and restricted economic activities.[69] Regional integration was therefore explored as an option[70] to enhance unity and address socio-economic inequalities.

65 As above.
66 PM Lehloenya & MN Mpya 'Exploring the citizen inclusiveness and micro-economic empowerment aspects of regional integration in Africa law' (2016) 20 *Law, Democracy and Development* 91.
67 BO Fagbayibo 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' unpublished LLD thesis, University of Pretoria, 2010 1.
68 Fagbayibo (n 67) 2.
69 C Ake 'Democracy and development in Africa' (1996) *The Brookings Institution*1 at 3; C Ake *A political economy of Africa* (1981).
70 This is supported by Fagbayibo (n 67) 2.

Harmonisation and, ultimately, uniformity of standards are essential to ensure that regional integration is successful.[71] The harmonisation of laws has two main objectives: unifying laws in instances where there is conflict or inconsistency; and reforming laws when the existing laws are problematic.[72] The ultimate objective in either circumstance is to establish a legal framework and set international standards.[73] According to Nicholson, harmonisation in the legal context is directed 'towards the elimination of discord with a view of avoiding incompatible outcomes associated with the application of rules of different legal systems'.[74] In effect, the different legal systems remain separate but function in harmony with one another.[75] During harmonisation, member states agree on common objectives and standards and may change or adapt their laws to meet these objectives.[76]

Regional integration became an important aspect towards the development of Africa through the establishment of regional blocks known as RECs. The commitment towards coordination, cooperation and harmonisation within the regional blocks is found in the numerous regional treaties and protocols. The principles of coordination and cooperation allow the RECs to meet the goals of regional integration, whereas harmonisation allows for the RECs to harmonise the laws in a particular area common to them. Member states of the three RECs have national laws on child labour. However, these laws have several shortcomings and are vague, and they are poorly regulated and implemented, making harmonsation a possible solution. There are several bases for the rationale of the legal harmonisation of child labour laws. It allows for common objectives[77] on child labour to be agreed upon; for consistency in the adoption,[78] amendments and adaptation to national laws; certainty in the law;[79] the establishment of a sub-regional institutional structure that focuses on child labour; uniformity as member states will have to apply the same laws; and

71 B Fagbayibo 'Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union' (2011) 36 *South African Yearbook of International Law* 218.
72 L Mistelis 'Is harmonisation a necessary evil? The future of harmonisation and new sources of international trade law' in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and perspectives of international trade law* (2001) 15.
73 As above.
74 C Nicholson 'Some preliminary thoughts on a comparative law model for the harmonisation of laws in Africa' (2008) 14 *Fundamina* 51.
75 JB Rudahindwa 'Legislative versus judicial harmonisation of law: A comparative study of OHADA commercial law and the US uniform commercial code' (2020) 7 *Journal of Comparative Law in Africa* 11.
76 As above.
77 A Yakubu *Harmonisation of laws in Africa* (1999) 29.
78 Mistellis (n 72) 16.
79 Yakubu (n 77) 29.

fostering legal collaboration, cooperation and respect in member states on the application of the rule of law.[80]

8 Defining legal harmonisation

According to Ajai harmonisation is a 'process of welding different types, traditions and standards of laws into a coherent separate whole system of laws by an international organisation that is thereupon directly binding on states'.[81] Bassani and Mattei further refer to harmonisation as the 'convergence of rules only to a limited extent, in order to attain a workable coordination among them'.[82] These definitions suggest different meanings of harmonisation. According to Ajai, harmonisation is a process that fuses different systems into an entirely new system, which is usually regulated by an international institution, whereas Bassani and Mattei suggest that harmonisation results in the limited unification of rules in order to achieve coordination. Ajai's definition sees harmonisation resulting in the creation of a new system, whereas Bassani and Mattei see harmonisation as a limited unification. Harmonisation does not focus on the adoption of a single set of laws; rather, it identifies various ways in which to accommodate the differences in legal systems of member states.[83]

The role of harmonisation in the legal development process depends on the elements of the law that are to be harmonised.[84] Harmonisation can be applied to general or specific areas of law in different countries, thus making the area of law not an essential requirement for the process of harmonisation.[85]

The regional regulation of child labour through legal harmonisation is plausible. Child labour laws may be regarded as specific laws as they regulate a particular area of law, namely, child law and employment

80 Mistellis (n 72) 16.
81 O Ajai 'Agenda for intra-African economic development: Business-legal frameworks, enablers and impediments' (2016) 3 *Journal of Comparative Law in Africa* 21.
82 M Bassani & U Mattei 'The common core approach to European private law' (1997) 3 *Columbia Journal of European Law* 339, http://www.jus.unitn.it/cardozo/Common.core/Insearch.html (accessed 10 August 2021).
83 Z Stephen 'Nafta and the harmonisation of domestic legal systems: The side effects of free trade' (1995) 12 *Arizona Journal of International and Comparative Law* 403; T Shumba 'Harmonising the law of sale in the Southern African Development Community (SADC): An analysis of selected models' LLD thesis, Stellenbosch University, 2014 32; G van Niekerk 'The convergence of legal systems in Southern Africa' (2002) 35 *Comparative and International Law Journal of Southern Africa* 314.
84 M Boodman 'The myth of harmonisation of laws' (1991) 39 *American Journal of Comparative Law* 702.
85 As above.

law. Thus, the harmonisation of child labour laws through regional integration will facilitate consistency and coherence or internal harmony, which attempts to reduce conflicts in legal systems.

9 Advantages and disadvantages of harmonisation

Legal harmonisation in Africa has many advantages, which allows for political stability, economic development and a sound and secure legal framework, and increases the confidence of potential investors, which is beneficial to Africa's development.[86] Despite the advantages being linked to economic progression, it will have several advantages to the sub-regional regulation of child labour. Currently member states have regulated child labour through legislation and programmes of action, which has not resulted in a decrease. Harmonisation allows for member states to work together by creating uniform rules, establishing certainty in the laws and regulating cross-border issues. According to Yakubu, harmonisation allows for

> practical predictable rules for the determination of the appropriate law to apply in solving practical problems on uniform basis; the inter-play of legal collaboration and mutual respect between various legal systems; co-operation and systemisation of rules of law of various states; the avoidance of costly, confusing and delay which are necessary incidents of divergent choice of law rules and the cross-fertilisation of ideas which enriches community laws.[87]

Harmonisation also produces neutral rules, allowing member states to ratify and adopt these to suit the individual needs and requirements of a particular country.[88] The neutrality of the rules allows member states to configure them according to their circumstances. This allows the member state the benefit of conforming to the rules, but with a degree of flexibility. It also fills a legal vacuum that is created by rules that previously did not exist in national laws.[89]

Harmonisation prevents a proliferation of national laws by creating a single law.[90] The advantage of a single set of laws leads to predictability and uniformity in the application of national laws among member states.[91]

Despite the noted advantages, one must be mindful of the disadvantages that arise during the harmonisation process. Diversity

86 Fagbayibo (n 71) 309.
87 Yakubu (n 77) 29.
88 As above.
89 Mistellis (n 72) 16.
90 As above.
91 Yakubu (n 77) 29.

in law can lead to inconsistent application of laws and policy on trade; it can lead to competition in respect of trade and allow stronger states more control than weaker and poorer states.[92] When member states decide to engage with one another, issues may arise that hamper cooperation in terms of which legal system will regulate the relationship.[93] Legal harmonisation results in some member states being subject to unfamiliar rules; therefore one party will be at an advantage over the other in respect of application of the rules and development.[94]

Harmonisation results in the loss of expertise in a particular area as countries have to concede to new laws.[95] The loss of expertise arises as a result of having to adopt or conform to new laws. It also places member states in a challenging position of having to adapt to and implement a new set of rules. Generally, member states have their laws and expertise regulating specific areas of laws. When new laws are implemented due to harmonisation, knowledge, skills and expertise are lost. Changing from one legal system to another involves abandoning a system to which one is accustomed and moving to new rules that may 'seem less adapted to the local culture and environment'.[96] Concern, risk and uncertainty arise when new laws are harmonised and implemented. This occurs when member states are unaware of the outcome of the implementation and the ensuing consequences. Generally, efforts are made when new rules are drafted to ensure that these do not clash with the old rules. This is done to ensure acceptance of the new rules and the effective implementation into national laws.[97] Harmonisation as a process is not easy and that has many negative consequences which member states will have to accept and adjust to. This, however, is not easy, as harmonisation involves several different legal systems, with each member state having its own rules, customs and practices. During negotiations and consultations these must be considered so as to ensure that harmonisation is beneficial to member states. What is required in order to mitigate the challenges highlighted above is synergy. Synergy relates to the interactions or cooperation

92 J Faria 'Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?' (2009) *Uniform Law Review* 5 9.
93 Faria (n 92) 9.
94 M Fontaine 'Law harmonisation and local specificities – A case study of OHADA and the law of contract' (2013) 18 *Uniform Law Review* 50.
95 Faria (n 92) 9.
96 Fontaine (n 94) 51.
97 Faria (n 92) 10; Fontaine (n 94) 51.

of regional institutions with national institutions to achieve a specific goal.[98] Strengthening the synergy between sub-regional and national institutions is fundamental to regional integration and harmonisation. Thus, in order for the regional integration of child labour laws to be effective, there has to be cooperation and collaboration between sub-regional and national levels. This will ensure effective implementation of the legal instruments established. This synergy will help ensure compliance.

The powers and functions of sub-regional institutions need to be clear and unambiguous.[99] At the same time, the drafters of sub-regional instruments should be cautious not to draft instruments that 'overtly or tacitly, circumscribe the influence or functions of critical regional institutions'[100] or national institutions. There has to be agreement in respect of functions, responsibilities, application and enforcement of laws. There needs to be a clear division of roles and duties. If child labour is to be successfully regulated for the benefit of the child, the above is essential. Some member states in these three sub-regions have implemented national legislation and policies to curb child labour, but the challenge is the actual implementation. To effectively curb child labour and to regulate it sub-regionally requires commitment and dedication. Stringent penalties need to be considered for non-implementation of policies. Also valuable to regional integration is the setting of uniform legislative norms and standards that member states can progressively realise. The success of harmonisation depends on this engagement, and a failure to consider the interests of each member state will affect the process, the ratification of treaties, and the implementation of the legal framework.

10 A model for harmonisation of child labour laws: A lesson from OHADA

10.1 An overview of OHADA

OHADA was established on 17 October 1993 in Mauritius and since then has been adopted in West and Central Africa.[101] OHADA

98 M Swart 'Alternative fora for human rights protection? An evaluation of the human rights mandates of the African sub-regional courts' (2013) 3 *Journal of South African Law* 439.
99 Fagbayibo (n 71) 72.
100 As above.
101 B Martor et al *Business law in Africa: OHADA and the harmonisation process* (2002) 5; Rudahindwa (n 75) 2; T Shumba 'Harmonising business laws in the Southern

currently has 17 member states.[102] It is recognised as an African regional body, which has used harmonisation to harmonise its business laws. It is also recognised for its clarity and erudition in harmonising its business laws.[103]

OHADA originated as a result of the political will 'to strengthen the African legal system by means of a secure legal framework and a business environment conducive to facilitating commercial transactions'.[104] After member states gained independence, they attempted to enact legislation to address the main areas, which resulted in plurality, diversity and obsolete legislation, leading to diverse, archaic and fragmented legal systems.[105] The situation was worsened by the withdrawal of investment in Africa as a result of legal and judicial insecurities.[106] As a result, the need for harmonisation emerged because of 'legal diversity, uncertainty and the lack of judicial security due to the inadequate training of judges, the paucity of legal information and a lack of recourses among other things'.[107]

African Development Community (SADC): Should SADC member states join OHADA?' (2016) 1 *Stellenbosch Law Review* 61.

102 At present, OHADA has 17 members: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo, https://www.tradeforum.org/OHADA-Four-Years-On-One-Business-Law-for-16-African-Countries/ (accessed 12 September 2021); P Bahamin 'Joining OHADA' (2013) *The Mining Journal*, http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ_DESIGN_NAME=print friendly (accessed 21 August 2021); B Kahombo 'The accession of the DRC to OHADA: Towards national prosperity by the unification of law?' (2012), http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf (accessed 3 September 2021).

103 CM Dickerson 'Harmonising business laws in Africa: OHADA calls the tune' (2005) 44 *Columbia Journal of Transnational Law* 62; CM Dickerson 'Perspectives on the future' in CM Dickerson (ed) *Unified business laws for Africa: Common law perspectives on OHADA* (2009) 108.

104 Martor et al (n 101) 9; Rudahindwa (n 75) 2; Shumba (n 83) 6.

105 R Beauchard 'OHADA nears the twenty-year mark: An assessment' (2013) 4 *World Bank Legal Review* 323. In order of ratification, the OHADA member states are Guinea-Bissau (15 January1994); Senegal (14 June 1994); Central African Republic (13 January 1995); Mali (7 February 1995); Comoros (20 February 1995); Burkina Faso (6 March 1995); Benin (8 March 1995); Niger (5 July 1995); Côte d'Ivoire (29 September 1995); Cameroon (20 October 1995); Togo (27 October 1995); Chad (13 April 1996); Republic of Congo (28 May 1997); Gabon (2 February 1998); Equatorial Guinea (16 April 1999); Guinea (5 May 2000); and Democratic Republic of the Congo (13 July 2012). See http://www.ohada.org/ etats-parties.html (accessed 3 September 2021); Rudahindwa (n 75) 2; Shumba (n 101) 61.

106 Shumba (n 101) 62; AK Nguru 'The attitude of OHADA law countries towards the CISG' (2016) 3 *Journal of Law, Society and Development* 101.

107 MS Tumnde 'The applicability of the OHADA Treaty in Cameroon: Problems and prospects' (2010) 25 *Tulane European and Civil Law Forum* 121; Rudahindwa (n 75) 2; Shumba (n 101) 61.

10.2 Successes in the harmonisation of business laws in OHADA

OHADA has made significant strides in achieving harmonisation. The first noted success is that it is a fully functioning institutional system, as discussed. OHADA has five key institutions that regulate it operations. The Conference of Heads of State and Government is considered to be the supreme institution; the Council of Ministers is considered the legislative organ; the Common Court of Justice and Arbitration (CCJA) is the judicial branch of OHADA; the Permanent Secretariat is regarded as the executive organ; and the final institution is the Centre for Training. This is significant as many African institutions are yet to achieve this milestone.[108] An institution that is fully operational will therefore have the mechanisms in place to achieve its goals.

OHADA illustrates that its membership is growing. It originally started up with 14 members joining, which has now increased to 17 states.[109] This indicates that countries have noted the benefits and the success of the harmonisation of business laws.

The creation of Uniform Acts is another achievement.[110] OHADA has several Uniform Acts regarding the subject matters listed in article 2 of the Amended Treaty. The Uniform Acts are reviewed regularly and amended whenever necessary.[111] This illustrates a commitment towards monitoring and evaluation. The harmonisation of laws in OHADA has led to the creation of certainty and has reduced unpredictability.[112] According to Beauchard, legal certainty results in laws and decisions being public and publicly available; are definite and clear in their applicability;

> the decisions of courts are enforced and, to the greatest extent possible, reasoned, so as to provide relevant information on the compliance of conduct with law; and the persons or officials associated with the application and enforcement of those laws must be easily identifiable and properly trained and equipped to accomplish their duty.[113]

OHADA adopted nine Uniform Acts to regulate the harmonisation of business laws.[114] These established a comprehensive, definitive and coherent framework.[115] The creation of a legal framework is essential

---

108 Shumba (n 101) 70; Ajai (n 81) 23.
109 Beauchard (n 105) 323; Shumba (n 101) 71.
110 As above.
111 Shumba (n 101) 71.
112 Beauchard (n 105) 327; Shumba (n 101 72.
113 Beauchard (n 105) 327.
114 Martor et al (n 101) 6, art 5 Amended Treaty.
115 Beauchard (n 105) 328. Examples include: '•The General Commercial Law Act provides the fundamental rules of business activity: merchant status, commercial leases, commercial sale of goods, agency, businesses and movables registry and microbusiness. •The Companies Act provides for various limited liability

for harmonisation. The Uniform Acts, once adopted by the Council of Ministers at an organisational level, become enforceable and binding for all member states, which are then required to apply these Uniform Acts into national legislation.[116] This follows the principles of harmonisation that require neutral laws be developed and applied into national laws. The Uniform Acts nullify all previous legislation of the member states in respect of that particular area of law.[117] According to article 10 of the Amended Treaty, the Uniform Acts apply directly to member states. This implies that national legislation in that area of law will no longer be applicable after the Uniform Act is adopted. The member state is permitted to implement other legislation, provided that the legislation complies with the Uniform Act.[118] Thus, OHADA's harmonisation process complies with the requirements for harmonisation, thereby making its experience relevant to the harmonisation of child labour laws.

The Uniform Acts provide member states with simple and modern laws compared to fragmented and uncertain national laws.[119] This is positive as it illustrates the importance of reviewing laws in order to ensure that they are updated and that they remain relevant to the issues they regulate. Member states, therefore, can disregard the national laws and adopt the more modern laws, if needed.

The lack of access to legal information was a notable challenge. This was a result of the unavailability of materials that governments did not provide, and the low salaries of the judges meant that they could not purchase their own materials.[120] Due to the lack of access to legal information, legal experts were unaware of the relevant laws and, therefore, could not apply the laws correctly. OHADA through the Regional School of Magistracy (ERUSMA) created access to

structures that protect business operators. •The Secured Transactions Act provides for various securities protecting creditors against the risk of defaults of their debtors and sets the conditions for the development of commercial lending. •The Accountancy Act provides for uniform accounting standards based on the true and fair view standard. •The Simplified Debt Collection Procedures and Enforcement Measures provides operators with modern legal remedies, such as seizures and garnishments, which are available to unpaid judgment creditors to compel judgment debtors to pay up, if need be with the assistance of the police.'

116 EA Fredericks 'The conflicts rule in respect of contractual capacity in the preliminary draft Uniform Act on the Law of Obligations in the OHADA region' (2018) 1 *SA Mercantile Law Journal* 139.

117 Martor et al (n 101) 6; Fagbayibo (n 71) 313; Ajai (n 81) 21; Yakubu (n 136) 29.

118 Article 10 of the Amended Treaty.

119 Rudahindwa (n 103) 17.

120 X Forneris 'Harmonising commercial law in Africa: The OHADA' (2001) 46 *Juris Periodique* 79-80, http://www.ohada.com/imprimable.php?vu=10&articlebiblio=480 (accessed 3 September 2020); Shumba (n 101) 72.

materials and laws in the OHADA official journal which allows legal information and materials to be disseminated.[121]

10.3 Challenges to harmonisation in OHADA

Despite the overall successes, there have been challenges that must be highlighted, as these may be relevant to the regional regulation of child labour through harmonisation in the three sub-regions.

While OHADA is fully operational, budgetary constraints to implement the Uniform Acts are a challenge.[122] The lack of capacity to carry out the different functions of the organs is another challenge.[123] The Permanent Secretariat is understaffed and lacks funds to carry out some of its functions. Without adequate funds and capacity, the fulfilment of OHADA's objective may be problematic.[124]

The CCJA has experienced an increase in cases, which can be viewed as positive. However, this has resulted in a backlog of cases due to the CCJA being understaffed.[125] The role of the CCJA was intended to create uniform interpretation and application of the Uniform Acts. This, however, has resulted in capacity issues.[126] According to Beauchard and Kodo, OHADA institutions require substantial modification and reform to enhance their efficiency and effectiveness.[127]

There is an unclear relationship between the OHADA Treaty and other national laws and treaties. The Uniform Acts are considered supreme and mandatory under the OHADA Treaty. However, the supremacy of the OHADA and other national constitutions has not been resolved.[128] Clarity is key to legal certainty and, therefore, the

121 Beauchard (n 105) 331; Shumba (n 101) 73.
122 Dickerson (n 103) 72; Shumba (n 101) 73.
123 Shumba (n 101) 73.
124 As above.
125 Ajai (n 81) 23. Since OHADA was launched, 'the workload of the CCJA has steadily increased. By 31 December 2009, the CCJA had rendered 467 decisions, including nine consultative opinions, 400 judgments and 58 orders.' R Beauchard & MJV Kodo 'Can OHADA increase legal certainty in Africa?' (2011) 17 World Bank Justice and Development Working Paper Series 17/2011, http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIncrease.pdf?resourceurlname=17-2011CanOHADAIncrease.pdf (accessed 3 September 2020).
126 Rudahindwa (n 75) 21.
127 Ajai (n 81) 2321; Beauchard & Kodo (n 125) 5.
128 JA Penda & MS Tumnde 'Problems of Implementation of OHADA in Anglophone Cameroon' (OHADATA reference number: D-04-13); CM Dickerson 'The introduction of OHADA law in Anglophone countries: Linguistic challenges' (2008) *Revue de droit des affaires internationales* 743 (OHADATA reference number: D-10-22); NE Enonchong 'The harmonisation of business law in Africa: Is article 42 of the OHADA Treaty a problem?' (2002) 51 *Journal of African Law* 95;

lack of clarity on this issue may result in uncertainty and confusion. Furthermore, provisions of the Uniform Acts also can conflict with the norms of other RECs.[129] Shumba argues that 'coordination of laws is needed to ensure that the laws enacted in the different regions are not in conflict with the OHADA Treaty and its Uniform Acts as this can be a source of legal uncertainty'.[130]

The resistance of national courts to apply and enforce OHADA laws is another challenge.[131] During the drafting of the OHADA Treaty the sovereignty of the supreme courts as courts of final instance over business laws was removed, resulting in defiance and hostility towards the CCJA and a deliberate unwillingness to apply the Uniform Acts.[132] Domestic courts tend to pass judgments using national laws despite the existence of Uniform Acts. A further problem is that Supreme Courts and parties to a dispute refuse to accept the exclusive jurisdiction of the CCJA in respect of matters within OHADA laws.[133]

11 Benefits of the harmonisation of child labour laws

As children are the most vulnerable members of a community, they are most in need of protection and care.[134] Children have the right to be protected from economic exploitation and from work that is considered dangerous to their health and well-being.[135] Numerous international and regional conventions have attempted to offer protection and care of children as well as to prevent the violations of their fundamental human rights. While there has been significant legal development, children continue to experience abuse, exploitation and have many of their rights violated. Children are exposed to various forms of abuse, including poor pay, hazardous working conditions, physical, mental and verbal abuse as well as

TJ Nyambo 'The legal system of trial in Cameroon: Implementing the OHADA Treaty in Anglophone Cameroon' (2001) 47 *Juris Périodique* 105; Shumba (n 101) 74.

129 Beauchard (n 105) 330; Shumba (n 101) 87.

130 Shumba (n 101) 75.

131 Dickerson (n 103) 58; Shumba (n 101) 75.

132 M Frilet 'Legal innovation for development: The OHADA experience' in H Cisse et al (eds) *World Bank Legal Review Volume 4: Legal innovation and empowerment for development* (2012) 340; Dickerson (n 103) 58; Shumba (n 101) 75.

133 Shumba (n 101) 75. According to Shumba: 'The reluctance of national courts to accept the jurisdiction of the CCJA as court of last instance is evident in cases where the supreme courts continue to exercise that jurisdiction over matters that fall within the ambit of OHADA laws.'

134 Shumba (n 101) 3.

135 HM Njoloma 'Child labour in Malawi's agriculture sector: The socio-economic and HIV/AIDS impact nexus' paper delivered at the National Conference on Eliminating Child Labour in Agriculture in Malawi (2012) 8.

poor working conditions, all of which are detrimental to their health, growth and development.[136]

Legal harmonisation attempts to reduce conflicts in existing legal systems by establishing common, minimum standards that take precedence over the national laws of member states.[137] It can be inferred that harmonisation has an important role in the harmonisation of laws. It does not matter which type of law is to be harmonised. What is essential is that harmonisation will be used to facilitate consistency and coherence or internal harmony, which attempts to reduce conflicts in legal systems.

There are several bases for the rationale of the harmonisation of child labour. First, it will allow for common objectives around the issue of child labour to be agreed upon. This will ensure better regulation and compliance with the international norms. Second, it will ensure consistency in the adoption, amendments and adaption to national laws. Third, it will allow for certainty in the law as the international and regional instruments on child labour are vague. Fourth, harmonisation will allow for the establishment of a sub-regional institutional structure that will focus primarily on the issue of child labour. The ILO currently is the international structure responsible for overseeing the progress of member states. However, as the ILO does not have authority to impose sanctions, there is very little it can do. Harmonisation will allow for the development of a regional institutional structure that should have autonomy to impose sanctions as this institution will have the necessary power to regulate and control. Fifth, it will allow for the regulation of child labour on a uniform basis as member states will have to apply the same laws. Uniform choices on laws and rules will ensure cost saving. Lastly, it will foster legal collaboration, co-operation and respect among the member states on the application of the rule of law. The harmonisation of child labour laws allows for certainty, uniformity and consistency in practices.

12 Lessons from OHADA on legal harmonisation

The success of OHADA in the harmonisation of business laws offers several lessons for the three RECs. It is essential to highlight some of the factors that may be useful for the harmonisation of child labour laws in these regions.

136 Celek (n 15) 90.
137 Fagbayibo (n 71) 310.

12.1 Planning stage

The negotiation and consultation stages were the first step towards the harmonisation of business laws. In order to reach consensus and agreement, this stage must be conducted comprehensively and in good faith. During the consultation, while a single set of laws was formed, the relevant national laws of member states were considered and accommodated in the proposed legal framework. Simple and modern laws were adopted, as it made the application and interpretation of these laws easier and less complicated. The regional integration of child labour laws through legal harmonisation is achievable provided that proper planning is undertaken by the member states, which encourages consultation with the member states. The initial buy-in of member states is fundamental to setting the foundation. Without this commitment it is unlikely that harmonisation will be successful.

12.2 Institutional structure

OHADA and the three sub-regions were established to achieve different goals. OHADA was established as a regional organisation and, therefore, is a regional harmonisation project for business laws. This establishes the need for a strong regional institution to harmonise child labour laws. The three RECs are regional institutions, but were formed individually to ensure economic regional integration and development by cooperation and coordination. The legal harmonisation of child labour laws, therefore, is not an aim of these institutions.[138] The methods of achieving the goals of the three RECs are different. Where OHADA uses harmonisation of business laws to achieve economic development and regional integration, the RECs use various types of cooperation for development.[139] There are differences in the goals and objectives of OHADA and the three RECs. This is important as the RECs are institutions designed for regional integration. Thus, the process and method for achieving harmonisation and economic integration are different, as discussed above.

The role of the CCJA has been an integral part of the enforcement of the Uniform Acts as a court of final instance. This has assisted harmonisation.

138 Art 53 OHADA Treaty; Shumba (n 101) 77.
139 Fagbayibo (n 71) 316.

It is agreed and accepted that there are several courts in the three RECs and that another court is not needed due to budgetary constraints, and duplication of roles and responsibilities and capacity. However, these already established courts focus on economic regional integration and may be unable to address the human rights and other related issues of child labour. Similar to OHADA's experience, national courts should be courts of first instance on child labour issues, with appeals being referred to the regional court. The regional court should function as a final court of appeal and allow direct access. Direct access should be granted in matters that fall within the exclusive jurisdiction of the regional court or when substantial injustice will arise.

12.3 Uniform Acts

The Uniform Acts are binding on all member states once they have been adopted, thereby making the Uniform Acts instrumental in the success of harmonisation in OHADA. The Uniform Acts are regularly evaluated and reviewed, which ensures that the laws remain relevant and are amended according to the development of the issue and the circumstances of member states. Harmonisation led to the creation of certainty and the removal of unpredictability. A further lesson that can be drawn from the Uniform Acts is the requirement that these must be published in a language common to the member states to ensure understanding and the correct interpretation and application of the applicable laws.

13 Conclusion

In this article the legal harmonisation of child labour laws through regional regulation was examined. While it may be argued that member states have implemented laws, the lack of direction from the international community is a concern. Harmonisation allows for the regulation of child labour laws to be specific to the needs of Africa. It will allow for the enactment of laws that consider and accommodate the charateristics and factors of an African society. It is not suggested that the international framework, goals and principles be ignored; rather, these are argued to be important and must be considered in shaping Africa's regulation. Harmonisation is a more practical solution to the regional regulation of child labour within the three RECs as it will allow the member states in these sub-regions to engage in discussions regarding their existing laws on child labour. It will allow the member states to identify and select the norms and standards that are to be adhered to. This will also ensure compliance

with the international legal norms and standards. Harmonisation will allow for consensus and agreement to be reached. Member states will, therefore, not lose their independence or sovereignty. Still, they will be able to regulate child labour, which is a serious continental problem affecting the rights, welfare and protection of children.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: NP Ncame 'Justice in conflict: Principle of complementarity or principle of competition?' (2023) 23
African Human Rights Law Journal 75-95
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a4

Justice in conflict: Principle of complementarity or principle of competition?

*Noluthando P Ncame**
Lecturer, Department of Public Law, University of Pretoria, South Africa
https://orcid.org/0009-0005-6664-3329

Summary: *The establishment of a permanent international criminal court was a necessity and the fear of it infringing on a state's sovereignty was real and ever present. As a result of this fear the International Criminal Court could not be awarded primary jurisdiction, and a compromise had to be reached in which it would operate under a regime of complementarity. This article focuses on the* Simone Gbagbo *case, as the first woman to be charged by the Court, with the object of nuancing the principle of complementarity in the various stages of an international criminal trial and the extent to which it portrays the tension of state sovereignty, tracing it from its infant historical or rudimentary practices to the current practice and making the necessary recommendations. All of this will be done by contextualising it all within the Côte d'Ivoire situation, particularly as it relates to complementarity. The article makes recommendations that focus on how and why the ICC should avoid seeking to dictate and impose its prosecutorial strategy on the domestic officials so as to avoid a crisis of its legitimacy being questioned, and the state's refusal to cooperate with the Court. It concludes with the caution that when the practices of the ICC and its Prosecutor make charging decisions for the state and embrace undermining the prosecutorial discretion of the domestic authorities, then the principle of complementarity will have been officially decimated and the principle of complementarity officially birthed.*

* LLB (Stellenbosch) LLM LLM (UP); noluthando.ncame@up.ac.za

Key words: *ICC; principle of complementarity; Côte d'Ivoire; Simone Gbagbo*

1 Introduction

The former Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, once said that 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.[1] Resonating throughout this statement is the principle of complementarity. It has been said that '[t]he long term viability of the ICC depends upon an implementation of the complementarity principle that preserves cooperative synergy between the Court and domestic jurisdictions'.[2] This synergy is important because of the original premise around the relationship between criminal law and the obligation that rests on a state. The rights and obligations bestowed upon a sovereign state by the criminal justice system are vital. Crimes are punished by the state because the victim of a criminal act is not the only victim of the act.[3] Criminal law is premised on the idea that criminal conduct violates the rights of the community at large, or causes harm to the community and, as such, the state should take on the responsibility of prosecuting criminals on behalf of the community.[4] It therefore is crucial to every sovereign state to have this right of theirs respected, and for other states, as well as the international community, to respect them enough not to interfere in their process of carrying out this responsibility towards their populace. This, however, is not limited to crimes affecting the populace of the state but also foreigners who commit crimes within a state's jurisdiction. 'According to the doctrine of state sovereignty each state has the right to exercise its jurisdiction over crimes committed in its territory – known as the territoriality principle.'[5] Depending on one's perspective, international criminal justice either challenges this notion of sovereignty or augments it. It may be seen as a challenge since it permits entities other than the state to exercise jurisdiction over crimes committed in the territory of the state. Alternatively, it augments sovereignty because it permits the exercise of jurisdiction where the state is not in the position to

1 Office of the Prosecutor, ICC, Informal Expert Paper 'The principle of complementarity in practice' (2003), http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf (accessed 23 August 2019).
2 MA Newton 'The complementarity conundrum: Are we watching evolution or evisceration?' (2010) 8 *Santa Clara Journal of International Law* 119.
3 CR Snyman *Criminal law* (2002) 14.
4 As above.
5 MM El Zeidy 'The principle of complementarity: A new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 870.

exercise such jurisdiction. One cannot help but formulate a third view of it being a system in competition with the domestic jurisdiction, thereby the notion of state sovereignty.

If international criminal law was a river, it would be the murkiest water through which one would have to sail. This is to be attributed to the fact that it is tainted by politics, the classist system involved among states in the international community and the fierce need to protect a state's sovereignty from the threat of being disregarded by it. It is through all of this that the ICC has to figure out how to sail swiftly through this river. It has to do so in such a manner that it does not interfere with 'the regular functioning of national institutions'.[6] There needs to be a guard against the national institutions being forced to function in a manner that mirrors the ICC. The complementarity regime of the Court is a compromise reached to protect the domestic jurisdiction and state sovereignty. This means that the national authorities are well within their right to determine their prosecutorial strategy, including the crimes to charge the accused with. The ICC is an institution that promises to safeguard and respect this above right with its complementarity regime.

The principle of complementarity has been the subject of much academic research. This is because the international community now has its very first permanent international criminal court.[7] The road leading to the creation of the ICC, understandably, was an extremely rocky one. This is due to the fact that this Court could potentially put in jeopardy the right of every state to prosecute their own nationals under the personality principle, or to prosecute nationals or non-nationals who committed a crime within their borders under the territoriality principle, or even to prosecute non-nationals who committed serious crimes against nationals under the passive personality or protective principle.[8] The sovereign right to prosecute; whether under the territoriality, personality or passive personality principles, is well-established in international law and highly valued by states.[9]

The ICC is a court of last resort with supranational jurisdiction. The ICC is complementary to the domestic jurisdiction and, as such, where the local officials are pursuing a matter genuinely, the

6 As above.
7 A Olsson 'The principle of complementarity of the International Criminal Court and the principle of universal jurisdiction' unpublished graduate thesis, University of Lund, 2003 10.
8 El Zeidy (n 5) 870.
9 As above.

Court will not get involved. This sounds simple enough to expect a harmonious relationship between the national jurisdiction and the international criminal justice system. However, this has proven not to be the case for a number of reasons, both political and legal. One of the legal issues that has presented itself is that there is a thin line between the ICC being complementary to the domestic jurisdiction or being in competition with it. When the Court sees it fit to dictate to the national officials on the exact charges with which the accused should be charged, then the ICC is officially in competition with the domestic jurisdiction. There are several ways in which one sees the competitive nature in the operation of the principle of complementarity of the ICC. This has led to the African Union (AU) having problems with the ICC, and one of the issues that the AU has identified has been the lack of deference to domestic jurisdictions.[10] The AU's call for deference can be seen through at least two lenses. First, in respect of the situation in Sudan, the AU has called the application of article 16 deferral of the investigations into and prosecution of the then President of Sudan in order to give the AU and other African bodies such as Intergovernmental Authority on Development (IGAD) a chance to resolve the matter in accordance with the recommendations made in the Mbeki Panel Report.[11] This approach was followed in the Kenyan situation.[12] Second, also in the case of Kenya, the AU has supported the Kenyan argument for non-admissibility of the cases against the President of Kenya, on the grounds that Kenya is willing and able to prosecute crimes against humanity perpetrated in the course of election violence.

In the Rome Statute there is no mention of the national institutions functioning in a manner that mirrors the ICC. This means that the national authorities are well within their rights to determine their prosecutorial strategy, including the crimes to charge the accused with. This was somehow discarded, forgotten or overlooked by

10 The 28th ordinary session of the Assembly of the African Union, https://au.int/en/newsevents/20170130/28th-ordinary-session-assembly-african-union (accessed 10 December 2017).

11 Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), Addis Ababa, Ethiopia, 1-3 July 2009 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1 (CCVII) 29 October 2009 5; see also C Jalloh, D Akande & M du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 8. See also African Union Report of the African Union: High-Level Panel on Darfur (AUPD) 29 October 2009, PSC/AHG/2(CCVII), https://www.refworld.org/docid/4ccfde402.html (accessed 23 May 2023).

12 AU Summit Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.334 (XVI), January 2011 para 6; see also D Tladi 'When elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU/ICC dynamic' (2014) 7 *African Journal of Legal Studies* 381.

the Court in the *Simone Gbagbo* matter. This article focuses on the case study of Simone Gbagbo. Simone Gbagbo is the former first lady of Côte d'Ivoire. She is the first women to ever be investigated and sought for prosecution by the Court. It is interesting to note that the ICC did not have her on their radar because of her specific conduct. They imputed her husband's conduct on her and decided that whatever evidence used against him could also be used against her. According to the Prosecutor:[13]

> [I]n all the circumstances, the conclusions of the Chamber in its Decision on [the Application for a warrant of arrest with respect to Mr Gbagbo] are equally applicable to the present Application as regards the contextual elements of the alleged crimes against humanity, along with the underlying acts it is suggested were committed by the pro-Gbagbo forces.

Besides being the first woman to be charged by the Court, Mrs Gbagbo's ICC case, rather than that of her husband, is of interest as the state genuinely did prosecute her. She was charged domestically and those charges differed from those with which she was charged by the ICC. This was rightfully the case because the state had access to evidence that links her to her specific crimes instead of only associating her with her husband's conduct. The ICC did not wish to accept this strategy; it wanted the domestic charges to be a replica of their charges. A spirit of competitiveness is detectable from the Court in it seeking to dictate to and almost force a prosecutorial strategy on the state.

The complementarity regime is affected by the discrepancies in the end goals of the international criminal justice and the domestic jurisdiction. This is what was at stake in the former first lady's case and that is the interest of this article. In dealing with such an issue, a balance has to be struck between two differing goals. The first is the goal of the Ivorian court to prosecute the former first lady, and the second is the goal of the ICC in pursuing this case. It is important to note that Côte d'Ivoire was one of the first states to sign the Rome Statute, on 30 November 1998, becoming the one hundred and twenty second state party to ratify the Statute.[14] On 15 February 2013 the state delivered the deposit of instrument of ratification of the Rome Statute.[15] Like many African states, the state welcomed

13 *The Prosecutor v Simone Gbagbo*, Public redacted version – Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, 2 March 2012, ICC-02/11-01/12-2-Red para 19.

14 The States Parties to the Rome Statute, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 14 November 2017) shows that majority of the members of the Rome Statute are African states.

15 As above.

the establishment of the Court. One would have thought that this would warrant a healthier relationship between the two jurisdictions instead of this hostility and competitiveness.

This article examines the complementarity regime of the ICC and assesses its implementation in the Simone Gbagbo matter. It then makes recommendations on how and why the ICC should avoid seeking to dictate to and impose their prosecutorial strategy on the domestic officials so as to avoid a crisis of their legitimacy being questioned and the state refusing to cooperate with the Court. It concludes with the caution that when the practices of the ICC and its Prosecutor make charging decisions for the state and embrace undermining the prosecutorial discretion of the domestic authorities, then the principle of complementarity will have been officially murdered and the principle of competition officially birthed.

2 Principle of complementarity

The Rome Statute establishes a Court that must be 'complementary to national criminal jurisdictions',[16] and even though the Statute does not go further to define what it means with this requirement, it has been stated that 'the term has come to encompass both the nature of the relationship between national courts and the ICC, and the specific application of those provisions relating to admissibility'.[17] The nature of the relationship between the Court and domestic jurisdictions encourages the exercise of jurisdiction by states. This basically is the notion of complementarity as the 'big idea': the idea that domestic jurisdictions are primary, and the ICC is subsidiary to them. There then is the notion of complementarity as an admissibility requirement. Complementarity as an admissibility requirement serves as a mechanism of how the Court was to apply this principle of complementarity as a big idea.[18] These mechanisms are found in articles 17, 18 and 19 of the Rome Statute, which is where the distribution of jurisdictional competence is to be found in the Rome Statute.

The principle of complementarity arguably is the most important feature of the ICC. The international criminal justice system has been commended for its 'evolution from a state-centred system, obsessed

16 Preamble to and art 1 Rome Statute.
17 L Yang 'On the principle of complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121-122.
18 O Solera 'Complementarity jurisdiction and international criminal justice' (2002) 84 *International Review of the Red Cross* 170.

with the preservation of sovereignty, to a system concerned with the human condition'.[19] The principle of complementarity embodied in the Rome Statute[20] sets a good balance because it also provides a solution to the new reality brought on by globalisation, which is that people's lives have become connected, meaning that whatever happens in one region also in a sense affects another region. This necessitated an active international jurisdiction while the national jurisdiction remained supreme. The complementarity regime is meant to assist the officials of the ICC to achieve this extremely sensitive balance of the national interests and the interests of the international system.

According to Newton the objective of the principle of complementarity is

> to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balances that supranational power against the sovereign right of states to prosecute their own nationals without external interference.[21]

The ICC has stated that article 17 of the Rome Statute calls 'for the state and the Court to complement each other and work in unison'.[22] The same could be said for article 19 as it also strives to achieve the same goal as that of article 17. These two articles have been the pillar of the majority of the admissibility challenges that have been heard by the Court.

Simone Gbagbo's domestic trial began in December 2014 and she was convicted and sentenced to 20 years' imprisonment in March 2015.[23] At first glance the genuine and successful domestic case marks a major victory for the Court's complementarity regime. It had the potential of portraying what it means for the international and domestic jurisdiction to work together and for the latter to be complemented. The ICC was to prosecute two persons, Mr Laurent Gbagbo and Mr Blé Goudé, accused of committing

19 D Tladi 'A horizontal treaty on cooperation in international criminal matters: The next step for the evolution of a comprehensive international criminal justice system' (2014) 29 *South African Public Law Journal* 368.
20 Art 17 of the 1998 Rome Statute of the International Criminal Court (Article 17).
21 MA Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 26-27.
22 Dissenting Opinion of Anita Usacka J, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled *Decision on the admissibility of the case against Saif Al-Islam Gaddafi', Gaddafi and Al-Senussi* (ICC-01/11-01/11-547-Anx2), Appeals Chamber, 1 May 2014 (Dissenting Opinion of Anita Usacka J).
23 M Caldwell 'Ivorians divided over Simone Gbagbo conviction', dw.com, 10 March 2015, http://www.dw.com/en/ivorians-divided-over-simone-gbagbo-conviction/a-18305986 (accessed 25 September 2021).

international crimes. The state would proceed with the case against Simone Gbagbo. What no one anticipated was the ICC insisting on continuing with this case because the state did not adopt its prosecutorial strategy. Everyone expects that the ICC would be involved in the principle of complementarity being given life at every stage of the proceedings. Instead, what one witnessed in this case was the birth of the principle of competition. The Prosecutor of the ICC charged Simone with crimes against humanity, murder, rape, other inhumane acts, and persecution.[24] The prosecutorial strategy of the local authorities differed from that of the Court. Domestically Simone was charged with crimes of disturbing the peace, organising armed gangs, and undermining state security.[25] The Prosecutor of the ICC felt strongly about this case being eligible to be heard by the Court. This was a result of the domestic charges not meeting the threshold of the 'substantially the same conduct' test.[26] This is the test that was adopted by the Appeals Chamber in the Kenyan cases.[27] This test is proving to be problematic especially in the context of the Simone Gbagbo matter. On 19 July 2021 Pre-trial Chamber II handed down its decision on the Prosecutor's request to vacate the effect of the warrant of arrest issued against Ms Simone Gbagbo.[28] The Prosecutor indicated the reason for filing this request as follows:[29]

> It has reviewed the evidence supporting the case against Ms Simone Gbagbo in light of both the majority and minority decisions in the Trial Chamber's No Case to Answer decision, as well as the Appeals Chamber's Judgment. It has done so pursuant to its duty under regulation 60 of the Regulations of the Office of the Prosecutor. Upon completion of that review, the Prosecution has concluded there is no reasonable prospect that it could prove the case against Ms Simone Gbagbo to the necessary evidentiary threshold should the warrant of arrest be executed.

24 *Warrant of Arrest for Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber III, 29 February 2012 (Gbagbo Arrest Warrant).

25 'Ivory Coast's former first lady Simone Gbagbo jailed' *BBC News* 10 March 2015, http://www.bbc.com/news/world-africa-31809073 (accessed 3 December 2021).

26 *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo,* Simone Gbagbo (ICC-02/11-01/12), Pre-Trial Chamber I, 11 December 2014 (Gbagbo Admissibility Decision).

27 See, eg, the judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11 OA) Appeals Chamber, 30 August 2011 (Kenyatta Appeals Judgment).

28 *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber II, 19 July 2021 (Gbagbo's withdrawal matter).

29 *Situation in the Republic of Côte d'Ivoire* (n 28) para 6; the judgment quotes the application submitted by the Prosecutor titled *The Prosecutor v Simone Gbagbo, Request to Vacate Arrest Warrant,* 15 June 2021, ICC-02/11-01/12-89-Conf-Exp para 6 (Prosecutor's request).

This reason does not even attempt to solve the complementarity issues raised by this case.

2.1 Admissibility

At the heart of the Court's complementarity regime are the admissibility requirements. The admissibility requirements dictate when the Court will be competent to exercise its jurisdiction in a particular case. These are not guidelines to be applied by the judges only. The Prosecutor of the ICC also has the obligation to constantly bear the guidelines in mind from the stage of determining whether or not to open an investigation. Interestingly, it should be noted that the notion of complementarity as a 'big idea' might lead to competition of jurisdiction and thus raise the issue of distribution of jurisdictional competence. The judiciary bodies, just as its political counterparts, will be fallible to constantly exerting its powers on others, even the power they do not possess.

The main provision in respect of the ICC's complementarity regime is contained in article 17, especially article 17(1), which states:[30]

> (1) Having regard to paragraph 10 of the preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) the case been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
> (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) the case is not of sufficient gravity to justify further action by the Court.

This article sets out the conditions under which an international criminal case will be admissible, that is, the conditions under which the Court may exercise jurisdiction. Put differently, this provision concerns the distribution of jurisdiction between the ICC and national jurisdictions. Key to the admissibility framework is the idea that the Court may only exercise its jurisdiction to prosecute a matter where

30 Rome Statute.

the national authorities have failed to deal with the matter.[31] This ensures that the manner in which the Court operates remains true to the intentions of the drafters of the Rome Statute, which was that the Court should be a court of last resort.[32] The notion of the Court being one of last resort is achieved by the objective standards set out by the provision to ensure that the Court is forced to respect the primary right and responsibility that lies with states to investigate and prosecute international crimes.[33] Benzing states that the principle of complementarity was created to offer a balance between the right and responsibility of every sovereign state to exercise jurisdiction and the realisation that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure that these objectives are reached and retain its credibility in the pursuance of these aims.[34] The article 17 admissibility requirements in the Rome Statute seek to promote this objective.[35]

Article 17 provides an exhaustive list for the requirements of inadmissibility, that is, if none of the elements mentioned in the provision exists in a specific matter, the case will be admissible.[36] Put differently, if one of the elements is present in a particular case, such a case will be deemed inadmissible. Article 17(1)(a) of the Rome Statute provides that a case is inadmissible where 'the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'.

In the first part of this provision it is clear that in order for a state to argue against the admissibility, there needs to be some sort of action on their part after the commission of a crime of international concern. It therefore is insufficient for a state to approach the Court with an admissibility challenge and claim an intention to start looking into the matter. The Rome Statute encourages states to take positive steps against any atrocities committed. This is an essential requirement as the ICC is a court that has as its primary aim the combating of any impunity.[37] An admissibility challenge can be raised even if the state investigating or prosecuting is not a state party. The

31 Art 17 Rome Statute.
32 P Seils 'Handbook on complementarity: An introduction to the role of national courts and the ICC in prosecuting international crimes' (2016) *International Centre of Transitional Justice* 2.
33 Seils (n 32) 3.
34 M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against Impunity' (2003) 7 *Max Planck Yearbook of United Law* 600.
35 Rome Statute.
36 Benzing (n 34) 601-605.
37 Seils (n 32).

only requirement is that such a state must have jurisdiction.[38] For a successful admissibility challenge it needs to be shown that the state investigating or prosecuting has jurisdiction over the crimes. Benzing states:[39]

> Jurisdiction, in this context, is not limited to the permissibility to exercise jurisdiction under a principle of international law but should also be taken to include the actual competence under the respective domestic legal system to adjudicate and enforce a judgement concerning a crime under the jurisdiction of the Court.

The final part of article 17(1)(a) provides an 'exception to inadmissibility'[40] and is the most contentious part of the provision. It is this part that is the root of most of the issues that have been taken up against the Court. Regardless of the fact that a state with jurisdiction over a matter has investigated or prosecuted it, the Court may still be able to exercise its competence to hear the matter if the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.[41] The Court's interpretation of the above quote is vital to its image as an independent legal institution. In the inquiry as to a state's unwillingness, the Court should always assess a case independently instead of formulating a general standard. However, this is not the case with the inability requirement as that has to do with the state of the judicial system.[42] This final requirement in the provision means that a state will not get away with initiating proceedings to protect suspects from being held accountable. States are being held to a certain procedural standard and if their effort does not meet it, the ICC would be entitled to exercise jurisdiction. This is set out in article 17(2) of the Rome Statute which provides as follows:

> In order to determine unwillingness in a particular case, the Court shall consider having regard to the principle of due process recognised by international law, whether one or more of the following exist, as applicable:
>
> (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

38 A state with jurisdiction may also bring a challenge on the ground it is investigating or prosecuting the case, or has already done so in terms of art 19(2)(b) of the Rome Statute.
39 Benzing (n 34) 602.
40 As above.
41 As above.
42 As above.

(b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

This provision gives an exhaustive list of scenarios that will be taken as unwillingness on the part of the state.

A state may also be found to be unable to carry out an investigation or prosecution. This situation is dealt with in article 17(3) of the Statute.[43] 'The notion of inability was inserted to cover situations where a state lacks a central government due to a breakdown of state institutions (ie the situation of a failed state), or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder.'[44]

Article 17(3) reads as follows:

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The provision sets out three possible scenarios of inability, and the final one 'serves as a generic term capturing all other possible situations'.[45] For a state to be said to be unable to proceed with a matter, it has to be evident that the specific state's judicial system is completely or at least partially inoperative. This is the case where the government has lost control over their territory to such an extent that the administration of justice has broken down.[46]

This admissibility provision, a central element of complementarity, is meant to ensure that the ICC respects the general rule that states have the first right and responsibility to exercise their criminal jurisdiction over international crimes in accordance with the principle

43 Rome Statute.
44 Benzing (n 34) 613.
45 As above.
46 As was stated by the Court in the *First Gaddafi case*, although the same Chamber went and contradicted itself in *Prosecutor v Saif Al-Islam Gaddafi and Abdullal Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi* ICC-01/11-01/11, Pre-Trial Chamber, 11 October 2013 when it found the matter to be inadmissible before them even though they stated that Libya had no control over the administration of justice in their country and the lack of legal representation of the accused in the domestic proceedings.

of sovereignty. In other words, states retain the primary right to investigate or prosecute, and only in certain cases may the ICC intervene. 'In order to implement the complementarity principle, the ICC Prosecutor and judicial chambers must respect and adhere to the Statute's admissibility criteria.'[47] In order to determine the issue of admissibility, the Rome Statute requires the Court to first ask four questions. First, the Court must ask whether the case is being investigated and/or prosecuted by a state with jurisdiction.[48] Second, where there is no ongoing prosecution or investigation, it should be enquired whether a state has investigated and concluded that there is no basis to prosecute.[49] Third, it should be established whether the accused has already been prosecuted for what they are being charged with.[50] Lastly, the gravity of the case should be probed before the Court may proceed with the case.[51] Should the above enquiries produce affirmative responses, 'the accused or the state normally challenges the admissibility of the matter but the Court may, *sua sponte*, raise the issue of admissibility'. Similarly, the 'ICC Prosecutor must, *sua sponte*, raise the issue of admissibility'.[52] The most contentious test of the admissibility provision of the Statute is the unwillingness and inability of a state with jurisdiction to investigate or prosecute a matter.[53]

3 Situation in Côte d'Ivoire

The presidential elections in Côte d'Ivoire were initially scheduled for 2005 but instead were moved to November 2010. In those elections Alassane Ouattara won. Laurent Gbagbo, the man he was up against in the elections, could not handle the defeat. He made accusations of electoral fraud having been committed and claimed that the Constitutional Council, which was constituted of his supporters, found that he had actually won the elections. All of this sparked the 2010 to 2011 post-election violence which in turn led to the second civil war in 2011. The UN set up a Commission to look into the situation and found that Simone Gbagbo, together with her husband and his close political alliances, had played an essential role in the planning of the violent attacks committed during the 2010-2011 post-election violence. It was determined that they had a hand in the commission of crimes such as murder, rape

47 El Zeidy (n 8) 897-898.
48 Art 17(1)(a) Rome Statute.
49 Art 17(1)(b) Rome Statute.
50 Art 17(1)(c) Rome Statute.
51 Art 17(1)(d) Rome Statute.
52 El Zeidy (n 8) 898.
53 El Zeidy (n 8) 899.

and other forms of sexual violence. The ICC acted on the findings of this Commission and charged Simone Gbagbo with the exact crimes that the Commission determined had been committed.[54] The Pre-Trial Chamber also aligned itself with the findings of the Commission when it found that there were reasonable grounds to believe that the Gbagbos and their inner circle exercised joint control over the crimes that were committed during this period.[55] Simone was also investigated, prosecuted and sentenced for her conduct during this period at the national level. She was charged with crimes that mirrored those that she faced at the international level, but she was essentially facing a greater case. The ICC ordered the national authorities to surrender Simone Gbagbo to them, but the national authorities refused to surrender the former first lady because of the state having instituted domestic proceedings against her.[56] These domestic proceedings were successfully instituted to the point of reaching a conviction. The sentence passed down by the Abidjan court in fact was double that which the prosecution sought in this matter.[57] In 2018 the President of Côte d'Ivoire pardoned 800 people, including the former first lady, Simone Gbagbo, who was serving a 20-year sentence for her role in the deadly post-election violence of 2010.[58]

Côte d'Ivoire appeared before the ICC on 1 October 2013 to challenge the admissibility of the case against Simone Gbagbo as the local authorities were pursuing a case against the same suspect for the same crime.[59] In this motion Côte d'Ivoire made the following submissions: First, it was argued that the national authorities were investigating the same case as the Court. This meant that the 'same conduct/case' test was fulfilled.[60] Second, the national justice system was investigating a more complex matter as it was broader in nature.[61] Third, the 'unwillingness' factor was dealt with, and it was argued that the domestic proceedings were not instituted to shield

54 *Warrant of Arrest for Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber III, 29 February 2012 (Gbagbo Arrest Warrant).
55 As above.
56 *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber I, 11 December 2014 (Gbagbo Admissibility Decision).
57 M Caldwell 'Ivorians divided over Simone Gbagbo conviction', dw.com, 10 March 2015, http://www.dw.com/en/ivorians-divided-over-simone-gbagbo-conviction/a-18305986 (accessed 3 December 2021).
58 R Maclean 'Ivory Coast President pardons 800 people including ex-first lady' *The Guardian* international edition, 7 August 2018, https://www.theguardian.com/world/2018/aug/07/ivory-coast-president-pardons-800-people-ex-first-lady-simone-gbagbo (accessed 29 November 2021).
59 Gbagbo Admissibility Decision (n 56).
60 Gbagbo Admissibility Decision (n 56) para 12.
61 Gbagbo Admissibility Decision (n 56) para 13.

Mrs Gbagbo. Finally, it was argued that any delays were justified[62] and the inability concern was moot. This was based on the fact that the post-electoral crisis led to the failure of the judicial system, but in time, and especially on 3 December 2012, all the national courts and judicial institutions started to operate regularly. A special investigative unit established in July 2011 started working on Mrs Gbagbo's case.[63]

Prosecution made the following submissions: First, it argued that the evidence adduced was not sufficient to prove that the 'same conduct' was applied, and especially: '[the admissibility challenge does not] cover all aspects of the offences which are the subject of the case before the Court'.[64] Second, Côte d'Ivoire did not provide the Court with direct evidence pointing out concrete and progressive investigative steps taken against the accused.[65] Lastly, the Pre-Trial Chamber should not proceed to the 'genuineness' element, because the 'same conduct' test has not been satisfied.

The Pre-Trial Chamber reiterated that the challenging state 'bears the burden of proof to show that the case is inadmissible' and has to provide sufficient evidence that investigations are ongoing and cover the same case as the case before the Court.[66] Article 17(1)(a) requires that 'the case is being investigated', which means that 'concrete and progressive investigative steps' were being undertaken.[67] In this case the Court found that the 'evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes' was insufficient. The state should have presented documentation that could prove that the investigation or prosecution was ongoing. These included factors such 'directions, orders and decisions issued by authorities in charge … as well as internal reports, updates, notifications or submissions contained in the file arising from the [case]' as this is the only way that the 'same conduct' requirement has been met.[68] The 'same case' requirement will be fulfilled when the applicant presents evidence that 'is strong enough to establish the [accused's] criminal responsibility'.[69] 'Sufficient investigation' will be proved when the exact parameters of the investigation being carried out both by the prosecutor and by the state have been clearly set out for the Court.[70] The Court

62 Gbagbo Admissibility Decision (n 56) para 14.
63 Gbagbo Admissibility Decision (n 56) para 15.
64 Gbagbo Admissibility Decision (n 56) para 17.
65 Gbagbo Admissibility Decision (n 56) para 18.
66 Gbagbo Admissibility Decision (n 56) para 28.
67 Gbagbo Admissibility Decision (n 56) para 30.
68 Gbagbo Admissibility Decision (n 56) para 29.
69 Gbagbo Admissibility Decision (n 56) para 31.
70 As above.

has not embraced a generic rule but rather adopts a case-by-case approach when dealing with this requirement. The parameters of the international criminal case require that the 'same suspect' and 'same conduct' before the ICC must be the same one that is the subject of the domestic case.[71] The state has to meet this requirement from the outset of their proceedings. The Court requires that this 'must be clear even during an investigation and irrespective of its stage'.[72] The ICC was dismissive of the added economical charges for the 'same case' requirement analysis, even though she was 'essentially accused, and committed to trial'[73] for the said charges. Inadmissibility of the case was not found even though the Court found that the domestic officials initiated proceedings for the same crimes as those before the Court.[74] This challenge was rejected and the state was ordered to surrender Simone Gbagbo with immediate effect.[75] The Court's decision was based on the fact that Côte d'Ivoire had not taken the necessary steps to convince the Court that they indeed were genuinely able and willing to investigate and prosecute Simone Gbagbo for the international crimes that she had committed.

Côte d'Ivoire impugned the decision and claimed in the second instance that (i)(a) an overly rigorous criteria for the determination of the existence of investigation/prosecution was applied when national investigations would not be sufficient for this requirement to be fulfilled; (b) the 'same person/same conduct' test requires a purely formal examination of the domestic case; (c) the Court applied this test incorrectly when it restricted itself to a few incidents when comparing international proceedings and the domestic proceedings;[76] (ii)(a) the national investigation of the 'same conduct' both before courts is sufficiently cited; (b) the ICC failed to look at the investigation that the authorities made in its entirety.[77]

This appeal was completely rejected for not showing how the first Chamber erred in its findings. Simone Gbagbo has not been arrested and the case remains at the pre-trial stage. In her country she was tried and convicted for undermining state security and sentenced to 20 years' imprisonment. She also stood a second trial for war crimes

71 Gbagbo Admissibility Decision (n 56) para 33.
72 Gbagbo Admissibility Decision (n 56) para 34.
73 Gbagbo Admissibility Decision (n 56) paras 47-48.
74 Gbagbo Admissibility Decision (n 56) paras 50-56.
75 Gbagbo Admissibility Decision (n 56) para 61.
76 Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo* Case ICC-02/11-01/12 OA, 27 May 2015 para 48 (Gbagbo Appeal case).
77 Gbagbo Appeal case (n 76) para 81.

and crimes against humanity where she was acquitted as a result of the serious violations of due process.

On 15 June 2021 the Prosecution withdrew its application for an arrest warrant against Simone Gbagbo and submitted to the Pre-Trial Chamber judges a request to vacate the warrant of arrest issued against her.[78] On 19 July 2021 the Pre-Trial Chamber granted the Prosecutor's request and ordered that the warrant of arrest against Mrs Gbagbo ceases to have effect.[79]

4 Recommendations

In international law we have the principle of good faith in terms of which parties are expected to act in utmost good faith in their interaction with all facets of international law, both public and private international law. The principle of good faith in international law has been given life in two ways. First, it is to be found in *pacta sunt servanda,* the rule that 'agreements must be kept', which is an exhibition of honesty and loyalty. Second, it operates as a rule of interpretation, especially statutory interpretation. According to article 26 of the Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. In the absence of any supranational authority, states have nothing to rely upon for the due fulfilment of international obligations but their trust in the good faith of the other parties.[80] In the *Nuclear Tests* case the International Court of Justice ruled:[81]

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus interested states may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

This principle is an essential interpretation tool where ambiguity, vagueness and an interpretation that could lead to absurdity exists. It is a problem that the ICC has not employed it in the context of the principle of complementarity. The principle of complementarity is not defined in the Rome Statute. Thus, there is vagueness: The current interpretation that is being employed is leading to absurdity

78 Prosecutor's request (n 29).
79 Gbagbo's withdrawal matter (n 28).
80 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155 331, https://www.refworld.org/docid/3ae6b3a10.html (accessed 20 April 2023) (Vienna Convention).
81 *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253.

and due the unclear definition there is ambiguity surrounding the principle of complementarity. Not only could the principle of good faith assist in interpreting the principle of complementarity but it could also be a good tool in formulating a test to resolve the different interests between the ICC and the domestic criminal jurisdictions in prosecuting a case. This test would not conflict with the Rome Statute; instead it would comply with both the Rome Statute and the Vienna Convention. The test should also seek to determine the 'unwillingness' and, if necessary, 'inability' of a state to prosecute a matter. The current admissibility tests formulated by the Court are good on paper and embody the principle of complementarity in theory. However, one cannot dismiss the application and interpretation problem that is destroying their comparability with the complementarity regime of this Court.

I propose that the current tests remain on condition that an extra leg be added to their enquiry, which is the principle of good faith. The international jurisdiction and the domestic criminal jurisdiction should be required to have a relationship that is based on good faith, that is, a relationship that imposes a moral behavioural standard of honesty, loyalty and reasonableness to both actors in the international criminal justice system. Adding an inquiry as to whether the domestic authorities are acting with utmost good faith will assist in making the inquiry into 'unwillingness' and 'inability' more powerful, thereby doing away with the need to impose the Court's prosecutorial strategy on the domestic officials.

The ICC should consider refraining from dictating to the state what crimes with which to charge the accused. Any action taken to genuinely combat impunity should meet the threshold of making a matter inadmissible before the Court. This is essential for the state's transitional justice efforts. After a conflict it is important for the populace to see that the new authorities are not afraid to deal with those that caused the conflict. This is more vital for transitional issues rather than for sovereignty. This is so because the doctrine of state sovereignty no longer is the gatekeeper that states envisioned it would be. Circumstances have forced the hand of the international community to prioritise the fight against impunities over the medieval idea of protecting and upholding the doctrine of state sovereignty at all costs. Embracing a criminal system that would threaten a state's sovereignty was a challenge, and instead of working through that with states, the international bodies chose to impose it on states. International criminal law would first strip the state of its primary right to prosecute and punish certain war crimes, as can be seen with the Nuremberg Tribunal, the Tokyo Tribunal, the International Criminal

Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The international criminal justice system embraced the concept of victor's justice and operated in that way. This is what makes the ICC different. The ICC was not imposed on states. It is a court that states chose to be affiliated with, and even though some states that chose to not be affiliated with the Court found their matters before the Court, the above statement still stands. It is a court of which the terms were negotiated and only signed into existence when an agreement was reached.

The Rome Statute neither explicitly refers to a principle of complementarity, nor does it define what complementarity is. However, it does set out when and how the ICC can hear a matter, which serves to tell us that this Court was created to be a court of last resort. The Court has a greater duty to clarify in its jurisprudence all this vagueness and the omission in the Statute. The case of Simone Gbagbo illustrates how the Court misses to embrace the opportunity to do just that. The manner in which the Court chose to interpret the 'same person/same conduct' case in this case is just leading the Court to a slippery slope. There are many questions that this case brings to mind, one of them being whether there are now two types of criminal justice systems. This case makes it clear that if the state charges an accused with domestic crimes instead of international crimes, the ICC still has competence to exercise its jurisdiction.

The situation in Côte d'Ivoire illustrates that either the prosecutorial strategy of the office of the Prosecutor is followed by the local authorities or else it will not be recognised by the Court as an effort to get justice for the victims. This is a problem that needs to be resolved urgently. This is a court that is complementary; it is neither primary nor is it in competition for the exercise of jurisdiction. How the Court interprets the admissibility requirements should be in a manner that ensures that the principle of complementarity is constantly being abided by.

Usacka J made the recommendation that the judges relax the 'same conduct' requirement much more than the Appeals Chamber has already done. She acknowledges that although there needs to be a

> nexus between the conduct being investigated and prosecuted domestically and that before the Court, this 'conduct' and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the

> Court and also does not need to include the same acts attributed to an individual under suspicion.[82]

Stahn argues for the Court to adopt a 'conditional admissibility' regime. This is to assist states that challenge admissibility of their matters before the Court by setting benchmarks for the state to meet within a certain period.[83] Finally, Robinson has proposed that the Assembly of States amend the Rules of Procedure and Evidence to juridify the consultation and sequencing process, requiring the Court to prioritise a genuine national proceeding based on different conduct.[84] Criminal law is a system that became necessary to prevent mob justice and self-help so that the state was given the responsibility to get justice, because a crime was no longer viewed as a wrong against a specific individual but rather as a wrong against the entire society. This is the reason why the primary responsibility to try crimes lies with the state within whose jurisdiction the crime was committed. Therefore, the duty lies with Côte d'Ivoire to get justice for their citizens for the crimes that the state recognises as those that have been committed against its society. The ICC does not seem to understand or chooses not to embrace their subsidiary status in the system, and all that it entails.

5 Conclusion

The principle of utmost good faith operates in a manner that seeks to bridge the gap between the different jurisdictions and should not be divorced from the application of the principle of complementarity by the ICC. The complementary nature of the ICC is absolute. In Africa, at least, the Court is rapidly losing its legitimacy as an independent institution; it is no longer seen as an independent judicial institution. The dark history of colonisation plays a major role in the conclusions drawn by many African states, but the epic failure in the interpretation and application of the principle of complementarity by the Court also plays its own part. The manner in which the Court has decided to deal with questions of admissibility and, essentially, complementarity is problematic. It is with all this in mind that one supports the idea that the ICC should not allow a case to appear before it if the state is genuinely prosecuting the same suspect regardless of the fact that the crimes are not the same or if the national prosecuting authority

82 Dissenting Opinion of Anita Usacka J (n 22).
83 C Stahn 'Admissibility challenges before the ICC from quasi-primacy to qualified deference?' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 253-254.
84 D Robinson 'Three theories of complementarity: Charge, sentence, or process?' (2012) 53 *Harvard International Law Journal* 181-182.

does not have the same prosecutorial strategy as the office of the Prosecutor. This is essential to the respect for a state's sovereignty, which is an element of an independent state for which a majority of the states in the Global South fought. Any decision of the Court that may be perceived as undermining that character of the state will be met with hostility. When the Court requires the state to institute proceedings against the same suspect for the same crime as the one being pursued by the Court, it essentially is taking away from the state the power to institute criminal proceedings in compliance with their constitution and legal system. It also does not assist in equipping the state to acquire resources to realise optimum protection from human rights violations within their domestic jurisdiction.

The ICC should have found the *Simone Gbagbo* case to be inadmissible because even though Côte d'Ivoire did not charge her with the same crimes as the Court, they did charge her. The country was genuinely willing and able to bring her to justice, and having her trial held in the local court has also done wonders for the legitimacy of the new leaders now in office. The strict requirement that the Court has for admissibility do not make sense when one takes into consideration that the successful trial and conviction of a suspect is highly dependent 'on the Court and the state complementing each other by working in unison'.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: TE Coleman, EY Ako & JG Kyerematenng 'A human rights critique of Ghana's Anti-LGBTIQ+ Bill of 2021' (2023) 23
African Human Rights Law Journal 96-125
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a5

A human rights critique of Ghana's Anti-LGBTIQ+ Bill of 2021

*Theophilus E Coleman**
Senior Postdoctoral Research Fellow, Department of Public Law, Faculty of Law, University of Johannesburg, South Africa
https://orcid.org/0000-0002-5481-9586

*Ernest Yaw Ako***
Lecturer, Faculty of Law, University of Cape Coast, Ghana
https://orcid.org/0000-0001-7214-4992

*Joshua G Kyerematenng****
Lecturer, Faculty of Law, University of Cape Coast, Ghana; Doctoral Researcher, Faculty of Law, University of Johannesburg, South Africa
http://orcid.org/0000-0003-1357-0064

Summary: *The Ghanaian Parliament is currently considering the passage of a law to re-criminalise consensual same-sex conduct between adults in private. If passed into law, the Anti-LGBTQ+ Bill will usher in a 'second wave' of criminalisation of lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ+) conduct and related activity. Section 104(1)(b) of the Criminal Offences Act of Ghana already criminalises 'unnatural carnal knowledge', which targets sexual conduct between persons of the same sex. The proponents of the Bill, a group of parliamentarians, argue that homosexuals do not have rights that can be protected by law. They also argue that homosexuality is against the culture and religion of most Ghanaians and, therefore, should be criminalised. The proposed law seeks to uphold the sanctity of a so-called Ghanaian family and cultural values by criminalising the right to free speech, including academic freedom;*

* BA LLB (Ghana) LLM LLD (Johannesburg); tecoleman@uj.ac.za/ edwintheocoleman@gmail.com
** BA LLB BL (Ghana) LLM LLD (Pretoria); ernest.ako@ucc.edu.gh
*** BA LLB BL (Ghana) LLM (Johannesburgh); joshkyerem@gmail.com

freedom of movement and association; and imposes an obligation on every Ghanaian to promote the contents of the Bill, including reporting homosexuals and homosexual activity to the police. This article argues that the foundational argument on which the Bill hinges is flawed, misconceived, and a total mischaracterisation of fundamental human rights enshrined in the 1992 Constitution of Ghana. In addition, viewed from a socio-legal, historical and anthropological perspective, the Bill is an unnecessary and misconceived exercise which, if successful, would derail the democratic gains Ghana has made over the years. Overall, the central arguments in support of the Bill fall short of the minimum threshold to limit the constitutional rights of persons in Ghana.

Key words: *constitutional rights; sexual orientation; minority rights; Anti-LGBTIQ+ Bill; 'unnatural carnal knowledge'; African traditional values; cultural rights; limitation of fundamental rights*

1 Introduction

Barring any unforeseen hitch, Ghana will join the list of African countries that either attempted but failed to or succeeded in passing legislation to re-criminalise consensual same-sex activity between adults in private.[1] This 'second wave'[2] of criminalisation by Ghana purportedly aims at preserving the cultural, family and religious values of Ghanaians.[3] The Promotion of Proper Human

1 See the Same-Sex Marriage (Prohibition) Act 2013 of Nigeria; the Gambia Criminal Code (Amendment) Act, sec 144A, which introduces the offence of 'aggravated homosexuality'; Anti-Homosexuality Act, 2014 of Uganda, which was subsequently declared unconstitutional by the Constitutional Court of Uganda for lack of parliamentary quorum during the passage of the law. See *Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition 8 of 2014 [2014] UGSC 14 (1 August 2014). We use the term 'sexual minority' to mean persons whose sexual preferences do not conform to the 'dominant heteronormative-heterosexual paradigm'; see E Heinze *Sexual orientation: A human right* (1995). Sexual minority is used interchangeably with the acronym LGBTIQ+ to denote lesbian, gay, bisexual, transgender, intersex and queer persons as used in international human rights law (see the Yogyakarta Principles (2007) and YP+10 (2017)).

2 JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14. Ambani argues that African countries such as Nigeria that have passed legislation after independence to re-criminalise same-sex sexual relations while colonial laws that criminalise the same conduct exist on criminal statutes exemplify a 'second wave' of criminalisation. For a general discussion on the 'second wave' of criminalisation of homosexuality in Africa, see JO Ambani 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the "separability thesis", secularism, and international human rights' LLD thesis, University of Pretoria, 2016 (on file with authors).

3 See the Memorandum and Preamble to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

Sexual Rights and Ghanaian Family Values Bill (Anti-LGBTIQ+ Bill) disbands existing lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ+) civil society groups and prohibits the formation of new such groups,[4] criminalises the activities of sexual minority rights advocates[5] and imposes an obligation on all persons and entities to report perceived homosexuals or homosexual activity to the police or community leaders.[6] Should this Bill be passed into law, it will cement the erroneous belief among many Ghanaians that homosexuality is against the culture and religion of Ghanaians. The law will also entrench a mistaken belief that homosexuality is a Western decadence imposed upon Africans and Ghanaians by the Western world. Most importantly, the anti-LGBTQ+ Bill will erode Ghana's democratic gains, the rule of law, respect for human rights and constitutionalism achieved in the last two decades of democratic rule.[7] As a modest contribution to the discourse on sexual minority rights, this article critiques the Bill in light of Ghana's domestic human rights protections but makes references to other regional and global human rights obligations.[8] The article contends that the foundational arguments put forward by the proponents of the Bill, particularly in the Memorandum to the Bill, are factually inaccurate and a mischaracterisation of human rights in the 1992 Constitution of Ghana. The Bill also flouts regional and human rights obligations under the various treaties that Ghana has ratified.

The article is organised into four main parts. The first part traces the events that have triggered the debate about homosexuality in Ghana. Next, the article considers the object, scope, purpose and key aspects of the Bill. The third part dissects the arguments advanced by sponsors of the Bill, including the claim that homosexuality is against the culture and religion of Ghanaians, and challenges those arguments from a socio-legal, historical and anthropological perspective. Further, assuming that the basis for passing this law is correct, it still fails the constitutional test required to pass a law to limit the constitutional rights of individuals. We propose that, as a constitutional democracy, Ghana should protect the rights of all persons, regardless of their sexual orientation.

4 Clauses 15 & 16 of the Bill.
5 Clause 4 of the Bill.
6 Clause 5(1) of the Bill.
7 Ghana returned to democratic rule in 1992 with a Constitution that protects the rights of all persons. The 1992 Constitution has been hailed as a beacon of democracy in Africa.
8 Ghana has ratified all major human rights treaties of the United Nations and the African human rights system. The Constitution of the Republic of Ghana, 1992 ch 5 also provides for a Bill of Rights.

2 Background to the Anti-LGBTQ+ Bill in Ghana

Moral entrepreneurs[9] had long conceived of a law to limit the activities of LGBT persons in Ghana in reaction to the perceived boldness and 'visibility' of LGBT persons to demand equal treatment before the law.[10] Even though same-sex sexual relationships had existed in Ghana before colonial administrators arrived on the then Gold Coast in the 1800s and continued into the present day,[11] the first public debate on homosexuality being a threat to Ghanaian society took place in 2006.[12] The Gay and Lesbian Association of Ghana (GALAG) announced on the radio in 2006 that Ghana would host an international conference of gays and lesbians in the capital, Accra.[13] This announcement was shocking to many Ghanaians because many Ghanaians either did not know of or denied the existence of LGBT persons in Ghana. This might have been shocking news to those who knew that homosexuals existed in Ghana and accepted them. Ghanaian society is highly conservative and was not prepared to accept that homosexuality has been part of Ghanaian culture since time immemorial.

Therefore, the natural reaction was that decadent Western culture was being imported into Ghana. So-called 'right-thinking' members of society – moral entrepreneurs – deemed it a duty to rise to the occasion and compel the government in power to 'quell' the insurrection of LGBT persons.[14] The then Minister of National Security, Mr Kwamina Bartels, characterised the LGBTI conference

9 WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Integrating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86 94. According to Tettey, moral entrepreneurs are 'individuals or organizations that assume responsibility for promoting, and/or enforcing, views and regulations that reflect their moral beliefs, with the goal of ridding society of perceived ills'.

10 'Bill to criminalise homosexuality coming soon – Foh Amoaning' 29 May 2018, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bill-to-criminalise-homosexuality-coming-soon-Foh-Amoaning-655883 (accessed 30 September 2019).

11 I Signorini 'Agonwole agyale: The marriage between two persons of the same sex among the Nzema of Southwestern Ghana' (1973) 43 *Journal Des Africanistes* 221 222; SO Murray 'Homosexuality and traditional sub-Saharan Africa and contemporary South Africa' 22, semgai.free.fr/doc_et_Africa_A4.pdf (accessed 26 December 2021); SO Dankwa 'The one who says I love you: Same-sex love and female masculinity in postcolonial Ghana' (2011) 14 *Ghana Studies* 223-224.

12 K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121.

13 As above.

14 Tettey (n 9) 94. Tettey observes: 'As Ghanaian media focus on homosexuality as a moral emergency, various stakeholders have taken up their own "moral and civil responsibility" by constructing gays and lesbians in the image of "folk devils" who need to be confronted, contained, and controlled for the public good.'

as a national security threat.[15] The announcement by GALAG and the public's negative reaction prompted the government to become involved in the debate on LGBTI rights in Ghana. This has led to a culture of politicisation of LGBTI rights in Ghana, which has continued to the present, with politicians at the mercy of moral entrepreneurs and the public to pass stringent legislation to suppress the activities of homosexuals or risk being voted out of power.[16]

The embers of the 2006 debate on homosexuality in Ghana were rekindled in 2011 with another debate triggered by three events.[17] First, a newspaper reported that approximately 8 000 homosexuals, most of whom infected with sexually-transmitted diseases, including HIV, had been registered by a non-governmental organisation (NGO) in Ghana's western and central regions.[18] Second, the United Kingdom threatened to cut budget support to African countries that do not respect LGBTI rights.[19] Lastly, Barack Obama, the then President of the United States of America, stated that America would use 'diplomacy and foreign assistance to ensure respect for the rights of homosexuals'.[20] The alleged registration of 8 000 homosexuals was a watershed moment in the Ghanaian debate on homosexuality. It showed the Ghanaian media setting an anti-LGBTI agenda to the delight of moral entrepreneurs, who then triggered the panic button to the chagrin of many Ghanaians. As Tettey observed, such agenda setting by the media is what moral entrepreneurs require to put homosexuals under siege.[21] The statements by the UK and USA also fuelled more hostility towards homosexuals because they fed into the erroneous belief that homosexuality is a Western agenda imposed on Africans.

The debate on homosexuality in Ghana in 2011 marks the starting point when moral entrepreneurs seriously started considering the passage of a law to curb the activities of homosexuals. By this time, fertile ground had been created for such a law because even though Ghana criminalises 'unnatural carnal knowledge',[22] many people deemed the law inadequate. At some point, persons who had occupied the high offices of the Attorney-General and Minister of

15 Essien & Aderinto (n 12) 127.
16 EY Ako 'Towards the decriminalisation of consensual same-sex conduct in Ghana: A decolonisation and transformative constitutionalism approach' LLD Thesis, University of Pretoria, 2021 119-134 (on file with authors).
17 E Baisley 'Framing the Ghanaian LGBT rights debates: Competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383 390.
18 As above.
19 As above.
20 As above.
21 Tettey (n 9) 94.
22 Sec 104(1)(b) Criminal Offences Act 29 of 1960.

Justice, responsible for advising the government on legal matters, indicated that the law was unenforceable.[23] The last public debate that prompted moral entrepreneurs to table a Bill in the Ghanaian Parliament was the opening of an LGBTI office in Accra, the capital of Ghana, by an LGBTI organisation in 2021. The pomp, pageantry and officialdom that graced the occasion were as annoying as it was brazen to many Ghanaians. Moral entrepreneurs felt threatened and needed to act decisively, including threatening to burn down the LGBTI office.[24] Some ambassadors of foreign missions in Ghana, such as the Australian High Commissioner, were present at the opening of the LGBTI office. The public capitalised on that to emphasise that homosexuality in Ghana was Western driven, with Western donor funding.[25]

Even though there was some debate around homosexuality in Ghana in 2012, this debate was muted. The Constitution Review Commission of Ghana (CRC) embarked on an exercise to collect information from Ghanaians, at home and abroad, on which sections of the 1992 Constitution of Ghana needed amendment. The CRC received submissions for and against the express protection of LGBTI rights in a new Ghanaian Constitution. Predictably, most Ghanaians who made submissions on the subject stated that they wanted no express protection of LGBTI rights in the new Constitution.[26] At the end of the exercise, the CRC recommended that the matter be left for the apex court of Ghana to decide when a person or group of persons approach the Court in sober moments.[27] While the decision of the CRC is yet to be acted upon, and the threat of introducing an anti-LGBTI Bill in Parliament nestled in the minds of anti-LGBTI activists, Ghana introduced new legislation that allowed members of parliament to introduce a Private Members Bill.[28] Hitherto, all Bills emanated from the executive.[29] While the executive, from the tenure of President Kufuor in 2006 to President Akufo-Addo's time in

23 'Homosexuality is not illegal – Attorney-General', https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuality-Is-Not-Illegal-Attorney-General-217527# (assessed 28 December 2021). However, see a contrary view by another former attorney-general who claimed that the law of Ghana criminalises consensual same-sex conduct; https://www.humandigntytrust.org/country-profile/ghana (accessed 28 December 2021).

24 'Kwabenya Traditional Council threatens to burn down LGBTQI meeting place' *Daily Graphic* (Accra) 23 February 2021 13.

25 'Coalition calls for closure of gay, lesbian office' *Daily Graphic* (Accra) 20 February 2021 1.

26 Report of the Constitutional Review Commission of Ghana 'From a political to a developmental Constitution' (2011) 656-657.

27 As above.

28 'Parliament adopts Private Members Bill' *The Chronicle* 18 July 2020, http://thechronicle.com.gh/parliament-adopts-private-mmbers-bill/ (accessed 28 December 2021).

29 Arts 106(2)-(4) & 108 Constitution of the Republic of Ghana, 1992.

2021, had publicly condemned homosexuality, they had all failed to introduce a law to re-criminalise homosexual relationships in Ghana.

The Anti-LGBTI Bill, a Private Members Bill, is supposedly being introduced to preserve Ghana's cultural and religious values. However, the real reason for introducing the Bill in Parliament is for politicians to obtain the favour of the electorate to stay in power. Unlike some African countries where homosexuality is used as a diversionary tactic to deflect from socio-economic hardship, Ghana is different. The debate on homosexuality in Ghana was unwittingly started by the LGBTI community with an announcement of an impending conference.[30] Moral entrepreneurs who felt they owed a duty to society to preserve Ghanaian 'morals' and culture instigated politicians to clamp down on this so-called 'moral decadence'. With the backing of religious leaders who command a significant following, politicians have found the LGBTI community as easy prey to launch their political careers or stay in power.[31] The scope and contents of the Bill defy the reasoning behind the Bill, which is considered below.

3 Key aspects of the Anti-LGBTQ+ Bill

3.1 Object, scope, and purpose of the Bill

The Bill seeks to provide proper human sexual rights and Ghanaian family values.[32] The meaning of Ghanaian family values includes the 'respect for the sanctity of marriage as a lifelong relationship between a man and a woman, each of whose gender is assigned at birth'.[33] It also includes the 'recognition of the nuclear and extended family as the basic unit for all Ghanaian ethnic communities as well as the recognition that the purpose of government is to protect and advance the family as the basic unit of society and to safeguard the best interest of children'.[34] Further, under the Bill, Ghanaian family values encapsulate the duty of parents, guardians, and teachers to 'ensure that children and young people receive equal protection against exposure to physical, emotional and moral hazards'.[35] The

30 For a comprehensive discussion of the causes of recriminalisation of homosexual conduct in Ghana, see Ako (n 16); EY Ako & A Odoi 'LGBTIQ+ lawfare in response to the politicisation of homosexuality in Ghana' in A Jjuuko et al (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 275.
31 As above.
32 Preamble to the Bill.
33 Clause 2 of the Bill.
34 As above.
35 As above.

Bill also contentiously notes that Ghanaian family values encompass the idea that gender is a social construct assigned to males and females at birth.[36] Also, to uphold the Ghanaian family values is to recognise that the chieftaincy institution is the ultimate source of political and traditional authority in Ghanaian ethnic communities.[37] Most importantly, Ghanaian family values, according to the Bill, include the duty to cherished values such as selflessness and communalism, among others.[38] The Bill applies to people who hold themselves out as lesbian, gay, bisexual, transgender, transsexual, queer, ally, pansexual, or a person of any socio-cultural notion of sex or sexual relationship that is contrary to the ideas of male and female or the relationship between males and females, and a person 'questioning their sexuality'.[39] The Bill also claims to apply to persons who have a biological anomaly, including a person that is intersex and any person involved in the promotion, propagation, advocacy for, support or funding of the LGBTTQQIAAP+-related activities.[40] Further, the Bill applies to persons who provide or participate in sex or gender reassignment, surgical procedure, or any other procedure intended to create a sexual category other than the sexual category of a person assigned at birth, except where the procedure is designed to correct a biological anomaly including intersex,[41] or a person who engages in sexual activity that is prohibited under the Bill.[42]

3.2 Statutory duty to promote proper human sexual rights and Ghanaian family values

The Bill imposes a statutory obligation on every Ghanaian to promote and protect the proper sexual human rights and Ghanaian family values.[43] Under the Bill, the following persons/institutions have a statutory duty to promote and protect the proper sexual rights and Ghanaian family values: parents, guardians, teachers or any other educational or religious instructors; churches, mosques, or any other religious or traditional institution or organisation; the executive, judiciary, and the legislature; constitutional bodies such as the Commission for Human Rights and Administrative Justice (CHRAJ) and the National Commission for Civic Education (NCCE); the media; and the creative arts industry.[44] The Bill requires that the

36 As above.
37 As above.
38 As above.
39 Clause 1 of the Bill.
40 Clause 1(d) of the Bill.
41 Clause 1(e) of the Bill.
42 Clause 1(f) of the Bill.
43 Clause 3(1) of the Bill.
44 Clause 3(2) of the Bill.

foregoing persons/institutions collectively ensure that the proper human and sexual rights and Ghanaian family values are integrated into the fabric of national life.[45] They are also enjoined to make conscious efforts to introduce the proper human sexual rights and Ghanaian family values into relevant aspects of national planning.[46]

3.3 Prohibition against undermining proper human sexual rights and Ghanaian family values

The Bill prohibits all persons from undermining the Ghanaian family values. Also, individuals are prohibited from soliciting, procuring, counselling, facilitating or promoting any act that undermines the Ghanaian family values and proper sexual human rights.[47] The Bill imposes criminal sanctions on any act that undermines the Ghanaian family values and proper sexual human rights. A person may be convicted to a fine or a prison term of not less than two months and not more than four months for undermining the Ghanaian family values.[48] Furthermore, under the Bill, persons in whose presence an act prohibited by the Bill is committed must report the incidence to a police officer, a political leader, or customary authorities of the area where the offence was committed.[49]

3.4 Prohibition of LGBTQ+ activities and related offences

Under the Bill, it is a criminal offence for a person to engage in sexual intercourse with persons of the same sex, an animal or objects.[50] Sexual intercourse is defined in the Bill to occur

> where a person penetrates the anus or mouth of another person with the penis of that person or contraption; or a person by use of any object or contraption, penetrates or stimulates the vagina or anus of another person; or a person by use of penis or any other object or contraption penetrates the anus or other bodily opening of an animal.[51]

Also, under the proposed law, it is a crime for a person to undergo gender or sex reassignment.[52] It is also a crime for a person to marry or purport to marry persons of the same sex or a person that has undergone gender reassignment.[53] Most significantly, the Bill

45 Clause 3(3)(a) of the Bill.
46 Clauses 3(2)(b) & (c) of the Bill.
47 Clause 4(1) of the Bill.
48 Clause 4(2) of the Bill.
49 Clause 5(1) of the Bill.
50 Clause 6(1)(a) of the Bill.
51 Clause 6(3) of the Bill.
52 Clauses 6(1)(b) & (c) of the Bill.
53 Clause 6(1)(c) of the Bill.

imposes criminal sanctions on any person who marries an animal or openly identify as a lesbian, transgender, transexual, queer, pansexual, ally, non-binary or any other gender identity contrary to the binary categories of male and female.[54] Any person who commits an LGBTIQ+-related offence, according to the provisions in the Bill, commits a second degree felony and is liable on summary conviction to a fine, not less than 750 penalty units and not more than 5 000 penalty units or a term of imprisonment of not less than three years and not more than five years or both.[55]

3.5 Prohibition of gross indecency and void marriage

Clause 10 of the Bill criminalises gross indecency. The Bill defines 'gross indecency' as a public display of affection or amorous display of affection between persons of the same sex or persons who have undergone gender reassignment or intentional cross-dressing to portray a different gender other than that assigned at birth.[56] A person who wilfully commits a grossly indecent act commits a misdemeanour is liable, on summary conviction, to a term of imprisonment of not less than six months and not more than one year.[57] One vital feature of the Bill is the prohibition of same-sex marriages conducted in Ghana or any other jurisdiction. According to clause 11 of the Bill, any marriage certificate issued or marriage entered into by persons of the same sex or a person who has undergone gender or sex reassignment is void.[58] Further, a person who administers, witnesses, solemnises or aids a same-sex marriage or marriage involving a person that has undergone gender or sex reassignment commits an offence and is liable on summary conviction to a term of imprisonment of not less than one year and not more than three years.[59]

3.6 Prohibition of propaganda and advocacy of LGBTIQ+ activities directed at a child, and funding or sponsorship

Clause 12 of the Bill provides that any person who, through social media, technological platform or technological account, among others, promotes any LGBTIQ+ activities commit an offence and, on conviction, is liable to a term of imprisonment not less than five years

54 Clauses 6(1)(d) & (e) of the Bill.
55 Clause 6(2) of the Bill.
56 Clause 10(2) of the Bill.
57 Clause 10(1) of the Bill.
58 Clauses 11(a) & (b) of the Bill.
59 Clause 11(3) of the Bill.

and not more than 12 years.[60] Also, any person who participates in any activity that promotes or supports LGBTQ+ activities commits an offence and on summary conviction, is liable to not less than five years and not more than ten years imprisonment.[61] It also is a criminal offence for a person to participate in or support any activity that seeks to change public opinion towards an act prohibited by the Bill.[62] Further, the Bill prohibits any advocacy on technological or media platforms that seeks to directly or indirectly evoke a child's interest in any activity prohibited by the Bill.[63] Under the Bill, both the user and the owner of the platform on which a material or information is circulated commit an offence. However, owners of media and technological platforms may be excluded from criminal liability if they did not consent or connive to commit the offence and the owner exercised reasonable diligence to prevent the commission of the offence.[64] The Bill also makes it a criminal offence to sponsor LGBTIQ+ activities by any person, including corporate and unincorporated entities. Any person, body corporate and unincorporated entities that sponsor LGBTIQ+ activities commit an offence and, on conviction, are liable to imprisonment for a term of not less than five years and not more than ten years.[65]

3.7 Disbandment of LGBTIQ+ groups, associations, clubs, or organisations and prohibition of an adoption order or grant of fosterage

The Bill applies retrospectively to dissolve or disband any group, society, association, club or organisation that existed before the coming into force of the Bill and of which the purpose is to partly, overtly or covertly promote, facilitate, support or sustain in any way acts prohibited under the Bill.[66] Also, a person is prohibited from directly or indirectly forming, operating or registering, or participating in an activity to support or sustain a group, association or organisation of which the purpose is to partly, overtly/covertly, promote facilitate or support an act prohibited under the Bill.[67] A person whose actions contravene the Bill commits an offence and is liable on summary conviction to imprisonment for a term not less than six years and not more than ten years.[68] Also, a court is

60 Clause 12(1)(a) of the Bill.
61 Clause 12(2)(a) of the Bill.
62 Clause 12(2)(b) of the Bill.
63 Clause 13(1) of the Bill.
64 Clause 13(2) of the Bill.
65 Clauses 13(3) & 14(1) of the Bill.
66 Clause 14(2) of the Bill.
67 Clause 16(1) of the Bill.
68 Clause 16(2) of the Bill.

prohibited from granting an application for an adoption order to an LGBTIQ+ person or any person whose gender is contrary to that of a male or female as assigned at birth.[69] Similarly, the Department of Social Welfare is precluded from granting an application for fosterage where the applicant is an LGBTIQ+ person or whose gender is contrary to the socio-cultural ideas of male and female as assigned at birth.[70]

3.8 Protection of victims of prohibited sexual activities, access to medical treatment and flexible sentencing of a LGBTIQ+ person

The Bill provides that victims of sexual activities prohibited by the Bill must not be penalised.[71] In addition to a sentence, a court may order a convicted person to compensate a victim for any psychological or physical harm.[72] In determining the quantum of payment, the court is required to take into account the degree of medical expenses, the degree of force and extent of damage suffered by the victim.[73] The Bill also prescribes that persons involved in the investigation processes, such as law enforcement officers, are to respect the privacy of accused and the victim.[74] Where the complainant or victim is a child, the Bill prescribes that the proceedings must be held *in camera*.[75] A court may also order a victim to undergo therapy provided by an approved service provider.[76] Where during the investigation or trial process an accused person recants or makes a voluntary request to access medical help or treatment, such request must be granted.[77] However, the recanting must be genuine and the cost of the medical treatment shall be borne by the accused or any other person acting on behalf of the accused.[78] The Bill imposes criminal sanctions on persons who verbally or physically abuse, assault, or harasses a person accused of a LGBTIQ+-related offence.[79]

69 Clause 17 of the Bill.
70 Clause 18 of the Bill.
71 Clause 19(1) of the Bill.
72 Clause 19(2) of the Bill.
73 Clauses 19(3)(a) to (c) of the Bill.
74 Clause 19(4) of the Bill.
75 Clause 19(5) of the Bill.
76 Clause 19(6) of the Bill.
77 Clause 20(1) of the Bill.
78 Clause 20(2) of the Bill.
79 Clauses 22(1)(a) & (b) of the Bill.

4 Debate and analysis/response to the argument advanced by the sponsors of the Bill

Upon a careful reading of the Bill and the Memorandum accompanying the Bill, some arguments are recurrent. These arguments are to the effect that (i) LGBTIQ+ activities are contrary to the public morals of Ghana and that the majority of Ghanaians do not approve of such acts because of their religious beliefs; (ii) LQBTIQ+ activities trigger grave public health concerns; and, most importantly, (iii) LGBTIQ+ activities are alien to Ghanaian and African culture and are an imposition by morally-depraved Western countries. Because of a combination and an interconnectedness of these claims the sponsors of the Bill assert that LGBTIQ+ activities must be criminalised. Other strands of argument include the claim that gay and lesbian rights are not human rights and, thereby, are not protected under the 1992 Constitution of Ghana. This article critiques the main arguments advanced by the sponsors of the Bill and as contained in the Memorandum to the Bill.

4.1 Homosexuality is not a human right

One argument advanced by the sponsors of the Bill is that gay and lesbian rights are not human rights. This argument gives the impression that the 1992 Constitution does not protect the rights of sexual minorities. Chapter 5 of the 1992 Constitution provides elaborate provisions on individuals' fundamental rights and freedoms. These rights include human dignity;[80] freedom of association;[81] equality and freedom from discrimination;[82] freedom of assembly;[83] the right to personal liberty;[84] the right to privacy;[85] the right to life;[86] freedom of the media;[87] and academic freedom.[88] These fundamental rights and freedoms in the 1992 Constitution serve as the cornerstone of Ghana's democracy.[89] As such, the rights and freedoms in the 1992 Constitution are highly upheld and cherished, especially when considering the egregious political past of Ghana,

80 Art 19 Constitution of the Republic of Ghana, 1992.
81 Art 21(3) Constitution of the Republic of Ghana, 1992.
82 Art 17 Constitution of the Republic of Ghana, 1992.
83 Art 21(d) Constitution of the Republic of Ghana, 1992.
84 Art 14 Constitution of the Republic of Ghana, 1992.
85 Art 18 Constitution of the Republic of Ghana, 1992.
86 Art 13 Constitution of the Republic of Ghana, 1992.
87 Art 21(a) Constitution of the Republic of Ghana, 1992.
88 Art 21(b) Constitution of the Republic of Ghana, 1992.
89 *Edusei v Attorney General (No 2)* [1998-1999] SCGLR 753; *Tehn Addy v Electoral Commission* [1996-1997] SCGLR 589; *Mensimah v Attorney General* [1996-1997] SCGLR 676; *New Patriotic Party v Inspector General of Police (IGP)* [1993-1994] 2 GLR 354.

which was characterised by abuse, neglect, and a lack of respect for the fundamental human rights of individuals.[90] In addition to Chapter 5 of the 1992 Constitution one finds the Directive Principles of State Policy (DPSP) (Chapter 6). The DPSP embody the objectives that government, citizens and state institutions, including parastatal institutions, must strive to achieve.[91]

The legal potency and justiciability of the DPSP had been uncertain.[92] However, the Supreme Court of Ghana settled those doubts as to the fact that all provisions in the 1992 Constitution are justiciable unless there are strong indications providing otherwise.[93] Both Chapters 5 and 6 of the 1992 Constitution operate to protect all persons in Ghana, including vulnerable persons such as children, women and persons with disabilities. Even though the 1992 Ghanaian Constitution does not explicitly mention the rights of LGBTIQ+ persons, its scope cannot be constricted to exclude sexual minorities such as gay and lesbian persons – the 1992 Constitution is unequivocal that it applies to and protects all persons in Ghana. Reflecting on the scope and applicability of the rights in the 1992 Constitution, Ako states:[94]

> Apart from making it clear that constitutional rights are the entitlement of every person, the 1992 Constitution also contains a relevant clause

90 H Jeff 'Human rights and democracy in Ghana: The record of the Rawlings' regime' (1991) 90 *Africa Affairs* 407-415; M Oquaye 'Human rights and the transition to democracy under the PNDC in Ghana' (1995) 17 *Human Rights Quarterly* 557-571; E Gyimah-Boadi & D Rothchild 'Rawlings, populism, and the civil liberties tradition in Ghana' (1982) 12 *A Journal of Opinion* 64-69. See generally D Simpson 'Violations of human rights in the seventies' in FE Dowrick (ed) *Human rights, problems, perspectives and texts* (1979) 132; W Tordoff *Governments and politics in Africa* (1984); CEK Kumado 'Forgive us our trespasses: An examination of the indemnity clause in the 1992 Constitution of Ghana' (1993-1995) 19 *University of Ghana Law Journal* 83; K Frimpong & K Agyeman-Budu 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' (2018) 18 *African Human Rights Law Journal* 244; TE Coleman 'Contractual freedom and autonomy in commonwealth Africa: Theoretical foundations and practical perspectives' LLD thesis, University of Johannesburg, 2020 (on file with authors).

91 M Mhango 'Separation of powers in Ghana: The evolution of the political question doctrine' (2014) 17 *Potchefstroom Electronic Law Journal* 2703 2727; PA Atupare 'Reconciling socio-economic right and Directive Principles with a fundamental law of reason in Ghana and Nigeria' (2014) 71 *Harvard Human Rights Journal* 71 95; NT Okyir 'Towards progressive realisation of socio-economic rights in Ghana: A socio-legal analysis' (2017) 25 *African Journal of International and Comparative Law* 91-100; TE Coleman 'Reflecting on the applicability and impact of the Fourth Republican Constitution of Ghana on the concept of contractual freedom and autonomy' in M Anton (ed) *Liber Discipulorum für Michael Martinek* (2021) 64.

92 *New Patriotic Party v Attorney General (31st December Case)* [1993-1994] GLR 35; *New Patriotic Party v Attorney General* (*CIBA* case) [1997] SCGLR 279.

93 *Ghana Lotto Operators Association & Others v National Lotteries Authority* [2007-2008] SCGLR 1088.

94 EY Ako 'Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights?' (2020) 4 *African Human Rights Yearbook* 99 117.

> that ensures that apart from constitutional rights, other rights that exist in other democracies intended to uphold the dignity of the human person are also applicable. This provision states that in addition to the rights in the Constitution, 'others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of [hu]man[kind]', are not excluded. This provision means that in interpreting the fundamental human rights provisions in the 1992 Constitution of Ghana, the Supreme Court, which is the only court empowered to do so, must take cognisance of international human rights law and foreign law.

The Bill restricts the following rights in the 1992 Constitution: the right to life; freedom of association; freedom of expression; freedom of speech; the right to equal treatment, the right to human dignity; freedom from discrimination; freedom of assembly; the right to demonstrate; and the right to personal liberty, among others. The limitation of these rights has triggered academics to criticise the Bill. Indeed, one argument often touted by the sponsors of the Bill is that homosexuality is not a human right and that the 1992 Constitution does not make provisions for such requests. While it is true that the 1992 Constitution does not explicitly provide for same-sex rights, it is false for one to claim that same-sex choices cannot be subsumed under some other rights in the 1992 Constitution. For instance, the 1992 Constitution provides that the dignity of all persons shall be inviolable. The 1992 Constitution also provides for the personal liberties of individuals to be respected. Furthermore, the Constitution provides for the respect for the right to life. Quite apart from constitutional rights infringements, the Bill also violates similar rights in regional and global human rights treaties that Ghana has ratified. Ghana is a state party to or has signed all major international human rights instruments in the United Nations (UN) and the African human rights systems.[95] For instance, Ghana is a state party to the International Covenant on Civil and Political Rights (ICCPR) and therefore is bound to respect the decisions of the Human Rights Committee, which states that discrimination on grounds of sexual orientation violates the rights to dignity, privacy and non-discrimination in ICCPR.[96] Ghana also is a member of the

95 Ghana has signed or ratified every major international human rights treaty of the African and United Nations systems except the Second Optional Protocol to ICCPR and the interstate communication procedure under the international convention for the protection of all persons from enforced disappearance, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=67&Lang=EN. In Africa, see https://au.int/en/treaties/1164.

96 Communication 488/1992, *Toonen v Australia,* UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/488 (1992); *G v Australia* Communication 2172/2012 CCPR/C/119/D/2172/2012 28 June 2017; *C v Australia* Communication 2216/2012 CCPR/C/119/D/2216/2012 1 November 2017; *Kirill Nepomnyashchiy v Russian Federation* Communication 2318/2013CCPR/C/123/D/2318/2013 23 August 2018.

Human Rights Council (HRC) and has recently concluded its fourth Universal Periodic Review on 24 January 2023, where it engaged meaningfully with the members of the HRC on ways to end the recriminalisation of consensual same-sex conduct and the violation of the rights of sexual minorities.[97] Emerging from the constitutional rights and international human rights analysis is the protection of personal liberty and human dignity.

The right to personal liberty and human dignity mirrors an individual's autonomy (personal autonomy). Also, underlying the right to life is the dignity of an individual.[98] Personal autonomy refers to the ability of an individual to have the independence and capacity to follow their self-legislated actions, flowing from the individual's capacity to reason – what Kant refers to as practical reason.[99] Indeed, individuals have the innate ability to make rational decisions and self-legislate their actions without external control.[100] An individual can ascribe unto themselves some kind of agency that is not subjected to the cause and effect of external forces.[101] Therefore, a person is endowed with the practical reason to determine the impact of their

97 See https://www.ohchr.org/en/hr-bodies/upr/gh-index for a list of documents and questions submitted by Ghana. In 2017 Ghana moved away from its hostile position in 2008 and 2012 on the subject of homosexuality and 'supported' the recommendations made by the HRC. See Human Rights Council 'Universal Periodic Review – Ghana Third Cycle Date of consideration: Tuesday 7 November 2017 – 14:30-18:00', https://www.ohchr.org/EN/HRBodies/UPR/Pages/GHIndex.aspx (accessed 10 July 2020); see also Report of the Working Group on the Universal Periodic Review Ghana A/HRC/37/7 (26 December 2017), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/367/88/PDF/G1736788.pdf?OpenElement (accessed 10 July 2020).

98 See E Wicks 'The meaning of "life": Dignity and the rights to life in international human rights treaties' (2012) 12 *Human Rights Law Review* 199; C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655; R Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1. See also *Navtej Singh Johar & Others v Union of India, The Secretary of Law and Justice* (Writ Petition 76 of 2016) where the Supreme Court of India stated that life without dignity is nothing.

99 GF Gaus 'The place of autonomy within liberalism' in J Christman & J Anderson (eds) *Autonomy and the challenges to liberalism: New essays* (2005) 282-283; L Zagzebski 'Intellectual autonomy' (2013) 23 *Philosophical Issues* 244 244; E Wilson 'Is Kant's concept of autonomy absurd?' (2009) 26 *History of Philosophy Quarterly* 159; J Waldron 'Moral autonomy and personal autonomy' in J Christman & J Anderson (eds) *Autonomy and challenges to liberalism* (2005) 307; K Dodson 'Autonomy and authority in Kant's Rechtslehre' (1997) 25 *Political Theory* 93 94-95; S Roehr 'Freedom and autonomy in Schiller' (2003) *Journal of History of Ideas* 119-120.

100 I Kant *The groundwork for the metaphysics: Edited and translated by AW Wood* (2002) 53-54 (Ak 4:436). See also CF Rostbøll 'Kantian autonomy and political liberalism' (2011) 37 *Social Theory and Practice* 341 342; JP Christman *The inner citadel: Essays on individual autonomy* (1989) 14; G Dworkin *The theory and practice of autonomy* (1988) 48; M Schroeder 'Scope of rational autonomy' (2013) *Philosophical Issues* 297 303; RS Taylor 'Kantian personal autonomy' (2005) *Political Theory* 602 610-612.

101 HE Allison *Kant's theory of freedom* (1990) 13-14; M Gass 'Kant's causal conception of autonomy' (1994) 11 *History of Philosophical Quarterly* 53-70.

choices on their lives.[102] The ability of a person to make choices inheres in that person as a matter of existence and thereby is not conferred by the political society. Most importantly, underlying the right to life is the dignity and autonomy of an individual. Even in a cultural and communal setting, an individual has the freedom to make choices that reinforce their individuality. Essentially, the choices of individuals are inextricably intertwined with their right to life, human dignity, and personal liberty. Hence, same-sex persons embracing their sexuality is an expression of their humanness and is firmly anchored in the right to human dignity.[103] The criminalisation of the expression of humanness of same-sex persons is akin to taking away their human dignity – what Shaw describes as 'dignity-taking'.[104]

4.2 Most Ghanaians are against homosexuality because of religious beliefs

Faith-based institutions have been the main actors advocating the criminalisation of LGBTIQ+ activities in Ghana. The Memorandum to the Bill provides that the architects behind the Bill comprise Christian and para-Christian bodies; institutions such as the Ghana Pentecostal and Charismatic Council; the Coalition of Muslim Organisations of Ghana; the Catholic Bishops' Conference; and Advocates for Christ, among others. The overall objective, according to the Memorandum, is to ensure that the sovereignty of Ghana is respected and protected. On the grounds of their religious beliefs, most Ghanaians express utter rejection of homosexual practices as those practices do not conform to the tenets of faith and respect for public morality. Some churches, such as the Church of Pentecost of Ghana, have cautioned members of parliament that vote against the Bill that their members will vote them out of power. The church's position is veiled in the need to achieve a moral society. The architects of the Bill, especially the faith-based organisations, argue that homosexual acts are contrary to God's natural law of sexual intercourse between a man and a woman.

102 Kant (n 100) 58 (Ak 4:441). See also D Pereboom 'Kant on transcendental freedom' (2006) 73 *Philosophy and Phenomenological Research* 537 540-541; PE Kleingeld 'Kant on the unity of theoretical and practical reason' (1998) 52 *Review of Metaphysics* 311 314-317; BK Powell 'Kant and Kantians on "the normative question"' (2006) 9 *Ethical Theory and Moral Practice* 535 536.

103 Ako (n 94) 111.

104 A Shaw 'From disgust to dignity: Criminalisation of same-sex conduct as dignity-taking and the human rights pathways to achieve dignity restoration' (2018) 18 *African Human Rights Law Journal* 113 117.

Hence, the sponsors of the Bill argue that since most Ghanaians disapprove of homosexual activities, it necessitates the criminalisation of consensual same-sex relationships. That argument in and of itself is reminiscent of the political concept of rule by majority and, indeed, the very structure of Ghana's democracy is one of majoritarian rule, that is, rule by the majority. However, some checks within the constitutional framework of Ghana ensure that the rights of all persons, including the vulnerable and minority groups, are protected. Suffice it to say, the argument advanced by the sponsors of the Bill indicates that whatever the majority supports must be upheld, in which case the rights of minorities are somewhat relegated to the background. A majoritarian rule may sometimes be problematic, especially in instances where the majority is monstrous and does not regard the rights of the minority in society. Several scholars and political thinkers have highlighted the dangers of majoritarian rule, especially in the case of a tyrannical majority. For instance, Alexis de Tocqueville, one of the influential political thinkers, expressed concerns about the 'tyranny of the majority'.

When he travelled to the United States of America in 1831, Alexis de Tocqueville observed that public opinion was an overwhelming force in American politics.[105] However, he questioned whether public opinion (preponderant views by the majority) is always motivated by the right reasons. He specified: 'I regard as impious and detestable the maxim that in matters of government most of a people has the right to do everything, and nonetheless I place the origin of all powers in the will of the majority. I am in contradiction with myself.'[106] As such, with 'tyranny of the majority' the majority imposes unjust laws upon the rights of individuals that cause 'freedom to be in peril'.[107] De Tocqueville accordingly called for democracies to avoid the 'tyranny of the majority'. Therefore, laws must have due regard for the rights and freedoms of the minority in society. Today, many democracies have evolved to include the rights of minorities, including the fight against slavery in most Western countries. Democracies have evolved to the point where there is a fight for equal treatment in many

105 A de Tocqueville *Democracy in America* (1835) trans HC Mansfield & D Winthrop (2000). See, generally, J Epstein *Alexis de Tocqueville: Democracy's guide* (2006); J Elster *Alexis De Tocqueville: The first social scientist* (2009); K Herb & O Hidalgo *Alexis de Tocqueville* (2005).

106 De Tocqueville (n 105) 240, also quoted in PC Kissam 'Alexis de Tocqueville and American constitutional law: On democracy, the majority will, individual rights, federalism, religion, civic associations and originalist constitutional theory' (2007) 59 *Maine Law Review* 36 52; JT Schleifer *The Chicago companion to Tocqueville's democracy in America* (2012) 90; CW Suprenant 'Minority oppression and justified revolution' (2010) 41 *Winter* 442; E Zoller *Introduction to public law* (2018) 175; T Nyirkos *The tyranny of the majority: History, concepts and challenges* (2018) 83.

107 De Tocqueville (n 105) 239-242.

countries. Hence, legislative power must be exercised in a manner that does not subjugate or undermine the rights of minority groups in society. In this way the dangers associated with the 'tyranny of the majority' will be avoided.

The sponsors of the Bill aver that the disapproval of homosexual acts flows from the religious beliefs of most Ghanaians. It is worth noting that Ghana is not a religious state. The 1992 Constitution of Ghana does not create a religious state or society. Also, unlike some constitutions, such as the Federal Constitution of Nigeria of 1999[108] and the Constitution of the Republic of Kenya of 2010,[109] which explicitly prohibit the creation of a religious state, the Constitution of Ghana does not expressly provide for that. Suffice it to say, the reference to 'God' in the Preamble to the 1992 Constitution is not indicative of creating a religious or Christian society, as proclaimed by some sponsors of the Bill. Indeed, due cognisance must be taken of the views expressed by Archer J (as he then was) in *Osam-Pinanko v Lartey & Another*,[110] where the learned judge averred that 'there is no established religion in Ghana recognised as the religion of the State. The courts of Ghana apply the laws of the country and not what the Christian Bible teaches.'[111] This decision, by extension, includes other holy books that serve as the basis for religious lives and activities, Ghana being a secular state. Accordingly, the teachings/dogmas and faith of any religion cannot be superimposed on the generality of Ghanaians as accepted national doctrines or principles. While the religious argument remains the strongest against homosexual conduct because the overwhelming majority of Ghanaians belong to the Christian and Muslim faiths, there are opportunities to use religion as a tool for tolerance and acceptance of LGBTIQ+ persons. The Christian and Muslim religions, which are dominant in Ghana, both advocate tolerance, forgiveness and love towards everyone.[112]

4.3 Homosexuality as a spreader of HIV in Ghana

Another aspect of the argument advanced by the proponents of the Bill is that the activities of LGBTIQ+ persons evoke grave health concerns, especially regarding the spread of sexually-transmitted diseases. According to the proponents of the Bill, considering

108 Art 10 Constitution of the Federal Republic of Nigeria, 1999.
109 Art 8 Constitution of the Republic of Kenya, 2010.
110 [1967] GLR 380.
111 *Osam-Pinanko v Lartey & Another* [1967] GLR 380 382-385.
112 PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) 2 *Cogent Social Sciences* 1.

the increase in the percentage of persons with HIV in Ghana, homosexual acts will exacerbate those health concerns. They cite a report by the Science Research Council of Ghana, which provides that approximately 18,1 per cent of persons living with HIV are gay persons (men who have sex with men). Accordingly, prohibiting homosexual acts will lead to a decline in HIV infections in Ghana. The logical deduction from the argument is the question as to the extent to which the criminalisation of homosexual activities affects or inhibits the spread of HIV in Ghana. The proponents of the Bill failed to advance any argument that shows that ascribing penal sanctions on consensual same-sex reduces the spread or control of HIV infections in Ghana. A claim that the spread of HIV infections is driven by men who have sex with men, thereby necessitating its criminalisation, must be followed by a logical question as to the proof that there is a causal link between the criminalisation of consensual same-sex and the control of the spread of HIV infection in Ghana. The sponsors of the Anti-LGBTIQ+ Bill have not established such a causal link. As Murray and Viljoen point out, the preponderance of HIV infections occurs through unprotected heterosexual sex.[113] Be that as it may, the question that remains unanswered by the sponsors of the Bill is how ascribing penal sanctions to same-sex relationships will reduce, inhibit or control HIV infections in Ghana.

Regarding the link between the criminalisation of sexual conduct and HIV infections, the overwhelming majority of research suggests that the decriminalisation of (homosexual) sexual conduct reduces the incidence of HIV infections.[114] In the context of Ghana, the UN Special Rapporteur on the Right to Health has noted that the criminalisation of sex between persons of the same sex reinforces stigma and discrimination against such vulnerable groups.[115] The Special Rapporteur further noted that Ghana should 'decriminalise

113 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86 96-97.

114 World Health Organisation The World Health Report 2004: Changing History 1 (2004); UNAIDS, 2006 Report on the Global AIDS Epidemic, http://data. unaids. org/pub/GlobalReport/2006/2006_GR_CH02_en.pdf; A D'Adesky *Moving mountains: The race to treat global AIDS 164-66* (2004); The Foundation for AIDS Research, Issue Brief 4, HIV Prevention for Men who Have Sex with Men (June 2006), http://www.amfar.org/binary-data/AMFAR_PUB- LICATION/ download_file/46.pdf; Resolution on AIDS Prevention in Africa, adopted 48th ordinary session, Council of Ministers, OAU Doc CM/Res.1165(XLVIII) (1988); Report of the Secretary-General on the Follow-Up of OAU Declarations on HIV/ AIDS in Africa - Doc CM/207 9(LXVIII), OAU Council of Ministers, 68th session, OAU Doc CM/Dec.423(LXVIII) (1998).

115 Report of the Special Rapporteur on the Right to Health A/HRC/20/15/Add 1 Human Rights Council, 10 April 2012.

sex work and men having sex with men'.[116] The basis of Ghana's Anti-LGBTIQ+ Bill is in sharp contrast to research reports and the recommendations of the Special Rapporteur, which are based on empirical evidence on the ground in Ghana, and therefore is untenable.

4.4 Homosexuality alien to Ghanaian and African culture

The centre of gravity of the argument advanced by the proponents of the Bill is that homosexuality is an abomination, a taboo and alien to Ghanaian and African culture. Indeed, one of the main reasons advanced regarding the limitation of the rights of persons by the sponsors of the Bill is anchored in the idea of promoting Ghanaian and African cultural values.[117] As the sponsors provide, 'we believe it is ripe for Parliament to actualise the intentions of the framers of the Constitution by providing a legal framework for the promotion of values that define our nationhood'.[118] The intention referred to is with regard to article 39(1) of the 1992 Constitution, which enjoins the state to take steps 'to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning'.[119]

Article 39(2) provides that 'the state shall assume that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole, and in particular that the traditional practices which are injurious to the health and wellbeing of the person are abolished'.[120] The sponsors of the Bill re-echo this position by referencing the African Charter on Human and Peoples' Rights (African Charter) on the primacy of the family as the basic unit of society and that the state must assist the family, which is the custodian of morals and traditional values recognised by the community.[121] The position of the sponsors of the Bill supposedly is corroborated by claims by the National House of Chiefs that homosexual practices are alien to African and Ghanaian cultures. In line with the claims that homosexual activities are contrary or alien to Ghanaian values, the proponents aver that 'our intention is to propose a bipartisan Private Member's Bill to proscribe the practices of and advocacy for the LGBTTQQIAAP+ in line with

116 Report (n 115) para 60(b).
117 Memorandum to the Bill 1.
118 Memorandum to the Bill 16.
119 Art 39(1) Constitution of the Republic of Ghana, 1992.
120 Art 39(2) Constitution of the Republic of Ghana, 1992.
121 Memorandum to the Bill 6-7.

our customs and values of people'.[122] Other arguments advanced by the sponsors of the Bill include the claim that states have an obligation in line with the right to self-determination to protect their cherished values. The sponsors of the Bill accordingly aver that 'in a vastly globalised world, where the threat of the infiltration of foreign culture is vastly present, states rely on the right to self-determination to preserve their socio-cultural values by enacting legislation to minimise the effect of the unacceptable foreign influence'.[123] Further, the sponsors of the Bill argue that the content of the Bill will be in line with the UN Sustainable Development Goals (SDGs), especially SDG3 and SGD5.[124]

To claim that homosexuality is alien to African and Ghanaian culture is to propose that same-sex relationships are an occurrence that is unknown in Africa. Indeed, some scholars have refuted the claim that homosexuality is alien to African society. Also, some scholars have posited that the reliance on traditional African values as a conduit not to respect or afford the protection to fundamental human rights of individuals is unjustified.[125] Epprecht reveals that pre-colonial African societies embraced and accepted same-sex relationships.[126] Commenting on the historical regulation of same-sex relationships in Africa, Ambani also highlighted the acceptance of same-sex relationships/orientation in some parts of pre-colonial Africa.[127] Ngwena further asserts that same-sex relationships are part of our 'Africanness'.[128] According to Ako, even though pre-colonial African societies

> valued heterosexual relationships that produced children that continued the generations of people, it still accepted and valorised consensual same-sex relationships as a significant part of society for purposes of war, abundant farming yield and the expression of the diverse nature of humanity.[129]

Hence, some pre-colonial African societies ascribed value to same-sex relationships for certain reasons, such as expressing our Africanness and humanity.

122 Memorandum to the Bill 3.
123 Memorandum to the Bill 13-4.
124 Memorandum to the Bill 8.
125 A El-Obaid & K Appiagyei-Tuah 'Human rights in Africa: A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 819.
126 M Epprecht 'Bisexuality and the politics of normal African ethnography' (2006) 48 *Anthropologica* 187 190-192.
127 Ambani (n 2) 23-24.
128 C Ngwena *What is Africanness? Contesting nativism in race, culture, and sexualities* (2018).
129 Ako (n 94) 106.

Furthermore, in some parts of Northern Nigeria, academic works reveal the existence of the *Yan Daudu* system of the Hausa people. In the *Yan Daudu* system, 'men who are more or less exclusively homosexuals (not always, but often transvestite or at least effeminate males) have sexual relationships with men not culturally distinguished from other men'.[130] The *Yan Daudus* were engaged in procuring, cooking and prostitution. Indeed, Pittin argues that there is a close link between *Yan Daudus* and prostitution.[131] Also, in Buganda (now Uganda), Kabaka Mwanga II is recorded to have executed men who served as his sexual objects.[132] Thoonen explains that the sexual predilections displayed by Kabaka Mwanga II were a common expression in pre-colonial African societies.[133] In addition, several historical accounts and scholarly works revealed that same-sex relationships existed during the pre-colonial era in Ghana.[134] During his research among the people of Nzema to investigate the pattern of residence and kinship, Signorini discovered a unique form of marriage known as *agonwole agyale* (friendship marriage). The Nzema culture distinguished this from *agonwole kpale* (marriage between different sexes – a relationship with the husband or wife

130 FA Salamone 'Hausa concept of masculinity and the 'Yan Daudu' in L Ouzgane & R Morrell (eds) *African masculinities: Men in Africa from the late nineteenth century to the present* (2005) 80. See generally RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009); SO Murray 'Review: Allah made us: Sexual outlaws in an Islamic African city by Rudolf Pell Gaudio' (2010) 39 *Language in Society* 696; SO Murray & W Roscoe (eds) *Boy-wives and female husbands* (1998); L Zilmman, JL Davis & J Raclaw (eds) *Queer excursions: Retheorising binaries in language, gender, and sexuality* (2014); MM Wilcox *Queer religiosities: An introduction to queer and transgender studies in religion* (2021); R Pittin *Women and work in Northern Nigeria: Transcending boundaries* (2002); VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017); SO Murray 'Gender-defined homosexual roles in sub-Saharan Islamic cultures' in SO Murray & W Roscoe (eds) *Islamic homosexualities: Culture, history and literature* (1997) 222; GG Bolich *Transgender, history and geography* (2007); RP Gaudio *Men who talk like women: Language, gender and sexuality in Hausa Muslim society* (1996).

131 R Pittin 'Marriage and the alternative strategies: Career patterns of Hausa women in Katsina city' PhD thesis, School of Oriental and African Studies, University of London, 1979.

132 J Blevins 'When sodomy leads to martyrdom: Sex, religion, and politics in historical and contemporary contexts in Uganda and East Africa' (2011) 17 *Theology and Sexuality* 51 54; N Hoad 'Arrested development or the queerness of savages: Revisiting evolutionary narratives of difference' (2000) 3 *Postcolonial Studies* 133 155-156; R Rao 'Re-membering Mwanga: Same-sex intimacy, memory and belonging in post-colonial Uganda' (2015) 9 *Journal of Eastern African Studies* 1-19; EF Nabutanyi '(Un)complicating Mwanga's sexuality in NaKisanze Segawa's the triangle' (2020) 26 *A Journal of Lesbian and Gay Studies* 439.

133 JP Thoonen *Black martyrs* (1941) 168.

134 Dankwa (n 11) 223; WF Mohammed 'Deconstructing homosexuality in Ghana' in SN Nyeck (ed) *Routledge handbook of queer African studies* (2020) 167; N Ajen 'West African homoeroticism: West African men who have sex with men' in SO Murray & W Roscoe (ed) *Boy-wives and female husbands* (1998) 129; SO Dankwa 'It's a silent trade: Female same-sex intimacies in post-colonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 192.

of the male or female partner).[135] *Agonwole agyale* is a type of marriage between persons of the same sex.[136] This type of marriage is considered the noblest expression of friendship. Signorini explains that *agonwole agyale* is a 'sublimation of a deep feeling which is of considerable value as a factor of social cohesion in Nzema culture and which is recognised by that society and expressed through institutions of growing complexity according to the intensity of the sentiments involved'.[137]

Suffice it to say that pre-colonial Ghanaian societies had elaborate laws that characterised sex and sexual relations that were offensive to society. However, pre-colonial Ghanaian societies did not ascribe any penal sanction to consensual same-sex relationships.[138] The criminalisation of same-sex relationships and sexual activities is attributed to the promulgation of the Criminal Ordinance 12 of 1892 by the British colonial government.[139] The Criminal Code Ordinance criminalised 'unnatural carnal knowledge'. This provision was carried into the current legislation on criminal law in Ghana, the Criminal Offences Act 29 of 1960. Therefore, it is safe to say that the imposition of penal sanctions on consensual same-sex relationships is a remnant of colonial law and not because African and Ghanaian cultural societies prohibited same-sex relationships or because homosexuality was alien to Ghanaian or African culture. Accordingly, it is suspect for the National House of Chiefs and the sponsors of the anti-LGBTIQ+ Bill to claim that homosexual acts are alien to African and Ghanaian culture and values without due regard to historical and anthropological studies on the subject matter.

The sponsors of the Bill, in justifying the limitation of rights of LGBTIQ+ persons, refer to articles 18(1) and (2) of the African Charter, which provides:[140]

> (1) The family shall be the natural unit and basis of society. It shall be protected by the state, which shall take care of its physical health and morals.

135 Signorini (n 11) 221.
136 As above.
137 As above.
138 See, eg, JM Sarbah *Fanti customary laws: A brief introduction to the principles of the native laws and customs of the Fanti and Akan sections of the Gold Coast with a selection of the cases thereon decided in the law courts* (1968); RS Rattray *Ashanti law and Constitution* (1929).
139 WB Griffith (ed) *Ordinances of the Gold Coast Colony and the rules and orders thereunder in force* (1903); JS Read 'Ghana: The Criminal Code, 1960' (1962) 11 *International and Comparative Law Quarterly* 272.
140 Memorandum to the Bill 6-7.

> (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

While it is true that the African Charter protects the family as a basic unit of society, it is equally essential to wholly assess the protection afforded to sexual minorities in the Charter. Ghana has not yet domesticated the provisions of the African Charter. The Charter makes provision for the protection of traditional African values. It is not clear which values are uniquely African since traditional African societies have several values and ethics. That notwithstanding, some scholars aver that African values include the expression of our humanness, non-discrimination, and respect for the dignity of others.[141] Also, the very nature of African traditional societies, being communitarian, evokes the idea of the prohibition of hate under African traditions and cultures. Generally, in many African countries African values/ethics are embodied in maxims and proverbs.[142] For instance, in Southern Africa the ethical value of ubuntu exists to underscore the communal nature of individuals in a traditional African society.[143]

The value of ubuntu was explained by the South African Constitutional Court in *S v Makwanyane*[144] in the following manner by Mokgoro J:[145]

> The value of *ubuntu* which metaphorically expresses itself in *umuntu ugunmuntu ngabantu* envelops the key values of group solidarity, compassion, human dignity, conformity to basic norms and collective unity … it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Also, in *Port Elizabeth Municipality v Various Occupiers*[146] the South African Constitutional Court explained that the

> spirit of *ubuntu*, part of a deep cultural; the heritage of most of the population, suffuses the whole constitutional order. It combines

141 K Quan-Baffour 'The wisdom of our forefathers: Sankofaism and its educational lessons for today' (2008) 7 *Journal of Educational Studies* 25.

142 T Metz 'An African egalitarianism: Bringing community to bear on equality' in G Hull (ed) *The equal society: Essays on equality in theory and practice* (2015) 186-187. See generally K Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (1987); P Ikuenobe 'African tradition, philosophy, and modernisation' (2010) 30 *Philosophical Papers* 245.

143 M Letseka 'African philosophy and educational discourse' in P Higgs et al (eds) *African voices in education* (2000) 186. See also LG Mpedi 'The role of religious values in extending social protection: A South African perspective' (2008) 28 *Acta Theologica* 105 111-115; D Tutu *No future without forgiveness* (1999) 35; TE Coleman 'Reflecting on the role and impact of the constitutional value of ubuntu on the concept of contractual freedom and autonomy in South Africa' (2021) 24 *Potchefstroom Electronic Law Journal* 9-17.

144 1995 (3) SA 391.

145 *Makwanyane* (n 144) para 308.

146 2005 (1) SA 217.

> individual rights and communitarian philosophy. It is a unifying motif to the Bill of Rights, which is nothing if not structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[147]

The notion of dignity is an essential part of traditional African values. Gyekye avers that even though traditional African society is mainly communitarian, it does not exclude certain innate qualities of an individual, such as the dignity of the person.[148] The notion of human dignity, which mirrors a person's instrumental worth, remains a cardinal part of African culture and is codified in the constitutions of most African countries.[149] The respect for the dignity of others, which is valued as a vital part of traditional African values, includes the respect for the inherent choices and orientation of an individual, including the right to relate to and choose one's partner. As Ako rightly puts it, 'the respect for person's dignity requires a duty to respect a person's most intimate, innate, and private domains of their life, which includes the right to relate and choose one's partner'.[150]

It is conceded that the African Charter does not provide for sexual minority rights. However, Murray and Viljoen indicate that this omission is because certain terminologies, such as sexual orientation, were not utilised during the period the Charter entered into force.[151] Suffice it to say, one must not lose sight of subsequent resolutions adopted by the African Commission on Human and Peoples' Rights (African Commission) to protect minority rights in Africa. For instance, Resolution 275 of the African Commission embraces and 'specifically condemns the situation of systematic attacks by states and non-state actors against persons based on their imputed or real sexual orientation or sexual identity'.[152] It therefore is unfathomable

147 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 para 37.

148 K Gyekye 'Person and community in African thought' in K Wiredu & K Gyekye (eds) *Person and community: Ghanaian philosophical studies* (1992) 102; Coleman (n 134) 1-24.

149 See, eg, Constitution of the Republic of South Africa, 1996, sec 1; Constitution of the Republic of Ghana, 1992, art 15; Constitution of the Republic of Kenya, 2010, art 28; Constitution of the Federal Republic of Nigeria, 1999, art 34; Constitution of the United Republic of Tanzania, 1977, arts 9 & 12; Constitution of the Republic of Namibia, 1990, the Preamble and art 8.

150 Ako (n 94) 110. Also see the decision of the High Court of Botswana in *Letsweletse Motshidiemang v Attorney General & Lesbians Gays and Bisexuals of Botswana* (*Amicus Curiae*) MAHGB – 000591-16; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); T Esterhuizen 'Decriminalisation of consensual same-sex acts and the Botswana Constitution: *Letsweletse Motshidiemang v Attorney General* (LEGAIBIBO as *Amicus Curiae*)' (2019) 19 *African Human Rights Law Journal* 843.

151 Murray & Viljoen (n 113) 86.

152 African Human Rights Commission 275 Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation and Gender Identity – ACHPR/Res. 275 (LV) 2014, https://www.achpr.org/sessions/resolutions?id=322 (accessed 20 November 2021). See also *Zimbabwe Human Rights Forum v Zimbabwe*

that the sponsors of the Bill referenced some provisions of the African Charter and created the impression that, from a regional perspective, respect for the rights of sexual minorities is detested when the African Commission embraces the rights of sexual minorities by explicitly condemning violence against people because of their gender identity or sexual orientation. Also, the sponsors of the Bill rely on article 39 of the 1992 Constitution as the basis to restrict the rights of LGBTIQ+ persons in Ghana. Article 39 of the 1992 Constitution provides:

> (1) Subject to clause (2) of this article, the State shall take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning.
> (2) The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society and that traditional practices which are injurious to the health and well-being of the person are abolished.
> (3) The State shall foster the development of Ghanaian languages and pride in Ghanaian culture.
> (4) The State shall endeavour to preserve and protect places of historical interests.

The view of the sponsors of the Bill that article 39 of the 1992 Constitution can operate to limit the rights of LGBTIQ+ persons is misconceived and a mischaracterisation of the essence of the constitutional provision. This is because article 39 of the 1992 Constitution provides a straightforward procedure for the government when integrating customary values into national life and planning through formal and informal education. Article 39 of the 1992 Constitution does not at any point require legislation (particularly of a criminal nature) as a procedure to integrate cultural values into national planning and national life, let alone to serve as a tool to limit the rights of others. One example that falls within the scope of article 39 of the 1992 Constitution is for the state to incorporate appropriate cultural dimensions into the educational curriculum in Ghana. Therefore, it is inconceivable that the sponsors of the Bill purport to give effect to article 39 of the 1992 Constitution through criminal legislation, even though the Constitution prescribes a procedure upon which the cultural objectives of the state can be realised.

(2006) AHRLR 128 (ACHPR 2006); *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006); *Purohit & Another v The Gambia* (2003) 96 (ACHPR 2003).

5 Do the arguments advanced in the Bill meet the threshold required to limit constitutional rights?

Thus far, this article has reflected on the key arguments advanced by the proponents of the anti-LGBTIQ+ Bill and ascertained whether those arguments from a legal, constitutional, historical and anthropological perspective justify the limitation of the rights of LGBTIQ+ persons. Conceptually and jurisprudentially, there is a convergence regarding the claim by the proponents of the Bill and this article that human rights are not absolute. However, any limitation of such rights must meet the required constitutional threshold. Suffice it to say, the 1992 Constitution contains certain limitation clauses. For instance, in terms of the right against discrimination, the Constitution empowers Parliament to enact laws that are reasonably necessary to provide:

> (a) for the implementation of policies and programmes aimed at redressing the social, economic or educational imbalance in the Ghanaian society;
> (b) for matters relating to adoption, marriage divorce, burial, devolution of property, on death or other matters of personal law;
> (c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or
> (d) for making different provision for different communities having regards to their special circumstances, not being provision which is inconsistent with the spirit of this Constitution.[153]

Also, the enjoyment of fundamental rights is accompanied by certain constitutional obligations. Article 41 of the 1992 Constitution provides, among other things, that

> the exercise and enjoyment of rights and freedom are inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen to respect the rights, freedoms and legitimate interests of others, and generally refrain from doing acts detrimental to the welfare of other persons.[154]

The 1992 Constitution does not provide an elaborate framework within which fundamental rights can be restricted, except the general limitation that the enjoyment of fundamental human rights is 'subject to respect for the rights and freedoms of others and for the public interest',[155] which is similar to the provision in the African

153 Art 17(4) Constitution of the Republic of Ghana, 1992.
154 Art 41 Constitution of the Republic of Ghana, 1992.
155 Art 12(2) Constitution of the Republic of Ghana, 1992.

Charter.[156] The limitation structure in the Ghanaian Constitution and that of the African Charter has been discussed extensively elsewhere.[157] Therefore, this article will not belabour the point. Suffice it to say, however, that we agree with scholars on this point that a person cannot be denied the enjoyment of rights in the Ghanaian Constitution or the African Charter merely because of their sexual orientation. The South African and Kenyan Constitutions provide an elaborate framework for limiting fundamental human rights that is worth emulating and reflecting.[158]

In South Africa, for instance, fundamental human rights can be restricted within the framework provided in section 36 of the Constitution of South Africa of 1996. Section 36 of the 1996 South African Constitution provides:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

Similarly, the 2010 Constitution of Kenya provides:

> A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right or fundamental freedom;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

156 Art 27(2) African Charter on Human and Peoples' Rights.

157 In the case of Ghana, see Ako (n 16) 166-170. See also Ako (n 94). For the analysis on the African Charter, see Murray & Viljoen (n 107). See also the Ghanaian cases of *Ahumah Ocansey v The Electoral Commission and the Centre for Human Rights and Civil Liberties v The Attorney-General* [2010] SCGLR 575; *Republic v Tommy Thompson Books Limited (No 2)* [1996-1997] SCGLR 575; *Charles Ayuune Akurugu v The Attorney-General* No HR/00039/2015 (29 March 2017), where the Oakes test and proportionality test was applied to determine the contours of restricting protected rights.

158 Sec 36 Constitution of the Republic of South Africa, 1996. See also Constitution of the Republic of Kenya of 2010, art 24.

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The point worth stressing is that not every reason can be relied upon to limit individuals' fundamental rights and freedoms. It even becomes problematic where the reasons advanced are factually inaccurate and a complete mischaracterisation of the law. The reasons advanced by the sponsors of the Bill must meet a threshold that justifies the restriction of the rights of individuals because of their sexual orientation. In sum, considering the factual inaccuracies, coupled with the inability of the sponsors of the Bill to advance sufficient reasons/justifications as the basis for the criminalisation of LGBTIQ+ activities in Ghana, this article takes the position that the Bill does not meet the threshold required to limit the fundamental rights in the 1992 Constitution of Ghana.

6 Conclusion

This article appraised Ghana's new Anti-LGBTIQ+ Bill of 2021. It discussed the scope, object, and essence of the Anti-LGBTIQ+ Bill and briefly reflected on Ghanaian family values as provided by the Bill. The article further discussed the statutory obligation on Ghanaians to respect the values enshrined in the Bill and other related issues. It also analysed the key arguments in the Memorandum to the Bill. The article argued that the main arguments advanced by the sponsors of the Bill are factually inaccurate and a mischaracterisation of the provisions in the Constitution of the Republic of Ghana of 1992. Also, the article argued that the claims and arguments heralded by the sponsors of the Bill do not reach the threshold required to limit the rights of LGBTIQ+ persons in Ghana and under the 1992 Constitution of Ghana.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: T Kachika 'Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi ' (2023) 23 *African Human Rights Law Journal* 126-155
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a6

Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi

*Tinyade Kachika**
Consultant, Gender and Social Inclusion, Lilongwe, Malawi
http://orcid.org/0009-0003-0092-1969

Summary: *In recent years, community laws to address harmful practices affecting women and girls in rural Malawi have been forming under the leadership of traditional authorities (chiefs), plural justice system actors who usually are suspected by international human rights law and jurisprudence of being on the side of women's rights violations. Yet, being community engineered, the community laws have some potential to practically protect women and girls from harmful practices. Taking off from a 'norm internalisation' conceptual footing, this article closely examines how the phenomenon of community laws sits with the expectations of international human rights law and jurisprudence on measures that states ought to take to internalise norms protecting women and girls from harmful practices. The article establishes that international human rights law and jurisprudence is saturated with calls for states to prioritise formal and macro-level measures to address harmful practices, although latest jurisprudence at both United Nations and African Union levels has cautiously begun to also recognise the role of plural justice systems. The article argues that it is high time that the human rights treaty-monitoring bodies started to critically re-examine*

* PhD (CapeTown); tkachika@hotmail.com

the high insistence on formal measures, given that the community laws, which are also internalising the norm protecting women from harmful practices, are manifesting at the level of chiefs' jurisdictions.

Key words: *harmful practices; community laws; norm internalisation; CEDAW/CRC General Recommendations/General Comments; African Commission/African Children's Committee General Comments*

1 Introduction

Recent scholarship[1] documents that in some parts of Malawi, chiefs are leading efforts to informally adopt community laws towards addressing harmful practices that mostly affect women and girls in their communities. These community laws address socio-cultural challenges and harmful practices, such as child marriage; incest; impregnation of schoolgirls (by teachers, schoolboys and other men); school-related gender-based violence; harmful puberty rituals for girls; harmful initiation rituals and practices; harmful widowhood rituals and practices; property dispossession of widows; harmful pregnancy-related practices; wife swapping; and domestic violence, among others. These practices, which are mere examples of harmful practices towards women and girls obtaining in various societies, fall within the purview of the definition of harmful practices under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[2] namely, 'harmful practices are all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.[3]

Legal formalists may be apprehensive of the community law phenomenon, and questions may justifiably arise regarding the legal force of these community laws in light of domestic legal frameworks. This would be a valid concern, and while the subsequent analysis alludes to the need to consider the community laws within a legal pluralism context, this is an issue for another article. For now, the focus is to use Malawi as a mere example to demonstrate that chief-led community laws on harmful practices are emerging in earnest

1 T Kachika 'A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi' PhD thesis, University of Cape Town, 2020 223 (on file with author).
2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa AU Doc CAB/LEG/66.6 13 September 2000.
3 Art 1(g) African Women's Protocol.

in some societies, and to interrogate how these community laws are positioned within United Nations (UN) and African Union (AU) human rights jurisprudence, which prescribes ways in which states should internalise norms protecting women and girls from harmful practices. This inquiry is important given that scholarship has established that the community laws that were studied in Malawi have inner force and tangible normative effects since they are closer to rural people than statutory law.[4] As such, one could argue, well-considered community laws have high potential to be a norm-internalisation conduit for tackling entrenched harmful practices at very local levels.

However, to what extent does international and regional human rights jurisprudence recognise that community laws and chiefs could be viable entry points for norm internalisation when it comes to protecting women and girls from harmful practices? This is the question being explored in this article. Drawing on the conceptual framework of norm internalisation, the article begins by briefly explaining how chiefs and their subjects are making these community laws in rural Malawi. It then provides a conceptual analysis of norm internalisation and how it is positioning community laws. Thereafter, legal sources of norms protecting women and girls from harmful practices are examined, followed by an analysis of international human rights jurisprudence that require states to take specific measures to internalise human rights norms. Next, the article examines how the community laws to address harmful practices in rural Malawi are located within the international human rights jurisprudence before concluding. Notably, the article does not involve conceptualising 'harmful practices', but concentrates on the global acceptability of community laws that address such practices.

2 Community laws: Description and role of chiefs

In Malawi, the hierarchical tiers of traditional leaders are paramount chief, senior chief, chief and sub-chief.[5] The 'chiefs' and 'sub-chiefs' are commonly known as traditional authorities and sub-traditional authorities respectively. Under these two groups are group village headpersons and village headpersons. A study conducted in Malawi[6] revealed that these community laws address contextual harmful

4 Kachika (n 1) 260. Examples of Malawian statutory laws are the Child Care, Protection and Justice Act 22 of 2010 (Malawi); Gender Equality Act 3 of 2013 (Malawi); and HIV and AIDS (Prevention and Management) Act (Malawi).
5 Sec 3 Chiefs Act Ch 22:03 Laws of Malawi.
6 Kachika (n 1).

practices prevalent in a chief's territory. These chief-led[7] community laws, which can be written or oral, are jointly agreed upon by chiefs and their communities to govern the behaviour of all community members in order to address specified harmful practices. Violations of the community laws attract various village fines such as chickens, goats or monetary equivalents that are also agreed upon at community level.[8]

Community laws, loosely dubbed 'community bylaws' in Malawi, can be made in any sector, but this article focuses on community laws in the gender sector. The community laws are usually made at the level of traditional authority (TA). While the TA champions the whole process, group village headpersons and village headpersons are usually active in the consultative formulation of the community laws through facilitating consultations with their subjects; and attending forums where proposals from the subjects are further debated to see what should be refined, rejected or adopted. Then, the community laws are usually adopted through a public launch within the community.[9]

This article will not dwell on how the community laws are conceptualised,[10] but suffice to say that the community laws are introducing an alternative mechanism, albeit informal, of addressing entrenched negative customs and practices, and it is intriguing that chiefs are leading this revolution. This role of chiefs defies literature, which usually situates chiefs and women's rights on binary opposing sides. Often, traditional leaders are viewed as the 'problematic other' on the women's rights question.[11] Of course, some scholars have acknowledged the relevance of traditional leaders to the implementation of women's rights. For example, Becker contends that traditional authorities are not at all stuck in old tradition, but are a changing and modern institution that, together with rural people, produces local modernities as the institution interacts with global social forces.[12] Bennett also acknowledges instances

7 While others could argue that the community laws are pushed on communities by NGOs, donors and even government (eg the Social Welfare Department) evidence in four study districts has rejected this argument. Chiefs and their communities are adamant that while outside players may technically or financially support consultations and other processes related to the community laws (eg publicly launching and printing the community laws) the actual laws formulated are purely the brainchild of communities.

8 For an exhaustive analysis, see Kachika (n 1) 228-245.

9 Implying that they are applicable to all villages governed by group village heads and village heads under the Traditional Authority; Kachika (n 1) 214.

10 For an exhaustive analysis, see Kachika (n 1) 228-245.

11 Kachika (n 1) 28.

12 H Becker 'New things after independence: Gender and traditional authorities in postcolonial Namibia' (2006) 32 *Journal of Southern African Studies* 31.

when chiefs' courts in Zambia modified customary law in order to improve women's status, only to have such decisions overturned by subordinate courts on the ground that the chiefs were negating customary law.[13] Sieder and McNeish identify traditional and community structures for dispute resolution as potential means of making quick gains in justice projects. [14]

With these few exceptions, literature, including some feminist scholarship, presents traditional leaders as being antagonistic to women's rights. This suspicion of traditional leaders is not exactly unfounded. For example, Bond observes that 'traditional leaders may be hostile to equality based cultural change'.[15] Williams argues that customary law systems (of which traditional leaders are custodians) 'legitimise and enforce' gender discrimination and threaten women's status, including in areas of marriage, divorce and property.[16] Doho asserts that in the Zimbabwean context, traditional leadership systems were, and indeed continue to be, partly responsible for 'women's pathetic conditions', [17] arguing, among other things, that the traditions that traditional leaders have condoned have been without women's consent.[18] Ewelukwa observes that Nigerian local rulers often resist efforts to reform customary practices that disadvantage women, and they suppress women's voices by undermining democratic processes at village levels.[19] Much of this literature is tainted by the tendency to overgeneralise which, in turn, invisibilises positive chief-led initiatives such as the community laws presented in this article. Furthermore, while some of the literature accepts the potential of traditional leaders as agents of positive change, it assumes without more ado that such change only happens under the influence of the state, and sometimes non-governmental organisations (NGOs).[20]

13 TW Bennett *A sourcebook of African customary law for Southern Africa* (1991); WVD Meide 'Gender equality v right to culture – debunking the perceived conflicts preventing the reform of the marital property regime of the official version of customary law' (1999) 116 *South African Law Journal* 108.

14 R Sieder & JA McNeish *Gender justice and legal pluralities: Latin America and African perspectives* (2013) 12.

15 J Bond 'Gender, discourse and customary law in Africa' (2010) 83 *Southern California Law Review* 567. Bond captures how, during the drafting of the new South African Constitution, traditional leaders in South Africa lobbied to exclude personal and customary law from the purview of the non-discrimination clause in the Constitution. A strong and organised women's lobby defeated the effort.

16 SH Williams 'Democracy, gender equality, and customary law: Constitutionalising internal cultural disruption' (2011) 18 *Indiana Journal of Global Legal Studies* 65.

17 O Dodo 'Traditional leadership systems and gender recognition: Zimbabwe' (2013) 1 *International Journal of Gender and Women's Studies* 38-39.

18 Such as forced marriages, levirate marriages, polygamy, FGM and inheritance inequalities; Dodo (n 17).

19 UU Ewelukwa 'Postcolonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 472-473.

20 Ewelukwa (n 19); S Wendoh & T Wallace 'Rethinking gender mainstreaming in African NGOs and communities' (2005) 13 *Gender and Development* 78.

It should be noted that this article has deliberately opted for the term 'community laws', and avoided using the locally popular term of 'community bylaws', given that in Malawi 'bylaws' can only be legally made by a district, town of city assembly,[21] or at area/traditional authority level to respond to contextual matters, so long as legal procedures are followed.[22] Nevertheless, the so-called 'community bylaws' (or 'community laws' as labelled in this article) also cannot be sweepingly discarded due to their informality. Although they are not a recognisable norm internalisation method under formal law, they could still be considered law within the scope of living law and legal pluralism (and, therefore, capable of internalising human rights norms). Claassens defines living law as 'blended law and experiences (ie from vernacular, constitutional or statutory sources)',[23] and Hellum labels living law as 'the outcome of the interplay between international law, state law, and local norms that takes place through human interaction in different historical, social and legal contexts'.[24] This means that even if they may not have the status of formal law or customary law, the community laws/'bylaws' have legal status as living law in the context pluralistic legal system.

Of course, scholars such as Tamanaha hesitate to give the label of 'law' to 'negotiated orders' under the guise of 'living law' because the term 'living law' betrays analytical clarity and drags 'non-law' materials into the law field.[25] However, this article agrees with Claassens's argument, that the rejection of living law as law, on whatever basis, carries with it the implication that people-made law cannot be law as such. Such rejection implies that, to qualify as law, a practice must be made by authorised 'experts', such as lawyers, judges, governments and traditional leaders.[26] Yet, legal pluralism demands the acceptance of different laws and mechanisms that draw legitimacy from international, state, local or non-official systems.[27] In fact, legal pluralism is even embraced to an extent by

21 Sec 5(1) Local Government Act 42 of 1998 (Malawi) as read with secs 6(1)(f) & 15(1)(b); Kachika (n 1) 9.
22 Sec 102 Local Government Act 42 of 1998 (Malawi); Kachika (n 1) 9.
23 A Claassens 'Entrenching distortion and closing down spaces for change: Contestations over land and custom in South Africa' PhD thesis, Roskilde University, 2012 31-32 (on file with author).
24 A Hellum 'Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe, north-south legal perspectives (1999) in Claassens (n 23) 32-33.
25 BZ Tamanaha 'A vision of social-legal change: Rescuing Ehrlich from "living law"' (2011) 36 *Law and Social Inquiry* 297-318.
26 Claassens (n 33) 34.
27 DM Engel 'Vertical and horizontal perspectives on rights consciousness' (2012) 19 *Indiana Journal of Global Legal Studies* 428.

international human rights jurisprudence.[28] The next part introduces norm internalisation theory and its interaction with community laws.

3 Theorising norm internalisation and the place of community law

The internalisation of international norms has been defined as 'a process by which states incorporate international law concepts into domestic practice'.[29] Indicators of norm internalisation include the integration of the norms into domestic formal legal systems and into domestic administrative arrangements.[30] However, the challenge lies in that there is a blurred conceptualisation of how norm internalisation percolates beyond formal domestication of international norms and formal institutional changes to reach rural settings dominated by customary law, tradition and practices in the African context (such as the community laws).

Several scholars recognise the relevance of local mechanisms in norm internalisation, but not in the context of phenomenon such as community laws. Zwingel appreciates that 'the label of norm internalisation' fails to expose diverse processes that unfold domestically after the state's treaty ratification. [31] However, she does not allude to harmful practices or local processes such as community laws. Rajam and Zararia acknowledge that textbook rights must translate into lived rights in local communities,[32] and that villagers may consciously or unconsciously translate global human rights discourses to local contexts.[33] However, the authors were not studying community laws or harmful practices or other micro-processes. Zwart argues that local institutions are essential to the full implementation of international human rights[34] without an examination of the mechanisms of local 'laws' or even the institution of chiefs. Even

28 Eg, CEDAW General Recommendation 33: Women's access to justice (23 July 2015) UN Doc CEDAW/C/GC/33 paras 61-64.

29 SH Cleveland 'Norm internalisation and US economic sanctions' (2001) 26 *Yale Journal of International Law* 6 in AD Kent 'Custody, maintenance and succession: The internalisation of women's and children's rights under customary law in Africa' (2006-2007) 28 *Michigan Journal of International Law* 510.

30 SS Englund 'Transnational norm diffusion and norm localisation: A case study of gender equality in the Republic of Chile and Bolivarian Republic of Venezuela' MS thesis, Leiden University, 2013 9 (on file with author).

31 S Zwingel 'How do norms travel? Theorising international women's rights in transnational perspective' (2012) 56 *International Studies Quarterly* 118.

32 N Rajaram & V Zararia 'Translating women's human rights in a globalising world: The spiral process in reducing gender injustice in Baroda, India' (2009) 9 *Global Networks* 465.

33 Rajaram & Zararia (n 32) 469.

34 T Zwart 'Using local culture to further the implementation of international human rights: The receptor approach' (2012) 34 *Human Rights Quarterly* 547.

Merry's norm internalisation concept of vernacularisation,[35] which engages how international human rights ideas and practices seep deeper into and are made resonant with lived realities of small(er) communities,[36] has not engaged the community laws phenomenon.

With these theoretical gaps in mind, the next part examines how international human rights jurisprudence approaches community law and informal systems.

4 Legal sources of the norms protecting women from harmful practices

Norms protecting women and girls from harmful practices are codified within both UN and AU human rights systems. At UN level, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[37] and the Convention on the Rights of the Child (CRC),[38] which advance women's and children's rights respectively, legally establish the norm that women and girls should be free and protected from harmful practices. CEDAW's approach to harmful practices is inspired by the Convention's key principles: non-discrimination against women and gender equality. Zwingel further observes that 'state responsibility' is the third key principle of CEDAW.[39]

Despite some critiques that CEDAW portrays culture negatively,[40] CEDAW has undeniably given traction to the concept of harmful practices.[41] In striving to eliminate harmful practices, article 2(f) of CEDAW obliges states 'to pursue a policy of eliminating discrimination against women by undertaking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women'. Article 5(a) commits state parties 'to take all appropriate measures to modify the social and cultural patterns of conduct of men and women so as

35 SE Merry *Human rights and gender violence: Translating international law into local justice* (2006) 135.
36 SE Merry & P Levitt 'The vernacularisation of women's human rights' in S Hopgood et al (eds) *Human rights futures* (2017) 213-236.
37 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) UN Doc A/RES/34/180.
38 Convention on the Rights of the Child (CRC) UN Doc E/CN.4/RES/1990/74.
39 S Zwingel 'Women's rights norms as content-in-motion and incomplete practice' (2017) 2 *Third World Thematics: A TWQ Journal* 678.
40 SE Merry 'Human rights law and the demonisation of culture (and anthropology along the way)' (2003) 26 *Political and Legal Anthropology Review* 71; JE Bond 'CEDAW in sub-Saharan Africa: Lessons in implementation' (2014) *Michigan State Law Review* 260.
41 C Longman & T Bradley *Interrogating the concept of 'harmful cultural practices'* (2016) 12.

to eliminate prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. Cusack and Pusey rightly note that these two provisions are buttressed by the principle of transformative equality, desiring state parties to intervene and eliminate obstinate gender stereotypes.[42]

For its part, CRC is underpinned by four principles: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for a child's views.[43] These principles 'frame children's protection from violence and harmful practices'.[44] Article 19 of CRC proscribes all forms of violence against children, while article 24(3) requires state parties to abolish traditional practices prejudicial to children's health. The prohibition of harmful practices is also implicit in several CRC provisions.[45]

The AU human rights system has also established the elimination of harmful practices as a legal normative standard.[46] While the African Charter on Human and Peoples' Rights[47] (African Charter), does not openly proscribe harmful practices, several protocols to the Charter address harmful practices and child marriage more rigorously. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[48] is lauded for taking a 'more nuanced approach to culture and tradition' when compared with CEDAW and the African Charter.[49] According to Banda, the Women's Protocol unequivocally rejects harmful practices by expansively defining what amounts to harmful practices.[50] Thus,

42 S Cusack & L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 63.

43 UNICEF Armenia, https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child (accessed 15 March 2022). These principles draw much from arts 2, 3, 6 & 12 of CRC.

44 Plan International 'In-depth review of legal and regulatory frameworks on child marriages in Malawi' (2016) 7.

45 Art 2: non-discrimination; art 3: primacy of the child's best interests; art 6: child's right to life, survival and development; art 12: right to participation; art 17: right to access information and materials; art 19: prohibition of violence against children; art 28: right of the child to education; art 31: child's right to rest, leisure and recreation; art 34: protection against sexual exploitation and sexual abuse; art 35: protection from abduction, sale of or trafficking; art 39: support for child victims of all forms of neglect, exploitation or abuse.

46 While the revised SADC Protocol on Gender and Development, adopted on 23 June 2016, also addresses harmful practices and child marriage under arts 2(2), 8(2)(a), 11(c), 20(1)(b) & 27(2), this article is attentive to the more globally comparable continental human rights system.

47 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

48 African Women's Protocol (n 2).

49 Bond (n 40) 261.

50 F Banda 'Blazing the trail: The African protocol on women's rights comes in force' (2006) 50 *Journal of African Law* 80. See art 1(g) of the African Women's Protocol for a definition of harmful practices.

the Protocol owns women's rights violations through harmful practices as African problems, and discredites views that such issues are driven by Western agendas.[51]

Besides article 5, which decrees legislative and other measures that states should take to eliminate harmful practices,[52] several provisions of the African Women's Protocol mandate states to address harmful practices. Article 2(2) of the Protocol has developed articles 2(f) and 5(a) of CEDAW[53] by committing states to eliminate harmful tradition practices through public outreach strategies.[54] Article 4(d) obliges states to use educational measures in eradicating traditional and cultural beliefs, practices and stereotypes that stimulate violence against women. However, article 6(c) of the Women's Protocol is soft on polygamy, since it only 'encourages monogamy as the preferred form of marriage'. Commenting on Article 17, Bond contends that the Women's Protocol has higher potential[55] to facilitate the local internalisation of human rights norms since it guarantees women the right to enjoy positive culture and to be key actors in the formulation of cultural policies.[56] Furthermore, this right guarantees that women can dialogue with traditional leaders to ensure that women's rights and positive cultural practices are localised.[57]

The African Charter on the Rights and Welfare of the Child (African Children's Charter)[58] similarly disapproves harmful practices. Article 1(3) discourages customs, traditions, cultural or religious practices that are inconsistent with the provisions of the Charter. Notably, 'discourage' is rather cautious language.[59] However, article

51 RS Mukasa 'The African Women's Protocol: Harnessing a potential force for positive change' (2008) *Jacana Media 7* in Bond (n 15) 519.

52 Under art 5 of the Women's Protocol, state parties 'shall take all necessary legislative and other measures to eliminate such practices, including (a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; (b) prohibition, through legislative measures backed by sanctions, of all forms of FGM, scarification, medicalisation and para-medicalisation of FGM and all other practices in order to eradicate them; (c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting; (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance'.

53 Banda (n 50) 80.

54 Art 2(2) African Women's Protocol.

55 Than CEDAW or the African Charter.

56 Bond (n 15) 541.

57 Bond (n 15) 547.

58 AU Doc CAB/LEG/24.9/49 (1990).

59 Nevertheless, the fact that the African Children's Charter asserts superiority over any custom, tradition, cultural or religious practice that contradicts it has been marked as a strength of the Charter;DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2001) 10 *International Journal of Children's Rights* 158.

21(1) plainly requires states to pursue 'all appropriate measures to eliminate discriminatory social and cultural practices that harm the welfare, dignity, growth and health of the child'. For its part, the African Youth Charter[60] directs that young people's education should preserve and strengthen positive traditional values and cultures, and that life skills education curricula should address cultural practices harmful to young girls' health.[61] Implementation frameworks such as the AU Agenda 2063[62] and the African Agenda for Children 2040[63] buttress these commitments.

5 What does human rights jurisprudence require states to do to internalise norms protecting women and girls from harmful practices?

Various scholars assert that international norms as outlined above become fully institutionalised nationally as states integrate the norms into formal sources of national law, policy and practice, as the norms become accepted and enforced by law, and as the norms become local practice.[64] Already, this norm internalisation model centres on formal institutional changes,[65] and not informal community level changes, as the community laws. The ensuing narrative confirms that international human rights jurisprudence on harmful practices prioritises this 'institutionalisation' approach to norm internalisation, urging states to chiefly address harmful practices through legal and administrative exploits.

5.1 Norm internalisation through legal measures

The use of the formal domestic legal system and instruments in domesticating global human rights norms is preferred as 'more

60 African Youth Charter, 2 July 2006, entered into force on 8 August 2009.
61 Art 13(3)(d) African Youth Charter.
62 Aspiration 6, Goal 1 AU Agenda 2063.
63 Aspiration 8 African Agenda for Children 2040.
64 A Acharya 'How ideas spread: Whose norms matter? Norm localisation and institutional change in Asian regionalism' (2004) 58 *International Organisation* 241; M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 895; SH Cleveland 'Norm internalisation and US economic sanctions' (2001) 26 *Yale Journal of International Law* 6, cited in AD Kent 'Custody, maintenance and succession: The internalisation of women's and children's rights under customary law in Africa' (2006-2007) 28 *Michigan Journal of International Law* 510; SS Englund 'Transnational norm diffusion and norm localisation: A case study of gender equality in the Republic of Chile and the Bolivarian Republic of Venezuela' MS thesis, Leiden University, 2013 9 (on file with author); T Flockhart (ed) *Socialising democratic norms: The role of international organisations for the construction of Europe* (2005) 50.
65 S Alldén 'How do international norms travel? Women's political rights in Cambodia and Timor-Leste' PhD thesis, Umeå University, 2009 90 (on file with author).

proficient and programmatic'.[66] Out of the analysed jurisprudence, only CEDAW General Recommendation 14 on female circumcision and other harmful practices (before being updated) did not explicitly demand legal measures for addressing female genital mutilation (FGM) and other harmful practices.[67] Jurisprudence on legal measures calls for (a) the enactment and review of legislation; and (b) the criminalisation and enforcement of criminal sanctions.

5.1.1 Enactment and review of legislation

Despite recent position shifts, both UN and AU jurisprudence mostly urges states to purge harmful practices through formal laws. CEDAW General Recommendation 12 on Violence against Women starts by inviting states to report on legislation enacted to protect women from all kinds of violence.[68] CEDAW General Recommendation 24 on women and health agitates for laws prohibiting FGM and child marriage.[69]

CEDAW General Recommendation 35, which updates General Recommendation 19,[70] regrets that states breach their due diligence obligation to address gender-based violence against women through inadequate or deficient implementation of legislation.[71] It recommends the prioritisation of functioning laws, institutions, and systems to address violence against women.[72] The CEDAW Committee's macro-delineation of arrangements that states should make in implementing General Recommendation 35 at legislative, executive and judicial levels exposes overt attentiveness to formal legal measures.[73]

66 AM Banks 'CEDAW, compliance, and custom: Human rights enforcement in sub-Saharan Africa' (2009) 32 *Fordham International Law Journal* 783; Z Orr 'The adaptation of human rights norms in local settings: Intersections of local and bureaucratic knowledge in an Israeli NGO' (2012) 11 *Journal of Human Rights* 243.

67 This general recommendation was updated by the joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18.

68 CEDAW General Recommendation 12: Violence against women UN Doc A/44/38 (1989) para 1.

69 CEDAW General Recommendation 24: Article 12 of the Convention (Women and health) UN Doc A/54/38/Rev.1, ch I (1999) para 15(d).

70 CEDAW General Recommendation 19: Violence against women UN Doc A/47/38 (1992).

71 CEDAW General Recommendation 35: Gender-based violence against women, updating General Recommendation 19 (26 July 2017), UN Doc CEDAW/C/GC/35 para 7.

72 General Recommendation 35 (n 71) para 25.

73 Under General Recommendation 35, the CEDAW Committee has interest to see that (a) legislation prohibiting all forms of gender-based violence against women is adopted and that all national laws are harmonised with CEDAW. This includes repealing, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine,

CEDAW General Recommendation 33 on women's access to justice also trumpets state-level mechanisms as the arsenal for resolving women's justice-related challenges. It recommends measures that states should implement in six areas considered pertinent to guaranteeing women access to justice. These measures are mostly judicial or quasi-judicial, and within the formal justice machinery.[74] Although the CEDAW Committee positively recognises alternative dispute resolution (ADR) processes[75] and plural justice systems,[76] its pitch that 'VAW cases should never undergo ADR processes'[77] divulges discomfort with these systems.[78]

The joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC on harmful practices (2014) declares that states should prioritise developing, enacting, implementing and monitoring relevant legislation as 'a key element of any holistic strategy to address harmful practices'.[79] Legislation aimed at eliminating harmful practices must include befitting measures for budgeting, implementing, monitoring and effective enforcement,[80] and provide victims of harmful practices with redress.[81] Moreover, the joint General Recommendation/General Comment provides guidance on legislative considerations that states should make in order to effectively address harmful practices.[82] CEDAW General Recommendation 36 on the right of girls and women to education supports measures that are prescribed by the joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC.[83] CRC General Comment 13 similarly urges states to pursue comprehensive legislative measures

encourage, facilitate, justify or tolerate any form of gender based violence. Also in particular, repealing provisions that allow, tolerate or condone forms of gender-based violence against women, including child or forced marriage and other harmful practices – paras 26(a) & 29(c); (b) public authorities are investigated and sanctioned for their inefficiency, complicity and negligence in dealing with complaints – para 26 (b); and (c) all legal procedures involving allegations of gender-based violence against women should meet international law standards – para 26(c).

74 The six areas are justiciability; availability; accessibility; good quality; provision of remedies for victims; and accountability of justice systems – CEDAW General Recommendation 33: Women's access to justice (23 July 2015) UN Doc CEDAW/C/GC/33 paras 15-19.

75 CEDAW General Recommendation 33 (n 74) paras 57 & 58.

76 CEDAW General Recommendation 33 (n 74) paras 61-64.

77 CEDAW General Recommendation 33 (n 74) para 58(c).

78 Part 5.4 below discusses these informal systems.

79 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 40.

80 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 12. Here, the joint General Recommendation/General Comment quotes what has been prescribed under CEDAW General Recommendation 28 (2010) UN Doc CEDAW/C/GC/28 para 38(a); and under CRC General Comment 13: The right of the child to freedom from all forms of violence (2011) UN Doc CRC/C/GC/13 para 40.

81 Joint CEDAW General Recommendation/CRC General Comment (n 67) 52.

82 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 55.

83 General Recommendation 36: The right of girls and women to education (2017) UN Doc CEDAW/C/GC/36 para 55.

(including budgetary, implementation and enforcement) against all forms of violence against children.[84] Furthermore, CRC General Comment 4 invites states to take all appropriate legislative measures and protect adolescents from all harmful practices.[85]

In the AU jurisprudence, the first call made by the joint General Comment of the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on ending child marriage (2017) is for states to 'enact, amend, repeal or supplement legislation' to prohibit the harmful practice of child marriage, and to set the minimum marriage age at 18 years. States are asked to make such legislation superior to customary, religious, traditional or sub-national laws.[86] Standards that should be observed in constitutional reforms related to child marriage are also articulated.[87] The emphasis on legislative reforms and the supremacy of legislation over other laws entails that formal legal structures are presumed to be the centres of human rights engineering, appropriation and internalisation, with the community/local structures being the recipients. Notably, some jurisprudence calls for criminal measures as well.

5.1.2 Criminalisation and enforcement of sanctions

Some jurisprudence recommends the criminalisation and imposition of penalties for harmful practices and violence against women. For example, CEDAW Recommendation 19 advises states to protect women from all kinds of violence through penal sanctions.[88] Even the updated CEDAW General Recommendation 35 on gender-based violence against women exhibits a punitive inclination, urging states to prosecute and punish gender-based violence against women through courts and tribunals.[89] Additionally, it urges that all judicial bodies are to strictly apply all penal provisions punishing gender-based violence against women.[90] States will become complicit in promoting gender-based violence against women when they fail to

84 CRC General Comment 13 (n 80) para 40.
85 CRC General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child (1 July 2003) UN Doc CRC/GC/2003/4 para 39(g).
86 Joint ACHPR/ACERWC General Comment on ending child marriage (2017) paras 18 & 19.
87 As above.
88 CEDAW General Recommendation 19: Violence against women UN Doc A/47/38 para 24(t)(i) –updated by General Recommendation 35.
89 CEDAW/C/GC/35 para 32(b).
90 CEDAW/C/GC/35 (n 89) para 26(c).

investigate, prosecute, and punish perpetrators and to compensate victims.[91]

UN and AU jurisprudence has slightly different positions on punishment targets. The joint CEDAW General Recommendation/CRC General Comment expects states to consistently enforce criminal sanctions, while being mindful of 'potential threats to and negative impact on victims, including acts of retaliation'.[92] Thus, no perpetrator is exempted from punishment. The joint African Commission/African Children's Committee General Comment asserts that states should not penalise/sanction children involved in child marriages. However, where they do, 'states must carefully avoid any risk of retaliation against a child'.[93] Unlike the joint CEDAW General Recommendation/CRC General Comment, which nets all perpetrators, the joint African Commission/African Children's Committee General Comment is hesitant about the sanctioning of parents 'to avoid clandestine child marriages'.[94] Instead, it targets punishment towards those registering child marriages without conducting checks, those officiating child marriages, and 'any person who actively encourages and facilitates a child marriage'.[95] However, it is inconceivable how parents could be divorced from the latter category, or how children could be consistently protected if reprobate parents face no consequences.

Generally, applying punitive measures to harm affecting women, as well as the deterrent effect of such measures, is a controversial issue. For example, there is concern that 'an abolitionist approach, backed by punitive measures like imprisonment and fines hardly works well for complicated challenges such child marriage and FGM, as penalties mostly lead to camouflaging the practices and driving them underground'.[96] Even rape discourse demonstrates that some early feminists were hesitant to support harsh penalties for rapists, arguing that such penalties would result in fewer convictions (and, therefore, less deterrence) unlike light punishments.[97]

These conversations attest that in dealing with harmful practices, a 'one-size-fits-all' punitive approach that is encouraged by international jurisprudence, and that has been massaged into

91 CEDAW/C/GC/35 (n 89) para 25.
92 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 51.
93 Joint ACHPR/ACERWC General Comment (n 86) para 19.
94 As above.
95 Joint ACHPR/ACERWC General Comment (n 86) paras 18 & 19.
96 J Boyden, A Pankhurst & Y Tafere 'Child protection and harmful traditional practices: Female early marriage and genital modification in Ethiopia' (2012) (22) *Development in Practice* 517.
97 Discussed in M Davis 'Setting penalties: What does rape deserve' (1984) 3 *Law and Philosophy* 162.

legislative approaches, may not always work. The next part illustrates that the jurisprudence also heralds formal administrative measures as important in tackling harmful practices.

5.2 Norm internalisation through administrative measures

Human rights jurisprudence recommends administrative measures that states ought to implement to address harmful practices in several categories: policy and other institutional frameworks; services for victims; budgetary resources; and capacity building/awareness raising.

5.2.1 Policies and other institutional frameworks

The jurisprudence bids states to undertake policy and other institutional measures at national and sector levels. CEDAW General Recommendation 4 on female circumcision charges states to review their national health policies,[98] while CEDAW General Recommendation 24 requires states to protect women's health by formulating policies, health care protocols and hospital procedures to address violence against women. [99] CEDAW General Recommendation 28 prompts states to design women-tailored public policies for the equal development of women and men.[100] CRC General Comment 13 further expects administrative measures to involve policy establishment.[101] CRC General Comment 4 stresses that states should regularly review and revise policies and strategies, and take all appropriate administrative and other measures to protect adolescents from all harmful practices.[102]

While each country has to determine appropriate measures for its comprehensive strategies or action plans for dealing with harmful practices, the joint CEDAW General Recommendation/CRC General Comment elucidates that such measures should target 'specific obstacles, barriers and resistance to the elimination of discrimination that fuel harmful practices and VAW'.[103] Similarly, Ibhawol has observed that cultural barriers to human rights should be identified, not for purposes of rejecting cultural traditions wholesale, but in

98 Updated by the joint CEDAW General Recommendation/CRC General Comment (n 67).
99 CEDAW General Recommendation 24: Article 12 of the Convention (Women and health) (1999) UN Doc A/54/38/Rev.1 para 15(a).
100 CEDAW General Recommendation 28: The core obligations of state parties under Article 2 of the CEDAW (2010) UN Doc CEDAW/C/GC/28 para 9.
101 CRC General Comment 13 (n 80) para 42.
102 CRC General Comment 4 (n 85) paras 2 & 39(g).
103 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 30.

order to understand their social bases so that apt human rights-based transformative solutions can be found.[104]

The intervention models that the jurisprudence recommends for states to adopt in their national strategies or action plans on harmful practices reveal a preference for programmes targeting the state machinery or those that are state-led, as opposed to community-(led) programmes. For example, CRC General Comment 13 advises states to introduce elaborate programmes, and monitoring and oversight systems to address all forms of violence against children within national and sub-national governments,[105] and within governmental, professional and civil society institutions.[106] The joint African Commission/African Children's Committee General Comment promotes the establishment and improvement of official births and marriages registration systems.[107]

The joint General Recommendation/General Comment recommends that a special 'high level entity should facilitate the vertical coordination of local, regional, and national level actors with traditional and religious leaders'.[108] This suggests the intent that a national level structure should be in control. Even the joint African Commission/African Children's Committee General Comment expects 'competent judicial, administrative and legislative authority,

104 B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 856.

105 By establishing a government focal point to coordinate child protection strategies and services; defining the roles, responsibilities and relationships between stakeholders on inter-agency steering committees with a view to their effectively managing, monitoring and holding accountable the implementing bodies at national and subnational levels; ensuring that the process of decentralising services safeguards their quality, accountability and equitable distribution; implementing systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention; providing independent national human rights institutions with support and promoting the establishment of specific child rights mandates such as child rights ombudsmen where these do not yet exist;accountability and equitable distribution; implementing systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention; providing independent national human rights institutions with support and promoting the establishment of specific child rights mandates such as child rights ombudsmen where these do not yet exist.</Note><DisplayText>Paragraph 42(a CRC General Comment 13 (n 80) para 42(a).

106 This includes adopting intra- and inter-agency child protection policies; professional ethics codes, protocols, memoranda of understanding and standards of care for all childcare services and settings (including daycare centres, schools, hospitals, sport clubs and residential institutions etc); and involving academic teaching and training institutions with regard to child protection initiatives; promoting good research programmes; CRC General Comment 13 (n 80) para 42(b).

107 Joint ACHPR/ACERWC General Comment (n 86) paras 26 & 28.

108 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 33.

or any competent authority provided by law' to provide institutional remedies related to access to justice.[109]

The jurisprudence also primarily situates the establishment of administrative monitoring mechanisms for harmful practices and all forms of violence against women and violence against children at state level. CEDAW General Recommendation 33 recommends states to take measures that strengthen the accountability of formal justice systems.[110] Similarly, the recommended 'independent monitoring mechanism' to track how women and girls are being protected from harmful practices under the joint General Recommendation/General Comment's holistic strategy[111] is likely to function at national level as well. CRC General Comment 13 promotes the national statistical system as an important tool in eliminating all forms of violence against children,[112] and 'strongly recommends' formal mechanisms for reporting violence against children that are entwined with the state's justice machinery.[113]

5.2.2 Services for victims

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence stresses that the state should ensure that victims of harmful practices access effective remedies and adequate protection. The joint CEDAW General Recommendation/CRC General Comment enjoins states to provide prevention, protection, recovery, reintegration, and redress measures to victims.[114] Particularly, victims

109 Joint ACHPR/ACERWC General Comment (n 86) para 41.
110 This includes (a) monitoring to guarantee that justice systems function in harmony with the principles of justiciability, availability, accessibility, good quality and the provision of remedies; (b) monitoring the actions of justice system professionals; CEDAW General Recommendation 33 (n 74) para 14(f).
111 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 34.
112 It urges the establishment of a comprehensive and reliable national data collection system in order for states to have systematic monitoring and evaluation of systems (impact analyses), services, programmes and outcomes based on indicators aligned with universal standards, and adjusted for and guided by locally established goals and objectives; CRC General Comment 13 (n 80) para 42(a)(v).
113 These recommended reporting mechanisms include the use of 24-hour toll-free hotlines and other information, communication and technologies (ICTs). Appropriate reporting mechanisms will be established by (a) providing appropriate information to facilitate the making of complaints; (b) participation in investigations and court proceedings; (c) developing protocols that are appropriate for different circumstances and made widely known to children and the general public; (d) establishing related support services for children and families; and (e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems; CRC General Comment 13 (n 80) para 42.
114 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 13.

should access legal remedies, victim support and rehabilitation services and socio-economic opportunities.[115]

According to CEDAW Concluding Observations on Malawi's state party report (2015), making justice accessible to women is part of the state's duty to investigate, prosecute and adequately punish perpetrators of all harmful practices.[116] CEDAW General Recommendation 33 stipulates that justice accessibility necessitates establishing justice access centres, such as one-stop centres,[117] and the 'creation, maintenance and development of courts, tribunals and other entities'.[118] Legal remedies should include rehabilitation.[119] The joint CEDAW General Recommendation/CRC General Comment regards medical, psychological and legal services as urgent support services for harmful practice victims.[120] Even for women in rural and remote areas, the CEDAW Committee still promotes formal systems – mobile courts.[121] Markedly, the Committee's imagination regarding making justice systems accessible to women concentrates on judicial and quasi-judicial systems and technologies.[122]

The joint African Commission/African Children's Committee General Comment proposes legal, health and education services for victims as well as those at risk of child marriage. Legally, it recommends that states should establish women's and children's police units.[123] Health services should include providing age-appropriate comprehensive sexual and reproductive health school curricula;[124] and comprehensive sexual and reproductive health services to girls, including married girls.[125] Educational services should include the provision of sanitary facilities for girls and bursary programmes targeting girls at risk.[126]

115 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 52.
116 Concluding Observations on the 7th Seventh Periodic Report of Malawi, CEDAW Committee 24 November 2015 UN Doc CEDAW/C/MWI/CO/7 (2015) para 21.
117 These should be devoted to the provision of legal advice and aid, commencing legal proceedings and coordinating necessary support services for women, including poor and rural women; CEDAW General Recommendation 33 (n 74) para 17(f).
118 CEDAW General Recommendation 33 (n 74) para 16(a).
119 Particularly medical and psychological care and other social services; CEDAW General Recommendation 33 (n 74) para 17(f).
120 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 82.
121 CEDAW General Recommendation 33 (n 74) para 16(a).
122 Eg, the removal of economic barriers to justice (filing fees and other court costs) and linguistic barriers in judicial and quasi-judicial processes (para 17(a)); videoconferencing of court hearings (para 17(d)); and ensuring a conducive physical environment for judicial and quasi-judicial processes (para17(e)); CEDAW General Recommendation 33 (n 74).
123 Joint ACHPR/ACERWC General Comment (n 86) para 40.
124 Joint ACHPR/ACERWC General Comment (n 86) para 36.
125 Joint ACHPR/ACERWC General Comment (n 86) paras 34 & 37.
126 Joint ACHPR/ACERWC General Comment (n 86) para 32.

The joint African Commission/African Children's Committee General Comment recommends that states should provide support for boys and girls who are already in marriage. Such support includes comprehensive social protection and health services, education assistance, legal assistance, and parenting support.[127] In this way the joint General Comment seeks to reduce the harsh impacts of child marriage on and further victimisation of those who married as children.[128] The already married category is not clearly covered in the support meant for 'children and women who are, or are at high risk of becoming victims of harmful practices'[129] under the joint CEDAW General Recommendation/CRC General Comment.

The various services require money, and the jurisprudence regards budgets as essential in internalising norms protecting women from harmful practices.

5.2.3 Budget and resource allocation

Under the jurisprudence, successfully addressing harmful practices cannot be achieved without central and local government budgets. The joint CEDAW General Recommendation/CRC General Comment and CRC General Comment 13 uphold the budget as one key strategy for implementing legislation to address harmful practices and violence against children respectively.[130] CEDAW General Recommendation 35 expects the executive to coordinate with relevant state agencies and commit adequate budgetary resources for the implementation of specific institutional measures.[131] The joint African Commission/ African Children's Committee General Comment anticipates that states would meet their obligations under the General Comment by 'allocating sufficient budgetary and other resources' towards ending child marriage.[132]

127 Joint ACHPR/ACERWC General Comment (n 86) para 42.
128 Joint ACHPR/ACERWC General Comment (n 86) para 25.
129 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 87(a).
130 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 12; CRC General Comment 13 (n 80) paras 40 & 41, CRC/C/GC/13. The latter urges laxing state parties to provide adequate budget allocations for the implementation of legislation and all other measures adopted to end VAC (para 41(e)).
131 That is, design of focused public policies, development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals; Joint ACHPR/ACERWC General Comment (n 86) para 26(b).
132 Joint ACHPR/ACERWC General Comment (n 86) para 45. Generally, para 17 of this joint General Comment explains that the normative framework of the joint ACERWC/ACHPR General Comment is also guided by art 26 of the African Women's Protocol, which urges state parties to adopt measures and provide budgetary and other resources towards the full and effective implementation of the Protocol.

Thus, the availability of budgets and resource allocation towards the implementation of institutional laws, policies and programmes targeting the elimination of harmful practices is an important indicator of whether states have internalised the norm protecting women from harmful practices. Relatedly, budgets are also vital for capacity-building interventions related to harmful practices.

5.3 Norm internalisation through capacity building and awareness raising

5.3.1 Nature of capacity-building and awareness-raising interventions

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence on harmful practices is unrelenting about the need to immerse wide categories of people in the human rights discourse if socio-cultural transformation leading to the abandonment of harmful practices is to materialise. This should be achieved through top-down 'capacity building', 'trainings', 'awareness raising' – and often the difference between these terminologies is vague.[133]

'A comprehensive, holistic and effective approach to capacity building' should focus on attitudinal and behavioural transformations towards harmful practices among targeted groups and the wider community.[134] The jurisprudence recommends capacity-building measures for purposes of empowering various cadres of duty bearers to know human rights norms and apply them to their services domains. UN jurisprudence shows that for the activities branded as 'capacity building/training', the CEDAW Committee has at times been engrossed with professional groups. For example, CEDAW General Recommendation 24 on women and health requires states to train health workers to spot and manage the health impacts of gender-based violence.[135] In the justice sector, CEDAW General Recommendation 33 instructs states to arrange 'capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials'.[136]

133 Kachika (n 1) 130.
134 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 70.
135 CEDAW General Recommendation 24 (n 69) para 15(b).
136 CRC General Comment 13 (n 80) para 29(f) provides that the training should be about the application of international legal instruments relating to human rights, including the convention and the jurisprudence of the Committee; and of legislation prohibiting discrimination against women.

However, the joint CEDAW General Recommendation/CRC General Comment accommodates both formal and informal structures in the 'comprehensive, holistic and effective approach to capacity building' that states should implement at all levels to eliminate harmful practices.[137] It observes that a key preventative measure is to develop the capacity of all relevant professionals who are in regular contact with victims, potential victims and perpetrators of harmful practices.[138] Police, public prosecutors, judges and other law enforcement officials should be trained to implement legislation criminalising harmful practices, equipping them with knowledge and skills about women's and children's rights, as well as victim handling.[139] Additionally, the joint General Recommendation/General Comment prompts states to include those serving in ADR and traditional justice systems in human rights training programmes.[140]

CRC General Comment 13 also supports building the capacity of personnel in both formal and informal structures. It requires states to provide initial and in-service general and role-specific training to all professionals and non-professionals working with and for children, including traditional and religious leaders, so that they can protect children from all forms of physical or mental violence.[141] The CRC Committee prefers that educational measures towards addressing attitudes, traditions, customs and behavioural practices that condone and promote violence against children should be implemented under the state's responsibility.[142]

The joint African Commission/African Children's Committee General Comment recommends that training programmes should be implemented for prosecutors, court personnel, national human rights institutions, civil society organisations supporting child

137 Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 69-72: These include influential leaders (such as traditional and religious leaders), as many relevant professional groups as possible (including health, education and social workers, child care professionals, asylum and immigration authorities, the police, public prosecutors, other law enforcement officials, judges and politicians at all levels). They need to be provided with accurate information about the practice and applicable human rights norms and standards with a view to promoting a change in attitudes and behaviours of their group and the wider community.

138 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 56.

139 Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 70-72(c).

140 The training should be on human rights and the appropriate application of key human rights principles. Traditional and religious leaders and professional groups should receive with accurate information about harmful practices and applicable human rights norms and standards; Joint CEDAW General Recommendation/ CRC General Comment (n 67) para 69.

141 CRC General Comment 13 (n 80) para 44(d).

142 Such measures should encompass well-programmed training/education undertakings targeted at a wide range of government and civil society professionals and institutions; CRC General Comment 13 (n 80) para 44.

marriage victims, and statutory bodies.[143] Additionally, states should 'conduct trainings and capacity building workshops for marriage and birth registration officials, teachers, health providers, judicial officers, and religious, community and traditional leaders', to enlighten them of laws proscribing child marriage and the rights of children to be protected from child marriage.[144]

When it comes to interventions coined 'awareness raising,' CEDAW General Recommendation 35 proposes that these programmes should target women and men at all societal levels; education, health, social services and law enforcement personnel and other professionals and agencies involved in prevention and protection responses; traditional and religious leaders; and perpetrators of any form of gender-based violence.[145] The joint CEDAW General Recommendation/CRC General Comment stipulates that traditional and religious leaders should be given accurate information about applicable human rights norms in order to renew their thinking.[146]

Furthermore, the joint CEDAW General Recommendation/CRC General Comment advises states to raise awareness of the causes and consequences of harmful practices through dialogue with relevant stakeholders.[147] Awareness-raising programmes targeting state structures should engage decision makers, relevant programmatic staff and key professionals working within local and national government agencies.[148] Personnel within national human rights institutions should also be awakened to the human rights implications of harmful practices so that they can focus on eliminating such practices.[149]

The above demonstrates that international human rights jurisprudence on harmful practices considers human rights education and awareness raising, including of traditional leaders, as a key step in creating an enabling environment for transforming traditional practices harmful to women and children.[150] This begs the question whether community systems are expected at all to be responsible

143 Joint ACHPR/ACERWC General Comment (n 86) para 40.
144 Joint ACHPR/ACERWC General Comment (n 86) para 43.
145 CEDAW General Recommendation 35 (n 71) para 30(b)(ii).
146 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 69.
147 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 56.
148 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 80(b).
149 As above.
150 CEDAW General Recommendation 19 (n 70) para 24(t)(ii); CRC General Comment 4 (n 85) para 20; CRC General Comment 13 (n 80) para 44; Banks (n 66) 834.

for designing and facilitating education and awareness-raising interventions.

5.3.2 Conceptualisers of education and awareness-raising interventions: Positioning of the state, civil society organisations and traditional leaders

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence on harmful practices recommends that states should design and implement awareness raising and education and capacity-building programmes. The jurisprudence is partially noncommittal about the need for the state to partner with civil society organisations and other local allies (norm translators/ vernacularisers) in developing relevant programmes. For example, CRC General Comment 4 places on state parties the onus of developing and implementing awareness-raising campaigns and education programmes to overcome harmful traditional practices.[151] The joint African Commission/African Children's Committee General Comment asserts that enforcement and awareness will occur only if states train all relevant stakeholders, especially government officials, police and the judiciary to protect girls and boys from child marriage and its effects.[152]

Part of the jurisprudence explicitly mandates states to design awareness-raising campaigns and education programmes together with civil society organisations. For example, CEDAW General Recommendation 35 requires states to develop and implement effective awareness and education measures[153] with the active participation of women's organisations and marginalised groups of women and girls.[154] Similarly, the 'ethnicity and minority sensitive' targeted outreach activities under CEDAW General Recommendation 33 are to be designed in close cooperation with women's and other relevant organisations.[155] Additionally, states are to cooperate with non-state actors in capacity-building and training programmes for justice system personnel.[156] Also, CRC General Comment No

151 CRC General Comment 4 (n 99) para 20.
152 Joint ACHPR/ACERWC General Comment (n 86) para 63.
153 To address and eradicate the stereotypes, prejudices, customs and practices that condone or promote gender-based VAW and underpin the structural inequality of women with men. prejudices, customs and practices that condone or promote gender-based VAW and underpin the structural inequality of women with men. </DisplayText></Cite></EndNote>
154 CEDAW General Recommendation 35 (n 71) para 30(b)(ii).
155 CEDAW General Recommendation 33 (n 74) para 17 (c).
156 To ensure that religious, customary, indigenous and community justice systems harmonise their norms, procedures and practices with the human rights standards; CEDAW General Recommendation 33 (n 74) para 64(a).

13 stipulates that both state and civil society organisations should facilitate educational measures, although the state is given overall responsibility.[157]

Besides trusting state actors and civil society organisations, jurisprudence developed in 2014, 2016 and 2017 respectively has pushed the frontiers and embraced local or traditional leaders in the pipeline that designs programmes, and transports human rights norms to the ground. The joint CEDAW General Recommendation/ CRC General Comment promotes the engagement of all relevant stakeholders, including local leaders, practitioners, grassroots organisations and religious communities, in preparing and implementing public discussion activities for eliminating harmful practices.[158] Similarly, CEDAW General Recommendation 34 invites states to adopt outreach and support programmes, awareness raising and media campaigns to eliminate harmful practices and stereotypes in collaboration with traditional leaders and civil society organisations.[159]

The language of 'collaboration' is also found in the joint African Commission/African Children's Committee General Comment, which urges states 'to facilitate dialogue, and promote collaboration between all stakeholders and particularly traditional, community and religious leaders, in preventing child marriage' as one harmful practice.[160] However, unlike CEDAW General Recommendation 34 that only specifies collaboration with traditional leaders when the state is adopting awareness programmes, the nature of collaboration in the joint General Comment could be variedly interpreted. It could either mean that traditional, community and religious leaders should be involved in implementing child marriage preventative strategies or that they should in fact also participate in developing such strategies.[161]

However, whatever the case, the fact that the above jurisprudence is not integrating traditional leaders as mere targets of awareness and education certainly is a paradigm shift. It addresses Bank's concern that CEDAW jurisprudence fails to guide states to collaborate with providers of customary justice as meaning making institutions and

157 CRC General Comment 13 (n 80) para 44.
158 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 81(f).
159 CEDAW General Recommendation No 34: The Rights of Rural Women (2016) UN Doc CEDAW/C/GC/34 para 23.
160 Joint ACHPR/ACERWC General Comment (n 85) para 62.
161 Kachika (n 1) 137.

actors.[162] By conscripting traditional leaders in both the formulation and facilitation of awareness programmes against harmful practices, traditional leaders are effectively being endorsed as having a role in diffusing human rights norms to the local.

One would argue that it is not surprising that traditional leaders have weight in CEDAW General Recommendation 34, the joint CEDAW General Recommendation/CRC General Comment and the joint African Commission/African Children's Committee General Comment – which are primarily about rural dealings[163] – since this is the best opportunity to capitalise on the territorial influence of traditional leaders. Nevertheless, the development is a fresh twist given the circumspect attitude that the same jurisprudence holds towards plural justice mechanisms, as the next part demonstrates.

Still, one should be mindful that the positive shifts notwithstanding, the foregoing illustrates that the extent to which traditional leaders are entrusted with the responsibility to facilitate norm internalisation pales compared to the high demand in the jurisprudence that they should be targets of awareness-raising and capacity-building programmes. Clearly, the very responsibility of traditional leaders to culturally sanitise 'the other' comes with the duty to first subject 'the self' to the internalisation dosage.[164]

5.4 Position of plural and community law in the jurisprudence

Jurisprudence regarding alternative dispute resolution (ADR) and plural legal systems is relevant because the community laws could fall under either. CEDAW General Recommendation 33 describes ADR processes as mandatory or optional systems that many jurisdictions have adopted for mediation, conciliation, arbitration and collaborative resolutions of disputes. ADR is mainly applied in issues of family law, domestic violence, among others.[165] Informal ADR processes include 'non-formal indigenous courts and chieftaincy-based ADR, where chiefs and other community leaders resolve interpersonal disputes'.[166] The community laws on harmful practices could operate as the 'chieftaincy-based ADR' mechanism since they are informally

162 Banks (n 66) 784.
163 CEDAW General Recommendation 34 is about the rights of rural women; the joint CEDAW General Recommendation/CRC General Comments is exclusively about harmful practices; and the joint ACHPR/ACERW General Comment is exclusively on ending child marriage, a notorious harmful practice.
164 Kachika (n 1) 139.
165 CEDAW General Recommendation 33 (n 74) para 57.
166 As above.

used to resolve locally-contexualised challenges affecting women and girls.

Relatedly, CEDAW General Recommendation 33 defines plural legal systems as 'religious, customary, and indigenous or community laws and practices that sometimes legally coexist with state laws, regulations, procedures and decisions'.[167] By individually mentioning customary law and community law, the CEDAW Committee contradicts Onyango's assertion that customary law is community law.[168] Therefore, the community laws in Malawi would fit under the jurisprudence's 'community law' label, especially as the jurisprudence considers it immaterial 'whether or not such laws have categorical legal basis'.[169]

Examined chronologically, the jurisprudence on harmful practices has been unstable in its endorsement of ADR and legal pluralism systems as potential mechanisms for addressing harmful practices. The joint CEDAW General Recommendation/CRC General Comment in 2014 concedes that ADR or traditional justice systems could sometimes be deployed to respond to harmful practices.[170] However, the joint General Recommendation/General Comment affirms that states' obligations under CEDAW and CRC[171] prohibiting harmful practices supersede customary, traditional or religious laws.[172] Thus, the joint General Recommendation/General Comment recommends the instant repeal of all legislation, traditional, customary or religious laws that condone, allow, or stimulate harmful practices.[173]

Then, while acknowledging the relevance of ADR and pluralist processes, CEDAW General Recommendation 33 of 2015 cautions that these flexible and cheaper processes may habour patriarchal values that embolden perpetrators, violate women's rights, and hinder women's access to justice.[174] Therefore, it utterly disapproves of subjecting any case of violence against women to ADR processes.[175] Like the joint General Recommendation/General Comment, General Recommendation 33 expects multiple sources of law, notwithstanding their legal viability,[176] within states to respect

167 CEDAW General Recommendation 33 (n 74) para 61.
168 P Onyango *African customary law: An introduction* (2013) 134.
169 CEDAW General Recommendation 33 (n 74) para 61.
170 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 71.
171 And other international human rights standards.
172 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 54(b).
173 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 54(c).
174 CEDAW General Recommendation 33 (n 74) paras 57 & 62.
175 CEDAW General Recommendation 33 (n 74) para 58(c).
176 From a formal law point of view.

and protect women's rights according to CEDAW and other human rights principles.[177] Thereafter, CEDAW General Recommendation 35 if 2017 reverts to the position accommodating ADR, only disputing the mandatory reference of violence cases to ADR procedures; and calling for ADR procedures to be strictly regulated.[178] It further urges plural legal systems to protect victims of gender-based violence against women and guarantee them access to justice and effective remedies.[179]

The fact that the jurisprudence between 2014 and 2017 exhibits fluctuating positions on whether violence against women, which includes harmful practices, should be subjected to ADR, including within traditional mechanisms, reveals that the jurisprudence on harmful practices itself is a living negotiation site.[180] Indeed, Krook and True have observed that norms evolve as their content is subjected to continuous scrutiny or affected by emerging developments.[181] Zwingel has also called norms 'never finished products and content-in-motion'. [182]

In recognising both the risk and the potential of plural justice systems to women's access to justice and women's rights generally, the jurisprudence draws attention to debates about living customary law, cultural relativism and universalism. CEDAW General Recommendation 33 expects states to reconcile existing plural justice systems with CEDAW by, among others, formally recognising and codifying religious, customary, indigenous, community and other systems.[183] However, the codification of customary law or equivalent is contested by living customary law scholars.[184] Furthermore, the pre-eminence of education and awareness-raising measures to promote norms protecting women from harmful practices in the jurisprudence betrays the commitment of the jurisprudence to universalism – the

177 CEDAW General Recommendation 33 (n 74) para 61.
178 CEDAW General Recommendation 35 (n 71) para 32(b).
179 CEDAW General Recommendation 35 (n 71) para 29(b).
180 As seen above, the jurisprudence went from a guarded acknowledgment of ADR as a possible avenue for such cases in 2014; to 'absolutely not' in 2015; and back to a cautious 'yes' in 2017.
181 ML Krook & J True 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality' (2012) 18 *European Relations* 117.
182 Zwingel (n 39) 676.
183 CEDAW General Recommendation 33 (n 74) para 62.
184 R Sieder & J-A McNeish *Gender justice and legal pluralities: Latin America and African perspectives* (2013) 13; TW Bennett *Human rights and African customary law* (1995) 23; R Ozoemena 'Living customary law: A truly transformative tool' (2013) 6 *Constitutional Court Review* 147.

notion that all societies must protect certain minimum standards of human dignity[185] – and not cultural relativism.

This bias towards universalism is underlined by the jurisprudence's rejection of any form of harmful practices and violence against women and violence against children, both in law and in practice. The rejection of cultural relativism is evident in the various instances when the jurisprudence denotes that culture and tradition directly incite harmful practices against women and girls.[186] This universalistic approach has been justified by concerns that 'the respect of cultural differences' may eventually translate into women's rights invasions.[187]

The implication of the jurisprudence's positivist approach to human rights is that CEDAW and CRC are not seen as 'legal codes amongst the several alternatives that exist in a plural legal field'.[188] Yet, it has been proven that in plural legal systems, the enthusiasm by a treaty-monitoring body to universalise could lead to the misunderstanding of local 'legal' arrangements that communities find functional.[189] This is a risk that orderings, such as the community laws on child marriage and harmful practices in rural Malawi, face, especially when they come across as potentially diluting statutory law and human rights standards. Indeed, the jurisprudence suggests that the internalisation of the norms protecting women from harmful practices either within ADR or other traditional processes would be incomplete if international human rights standards are shortchanged.

6 Conclusion

A key aspect of the international human rights law and jurisprudence on harmful practices are measures that states are expected to pursue to eliminate harmful practices. International law and jurisprudence suggest that internalisation of norms protecting women from harmful

185 SE Merry 'Constructing a global law: Violence against women and the human rights system' (2002) 28 *Law and Social Inquiry* 944.

186 CEDAW General Recommendation 35 (n 71) para 14; Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 5, 6 & 8; CRC General Comment 13 (n 80) para 12.

187 SM Okin 'Feminism, women's human rights and cultural differences' (1998) 13 *Hypatia* 36.

188 SE Merry 'Human rights and transnational culture: Regulating gender violence through global law' (2006) 44 *Osgoode Hall Law Journal* 74.

189 Merry (n 188) 59 & 72. Merry provides an example regarding how the CEDAW Committee, in deliberations of a Fiji state party report and ensuing Concluding Observations, instinctively rushed to demand the scraping of a useful and entrenched reconciliatory local mechanism called *bulubulu*. The Committee was reacting to a concern expressed by the state party delegation that *bulubulu* was sometimes being misused to handle rape cases. Instead of condemning this element of abuse, the Committee insisted that *bulubulu* be abolished which, according to the Fiji delegation, is a non-starter as it is a Fiji way of life.

practices should address three programmatic areas, predominantly at the formal or macro-level. There is a resounding call for states to prioritise legislative measures, administrative measures, and to adopt policy and other capacity building, training, awareness raising as a strategy for ensuring that different duty bearers are internalising international standards towards eliminating harmful practices.

Notably, community laws are not a legislative measure under the jurisprudence. Rather, CEDAW jurisprudence suggests that community laws fall under ADR and plural justice systems and recommends that plural justice systems should be harmonised with CEDAW through codification. Over the years, the jurisprudence seems unstable about whether to subject violence against women to ADR. This inconclusiveness confirms that international human rights norm negotiation is rolling business.

Newer jurisprudence that tasks the state to design and implement awareness raising and education or capacity-building programmes in collaboration with traditional leaders is a novelty, considering that the jurisprudence is generally nervous about plural justice mechanisms. Therefore, the emergence of community laws in contexts such as rural Malawi is challenging relevant UN and AU human rights treaty-monitoring bodies to critically examine the current stance that suggests that norm internalisation is mostly credible within state or formal institutions and systems. Yet, the community laws, which are also internalising the norm protecting women from harmful practices, are at the level of chiefs and their subjects and territories.

More remains to be understood about community laws on harmful practices themselves, for example, what domestic laws say about their domestication as well as about harmful practices in general; and how the community laws are actually internalising human rights norms on the ground, and how they contrast with customary law. All these are topics for further articles.[190]

190 These issues have also been holistically analysed in the author's PhD thesis; Kachika (n 1).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: BE Ecoma 'A post-mortem assessment of the #EndSARS protest and police brutality in Nigeria' (2023) 23
African Human Rights Law Journal 156-181
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a7

A post-mortem assessment of the #EndSARS protest and police brutality in Nigeria

*Bonnievolo E Ecoma**
Legal Practitioner, Asterley Attorneys, Abuja, Nigeria
https://orcid.org/0000-0001-8213-0316

Summary: *In October 2020 many Nigerians took to the streets to protest against the illicit and inhumane activities and brazen brutality of the Special Anti-Robbery Squad (SARS), a special unit of the Nigerian police force renowned for the most unethical, illegal, corrupt and dehumanising practices. With significant global reach and support, the protesters demanded, among others, the disbandment of the police unit and justice for all deceased victims of police brutality. These and other demands, which were all geared towards ending police brutality, were well received by the federal government, with promises of full compliance. A first step was the actual disbandment of SARS. With successive demands tilting towards a silent revolution, the protest was truncated by military repression, leaving many in doubt as to whether or not the government would fulfil its promises in respect of the demands. This article undertakes an assessment of the protest in its context in a bid to ascertain whether or not the post-protest period has witnessed an end to or reduction in the level of police brutality. It examines the culture of police brutality, precursors to the protest, the demands by protesters as well as the responses and promises by government, and appraises the extent to which such promises and proposed policy reforms by the federal government have translated into significant and sustainable changes in policing.*

* BSc (Hons) (Calabar) LLB (Hons) (Okada) BL (Abuja); ecomabonnie@gmail.com

Key words: *#EndSARS; Nigeria; police; brutality; protest*

1 Introduction

The year 2020 will always be remembered as a remarkable year in the annals of Nigerian history for many reasons. Apart from the infiltration of the corona virus into the country with its attendant impacts, the year witnessed an event, the magnitude and global impact of which arguably are unmatched in respect of similar events in the country's history. That event is the #EndSARS protest. First starting off as a subtle call to action, subsequently metamorphosing into a revolutionary behemoth, the protest shook Nigeria to its very foundations and left a profound message: Nigerian youths were more than ready to initiate and sustain positive and unusual change in the country. While it lasted, the protest garnered unprecedented support in and outside the country and rejuvenated traditional values such as unity, integration, communality and nationalism, which were either chequered or missing. The protest, which was organised and sustained by Nigerian youths, quickly morphed into a social movement that went beyond the primary demand for an end to police brutality in Nigeria, to demands for good governance. For over a century, the country had been ravaged by brutality from security forces that was constantly meted out to citizens, but the primary and, indeed, prominent culprit in the scheme of brutality in the post-independence period was the Special Anti-Robbery Squad (SARS), a unit of the Nigerian police force renowned for unprecedented police brutality and brazen violation of human rights.[1] For decades SARS operated with brutish reckless abandon and without regard for the rule of law or national, regional and international human rights guarantees. The unit meted out the worst forms of brutality to innocent and vulnerable Nigerians with unprecedented impunity. The immediate and complete disbandment of the dreaded SARS, therefore, was top on the list of demands by the #EndSARS protesters who were mostly victims of brutality. The demand was essentially aimed at uprooting the deeply-entrenched culture of brutality. With resilience, valour and a unified voice, the protesters presented their demands to the federal government, whose immediate response was the disbandment of SARS. Although the government pledged full compliance with other demands and indeed initiated subtle

1 BE Ecoma 'The subsidence of the criminal justice system and extrajudicial killings in Nigeria' (2020) 5 *Miyetti Quarterly Law Review* 78-79; T Ajayi 'Nigeria's #EndSARS struggle endures' 19 October 2022, https://www.thenewhumanitarian.org/opinion/first-person/2022/10/19/Nigeria-EndSARS-police-brutality (accessed 25 October 2022).

moves to make good its promise, the protesters did not back down. However, the protest was violently repressed in its prime before the subtle moves could translate into paradigm-changing and sustainable reforms. Against this background, this article evaluates the #EndSARS protest and the demands that were made, with a view to ascertaining whether or not the protest achieved its primary goal of putting an end to police brutality in Nigeria. As a prelude, the article clarifies the terms 'endSARS' and 'police brutality', and delves into an analysis of the culture of police brutality in Nigeria as well as the heinous acts perpetrated by SARS. It proceeds with a consideration of the #EndSARS protest, demands and responses by government, a performance evaluation of the demands, and an analysis of sundry issues. The central objective is to ascertain whether police brutality has ceased, waned or increased during the post-protest period.

2 Terms of discourse

In its traditional sense, the phrase 'EndSARS' is quite unequivocal in meaning at a literal glance. However, for clarity it may be defined or analysed in three ways, all of which communicate the same message: a demand for an end to police brutality in Nigeria. The phrase may thus be analysed as a call to action, as a hashtag, and as a protest or social movement.

As a call to action, the phrase reflects the height of discontent with the sinister practices of SARS, and thus represents a call for an end to the existence of the unit and all its heinous practices. It thus is a call for the attention of government, civil society organisations, the youths and the general public to the inhumane and barbaric practices and activities of SARS, which include harassment; corruption; extra-judicial killings; extortion; impunity; disrespect for human rights; torture; unlawful arrest and detention; and trumped-up charges.[2] It is a distress, yet bold call that has lasted for many years without requisite answers. It is a call for human rights-based law enforcement, respect for the rule of law, an end to the profiling of young Nigerians, and policing based on integrity, accountability, professionalism and service.

The #EndSARS hashtag was created by young Nigerians on Twitter in 2017 to serve as a medium for amplifying the call to action, and for transforming that verbal or written national call to a virtual and

2 A Uwazuruike '#EndSARS: The movement against police brutality in Nigeria' (2020) *Harvard Human Rights Journal* https://harvardhrj.com/2020/11/endsars-the-movement-against-police-brutality-in-nigeria/ (accessed 15 March 2021).

globally-publicised campaign. The hashtag thus served as a medium for creating awareness on police brutality in Nigeria, reporting incidents and experiences of police brutality, and rallying support for the disbandment of SARS, which had become a terror to vulnerable Nigerian youths.[3] Using the hashtag, many Nigerians relived their horrid experiences at the hands of SARS and other police officials, either while in custody or in public. While the hashtag generated a community of like-minded youths and thus provided some succour to victims of police brutality who knew others understood their plight and could offer some assistance where possible, it served as a constant reminder of the fact that the malfeasance of SARS was bad for Nigerian society and that something had to be urgently done to preserve the lives and properties of teeming Nigerian youths.

Regarding the third aspect, EndSARS is regarded as a decentralised social movement and a series of mass protests against police brutality in Nigeria.[4] The protest derived its name from the 2017 Twitter hashtag and was triggered by the extra-judicial killing of a young man by an officer of SARS in October 2020. The incident evoked mass demonstrations across major cities in Nigeria, solidarity protests overseas, and outrage on social media platforms.[5] The protest has been described as an incomplete, half-hearted or failed revolution[6] that expanded to include demands for good and accountable governance, and was notable for its patronage by a demographic that is made up entirely of young Nigerians.[7]

Police brutality is an extreme form of police misconduct, violence and civil rights violations, which consists in the deployment of excessive and unwarranted force against an individual or group in the form of physical or verbal harassment, physical or mental injury, damage to property, death, and so forth.[8] It also refers to the excessive use of force by a police officer against a victim or victims that is deemed to go beyond the level required to sustain

3 F Eleanya '#ENDSARS hits No 1 top trending hashtag globally' 9 October 2020, https://businessday.ng/amp/news/article/endsars-hits-no-1-top-trending-hashtag-globally/ (accessed 10 November 2020).
4 Uwazuruike (n 2).
5 As above.
6 D Anele 'The anatomy of EndSars protests as an incomplete revolution (1)' 1 November 2020, https://www.vanguardngr.com/2020/11/the-anatomy-of-endsars-protests-as-an-incomplete-revolution-1/amp/ (accessed 1 December 2021); Ajayi (n 1).
7 AC Levan & P Ukata 'How the #EndSARS protest movement reawakened Nigeria's youth' 26 November 2020, https://blog.oup.com/2020/11/how-the-endsars-protest-movement-reawakened-nigerias-youth/ (accessed 2 December 2021).
8 RB Hill 'Understanding five different types of police brutality' 2 March 2017, https://criminallaw.com/lawyer/rhonda-b-hill-chicago-il/blog/understanding-five-different-types-of-police-brutality (accessed 10 November 2021).

life, avoid injury or control a situation,[9] and equally refers to various human rights violations by the police which might include beatings, racial abuse, unlawful killings, torture, or the indiscriminate use of riot control agents at protests.[10] Police brutality causes significant physical and psychological harm to victims, entails considerable financial costs to communities, and undermines the legitimacy of the institution of policing.[11] Traditional perspectives locate the causes of police brutality primarily in the institution of policing, whereas conflict perspectives maintain that police brutality reflects racial/ethnic divisions of the larger society.[12]

Scholars categorise the underlying factors that lead or contribute to police brutality into two: individual-level factors and organisational-level factors. Individual-level factors are those that originate from the offending officer and include personal problems and mental health issues such as post-traumatic stress disorder (PTSD) from job-related stressors and trauma, and antisocial personality disorder (APD), all of which may result in the use of excessive force.[13] Organisational-level factors, on the other hand, include policies of the police department or the general working environment.[14] Cuncic explains that if a police department sets vague or lenient limits for the use of force that indirectly allow police officers to use their own discretion, the likelihood that officers will use excessive force increases. In addition,

> if the general working environment of the police department is such that excessive use of force is not punished or reprimanded, that sends the message to the police force that it is an acceptable part of their job description – thus, the use of force becomes legitimised because everyone does it and nobody says anything about it.[15]

3 Background to police brutality in Nigeria

Whether as an expression, a demand, hashtag or protest, the phrase 'EndSARS' bespeaks utmost discontent with the way and manner in which policing is carried out, and voices a call for an end to all forms of police brutality perpetrated by the SARS unit, in particular, and by

9 A Cuncic 'The psychology behind police brutality' 17 January 2021, https://www.verywellmind.com/the-psychology-behind-police-brutality-5077410 (accessed 7 January 2022).
10 Amnesty International 'Police violence' nd, www.amnesty.org/en/what-we-do/police-brutality/ (accessed 8 January 2022).
11 MD Holmes 'Police brutality' in AJ Trevino (ed) *The Cambridge handbook of social problems* (2018) 412.
12 As above.
13 Cuncic (n 9).
14 As above.
15 As above.

the Nigerian police force, in general. To further appreciate the history, hashtag and protests of EndSARS, an examination and understanding of the culture of brutality leading up to the establishment of SARS are necessary.

3.1 Culture of police brutality in Nigeria

Police brutality is not a nascent phenomenon in Nigeria. Its history and the call for its discontinuance are respectively traceable to the colonial and post-colonial eras of the police force. Brutality was adopted as the *modus operandi* of the colonial police force primarily because colonialism itself was an instrument of brutality, enforced through brutality. As Blakemore notes, the history of colonialism is one of brutal subjugation of indigenous peoples.[16] Ajomo and Okagbue note that the colonial police force was conceived as a force to serve the interests of the colonial master in its dealings with the citizen, and so the use of force to subjugate the citizen and ensure enforcement of colonial measures and policies was a major feature of the police system. Thus, 'from inception, the force was neither social service-oriented nor populist; it was not a force given by the people to themselves to serve and protect them'.[17] The CLEEN Foundation corroborates this view by noting that the colonial police was not accountable to the colonised but to the colonisers, and so their excesses were not checked, thus resulting in their behaviour as an 'army of occupation', killing, maiming and looting.[18]

The coercive and anti-populist orientation of the police endured throughout the independence and post-independence eras of the country and became part and parcel of the operational framework of the police or its default setting. This, together with the violence, brutality and wanton destruction perpetrated by the military during the various military regimes in Nigeria, left pungent traditions of brutality in the atmosphere of law enforcement and military operations that have been sustained by gross impunity, nepotism and corruption. Capturing the ignoble mode of operation of the police and the general distrust of the citizens for the police way back in 1990, a *Daily Champion* newspaper editorial stated the following:[19]

16 E Blakemore 'What is colonialism?' 19 February 2019, https://www.nationalgeographic.com/culture/article/colonialism?cmpid=int_org=ngp::int_mc=website::int_src=ngp::int_cmp=amp::int_add=amp_readtherest (accessed 10 January 2022).
17 MA Ajomo & I Okagbue (eds) *Human rights and the administration of criminal justice in Nigeria* (1991) 127.
18 CLEEN Foundation *Analysis of police and policing in Nigeria* (nd) 8-9.
19 *Daily Champion* 27 January 1990 4, cited in Ajomo & Okagbue (n 17) 127.

> Sadly, many of the men and officers in the police force who are supposed to be in the forefront of the battle against crime are, ironically, neck deep in crime. Where they do not barter arms for cash with robbers, they give vital security leads to their cronies in the underworld. And when they are not extorting money from motorists on the highways, they are busy harassing innocent traders and civilians. The fallouts from the worsening security situation have included mounting cases of police brutality, 'accidental' bullet discharges, often leading to the untimely deaths of innocent road users.

Notably, the above statement about the gross malfeasance of the police was made in 1990, two years before the establishment of SARS. The irresistible conclusion, therefore, is that the culture and practice of police brutality had been deeply entrenched in the police force right from colonial times and long before the establishment of SARS. By default, it was naturally transferred to SARS as part of its scheme of operation and metamorphosed into something worse. Evidently troubled by the activities of the police, Ajomo and Okagbue noted the following in 1991: 'It is ironical that while the police exist for the protection of the citizens, the problem now is how to protect the citizen from the police, somewhat of a *quis custodes ipsos custodiet* (who will guard the guards themselves) situation.'[20] In 1993, a year after the establishment of SARS, Professor Alemika noted the following about the police:[21]

> The Nigeria Police Force is still largely vicious and corrupt. Political opponents of governments and military administrations – usually workers, students, radicals and human rights activists – continue to suffer excessive and recurrent waves of brutalities, abductions, unwarranted searches and violations of privacy and private family life, extra-judicial killings, bodily injury, intimidation, harassment and loss of personal liberties in the hands of the police and sundry state 'intelligence' and security agencies in the country.

Sadly, the picture painted in the editorial and by Professor Alemika worsened over the years. Amongst other forms of brutality, extra-judicial killings or executions became the order of the day. The police force, and especially its worst unit, SARS, became tools for the extra-judicial execution of factually innocent citizens and suspects who had not been subjected to trial. SARS was renowned for operating an abattoir where suspects and factually innocent individuals were unduly and unlawfully detained without trial, subjected to the worst forms of torture, and gruesomely murdered, all of which were constantly done with impunity. Other units of the police were

20 Ajomo & Okagbue (n 17) 128.
21 EEO Alemika 'Colonialism, state and policing in Nigeria' (1993) 20 *Crime, Law and Social Change* 208.

equally renowned for killing citizens at will, mostly at checkpoints, subsequently labelling them as armed robbers. In 2006 the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions noted the following:[22]

> Police put forth various pretexts to justify extrajudicial executions. When a victim is killed in custody, an attempted escape may be cited. When the victim is killed before being taken into custody, his status as an armed robber may be cited. While armed robbery plagues much of Nigeria, the label of 'armed robber' is very often used to justify the jailing or extrajudicial execution of innocent individuals who have come to the attention of the police for reasons ranging from a refusal to pay a bribe to insulting or inconveniencing the police. Extrajudicial executions are also facilitated by the impunity the police force enjoys.

A 2007 Report by Human Rights Watch estimated that the Nigerian police had killed over 10 000 people between 2000 and 2007.[23] It noted that the figures were suggestive of the fact that the police routinely resorted to the disproportionate and illegal use of lethal force and may have committed multiple extrajudicial killings in the course of police operations. It noted further that such indicators were especially worrying in light of numerous well-documented cases of deaths of detainees in police custody and that almost as disturbing as the numbers themselves was that leading police officials appeared to regard the grim statistics as indicators of effective police work rather than as a scandal. In closing, the report pointed out that Nigeria's police force remains mired in deeply entrenched patterns of torture, corruption, murder, and other forms of human rights abuse, and that torture remains an intrinsic part of how law enforcement services operate in Nigeria.

In its 2019 Report on Human Rights Practices in Nigeria, the United States Department of State noted that significant human rights issues included unlawful and arbitrary killings, including extra-judicial killings, forced disappearances, torture, and arbitrary detention, while impunity remained widespread.[24] A study conducted by TheCable after reviewing media reports, data from the Council on Foreign Relations, and statements from various groups and affected persons revealed that between March 2019 and February 2020, the

22 UNCHR 'Civil and political rights, including the question of disappearances and summary executions: Extrajudicial, summary or arbitrary executions' Mission to Nigeria, report by Special Rapporteur Mr Philip Alston 7 January 2006 UN Doc E/CN.4/2006/53/Add.4 2.

23 Human Rights Watch 'Nigeria: Investigate widespread killings by police' 18 November 2007, https://www.hrw.org/news/2007/11/18/nigeria-investigate-widespread-killings-police (accessed 30 January 2022).

24 United States Department of State 'Country reports on human rights practices for 2019: Nigeria' (2019) Bureau of Democracy, Human Rights and Labour 1-2.

Nigerian police force had killed 92 persons in different locations across the country.[25] Data showed that killings were recorded every month and that most of the extra-judicial killings occurred during protests, many of which were unprovoked. Some of the most prominent reasons for such killings included a refusal to give a bribe, an argument, 'accidental discharge', and an attempt to disperse protests.[26] Condemning the spate of police brutality in the country and the subsidence of the criminal justice system, Ecoma[27] noted that brutality by the police violates the rights of citizens, suspects and even defendants, and that there appears to be no scintilla of respect for human rights enshrined in the Nigerian Constitution and other statutes, especially given the fact that the police seem to have the unbridled right to kill at will without prior inquiry as to the guilt or innocence of a suspect.

3.2 The many sins of SARS

SARS was established in 1992 as a special undercover unit of the Nigerian police force to combat armed robbery, kidnapping and allied crimes. Until its disbandment in 2020, it had a country-wide reach as it operated in each state and the federal capital territory. In each state, it was domiciled in the Criminal Investigations Department of the State Police Command. At the federal level, it operated as the Federal Special Anti-Robbery Squad (FSARS) domiciled in the Federal Criminal Investigation Department, Abuja. At both levels, SARS was under the leadership of senior police officers and its mandate was to arrest, investigate and prosecute suspected armed robbers, murderers, kidnappers, hired assassins and other violent criminals.[28] Almost immediately after its establishment, it abandoned its mandate and became the worst example of what it was set up to checkmate. It became the most brutal subdivision of the Nigerian police force renowned for extra-judicial executions in outrageous proportions;[29] extortion; human rights violations; profiling of young men; and disproportionate use of force.[30] It was responsible for widespread

25 C Asadu 'In detail: Police "kill 92" Nigerians in one year – and justice delayed for victims' 30 June 2020, https://www.thecable.ng/in-detail-police-kill-92-nigerians-in-one-year-and-justice-delayed-for-victims/amp (accessed 25 January 2022).
26 As above.
27 Ecoma (n 1) 79-80.
28 Amnesty International '#EndSARS movement: From Twitter to Nigerian streets' 2021, https://www.amnesty.org/en/latest/campaigns/2021/02/nigeria-end-impunity-for-police-violence-by-sars-endsars/ (accessed 27 November 2021).
29 Ecoma (n 1) 78.
30 J Egbas '"How SARS killed Remo Stars footballer" – Friend of Tiyamiyu Kazeem shares his story' 24 February 2020, https://www.pulse.ng/news/local/how-sars-killed-remo-stars-footballer-friend-of-tiyamiyu-kazeem-shares-his-story/6x40f50 (accessed 27 March 2020).

torture and other cruel, inhuman and degrading treatment or punishment of detainees who were subjected to various forms of torture and ill-treatment (including severe beating, hanging, starvation, shooting in the legs, mock executions, and threats of execution) in order to extract information and 'confessions'.[31] Youths were the usual targets, primarily because of their naiveté, ignorance of their human rights, and stereotypes held by the police – tagging them as criminals, internet fraudsters, or armed robbers because of dreadlocks, ripped jeans, tattoos, flashy cars, or ostensibly expensive gadgets such as smartphones and laptops.[32] In 2010 an editorial by Sahara Reporters exposed how, in just 18 months, SARS and other police units had raked in N9,35 billion (€51 million/$60 million) from mounting roadblocks and extorting residents.[33] Notably, the heinous acts perpetrated by SARS were almost always directed at poor, young and vulnerable Nigerian youths and were curiously perpetrated mainly in the southern part of Nigeria as a slew of reports, complaints and incidents of brutality were primarily traceable to towns, cities and states in Southern Nigeria.

3.3 Why police brutality persists

Although the practice of police brutality has received global condemnation, it continues to rage. In Nigeria, the practice has accounted for the destruction of several lives and properties from colonial times to date. In spite of the prevalence of constitutional and statutory provisions that guard against brutality, the practice has continued to thrive and has gone beyond a practice solely attributable to the police, to one which now is general practice for law enforcement, military and paramilitary organisations. The intractable question in light of all the human rights guarantees is why the practice continues to thrive unabated. What sustains the scale and intractability of ending police brutality in Nigeria? The factors responsible are individual, organisational, systemic and governmental in nature.

At the individual level, it certainly cannot be ruled out that some police officers suffer from mental health issues such as post-traumatic stress and anti-social personality disorders. Additionally, some have

31 Amnesty International *Nigeria: 'You have signed your death warrant': Torture and other ill treatment in the special anti-robbery squad* (2016) 5.

32 Africa Centre for Strategic Studies '#EndSARS demands Nigerian police reform' 10 November 2020, https://africacenter.org/spotlight/endsars-demands-nigerian-police-reform/ (accessed 30 November 2021).

33 C Mwakideu 'Unease as Nigeria marks one year after #EndSARS protests' 16 October 2021, https://amp.dw.com/en/nigeria-end-sars-protests-one-year-unease/a-59521109 (accessed 30 November 2021).

been found to be intoxicated while on duty.[34] These individual or personal issues, which have been left unchecked, combine to grossly affect the manner in which they discharge their duties and largely account for why they brutalise innocent citizens. These personal problems of police officers in Nigeria have gained notoriety, so much so that they formed the basis for one of the #EndSARS demands: that in line with the new Police Act, SARS officials should be subjected to psychological evaluation and retraining before their redeployment.[35]

At the organisational or institutional level, the police force has always been given to violence and brutality right from colonial times when it was established. The colonial vestiges of brute force and abuse of human rights, among others, remain very firmly imprinted in the police force. This has been worsened by institutional support for brutality, impunity and lack of adequate reforms. The Police Force Order 237 (Rules for Guidance in the Use of Force and Firearms by the Police), for instance, permits officers to shoot suspects and detainees who attempt to escape from custody or avoid arrest.[36] Amnesty International notes that the abuse of the Order has resulted in numerous unlawful killings and facilitated extra-judicial executions, while police officers go largely unpunished, using it as a justification as well as cover-up for the use of lethal force.[37] Although there is training on human rights in the police,[38] human rights-based policing or law enforcement has almost never been practised. Officers, therefore, act with reckless abandon in the discharge of their duties, thereby violating several rights guaranteed to citizens in statutes, the Nigerian Constitution, as well as in applicable regional and international instruments. Police officers are also known to coerce or extract confessions from suspects and innocent civilians using the most brutal and horrific forms of torture. There usually is little or no sanction from superior officers; instead, there appears to be support and encouragement for the apprehension, parading and killing of supposed criminals, most of whom are factually innocent.

34 GE Abikoye & RG Awopetu 'Drug use and multidimensional work performance in a sample of policemen in Nigeria' (2017) 16 *African Journal of Drug and Alcohol Studies* 64-66; E Usman 'Why police killings persist – Investigation' 7 January 2023, https://www.vanguardngr.com/2023/01/why-police-killings-persist-investigation/ (accessed 2 February 2023).

35 B Edokwe 'Five demands from #EndSARS protesters' 12 October 2020, https://barristerng.com/five-demands-from-endsars-protesters/ (accessed 10 November 2020).

36 Usman (n 34).

37 Amnesty International *Killing at will: Extrajudicial executions and other unlawful killings by the police in Nigeria* (2009) 17.

38 See *The Nigeria police force human rights practice manual* (2014); *The Nigeria police force human rights desk officers manual of guidance* (2014); sec 19 Police Act 2020.

Although some initiatives have brought about the enactment of statutory provisions, such as section 70 of the Police Act 2020 and section 34 of the Administration of Criminal Justice Act 2015, which seek to bring about effective monitoring of the police and its activities through regular inspection visits to police stations by judges and magistrates, the police have found ways to circumvent and frustrate the operation of such provisions. For instance, a recent inspection visit to a police station in Lagos by a chief magistrate and some lawyers under the aegis of the Duty Solicitors Network (DSN) revealed startling details. The DSN found that policemen across Lagos engage in the practice of kidnapping citizens and detaining them in police stations without the knowledge of their families and the judiciary, and that arrests are randomly made on suspects of all ages, charged with no particular offence, without being informed of the reason for their arrest, and picked up while going about their normal private lives.[39] Among other irregularities, the DSN found the following: (a) the police left the cells empty and kept suspects in rooms in different parts of the police facility so as to hide them away from the magistrate and lawyers; (b) most of the suspects discovered in the rooms were minors and had been in detention for months without being charged to court; (c) there was no record of the suspects detained nor statements obtained at the time of their arrest; and (d) most regrettably, the secret detentions were at the instance of the Commissioner of Police who directed that the detainees should be neither released nor charged to court.

At the level of the criminal justice system, there is a general system failure that has resulted in the abuse of process, a disregard for the rule of law and impunity, among others. This has made accountability and discipline in its components, such as the police, extremely difficult. As Ecoma notes,

> the system is at the brink of collapse drawing from unethical practices which it developed and continues to exude as traits. Such systemic practices which are highly prejudicial and constitutionally offensive include impunity, contempt for the rule of law, and a general disregard for fundamental rights. With corruption, inept officials and a general systemic failure, the components of the system appear to function at cross-purposes, thus tilting the system further away from achieving its fundamental objectives and ultimately branding it as an assemblage of uncoordinated institutions, a 'criminal' justice system, and a conveyor belt of injustice, from beginning to end. Consequently, the system in

39 C Unini 'Police secretly detaining suspects without the knowledge of families of the detainees – Akinlade led group raises alarm' 15 January 2022, https://thenigerialawyer.com/police-secretly-detaining-suspects-without-the-knowledge-of-families-of-the-detainees-akinlade-led-group-raises-alarm/ (accessed 16 January 2022).

> its subsidence erodes public confidence, fosters impunity, and lends credence to resort to self-help and the perversion of justice, all of which challenge its legitimacy and credibility.[40]

As a result of such systemic failure, there is an absence of effective monitoring or checks and balances. Accordingly, some of the components of the system tend to operate on their own terms and without regard for the rule of law, human rights and accountability.

At the governmental or state level, there is tacit support for brutality and repression. This has been the case right from colonial times, through the independence and post-independence eras. As such, the police force has always been an instrument of the state for purposes of domination, oppression and repression. As Strong[41] notes, two days after the massacre that occurred during the #EndSARS protest, the President of Nigeria in his first televised address in response to the protest called for an end to the protest, stating that the government would not 'allow anybody or groups to disrupt the peace of the nation'. Strong further notes that 'even without directly acknowledging the killings, the message was clear: The Nigerian government is prepared to continue to use force to put down the #EndSARS movement.' There also is the issue of a lack of sincerity or political will on the part of government to end brutality. There have been countless promises to initiate reforms, prosecute erring officers, put an end to brutality in all respects and bring about accountability, but all these have amounted to empty promises. By its wilful and unusual reluctance, refusal and neglect to change the narrative in policing and law enforcement generally, government is complicit.

Another factor is poor funding and training of the police. Human Rights Watch finds that Nigeria's police force generally lacks the capacity to deal with the challenges they face as officers are poorly trained, ill-equipped and poorly remunerated. It also finds that some human rights abuses carried out by the police are partly in response to public pressure to reduce the high levels of violent crime. Thus, as investigations have revealed, lacking the means to carry out effective criminal investigations, some police officers extract confessions through torture, or murder suspects in their custody who they believe to be guilty.[42] There is also the issue of unbridled disrespect for court judgments and the rule of law. Over the years, there

40 Ecoma (n 1) 60.
41 K Strong 'The rise and suppression of #EndSARS' 27 October 2020, https://www.harpersbazaar.com/culture/politics/a34485605/what-is-endsars/ (accessed 30 November 2021).
42 Human Rights Watch (n 23).

have been several judgments by national and regional courts that have found law enforcement officers and their agencies liable for violating the rights of citizens.[43] The enforcement of such judgments, which usually award costs in favour of the victims, has always been frustrated by government and its appointees, thus leaving victims and their families with half justice.[44]

The foregoing issues in addition to the 'Nigerian factor'[45] account for why police brutality continues to thrive in Nigeria. These issues have lasted unresolved for decades. The #EndSARS protest, therefore, presented an opportunity for bringing these issues and many more to the fore for urgent attention and lasting solutions.

4 #EndSARS protest, demands and responses

With unabated and unpunished heinous crimes committed by SARS officials, as well as repeated calls on and off-line for the disbandment of SARS, and constant but unfulfilled promises by the federal government to disband same, the final straw was the surfacing on 3 October 2020 of a video clip online that showed a SARS officer driving off in the Lexus SUV of a young man in Delta State after shooting him and pushing his body out of the car.[46] Within days,

43 SaharaReporters 'Civic group, SERAP lists six court judgments disobeyed by Buhari-led Nigerian government' 8 December 2021, https:/saharareporters.com/2021/12/08/civic-group-serap-lists-six-court-judgments-disobeyed-buhari-led-nigerian-government (accessed 2 March 2022); F Falana 'Why human rights abuse has continued unabated in Nigeria, by Femi Falana' 13 December 2021, https://www.premiumtimesng.com/opinion/500654-why-human-rights-abuse-has-continued-unabated-in-nigeria-by-femi-falana.html (accessed 24 December 2021); S Ogunlowo 'Special report: How billion naira court judgments have failed police brutality victims' 2 October 2022, https://www.premiumtimesng.com/news/headlines/557298-special-report-how-billion-naira-court-judgements-have-failed-police-brutality-victims.html (accessed 14 November 2022).

44 Falana (n 43); Ogunlowo (n 43).

45 The term is one that is quite versatile but may be viewed in two principal ways: positively and negatively. The term is used in the negative sense in this article. In this context, Dr Floribert Endong asserts that the term is used to describe the intense moral decay or mental corruption that has seriously affected Nigerian society to the extent that what is 'universally' viewed as reprehensible is paradoxically accepted in the Nigerian context as working and efficacious; in other words, it is the tendency of believing that anything – morally good or bad – can go in Nigeria, because the country is in a severe state of social malady. See FPC Endong 'The effects of the "publish or perish syndrome" on research and innovation in Nigerian universities: Insights from recent research and case studies' in A Sandu, A Frunza & E Unguru (eds) *Ethics in research practice and innovation* (2019) 95. Prof Munzali Jibril asserts that the term has come to mean unfortunately, corruption, nepotism, dishonesty, fraud and anything that is negative in our national life. See M Jibril 'The Nigerian factor and the Nigerian condition' *The Guardian* (Nigeria) 2 October 2003 8.

46 Human Rights Watch 'Nigeria: A year on, no justice for #EndSARS crackdown' 19 October 2021. https://www.hrw.org/news/2021/10/19/nigeria-year-no-justice-endsars-crackdown/ (accessed 24 November 2021).

Nigerian youths took to the streets to express their grave displeasure at the spate of police brutality, impunity and extra-judicial killings, among others, and to call once again for the disbandment of SARS. The #EndSARS hashtag was even more prominently used during the protest, not just in Nigeria but globally. On 9 October 2020 the #EndSARS hashtag was the top trending hashtag in the world with over 2 million tweets.[47]

While the immediate cause of the protest was the viral video of the young man who was shot and killed in Delta State, the remote causes were the following: the economic crisis sparked by the fall in global oil demand (and compounded by the outbreak of the COVID-19 pandemic); institutionalised corruption; state profligacy resulting in poverty; the eight months' closure of universities due to strikes; staggering unemployment; worsening economic conditions; bleak projections for the future;[48] and decades of brutality by and impunity for SARS, among others. The #EndSARS protest, therefore, became a symbol for broader resentment and opened the path for marginalised Nigerian youths to vent bottled-up grievances against the government, starting with the excesses of SARS that the government failed to address after several promises of reform.[49] The protest, which started in Lagos on 8 October 2020, spread to other cities across the country and received support nationally and internationally.

On 11 October 2020 the protesters released a five-point demand (styled #5for5) that centred on tackling the scourge of police brutality. The demands were (i) the immediate release of all arrested protesters; (ii) justice for all deceased victims of police brutality and appropriate compensation for their families; (iii) the setting up of an independent body to oversee the investigation and prosecution of all reports of police misconduct (within 10 days); (iv) in line with the new Police Act, psychological evaluation and retraining (to be confirmed by an independent body) of all disbanded SARS officers before they can be redeployed; and (v) an increase in police salaries so that they are adequately compensated for protecting the lives

47 V Obia '#EndSARS, a unique Twittersphere and social media regulation in Nigeria' 11 November 2020, https://blogs.lse.ac.uk/medialse/2020/11/11/endsars-a-unique-twittersphere-and-social-media-regulation-in-nigeria/ (accessed 27 November 2021).

48 O Ojewale 'Youth protests for police reform in Nigeria: What lies ahead for #EndSARS' 2020, https://www.brookings.edu/blog/africa-in-focus/2020/10/29/youth-protests-for-police-reform-in-nigeria-what-lies-ahead-for-endsars/amp/ (accessed 3 December 2021).

49 As above.

and property of citizens.[50] The demands were accepted by the federal government and, as part of an immediate response, SARS was disbanded but quickly replaced with a new unit called the Special Weapons and Tactics (SWAT) Unit. State governments were directed to set up judicial panels to investigate human rights abuses by SARS and compensate victims, and many detained protesters were released. The Inspector-General of Police announced plans to subject SARS officials to psychological evaluation, among other reforms. There were also indications that the salaries of police officers would be increased as promised. However, the protesters rejected the establishment of SWAT, regarding it as only a change of name for SARS. Possibly elated by the rapid acceptance and response, or merely adamant that the time to reform Nigeria had come, the protesters subsequently tabled before the federal government a seven-point demand (#7for7) aimed at correcting the many ills in governance and society. The subsequent demands were (i) institutional reforms (security); (ii) cost of governance; (iii) constitutional reforms; (iv) education reforms; (v) health reforms; (vi) youth development reforms; and (vii) public office reforms.[51]

During the course of the protest, hoodlums suspected to be sponsored by the government hijacked the protest across cities in Nigeria.[52] The hoodlums wreaked havoc on protesters, public buildings and private businesses, and orchestrated several jailbreaks, all in a bid to deter the protesters and disrupt the protest. Undeterred by the attacks, the protesters continued with the protest, but before the #7for7 demands could be officially accepted or rejected, the protest was terminated by military repression on 20 October 2020, a day now referred to as 'Black Tuesday'.[53] On Black Tuesday, hundreds of protesters gathered as usual at the Lekki tollgate in Lagos to stage a peaceful sit-in. The State Governor, Babajide Sanwo-Olu, announced a state-wide curfew starting at 16:00, but later rescheduled to start

50 T Daka 'FG okays #EndSARS protesters' "5for5" demands' 13 October 2020, https://guardian.ng/news/fg-okays-endsars-protesters-5for5-demands/ (accessed 6 November 2020).

51 PM News Editor '#EndSARS protesters widen demands: It's now #7for7' 16 October 2020, https://pmnewsnigeria.com/2020/10/16/endsars-protesters-widen-demands-its-now-7for7 (accessed 7 November 2020).

52 SaharaReporters 'Breaking: Again, government-sponsored thugs attack #EndSARS protesters in Lagos' 15 October 2020, https://saharareporters.com/2020/10/15/breaking-again-government-sponsored-thugs-attack-endsars-protesters-lagos (accessed 20 November 2020); S Mbamalu 'Nigerian government accused of hiring hoodlums to attack protesters' 15 October 2020, https://thisisafrica.me/politics-and-society/endsars-nigerian-govt-hires-hoodlums-to-attack-protesters/ (accessed 27 December 2020).

53 CB Okoye 'Democracy and right to freedom of expression: A case study on the Nigerian youth protest on police brutality' (2021) 11 *Open Journal of Political Science* 35.

at 21:00.[54] Between 18:30 and 19:00, military officials arrived at the scene in about five trucks, surrounded the protesters, and fired live ammunition at peaceful, unarmed and defenceless protesters who were singing the Nigerian anthem and waving the Nigerian flag.[55] At least 15 people were said to have been killed and their bodies taken away by the military. A few moments after the military left, approximately 15 police officers reportedly arrived at the scene and shot at some of the remaining protesters.[56] This incident on Black Tuesday is usually termed the 'Lekki massacre'. The Nigerian army initially categorically denied the allegation of firing live ammunition at the protesters, but subsequently claimed that only blank bullets were fired and no death was recorded.[57] However, a CNN investigative report and the report of the Lagos State Judicial Panel of Inquiry revealed otherwise. Both reports confirmed that the military had fired live ammunition at unarmed protesters and killed many of them.[58]

Although the federal government almost immediately accepted the #5for5 demands of the protesters and initiated moves to fulfil its promises,[59] its response to the protest and the demands was not entirely positive. Before the military repression, which reportedly had the backing of government, the announcement of government's commitment towards justice and accountability during the protest was simultaneously followed by attacks on peaceful protesters by security forces. Between 8 and 20 October 2020 security forces

54 I Adediran '#EndSARS: Lagos imposes 24-hour curfew' 20 October 2020, https://www.premiumtimesng.com/news/headlines/421807-endsars-lagos-imposes-24-hour-curfew.html (accessed 7 November 2020).

55 A Ukomadu, A Akwagyiram & L George 'Fires burn in Lagos after Nigerian soldiers shoot anti-police protesters' 21 October, 2020 https://www.reuters.com/article/ozatp-uk-nigeria-protests-idAFKBN2761DM-OZATP (accessed 7 November 2020); J Augoye 'Lekki shooting: 15 people killed, soldiers took their bodies away – DJ Switch' 23 October 2020, https://www.premiumtimesng.com/news/headlines/422689-lekki-shooting-15-people-killed-soldiers-took-their-bodies-away-dj-switch.html (accessed 7 November 2020).

56 N Ibekwe 'Investigation: Bullets, blood and death: Untold story of what happened at Lekki toll gate' 31 October 2020, https://www.premiumtimesng.com/news/headlines/423823-investigation-bullets-blood-death-untold-story-of-what-happened-at-lekki-toll-gate.html (accessed 9 November 2020).

57 A Olufemi '#EndSARS: Despite contrary evidence, Nigerian army denies shooting at protesters' 21 October 2020, https://www.premiumtimesng.com/news/headlines/422021-endsars-despite-contrary-evidence-nigerian-army-denies-shooting-at-protesters.html (accessed 6 November 2020); N Elbagir et al 'Nigerian army admits to having live rounds at Lekki toll gate protests, despite previous denials' 21 October 2020, https://cnn.com/cnn/2020/11/21/africa/nigeria-shooting-lekki-toll-gate-intl/index.html (accessed 9 November 2020).

58 Lagos State Judicial Panel of Inquiry on Restitution for Victims of SARS-Related Abuses and Other Matters 'Report of Lekki incident investigation of 20th October 2020' 301-303; S Busari et al 'Nigerian judicial panel condemns 2020 Lekki toll gate shooting as "a massacre"' 16 November 2021, https://edition.cnn.com/2021/11/15/africa/lekki-tollgate-judicial-panel-report-intl/index.html (accessed 15 December 2021).

59 Daka (n 50).

repeatedly and unjustifiably responded with excessive force and arrested dozens of protesters, held them incommunicado for many hours or days, denied them access to lawyers, and filed trumped-up charges against them.[60] The bank accounts of individuals and groups who donated to, received or disbursed funds for the protest were frozen, travel restrictions were placed on supporters, and media houses were fined for using footage from social media in their coverage of the protest.[61]

5 Post-protest review of the #EndSARS demands

An evaluation of the #EndSARS demands and responses thereto is necessary in order to ascertain whether there have been significant and sustainable reforms in policing in Nigeria after the protest. This will reveal the effectiveness or otherwise of the protest, and whether or not the goals of the protest have been achieved. Given that the #7for7 demands were neither officially accepted nor rejected, the analysis will be made in respect of the #5for5 demands.

The first demand was for the immediate release of all arrested protesters. On 13 October 2020 the President of Nigeria directed the unconditional release of all detained protesters as well as investigations into human rights violations by former SARS officials. Approximately a month thereafter and following a recommendation by the state Attorney-General, the Lagos state government announced the release of 107 persons who had been taken into custody in police facilities and correctional centres over the #EndSARS protest in the state.[62] In the same month, however, the federal government targeted those who played key roles in the protest by freezing their bank accounts, seizing their travel documents, and carrying out arrests. In February 2021 several youths were arrested while protesting against the reopening of the Lekki toll gate. Years after the protest and in spite of promises by government, several #EndSARS protesters are still languishing in detention.[63]

60 Human Rights Watch (n 46).
61 As above.
62 N Ayitogo 'Analysis: #EndSARS: Five months after, is the Nigerian govt meeting protesters' demands' 17 April 2021, https://www.premiumtimesng.com/news/headlines/455674-analysis-endsars-five-months-after-is-the-nigerian-govt-meeting-protesters-demands.html (accessed 26 November 2021); Amnesty International 'Nigeria: Two years on, more than 40 #EndSARS protesters still languishing in jail' 20 October 2022, https://www/amnesty.org.ng/2022/10/20/nigeria-two-years-on-more-than-40-endsars-protesters-still-languishing-in-jail (accessed 30 December 2022).
63 E Nnadozie et al 'One year after #EndSARS protest, over 300 still in detention' 19 October 2021, https://www.vanguardngr.com/2021/10/one-year-after-endsars-protest-over-300-still-in-detention/amp/ (accessed 30 November 2021).

In respect of the second and third demands, state governments set up judicial panels of inquiry to investigate cases of police brutality and compensate victims. However, five states in the north-west region (Sokoto, Zamfara, Kano, Kebbi and Jigawa) and two states in the north-east (Adamawa and Yobe) did not set up panels.[64] Most of the petitioners alleged human rights violations through extra-judicial killings, torture, extortion, harassment, sexual and gender-based violence, illegal and indiscriminate arrests, illegal detention, and abuse of power by the police and other security agencies.[65] While questions about the competence of some panels have arisen, most of the panels limited the number of petitions to be received and heard, some have been inconsistent in their duties, some have been frustrated by security officials who dishonour subpoenas to appear before the panels, others have relied heavily on legal technicalities to the disadvantage of petitioners, and some have entertained petitions in the absence of legal counsel amidst general distrust by the citizenry.[66] While some states have paid or initiated processes to pay compensations to victims of police brutality, others are yet to do the same. Although the steps towards compensation are commendable, the fact remains that compensation cannot make up for the lives lost, injuries sustained, trauma experienced, and properties destroyed at the hands of SARS and other police officers, irrespective of the amount awarded or paid.

The fourth demand was the psychological evaluation and retraining of all disbanded SARS officers before their redeployment. Two days after the disbandment, officers who served under the defunct SARS unit were directed by the Inspector-General of Police to report to the force headquarters, Abuja, for debriefing and psychological examination. The National Economic Council subsequently recommended psychiatric evaluation and drug tests for recruits into arms-bearing security agencies before and after enlistment. Years later, these recommendations appear to be mere wishes as there is no evidence of implementation. Reports indicate that while police vehicles and personnel are no longer seen in public with the SARS inscription, many believe that members of the defunct unit have been redeployed without any evaluation or sanction where necessary.[67]

64 Ayitogo (n 62).
65 As above.
66 As above.
67 N Ayitogo & K Yusuf '#EndSARS anniversary: One year after, what has happened to protesters' five-point demand?' 20 October 2021, https://www.premiumtimesng.com/news/headlines/490594-endsars-anniversary-one-year-after-what-has-happened-to-protesters-five-point-demand.html (accessed 30 November 2021)

The last demand was an increase in police salaries. The rationale for this demand was that adequate compensation of the police would forestall bribery and the commission of crimes by the police. Thus, in June 2021 President Buhari ordered an increase in the salaries and benefits of the police in an attempt to reform the police force, a policy move that aligned with the #5for5 demand for better funding and welfare for the police.[68] However, an interview with several police officers revealed that nothing had changed in terms of their remuneration and welfare since the #EndSARS protest.[69] The salary structure that was last reviewed in 2019 puts officers' salaries as low as N9 000 for new police recruits, and between N48 000 and N56 000 for police sergeants.[70] On 15 December 2021 the Federal Executive Council approved a 20 per cent salary increase and other incentives for police officers. Although the increment was to take effect from January 2022, as at September 2022 the increment was yet to go into full effect, with many police officers complaining that the 20 per cent raise made little or no difference.[71]

The review has revealed the existence of a common thread that plagues police reforms in Nigeria – a lack of political will to implement and sustain reforms. Pre-EndSARS reform efforts failed primarily due to a lack of political will on the part of government to ensure that recommendations of several constituted committees were effectively considered and applied. The #EndSARS #5for5 demands, which were geared towards extensive police reforms just like previous reform efforts, inevitably suffered the same fate. As the review has shown, although there were initial moves to implement the #5for5 demands, these moves were primarily sustained by the protest. The post-protest period has witnessed lethargy on the part of government to follow through.

6 Somersaults, repression, and unabated brutality

Events since the #EndSARS protest have illustrated that there has been no positive change in the way and manner in which policing or

68 T Ibirogba '#EndSARS: One year later, where are we now?' 20 October 2021, https://culturecustodian.com/endsars-one-year-later-where-are-we-now/ (accessed 30 November 2021)

69 Ayitogo & Yusuf (n 67).

70 D Bamidele '#EndSARS: 1 year after, the Nigerian government is yet to implement its 5 for 5 promises' October 2021, https://technext.ng/2021/10/21/endsars-1-year-after-the-nigerian-government-is-yet-to-implement-its-5-for-5-promises/ (accessed 30 November 2021).

71 A Adebayo 'FG begins police pay rise implementation, dashes hope on percentage' 1 September 2022, https://punchng.com/fg-begins-police-pay-rise-implementation-dashes-hope-on-percentage (accessed 30 November 2022).

law enforcement is carried out in Nigeria. Although the name SARS may no longer be found in the structure or lexicon of the Nigerian police force, its heinous and inhumane practices remain very much alive in the police force, bearing in mind, of course, that officials of the defunct SARS unit have clearly been subsumed into other units of the police and, therefore, are still on the prowl.

20 October 2021 marked the first anniversary of the #EndSARS protest, especially the Lekki massacre. The memorial was marked by a car procession at the Lekki toll gate in honour of those who died on Black Tuesday and as a result of police brutality. Attendees were advised by the organisers to come out in groups and stay in cars for safety purposes.[72] The Lagos State Commissioner of Police, Hakeem Odumosu (as he then was), had earlier warned against the organisation of any protest to mark the anniversary. He cautioned, without deference for the constitutionality of peaceful protests, that the police 'will use all legitimate means within their constitutional power to suppress the planned protest'.[73] The protesters defied the warning and were met with stiff resistance even though they were peaceful. After having arrested a handful of protesters, especially those who arrived early at the venue for the rally, heavily armed police officers swooped on protesters who converged on the scene, trying to get hold of as many as they could while firing tear gas to disperse hundreds of others.[74] Several journalists who were at the venue to cover the memorial were beaten, harassed and arrested.[75]

In its assessment of the state of affairs a year after the #EndSARS protest, Amnesty International noted that no one has been brought to justice for the torture, violence and killings of peaceful protesters, while reports of human rights violations by the police continue. It further noted that despite the gravity of these human rights violations, not a single member of the security forces has been prosecuted.[76] Even worse is the hostility that trailed the report of the Lagos State Judicial Panel of Inquiry as exhibited by the federal government. The

72 A Alade et al 'Anxiety as EndSARS promoters insist on memorial protest' 20 October 2021, https://dailytrust.com/anxiety-as-endsars-promoters-insist-on-memorial-protest (accessed 23 November 2021).

73 News24 'Nigeria police warn over new Lagos #EndSARS protests' 11 October 2021, https://www.news24.com/amp/news24/africa/news/nigeria-police-warn-over-new-lagos-endsars-protests-20211011 (accessed 3 December 2021).

74 D Yusuf 'Nigeria: A police clampdown on #EndSARS protest shows nothing has changed, activists say' 20 October 2021, https://www.theafricareport.com/138766/nigeria-a-police-clampdown-on-endsars-protest-shows-nothing-has-changed-activists-say/amp/ (accessed 30 November 2021).

75 International Press Centre 'IPC decries attack on journalists and #Endsars activists at one-year anniversary protests' 20 October 2021, https://www.ipcng.org/2021/10/20/ipc-decries-attack-on-journalists-and-endsars-activists-at-one-year-anniversary-protests/ (accessed 30 November 2021).

76 Yusuf (n 74).

federal government rejected the findings of the Panel by denying the killing of protesters and describing the Report as fake, and one based on social media 'tales by moonlight'.[77]

In the days, weeks and months leading up to the 2021 #EndSARS memorial, Nigerians were inundated with several reports of police brutality, which confirmed the fears of many that nothing had actually changed in policing since the protest. In February 2021 the police beat up and arrested protesters who gathered at the Lekki toll gate to protest against its reopening.[78] In July police officers attached to the Force Criminal Investigation Department Annex, Alagbon Close, Lagos forcibly extorted N22 000 000 worth of Bitcoin from two young real estate developers.[79] A few months to the memorial, the police in Akwa Ibom state were accused of illegally arresting and beating to death a recent university graduate in a police cell.[80] The police claimed that he died from natural causes, but an autopsy report revealed that the young man had been tortured and had sustained a blunt head injury. About 72 hours to the memorial, a video of police brutality surfaced online. In the viral video, police officers were seen harassing passengers of a commercial vehicle in Kogi state. The officers illegally gained access to a student's mobile phone, forced him onto a motorcycle, and extorted N25 000 from him at a nearby shop simply because he was in possession of a laptop computer.[81] When questioned by other passengers about their illegal acts, they assaulted the passengers and threatened to 'spill blood'.

77 BC Onochie, J Baba-Yesufu & S Olumide 'FG: Lagos #EndSARS report recycled fake news, tales by moonlight' 24 November 2021, https://guardian.ng/news/fg-lagos-endsars-report-recycled-fakes-news-tales-by-moonlight/ (accessed 20 December 2021); T Iyare 'EndSARS: Lagos judicial panel report is tales by moonlight … Lai Mohammed' 24 November 2021, https://www.ndr.org.ng/endsars-lagos-judicial-panel-report-is-tales-by-moonlight-lai-mohammed/ (accessed 15 December 2021).

78 A Ukomadu & S Sanni 'Nigerian police beat, arrest protesters at site of Lekki shootings, witnesses say' 13 February 2021, https://torontosun.com/news/world/nigerian-police-beat-arrest-protesters-at-site-of-lekki-shootings-witnesses-say/wcm/fb4c33d3-8370-4505-b914-dff5d2846281/amp/ (accessed 1 December 2021).

79 SaharaReporters 'How Nigerian policemen extorted N22 million worth of Bitcoin from young men at gunpoint in Lagos' 18 December 2021, http://saharareporters.com/2021/12/18/how-nigerian-policemen-extorted-n22million-worth-bitcoin-young-men-gunpoint-lagos (accessed 15 January 2022).

80 SaharaReporters 'Police illegally arrest, beat young Nigerian graduate to death in custody' 3 September 2021, https://www.saharareporters.com/2021/09/03/police-illegally-arrest-beat-young-nigerian-graduate-death-custody (accessed 4 December 2021).

81 E Uti 'Video: Kogi policemen beat passengers for challenging them, threaten to spill blood' 17 October 2021, https://fij.ng/article/video-kogi-policemen-beat-passengers-for-challenging-them-threaten-to-spill-blood/ (accessed 15 December 2021).

After the memorial, there were still reports of police brutality and, even worse, of robbery by the police. In December 2021 the Foundation for Investigative Journalism reported how police officers attached to the Igando police station in Lagos state robbed a 21 year-old student of N51 000. The student, who was in possession of a large sum of money, was asked if he was 'aware of how some Nigerian police officers have wasted the lives of many innocent youths'[82] when he resisted the extortion. The Foundation also reported how police officers cumulatively stole N2 487 000 from several Nigerians across the country in December 2021 alone.[83] In its report the Foundation further noted that some police officers, operating as rogues, often make unjustifiable arrests, unlawfully search phones, and plant incriminating items on unsuspecting individuals in order to rob them under the guise of granting bail after their arrest. There also is a report on a criminal team led by a Deputy Superintendent of Police running riot all over Lagos, seizing, framing and extorting innocent citizens, including extorting N32 000 000 worth of Bitcoin from two young men.[84] In 2022 there were several reports of police brutality, including the use of point-of-sale machines by police officers for extortion.[85] On 25 December 2022 a police officer, Drambi Vandi, attached to the Ajiwe police division in Ajah area, Lagos, fatally shot an unarmed and pregnant lawyer, Mrs Omobolanle Raheem. Earlier in the month, a young man who was on his way to buy petrol was also shot dead by an officer from the same police division.[86]

The foregoing accounts, in addition to earlier accounts contained in this article, indubitably reveal a new vista or transmutation from the usual forms of police brutality (such as extra-judicial killings, assault and battery, unlawful detention, coerced confessions, trumped-up

82 E Uti 'Lagos police "rob" student of N50,000 at gunpoint, say they can waste innocent lives' 11 December 2021, https://fij.ng/article/lagos-police-rob-student-of-n50000-at-gunpoint-say-they-can-waste-innocent-lives/ (accessed 15 January 2022).

83 D Ojukwu 'In armed robbery fashion, how police stole over N2.4m from Nigerians in December' 30 December 2021, https://fij.ng/article/in-armed-robbery-fashion-how-police-stole-over-n2-4m-from-nigerians-in-december/ (accessed 15 January 2022).

84 SaharaReporters 'Exclusive: How under fire police officers in Lagos allegedly extorted N32 million worth of Bitcoin from another set of young men at gunpoint' 27 December 2021, http://saharareporters.com/2021/12/27/exclusive-how-under-fire-police-officers-lagos-allegedly-extorted-n32million-worth?utm_source=headtopics&utm_medium=news&utm_campaign=2021-12-27 (accessed 15 January 2022).

85 B Abe & J Olaoluwa '[Special report] Despite EndSARS protest, police harassments persist, use POS for extortion' 21 November 2022, https://www.icirnigeria.org/special-report-despite-endsars-protest-police-harassment-persist-use-pos-for-extortion/ (accessed 10 January 2023).

86 O Adelagun 'Christmas day tragedy: Police officer kills lawyer in Lagos' 26 December 2022, https://www.premiumtimesng.com/news/top-news/572407-christmas-day-tragedy-police-officer-kills-lawyer-in-lagos.html (accessed 10 January 2023).

charges, and so forth) to outright armed robbery. This is plausible in view of strong claims to the effect that armed robbers have found their way into the police force and police recruitment camps.[87] Cumulatively, the detailed acts run foul of provisions of the Police Act, such as sections 5(2) and 9(2)(a), which require the compulsory provision of legal services to suspects, accused persons or detainees, and sections 4, 5 and 37 which require the police to respect the rights of suspects, to protect lives and properties of citizens, and to promote and protect fundamental rights.

7 Need for reform

The analysis in this article essentially is only a snapshot of the state of affairs in policing and law enforcement in Nigeria. It is clear that the system of policing, law enforcement and even the criminal justice system are in dire straits. Effective and sustainable reforms therefore are pivotal to addressing the issues and challenges identified in the article. An apt starting point would be the de-politicisation and democratisation of policing, law enforcement and the criminal justice system. It has been reiterated that the police in particular have often been used as instruments of state domination, repression and control, and this has been evident in many respects. To enable the system to function properly and also to restore confidence, there must be independence of the police, and non-interference by government. Additionally, it is necessary to decentralise the police force to allow for state policing. This will go a long way towards ensuring that true federalism in terms of policing is practised.

Second, there must be extensive oversight of law enforcement agencies. This would require efficient and effective oversight activities by relevant agencies, the Bar and the bench, and the legislature. Accordingly, stakeholders such as the Police Service Commission (PSC), the Nigerian Bar Association (NBA), the Federal and State Ministries of Justice, the National Human Rights Commission (NHRC), and the Legal Aid Council (LAC), among others, must be alive to their respective responsibilities. Each police station should have a human rights desk manned by officials from the Office of the Public Defender and NBA, and charged with the responsibility of co-processing arrestees and entering their records into a digital

87 See F Ndubuisi & O Olawale 'Nigeria: Obasanjo: Police recruit armed robbers' 8 March 2004, https://allafrica.com/stories/200403080753.html (accessed 5 January 2022); 'K Akinlade 'Like Obasanjo, PSC Chair, Smith confirms armed robbers recruited into Nigeria police' 2 February 2022, http://crimeworld.com.ng/2022/02/02/like-obasanjo-psc-chair-smith-confirms-armed-robbers-recruited-into-nigeria-police/ (accessed 5 February 2022).

database accessible to the Ministry of Justice, the NBA, judges, and chief magistrates within the jurisdiction.

Transparency, accountability and effective discipline, which are critical to the success of any organisation, clearly are lacking in the Nigerian police force. To ensure that the police force does not degenerate beyond its current state, there is an urgent need to strengthen and sustain internal and external mechanisms for transparency, accountability and discipline. One such mechanism is the adoption of a collective responsibility system in which senior police officers across divisions will be held responsible for the acts of junior officers they supervise. Utilising this approach will go a long way towards stemming the tide of police brutality and recklessness. Every bullet must be accounted for, and police officers must, while on duty, be compulsorily made to wear uniforms with sewn-in names and force numbers (except when on authorised discreet operations), in order to aid easy identification. Orderly room trials of errant police officers should be made to have the mandatory attendance of officials from the NBA, the Ministry of Justice, and other stakeholders so as to guarantee the integrity of proceedings. The reporting system of the police is often marred by bottlenecks and compromises. As the main supervisory and oversight body of the police, the PSC must be alive to its responsibilities in receiving, investigating and dealing with reports/complaints against erring officers. It should create multiple channels for complaints submission, including a nationally accessible toll-free short code, and also set up a national database with detailed reports of police misconduct, geographic location of incidents, the result of investigations, and sanctions enforced. There also is a need for the National Assembly to revisit the Police Act 2020 and to properly clarify the roles and functions of the Police Complaints Response Unit established under the Act.

In addition to the above, the following are also recommended: (a) regular random psychological evaluation and opium tests for police officers; (b) updated police training curriculum, with the emphasis on human rights-based law enforcement; (c) compulsory promotion examinations for police officers based mostly on human rights-based policing, set and graded by the PSC; (d) regular unscheduled visits by the NBA, NHRC and the LAC to police stations across the country; (e) effective implementation of the #5for5 and #7for7 #EndSARS demands; (f) regular retraining and proper funding of the police; (g) consideration of an officer's record of service as criteria for promotion; (h) provision of adequate facilities for policing; and (i) revised police guidelines that should, among others, emphasise human rights-based policing, clearly define what excessive force is,

and authorise excessive force as a last resort and only where there is an imminent threat to life. These recommendations should be enforced across all law enforcement, military and paramilitary organisations in the country, with modifications where necessary. In the final analysis, these recommendations can only be effectively activated and sustained by government's firm and sincere commitment to an improved system of law enforcement.

8 Conclusion

Police brutality is a cancer that has eaten deep into the fabric of Nigerian society and has been sustained primarily by impunity and a lack of political will to reform the system of policing, law enforcement and criminal justice. There also is the challenge of a lack of respect for the rule of law and human rights. This article undertook a post-mortem assessment of the #EndSARS protest and police brutality in Nigeria with a view to ascertaining whether or not there has been an end to, a reduction or an increase in the spate of brutality by the Nigerian police since the protest. The article found that there has been no paradigm-changing reform years after the protest, and further found as disturbing the fact that police brutality has continued without let or hindrance. These findings call into question the impact the #EndSARS protest had in terms of putting an end to police brutality in the country. It has been shown that there are a number of potent factors that sustain the heinous practice, government complicity inclusive. It may thus be stated that while the protest expressed beautiful aspirations for the country, the very actors and factors that sustain brutality and other maladies in the country ensured that no significant gains were recorded. These notwithstanding, the protest may be hailed for giving a snapshot of what a united, peaceful and progressive Nigeria looks like, a picture or image that has been the lifelong dream of many. While the task of dealing with the menace of brutality in the police and other security agencies is intractable, it is not insurmountable.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: P Mutu 'Leveraging technology to deliver basic education to children in conflict areas of Northern Nigeria' (2023) 23
African Human Rights Law Journal 182-204
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a8

Leveraging technology to deliver basic education to children in conflict areas of Northern Nigeria

*Perekeme Mutu**
Post-Doctoral Fellow with UNESCO; Post-Doctoral Fellow, Department of Private Law; University of Pretoria, South Africa
http://orcid.orcid.org/0000-0003-1175-218X

Summary: *Studies have shown that children residing in countries affected by armed conflict are more likely not to attend school as compared to other children. This is the fate of millions of children in Northern Nigeria, where the attacks on educational facilities by Boko Haram terrorists and the general insecurity in the region have resulted in the closing down of thousands of schools in the region by the government at various levels, without viable alternative methods of enabling access to education for the affected children. This serves as the foundation for the question addressed in this article, namely, whether the general insecurity in the region absolved the government of its obligation to ensure access to basic education for children in the region. Through the interrogation of various international, regional and domestic legal instruments and jurisprudence, the article argues that the insecurity in the northern region does not absolve the government of its obligation to provide the enablement for children to access basic education in the region. As a way of recommendation, the article explores the possibility of the government leveraging technology as a method of enabling access to basic education to children in the affected areas.*

* BA (Hons) LLB (UNISA) MPhil PhD (Pretoria); perekeme.mutu@gmail.com

Key words: *right to basic education; armed conflict; leveraging technology; Northern Nigeria; Boko Haram*

1 Introduction

The significance of education in both human and societal development no longer is in doubt. Education is viewed as an enabling right that builds the capacity of individuals.[1] The right to education is indispensable for the realisation of other human rights, such as, but not limited to, the rights to freedom of expression, association, access to health care and work.[2] On this basis Tomasevski argued that the denial of the right to education leads to compounded denials of other human rights and the perpetuation of poverty.[3] However, armed conflict has been identified as one of the factors that interrupt access to education for millions of children. This is evident in a 2011 Education For All (EFA) Monitoring Report, which revealed that an estimated 28 million children were denied access to education by armed conflicts around the world.[4] According to the Global Education Monitoring Report 2022 of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), Nigeria has an estimated 19,7 million out-of-school children.[5] While various factors, such as religious and cultural practices and socio-economic conditions, have contributed to the high number of out-of-school children, the general insecurity caused by the activities of the Boko Haram terrorist group and armed bandits has exacerbated the situation, particularly in the country's northern region.[6]

---

1 Art 29 United Nations Convention on the Rights of the Child 1990. Also see United Nations Committee on the Rights of the Child 'Days of general discussion on the right of the child to education in emergency situations' 2008 49 Session 19 September.

2 General Comment 13 of the UN Committee on Economic, Social and Cultural Rights 1999 para 1. Also see the Maastricht Guidelines on violations of economic, social and cultural rights 1997.

3 K Tomasevski Annual report of the Special Rapporteur on the Right to Education 2000 E/CN.4/2001/52 para 9-4. Also see K Tomasevski *Education denied: Cost and remedies* (2003) 32.

4 Education For All 'The hidden crises: Armed conflict and education' 2011 Education For All Monitoring Report, https://en.unesco.org/gem-report/report/2011/hidden-crisis-armed-conflict-and-education (accessed 24 March 2022). Also see United Nations International Children's Emergency Fund 'Education under fire: How conflict in the Middle East is depriving children of their schooling' 2015, https://childhub.org/sites/default/files/library/attachments/education_under_fire.pdf (accessed 12 March 2022).

5 UNESCO Global Education Monitoring Report 'New estimation confirms out of-school population is growing in sub-Saharan Africa' (2022) ED/GEMR/MRT/2022/PP/48 6.

6 MMN Ndanusa, QK Abayomi & Y Harada 'Examining the fragments and causes of increasing out-of-school children in Nigeria' (2021) 13 *Journal of African Development* 66; UNESCO (n 5) 6.

The impact of armed conflict has been extensively researched from different perspectives, including economic impact,[7] mental and psychological impact[8] and physical and social impacts.[9] This article contributes to this broader debate by examining the impact of arm conflict from a children's rights approach specifically on children's rights to basic education. The article further interrogates how the government can deploy technology to provide access to basic education for children in the affected areas.

The ongoing security situation in the northern part of Nigeria has led to the closure of thousands of public schools by the government in the region without viable alternative methods of enabling access to education for the affected children.[10] Consequently, millions of children in the region are without access to basic education. The question this article hopes to address is whether the security situation in Northern Nigeria absolves the government of its obligation to protect, promote, and fulfil every child's right to basic education in the region. How can the government fulfil its obligation amidst the security challenges? Can technological intervention be relied upon to guarantee access to basic education for children in the affected areas? Drawing from international, regional, and domestic legal instruments and jurisprudence, I make the case that even amidst the security challenge in the region, the government is obligated to protect, promote and fulfil the right to basic education of children in the conflict affected areas of Northern Nigeria. As a way of recommendation, the article explores how the government can deploy technological intervention to fulfil its obligation by delivering basic education to the affected children in the region.

The article is divided into three main parts. The first part examines the security situation in the northern region of Nigeria and its impact on the right to basic education of the children in the region.

7 P Serneels & M Verpoorten 'The impact of armed conflict on economic performance: Evidence from Rwanda' (2012) Discussion paper 6737. This paper explores the economic consequences of the civil war in Rwanda. Also see H Lopez & Q Wodon 'The economic impact of armed conflict in Rwanda' (2005) 14 *Journal of African Economies* 586.

8 T Miller et al 'Emotional and behavioural problems and trauma exposure of school-age Palestinian children in Gaza: Some preliminary findings' (2007) 15 *Medicine, Conflict and Survival* 368.

9 As above. Also see F Kumar 'Social and economic consequences of violent armed conflict: Evidence from displaced camps in Jammu and Kashmir, India' in EA Nyam & F Idoko (eds) *Examining the social and economic impacts of conflict-induced migration* (2019) 12; L Ammons 'Consequences of war on African countries' social and economic development' (1996) 39 *African Studies Review* 67.

10 ON Jacob & AG Ndubuisi 'The effect of incessant closure of school on school administration in Northern Nigeria' (2021) 1 *International Journal of Innovative Analyses and Emerging Technology* 99.

The second part of the article explores the question of whether the conflict situation absolves the government of its obligation toward the right to basic education for children in the affected region. To respond to these questions, the article explores various legal instruments protecting the right to basic education and the obligation it imposes on the government to provide access to basic education for the children in the region. The article discusses the effort of the government in ensuring that children in the region have access to basic education amidst the security challenge. In this regard, the article examines the Safe School Initiative introduced by the government in partnership with other stakeholders to ensure a safe learning environment for the children in the region. As a way of recommendation to the government, the last part of the article explores how technology can be deployed to deliver basic education to children in the comfort and security of their homes. In this regard, the article identifies three types of technology-supported interventions to deliver education services in a conflict environment. These are (i) mobile phone-based delivery of educational content; (ii) internet-enabled computer lab supporting education; and (iii) interactive radio instruction (IRI) to deliver primary education. The article examines the application of these three technological interventions in the context of their applicability and suitability in the conflict-affected areas in Northern Nigeria. Deducing from the evaluation of the three approaches, the article recommends the IRI approach as the most suitable and applicable approach for the government to deliver basic education to children in the conflict-affected areas. This recommendation is made based on the low infrastructural requirement and the simplicity of the implementation of such approach.

2 Security situation in Northern Nigeria

Since 2009 the northern part of Nigeria has been affected by security challenges. A terror organisation known as Boko Haram[11] has launched major attacks against the people of the region and

11 The group's official name as contained in its manifesto is Jamaiatu Ahlis Sunna Lidda'awatawaj-jahad, which translates to 'Association of Sunnis for the propagation of Islam and Jihad'. Ideologically, Boko Haram opposes not only Western education but also Western culture, and aims to establish Shar'ia law throughout Nigeria. For more on this, see SA Ekanem, JA Dada & BJE Ejue 'Boko Haram and amnesty: A philo-legal appraisal' (2012) 2 *International Journal of Humanities and Social Science* 2231; GU Ntamu & OE Ekpenyong 'Boko Haram: Threat to Nigerian national security' (2014) 10 *European Scientific Journal* 244; T Johnson 'Backgrounder: Boko Haram' (2011) Council on Foreign Relations, New York 31.

government institutions.[12] The conflict started as retaliation for the extra-judicial killing of the group leader, Mohamed Yusuf, by the Nigerian government.[13] The group launched its first attack in January 2010 in Borno state, resulting in the death of four people.[14] Since then it has intensified its attacks in various parts of the northern region. In 2011 the group bombed the police force headquarters in Abuja.[15] In 2012 the group sent a suicide bomber to bomb the United Nations (UN) headquarters in Abuja, resulting in the death of 21 people with several more injured.[16] On 20 January 2012 the group attacked the city of Kano, with more than 185 people killed.[17] From 3 to 7 January 2015 the sect carried out a raid in 16 villages in Northern Nigeria, which later came to be termed the 'Baga Massacre'.[18] An estimated 2 000 people were killed and several villages destroyed.[19]

Educational facilities and learners have not been spared in these attacks. In 2014 more than 276 girls were kidnapped from a boarding school in the town of Chibok in the region.[20] In 2017, 100 of the Chibok girls were released by the kidnappers.[21] At the time of writing this article, several of these girls were still in captivity. While Boko Haram started the attacks and kidnapping of learners in schools, other criminal elements, such as armed bandits, have taken advantage of the situation to perpetuate further kidnapping of learners, thereby increasing the general insecurity in the region. In 2018, 110 school girls were abducted from Dapchi in Yobe state for ransom.[22] On 27 February 2021 bandits attacked the Government

12 I Mantziko 'Boko Haram attacks in Nigeria and neighbouring countries: A chronology of attack (2014) 8 *Perspective on Terrorism* 63.
13 J Campbell 'Boko Haram origin, challenges and responses (2014) Norwegian Peacebuilding Resource Centre, Policy Brief. Also see O Badejogbin 'Boko Haram: An enquiry into the social-political context of Nigeria's counter-terrorism response' (2013) 17 *Law, Democracy and Development* 226.
14 Campbell (n 13).
15 A Walker 'What is Boko Haram' (2011) Special Report, https://www.usip.org/sites/default/files/SR308.pdf (accesses 10 March 2022).
16 United Nations 'United Nations unveils full list of staff killed in recent deadly attack in Abuja, Nigeria' (2011), https://news.un.org/en/story/2011/09/386582-un-unveils-full-list-staff-killed-recent-deadly-attack-abuja-nigeria (accessed 10 March 2022).
17 J Adibe 'What do we really know about Boko Haram?' in I Mantzikos (ed) *Boko Haram: Anatomy of a crisis* (2013) 10.
18 S Muscati 'Anatomy of a Boko Haram massacre' (2015), https://www.hrw.org/news/2015/06/10/anatomy-boko-haram-massacre(accessed 10 March 2022).
19 Muscati (n 18) 10. Also see H Umar & M Faul 'Boko Haram says responsible for massacre that left up to 2 000 dead' (2018), https://www.haaretz.com/boko-haram-says-responsible-for-baga-massacre-1.5363210 (accessed 10 March 2022).
20 A Vereje & CM Kwaja 'An epidemic of kidnapping: Interpreting school abductions and insecurity in Nigeria (2021) 20 *African Studies Quarterly* 88.
21 Vereje and Kwaja (n 20) 88.
22 N Orjinmo 'Nigeria's school abductions: Why children are being targeted' (2021), https://www.bbc.com/news/world-africa-56212645 (accessed 26 May 2021).

Girl's Secondary School in Jangebe, Zamfara state, and kidnapped approximately 300 learners from the school.[23] The girls were released on 1 March 2021.[24] Whether ransom was paid in all these kidnappings before the girls were released remains speculation.

In March 2021 around 30 students were kidnapped from a Forestry Mechanisation School in Kaduna state.[25] On 16 March 2021 gunmen on motor cycles stormed a primary school in Kaduna and abducted three teachers.[26] Some of these kidnappings have also led to the death of learners.[27] In June 2021, 94 learners were kidnapped in Birnin Yauri in Kebbi, and three of them died in the process.[28] The incessant kidnappings not only have an impact on access to education for millions of children, but they also serve as a catalyst or reason to discourage families from sending their children to schools, thereby not only impacting the desire of children to acquire education, but also violating their right to education as enshrined in various legal instruments. However, an argument could be made that parents are not prevented from relocating their children to safer schools, and as such the issue of conflict preventing children from accessing schools should not be a problem. While this is a valid argument, cost implications have to be factored into this arrangement, in that the parents may not be able to afford this. Such cost implications may include providing accommodation to the children or child, as the case may be, that is, if the location of the school is different and a distance from where the parents reside. Feeding costs will also have to be considered. Also, at the level of basic education, most of these children are still young and may not be able to care for themselves. Consequently, parents who cannot afford such costs and are not willing to risk the safety of their children will be discouraged from sending their children to school. Hence, the focus of this article on technology to deliver basic education to affected children in their homes by the government.

23 J Campbell 'Mass kidnapping in Nigeria captures International attention – Again (2021), https://www.cfr.org/blog/mass-kidnapping-nageria-captures-international-attention-again (accessed 26 May 2021).
24 As above.
25 J Diaz '30 students missing in northwest Nigeria in country's latest school kidnapping' (2021), https:www.npr.org/2021/03/12/976348734/30-students-kidnapped-in-northwest-nigeria-in-countrys-latest-school-kidnapping (accessed 26 May 2021).
26 C Claire 'Mass kidnapping for ransom attacks continue in Nigeria' (2021), Mass Kidnap for Ransom Attacks Continue in Nigeria (asisonline.org) (accessed 5 May 2021).
27 A Hazzd & G Mohammed 'Gunmen kill student, kidnap 42 in attacks on Nigeria school' (2021) *Reuters*, https://www.reuters.com/article/us-nigeria-security-kidnapping-idUSKBN2AH14Y (accessed 21 June 2021).
28 SABC News 'Three students dead after Nigeria school kidnapping, says principal' (2021), https://www.sabcnews.com/three-students-dead-after-nigeria-school-kidnapping-say-principal/ (accessed 21 June 2021).

3 Right to education and the obligation on the Nigerian state

3.1 The general provision protecting the right to basic education

Several international human rights instruments recognise the right to education. The first is the Universal Declaration of Human Rights (Universal Declaration) adopted in 1948.[29] Article 26(1) of the Universal Declaration states that '[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages'.[30] Although the Universal Declaration is not a legally-binding instrument, it created the framework or foundation for the development of other legally-binding instruments.[31] According to Onuora-Oguno, although the Universal Declaration did not use the term 'basic education', it uses concepts such as fundamental and elementary education, which can be regarded as denoting basic education.[32] In essence, the Universal Declaration not only provided for the protection of the right to basic education, but also espouses the purpose of education which, among other objectives, is to be directed towards the full development of the personality, strengthening, and respect for human rights, as well as the promotion of tolerance among nations.[33]

Given the significance of education for all, in 1960 UNESCO) adopted the Convention against Discrimination in Education (CDE).[34] Article 4(a) of CDE provides that state parties to the Convention must undertake to make primary education free and compulsory and to ensure that secondary education in its different forms is generally available and accessible to all. The CDE prohibits all forms of discrimination based on race, colour, sex, language, religion, political or other opinions, nationality, social origin, economic circumstances or birth.[35] The CDE seeks to promote equality in the provision of education. Consequently, the government is under an obligation to create the enabling environment for every child, including those in

29 Art 26(1) Universal Declaration.
30 As above.
31 K Beiter*The protection of the right to education by international law* (2006) 94. Also see L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *Potchefstroom Electronic Law Journal* 99.
32 AC Onuora-Oguno *Development and the right to education in Africa* (2019) 29.
33 Art 26(2) Universal Declaration.
34 Art 4(a) Convention against Discrimination in Education 1960.
35 Art 1 Convention against Discrimination in Education.

the conflict-affected areas in the northern region, to have access to basic education.

Article 26 of the Universal Declaration and article 4(a) of CDE were later reaffirmed and further developed by articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was adopted in 1966. Article 13(2)(a) of ICESCR urges state parties to make primary education compulsory and available at no cost to all, and provides that secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.[36] The protection accorded by ICESCR to the right to education is so significant that there can be no meaningful discussion of the right to education from an international law perspective without reference to the provisions of ICESCR. On this basis Beiter asserts that articles 13 and 14 of ICESCR arguably represent the most important codification of the right to education in international law.[37]

In addition to the general legal instruments protecting the right to basic education, specific international legal instruments protect the rights to basic education of specific vulnerable groups in society. The Convention on the Rights of the Child (CRC) is one of these instruments. CRC was adopted in 1989 and provides for the realisation of the child's right to education.[38] At the regional level, the African Charter on Human and Peoples' Rights (African Charter) also provides for education rights.[39] Article 17 of the African Charter stipulates that 'every individual shall have the right to education'. The African Charter on the Rights and Welfare of the Child (African Children's Charter) guarantees the right to basic education. Article 11(1) of the Children's Charter provides that '[e]very child shall have the right to an education'.[40] Article 11(3)(a) provides that basic education should be made free and compulsory,[41] while articles 11(3)(b) and (c) obligate state parties to make secondary and higher education progressively accessible for free.[42]

36 Art 13(2)(a) ICESCR.
37 K Beiter *The protection of the right to education by international law* (2006) 86.
38 Art 28(1)(a) of CRC provides that state parties must make primary education compulsory and free for everyone.
39 Art 17 of the African Charter stipulates that 'every individual shall have the right to education'.
40 Art 11(1) African Children's Charter.
41 Article 11(1)(a) African Children's Charter.
42 Arts 11(1)(b)-(c) African Children's Charter.

A unique aspect of the African Children's Charter is the use of the concept 'basic education'. Every other legal instrument examined so far has used concepts such as 'fundamental education', 'elementary education' and 'primary education'. The Children's Charter seems to be the first international legal instrument to use the term 'basic education'. Although the reason for the use of the concept of basic education in the African Children's Charter was not explained, one cannot rule out the influence of the 1990 World Declaration on Education for All (EFA Declaration). The concept of basic education was first introduced into the education discussion or lexicon in this Declaration.[43] Both the EFA Declaration and the adoption of the African Children's Charter took place in 1990, with the Children's Charter being adopted a few months after the EFA Declaration. The significance of the emphasis on basic education, as opposed to primary education, is the shift towards the substance of education that will enable individuals to perform certain basic functions in society, and also to contribute meaningfully to society. The purpose of such basic education is well enunciated in article 1 of the EFA Declaration.[44] The commitment to meet these basic learning needs has influenced member states to redesign their education systems and curricula to reflect these basic learning needs. For example, in Nigeria, basic education goes beyond primary education, which is six years of primary schooling and includes three years of junior secondary education, a total of nine years of schooling.

At the domestic level, the right to education in Nigeria is not constitutionally justiciable.[45] However, as noted by Akinbola, the enactment of the Universal Basic Education Act 2004 (UBE Act 2004)[46]

43 K Tomasevski 'Preliminary report of the Special Rapporteur on the Right to Education' (1999), http://repository.un.org/bitstream/handle/11176/223172/E_CN.4_1999_49-EN (accessed 8 March 2022).

44 Art 1 of the World Declaration on Education for All, Jomtien, Thailand 1990, provides: 'Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.'

45 *Federal Republic of Nigeria & Another v Registered Trustees of the Social Economic Rights Action Project (SERAC)* (ECOWAS 2009) Suit ECW/CCJ/0808, 27 October 2009. In this case the Nigerian government represented by Universal Basic Education Commission (UBEC) argued that education in the Nigerian Constitution is a mere directive principle of state policy and does not confer legal rights on anyone.

46 Sec 2(1) of the Universal Basic Education Act 2004 confers on every child in Nigeria the right to free and compulsory basic education.

and the Child Right Act 2003[47] has elevated the status of the right to basic education to a justiciable right in Nigeria.[48] Both Acts not only guarantee the right to free and compulsory basic education of every child in Nigeria, but also confer a legal obligation on the government at all levels to ensure the provision of free and compulsory basic education to every child in Nigeria. In addition, in *Republic of Nigeria and Another v Registered Trustees of the Social Economic Rights Action Project (SERAP)*, which was heard by the Economic Community of West African States (ECOWAS) regional court, it was confirmed that the right to basic education confers a legal entitlement on every child in Nigeria.[49] In the case of *Legal Defence and Assistance Project (LEDAP) GTE and Ltd v Federal Ministry of Education & Another* the Federal High Court in Abuja observed that every child in Nigeria has the right to basic education, on the basis of the UBE Act 2004 and section 18 of the Nigerian Constitution.[50] This overview of the international, regional and domestic legal instruments protecting the right to education illustrates that the right to basic education is adequately protected.

Having established that the right to education, specifically basic education, confers a legal entitlement on every child in Nigeria and confers the corresponding obligation on the state to provide such education; the question is whether this obligation is applicable in conflict situations.

3.2 Protection of the right to education in conflict situations

As demonstrated by the preceding discussion, the right to education is adequately protected at the international, regional and national levels. However, the question arises as to whether the state is under an obligation to provide access to basic education for children in conflict areas. This part addresses this question. Education, as a human right, should be guaranteed and protected for all individuals at all times. However, in conflict situations, states are often faced with the challenge of protecting the right to education. Article 2(1) of ICESCR requires states to achieve the right to education by making

47 Sec 15(1) of the Child Rights Act 2003 provides that every child has the right to free, compulsory and universal basic education and it shall be the duty of the government in Nigeria to provide such education.

48 BR Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) 10 *African Human Rights Journal* 467. Also see of EL Taiwo & A Govindjee 'The implementation of the right to education in South Africa and Nigeria' (2012) 33 *Obiter* 119.

49 *Nigeria v SERAC* (n 45).

50 *Legal Defence and Assistance Project (LEDAP) GTE and Ltd v Federal Ministry of Education & Another* (FIIC/ABJ/CS/987/15) (2017) NGIIC 2.

effective use of available resources.[51] However, insecurity and armed conflicts may limit the availability of such resources, thereby limiting the state's ability to fully realise the right to education. That being said, human rights apply in all contexts; people do not lose their human rights as a result of conflict.[52]

In other words, even in a conflict situation, children have the right to education which should be respected, protected and fulfilled by the state. The protection of the right to education in a conflict situation is regulated by the Geneva Convention of 1949 (Geneva Convention) and its two Protocols. Article 24 of the Geneva Convention requires states to ensure that children under the age of 15 years who are orphaned or separated from their families as a result of conflict are not abandoned.[53] It espouses that the religion and educational interests of these children are facilitated in all circumstances.[54] This can be interpreted to mean that regardless of the security situation in Northern Nigeria, the government is under an obligation to protect the right to basic education of children in Nigeria. Article 94 of the Geneva Convention provides that the detaining power shall encourage intellectual, educational and recreational pursuits.[55] It ensures that suitable premises are provided for the education of children.[56] The Convention emphasises that children should be allowed to attend schools either within the place of internment or outside.[57]

The protection of the right to education in a conflict situation is not limited to the Geneva Conventions of 1949 and its additional protocols. The protection of the right to education in a conflict situation can be deduced from the provisions of other international instruments. For instance, the Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 3 identifies the minimum core content of the right to education which must be realised immediately and at all times.[58] The minimum core content of the right to education in this context is basic education, which imposes a minimum core obligation on the state to provide basic education. Failure by states to meet these minimum core obligations will be in

51 Art 2(1) ICESCR.
52 Global Coalition to Protect Education from Attack (GCPEA) 'Lessons in War 2015: Military use of schools and universities during armed conflict (2015), https://www.scholarsatrisk.org/wp-content/uploads/2016/05/Lessons_in_War_2015.pdf (accessed 10 April 2022).
53 Art 24 of the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.
54 Geneva Conventions (n 53).
55 Art 94 Geneva Conventions (n 53).
56 Geneva Conventions (n 53).
57 As above.
58 ESCR Committee General Comment 3.

breach of their treaty obligations. The Maastricht Guidelines provide further interpretation of the minimum core obligation imposed on states. The Maastricht Guidelines provide that the minimum core obligation, in this case the provision of basic education, applies regardless of the availability of resources or any other factors and difficulties.[59] In this context, this may be interpreted to mean that the government is obligated to provide basic education even in a conflict situation. The Committee on the Rights of the Child on its day of general discussion on the right of the child to education in emergencies outlined the obligation of state parties to ensure access to education for children in conflict situations. According to the Committee, state parties to the Convention must prioritise education as an emergency measure, which must be understood as a 'essential protection' mechanism that must be included as part of the humanitarian response from the start of the emergencies in order to allow for the continuation of children's education and the development of their future capacities.[60] This again points to the fact that the security situation in the northern region of Nigeria does not absolve the government of its obligation of ensuring access to basic education to the children affected by the conflict in the region. The government is obligated to put in place measures to ensure the continuation of children's education in the region even amid the security challenges.

At the regional level, Bakare has observed that the provision of article 9(2)(b) of the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) are provisions that may be interpreted to accommodate the protection of the right to education in a conflict situation. This provision provides that internally-displaced persons must be provided with adequate humanitarian support, which should include food, shelter, water, medical care, education and other necessary services. It must also be noted that the African Charter does not allow for derogation of any of its rights, even during a conflict situation. This view was explicitly expressed by the African Commission on Human and Peoples' Rights (African Commission) in the case of *Commission Nationale des Driots de l'Homme et des Libertés v Chad*. In this case the Commission provides as follows:[61]

59 Maastricht Guidelines on Violation of Economic, Social and Cultural Rights paras 9-10.

60 Committee on the Rights of the Child Day of General Discussion on the Right of the Child to Education in Emergency Situations 49th session 15 September-3 October 2008.

61 (2000) AHRLR 66 (ACHPR 1994) para 21.

> The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a situation of civil war cannot be used as an excuse by the state for violating or permitting violations of rights in the African Charter.

The consequence of this is that the obligations imposed by article 17 of the African Charter, which guarantees the right to education, cannot be derogated from in an armed conflict situation. The Nigerian state's obligation to ensure that children in the northern region have access to basic education does not cease even in the face of the ongoing security challenges in the region.

At the domestic level, section 14(2)(b) of the Nigerian Constitution provides that 'the security and welfare of the people shall be the primary purpose of government'.[62] The combined reading of section 14(2)(b) of the Constitution with the UBE Act 2004 and the CRA 2003, which guarantee the right to basic education of children, simply means that it is the primary responsibility of the government to provide security and enabling environment for every child in Nigeria to receive basic education. States are also obligated to give effect to their international obligations through their respective domestic laws. Nigeria as a party to several of these international treaties has made an effort to give effect to some of these international laws. For example, as a dualist state,[63] Nigeria has domesticated the African Charter.[64] This means that the provisions of the Charter are now part of the domestic laws of Nigeria.[65] This position was confirmed by the Appeal Court of Nigeria in the case between *IGP v ANPP,* where the Court explicitly stated that the African Charter was part of Nigerian law, and must be upheld by the courts.[66] This can be interpreted to mean that article 17 of the African Charter, which provides for the right to education, cannot be derogated from by the state, even in the face of the ongoing conflict in the northern part of Nigeria.

Having established that the ongoing security situation in the northern region of Nigeria does not absolve the government of

62 Sec 14(2)(b) Constitution of the Federal Republic of Nigeria 1999.
63 Nigeria operates a dualist system. Sec 12(1) of the Constitution of the Federal Republic of Nigeria provides that no treaties can be applied domestically unless they have been incorporated through domestic legislation.
64 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.
65 E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria (2007) 51 *Journal of African Law* 260. Also see M Adigun 'The implementation of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child in Nigeria: The creation of irresponsible parents and dutiful children (2019) 51 *Journal of Legal Pluralism and Unofficial Law* 320.
66 *IGP v ANPP & Others* Appeal CA/A/193/M/05.

its obligation of ensuring access to basic education for children in the region, the question arises as to what the government has done to ensure that even in the face of the ongoing security situation or challenge in the region, the right to basic education of children is protected. What are the alternative means available for the government to ensure that the right to basic education of children in the region is fulfilled? How can the government leverage technology to deliver education to learners near their homes? How can government deliver the type of education a child from a rich home received during the COVID-19 pandemic, where such a child sits in the comfort of his or her father's house to receive an education? The next part responds to these questions.

4 Government's efforts to ensure access to education in the conflict situation in Northern Nigeria

In addition to the military effort to ensure that the conflict in the northern region of Nigeria is addressed and that children have access to education, the government also introduced the 'Safe School Initiative' programme in the region.

4.1 Safe Schools Initiative

The Safe Schools Initiative was introduced in 2014, against the backdrop of the kidnapping of over 200 school girls from Chibok Town by Boko Haram insurgents; the destruction of more than 910 schools; and the closure of over 1 500 schools between 2009 and 2015, which left approximately 600 000 children of school-going age without access to learning in the northern region of the country.[67] In May 2014 the Nigerian government, the UN Special Envoy for Global Education, Gordon Brown, and a coalition of Nigerian business leaders jointly launched the Safe Schools Initiative.[68] The Initiative seeks to improve the protection and safety of students, family members and teachers. It focuses on the following:[69]

67 German Cooperation 'Supporting the Nigerian safe schools initiative: Promoting safe and uninterrupted access to education for schools children' (2016) *Internationale Zusammenarbeit* (GIZ).

68 Global Coalition to Protect Education from Attack (GCPEA) 'Report: The Safe School Initiative' (2014), https://protectingeducation.org/news/report-the-safe-schools-initiative/ (accessed 25 February 2022).

69 As above. Also see CV Gever 'Questioning the Safe School Initiative and making a case for a safe school model: The media as the nucleus' (2016) 6 *Sokoto Journal of the Social Sciences* 2.

(1) rehabilitating the security infrastructure at schools and the establishment of community-orientated security concepts;
(2) transferring students from high-risk areas to safe schools and providing complementary trauma counseling; and
(3) providing education for internally-displaced persons in camps and communities.

The initiative was co-funded by the Federal Government of Nigeria; Nigerian business leaders; the German Federal Ministry for Economic Cooperation and Development; the Norwegian government; the African Development Bank; the United States Agency for International Development; and the United Kingdom Department for International Development.[70]

4.2 Evaluating the impact of the Safe Schools Initiative

While the initiative was loudly applauded, the impact of the initiative in terms of protecting and ensuring access to basic education for children in the region has been minimal. In terms of the positive impact of the initiative, more than 2 400 students have been transferred and given admission to government schools in safer parts of the country, where they have been given comprehensive support.[71] The Safe Schools Initiative has also helped to protect the students against further trauma and allowed them to receive access to education. However, in the overall scheme of things, the initiative has not prevented attacks on schools and the kidnapping of learners. If anything, since the introduction of the initiative, more schools have come under attack, more learners have been kidnapped, and more schools have been closed down by the government.[72] The reason for the failure of this policy to achieve its overall objective has been largely attributed to the lack of effective implementation of the policy.[73] The government has been accused of abandoning the Safe Schools Initiative. In the wake of the recent increase in attacks and kidnapping of learners, the Nigerian National Assembly (Parliament) had set up a committee to investigate the reasons for the abandonment of the initiative.[74] Parliament urged the federal

70 German Cooperation 'Supporting the Nigerian Safe Schools Initiative: Promoting safe and uninterrupted access to education for school children' (2016) *Internationale Zusammenarbeit* (GIZ).
71 I Lawal 'Unending attacks on schoolchildren despite Safe School Initiative' *The Guardian* 24 December 2020, https://guardian.ng/features/education/unending-attacks-on-schoolchildren-despite-safe-school-initiative/ (accessed 25 February 2022).
72 As above.
73 S Aborisade 'Nigeria's Safe School Initiative designed to fail – Lawal' *Punch* 1 October 2021, https://punchng.com/nigerias-safe-school-initiative-designed-to (accessed 25 February 2021).
74 As above.

government to collaborate with state governments to restore, revive and revalidate the Safe Schools Initiative and to deploy special security personnel to schools in Nigeria.[75] Given the failure of the Safe Schools Initiative, how can access to basic education amid the ongoing security challenges be realised in the region? What role can technology play to ensure access to the basic education of children in the region?

5 Mobilising technology to guarantee the right to basic education of children in the conflict area of Northern Nigeria

The COVID-19 pandemic has caused the greatest disruption in global education systems in history where schools were shut down, affecting nearly 1,6 billion students in over 190 countries across all continents.[76] To ensure the continuity of education, distance learning solution through technological intervention was introduced. While COVID-19 has had a huge negative impact on access to education, it has also created the opportunity for the incorporation of systems of flexible distance learning by exploring opportunities to further invest in technological innovations.[77]

E-learning is viewed as the deployment of electronic media to deliver education and monitor learners' performance.[78] It is an innovative approach for delivering a well-designed and interactive learning environment to anyone, at any place, by using the internet and digital technologies.[79] It is the convergence of the internet and learning. The application and process of e-learning include computer-based learning; web-based learning; visual classrooms; and digital collaboration where content is delivered through the internet, audio or videotapes, satellite television and CD-ROM.[80]

75 L Baiyewu 'Reps probe Jonathan's N2bn Safe School Initiative' *Punch* 7 May 2021. https://guardian.ng/features/education/unending-attacks-on-schoolchildren-despite-safe-school-initiative/ (accessed 25 February 2022).

76 United Nations Sustainable Development Group (UNESDG) 'Policy brief: Education during COVID-19 and beyond (2020), https://unsdg.un.org/sites/default/files/2020-08/sg_policy_brief_covid-19_and_education_august_2020.pdf (accessed 27 February 2022). Also see A Schleicher 'The impact of COVID-19 on education insights from education at a glance 2020' (2020), https://www.oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf (accessed 27 February 2022).

77 Schleicher (n 76).

78 N Hedge & L Hayward 'Redefining roles: University e-learning contributing to life-long learning in a networked world' (2004) 1 *E-Learning* 129. Also see TO Ajadi, O Salawu & FA Adeoye 'E-learning and distance education in Nigeria' (2008) 7 *Turkish Online Journal of Educational Technology* 61.

79 Ajadi et al (n 78) 1.

80 As above.

Leveraging the power of technology to deliver education allows learners living in remote areas access to education. The benefit of leveraging technology for the delivery of education in the context of the security challenge in the northern region is substantial. Such a learning approach has the potential to prevent learners from congregating in one location, where they become easy targets for kidnapping by bandits and Boko Haram terrorists, as has been the unfortunate practice in recent years. The use of technology to deliver education to students will allow them to obtain basic education in the comfort and security of their own homes, thereby reducing the security risks they face at conventional schools.

While the deployment of technology will assist the government to fulfil its obligation towards the right to basic education in the security-challenged region of Northern Nigeria, the realities are more complex. A major challenge to such an initiative is the issue of infrastructure. For this initiative to be successful, it will require massive investment from the government in digital learning. This will include a stable power supply; access to the internet; laptops; computers; and adequate training for the teachers to use these innovative educational platforms. Unfortunately, the lack of such infrastructure in the region will make such digital learning difficult. That said, a study sponsored by the United States Agency for International Development (USAID) has identified various technology-supported interventions to deliver education services that promote equal access to education for children in conflict-affected environments.[81] The study identifies three types of technology-supported intervention to deliver education services in a conflict environment. These are:

(1) mobile phone-based delivery of educational content for improving student learners, aimed at both teachers and students;
(2) internet-enabled computer lab supporting K-12 education and youth employment-focused training; and
(3) interactive radio instruction (IRI) in primary education.

The study reveals that the decision to adopt any of these technological interventions to deliver education services is dependent on the context and the advantages and disadvantages of each of these technological interventions.[82] Consideration will have to be given to available infrastructure, to determine the choice of the option to adopt which best suits the delivery of the educational needs of learners in the conflict-affected areas of Northern Nigeria.

81 USAID 'Using technology to deliver educational services to children and youth in environment affected by crisis and/or conflict' (2013) United States Agencies for International Development of the United States 3.
82 As above.

In the year 2000 UNESCO piloted a project to enhance girls' literacy skills through the use of mobile phones in Pakistan.[83] Pakistan as a country cannot be described as affected by crisis or conflict. However, security challenges to learners are compromised in some pockets of the country.[84] In addition to the security challenges, certain prevailing traditional practices in parts of the country have prevented some parents from sending their children, particularly the girl child, to school regularly. This has resulted in extremely low literacy rates.[85] To ensure access to education for the girl child, UNESCO piloted a project that distributed mobile phones to a group of 250 semi-literate girls located in three districts between rural and semi-urban areas.[86] School work was sent to these learners via text messages, in which they were encouraged to copy it into their work books. The girls were also encouraged to create and send messages on learning challenges they might encounter. The research report reveals that over the four months, in which the programme was piloted, the 'girls' literacy skills improved by a weighted average of 67 per cent'.[87] The phone-based approach enables the learners to learn outside of schools as self-directed learners in a small but significant way.[88]

The infrastructure required for the phone-based approach is a simple phone (non-Android) that can receive and send text messages and a pre-paid SIM card. Given that Nigeria has over 90 per cent cell phone network coverage, including the conflict-affected areas,[89] the phone-based approach would have been a suitable technological intervention to deliver basic education services for children in the conflict-affected areas. The mobile phone-based approach as shown in the Pakistan case study will ensure that children who have been prevented from going to school as a result of the security challenge in Northern Nigeria have access to basic education from the comfort and security of their parents' homes.

However, the cellphone-based approach has its drawbacks in the conflict-torn region of Northern Nigeria. The terrorists did not spare cell phone network infrastructures from their attacks. Furthermore,

83 I Miyazawa 'Literacy promotion through mobile phones' (2000) 13th UNESCO-Applied International Conference and World Bank-Keris High Level Seminar on ICT in Education; Project Brief paper, https://silo.tips/download/literacy-promotion-through-mobile-phones (accessed 27 February 2022).
84 Miyazawa (n 83) 37.
85 USAID (n 81).
86 Miyazawa (n 83) 37.
87 As above.
88 As above.
89 P Gilbert 'Nigerian internet and mobile penetration grows' (2021), https://www.connectingafrica.com/author.asp?section_id=761&doc_id=767400 (accessed 3 June 2022).

in order to disrupt the coordinated activities of the terrorist groups in the affected areas, the government had to instruct network providers to temporarily shut down network operations in the affected areas at some point.[90] Given such challenges in the region, the cell phone-based approach will not be a reliable approach for such learning activities in the conflict-affected areas.

The second technological intervention for the delivery of education in conflict environments identified by the USAID-sponsored research is the interactive radio instruction (IRI) approach.[91] The IRI is considered an instructional methodology that combines an audio component, which is delivered by an audio teacher through a radio, audio cassette or MP3 player, with learning activities carried out by students. The IRI programme has been adopted as a technological intervention to deliver education services for children in several conflict-affected areas, which include Somalia and South Sudan.[92] In 2005 the programme was introduced in Somalia to ensure that even amidst the conflict, children have some sort of basic education.[93] Teachers used radio to receive and broadcast programmes daily, three hours per day, and five days per week. Digital players were also provided to teachers and learners to deliver basic skills that covered life skills, health, conflict prevention and mediation.

The programme continued until 2011 and achieved a remarkable result. The IRI audio programme provided 330 000 children in Grades 1 to 5 access to basic education.[94] According to the implementation agency, the programme assisted in providing stability to fragile communities by providing consistent education service, engaging families and communities, and teaching knowledge and skills that both children and adults require to move communities out of conflict and poverty.[95] The low infrastructure requirement of the IRI approach also made it a perfect fit for the conflict-affected region of Northern Nigeria. As demonstrated in the case of Somalia, the application of IRI provided 33 000 children in conflict-affected areas with basic education and reduced the impact of the conflict on the

90 A Adepetun et al 'Zamfara residents lament indefinite telecoms shutdown amid rise in bandits' activities' *The Guardian* 28 September 2021, https://guardian.ng/news/zamfara-residents-lament-indefinite-telecoms-shutdown-amid-rise-in-bandits-activities/ (accessed 3 June 2022).
91 USAID (n 81).
92 As above (n 91).
93 As above.
94 USAID 'Final Report of the Somalia Interactive Radio Instruction Programme' (2012), https://pdf.usaid.gov/pdf_docs/pdact951.pdf (accessed 4 March 2022). Also see Education Development Centre (EDC) 'The Somalia interactive radio instruction programme', https://www.edc.org/sites/default/files/EDC-Education-Fragility-Series-Somalia-SIRIP.pdf (accessed 4 March 2022).
95 Education Development Centre (n 94).

children. I therefore recommend that the government, as part of its obligation towards fulfilling the right to basic education, provides the IRI approach in the conflict-affected areas of Northern Nigeria, to enable the children to have access to basic education.

The third technological intervention to deliver basic education to conflict-affected areas identified by the research is internet-enabled computer labs for education and training. Since 2003 the UN Refugee Agency (UNHCR) and Microsoft along with other partners have collaborated to establish community technology access (CTA) programmes in refugee camps in over 22 countries, located in Africa, East and Central Europe, Asia and the Middle East.[96] While each country's programme may be different and adapted to suit the local context, the overall aim remained the same, which is to enhance access to education. For example, in Kenya's Dadaab refugee camp, which hosted an estimated 475 000 refugees, mostly children, three CTA labs were established.[97] Each of these labs was fitted with 20 computers, each connected to the internet, a basic printer and a video projector.[98] The CTAs provide formal education, basic literacy skills, long-distance learning and vocational education. The report suggests that the programme has been largely successful. It resulted in an improved level of retention in primary and secondary education. It also increases girls' enrolment in science classes.[99]

While the CTA has proven to be a significant technological intervention that enables access to basic education for children in a conflict environment in other climes, its successful application in Northern Nigeria could be challenging for several reasons. Computer labs require reliable electricity to function effectively and, given the unreliable power supply in the country, it will be problematic to successfully implement such a programme. Compared to radio and mobile telephones, computer labs are more expensive to set up and have a higher maintenance cost. Although it is the government's obligation to put measures in place, including setting up computer labs that will ensure access to basic education for children in Northern Nigeria, prevailing financial constraints will make such a programme difficult to realise.

Another reason why computer labs might not be such a good idea in the prevailing security situation in Northern Nigeria is the fact that

96 USAID (n 94).
97 As above. Also see UNHCR 'Kenya: Education', https://help.unhcr.org/kenya/dadaab/education/ (accessed 4 March 2022).
98 USAID (n 94).
99 As above.

computer labs will require bringing several learners to learn in one computer lab. This will make such learners a soft target for kidnapping for ransom. The idea is to enable the learners to have access to basic education from the comfort and security of their parents' homes and, if that is the case, computer labs are not a viable option under the current circumstances, unless the government has the resources to provide each learner with a computer and internet services to learn from their homes, with adequate training on the use of the computers. Comparatively, even though computers will have been better learning tools for the children, given the prevailing security challenges, the IRI instruction approach will be a better option for the government to consider, as it is affordable, easier to operate for the learners, and will not require the children to congregate in computer labs.

6 Why the Nigerian government should look in the direction of the IRI approach

After considering the advantages and disadvantages of the three technological approaches to delivering basic education to children in the affected areas, the article recommends the IRI approach to be more appropriate and applicable in the Nigerian context. The IRI is recommended in this case for various reasons. Radio receivers are simple in design and inexpensive, especially for people living in rural areas. It is also appropriate because some of these are battery operated, making users less reliant on electricity supply. This is a major advantage, because electricity supply, not only in the conflict-affected areas of Northern Nigeria but in the entire country, remains a major challenge. As such, any recommendation in terms of a suitable technological approach to deliver basic education in the affected areas must consider this challenge. Adopting the IRI learning approach means that the lack of power supply will not affect delivery of basic education to the affected children. It also is a suitable technological intervention to deliver basic education to the affected children as the radio requires very little attention and its signal can reach remotes areas.

Moreover, the IRI is an approach that has already been adopted to deliver basic education for children in the northern region during the COVID-19 lockdown.[100] During the lockdown USAID,

100 G Njoku 'The continued relevance of radio in the digital age' (2022), https://www.thecable.ng/the-continued-relevance-of-radio-in-the-digital-age (accessed 24 February 2023). Also see MA Kombol 'Potential uses of community radio in political awareness: A proposal for Nigeria' (2014) 24 *New Media and Mass Communication* 12.

in partnership with the United Nations Children's Fund (UNICEF), supported several states in the northern region to provide radio learning programmes.[101] For example, more than 300 000 learners in Borno state received lessons in four core subject areas, including mathematics and English, through the radio learning programme. A similar programme was introduced by UNICEF and USAID in Sokoto and Bauchi state during the COVID-19 lockdown;[102] 670 lessons were aired over radio and television aimed at learners in Grade 1 to 3.[103] The lessons were provided in English and the Hausa language, which is one of the languages spoken in Northern Nigeria. The lessons were broadcast for several hours per day, with the expectation to reach a total of 600 000 students.[104]

Given that the IRI has already been tested and deployed to deliver basic education for children in the region during the COVID-19 lockdown, it can also be deployed to provide basic education to children affected by the conflict. In this case the government, as the duty bearer of the right to basic education, has to take the initiative to identify these children and to set up such radio learning programmes to guarantee their access to basic education.

7 Conclusion

The article started by raising a pertinent question, namely, whether the security situation in Northern Nigeria absolves the government from its obligation to promote, protect and provide the right to basic education for children in the region. This question was raised in the context of the security situation in the region where thousands of schools have been closed down and millions of children are without access to education. By interrogating various international, regional and domestic legal instruments, the article demonstrated that even in a conflict situation the government is under an obligation to protect and provide basic education for children within its jurisdiction. The closing down of schools as a consequence of the security challenges, without making alternative arrangements for the affected children to have access to basic education, amounts to a violation of their rights to basic education.

101 PE Ephraim 'The potentials of radio in combating misinformation about COVID-19 in Nigeria' (2020), https://www.intechopen.com/chapters/73338 (accessed 25 November 2023).
102 A Fugate 'Radio lessons in Northern Nigeria support reading during COVID-19 pandemic', https://www.creativeassociatesinternational.com/stories/radio-lessons-in-northern-nigeria-support-reading-during-the-covid-19-pandemic/ (accessed 25 February 2023).
103 As above.
104 As above.

As a way of recommendation, the article draws copiously from the research work sponsored by USAID on the use of technology to deliver basic education in conflict-affected countries. Drawing lessons from such research work, the article recommends that government explore technological innovative learning techniques such as the interactive radio instruction approach, which is relatively affordable and requires less complex infrastructure to deliver basic education to the children affected by the conflict in the northern region of Nigeria. A failure by the government to take every necessary measure, including technological measures, to provide education to the millions of children that do not have access to basic education because of the ongoing security challenge, will not only amount to a violation of their obligation towards the right to basic education, but will also mean subjecting millions of children to a bleak and an uncertain future.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: P Vengesai '*Mangwende v Machodo*: Bride price refund and the violation of women's rights in contemporary Zimbabwe' (2023) 23 *African Human Rights Law Journal* 205-217
http://dx.doi.org/10.17159/1996-2096/2023/v23n1a9

Mangwende v Machodo: Bride price refund and the violation of women's rights in contemporary Zimbabwe

*Priccilar Vengesai**
Law Lecturer, Herbert Chitepo Law School, University of Great Zimbabwe
http://orcid.orcid.org/0000-0003-1113-0380

Summary: *This article undertakes an analysis of a Zimbabwean High Court case,* Mangwende v Machodo*, on the refund of the bride price. It is ascertained in the article that the bride price is a legal requirement for customary marriages, hence constituting a significant founding culture for customary marriages. A point of contention motivating the article is, as was held in the case under discussion, that a cheating wife's bride price may be withheld by the husband who would have not paid it in full or, where it was paid up, he can be refunded in full. The gap that exists in this scenario is that, in the case of the husband cheating, the wife does not have a corresponding recourse. The one-sidedness of this custom displays a grave inequality to the prejudice of women. It is also argued that the bride price refund violates the wife's dignity. It is therefore recommended that customary law around the bride price must be developed to meet the constitutional demands of gender equality. In developing this customary law, an important factor to consider is the duration of the marriage. In a situation where a couple stayed together for a reasonable period, each party playing his or her role, it cannot be fair for the husband to be refunded. There could be scenarios where the wife cheats, soon after the bride price was paid and before the couple*

* LLB (Fort Hare) LLM (KwaZulu-Natal) LLD (Pretoria); priccssy@yahoo.com

move in together as husband and wife, when the bride price can be refunded. Furthermore, not all bride price items are refundable and, therefore, those components of bride price that can be refunded must be clearly defined.

Key words: *bride price; refund; women's rights; culture; equality*

1 Introduction

Pursuant to the accepted standing principle of legal pluralism in Zimbabwe, courts are at liberty to apply either general law or customary law while greatly relying on the circumstances of each case. Major factors that come to play when the court is to decide whether to apply customary law or general law are well tabulated in the Customary Law and Local Courts Acts.[1] These factors include, primarily, the justice of the case; the agreement of the parties; the nature of the case; the surrounding circumstances;[2] and the kind of life that the parties were living.[3] The case of *Mangwende v Machodo*[4] (*Mangwende* case) is an extraordinary case of a bride price claim where the court chose to apply customary law in determining whether the father of an adulterous daughter (the appellant) was or was not entitled to payment of the balance of the bride price. The Court made reference to the fact that under customary law, a husband is entitled to be given a refund of the full bride price if the wife is unfaithful.[5] This article will analyse this judgment and unpack difficulties associated by its implications and effects on women's rights in Zimbabwe. The analysis is done against the background that Zimbabwe currently is on its firm drive to establish constitutionalism. Women's rights that were lagging behind in the preceding Constitution[6] have been taken aboard in an elaborative way in section 80 the Constitution of Zimbabwe, which provides:[7]

> (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

1 Customary Law and Local Courts Act ch 7:05 of 2004.
2 Sec 3(1)(a) Customary Law and Local Courts Act (n 1).
3 Sec 3(1)(b) Customary Law and Local Courts Act.
4 *Mangwende v Machodo* 2015 ZWHHC 755.
5 AS Chigwedere *Lobola: The pros and cons* (1982) 2 defines *lobola* as 'all the payments made by the bridegroom and his party to the father-in-law and his party to secure the services of a bride'.
6 Constitution of Zimbabwe 1980.
7 Constitution of Zimbabwe Amendment 20 of 2013 (Constitution).

(2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
(3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.

Furthermore, equality and dignity are taking centre stage both as values underpinning the Constitution and as standalone rights.[8]

2 Facts of the case

In the *Mangwende* case a couple who had been in an unregistered customary union divorced after it was discovered that the wife had been involved in a series of adulterous relationships. During the trial at the magistrate's court it was submitted to the court that the wife had cheated on her husband (the respondent) on multiple occasions with multiple people, who included the respondent's elder and younger brothers, a nephew and a herd boy. The respondent eventually divorced his wife and sent her back to her parents' home. The wife's father (the appellant) decided to demand the outstanding bride price from the respondent. The appellant approached the magistrate's court to claim the outstanding bride price. The respondent opposed the application, objecting to pay the balance of the bride price as the wife had cheated on him with multiple people.

3 Issues

The main issue to be considered by the court *a quo* was whether under customary law the appellant was entitled to be paid the balance of the bride price by the respondent in the circumstances, namely, that the appellant's daughter was divorced because of her adultery. For the above issue to be properly answered, the court *a quo* had to establish whether the wife indeed had been unfaithful to the respondent and with whom. The appellant court was seized with the issue of whether the court *a quo* had properly applied customary law by denying the appellant's claim of the outstanding bride price.

8 Sec 3(1) of the Constitution provides: 'Zimbabwe is founded on respect for the following values and principles: … (f) recognition of the inherent dignity and worth of each human being; (g) gender equality'.

4 Ruling

Upon consideration of all the evidence, the court *a quo* concluded that there was uncontroverted evidence that the appellant's daughter had committed adultery with multiple partners ranging from the respondent's brothers, nephews and the couple's herd boy. The court *a quo* held that the wife had broken the marriage contract by cheating on the respondent. Due to this breach the appellant was not entitled to any outstanding balance of the bride price. The magistrate proceeded to rule that under customary law, a man who would have paid the full bride price was entitled to a full refund if the wife engages in adultery.[9]

The appellant was aggrieved by the judgment of the court *a quo* and lodged an appeal to the High Court. In the appeal he requested that the dismissal of his claim for payment of the outstanding bride price by the magistrate's court be set aside. Mwayera and Uchena JJ dismissed the appeal with costs. In dismissing the appeal, the appellate court stated:[10]

> In coming up with the disposition of the matter whereby the court a *quo* dismissed the claim for the balance of *lobola,* the trial magistrate properly exercised his discretion and I find no fault in his findings. The court ascertains that, the appeal lacks merit and should fail. It is ordered that the appeal be dismissed with costs.

The appellate court also stated that the very purpose of bride price was flaunted by the appellant's daughter when she engaged in extramarital sexual relations, thereby violating the marriage relationship.[11]

5 Analysis

5.1 Position of bride price under Zimbabwean law

The highly-celebrated case of *Conradie v Rossouw*[12] established the principle that 'consideration' (bride price) was not part of Roman-Dutch law. Similarly, bride price is not part of general law in Zimbabwe, hence it is not a requirement for a civil marriage.[13] On the contrary, customary law, as provided for in section 7 of the

9 *Mangwende v Machodo* (n 4).
10 As above.
11 As above.
12 *Conradie v Rossouw* 1999 AD 273.
13 Marriage Act ch 5:17 of 2022 secs 18-27.

Customary Marriages Act, makes it a requirement that the guardian of a woman must consent to the marriage, and the marriage officer must ascertain that there was payment of a consideration in order for a customary marriage to subsist.[14] In particular, the section provides the following as the legal requirements for customary marriages:

> Solemnisation of marriage
>
> (1) If the customary marriage officer is satisfied –
>
> (a) save where a magistrate has fixed the marriage consideration in terms of section five, that the guardian of the woman and the intended husband have agreed on the marriage consideration and the form thereof …

Notably, the Customary Marriages Act does not use the term 'bride price', but rather uses the word 'consideration'. Section 2 of the Customary Marriages Act defines a marriage consideration to be 'the consideration given or to be given by any person in respect of the marriage of an African woman'. Although it does not expressly define the word 'consideration' as a bride price, this definition undoubtedly equates consideration with the customary bride price. Moreover, the Parliamentary House of Senate interpreted 'consideration' required in terms of section 7 of the Customary Marriages Act to mean *lobola*.[15] *Lobola*, undeniably, is a customary bride price.[16] Similarly, the Marriage Bill that was passed in Parliament and now awaits presidential assent has unequivocally made bride price (*lobola*) a legal requirement of customary marriages.[17]

Unregistered customary unions rely heavily on the payment of bride price as proof of their existence. This position was echoed in the case of *Hosho v Hasisi*[18] where it was held that for a union to qualify as an unregistered customary union, certain cultural practices, which include the payment of *lobola,* are obligatory upon its formation. The Court held that payment of *lobola* remains the most valued proof of an unregistered customary union. The Court reached this decision after the respondent in that matter (Hasisi) had been given an eviction notice from a house she claimed to have been their matrimonial home with her deceased husband. Hasisi's stepson sold the house without her consent. She argued that she had equal

14 Marriage Act ch 5:17 of 2022 sec 16.
15 Marriage Bill in Parliament, http://www.veritaszim.net/sites/veritas_d/files/Marriages%20Bill%20HB%207A-2019%20-%20Minister%27s%20Proposed%20Amendments%20for%20Senate%20Committee%20Stage.pdf (accessed 20 June 2021).
16 N Ansell '"Because it's our culture!" (Re)negotiating the meaning of *lobola* in Southern African secondary schools' (2001) 27 *Journal of Southern African Studies* 697.
17 Marriage Bill in Parliament (n 15).
18 *Hosho v Hasisi* 2015 ZWHHC 491.

claims to the house since she was a spouse of the deceased who was the father to her stepson. The Court had to establish whether or not a valid unregistered customary union existed. In establishing the existence of a valid unregistered customary union, the Court considered whether or not bride price was paid. Analogously, in the case of *Gwatidzo v Masukusa*[19] the payment of bride price was also used as an attestation to the existence of an unregistered customary union. Corroborating this position, Chisi points out that *lobola* is verification, in concrete terms, that families have agreed to the marriage of their son and daughter.[20]

5.2 Correlation between bride price and infidelity

The reading of the judgment establishes a link between bride price and the fidelity of a wife. Before arriving at its decision, the Court was supposed to have ascertained why the bride price was paid under customary law. If it is paid to secure the fidelity of a woman by a husband, then it may certainly be refunded when the wife cheats. However, literature abounds that supports the position that the payment of bride price is not limited to securing the fidelity of a wife. Bride price, traditionally regarded as a token of appreciation to the parents of a bride, usually in the form of cash or livestock, is an entrenched part of marriage customs in Zimbabwe.[21] One main function of the bride price is that it symbolises the absolute transfer of rights in a wife's procreative and economic capacity from the wife's family to her husband's family.[22] A wife, therefore, is expected to fulfil a reproductive and economic role for her husband during the subsistence of the marriage.[23] Chigwedere views the bride price as a form of marriage payment meant to build a relationship between the two families and also to demonstrate the ability of a man to take care of his family.[24] Furthermore, under customary marriages, the bride price is said to be paid to show that the husband values his wife.[25] In the same vein, Chisi asserts that engaging in sexual relations with a woman for whom a man has not paid the bride price means that the man regards such a woman as one of lesser value and, therefore, 'one of whiling up time, a kind of toy'.[26]

19 *Gwatidzo v Masukusa* 2000 (2) ZLR 410 (H).
20 JT Chisi 'Lobola in Zimbabwe: A pastoral challenge' Master's dissertation, University of Pretoria, 2018 82.
21 Chigedere (n 5) 3.
22 Chisi (n 20) 82.
23 Chisi (n 20) 83.
24 Chigwedere (n 5) 2.
25 M Gelfand *The genuine Shona: Survival values of an African culture* (1999) 171.
26 Chisi (n 20) 84.

Chireshe and Chireshe claim that the bride price symbolises gratitude to the wife's family for birthing and raising their daughter who, by virtue of the traditional marriage, is expected to broaden her husband's family by birthing children.[27] Since the husband paid the bride price, the children become members of his lineage and ancestry. The bride price also secures a lineage in the bride's family as, according to the Shona custom, the cows paid as bride price will be used by the elder brother to pay the bride price for his own wife, thus securing his lineage.[28]

Arguably, the Court in the *Mangwende* case gave bride price a different meaning as it tied it to the fidelity of a wife and disregarded all other purposes it carries. The judgment exposes how women lack the power to negotiate for themselves in the bride price transaction and eventually lack agency to determine their sexual rights. In this case, the Court only established that the wife's sexual activities with third parties concerned were not arranged by the family and, hence, it was not a condoned infidelity. This means that her infidelity was going to be condoned if it was a choice that was made by other people.

Another point of contention is the Court's failure to inquire into the reason why the wife of the respondent was unfaithful. In traditional Shona custom, the infidelity of the woman was condoned, even encouraged, where the husband was infertile; hence the Shona idiom *gomba harina mwana* which alludes to the fact that a child born to a married woman belongs to her husband even if she has cheated and fallen pregnant as a result of an extramarital affair.[29] This demonstrates how infidelity itself is not a fundamental breach of a customary marriage.

5.3 Should bride price be refunded?

Long ago, when a man failed to present a hoe, or *badza*, as bride price in marriage, he had the option of paying bride price through labour in a practice known as *kutema ugariri*.[30] A man seeking marriage would stay with the wife-to-be's family and work for his bride until the father-in-law was satisfied with his work, when he would be given his bride.[31] Contemporary bride price includes cash,

27 E Chireshe & R Chireshe 'Lobola: The perceptions of Great Zimbabwe University students' (2010) 3 *Journal of Pan African Studies* 211.
28 Gelfand (n 25) 45.
29 'Gomba harina mwana minister says' (2013), https://insiderzim.com/gomba-harina-mwana-minister-says (accessed 25 April 2022).
30 Chigwedere (n 5) 3.
31 As above.

groceries, cattle and clothes for the bride's parents.[32] This nature of bride price depicts that at divorce, some of the bride price items would have been used up or shared among relatives who would have been present at the *lobola* function. In some cases, cows or cattle would have died or been sold or, in some cases, passed on for inheritance or other customary law trading. Henceforth, the nature of the bride price makes its full refund, at any stage, very problematic.

5.4 Bride price refund and women's right to dignity

The issue then takes a different turn when one evaluates the dignity of a woman *vis*-à-viz the issue of bride price refund. At its best, the concept of human dignity is the belief that all people hold a special value that is tied solely to their humanity. As long as one is a human being they deserve to be treated with dignity. The United Nations (UN) Charter[33] and the Universal Declaration of Human Rights (Universal Declaration)[34] set the tone for the recognition of human dignity. Subsequently, the International Covenant on Civil and Political Rights (ICCPR) makes it clear that even those whose liberty has been legally deprived deserve to be treated with dignity.[35] At regional level the protocol on women's rights of the African Charter on Human and Peoples' Rights (African Charter) articulates that member states must observe women's dignity.[36]

Despite its prominence in the international legal discourse, dignity is one of the key founding values in the Constitution as provided for in section 3. It also is a right clearly provided for in section 51 of the Constitution. The section provides that '[e]very person has inherent dignity in their private life, and the right to have that dignity respected and protected'. The endowed dual status of human dignity by the Constitution portrays its importance and calls for that magnified regard.

Human dignity has a broad meaning that covers a number of different values,[37] and it is difficult to capture its meaning in precise terms.[38] The Zimbabwean courts have not yet ventured a

32 Ansell (n 16) 699.
33 United Nations Charter of the United Nations 24 October 1945.
34 Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
35 Art 10 International Covenant on Civil and Political Rights 19 December 1966.
36 Art 3 of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 provides for the right to equality for women in Africa.
37 *Le Roux v Dey* 2011 (3) SA 274 (CC) 138.
38 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 29.

comprehensive definition of human dignity. Nonetheless, De Vos and Freedman assert that the right to dignity implies that human beings must be protected from conditions or treatment that offends one's worth in society.[39] They go on to say that treatment that may be considered 'abusive, degrading, humiliating or demeaning' is a violation of this right. Haysom regards any treatment that categorises a human being as an object to be a violation of the right to dignity enshrined in section 51 of the Constitution.[40] With regard to the case of *Mangwende*, the act of refunding the bride price commodifies and objectifies women. Women become objects that can be returned for a refund, thereby demeaning their humanity and dignity.

It is not disputed that the Constitution in section 16 allows the practice of customs and culture of one's choice. However, the practice of culture must not be at the expense of the inherent dignity of a woman.[41] When their sexual rights are tied to bride price, women become sexual slaves and that takes away their sexual agency.[42] Agency is defined as the ability to make choices and to set goals and achieve these.[43] Women's sexual agency is the ability for a woman to realise and act on their wishes, interests and needs in relation to their sexual decision making and sexual behaviour.[44] Once this sexual agency is taken away from them, it equally affects their sexual rights and it attacks their inherent dignity since they cannot exercise their sexual rights in a way that human beings are expected to do.[45] It is thus submitted that, because of the customary law that was applied, the appellant's daughter's sexual rights and sexual agency were violated. The payment of *lobola* for a woman under customary marriage takes away the woman's right to decide on who to have intercourse with, and when and how to have it. The appellate court's inquiry into whether the sexual relations that the appellant's daughter had with the respondent's relatives were a family arrangement alludes to the woman's lack of sexual agency. When the Court realised that it had not been arranged, it became illegal and it was then regarded as an infidelity that could

39 P de Vos & W Freedman *South African constitutional law in context* (2014) 423.
40 N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African constitutional law: Bill of Rights* (2002) 131.
41 Sec 16 Constitution (n 7).
42 B Amon *Where are the ancestors?* (1993).
43 B Sahu, P Jeffery & N Nakkeeran 'Contextualising women's agency in marital negotiations: Muslim and Hindu women in Karnataka, India' (2016) 6 *Sage Open Journal* 2.
44 JM Wood, PK Mansfield & PB Koch 'Negotiating sexual agency: Postmenopausal women's meaning and experience of sexual desire' (2007) 17 *Qualitative Health Research* 190.
45 Office of the High Commissioner for Human Rights 'Sexual and reproductive health and rights' (2017), http://www.ohchr.org/EN/Issues/Women/ WRGS/Pages/HealthRights.aspx. (accessed 26 April 2022).

not be condoned under customary law, hence the forfeiture of the outstanding *lobola* by the appellant. An upshot of this ruling is the fact that the woman is perpetually voiceless regarding her sexuality which is freely governed, not only by her husband but by his whole family.

5.5 Bride price refund and the right to equality

Equality as a right for women at international level is clearly spelt out in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[46] The core content of the right to equality may be derived from the General Comment on the right to equality under ICCPR which requires that law must extend the same rights enjoyed by men to women on an equal basis and in their totality.[47] Similarly, section 56 of the Constitution requires that everyone must be treated equally before the law and prohibits any form of unfair discrimination based on the grounds listed therein.[48] Section 56(3) provides:

> Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status or whether they were born in or out of wedlock.

Zimbabwean customary marriage laws give a man the right to claim a bride price refund upon dissolution of an unregistered customary marriage because of the wife's adultery, yet it does not give a woman the right to claim compensation for the value of the services she rendered to the husband or any other corresponding right or remedy in the case of the husband's adultery. The Court in this case clearly stated that 'a man is entitled to a full *lobola* refund'. This means that only men qualify as the beneficiaries of the right to claim a *lobola* refund, and women are excluded. This wording of the Court is grounded on the fact that it is only women for which lobola is paid and not men. However, affording men a full *lobola* refund without considering whether during the subsistence of the marriage the woman performed duties that she was expected to perform that are intrinsically linked to the payment of *lobola* leaves the law tilted to the advantage of men and at the disadvantage of women.

46 Convention on the Elimination of All Forms of Discrimination against Women 18 December 1979.
47 General Comment 28 of ICCPR art 3 (The Equality of Rights Between Men and Women) 1 adopted at the 68th session of the Human Rights Committee, 29 March 2000.
48 Sec 56(3) Constitution (n 7).

In order for this law to respect equality between men and women, the Court could have interpreted the custom in a manner that gives women the same right to claim a refund for domestic services offered to men. Conversely, it may be argued that the Court did not have occasion to comment on what a woman would receive, as it was not an issue before it, because the husband was not the one who had cheated. Broadly, this could be an argument against the custom itself as it creates inequality, and in interpreting this custom, the Court could have adopted a purposive approach to develop the custom so that it can be in sync with the Constitution.[49] When one appreciates trite locus of the Zimbabwean law where women in customary marriages are not endowed with the right to claim adultery damages, it becomes compelling that courts must be alive to customs that confront an equal society envisaged by the Constitution.[50] Without dwelling much on the equality of *lobola* itself, it may be pointed out that the Court could have moved a step further and applied a broad perspective of the *lobola* payment and the rights of women.[51] Courts are endowed with the duty to deliver justice and to transform laws. The Court in this case neglected or ignored its duty to develop customary law and to align it with the principles of equality that are enshrined in the Constitution.

Payment of the bride price imposes a burden on men as they are mandated to gather resources for the bride price. As such, a bride price refund would seek its justification, where there is infidelity by a woman, in providing solace to a man who, after having paid the bride price, was then betrayed by the person for whom he had paid it. On the contrary, the woman is not compensated for the time lost and services that she would have provided to the husband during the subsistence of the marriage, in the case of infidelity by a man, constituting unfair differentiation of partners in a similar position.

6 Conclusion

The focus of this article was on inequalities that surround the bride price refund that Zimbabwean courts reinforce. In sum, it is to be noted that one of the lessons that emerges from the case under discussion is the problem of a dual legal system. While the notion

49 Sec 176 of the Constitution provides: 'The Constitutional Court, Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop common law or the customary law, taking into account the interest of justice and provisions of this Constitution.'

50 *Gwatidzo v Masukusa* (n 19).

51 P Vengesayi '*Lobola* culture and the equality of women in Zimbabwe' (2018) 12 *Pretoria Student Law Review* 114.

of dual legal system in Zimbabwe permits the application of both general law and customary law, in this case the choice to apply customary law rendered nugatory efforts to realise constitutionally-enshrined gender equality. Therefore, the judgment does not advance constitutional equality demands. Furthermore, the judgment set a precedent at law that subjects women to unfair discrimination and an impairment of their dignity. The violation of women's rights in Zimbabwe through customs and the perpetuation of such a violation is lamentable. In light of these shortcomings, women deserve to be relieved of such debauched customs. It thus may be concluded that the judgment in the *Mangwende* case has no place in the constitutional dispensation and sets a bad precedence. The custom of the *lobola* refund was supposed to have been developed to be consistent with the Constitution.

7 Recommendations

In light of the above discussion it is recommended that judicial activism must play a central role in transforming customary laws that have traditionally been repressive to women. In the spirit of cultural relativism judges can improve the treatment of women at the hands of customary marriage laws by interpreting these taking cognisance of gender equality and the dignity of women. In developing the customary law, factors such as the duration of the marriage must be taken into consideration. Once the couple have stayed together with each party playing his or her role, it can no longer be fair for *lobola* to be refunded. There are scenarios where the husband has just paid *lobola* when he discovers that the wife has cheated, before they have stayed together, where it can be refunded. Furthermore, as not all *lobola* items are refundable, the court must clearly define the components of the bride price that can be refunded, and should further ascertain what would be the position if some of *lobola* items have been used up, have died or have been stolen.

The denial of women's sexual rights and sexual agency under customary marriage laws demeans women's dignity, and these laws need to be redefined to allow women to exercise their sexual rights and sexual agency in all circumstances. The legislature must play its part in fairly regulating the bride price refund or otherwise under customary marriage laws. Such regulation should address issues related to the rights of women *viz-à-vis* patriarchal cultural practices. In essence, the dignity and equality of women must be upheld in customary marriage laws. The legislature should bring cultural practices up to date with the ever-changing global equality demands.

Customary marriage negotiations must be premised on the principles of equality. If equality is observed at the inception of customary marriages, all ancillary women's rights violations would be protected.

THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see **www.chr.up.ac.za** or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
chr@up.ac.za

Staff

Foluso Adegalu
Co-manager: Advocacy and Litigation Unit; Doctoral candidate

Mai Aman
Research Assistant: Children's Rights; Doctoral candidate

Victoria Ameachi
Assistant: Marketing and Communications

Dennis Antwi
Manager: Advanced Human Rights Courses

Abiy Ashenafi
Manager: Migration Unit

Benson Atonga
Doctoral candidate

Landilani Banda
Manager: SOGIESC Unit, Post-doctoral Fellow

Dorcas Basimanyane
Project Officer: Advanced Human Rights Courses

Samuel Chamboko
Financial Manager

Lydia Chibwe
Project Officer: Women's Rights Unit

Rutendo Chinamona
Project Coordinator: LLM (Sexual and Reproductive Rights in Africa)

Busisiwe Crafford
Graphic Designer: Communications and Marketing

Isabeau de Meyer
Publication Manager: *African Human Rights Law Journal*

Hlengiwe Dube
Manager: Expression, Information and Digital Rights Unit

Elvis Fokala
Manager: Children's Rights Unit

Charles Fombad
Professor of Law, Director, Institute for International and Comparative Law in Africa (ICLA)

Janet Gbam
Research Assistant; Academic Associate

Ivy Gikonyo
Doctoral candidate

Liesl Hager
Assistant: Pretoria University Law Press (PULP)

Lizette Hermann
Manager: Pretoria University Law Press (PULP)

David Ikpo
Project Coordinator: Communications and Marketing

Oluwatomiwa Ilori
Postdoctoral Fellow: Expression, Information and Digital Rights Unit

Jonathan Kabre
Programme Coordinator: LLM (International Trade and Investment Law in Africa)

Eduardo Kapapelo
Project Co-ordinator: Nelson Mandela World Human Rights Moot Court Competition

Simphiwe Khumalo
Coordinator: Marketing and Website Development

Brian Kibirango
Doctoral candidate

Magnus Killander
Professor and Head of Research

Lloyd Kuveya
Assistant Director

Arnold Kwesiga
Manager: Business and Human Rights

Emily Laubscher
Assistant Financial Manager

Bonolo Makgale
Manager: Democracy and Civic Engagement

Trésor Makunya
Publications Coordinator; Post-doctoral Fellow

Sabeeha Majid
Project Assistant: Disability Rights Unit

Rotondwa Mashige
Programme Coordinator: LLM/MPhil (Human Rights and Democratisation in Africa)

Michelle Masiwisa
Programme Manager: LLM/MPhil (Human Rights and Democratisation in Africa)

Tadiwanashe Mavunga
Project Assistant: Disability Rights Unit

Sydney Mdhlophe
Assistant: Pretoria University Law Press (PULP)

Tendai Mbanje
Intern; Doctoral candidate

Andile Mdleleni
Manager: Communications and Marketing

Nathan Milanzi
Project Assistant: SOGIESC Unit

Naledi Mpanza
Research Assistant: SOGIESC Unit

Lyse Mpema
Communications Officer: African Coalition for Corporate Accountability (ACCA)

Dianah Msipa
Manager: Disability Rights Unit; Doctoral candidate

Davina Murden
Alumni Coordinator; Doctoral candidate

Nkatha Murungi
Assistant Director

Tatenda Musinahama
Podcast Producer

Susan Mutambusere
Tutor; Doctoral candidate; Project Officer: Women's Rights Unit

Charles Ngwena
Professor of Sexual and Reproductive Health Rights; Disability Rights

Matikomborero Nyamadzi
Project Assistant: African and World Moot Courts

Michael Nyarko
Co-Manager: Advocacy and Litigation Unit; Doctoral candidate; Editor: *AfricLaw.com*

Nqobani Nyathi
Research Assistant: Children's Rights Unit; Doctoral candidate

Kerigo Odada
Doctoral candidate

Enigbokan Omotunde
Project Officer: Migration Unit; Doctoral candidate

Lourika Pienaar
Webmaster

Sarita Pienaar-Erasmus
Assistant Financial Manager

Ahmed Sayaad
Project Coordinator: Christof Heyns African Human Rights Moot Court Competition

Tariro Sekeramayi
Project Assistant: Democracy and Civic Engagement

Marystella Simiyu
Tutor; Doctoral candidate

Seyitan Solademi
Project Officer: Women's Rights Unit; Doctoral candidate

Ompha Tshanamo
Research Assistant: Expression, Information and Digital Rights Unit

Chanel van der Linde
Project Officer: SOGIESC Unit

Ruth Versfeld
Project Officer: Advocacay and Litigation Unit

Carole Viljoen
Office Manager

Frans Viljoen
Director

Extraordinary/Honorary professors

Dan Kuwali
Lawyer in private practice, Malawi

Stuart Maslen-Casey
Geneva Academy of International Humanitarian Law and Human Rights

Michael Stein
Harvard Law School, United States of America

Extraordinary lecturers

Adem Abebe
Senior Research Fellow, Max Planck Institute, Germany

Horace Adjolohoun
Principal Legal Officer, African Court

Jay Aronson
Carnegie Mellon University, United States of America

Japhet Biegon
Amnesty International, Kenya

Solomon Ebobrah
Professor of Law, Niger Delta University, Nigeria

Jan Mutton
Ambassador of Belgium to South Africa (retired)

Advisory board

Edouard Jacot Guillarmod
Consultant

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

David Padilla
Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Elsabe Schoeman
Dean, Faculty of Law, University of Pretoria

Sylvia Tamale
Retired Professor of Law, School of Law, Makerere University, Uganda

Johann van der Westhuizen
Retired Justice of the Constitutional Court of South Africa

Academic Programmes

- LLM/MPhil (Human Rights and Democratisation in Africa)
- LLM (International Trade and Investment Law in Africa)
- 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.

Books for review should be sent to:
The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission must indicate that it has not already been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- Manuscripts will not be considered if the English is below standard. In case of doubt about the correct use of the English language, authors are advised to have their text checked by a native English speaker before submission.
- 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.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors need to provide their ORCID identifier. ORCID provides a persistent digital identifier that distinguishes them from every other researcher and, through integration in key research workflows such as manuscript and grant submission, supports automated linkages between them and their professional activities ensuring that their work is recognised. If authors do not have such an ID, they can register at the website https://orcid.org/register.
- 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.

- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.
- The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- 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.
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- 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 December 2022
Compiled by: I de Meyer
Source: http//www.au.int (accessed 9 June 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	07/07/16			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	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	11/07/17
Eritrea	14/01/99		22/12/99			
Eswatini	15/09/95	16/01/89	05/10/12		05/10/12	
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	11/06/08
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	07/01/21
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	
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
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	**28/12/23**	02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	06/04/22
TOTAL NUMBER OF STATES	**54**	**46**	**50**	**34**	**42**	**38**

Ratifications after 31 July 2022 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.