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Editorial

This issue of the *Journal* contains contributions dealing with a wide variety of thematic concerns.

The first area of focus is 'African tradition' and its sometimes contentious relationship with human rights. Nhlapo and Mwambene each interrogates an aspect of traditional African societies, namely, the phenomenon of homicide and the institution of marriage. They postulate possibilities for ensuring accountability in situations where tradition and human rights may be in conflict. Drawing from foundational values of 'African tradition' and historical context, in their respective contributions Ntlama and Small explore the contemporary understanding of two concepts ('peace' and 'self-determination') in the light of their historical evolution.

The next two contributions touch on some of the pressing human rights problems of the present times. Despite the fact that slavery is outlawed, and that the right to be free from slavery has acquired the status of customary international (human rights) law, 'contemporary forms of slavery' still persist. Using a human rights lens, Gyurácz uncovers the largely unexplored phenomena of domestic servitude and ritual slavery in West Africa. For her part, Mswela draws attention to the plight of persons with albinism, and the particular and often extreme risk of violence to which they are exposed in parts of Africa.

Turning to areas in which some achievement or positive progress has been observed, three contributions chart experiences at the domestic level. Okpaluba highlights possibilities of state liability that flows from the illegal deprivations of liberty with reference to cases in Lesotho. Kondo draws inspiration from the inclusion of socio-economic rights in the 2013 Constitution of Zimbabwe, and Oduwole and Akintayo review, from a human rights perspective, the successes and failures of Nigeria's response to the Ebola virus.

Africa has in the last decade or so become increasingly associated with the movement of people across borders, often into Europe, giving rise to issues of asylum seeking and refugee status. In line with this trend, Addaney shifts the focus to a less common issue pertaining to the movement of migrants, namely, the situation of urban refugees. In a contribution dealing with forced human movement, particularly within states, Adeola explores the accountability of corporations for displacement that takes place in the name of 'development'.

While much media and scholarly attention has been devoted to the fractured relationship between 'African countries' and the International Criminal Court (ICC), there is a need to narrow down the issue to an area of core concern: prosecutions mandated by

Security Council resolutions. In her contribution, Asaala focuses on this issue, and explores the effect of Security Council resolutions on negative African perceptions of the ICC.

In addition to the regular overview of human rights developments in the African Union by Nyarko and Jegede, the 'Recent Developments' section contains a critical discussion of the second Advisory Opinion of the African Court on Human and Peoples' Rights (submitted by Socio-Economic Rights and Accountability Project (SERAP)), delivered on 26 May 2017. In his analysis, Jones raises concerns about the significant implications of the Court's finding for the competence of non-governmental organisations to approach the Court with requests for advisory opinions. In our view, the Advisory Opinion represents an unfortunate continuation of the Court's literalist and textual interpretive approach, which was also manifest in its first Advisory Opinion. In that Opinion, the Court settled for a narrow textual interpretation, even as it paid some lip service to the benefits of a more purposive approach. This interpretive approach resulted in restrictions to accessing the Court. While the effect of the first Opinion was that the African Committee of Experts on the Rights and Welfare of the Child could not submit cases to the Court, the practical effect of the second Opinion is that African non-governmental organisations are not able to approach the Court for its advice. On a continent where the promises of the Court's jurisdiction lie far beyond the reach of ordinary Africans, it is our view that a more purposive approach – one aimed at enlarging rather than narrowing down access – would have been more appropriate.

This issue of the *Journal* also brings together the voices of well-established scholars, such as those of Professors Thandabantu Nhlapo and Chuks Okpaluba, with the voices of early-career and emerging scholars. In fact, the *Journal* regards it as part of its role and responsibility to assist in the capacity development and intellectual growth of younger scholars.

The editors wish to thank the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Allehone Abebe; Patricia Achan; Romola Adeola; Horace Adjolohoun; Kwadwo Appiagyei-Atua; Patricia Bako; Japhet Biegon; Danwood Chirwa; Bonolo Dinokopila; Angelo Dube; Ebenezer Durojaye; Patrick Eba; Charles Fombad; David Ikpo; Philip Iya; Paul Johnson; Robert Johnson; Juliet Kekimuli; Kristi Kenyon; Elmarie Knoetze; Anton Kok; Tshepo Mosaka; Khulekani Moyo; Melanie Murcott; Nkatha Murungi; Lea Mwambene; Michael Nyarko; Nlerum Okogbule; Lame Olebile; Marius Pieterse; Itumeleng Shale; Ann Skelton; Julia Sloth-Nielsen; Ann Strode; Dire Tladi; and Johan van der Vyver.

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Homicide in traditional African societies: Customary law and the question of accountability

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Summary

The article discusses the attitudes of traditional African societies towards the taking of human life, aiming to understand the incidence, nature and causes of killing in traditional society. The article explores the responses of these societies to homicide, seeking to unearth legal, religious or other norms, if any, governing the taking of human life. The article interrogates the issue of accountability, to discover whether traditional societies recognised any obligation to ensure that a killer was made to account for his or her act – thereby inevitably raising questions about the right to life. The article concludes that in the customary law of these societies values and norms in respect of killing existed and that notions of accountability were indeed recognised, although (being drawn from strong communitarian foundations and a widespread belief in the supernatural) they differed significantly from modern human rights norms.

Key words: *right to life; homicide; traditional Africa; accountability*

1 Introduction

There is no shortage of written materials dealing with the manner in which traditional African societies went about their daily business and dealt with all types of practical and moral questions, including the killing of human beings by other human beings. There are ethnological, sociological, historical and legal accounts, supplemented by personal records and narratives of sundry travellers,

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adventurers, traders and colonial civil servants.[1]

What these accounts mostly have in common is their capturing of the circumstances occasioning the taking of human life in various societies at various periods in the development of these societies. Frequently, these accounts will reveal the dynamics underlying such incidents and set out the consequences of the behaviour identified. Occasionally, these descriptions will yield rich insights into the reasons for these dynamics, including the political, economic, religious and sometimes purely pragmatic considerations that come into play. All these are helpful in understanding the context within which the taking of human life occurred in traditional society.

Less accessible is information which points directly to the value that these societies placed on human life in a sense that might be useful in determining whether a right to life was recognised and, consequently, protected and promoted. The purpose of the article is to attempt the task of discovering the 'mind' of traditional society on the killing of human beings by other human beings. This is another way of saying that the article will attempt to unearth ethical, legal, religious or other norms, if any, that were applicable to killing in these societies, not for their own sake, but for the purpose of throwing light on present practices and whether these in any way can be explained by reference to past values.

This already hints at several problems inherent in the task. In the first place, the notion of killing needs to be interrogated a bit further. The taking of human life occurs in many forms and at many levels, differing in motivation, intent, scale, intensity and method. It is beyond the scope of the article to deal with all types of killings and their ramifications. Therefore, the article seeks to confine itself to those killings that happen in communities and can be seen in the context of people's daily lives and interactions. For this reason, it is not possible to give full attention to killings on a massive scale, such as during wars or other upheavals (for example, genocide).[2]

Clearly included will be those killings perpetrated by political authorities (or on their orders) upon their subjects. Such killings are

1 See, eg, F Boyle *Through Fanteeland to Coomassie: A diary of the Ashantee expedition* (1874); TB Freeman *Journal of various visits of the Kingdom of Ashanti, Aku, and Dahomi* (1844); W Hutton *A voyage to Africa* (1821). For a sample on writings on Southern African societies, see J Shooter *The kafirs of Natal and the Zulu country* (1857); AT Bryant *Olden times in Zululand and Natal* (1929); AF Gardiner *A journey to the Zoolu country* (1836); BA Marwick *The Swazi* (1940); HA Junod *The life of a South African tribe Vol 1* (1927); HC Lugg *Life under a Zulu shield* (1975); M Hunter *Reaction to conquest* (1936).

2 War, in particular, would have provided a useful counterpoint in the current discussion. Not only would it introduce a different scale of assessment on the question of the taking of human life, but it would also supply a helpful context against which to understand modern developments such as the growth of international humanitarian law. Despite these attractions, however, the subject of war is vast and the results yielded by the excursus may not throw enough light on the core concerns of this article to justify the digression. One notes, eg, that in a 15-page section devoted solely to war and warfare, and covering everything from

important, not only as comparisons to violence between ordinary citizens, but also as a measure of whether all lives in the group were considered to be of equal worth and weight. For all of the types of killings included for consideration here, the word 'homicide' is used because its dictionary meaning as 'the killing of a human being by another person'[3] properly captures the neutrality that we seek. This neutrality enables us to deal with all instances of killing, regardless of the level of culpability attaching to each and whether they are punishable.

A second preliminary difficulty relates to the notion of traditional societies itself. While the concept of tradition itself is contested, we do not wish to engage with that debate here. Since our aim is to try and fathom the attitudes to killing of indigenous African societies, we will be satisfied with accounts of precolonial society as well as any other evidence of African practices, even if these straddle different historical periods, including the extension of foreign administration to these societies. In the work undertaken by anthropologists in the early parts of the twentieth century, for instance, it was often possible to detect a useful residue of precolonial thinking even when the societies in question were grappling to understand the 'laws of the white man'. This was sometimes graphically illustrated in reported instances of the persistence of customary practices in the face of harsh penalties, amid general perplexity on the part of the populace as to the reason or need for these curbs.[4] Although not dealing exclusively with African societies, Diamond provides a useful description of his use of the adjective 'traditional' or 'small-scale' as meaning[5]

> past and present societies living at low population densities in small groups ranging from a few dozen to a few thousand people, subsisting by hunting-gathering or by farming or herding, and transformed to a limited degree by contact with large, Westernised, industrial societies.

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mobilisation and doctoring the army to tactics and strategy and weapons of war, Soga hardly touches upon the issue of norms around killing. One has to try and deduce attitudes from headings such as 'Mutilation of the dead' and 'The chief's address to the warriors', neither of which is really helpful to the quest: The former is about the fear of backlash from the enemy's medications, and the latter is largely about chants and exhortations (see JH Soga The *Ama-Xosa: Life and customs* (1932) 65-81). It is similarly difficult to extract any deep understandings about the right to life from Kuper's rich account of warfare among the Swazi (see H Kuper *An African aristocracy: Rank among the Swazi* (1947) 123-126).

3 *Collins dictionary of the English language* (1986).

4 See, eg, GM Wilson 'Homicide and suicide among the Joluo of Kenya' in P Bohannan (ed) *African homicide and suicide* (1960) 179, who says that '[t]he Joluo people – although on the surface they have accepted Christianity – still retain the ceremonial, religious, and ritual aspects of their culture to a very large degree. Their family system remains strong and largely unimpaired by the impact of Western civilisation.' P Bohannan 'Homicide among the Tiv of Central Nigeria' in Bohannan (above) 31 discusses the introduction of British legal arrangements and the Tiv response as one of 'amazed wonder that Europeans execute a man whose only fault was killing another'.

5 J Diamond *The world until yesterday: What can we learn from traditional societies?* (2013) 6.

To put this another way, we accept Diamond's notion of traditional society as being helpful for purposes of describing the populations reviewed in this article. The definition has the merit of covering the very broad range of living conditions recorded in respect of African societies as well, from very small-scale and isolated, to 'almost westernised', and the various permutations in between. The importance of this approach is that it focuses attention on the core task, and avoids scholarly skirmishes about the complexities of the concept of 'tradition'. That core task is to attempt an understanding of how indigenous African societies dealt with killing and whether any similarities between them can be detected and, with these similarities, some idea of the existence of normative underpinnings, if any. The most direct route to this information are the recorded accounts of populations studied in the eighteenth and nineteenth centuries, as well as pre-colonial social formations where available, right down to groups living in relatively contemporary times but still shielded from thoroughgoing modernisation. In the article, then, reference to 'African societies' (or 'these societies') means nothing more ambitious than any groups (whether kin or clan, tribe or nation) for whom evidence of customs relating to killing has been recorded.

The third point to be cleared is the question of accountability. Accountability, in the way the concept is used in the article, is the corollary of the right to life as defined in the literature of international law.[6] This basically holds that there are two components to the right to life: a prohibition against killing, except for good reason (that is, in self-defence or in defence of another life); and bringing the perpetrator to account when the norm has been violated.[7] This theme will be fleshed out in section 7 below.

Finally, a word about the structure of the article is in order. The writer has reviewed, at different levels of depth, a literature on killing which covered some 30 societies spread geographically around the continent in West, East, Central and Southern Africa. As indicated earlier, some of these accounts are classical anthropological studies, while many are attempts at unravelling the legal principles in the communities concerned. It can only be possible here to give a sense of certain commonalities and regularities of thinking distilled from these studies; bombarding the reader with the minutiae of the rules pertaining to homicide in over 24 indigenous communities is neither possible nor desirable. What appears useful is to paint a picture of how African peoples over time have dealt with the taking of human

6 Art 6(1) of the International Covenant on Civil and Political Rights provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

7 C Heyns 'The right to life under international law: Introductory remarks', unpublished paper delivered at the Seminar on Unlawful Killing and Accountability in African Societies, University of Pretoria, 21 September 2015 (used with permission).

life and whether any norms and values can be discerned from their reactions to these incidents.

2 Homicide in traditional African societies

2.1 The Nuer

There can be no better place to start a review of killing in traditional African society than with Evans-Pritchard's classical account of the Nuer of Sudan,[8] a 'stateless' society lending itself well to a study of social mechanisms in respect of death caused by human agency. For a lawyer, it is not easy to fathom whether homicide was considered a crime or a delict or neither among the Nuer: Killing was killing, and was rendered quite frequent because of the Nuer's fighting culture. Evans-Pritchard describes this culture as follows:[9]

> A Nuer will at once fight if he considers that he has been insulted, and they are very sensitive and easily take offence. When a man feels that he has suffered an injury there is no authority to whom he can make a complaint and from whom he can obtain redress, so he at once challenges the man who has wronged him to a duel and the challenge must be accepted. There is no other way of settling a dispute and a man's courage is his only immediate protection against aggression.

Evans-Pritchard also describes the phenomenon of the 'blood-feud', which he explains as follows:[10]

> Blood-feuds are a tribal institution, for they can only occur where a breach of law is recognized since they are the way in which reparation is obtained. Fear of incurring a blood-feud is, in fact, the most important legal sanction within a tribe and the main guarantee of an individual's life and property. If a community of one tribe attempts to avenge a homicide on a community of another tribe a state of intertribal war, rather than a state of feud, ensues, and there is no way of settling the dispute by arbitration.

According to Evans-Pritchard, the process following upon a homicide (that is, 'the procedure for settling a blood-feud'[11]) is for the slayer to report himself to the leopard-skin 'chief'[12] so that he can be cleansed. This requires certain rituals and is also a period where the sanctuary at the chief's home offers the killer a respite from immediate retaliation, which it is the duty of the deceased's family to pursue:[13]

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8 EE Evans-Pritchard *The Nuer: A description of the modes of livelihood and political institutions of a Nilotic people* (1940).

9 Evans-Pritchard (n 8 above) 151.

10 Evans-Pritchard 150.

11 Evans-Pritchard 152.

12 Conceding that the word 'chief' may be a misnomer, Evans-Pritchard describes these members as sacred persons without political authority who are central in the settlement of feuds and are arbiters in issues involving cattle. In earlier times they enjoyed the power to bless or curse.

13 Evans-Pritchard (n 8 above) 152.

> As soon as the kinsmen of the dead man know that he has been killed they seek to avenge his death on the slayer, for vengeance is the most binding obligation of paternal kinship and an epitome of all its obligations. It would be great shame to the kinsmen were they to make no effort to avenge the homicide.

After an appropriate cooling-off period, the chief commences negotiations between the two sides and, after investigating the assets of the slayer's people, proposes to the deceased's family that they accept so many cattle as compensation. After some ritual toing and froing, some 40 to 50 cattle are paid, although normally not all at once. Atonement ceremonies are performed and life for the slayer's kin returns to a semblance of normality (not complete safety until the whole debt has been paid). The cattle are distributed among the deceased's kin, including a portion to be used to marry a wife in the name of the deceased in order to bear an heir.

Evans-Pritchard makes a strong point about the significance of social distance in the Nuer attitude to homicide: 'What happens when a man kills another depends on the relationship between the persons concerned and on their structural positions.'[14]

Settlement is easier the closer the lineages are to each other because 'corporate life is incompatible with a state of feud'.[15] Where nearby villages are involved an accommodation is quickly reached. In his discussion of the Barotse, Gluckman[16] elaborates on Evans-Pritchard's account of the Nuer and teases out important questions of *liability* in such stateless societies where vengeance is the primary method of redress. He states:[17]

> The operation of rules of vengeance brings up in sharp form key concepts in the law of wrongs: recognition of intention to kill as against killing by negligence or accident, questions of responsibility and liability, and provisions of restitution or punishment.

In respect of the relationships involved, he continues, intention appeared to be irrelevant in cases of the killing of one member of a kinship group by an outsider. What was important was that a social relationship existed where the rules dictated that 'murder' must be compensated by blood money.[18] Evans-Pritchard also makes the point that any killing disturbs the social equilibrium by disrupting the 'balance of blood' between the groups, which must now be redressed as part of the interplay of the rights they have against each other.[19]

Strongly corroborating Evans-Pritchard, Gluckman points out the two extremes representing the position where settlement is less likely in distant relationships though liability is recognised, and more

14 Evans-Pritchard 155.
15 Evans-Pritchard 156.
16 M Gluckman *The ideas in Barotse jurisprudence* (1965).
17 Gluckman (n 16 above) 235.
18 As above.
19 As above.

intimate relationships where redress is not possible (because the givers of blood money would be the very same people to receive it) and liability – though recognised – is virtually 'waived', the whole incident being characterised 'as a sin, subject only to ritual or religious sanction'.[20] He concludes: 'At this extreme there is no legal liability, while at the other extreme compensation is not likely to be paid. In the middle range compensation may be offered and accepted.'[21]

Gluckman also makes an interesting point about the Nuer and the question of guilt. It appeared to him that guilt did not arise as an issue where the moral question lay not in the incident but in its concealment:[22]

> Seemingly, among the Nuer the issue of guilt for a particular killing was unlikely to arise. It was a heinous breach of moral duty for a man to conceal that he had killed another, since killing set up a spiritual barrier between the two sets of kin. For example, if they are together illness would assail them. The killer himself had to be cleansed from his spilling of blood.

We shall return to the lessons learnt in observing how a stateless society, like the Nuer, deals with homicide.

2.2 The Barotse

Two decades after the appearance of Evans-Pritchard's work on the Nuer, Gluckman published his study on the Barotse of Northern Rhodesia, as it was at the time. Homicide amongst the Barotse, conceived without distinction between murder and culpable homicide, occasioned a range of response options, from actually killing the offender, subjecting him to a fine, taking him as a slave, to letting the matter quietly drop when it was 'politic to do so'.[23] When payable, compensation to the deceased's family was set by the court, as was the case with enslavement. Still pursuing his interest in the question of liability, Gluckman concludes that in situations of feud, liability attaches regardless of intention if the killing occurs within a certain range of relationships.[24] This discussion leads him to the work of Elias, who asserts that 'there is a notion of *mens rea* in African law'.[25] In the quoted passage, Elias cites the work of Penwill on the Kamba of Eastern Kenya, who asserts that Kamba law does not distinguish between murder, manslaughter and death caused by accident and, yet, concedes that a portion of the fine (the cow of the accident) appears to acknowledge special consideration of the incident if it was accidentally caused.[26] Elias believes that the paradox

20 Gluckman (n 16 above) 206.
21 Gluckman, citing I Schapera 'The sin of Cain' in *Royal Anthropological Institute of Great Britain and Ireland* (1955) 33-43.
22 As above.
23 Gluckman (n 16 above) 211 citing DW Strike *Barotseland: Eight years among the Barotse* (1969).
24 Gluckman 220.
25 TO Elias *The nature of African customary law* (1956) 141.
26 DJ Penwill *Kamba customary law* (1951) 81.

is resolved by keeping in mind 'the confusion between liability and the qualification of damages' and that[27]

> in homicide cases … the elders naturally regard the consequences of the children and other dependants of the victim being suddenly left destitute as more important than the *manner* of the encompassing of the death by the killer.

Gluckman disputes this reasoning, arguing that the more accurate position is 'to see the law as applying a strict liability arising out of duty to avoid harming others, and that the extent of liability can be reduced if the defendant can adduce mitigating circumstances',[28] where the onus lies on the defendant (based in part on certain social relationships which raise a presumption that the harm was maliciously caused).

Gluckman's discussion of strict liability (sometimes inferred from circumstances) flows into an interesting consideration of witchcraft, which he contrasts with the class of wrongs where the mental state of the perpetrator is irrelevant. He writes that in some societies the offence of harming others by witchcraft is believed 'to flow from the mere feeling of malice, envy, spite, hate, anger, jealousy, or greed, without the volition or action of the alleged witch, provided that he has the power of witchcraft in his body'.[29]

Arguing that in societies holding these beliefs 'any misfortune suffered by a tribesman … can be converted into a tort or a crime', Gluckman explains his thesis as follows:[30]

> Groups of kin have to co-operate to achieve multifarious purposes of all kinds. The effect is that every action by any member of a group, which departs from norms, influences adversely many purposive activities. A quarrel between two brothers has wider effects than in our industrial society; it may imperil productive work, affect the solidarity of political action, or disturb the unity of a religious congregation. Hence each breach of norm has a spreading moral disturbance: many relationships and activities are affected. Conversely, if outside events do not run normally, this points to secret disturbances in the moral relations of the members of the group.

His conclusion is that in such societies, where opportunities for individual advancement are few, the damage is done to a kinsman merely by wishing him ill, even though one does not act on one's ill will.[31]

This bears a striking resemblance to the views of Metz, whose search for the content of ubuntu leads him to the conclusion that it is

27 Penwill (n 26 above) 142 (emphasis in original) cited in Gluckman (n 16 above) 233.
28 Gluckman (n 16 above) 234.
29 Gluckman 235.
30 As above.
31 As above.

a moral principle animated by a sense of goodwill towards one's community.[32] (We return to this theme later in the article.)

2.3 The Tiv

Bohannan's study of the Tiv of Central Nigeria adds to the stock of knowledge of societies where 'there was no hierarchy of "responsible offices" and the "law" was kept through *ad hoc* meetings of groups of elders associated with lineages, or by self-help'.[33] The Tiv recognise different levels of blameworthiness in respect of homicide: Killings are divided into those that happen accidentally, or 'through ignorance' or are done purposely. Murder is, thus, recognised as a crime, as is culpable homicide. Other common types of killing include the killing of a wife's lover; the killing of people accused of witchcraft (or, more interestingly, killing for fear of witchcraft – including suicide by those accused of witchcraft); the killing of thieves; and accidental killing during the communal hunting season.

The death penalty is often prescribed, mostly for premeditated murder and theft when the thief is caught in the act. Killing because of adultery has also been known to attract the death penalty (apparently when the killing showed evidence of premeditation) although, in many instances, a fine or sentence of hard labour appears to suffice. Bohannan's example showed noticeably high levels of 'guilty but insane' verdicts in the courts, mostly linked to various killings in the heat of the moment (for instance, those of thieves caught red-handed and suspected witches). Insanity (including epilepsy and sleeping sickness) appeared to match self-defence as a legitimate defence to a charge of murder.[34]

Two significant aspects of Tiv culture may be highlighted. The first is the Tiv paradox, noted by Bohannan, relating to witchcraft, where the Tiv believe that one's closest kin (agnates and one's mother) is simultaneously one's refuge and support system, and also the people most likely to harm one.

Referring to this as 'a very overt Tiv belief', Bohannan explains that 'it is one's agnates who bewitch one, but not the agnates of one's own generation who are, rather, one's protectors against the elders of one's agnatic lineage'.[35] He gives the background as follows:[36]

> Tiv explain much of their cosmography and most of their notions of illness and misfortune by reference to *tsav,* which is sometimes translated into English as 'witch-craft substance'. Tiv say some of the elders of the community, who have *tsav* and form the *mbatsav,* meet at night in order to carry out rituals which are to the advantage of the lineage and all people

32 T Metz '*Ubuntu* as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532.
33 Bohannan (n 4 above) 31.
34 Bohannan 43.
35 Bohannan 44.
36 As above.

> who live within its area. However, in order to carry on their work they must make human sacrifices from time to time, and it is as *mbatsav* that the elders decide who is to be sacrificed. All illness and death is ultimately attributable to *tsav,* usually it is the *mbatsav* among one's agnates who have reason and power to kill one.

Reviewing a court case in which a man was found guilty but insane for killing a kinsman whom he thought was bewitching him, Bohannan concludes that the accused had acted according to sound Tiv values, and summarises the paradox as follows:[37]

> Agnatic kinsmen are loved and respected because they are kinsmen and neighbours, but they are also feared because they share a common patrimony with you and because, as a group, they must renew themselves spiritually and ceremonially through spilling the blood of one of themselves as a sacrifice.

The second cultural feature of note is significant in that it links to a general point sought to be made in the article, namely, the importance of ritual killings. The Tiv believe in human sacrifice, not only for maintaining prosperity, but also for establishing what Bohannan reports as the 'great fetishes'.[38] These sacrifices or 'fortifying ceremonies' require bits of the human anatomy for their potency. A further upshot of such killings (which are considered murder in modern Tivland and punishable by hanging) is related to an instance where a man, in fear of being sacrificed in this way, pre-emptively killed the suspected perpetrator first in order to protect himself.[39]

Finally on the Tiv, Bohannan notes a matter of some interest, which is that the material reveals a glaring difference between this society and societies in the developed West: the almost total absence of killings motivated by economic gain. He explains:[40]

> Lack of 'economic motivations' for murder is associated with the sort of community life which Tiv live. One would find it impossible to keep or enjoy anything which he might have gained by murder.

Bohannan relates an instance of a robbery where the Tiv attacked a Hausa trader and took his goods, and makes the point that when the murderers were caught, the goods were found to have been distributed among kinsmen.[41]

2.4 The Igbo

Seeking to understand the nature of punishment among the Igbo of Eastern Nigeria, Igwe[42] classifies Igbo laws into two broad categories:

37 Bohannan (n 4 above) 47.
38 Bohannan 61.
39 As above.
40 As above.
41 Bohannan (n 4 above) 62.
42 ED Igwe 'Igbo jurisprudence: A discourse on the nature of punishment in

divine and human.[43] The former pertains 'to God, divinities, spirits and ancestors'[44] and offenders need to be punished 'either during their life time or at the end of it, or even during their next life cycle'.[45] Murder straddles both categories, being regarded not only as an offence against society but also as a violation of divine law.

Crimes in Igbo law include homicide, incest, suicide, arson and adultery. Murder was considered a crime against society as well as a violation of divine law, since all life comes from God.[46] The killer is expected to hang himself, failing which he is banished. His property is forfeited, and it appears that 'his family is excluded from most community privileges and also have their properties confiscated', although it is not clear whether this happens upon banishment or only if he flees.[47] Even a killing during war calls for ritual cleansing.

Where the killing is not perpetrated by kinsman upon kinsman, as in the case where the murderer is from another village, retributive justice calls for a life-for-a-life to stave off war,[48] as well as compensation, the latter being payable even in the case of accidental killing.[49] An unproven suspicion of witchcraft leads to the suspect being required to swear his innocence before a deity and, if over a period no harm comes to him, he is presumed innocent – his guilt is deemed proven if he suffers harm or illness.

An unusual crime found in the Igbo list is the crime of 'unmasking a masquerade', which the writer describes as the removal of the mask of a performer at an important ceremony, where the masked performers are believed to embody the spirits of the ancestors. Unmasking, thus, is tantamount to 'killing an ancestral spirit', with dire consequences for the group.[50] The penalty for such behaviour is death. Penalties for other offences on the list include banishment, ostracism, a fine or forfeiture of property.

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traditional African society' (2011) 1 *Filosofia Theoretica*: *Journal of African Philosophy, Culture and Religions* 119.

43 Igwe (n 42 above) 12.

44 As above.

45 As above, indicating a belief in reincarnation.

46 'The Igbo believe in the existence of a supreme being – God whom they call different names according to subculture area groups' (Igwe (n 42 above) 23). The supreme being sits at the apex of the divine hierarchy which also comprises divinities, spirits and ancestors.

47 Igwe (n 42 above) 12.

48 As above. The author cites the famous example from Chinua Achebe's *Things fall apart* as an illustration. A citizen of Umuofia village, a woman, was killed by the people of Mbano, a neighbouring village. Umuofia demanded compensation in the form of a young man and a virgin, failing which war with the Mbano village would ensue. The virgin was given to the husband of the deceased, and the young man was killed. As the author observes: 'This takes care of both the human and divine disharmony created by the offence of murder' (126).

49 As above.

50 Igwe (n 42 above) 127.

2.5 The Joluo

Wilson's account of the Joluo (sometimes known as the Luo) of Kenya starts with a revealing statement:[51]

> The Nilotic Joluo regard violence as an unnecessary loss of control, or at best a calculated necessary last resort to secure goals which have been carefully weighed and assessed as to the possible supernatural and social consequences. The Joluo believe that a goal does not justify the means if the means require violence, unless all methods of arbitration, conciliation, appeal to authority, both temporal and supernatural have been tried and proved to be unsuccessful or inadequate.

Nowhere in the other materials studied has there been such an upfront description of an anti-violence principle as background to the understanding of homicide in the society in question. Apparently the reason is that 'violence requires cleansing' in order to ward off supernatural consequences. This belief in the supernatural permeates the Joluo response to homicide:[52]

> Deeply ingrained is the notion that life goes on after death on earth – that ancestors in the spirit world are able to influence the lives, conduct, fortunes, for good or evil, of their descendants. Ghosts are more likely to be benevolent if they can count numerous descendants on earth and extremely malevolent if life on earth was cut short by violence or unnatural death by war, accident, or suicide. The more descendants a ghost has, the higher its status in the after-world, and therefore the greater its pleasure and benevolence.

The Joluo distinguish between unpremeditated, heat-of-the-moment killings arising from quarrels during drinking parties or incidents of infidelity or sexual jealousy, which are regarded as less serious (and having consequences only for the perpetrator) and premeditated murder, which is believed to affect the whole group.

As is the case with other studies reviewed, social (and sometimes geographical) distance plays a role. Murder by 'outsiders' leads to immediate sanction, which may take the form of confiscation of cattle, or the killing or banishment of the slayer. Sometimes the slayer's group will be required to give up a woman to bear an heir in the name of the deceased.[53] Linked to the Joluo belief in the supernatural, the placation of the 'ghost' of the deceased appears to be important. This will be further discussed below.

2.6 The Basotho

Closer to home, we begin with a scan of the approaches to homicide among the Basotho. According to Ashton, homicide is considered a

51 Wilson (n 4 above) 182.
52 Wilson 184.
53 Wilson 183. 'The woman would be regarded as the wife of the dead man; her children would placate his ghost as father …'

civil wrong, as are assault and rape, and is punishable by the requirement of compensation.[54] Compensation was in the range of ten cattle for the killing of a male or female adult and four or five for a child, or a figure set at the court's discretion. No compensation was payable upon the killing of a kinsman, for the same reasons as in other communities studied, namely, that the givers and the recipients are the same legal entity. Compensation was calibrated according to the degree of culpability and, controversially according to Duncan, the value of the victim.[55] This was later elucidated by Palmer[56] as meaning social position rather than monetary value. Defences to homicide included killings deemed to be lawful, such as those on witches, enemies during wartime or in cattle raids, thieves caught in the act and an honour killing by a father on a son who has brought dishonour to the family.[57] Abortion and infanticide were dealt with by the family even though they were not classed as lawful.[58] Accidental deaths were not prosecutable.

2.7 The Zulu

Krige starts off her chapter on the political organisation of the Zulus with a useful description of 'the tribe', which is reproduced here because in many ways it mirrors the social organisation of indigenous communities in South Africa:[59]

> Among the Bantu, political organisation has not yet been divorced from principles of kinship, and the true national unit appears to be the sib. In pre-Shakan days, Natal was peopled by small exogamous sibs. But the sib is not a stable unit; it grows, sub-divides and is reinforced by sections of people who have, for political reasons or because of an accusation of witchcraft, fled from their own kin. In this manner it develops into what is known as a 'tribe,' consisting of people belonging to many different sibs.

The social organisation described above was underpinned by the ascription of great powers to the King, who had both legislative and judicial powers, although Krige warns that 'in neither was he as autocratic as the powers exercised by the great Zulu kings have led us to suppose',[60] pointing to the role of elders and councillors. Krige refers to another limitation on the powers of the King, which was that no killing could take place unless an offence had been committed, but she concedes that it was easy enough for trumped-up charges to be levelled by the King, especially against a rich man whose estate the King may covet.[61]

54 H Ashton *The Basuto* (1952) 255.
55 P Duncan *Sotho laws and customs* (1960) 105.
56 VV Palmer *The Roman-Dutch and Sesotho law of delict* (1977) 114.
57 Ashton (n 54 above) 255.
58 As above.
59 EJ Krige *The social system of the Zulus* (1936) 217.
60 Krige (n 59 above) 218.
61 Krige 219.

Homicide, then, was closely tied up with the powers of the King as far as both its perpetration and its punishment were concerned. Recognised crimes were witchcraft, desertion, incest and treason, all of which were punishable by death. In many cases, the death of the culprit was accompanied by the destruction of his homestead and confiscation of his cattle, which were 'eaten up' by the King. Cases of homicide were heard by the traditional courts of law and were classified into offences against the individual and offences against the King.[62] Some regard was had to *mens rea* for purposes of punishment, where a fine or compensation may suffice for unpremeditated killings. A fine was also exacted for adultery and rape and, in aggravated cases, sometimes the death penalty. During the reign of Shaka, there were a slew of offences specially created by him which were punishable by death: trespassing into the royal harem; eating the new harvest before the King had performed the first fruits ceremony; and cattle rustling.[63]

Apart from the death penalty, killings perpetrated by the rulers were also known in traditional Zulu society. Krige points out that the King was both the group's representative to the ancestors, and the nation's chief medicine man, 'the centre of all agricultural and war ritual and representative of the unity of the tribe'.[64] In these roles, the King needed to be strengthened in order to be able to harness forces in the universe for the benefit of the nation. Krige continues:[65]

> Furthermore, he must be strong, not only physically but magically. As representative of the tribe, he must be a man who has been specially fortified against all manner of harm, for so closely bound up with the welfare of the tribe is the life of the King, that enemies can strike a blow of the life of the tribe through him. By hurting the King, they can break up the whole tribe.

For these reasons, the King undergoes strict strengthening procedures:[66]

> On his accession, the Zulu King has to be spiritually prepared and fortified for his office and for his fortification parts of the human body are essential. The human body is the strongest and most powerful of all medicines, and for doctoring a King the most effective parts must be used.

Finally, Krige reports on burial rituals which again involve the loss of human life in the form of close household servants who are ritually killed and buried with the King.[67] This aspect will be discussed further below.

62 Krige 229.
63 As above.
64 Krige (n 59 above) 233.
65 Krige 241.
66 As above.
67 Krige (n 59 above) 236.

2.8 The Xhosa

According to Soga,[68] *AmaXhosa* did not recognise the civil-criminal distinction and recognised the death penalty only in the case of witchcraft. He emphasises the point that '[t]he primary object of Xhosa law … is to preserve tribal equilibrium',[69] and that the task of the law is to guide the individual in maintaining the cohesion and integrity of the group. In addition to this, the task of the courts was to restore equilibrium rather than to dwell on guilt: '[T]he ethical question scarcely counts, restoration is the principal thing.'[70] Incest, witchcraft and rebellion fall into this category: They are objectionable not because of moral reasons, but because they threaten the very existence of the group.

Soga also mounts a persuasive argument about the Xhosa view of murder, which he reports as being quite contrary to the Mosaic law of an eye-for-an-eye. *AmaXhosa* avoid capital punishment for a reason, says Soga, and such reasoning is *'characteristic of the value placed upon the life of an individual as part of the tribe*'.[71] The stock answer of the Xhosa to the question as to why they eschew capital punishment, according to Soga, is 'Why sacrifice a second life for one already lost'.[72] Instead, a heavy fine is paid.

2.9 Southern African peoples in general

There is an abundance of materials on homicide among the indigenous communities in South Africa[73] and its neighbours, and perhaps all that can be done here is to summarise some of the data, pulling out the common threads and any other information of special interest or relevance.

Strongly echoing the Xhosa approach, *AmaBhaca*, also of the Eastern Cape in South Africa, have a notion of crime which distinguishes those offences that compromise the solidarity of the group from inter-personal disputes. The former are seen as an attack upon the King, who embodies the nation: Such is the Bhaca view of murder, assault, witchcraft and incest. Again showing similarities with the Xhosa, the response to murder is restitutive and not necessarily the death penalty.[74] The Swazi also differentiate between private wrongs and cases 'with blood',[75] which include murder and

68 Soga (n 2 above).
69 Soga 44.
70 As above. The ethical question here presumably is the issue of the moral turpitude of the killing itself.
71 As above (my emphasis).
72 As above.
73 JMT Labuschagne & JA van den Heever 'Liability arising from the killing of a fellow human being in South African indigenous law' (1995) 38 *Comparative and International Law Journal of Southern Africa* 3, to whom I am indebted for most of the citations in this section.
74 WD Hammond-Tooke *Bhaca society* (1962).
75 H Kuper *The Swazi: A South African kingdom* (1936).

witchcraft, punishable by death coupled with the confiscation of the slayer's property.

Mönnig[76] and Harries[77] on *BaPedi*, Prinsloo[78] on *BaLobedu*, Cook[79] on the Bomvana and Junod[80] on the Tsonga all speak of various kinds of compensation for a killing, whether the death penalty is an option (as in the case of *BaPedi*) or not. The models of reparation range from giving cattle to enable a male member of the victim's family to marry a wife or the giving of a daughter as procreator, to the delivery of a token number of beasts to the deceased's kin 'to dry the tears', sometimes allocated by the chief from the fine received. *BaTlokwa* exact the death penalty (including euthanasia) for murder, accompanied by a fine to the chief, a portion of which is used in the purification rites.[81] Myburgh and Prinsloo[82] report that the Ndebele prescribe the death sentence for murder but, in certain circumstances, a fine or even corporal punishment.

In these responses to homicide, it is interesting to note the defences that are allowed to a charge of murder, as they throw some light on which killings are viewed as 'lawful' or in any other way excusable. Self-defence is the most common exculpatory factor, and is found among the Pedi of Phalaborwa, *BaTlokwa*, *Batswana* and *Bakwena*[83] and the Ndebele. This is closely followed by the killing of a witch or wizard (someone identified as such by a divination) or a thief caught in the act. (It does appear that, for many indigenous communities, the killing of a suspected witch mitigates the sentence, is treated as a version of self-defence or, as in the case of the Tiv of Nigeria, is characterised as a form of insanity.) Other common defences include the killing of a wife's lover, or a killing during conflict with outsiders or in obedience to a lawful command. Amongst *BaTlokwa*, provocation is a recognised defence while among indigenous societies, generally, drunkenness is hardly ever acceptable as a complete defence.

This review of Southern African societies is concluded with accounts of two significant neighbours: the Swazi of Swaziland and the Ndebele of Zimbabwe. The Swazi account is significant in that, of all the countries in the Southern African Development Community (SADC) region, the Kingdom of Swaziland arguably is the one nation

76 HO Mönnig *The Pedi* (1967) 328.
77 CL Harries *The laws and customs of the Bapedi and cognate tribes of the Transvaal* (1929).
78 MW Prinsloo *Inheemse publiekreg in Lebowa* (1938), cited in Labuschagne & Van der Heever (n 73 above) 423.
79 PAW Cook *Social organisation and ceremonial institutions of the Bomvana* (1931).
80 HA Junod *The life of a South African tribe Vol 1* (1927).
81 ASP Botha *Inheemse strafreg in Qwaqwa* (1986), cited in Labuschagne & Van den Heever (n 73 above).
82 AC Myburgh & MW Prinsloo *Indigenous public law in KwaNdebele* (1985).
83 J Church 'Murder and culpable homicide' in AC Myburgh *Indigenous criminal law in Bophuthatswana* (1980) 78-80.

state in the neighbourhood which survived the colonial experience with its indigenous culture virtually intact.[84] Kuper[85] describes the richness of Swazi culture, from precolonial times to the present day, painting a picture of a nation in which the monarchy plays an important role. Crime among the Swazi is divided into private wrongs, and cases 'with blood'.[86] Private wrongs include theft, slander, adultery and property disputes – all punishable by fines or compensation, or both. 'Blood' cases are murder and witchcraft, both punishable by death with confiscation of property, although banishment is often substituted in the case of witchcraft. The heavier penalties are invariably exacted where the offence is against the rulers as opposed to commoners. However, for our purposes the real significance of the Swazi lies in their rituals of kingship, which will be discussed later in the article.[87]

As for the Ndebele of Zimbabwe, their attitude to homicide mirrors much of the values of other Nguni groups in the region. They divided crime into two categories: *amacala amakhulu* (serious crimes which included murder, treason and witchcraft); and *amacala amancane* (less serious offences such as theft and domestic conflicts). The former were heard before the King, while the latter could be dealt with by any tribunal within the hierarchy of household heads, headmen and chiefs.[88]

Both murder and witchcraft were punishable by death, with banishment being the norm in the case of unproven allegations of witchcraft.[89] Death was also the penalty for treason and other political crimes, and in succession upheavals there was much evidence of purges and massacres.[90] However, as will appear below, our interest in the Ndebele again lies in their model of governance.

3 Homicide in traditional African societies: Some common themes

A quick review such as the one above throws up some commonalities and a number of discernible trends, many at a fairly superficial level but some having the potential for deeper analysis. For our purposes, we shall concentrate on those themes that provide some insights into our core question, which is that of seeking norms relating to the taking of human life. From this perspective, recurring themes appear

84 See T Nhlapo *Marriage and divorce in Swazi law and custom* (1992) 4-5.
85 Kuper (n 75 above).
86 Kuper 36.
87 See sec 4 below.
88 SJ Ndlovu-Gatsheni 'Inkosi Yinkosi Ngabantu: An interrogation of governance in pre-colonial Africa – The case of the Ndebele of Zimbabwe' (2008) 20 *Southern African Humanities* 386.
89 Ndlovu-Gatsheni (n 88 above) 387.
90 As above.

to be the following: the group and its influence on the individual; religion, especially notions of life after death; belief in the supernatural; kinship as the basis of social relationships; and, in selected cases, the issue of violence at the hands of those in authority.

3.1 The group and the position of the individual

In all the traditional communities reviewed, some version of the communal ethic is in evidence in a stronger or weaker form, depending on the group surveyed. It is assumed here that it is beyond debate that African traditional societies displayed or were perceived to display strong group solidarity in their social organisation. Wiredu captures this well in the following statement:[91]

> In Africa it is anthropologically verifiable that generally, the operative ethic is communalism. This is a kind of social formation in which kinship relations are of the last consequence. People are brought up early in life to develop a sense of bonding with large kinship circles. This solidarity starts from the household and radiates outward to the lineage and, with some diminution of intensity, to the clan at large. The normative meaning of this bonding for an individual is that she has obligations to large groups of kith and kin. This relationship is balanced in the converse by rights due to her from a corresponding multitude of relatives.

As will be seen in the conclusion below, the ethic of group solidarity is the single most important consideration in understanding the approach to homicide in traditional African societies.

It is possible to proceed on the basis of this assumption even as debates continue as to the existence, then and now, of this notion and whether its influence persists. At least two ideas appear to be embedded in the notion of group solidarity: kinship as the basis of social organisation; and survival in the face of harsh economic realities.

3.1.1 Importance of kinship

As pointed out by Wiredu, African societies are generally organised around lineages, regardless of whether they remain small and close-knit or have expanded into nations, nation states or indeed even empires.[92] One immediate offshoot of this in respect of homicide is the distinction drawn between a killing involving close kin, distant kin, and 'outsiders'. As a general rule, killings within the family were considered serious transgressions which, however, did not lead to the death penalty, and sometimes did not necessarily lead to compensation either. In the former instance, staying the death penalty appeared to be based partly on the matter being 'somewhat private' and subject primarily to the jurisdiction of family heads and

91 K Wiredu 'An oral philosophy of personhood: Comments on philosophy and orality' (2009) 40 *Research in African Literatures* 15.

92 See, eg, Krige's description of the structure of the Zulu nation (Krige (n 59 above)).

elders and supernatural sanction, and partly on a general reluctance to compound the loss of a life with the taking of another.[93]

In the latter case, compensation was not payable simply because of the logic of role overlap: The people paying the compensation would be the same people due to receive it, using the same pool of resources.[94] As a result, the matter tended to be left to the ancestors or God to punish, being considered a sin rather than a crime.[95] Where a fine was payable to the chief, the matter fell into the category below.

3.1.2 Economic survival

There is an obvious overlap between the various reasons for the strong hold of group dynamics in traditional society (for instance, both religious and moral considerations play a part in mediating the behaviour of members as kin or as part of the community). The imperative of survival is one such consideration, which cuts across many identity boundaries. In respect of homicide, the survival of the group as an economic entity is key. Generally, members are considered to 'belong' to the chief or the king in his role as the embodiment of the unity and the well-being of the group.[96] The issue of the death penalty thus comes in, underlining the seriousness of depriving the group of a productive unit in the struggle for survival, whether the deceased's role was that of warrior, agricultural producer, child bearer or medicine man.[97] The same logic underpinned the rules regarding compensation to the victim's family (usually in the form of cattle to enable them to marry a wife, or the surrender of a female, as procreator) in addition to any fines payable to the 'state'.

The question that really cries out for an answer is whether power and influence tilted in favour of the group and away from the individual. On the evidence of the societies reviewed, there seems little doubt that this question should be answered in the affirmative: The primacy of the group comes through at all levels. A good example is the question of ritual cleansing which, in all the societies studied, underpinned a clear distinction between individual actions, on the one hand, and their impact on the group and its well-being and survival, on the other. A clear distinction was made between punishments specific to the perpetrator (such as a court-imposed fine) and group activity, usually involving a slaughtering to appease the

93 See, eg, Soga (n 2 above) 44.
94 Gluckman (n 16 above) 206.
95 As above.
96 Among the Zulu, this is captured in the saying 'all blood belongs to the King' (Krige (n 59 above) 228). Soga (n 2 above) refers to the chief as 'proprietor of every individual in the tribe' (43).
97 As above.

ancestors, as expiation for the deed lest the group be visited with calamity.[98]

3.1.3 Religion, life and the hereafter

It is beyond the scope of this article to do a treatise on African religion and its influence on the thinking of traditional communities. All that can be managed here is an attempt to sketch the basic shape of those belief systems that may fall under the rubric of religion, always with the aim of determining their relevance to the issue of homicide.

There is no better place to start than with the seminal work of Mbiti, who begins his treatise with the following words:[99]

> Africans are notoriously religious, and each people has its own religious system with a set of beliefs and practices. Religion permeates into all the departments of life so fully that it is not easy or possible always to isolate it. A study of these religious systems is, therefore, ultimately a study of the peoples themselves in all the complexities of both traditional and modern life.

He goes on to assert that for the African, religion permeates all areas of life and that 'there is no formal distinction between the sacred and the secular, between the religious and non-religious, between the spiritual and the material …'[100]

Linking these thoughts with the so-called community principle, Mbiti concludes:[101]

> Traditional religions are not primarily for the individual, but for his community of which he is part. Chapters of African religions are written everywhere in the life of the community, and in traditional society there are no irreligious people. To be human is to belong to the whole community, and to do so involves participating in the beliefs, ceremonies, rituals and festivals of that community.

Very generally speaking, many traditional religions will exhibit some or all of the attributes listed by Igwe[102] in his discussion of the Igbo, as follows:

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98 See n 138 below. While there is evidence of the practice of group purification, this matter is not in reality straightforward. Between the belief that death itself 'casts a shadow' or 'brings darkness' over the living, and the religious need to avoid the wrath of the ancestors at all costs, it is sometimes difficult to unravel motives underlying various cleansing rituals, from the washing of hands by funeral attendees before they re-enter the homestead, to the purification of the king as the embodiment of the group, to routine ancestor appeasement ceremonies in times of family misfortune. All these responses to death, in general, tend to cloud the specific issue of *homicide* as a stain on the group necessitating corporate cleansing. (See, generally, Kuper (n 2 above) 183-187; Wilson (n 4 above); R Lee & M Vaughn 'Death and dying in the history of Africa since 1800' (2008) 49 *Journal of African History* 341.

99 JS Mbiti *African religions and philosophy* (1989) 1.

100 Mbiti (n 99 above) 2.

101 As above.

102 Igwe (n 42 above) 123.

- a belief in God – a supreme being, called by various names relating to the roles of creator, protector, ruler of earth, sea and sky, and generally perceived to reside 'above' (that is, in the sky, the clouds or atop some fearsome mountain);
- a belief in divinities, who are spiritual beings who 'act as servants of God in His theocratic government of the universe'.[103] The supreme being is usually approached via the divinities;
- a belief in spirits – sometimes an overlapping concept with divinities, sometimes separate. Spirits, according to traditional Igbo, are 'good or evil, benevolent or malevolent' and may be used as a channel to approach God;
- a belief in ancestors – who are 'departed spirits who stand in close relation to their family or tribe'[104] and who are regarded as members, to varying degrees, of the families and communities to which they belonged during their lifetime, a concept very familiar to local southern African traditional societies and systems of customary law;
- a belief in magical forces – believed to emanate from the universe and capable of being harnessed, for good or for evil, by those with the skills or powers to do so. This is the basis of the widespread African belief in witchcraft,[105] an element that is important enough to discuss separately (below).

The implications of these beliefs on the issue of homicide are readily apparent, as are the obvious overlaps between them. Hopefully, the influence of each will emerge in the discussion which follows.

Conscious of these overlapping elements, I propose to highlight two aspects, which I believe are key to understanding traditional attitudes towards life and death: belief in the hereafter; and belief in the supernatural.

3.1.4 Belief in life after death

The belief among African traditional societies that life continues in some form after a person's physical death is so pervasive that it can be categorised under headings as divergent as religion and family law. According to Mbiti, '[d]eath stands between the world of human beings and the world of the spirits, between the visible and the invisible'.[106] Using the example of a Ndebele funeral, Mbiti sketches the procedures and rituals that are performed, and explains their symbolism in relation to the Ndebele belief in the hereafter.

Thus, the spear with which the heir of the deceased strikes the grave is for defence and protection 'on the way to … the new country'; personal belongings buried with the body are for use in the hereafter; and the animal slaughtered after the ceremony is likewise to provide the deceased with food.[107] Post-funeral ceremonies and rituals are equally redolent with meaning, cleansing the living from

103 As above.
104 Igwe (n 42 above), quoting HO Anyanwu *African traditional religion from the grassroots* (1999) 112.
105 Mbiti (n 99 above) 124.
106 Mbiti 145.
107 Mbiti 147.

the stain of death, mystically connecting them with the deceased and, finally, 'summoning back' his spirit so that the unity of the living and the departed can be established. Mbiti states:[108]

> It is a ritual celebration of man's conquest over death: For death has only disrupted and not destroyed the rhythm of life. It indicates also that the departed is not really dead: His is a living-dead, and can be contacted, invited back and drawn into the human circles. The new 'beast of the ancestors' symbolizes the continuing presence of the living-dead in the family and among his people.

Wilson takes up the story, relating similar funeral rites and the reasoning behind them directly to the Joluo attitude to homicide.[109]

Lee and Vaughn echo these sentiments:[110]

> To simplify, the dead could only find their place as ancestors, rather than vengeful ghosts, if their loss had been properly registered, not only by the individuals closest to them, but by the social groups of which they were members.

The message embedded in these examples is that each family considers that it has members in the present as well as in the past; that those in the past are the living dead whose condition in the afterlife is largely dependent on the actions and piety of those they left behind. They are thus likely to be well-disposed towards their earthly kin if they are happy with their performance, and angry and ill-disposed if they are not. The task of the living is to keep them happy and well-disposed.

3.1.5 Belief in the supernatural

Allott[111] refers to these beliefs and practices as 'religio-magical' when emphasising their significance in customary law, thus confirming the overlaps mentioned above. Whether considered as an aspect of religion or some other kind of spirituality, the supernatural has always played a key role in the lives of traditional African societies, explaining daily phenomena, such as illness, or natural disasters, such as droughts and floods. However, its most visible form in day-to-day social interactions is the issue of sorcery or witchcraft.

All the societies reviewed in the article share a preoccupation with witchcraft, and invariably reserve some of their severest penalties for perpetrators, real or imagined.[112] Krige reports that 'witchcraft is looked upon as the most terrible crime by the Zulus, and as such cannot be tried by judicial process'[113] because it is due to unforeseen

108 As above.
109 Wilson (n 4 above).
110 Lee & Vaughn (n 98 above) 342.
111 A Allott *Essays in African law: With special reference to the law of Ghana* (1960).
112 The death penalty is invariably invoked, sometimes preceded by torture and, occasionally, involving the slaughter of the whole family and the confiscation of property.
113 Krige (n 59 above) 225.

forces discoverable only through divination, which appeals to the same forces. Witchcraft is perceived not only as hurting individuals and families, but also as destabilising the group.[114] It is thus classified variously in many societies as a crime and/or a delict and even treason.[115] The same multifaceted interpretations lead to differences in approach to sentencing, ranging from 'exemplary' harshness (Zulu); death or banishment (Swazi); to a strong link to insanity (Tiv), which has the effect of mitigating the sentence or providing a defence in the case of one who kills a suspected witch as a pre-emptive strike.

3.3 Killings at the hands of authorities

Before the central issue of accountability is discussed, it is important to treat the issue of homicide perpetrated by rulers or at their behest, or in consequence of customs and rituals surrounding them. In the previous discussion we have seen how traditional societies have viewed, and dealt with, homicide amongst their members, with the role of the rulers (whether an aristocracy, a militaristic leadership or kinship hierarchy) being confined to adjudication and sentencing.

What has not received attention is the question of the taking of human life in the absence of any wrongdoing on the part of the victim, particularly in those cases where the killing is on the direct orders of the ruler (but not in execution of a sentence for an offence), or is done on his behalf or in pursuit of custom relating to him. For convenience, I shall refer to the ruler as the king, and to the phenomenon under discussion as human sacrifice.

Excluded from this discussion, as mentioned above, are killings in execution of sentence for wrongdoing, self-defence and killings in war or other conflict situations. Also excluded is the crime of ritual murder as committed by ordinary citizens, and the issue of regicide, which is the other side of the coin in the current discussion. The issue of regicide will be discussed later in the article.

A final word of caution before the discussion: Although there is ample anthropological evidence of the practice of ritual killing by or on behalf of kings, in contemporary times the matter remains mostly shrouded in secrecy. In this respect, it is no different from many other traditional practices where there is a cult of secrecy, such as in respect of the exact details of initiation rites.

A useful starting point is an understanding of the place and role of kings in African traditional society. In the section of his book headed 'Kings, queens and rulers', Mbiti has the following to say about kingship:[116]

> Where these rulers are found, they are not simply political heads: they are the mystical and religious heads, the divine symbol of their people's health

114 See Soga (n 2 above) 45.
115 Krige (n 59 above) 227.
116 Mbiti (n 99 above) 177.

> and welfare. The individuals as such may not have outstanding talents or abilities, but their office is the link between human rule and spiritual government. They are therefore, divine or sacral rulers, the shadow or reflection of God's rule in the universe. People regard them as God's earthly viceroys.

This is echoed by Krige, who describes the Zulu King as both representative to the ancestors and chief medicine man, 'the centre of all agricultural and war ritual and representative of the unity of the tribe'.[117] This explains the need for the King to be fortified for his office, not only so that he can have powers to harness forces in the universe for the benefit of the group, but also in order that he becomes strong enough physically and magically to withstand attempts to harm him, for to harm the King is to harm the nation.[118]

For these reasons, the King undergoes strict strengthening procedures.[119] Krige also reports on burial rituals which again involve the loss of human life in the form of close household servants who are ritually killed and buried with the King.[120] Human sacrifice for similar purposes is reported as far afield as Asante in the nineteenth century.[121]

There is also evidence of ritual 'fortifications' involving human sacrifice among the Tiv, although it is not clear if this was in all cases at the behest of royalty.[122]

4 Incidence and types of homicide: A summary

From the materials reviewed, it is evident that homicide occurred significantly in traditional society, even frequently. What is difficult to assess is the rate of the occurrences, because of the lack of uniformity in the incidence of killing in the various traditional contexts, ranging from societies like the Nuer, where it can legitimately be described as 'over the top', to systems such as those of the Joluo, where a considered and apparently successful set of restraints operated to keep the incidence of homicide muted.[123] However, in all the societies studied, homicide presents as a human urge that they all struggled to deal with.

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117 Krige (n 59 above) 233.

118 Krige 241.

119 Krige 233 241.

120 Krige (n 59 above); Kuper (n 2 above) 82 notes similar practices among the Swazi.

121 C Williams 'Asante: Human sacrifice or capital punishment? An assessment of the period 1807-1874' (1988) 21 *International Journal of African Historical Studies* 441.

122 Bohannan (n 4 above) 61.

123 To cite a non-African example, the Cheyenne of North America had in place a set of restraints against homicide (banishment and the need for ritual cleansing) which were effective because they merged personal punishment with group renewal, thus deterring any hasty resort to killing. KN Llewellyn & E Adamson Hoebel *The Cheyenne way: Conflict and case law in primitive jurisprudence* (1941) 132-135.

An attempt to list the types of killing that took place would produce something like the following:

- hot-blood fights and disagreements (the ubiquitous drinking party);
- sexual jealousy (crimes of passion including those triggered by marital infidelity);
- accidental killings (eg the hunting party);
- negligent and/or reckless killings (to be distinguished from accidents);
- premeditated killing (encompassing murder);
- war, cattle raids and revenge attacks;
- killings driven by 'lawful instructions' (these would include the execution of a lawful death sentence, as well as ritual homicide ordered by authority of custom);
- self-defence or other necessity which precluded *mens rea* (including, in some societies, pre-emptive killing in the belief by the slayer that he was the target of sorcery);
- violence involving family issues (infanticide, matricide, patricide, sacrifice, euthanasia);
- killings driven by superstition and belief (for instance, deformities at birth, including the issue of twins); and
- regicide, assassination and other political 'solutions'.

All these kinds of killings come into sharp relief when, in each society, they are compared to the defences accepted as being adequate to exculpate completely or at least to mitigate sentence on the basis that moral blameworthiness was reduced. Thus it is interesting to note that, in addition to self-defence proper, many societies were prepared to countenance the killing of a suspected sorcerer[124] and a thief caught in the act, almost on the same basis of self-help. Also interesting are the lengths to which some societies were willing to go to extend the blanket protection of insanity and epilepsy, even sleeping sickness, to certain categories of slayers.[125]

For our purposes, the deployment of defences and other mechanisms of excusability begin to hint at the values of these societies and the norms they observed in relation to the taking of human life, a subject to which we now turn.

5 Homicide in traditional African societies: Norms and sanctions

The question of sanctions is important in throwing some light on the disapproval of certain kinds of behaviour, and how strongly or weakly such actions were disapproved of. At the apex of the hierarchy of disapproval stands the death penalty. In common with some modern legal systems, the death penalty was considered appropriate for premeditated killing (namely, murder), although in traditional systems

124 My informant on the Zulu explained the extended definition of a witch as anyone who was caught lurking around someone else's homestead in the dead of night (Zondi interview, Durban, 3 September 2015).

125 See, eg, Bohannan on the Tiv (n 4 above).

this highest form of disapproval was also extended to homicides that contemporary systems would balk at. Indeed, some kinds of killing, as we have seen, were considered a duty.[126]

Generally speaking, traditional society reserved the death penalty for murder, witchcraft, red-handed theft and treason.[127] The line between the death sentence as an order of the court, the King and other judicial process, on the one hand, and permission for a member of the group to take the law into his own hands in certain circumstances, is blurred.[128] One may thus qualify the earlier statement by referring not only to the death penalty, but also 'to any death of a wrongdoer occurring at the hands of ordinary citizens for which there were no repercussions'.[129] This has implications for the discussion of accountability which follows, but for now it should suffice that the sanctioned killing of a wrongdoer marked the pinnacle of social disapproval.

There were other punishments. The taking of a life may result in a fine, especially (but not exclusively) in those societies where the death penalty was not recognised.[130] The fine may be coupled with a requirement for compensation to the victim's family. A fine could expand to the confiscation of the slayer's assets (which itself may be executed in parallel with the death penalty). Banishment was another mainstream punishment.[131] In earlier societies, the list of sanctions may include an entitlement to revenge (blood-for-blood) by the victim's kin. Other forms of compensation included enslavement[132] and various versions of providing offspring to swell the ranks of the victim's lineage.[133]

The philosophical question here is a challenging one. It is easy to discern a very pragmatic motive in these arrangements, animated, on the one hand, by a strong disapproval of wanton killing and, on the other, by the practical need to 'make good' the loss to the deceased's kin. At a cursory glance, no evidence of ethical codes such as *ubuntu* readily avails itself, but this perception will be interrogated at the conclusion of the article.

It should suffice here to conclude that, on the question of traditional values with regard to homicide, one clear norm which

126 Evans-Pritchard (n 8 above) 152.

127 Treason had a wide definition, including disobedience to the king and various kinds of disloyalty.

128 As in the case of discovering a 'witch' 'around one's household at night or catching a thief in the act' (Zondi interview, Durban 3 September 2015).

129 As above. Methods of execution varied, ranging from clubbing to death to throwing off a cliff. The harshest, involving torture, were reserved for sorcerers; Krige (n 59 above) 227.

130 On the Xhosa, see Soga (n 2 above). It should be remembered that a fine payable to the chief or king indicated that the offence was a crime, not a delict, or both.

131 On the Swazi, see Kuper (n 75 above).

132 Where a kinsman of the slayer was given up to the victim's family for servitude.

133 By providing cattle for *lobolo* to enable the deceased's brother or other relative to take a bride, or by providing a young girl as a procreator.

comes to the surface is this*: Killing was not allowed except for good reason*. The reality is simply that the list of reasons considered to be good reasons was, in the circumstances of those societies at the time, somewhat longer than would be countenanced in modern law. Any taboos that supported this norm appear to have been based on religion and on the supernatural – namely, that wanton killing defiled the group and consequently attracted the wrath of God, or the ancestors, hence the need for ritual cleansing.[134] Compensation and other forms of reparation were the secular side of the coin. Self-defence and its variants are helpful in understanding the outer limits of the norm, indicating when it was considered to have been breached and when it was not.

6 Question of accountability

The *Collins dictionary*[135] gives one of the meanings of 'account' as 'an explanation of conduct, especially one made to someone in authority', and describes 'accountable' as being 'responsible to someone for some action; answerable'. There is a stricter, more formalised meaning in international law, a working version of which for our present purposes can be formulated as follows, based on the notion of the right to life.[136]

The formulation concedes that there are various forms of accountability, ranging from imprisonment and fines to non-criminal forms, such as formal disciplinary processes and reprimands. The question is whether any of these forms of accountability existed in traditional society. The answer, after the review we have gone through, must surely be in the affirmative. Unfortunately, that is not the end of the matter. Several questions remain, such as whether such forms of accountability actually imply the recognition of a right to life as known in human rights law or by any other yardstick. That interesting discussion is beyond the scope of this article, but the question of human rights is raised vividly in one particular context, which provides a fitting conclusion to these reflections on traditional society.

This is the attempt to squarely confront the elephant in the room: the killing of ordinary people by those in authority. I confine myself to the ritual killing of members of the group by their leaders, specifically kings. It was noted earlier that kings were considered to be the

134 For examples of ceremonies of atonement, see Evans-Pritchard (n 8 above) 154; Krige (n 59 above) 228.

135 n 3 above.

136 'The failure of the state to take effective measures to identify and hold to account individuals or groups responsible for violations of the right to life can itself be a violation by the state of that right, even more so where there is tolerance of a culture of impunity. Draft General Comment 3 on Article 4 of the African Charter on Human and Peoples' Rights (The right to life) para 7, commenting on para 3 of the text.

embodiment of the group,[137] perceived to have both earthly and magical qualities necessary for the protection of the collective. The discussion is thus about that complex of issues which implicates the so-called communal ethnic and questions of the right to life.

Time does not permit a full exposition of the terrain, but several pointers to the argument should suffice in making the point. In the first place, I am persuaded that the communal ethic or solidarity principle is a reality for African societies and that continuing doubts about this are the result of weak argumentation on the part of its supporters or wilful blindness on the part of doubters. I will attempt to make the point by referring to the work of African scholars who argue, persuasively in my view, that the failure to acknowledge the significance of kinship in the make-up of pre-colonial African societies is a missed opportunity to understand Africans and the world view that animates their response, for instance, to human rights.[138]

In brief, these writers make the point that a human rights dispensation for Africa that consciously accepts and works with, rather than against, these insights will find more resonance with African populations. Second, many of these scholars question anthropological and historical versions of pre-colonial societies which emphasise the 'single despot' view of African kingship.[139] Taken together, these views paint a picture of political accountability by traditional leaders that went far beyond anything found in modern constitutions.

Simply stated, the argument is that there was far more real accountability in pre-colonial traditional society than there is in contemporary African society. Asserting this argument, Ayittey observes:[140]

> The indigenous form may be different from the Western. Nonetheless, the important fact is traditional African rulers – chiefs and kings – are held accountable for their actions and were removed from office or killed (regicide) for dereliction of duty. By contrast, most modern African leaders cannot be held accountable and commit crimes with impunity.

Ayittey details various accounts of West African societies where the duties and responsibilities of a king were so onerous that many candidates (where choice was possible) declined the honour when offered because, in addition to a life of genuine powerlessness except as a mouthpiece of the council of elders,[141] their lives were forfeited if

137 Krige (n 59 above) 233.

138 GBN Ayittey 'Traditional institutions and the state of accountability in Africa' (2010) 77 *Social Research* 1183-1210; C Ake 'The unique case of African democracy' (1993) 69 *International Affairs* 239-244; Ndlovu-Gatsheni (n 88 above) 375-397; C Ake 'The African context of human rights' (1987) 34 *Africa Today* 5-12; Wiredu (n 91 above); Mbiti (n 91 above).

139 Ndlovu-Gatsheni (n 88 above) 378.

140 Ayittey (n 138 above) 1185.

141 The Zulu description of a king as *umlomo ongathethi manga* (the mouth that tells no lies) embodies this notion in its implication that words uttered by a king are in any case not his own (Zondi interview, Durban, 3 September 2015).

their stewardship of the group did not pass muster. Both the Yoruba and the Akan had mechanisms to trigger regicide, royal suicide or abdication.[142] Family-sanctioned assassination of the leader was also included.[143]

In this regard, Ayittey is corroborated by Ndlovu-Gatsheni who describes the development of the Ndebele kingdom from the militaristic period of state formation to a 'settled phase' where the contours of an accountable kingship started to emerge.[144] He rejects the model of a single despot, explaining his position as follows:[145]

> By a single-despot model I mean the emphasis on precolonial forms of governance as centralised pyramidal monarchies with all-powerful kings at their apexes with power over both the life and death of their subjects … In the first place it is too simplistic to use a single-despot model to explain African governance systems because the diverse nature of African societies defies such generalizations. Each precolonial society had a unique set of rules, laws and traditions suitable for particular contexts. These rules, laws and traditions, commonly termed customs, formed the basis of how people lived together as part of a community or state.

Elaborating on the settled phase, Ndlovu-Gatsheni maintains that it was during this time that issues of governance, accountability, legitimacy and human rights (long ignored during the turbulence of the formative years) now began to receive attention in state politics.[146]

It was a phase marked by 'royalisation' where, as the kingship took on more shape and power, so also did the constraints on that power increase. Ndlovu-Gatsheni explains:[147]

> In theory, the king was the head of state, head of government, religious chief, commander-in-chief of the armed forces and the supreme judge of all criminal cases. In practice, however, the king was basically a ceremonial head of state in all these posts and a source of unity in the state.

This aligns with the view of Ayittey who states:[148]

> Generally, African natives accepted the king as a necessary evil. He was necessary for the preservation of the social order but a potential danger. He could abuse his powers and be intrusive, trampling on the independence and freedom of his people. To resolve this dilemma, African ethnic groups sought, with various degrees of success, to create some personality hidden from public view but whose awe-inspiring authority could be invoked to maintain order and harmony.

Such analyses support the assertion that African kings in early times were not only accountable, but the things they were accountable for

142 Ayittey (n 138 above) 1195.
143 As in the Zulu case of the killing of King Shaka (Zondi interview, Durban 3 September 2015).
144 Ndlovu-Gatsheni (n 88 above) 379.
145 Ndlovu-Gatsheni 378.
146 Ndlovu-Gatsheni 379.
147 Ndlovu-Gatsheni 383.
148 Ayittey (n 138 above) 1190.

covered a much wider spectrum. So, for instance, as Ndlovu-Gatsheni explains,[149] pre-colonial kings were accountable even for natural disasters.[150]

Two points emerge from this. The first is that it would be difficult to deny that the notion of accountability existed in traditional society, even in its contemporary sense of requiring that consequences be visited upon the taker of human life. The second is that, unfortunately, this does not dispose of the matter of whether such accountability was exacted in pursuit of a recognised right to life. When aides close to the king arranged for people to 'accompany' the king to the other side when he died, they believed they were acting in the common good. As my KwaZulu-Natal informant said, 'if not, it was just murder'.[151] It is difficult to decide whether or not this is evidence that a right to life was recognised in traditional society. On the one hand, an argument may be made that, generally speaking, life was respected and killings of this type were an exception to the rule (that is, that taking life in pursuit of the common good was excusable), or it may be contended that an example such as this proves the absence of a notion of the right to life, on the other.

On balance, I believe that there is enough material to support an assertion that traditional African society recognised a right to life; it was in its operationalisation that the practice of these societies differs markedly from modern practice.

In the first place, 'life' would have meant something different to these societies. As mentioned above, life would have been framed in communal terms, both from a practical standpoint as well as in a moral sense. A conception of a right to life would perforce conform to this ethic, a notion that is perhaps already hinted at in various versions of the 'wealth in people' idea.[152]

Additionally, as a human rights principle, the right to life would need to be understood in terms of the possibility that an African conception of human rights may be different from the Western conception.

149 Citing C Ake 'Rethinking African democracy' (1991) 21 *Journal of Democracy* 43-78 and J Cobbah 'African values and human rights: An African perspective' (1987) 93 *Human Rights Quarterly* 309-331.

150 Ndlovu-Gatsheni (n 88 above) 388. He also discusses accountability through patronage, made possible by control of production (390-391). See also Ayittey (n 138 above), who mentions other forms of accountability: regicide; fear of secession; and traditional civil society watchdogs (1196-1200).

151 Zondi interview, Durban, 3 September 2015.

152 Whether this is in the form of the Xhosa reluctance to deplete the numbers of the group by capital punishment, or the Swazi notion that people belong to the King. See H Hannum 'The Butare Colloquium on Human Rights and Development in Francophone Africa' (1979) *Universal Human Rights* 65, who asserts that the right to life was much wider in traditional culture, entailing not only a prohibition against killing but also an obligation to maintain needy members of the community (69).

Ake explains it as follows:[153]

> First, we have to understand that the idea of legal rights presupposes social atomization and individualism, and a conflict model of society for which legal rights are the necessary mediation. However, in most of Africa, the extent of social atomization is very limited mainly because of the limited penetration of capitalism and commodity relations. Many people are still locked into natural economies and have a sense of belonging to an organic whole, be it a family, a clan, a lineage or an ethnic group. The phenomenon of the legal subject, the largely autonomous individual conceived as a bundle of rights which are asserted against all comers has not really developed much especially outside the urban areas.

Ake elaborates further:[154]

> It is necessary to extend the idea of human rights to include collective human rights for corporate social groups such as the family, the lineage, the ethnic group. Our people still think largely in terms of collective rights and express their commitment to it constantly in their behaviour. [This disposition] … underlies the so-called tribalists voting pattern of our people, the willingness of the poor villager to believe that the minister from his village somehow represents his share of the national cake, our traditional land tenure systems, the high incidence of cooperative labour and relations of production in the rural areas. These forms of consciousness remain very important features of our lives. If the idea of human rights is to make any sense at all in the African context, it has to incorporate them in a concept of communal human rights.

If there is substance to these assertions, then such a conception of human rights is bound to provide a context one cannot ignore in assessing how the right to life would have been perceived in traditional African society.

In the second place, traditional African societies were facing exigencies in their daily lives which were quite different from contemporary life. There were categories of killings then prevalent that have no counterpart in modern conditions (or, at least, the justifications of which were unique to those circumstances). Infanticide, euthanasia, killing of the elderly and regicide would largely fall in these categories.[155] The reasons are varied, ranging from inhospitable climate and terrain making it impossible for a nomadic group to travel with the infirm, to superstition.[156]

Interrogating the link between the community principle and human rights naturally leads to a reflection on the impact of this ethic on morality. Here the work of Metz is instructive. Metz argues, to my

153 Ake (n 138 above) 9.

154 As above.

155 Although not exclusively discussing African societies, Diamond (n 5 above) 179 has a useful discussion of infanticide where, among the !Kung of the Kalahari, the decision of whether to kill, eg, a deformed newly born is left to the mother. Interestingly, Diamond points out that no ethical issue attaches to this act, since the !Kung believe that life begins not at birth, but when the child is given a name.

156 As above.

mind convincingly, for a link between the communal ethic and *ubuntu* as a moral theory.[157] Setting out to refute criticisms of *ubuntu* as *vague* (that is, without ascertainable content), *collectivist* (and, therefore, hostile to individual freedom) and *anachronistic* (because of its traditional origins), Metz articulates a normative theory based on the capacity for community represented by what he calls 'identity' and 'solidarity'.[158] This leads him to a more nuanced interpretation of the popular rendition of *ubuntu* as meaning that 'a person is a person through other people'. According to his version, 'one becomes a moral person insofar as one honours communal relationships'.[159]

Metz concludes:[160]

> According to this moral theory, grounded in a salient Southern African valuation of community, actions are wrong not merely insofar as they harm people (utilitarianism) or degrade an individual's autonomy (Kantianism), but rather just to the extent that they are unfriendly or, more carefully, fail to respect friendship or the capacity for it. Actions such as deception, coercion and exploitation fail to honour communal relations in that the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness …

Arguing on the basis of dignity being the keystone of human rights and rejecting the Kantian view that persons have worth because they have the capacity for autonomy, Metz describes his account as asserting that persons have superlative worth 'because they have the capacity to relate to others in a communal way'.[161] This is an attractive account of human rights from an African perspective as it does not deny the resilience of the communal ethic as it, similarly, does not deny the importance of human rights. This may yet prove useful in untangling the Gordian knot posed above, namely, the issue of accountability for homicide in situations where an assessment of action as right or wrong centrally involves the well-being (however perceived) of the group.

7 Conclusion

Having reviewed the practices and attitudes of a number of traditional African societies on the issue of homicide, we are left with a sense that we do not have to go very far to establish that these societies did recognise and understand the notion of accountability. We also find that such understanding encompassed aspects of accountability that are recognised in modern society, namely, the subjection of a perpetrator to sanctions. But there the similarity ends.

157 Metz (n 32 above).
158 Metz 538.
159 Metz 540.
160 As above.
161 Metz (n 32 above) 544.

To understand this, we need to go back to the task at hand, which is to see if there is anything in traditional practice that has resonance in contemporary life relative to the taking of human life and the consequences of such action. Heyns sets out the basics:[162]

> The right to life under international human rights law has two distinct components. The first sets out the substantive norm, and provides that no one shall be subjected to an arbitrary deprivation of his or her life. It is thus preventative.

In respect of accountability, Heyns states:[163]

> The second component of the right to life is that there shall be accountability for arbitrary deprivations of life. Accountability entails notions of justice, which is traditionally seen as requiring investigations and where applicable, prosecutions, but increasingly also truth seeking and reparations.

Importantly, Heyns emphasises that the lack of accountability for an arbitrary deprivation of life, itself, is 'a stand-alone violation of the right to life'[164] in international law.

Finally, observing that the right to life is not unlimited and may in certain circumstances be curbed, Heyns discusses the 'protect life' principle, concluding that in current international law the right to life calls for the taking of life only to protect another life. 'Life may not be taken for example purely to protect property.'[165]

This then puts into perspective the question posed earlier, namely, whether the undoubted examples of traditional accountability imply that a right to life was recognised in traditional African society. It also puts into perspective the statement made that there are similarities between the practices of traditional society and the requirements of modern law, but that these similarities do not go far.

To make sense of the traditional African approach to homicide, one has to understand that it is, predictably, pervaded by the community principle, which itself is no stand-alone factor but part of a complex set of interlinked considerations: religion; belief in the supernatural; and the survival imperative. Inevitably, 'life' in the sense of the right to life must have meant something to traditional society that is fundamentally different from the meaning it has in contemporary society. There is a sense in which it is not overstating the case to suggest that a person's life 'belonged' to her but to others as well. Identifying her individual 'right' to this life was, therefore, not a single linear calculation. A homicide in traditional society (whether accidental, negligent or intentional) could invoke justifications, or produce consequences, that are demonstrably different from anything

162 Heyns (n 7 above) 3.
163 As above.
164 As above.
165 Heyns (n 7 above) 4. One can already detect important divergences here between international law and the norms prevalent in traditional society.

that one might associate with, for instance, a killing in a South African suburb or township today. In a traditional small-scale nomadic society of hunter-gatherers or small-scale farmers, for instance, the taking of a life might invoke explanations such as that she was a witch intent on harming us or our crops; he was a thief endangering our livelihood; she was a deformed baby representing a curse by the ancestors; he was old and infirm, unable to travel with us when the snows come; he was plotting against the king, destabilising the group and courting the wrath of the ancestors. The list is long. Even in the case of a straightforward murder, there were consequences not only for the perpetrator but for the group (be it the clan or the tribe), and these were differentiated according to whether the life taken was that of a kinsman or an outsider.

Modern notions of accountability are only partly accommodated in such a scenario, as are notions of life and notions of right, indeed even of justice. That the contemporary notion of accountability is tied up with justice is not surprising: It operates at a level where the nation state, acting through elected representatives, requires to maintain order among large populations, the members of which are largely strangers to each other.[166] In small societies where everybody knows everybody else (and are most likely to be kin), the priorities may be different – restoration of relationships may be more important than justice in an abstract sense.[167] The question whether restoration may itself be an aspect of the idea of justice in such societies suggests that further work needs to be done to understand the 'mind' of traditional African societies on the matter of the taking of human life.

166 Diamond (n 5 above) has an illuminating discussion about the evolution of nation states from small-scale origins in which he lists many of the features that changed in the process (10-12).

167 As above.

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The essence vindicated? Courts and customary marriages in South Africa

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Summary

This article describes different approaches in which courts have determined the validity of customary marriages under the Recognition of Customary Marriages Act in order to address the historical injustices of vulnerable parties in a customary marriage. These approaches are drawn from selected cases decided after the Act came into effect and consist of two scenarios, namely, 'judicial notice' and 'proof' of customary law. These approaches produce considerably distinct results. On the one hand, where courts adopt the approach of 'judicial notice' and apply official customary law, the inevitable result has been the invalidation of marriages. On the other hand, if the approach has emphasised the recognition of the essence of customary law, courts have validated these marriages and protected vulnerable parties. These results may support (at least partly) the theory by various scholars that the Constitution envisaged that courts will be applying living customary law in order to fulfil their constitutional obligations.

Key words: *customary marriages; validity; judicial notice; proof of customary law; living customary law*

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1 Introduction

Since the coming into effect of the Recognition of Customary Marriages Act (RCMA),[1] case law show that customary rules and practices that regulate the validity of a customary marriage have undergone significant change.[2] The motivating factor has been the Constitution of the Republic of South Africa, 1996 (Constitution).[3] For example, courts have accepted the rule laid down in *Mabena v Letsoalo*,[4] namely, that a woman could now negotiate and receive *lobolo*.[5] In accepting this change, Judge Dlodlo in *Fanti v Boto* cited with approval *Mabena v Letsoalo* and observed that '[i]f courts do not observe the role played … by women in society, then that would include failure … on their part to participate in the development of customary law'.[6]

In addition, courts have accepted the requirement that, under Tsonga customary law, a husband who wants to marry a subsequent wife must inform his first wife.[7] This, again, was based on the fact that 'any notion of the first wife's equality with her husband would be completely undermined if a husband were able to introduce a new marriage partner to their domestic life without her consent'.[8] More recently, in *Nhlapo v Mahlangu*[9] the court accepted evidence by expert witnesses that according to Ndebele culture, 'when a man wants to enter into a second customary marriage he must have the first wife's approval'.[10] In recognising this rule, the court made

1 The Recognition of Customary Marriages Act, 1998 (RCMA), which regulates all customary marriages in South Africa, came into effect on 15 November 2000.

2 See, eg, the cases of *Mabuza v Mbatha* 2003 (4) SA 218 (C) and *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

3 In particular, sec 39(2) of the Constitution provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In addition, sec 211(3) provides that '[c]ourts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.

4 In *Mabena v Letsoalo* 1998 (2) SA 1068 (T), decided prior to the RCMA, the High Court gave effect to the living custom that allows the mother of the bride to perform the task of negotiating and receiving *lobolo*. Traditionally, this requirement was met if the agreement was between the bride's and groom's male guardians.

5 *Fanti v Boto* 2008 (5) SA 405 (C) para 21.

6 *Fanti v Boto* (n 5 above) para 21

7 According to expert witnesses' evidence, the requirement was to 'inform' the wife and her 'consent' was not needed. *Mayelane v Ngwenyama* (n 2 above) para 61.

8 *Mayelane v Ngwenyama* (n 2 above) para 72. In addition, the Constitutional Court in para 74 observed, 'given that marriage is a highly personal contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent'.

9 [2015] ZAGPPHC 142 para 34. Briefly, the challenge to the validity of the marriage was brought by the first wife who alleged that, according to Ndebele custom, her consent as the first wife was a requirement for subsequent marriages by her husband.

10 *Nhlapo v Mahlangu* (n 9 above) para 33.

reference to the *dictum* in *Mayelane v Ngwenyama* and was of the opinion that 'consent of the first wife was a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act'.[11]

Against this brief background, the article explores whether courts apply living or official customary law when establishing the validity of customary marriages. The aim is to assess how courts address the injustices of the past that led to the non-legal protection of vulnerable parties, particularly women, in customary marriages. The article is divided into five main sections. The second section briefly outlines the legal framework regarding the requirements for a valid customary marriage under the RCMA. This part also discusses the distinction between living and official customary law. The third part is a discussion of the two main approaches adopted by courts in determining the validity of a customary marriage, namely, the 'judicial notice approach' and 'proof of customary law approach'. The fourth section is a critical analysis of the cases discussed and addresses the question whether courts protect vulnerable parties in a customary marriage. The last section is a conclusion in which, borrowing from Ozoemena's words, it is argued that 'the value of the Recognition Act as a tool to remedy the injustices of the past in relation to customary marriages'[12] can be achieved when courts apply living customary law. Such an approach may partly also support the theory by various scholars that the Constitution envisaged that courts would be applying living customary law in order to fulfil their constitutional obligations.[13]

11 *Nhlapo v Mahlangu (*n 9 above) paras 30 & 33 as cited in *Mayelane v Ngwenyama* (n 2 above) para 30.

12 R Ozoemena 'Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*' (2015) 18 *Potchefstroom Electronic Law Journal* 969 987.

13 TW Bennett 'Reintroducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 1 11. Further, Bennett 8 observed that the '[c]onstitutional protection was reserved for the living law, which was deemed a genuine feature of African culture'. See also W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241 247. Lehnert (247) observes that 'the courts' obligation to apply customary law must refer to the living law because the distorted official customary law cannot be regarded as an expression of the culture of black South Africans'. See C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problem solved or just beginning?' (2000) 117 *South African Law Journal* 306 331 where similar observations were made. In addition, Himonga & Bosch 328 observed that '[i]n the South African situation, the recognition of a right to culture also implies the recognition of theoretical frameworks of law that lie outside the legal positivists approaches to law. Denying that law can exist outside the state-generated law is tantamount to denying that there is a right to culture.' Reference can also be made to C Himonga & A Pope '*Mayelane v Ngwenyama and Minister for Home Affairs*: A reflection on wider implications' (2013) *Acta Juridica* 318 321.

2 Requirements for a valid customary marriage under the Recognition of Customary Marriages Act

The RCMA regulates all customary marriages in South Africa.[14] According to section 2, it recognises two types of marriages, namely, marriages concluded before and after the coming into effect of the RCMA.[15] Marriages concluded before the RCMA are recognised provided they are in existence and valid at the time when the Act came into force.[16] With the exception of KwaZulu-Natal, the requirements for a valid marriage concluded before the RCMA are, therefore, provided under traditional living customary laws as observed by indigenous communities.[17] These requirements, as outlined by several scholars,[18] include the age of puberty or undergoing initiation ceremonies; consent of spouses; consent of parents or guardians, especially the bride's male guardian or father; prohibited degrees of relationships, whereby most communities prohibited marriages between members of the same clan; formal delivery or handing over of the woman from her family to the family of the husband; the agreement that *lobolo* will be delivered; and non-existence of a civil marriage.

For customary marriages concluded in KwaZulu-Natal, the requirements, as stipulated under section 38(1) of the KwaZulu Act on the Code of Zulu Law and Natal Code of Zulu Law, are consent of the father of the prospective wife (if a minor), which consent may not be withheld without good reason; consent of the father of the prospective husband (if a minor); and a public declaration by the intended wife to an official witness at the celebration of the marriage

14 According to the Preamble, the RCMA is an 'Act to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith'.

15 Sec 2(1) of the RCMA provides that '[a] marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage'. Sec 2(2) of the RCMA provides that '[a] customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage'. Sec 2(3) provides that '[i]f a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages'. Sec 2(4) provides that '[i]f a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages'.

16 See also IP Maithufi '*MM v MN*' (2012) 2 *De Jure* 405.

17 See TW Bennett *Customary law in South Africa* (2004) 194.

18 Eg, Bennett (n 17 above) 195 and C Rautenbach et al *Introduction to legal pluralism* (2010) 50.

that the union was with her free will and consent.[19] After the RCMA came into effect, section 3(1) requires that both parties must be over the age of 18;[20] both parties must give consent to be married under customary law;[21] and, more relevant to this discussion, 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.[22]

From the preceding paragraphs, whether a customary marriage was concluded before or after the RCMA, one of the crucial requirements for its validity is meeting the *customary law* requirements. But what is customary law in the context of customary marriage requirements? According to the RCMA, customary law is defined as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[23] Literature informs us that there are mainly two forms of customary law: living and official law.[24] These forms have been confirmed in, for instance, *Bhe v Magistrate Khayelitsha,*[25] in which case the Constitutional Court stated: 'the official rules of customary law are sometimes contrasted with what is referred to as living customary law, which is an acknowledgment of the rules that are adapted to fit in with changed circumstances.'[26] Again, in *Mabena v Letsoalo*, the High Court held that there are two forms of customary law, 'an official version as documented by writers, and living law, denoting law actually observed by African communities'.[27] In addition, legislation dealing with customary law also recognises the coexistence of official and living customary law. For example, both the RCMA and Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009 (Customary Succession Act) define customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[28]

19 Sec 38(1) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and Natal Code of Zulu Law published in Proclamation R151 of 1987, GG 10966.

20 Sec 3(1)(a)(i) RCMA.

21 Sec 3(1)(a)(ii) RCMA.

22 Sec 3(1)(b) RCMA.

23 Sec 1 RCMA.

24 Authors, eg, C Himonga et al (eds) *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 27 have observed a third form of customary law which is state generated by courts and legislation. On the general discussion on dichotomy between official and living customary law, see generally Himonga & Bosch (n 13 above) 319-331.

25 2005 (1) SA 580 (CC).

26 *Bhe* (n 25 above) para 87.

27 *Mabena v Letsoalo* (n 4 above) para 1074.

28 See secs 1 of both the RCMA and the Customary Succession Act. It should, however, be observed that, even though both legislations use the exact same wording in defining customary law, there is a minor difference between the two. The RCMA use the word 'peoples' and the Customary Succession Act use 'people'. The difference, however, does not affect the fact that both legislations envisage the living customary law as observed by the indigenous communities. See also

In addition, when determining the applicable customary law in the context of customary marriage requirements, it is important to restate that these laws are diverse due to the different ethnic groups that exist in South Africa.[29] This diversity, compounded by the different forms and sources of customary law,[30] gives rise to the need to ascertain the applicable customary laws in a given case, which remains a challenge.[31] Furthermore, our courts have observed that 'customary law is a dynamic system of law that, along with society, changes with time'.[32] This position has led courts to emphasise the importance of proving the custom in the context of customary marriages. In *Moropane v Southon*,[33] for example, the court observed:[34]

> African law and its customs are not static but dynamic. They develop and change along with the society in which they are practiced. This capacity to change requires the court to investigate the customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their customary law at a particular time of their evolution.

Again, in *Mayelane*, the Constitutional Court observed:[35]

> First, a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be an onerous where the customary law rule at stake is a matter of controversy with the constitutional recognition of customary law, this has become the responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

The above discussion show that the Constitution envisaged that courts will be applying living customary law.

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definitions by different customary law scholars, eg Rautenbach et al (n 18 above) 29 define living law 'as original customs and usages that are in constant development'. Himonga et al (n 24 above) 27 refer to Hamnett's description of customary law 'as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority'. Bennett (n 17 above) 1 indicates that 'customary law is derived from social practices that the community concerned accepts as obligatory'.

29 *Mayelane v Ngwenyama* (n 2 above) para 51. See also Himonga & Pope (n 13 above) 322.

30 The different sources of customary law may include customs and usages of the communities, case law and legislation.

31 See also recently observed by Ozoemena (n 12 above) 977 and Lehnert (n 13 above) 246.

32 See, eg, *Bhe* (n 25 above) para 87; *Alexkor v Richtersveld Community* 2004 (5) SA 460 (CC) para 52.

33 (755/12) [2014] ZASCA 76.

34 *Moropane v Southon* (n 33 above) para 36.

35 *Mayelane v Ngwenyama* (n 2 above) para 48.

3 Approaches of courts in determining the validity of a customary marriage

3.1 Judicial notice approach

The starting point for a discussion on whether courts apply official or living customary law in determining the validity of a customary marriage is section 1(1) of the Law of Evidence Amendment Act (LEAA).[36] The LEAA provides that 'any court may take judicial notice … of indigenous law in so far as such law can be ascertained readily and with sufficient certainty …'[37] Several authors agree that this provision envisaged that courts will be applying 'official customary law' since it is more certain than living customary law.[38] For example, Kruuse and Sloth-Nielsen have pointed out that 'the application of section 1 of the Law of Evidence Amendment Act is possible only where the customary law is reasonable and certain'.[39] In addition, courts have observed that 'ascertaining customary law from textbooks and case law does not present problems'.[40] Indeed, Ngcobo J in his dissenting judgment in *Bhe* affirmed that[41]

> there are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained with sufficient certainty. Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 says so.

However, in ascertaining the applicable customary laws, section 39(2) of the Constitution, which obligates courts to recognise and apply customary law subject to the Constitution and the Bill of Rights, becomes relevant.[42] As Bennett rightly pointed out, acceptance of customary law by courts 'involved complex issues of proof, compliance with the Constitution, and the endorsement of culture and tradition'.[43] In the context of customary marriage laws, the

36 Law of Evidence Amendment Act 45 of 1988, as amended by the Justice Laws Rationalisation Act 18 of 1996.

37 Sec 1(1) LEAA. See also Himonga & Bosch (n 13 above) 308.

38 See, eg, Himonga & Pope (n 13 above) 323; H Kruuse & J Sloth-Nielsen 'Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*' (2014) 17 *Potchefstroom Electronic Law Journal* 1710 1718.

39 Kruuse & Sloth-Nielsen (n 38 above) 1718. See also Himonga & Bosch (n 13 above) 336 who observed that this provision does not help with proof of customary law.

40 *Motsoatsoa v Roro* [2011] 2 All SA 324 para 15.

41 *Bhe* (n 25 above) para 150.

42 The importance of these provisions in the context of customary law has been widely observed. See eg Ozoemena (n 12 above) 981; Himonga & Pope (n 13 above) 323; and C Rautenbach & W du Plessis 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (*in*)*novatio* or *confusio*?' (2012) 57 *McGill Law Journal* 749.

43 Bennett (n 13 above) 1.

Constitutional Court in *Mayelane v Ngwenyama* reaffirmed this fact as follows:[44]

> When section 3(1)(b) thus speaks of customary law marriages, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based. It is no answer to state that the definition of customary law and customary marriages in the RCMA does not expressly state this. Those definitions must be read together with the Constitution and this Court's jurisprudence.

An examination of the cases in which the validity of a customary marriage was challenged due to non-compliance with the formal integration of a customary rule seems to suggest that courts comply with section 1(1) of the LEAA, but disregards the Constitution. A prime example is *Fanti v Boto.*[45] The issue in this case was the validity of a customary marriage where there was non-fulfilment of the requirement of formal delivery of the bride to the bridegroom's family. What was at stake was the husband's right to bury his deceased wife.[46] The brief facts were that the first respondent's daughter passed away in Hermanus on 7 November 2007. Funeral arrangements were made to bury the deceased in Hermanus, where she was staying with the first respondent (her mother) at the time of her death.[47] A day before the funeral date, the applicant sought an urgent application for an order declaring that he was entitled to the custody and control of his wife's body, and to determine when and where his deceased wife was to be buried.[48]

The applicant's founding affidavit deposed that he was married to the deceased according to Xhosa customary marriage laws in 2005. He further averred that in the conclusion of this marriage, he met the Xhosa customary marriage laws, including payment of *lobolo* in the amount of R3 000, and two bottles of brandy were delivered to the first respondent.[49] The first respondent denied the fact that a valid marriage had taken place. She asserted that the initial payment was not *lobolo* but *imvula mlomo* (the mouth-opener), the acceptance by the bride's family, which only signifies willingness to enter into the marriage negotiation.[50] The court analysed the wording of the RCMA and held that no valid marriage existed between the deceased and the applicant.[51] The result was that the mother of the deceased was

44 *Mayelane v Ngwenyama* (n 2 above) para 76. In addition, the Constitutional Court approved the authority laid down in *Gumede* as follows: 'This Recognition of Customary Marriages Act not only makes provision for regulation of customary marriages, but most importantly, it seeks to jettison gendered inequality within the marriage and the marital power of the husband by providing for the equal status and capacity of spouses' (para 77).

45 *Fanti v Boto* (n 5 above).

46 *Fanti v Boto* para 1.

47 As above.

48 *Fanti v Boto* (n 5 above) para 2.

49 *Fanti v Boto* para 5.

50 *Fanti v Boto* para 8.

51 *Fanti v Boto* para 19.

declared the person entitled to undertake funeral arrangements and to bury the deceased daughter.[52]

For purposes of the article, however, what is relevant is that in holding that no marriage existed, the judge cited with approval the essential requirements of a customary marriage as consent of the bride, consent of the bride's father or guardian, payment of *lobolo*, and the handing over of the bride, as laid down in *Mabuza v Mbatha* and other case law.[53] The judge also made reference to scholarly writings on these requirements.[54]

Commenting on the importance of the requirement of the handing over of the bride in validating a customary marriage, the court observed:[55]

> One does not merely inform the head of the family of the bride. The customary marriage must take place in his presence and/or the presence of those representing his family and who have been duly authorised to do so … The importance of these rituals and ceremonies is that they indicate in a rather concretely visible way that a customary marriage is being contracted and that *lobolo* has been paid and/or the arrangement regarding the payment of *lobolo* have been made and that such arrangements are acceptable to the two families, particularly the bride's family.

Similarly, in *Motsoatsoa v Roro*,[56] 'the contention was that one of the crucial prerequisites of a valid customary marriage, namely, the handing over of the bride to the bridegroom's family, is amiss'.[57] What was at stake was the right to inherit the deceased's house.[58] The facts of the case are briefly that the applicant and the deceased were lovers and lived together in the same house from 2005 until his death in 2009. Before his death, the deceased introduced the applicant to his parents and informed them of his intention to marry her.[59] Thereafter the deceased, through his parents, negotiated and agreed on *lobolo* with the applicant's parents.[60] After his death, the applicant approached the Department of Home Affairs, the third respondent, with a request to have the customary marriage between herself and

52 *Fanti v Boto* para 29.

53 *Fanti v Boto* paras 19 & 20. The court made reference to *Mabuza v Mbatha* (n 2 above) and other authorities, including *Gidya v Yingwana* 1944 NAC (N&T) 4; *R v Mane* 1947 2 PH H 328 (GW); *Ziwande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103.

54 *Fanti v Boto* (n 5 above) paras 20, 22 & 23. Reference was made to the writings of JC Bekker & NJJ Olivier *Indigenous law* (1995) as well as JC Bekker *Customary law in Southern Africa* (1989).

55 *Fanti v Boto* (n 5 above) paras 21, 22 & 23. The court further commented that 'all authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family'.

56 *Motsoatsoa v Roro* (n 40 above).

57 *Motsoatsoa v Roro* para 7.

58 *Motsoatsoa v Roro* para 2.

59 As above.

60 *Motsoatsoa v Roro* para 3.

the deceased registered posthumously.[61] She did not succeed. The applicant then approached the Court on two grounds: that it be declared that a customary marriage had existed between herself and the deceased; and that the Department of Home Affairs be directed to register the customary marriage between the applicant and the deceased in terms of section 4(7) of the RCMA.[62]

The court, relying on the official customary laws and the academic views of Maithufi and Bekker, *Fanti v Boto*, and Bennett,[63] ruled that no valid marriage existed due to non-compliance with the requirement of the formal delivery of a customary marriage.[64] Judge Matlapeng, concluding that no valid marriage existed, observed:[65]

> One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family, namely, that of the groom … Until the bride has been formally and officially handed over to the groom's people there can be no valid customary marriage.

A more recent example where the challenge to the validity of a customary marriage was based on the requirement of the handing over of the bride to the bridegroom's family is *Mxiki v Mbata & Another.*[66] What was at stake in this matter was the right to inherit from the deceased estate.[67] The case was an appeal from the court *a quo* in which the trial judge had directed and ordered, first, that the Department of Home Affairs register a customary marriage between the deceased and the appellant concluded on 3 November 2007 and, second, issue the appellant a customary marriage certificate.[68] The appellant alleged that she had entered a customary marriage with the deceased in 2007 and that they were staying together until his death in February 2009. She further alleged that a minor child had been born out of this relationship and that they were also the registered owners of two immovable properties.[69] In support of these allegations, the appellant annexed to her founding affidavit a copy of an acknowledgment of receipt of partial delivery of the *lobolo*.[70] The deceased's father disagreed with the appellant and stated that the November 2007 events did not constitute a customary marriage agreement, as 'the appellant was never handed over to the deceased's family as required by customary law'.[71] In agreeing with the

61 *Motsoatsoa v Roro* para 4.
62 *Motsoatsoa v Roro* para 1.
63 *Motsoatsoa v Roro* para 20.
64 *Motsoatsoa v Roro* para 22.
65 *Motsoatsoa v Roro* paras 19 & 20.
66 [2014] ZAGPPHC 825.
67 *Mxiki v Mbata* (n 66 above) para 2.
68 *Mxiki v Mbata* para 1.
69 *Mxiki v Mbata* para 2.
70 *Mxiki v Mbata* para 3.
71 *Mxiki v Mbata* para 4.

deceased's father and holding that no valid marriage had taken place, the judge stated:[72]

> The Act requires that *the marriage must be negotiated and entered into or celebrated in accordance with customary law.* The customary law of marriage is, in my view, correctly stated by Matlapeng AJ in *Motsoatso v Roro & Another* 2011 (2) ALL SA 324 at para 17 as follows: 'As described by the authors Maithufi IP and Bekker JC "Recognition of Customary Marriages Act 1998 and its impact on family law in South Africa" *CILSA* 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and groom. It involves the two families. The basic formalities which lead to a customary marriage are: Emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties ie the man and the woman have agreed to marry each other); a meeting of the parties' relatives will be convened where *lobolo* is negotiated and the negotiated *lobolo* or part thereof is handed over to the woman's family and the two families will agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding).

Further, the court was of the following opinion:[73]

> A customary marriage is a union of two family groups a bride cannot hand herself over to her in-laws. Her family has to hand the bride over to her husband's family at his family's residence where the elders will counsel the bride and the bridegroom in the presence of their respective families. Accordingly, the court was of the view, it is the handing over of the bride, even if the *lobolo* has not been paid in full, that constitute a valid customary marriage not the payment of *lobolo* as the court *a quo* found.

Consequently, similar to *Fanti v Boto* and *Motsoatsoa v Roro*, the court concluded that 'there can be no valid customary marriage until the bride has been formally and officially handed over to her husband's family'.[74] In holding that no valid marriage exists, the court relied on the official customary law provided in *Motsoatsoa v Roro* and Bennett's writings.[75]

Furthermore, in *Ndlovu v Mokoena,*[76] the question before the court was whether the *lobolo* transaction concluded the marriage between the deceased and Ndlovu. The brief facts were that Ndlovu made an application claiming that she was the only customary wife of the deceased and requested an order declaring the (alleged) customary marriage between Mokoena and the deceased null and void. The deceased had passed away in 2008.[77] As an educator in the service of the Ministry of Education, pension benefits were payable to the wife of the deceased. If the first alleged customary marriage had been validly concluded, the pension was to be divided in half between the

72 *Mxiki v Mbata* para 9.
73 *Mxiki v Mbata* para 10.
74 As above.
75 *Mxiki v Mbata* (n 66 above) paras 9, 10 & 11.
76 (2973/09) [2009] ZAGPPHC 29.
77 *Ndlovu v Mokoena* (n 76 above) para 2.

two wives.[78] Before the court there were two customary marriage certificates issued by the Department of Home Affairs. The first was that of Mokoena and the deceased, dated 25 May 1991. The second was that of Ndlovu and the deceased, dated 20 May 1998. The same marriage officer issued both certificates after the death of the deceased. The marriage officer who issued the marriage certificates told the court that he, *inter alia*, had reference to a one-page *lobolo* negotiation document before he issued the marriage certificate.[79]

The question that was before the court was whether the *lobolo* transaction concluded the marriage between the deceased and Ndlovu. The court referred with approval to the authority laid down in the cases of *Fanti v Boto* and *Mabena v Letsoalo*, where it was held that the *lobolo* transaction is but one of the two requirements for the conclusion of a customary marriage. The other requirement is the delivery of the woman to the family of the man. Judge Van Rooyen consequently held:[80]

> I have come to the conclusion that there are sufficient reasons for me to intervene: there is no evidence that there was a delivery of Velaphi or that they lived together and the court documents amount to supporting evidence that a marriage had not been concluded. I, accordingly, find that although there was no evidence of fraud, the marriage officer did not apply his mind properly to all the facts which were before this Court and that the certificate must be set aside.

3.2 Proof of customary law

The second approach in determining the validity of a customary marriage is to call witnesses to prove the existence of a particular custom. This is in line with section 1(2) of LEAA. Section 1(2) of LEAA provides that '[t]he provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned'.

This provision, it is argued, envisages that courts will source living customary rules from the experts of the community concerned. There are several cases in which courts have adopted this approach and called witnesses. In *Mabuza v Mbatha,*[81] for example, the issue before the court was the requirements for a valid siSwati customary marriage.[82] The brief facts were that the plaintiff and the defendant entered into a relationship in 1989. The plaintiff fell pregnant in September 1989. In or about November 1989 the defendant's family approached the plaintiff's family to start negotiations for the *lobolo* payments, and the penalty payment related to the fact that the plaintiff had fallen pregnant out of wedlock. An agreement was

78 *Ndlovu v Mokoena* paras 1 & 2.
79 *Ndlovu v Mokoena* para 7.
80 *Ndlovu v Mokoena* para 12.
81 *Mabuza v Mbatha* (n 2 above).
82 *Mabuza v Mbatha* para 3.

reached with regard to the payment of *lobolo*, which the defendant paid in full. The plaintiff and defendant lived together as husband and wife since about 1992 when the plaintiff moved into the house with the defendant. [83]

In 2000, and after the parties had relocated to the Western Cape, the relationship between them terminated and the plaintiff instituted a divorce action against the defendant.[84] The defendant opposed the divorce action on the ground that no marriage existed between the parties because under isiSwazi law, marriage required the payment of *lobolo* and the formal handing over of the bride.[85] The plaintiff herself and an expert witness supplied evidence to the fact that a valid marriage existed. The plaintiff's evidence was that there were three requirements to a siSwati marriage: *lobolo*; *ukumekeza* (formal integration); and formal delivery of the woman to her husband's family. She told the court that all the requirements had been met except for the *ukumekeza* custom. The expert witness's evidence was that if the *lobolo* requirement and formal delivery took place, the formal integration could be waived.[86] In addition, the expert witness concluded 'that it was inconceivable that *ukumekeza* was so vital such that it could not be dispensed with by agreement between the parties'.[87]

The evidence of the defendant and his expert witness was that *ukumekeza* was still a vital requirement. In particular, the expert witness stated:[88]

> *Ukumekeza* is vital because it makes a woman a wife. If a bride did not go through *ukumekeza*, she would be no more than a girlfriend even if *ilobolo* [were] paid for her. *Ilobolo* does not change the status of a woman to that of a wife. It is only the *ukumekeza* custom, according to Swati people, which makes a woman a wife.

The court acknowledged that this customary requirement existed, but held that the omission was not fatal and the marriage was recognised as valid.[89] In upholding the marriage as valid, Judge Hlope said that *'*[i]n my judgment there is no doubt that *ukumekeza*, like so many other customs, has somehow *evolved* so much so that it is probably practised differently than it was centuries ago …'[90] More importantly, the court declared that '[i]f one accepts that African customary law is recognized in terms of the Constitution … there is no reason … why the courts should be slow at *developing* African customary law'.[91]

83 *Mabuza v Mbatha* para 7.
84 *Mabuza v Mbatha* para 1.
85 *Mabuza v Mbatha* para 2.
86 *Mabuza v Mbatha* para 14.
87 *Mabuza v Mbatha* para 15.
88 *Mabuza v Mbatha* para 21.
89 *Mabuza v Mbatha* para 27.
90 *Mabuza v Mbatha* paras 25-27 (my emphasis).
91 *Mabuza v Mbatha* para 30 (my emphasis).

Another example where proof of a particular customary rule by witnesses led to the validity of a marriage is the case of *Nthejane v Road Accident Fund.*[92] In this case, the plaintiff, acting on behalf of her minor son, sued the defendant for certain damages arising out of the death of her husband, the biological father of her son.[93] The brief facts of this case were that the parties agreed to enter into *lobolo* negotiations. These negotiations took place, and it was agreed that the deceased's family would give ten cows as *lobolo*. The parties also agreed that delivery of the *lobolo* was to take place at a later stage.[94] The defendant, however, challenged the validity of a customary union due to non-fulfilment of the *lobolo* requirement.[95] The issue for the court to decide was whether or not the plaintiff was married to the deceased in terms of a customary law. The plaintiff and her grandfather gave evidence that the requirements of *lobolo* and formal delivery of the woman had been met. The defence did not challenge this. In holding that the marriage was valid, the court simply observed 'that the *lobolo* agreement was acceptable to both families and that, therefore, the arrangement was in accordance with their customary practices'.[96]

In addition to these cases, in *Mayelane v Ngwenyama*[97] the appellant challenged the validity of the marriage between her deceased husband and the respondent due to the fact that she, as the first wife to the deceased, had not been consulted before the marriage was concluded. The brief facts of the case are as follows: On 1 January 1984, the first respondent, Ms Mdjadi Florah Mayelane, was married to the deceased, Hlengani Dyson Moyana, according to customary law and tradition at Nkovani Village, Limpopo. Three children were born out of the union. The marriage was not registered. The deceased died on 28 February 2009 and the marriage was still subsisting. When the first respondent sought to register the customary union at the Department of Home Affairs after the death of the deceased, she was advised that the appellant, Ms Mphephu Maria Ngwenyama, had also sought to register a customary marriage allegedly contracted between her and the deceased on 26 January 2008.[98]

The first respondent challenged that the purported marriage between the deceased and the appellant was *ab initio* null and void because of the fact that she had not been consulted before it was concluded. The Constitutional Court complied with both sections 1(1) and (2) of the LEAA and called nine witnesses.[99] In taking into

92 (2011) ZAFSHC 196.
93 *Nthejane v Road Accident Fund* (n 92 above) para 1.
94 *Nthejane v Road Accident Fund* para 9.
95 *Nthejane v Road Accident Fund* para 8.
96 *Nthejane v Road Accident Fund* paras 9 & 11.
97 *Mayelane v Ngwenyama* (n 2 above).
98 *Mayelane v Ngwenyama* para 4.
99 The composition of these witnesses was as follows: three in subsisting polygynous marriages; one advisor to the traditional leaders; one commissioner in the

account their evidence, the court found that the living law of Xitsonga required that the first wife be informed of her husband's impending subsequent marriages. Consequently, the Court invalidated the subsequent marriage on the basis that consent from the first wife had not been obtained.[100] The Court arrived at this decision by, *inter alia*, applying the constitutional principles of equality and dignity as they relate to the first wife and the husband.[101] As rightly pointed out by Kruuse and Sloth-Nielsen, the view of the Constitutional Court was that 'informing' and 'consent' were traditionally-accepted legal norms upon which a valid marriage could exist.[102] In this case, however, a different conclusion was reached despite the fact that courts adopted the same approach as in *Mabuza* and *Nthenjane*. [103]

The last example is *Moropane v Southon*.[104] The issue before the court was whether the parties were married according to customary law or civil law. This case was an appeal from the High Court in which the trial judge had held that there was a valid customary marriage between the appellant and the respondent. The brief facts of this case were that Moropane (the appellant) and Southon (the respondent) met and fell in love in 1995. At the time, Moropane was still married to his former wife whom he divorced in 2000.[105] In 2002, Moropane proposed marriage to Southon. According to Southon and her witnesses, she concluded a customary marriage because the *lobolo* and formal delivery of the bride to her husband's family, among other requirements, had been met.[106] Moropane disputed the fact that a valid customary union had come into existence. According to him, the so-called *lobolo* paid by his emissary was, just as in *Fanti v Boto*, for *pula molom/go kokota* (literally translated as 'opening the mouth to start the marriage negotiations'). Moropane also admitted that Southon, accompanied by her aunt, had come to his home, but maintained that she was delivered not as a *makoti*.[107]

Two expert witnesses were led to assist the court in determining whether the marriage between the parties met Pedi customary marriage requirements.[108] Both experts agreed that the customary marriage requirements for a valid customary marriage amongst the Bapedi people included negotiations; agreement; the payment of *lobolo*; and formal delivery of the woman, among others. More importantly, both experts agreed that the handing over of the *makoti*

Commission on Traditional Leadership Disputes and Claims; two traditional leaders; and two academic experts.

100 *Mayelane v Ngwenyama* (n 2 above) para 87. Apart from non-fulfilment of this requirement, *lobolo* and other customary requirements were also not met.

101 *Mayelane v Ngwenyama* (n 2 above) para 83.

102 Kruuse & Sloth-Nielsen (n 38 above) 1721.

103 *Mayelane v Ngwenyama* (n 2 above) para 4.

104 *Moropane v Southon* (n 33 above) 76.

105 *Moropane v Southon* para 4.

106 *Moropane v Southon* paras 7-14.

107 *Moropane v Southon* paras14-15.

108 *Moropane v Southon* para 39.

to her in-laws was the most crucial part of the customary marriage.[109] The court found that the essential requirements for a valid customary marriage according to the Bapedi people had been met and, therefore, upheld the decision of the court *a quo* that a valid customary marriage existed.[110]

4 Critical analysis: Are courts applying living or official customary law?

In determining the validity of customary marriages, three main observations are made. First, courts seem to apply a new form of customary law, which is not based on official or living customary law. Second, courts are seen to strictly adhere to official customary law as found in the books and case law. Lastly, courts accommodate and recognise particular living customary rules as practised on the ground. The impact of these approaches on the validity of customary marriages and the protection of women found in these marriages is discussed below.

4.1 New form of customary law

An examination of the cases discussed reveals that, in some instances, courts do not apply 'living' customary law or 'official' customary law when determining the validity of customary marriages.[111] The preference has been to apply a new form of customary law that is either justified on the 'development of customary law', or on the 'equality of spouses in a customary marriage' envisaged by section 6 of the RCMA, read with section 9 of the Constitution.[112] This position has led Kruuse and Sloth-Nielsen to observe that 'courts have had to enter the law-making arena … where current environment … provides inadequate direction'.[113]

For example, in *Mabuza v Mbatha*, two expert witnesses gave contradictory views on whether the requirement of the formal integration of the woman may be waived or not. Judge Hlope concluded that a valid customary marriage existed based on the fact that 'if one accepts that African customary law is recognised in terms

109 *Moropane v Southon* para 40.

110 *Moropane v Southon* paras 55-57.

111 See also similar observations by Bennett (n 13 above) 11 and Himonga & Pope (n 13 above) 329.

112 Sec 6 of the RCMA provides: 'A wife in a customary marriage has, on the basis of the equality with her husband and subject to the matrimonial property system governing the marriage, full status to acquire and dispose of property …'

113 Kruuse and Sloth-Nielsen (n 38 above) 1731. See also Bennett (n 13 above) 2 who observed, in 2009, that once living law becomes a primary source of law, 'the courts start playing the role of law-makers'.

of the Constitution … there is no reason, in my view, why courts should be slow at developing African customary law'.[114] Similarly, in *Mayelane v Ngwenyama*, where evidence tendered by witnesses made it clear to the court that the requirement was to 'inform' the first wife, in the following terms:[115]

> (a) although not the general practice any longer, VaTsonga men have a choice whether to enter into further customary marriages; (b) when VaTsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process leading to a further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.

The Constitutional Court, however, developed Xitsonga customary marriage rule of inform to make consent a requirement for a subsequent marriage.[116]

4.2 Living customary law

The Constitutional Court in *Alexkor v Richtersveld Community* observed that '[i]t is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules'.[117] In the context of this discussion, where courts apply living customary law, courts have accepted that it complies with constitutional requirements and therefore the general outcome has been validation of that the marriage. This outcome resonates with the observations made by Lehnert and Bennett in 2005 and 2009, respectively, that courts assumed that living customary law was more likely to comply with constitutional values, particularly the right to equality and dignity.[118] For example, courts seem to accept validity of a particular living

114 *Mabuza v Mbata* (n 2 above) para 30.

115 *Mayelane v Ngwenyama* (n 2 above) paras 61 & 122. See also evidence of Headman Maluleke in an additional affidavit where it is stated: 'The prospective bridegroom should inform his existing wife about his intentions to marry another wife. He informs her so that she should not be surprised in seeing another wife. It is not a requirement to even advise as to the identity of the prospective subsequent wife. Whether she gives her consent or not, the prospective bridegroom will proceed with his plan to marry another wife.'

116 *Mayelane v Ngwenyama* (n 2 above) para 75. See also discussion by Ozoemena (n 12 above) 979.

117 *Alexkor v Richtersveld Community* (n 32 above) para 52. See also Himonga & Pope (n 13 above) 321 and Bennett (n 13 above) 11 who, however, observed that the first acceptance of living customary law was in *Ex Parte Chairperson of the Constitution Assembly: In re Certification of the Constitution of the RSA, 1996*, 1996 (4) SA 744 para 197 where the Constitutional Court held that the Constitution guarantees 'the survival of an evolving customary law'.

118 Lehnert (n 13 above) 247 and Bennett (n 13 above) 8-9. The rights to equality and dignity are provided for in secs 9 and 10 of the Constitution, respectively.

customary rule where expert witnesses are called to give evidence despite differences in their opinions. The courts simply believe the one and disregard the other opinions. For example, in *Moropane v Southon*, the court accepted evidence by expert witnesses on the Pedi marriage requirements and upheld the decision of the court *a quo* that a valid marriage existed despite the differences in the evidence given.[119] The differences in the evidence given by the expert witnesses related to whether money could be used as *lobolo*, and whether it was in accordance with Pedi culture to slaughter a sheep instead of a cow, among others.[120]

In some instances, courts seem to accept living customary law, even where parties before the courts give the only evidence on the applicable living customary law. The only qualification seems that the other party must not have opposed it. For example, in *Nthenjane*, the court accepted the evidence that *lobolo* and formal integration requirements had been met. In this case, evidence was given by the plaintiff and her grandfather and was not opposed by the defendant.[121]

Furthermore, and more important to the characteristics of customary law, in the application of living customary law, courts seem to pay regard to the fact that customary law is dynamic and changes with social circumstances.[122] This position is well summarised by the Constitutional Court in *Bhe*, as follows:[123]

> True customary law will be that which recognises and acknowledges the changes which continually take place. In this respect, I agree with Bennett's observation that '[a] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency'.

4.3 Official customary law

Where courts apply official customary law, the inevitable result has been the invalidation of marriages. The discussion has also revealed that issues raised in challenging the validity of marriages are about legal recognition as a spouse to inherit from the deceased estate. For example, in the cases of *Motsoatsoa v Roro, Ndhlovu v Mokoena* and *Mxiki v Mbata*, what was at stake was the right to inherit the intestate estates of the deceased. The application of official customary law, without considering the issues at stake, therefore, leads to harsh consequences for vulnerable parties, particularly women and children.

119 *Moropane v Southon* (n 33 above) paras 39-40.
120 *Moropane v Southon* para 41.
121 *Nthejane v Road Accident Fund* (n 92 above).
122 See discussions by Ozoemena (n 12 above) 975 on the impact of law in addressing social change.
123 *Bhe* (n 25 above) para 86.

In acknowledging the adverse consequences due to the application of official customary law, the Constitutional Court in *Bhe* observed that[124]

> … magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society. Examples of this are the manner in which the *Bhe* and *Shibi* cases were dealt with by the respective magistrates.

Therefore, as is evident from these cases, if the application of official customary law will 'lead to correctness of decision but consequently to an injustice, nullity must [therefore] give way to an intended validity'.[125] Moreover, in cases such as *Fanti v Boto* where other customary requirements have been met, particularly that of both spouses having given consent, courts seem to be unfair to insist that the non-fulfilment of *only* one requirement should lead to the invalidity of a marriage.

5 Conclusion

The discussion of cases reveals that there is a disparity in addressing the injustices of the past when official or living customary law is applied in the context of customary marriages. Vulnerable parties are protected where courts focus on the 'essence' of customary law and apply living customary law.[126] They are also protected where courts develop living customary laws in line with the Constitution and the Bill of Rights.[127] Indeed, the Constitutional Court observed in *Mayelane v Ngwenyama*:[128]

> This Court has accepted that the Constitution's recognition of customary law as a legal system … requires innovation in determining its *living* content as opposed to the potentially stultified version contained in … legislation and court precedent.

However, as Bennett rightly points out, the challenge with this preference for living customary law 'is how this living law is to be discovered and how it can be proved'.[129] Indeed, in *Mayelane* the Constitutional Court observed these challenges[130] and cited with approval the dictum in *Bhe* case that 'the difficulty lies not so much in the acceptance of the notion of "living" customary law but in

124 *Bhe* (n 25 above) para 87

125 Rautenbach & Du Plessis (n 42 above) 766.

126 See *Mabuza v Mbata* (n 2 above).

127 *Mayelane v Ngwenyama* (n 2 above) para 43.

128 *Mayelane v Ngwenyama* (n 2 above).

129 Bennett (n 13 above) 11. See also Kruuse & Sloth-Nielsen (n 38 above) 1717.

130 In *Mayelane v Ngwenyama* (n 2 above) para 25, the Constitutional Court also pointed out that '[p]aradoxically, the strength of customary law – its adaptive inherent flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of law'.

determining its content and testing it … against the provisions of the Bill of Rights'.

Despite the challenges, there is no doubt that the RCMA is an attempt to address historical injustices to women. Therefore, it cannot have unintended consequences for the women it seeks to protect.[131] Moreover, courts have welcomed the RCMA as[132]

> a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in which marriages were entered into accordance with the law and culture of the indigenous African people of this country.

This was recently reiterated in *Maropane v Southon*, that '[t]he primary objective of the RCMA is to give customary marriages recognition which was not the case under the past odious apartheid regime'.[133]

In light of the above, courts must be sensitive to such issues and develop official customary rules or apply living customary law in line with the Constitution in order to protect the vulnerable parties. More importantly, the choice is not only between applying living or official customary law, but *how* courts develop these laws in line with the Constitution.[134] Indeed, in *Mabuza v Mbatha* '[t]he court held that the test for the validity of indigenous law is … consistency with the Constitution'.[135]

131 *Gumede v President of South Africa* [2008] ZACC 23 paras 161-162.
132 *Maropanee v Southon* (n 33 above) para 44. See also *Mayelane v Ngwenyama* (n 2 above) para 26.
133 As above.
134 Himonga & Bosch (n 13 above) 331 (my emphasis).
135 *Mabuza v Mbata* (n 2 above) para 32.

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The foundations of 'peace' as a value for the promotion of human rights in Africa

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Summary

This article identifies 'peace' as a strategic value in promoting human rights in Africa. The objective is to juxtapose the theoretical and practical foundations of 'peace' as a conceptual basis for the promotion of human rights into a substantive reality. The article does not examine the status of Africa's political context as such, an undertaking which will redirect the envisaged assumption of the stability of African governments in the regulation of state authority. The article is premised on the notion that such stability may provide a foundation for 'peace' as a value that is likely to create an environment conducive to greater respect for all human rights.

Key words: *peace; value; strategic; foundation; human rights; Africa*

1 Introduction

The promotion of human rights in Africa is seen against the background of their development within the framework of international human rights.[1] This evolution of rights is owed to the struggles within African states in the colonial and post-independence eras. As a consequence, 'human rights have been elevated as a matter

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1 A d'Amato 'The concept of human rights in international law' (1982) 82 *Columbia Law Review* 1110-1159.

that deserves the attention of African governments and seen as a value that inform and inspire grass-roots approaches to them'.[2] The inspiration for their development is deduced from the quest to uphold the inherent values in human rights norms and standards that should represent a qualitatively higher form of unity and integration for the African continent.[3] Their development paves the way for the integration of 'peace' as a central value in the general system of the rights framework in Africa. The integration of this value further offers an opportunity for the advancement of a regional perspective towards the establishment of a value-based approach for human rights in Africa. In essence, its integration seeks to ensure effective and responsible leadership and the empowerment of people to participate and bring inputs in the decision-making process through the system of human rights, which infuses 'peace' as a value.[4] This approach is likely to create an environment that is conducive to the consolidation of the state's responsibilities by requiring legislative and other policy-related programmes to provide a framework within which 'peace' may be consolidated as a foundational value in the realisation of human rights.

However, the realisation of human rights in Africa is thwarted by various challenges and atrocities that have an impact on the development of 'peace' as a value in the promotion and protection of human rights. These challenges relate to violence, ethnicity, corruption, disrespect for traditional value systems and other related factors,[5] which factors threaten the stability of the African continent and the centrality of 'peace' as a value in the promotion of human rights in Africa.

Furthermore, the concept of 'peace' in developing a value-based approach in promoting human rights is unclear. The lack of certainty about this concept derives from the extent to which it may be used to ensure its substantive translation into specific human rights. The lack of clarity about the effect of 'peace' as a value derives from its 'indirect' application in the constitutional and legislative instruments that seek to protect human rights. This means that the concept of 'peace' is untethered from the interpretation of the various provisions in order to conceptualise the meaningful and effective promotion of human rights.

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2 C Villa-Vicencio 'Transitional justice and human rights in Africa' in J Diescho & A Bösl (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 48.

3 B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in Diescho & Bosl (n 2 above) 139.

4 W Huber 'Human rights and globalisation – Are human rights a "Western" concept or a universality principle?' (2014) 55 *Ned Geref Teologiese Tydskrif* 117-137 http://ngtt.co.za (accessed 25 July 2015).

5 PD Williams 'Enhancing civilian protection in peace operations: Insights from Africa' (2010) Africa Centre for Strategic Studies Research Paper 1 https://www.polity.co.uk/up2/pdf/ACSS_Research_Paper1_Civilian_Protection_PKOs_Sept2010.pdf (accessed 23 July 2015).

Against this background, the article identifies 'peace' as a strategic value in promoting human rights in Africa. The objective is to juxtapose the theoretical and practical foundations of 'peace' as a conceptual basis for the promotion of human rights into a substantive reality. The article does not examine the status of Africa's political context because such an undertaking will redirect the envisaged assumption of the stability of African governments in the regulation of state authority. The article is premised on the notion that such stability may provide a foundation for 'peace' as a value that is likely to create an environment conducive to a greater respect for all human rights. The likelihood is traced from the potential of 'peace' to develop a value-based approach, which concretises the argument for its use as a strategic value for the advancement of human rights. The article acknowledges the challenges faced by African governments which impact negatively on the evolution of human rights, as noted above. However, these challenges are not the subject of this inquiry.

2 Peace: Value-based strategy for human rights?

2.1 Elements of the value-based approach to human rights

Africa is faced with the pressing need to ensure the meaningful integration of 'peace' as a value for the promotion of human rights. Human rights may be defined in terms of rights that impose positive or negative obligations on states. This means that these rights are designed within the framework of the agreed norms, values and standards that regulate the conduct of states towards their citizens in both the public and private spheres. Without classifying these rights, the Universal Declaration of Human Rights (Universal Declaration),[6] notwithstanding its non-binding status on states, is the primary document that provides a conceptual framework for the globalisation of human rights. On the African continent, the African Charter on Human and Peoples' Rights (African Charter)[7] is the document that conceptualises human rights as inherent and inalienable rights guaranteed to everyone by virtue of being human, and which cannot be taken away, whether by the state or private individuals. These instruments may be indirectly interpreted to include a framework for the linkage of 'peace' in the affirmation of the rights framework. 'Peace' is defined as a moral compass that seeks to ensure a 'sense of security and safety and harmonious relationships, without feeling a

6 Adopted on 10 December in 1948. The Universal Declaration was supplemented by the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly on 16 December 1966 and entered into force 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was also adopted on 16 December 1966 and entered into force on 3 January 1976. Together these instruments are referred to as the International Bill of Human Rights.

7 Adopted in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 21.

need for revenge, punishment, reparations, or apologies. It is a sense of goodwill and well-being.'[8] This definition was qualified by Premier Zhou Enlai of China on 31 December 1953 when he developed the five basic elements which entail the concept of 'peace' as mutual respect for each nation's territorial integrity and sovereignty; non-aggression; non-interference in each other's internal affairs; equality and mutual benefit; and peaceful co-existence.[9]

These elements relate to the purpose of the United Nations (UN) Charter,[10] as envisaged in article 1 which provides:

> (1) to maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the *peace*, and for the suppression of acts of aggression or other breaches of the *peace*, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the *peace*; and
>
> (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal *peace*.

Although these principles focus more on the relationship between states, they provide the frame of reference for the use of 'peace' as a value for human rights promotion between a state and its citizens at the domestic level. Harmonious relations between states have the potential to contribute to the way in which they adhere to the prescripts of international human rights in the advancement not only of the respect, protection and promotion but also the fulfilment of the rights at domestic level.[11]

In the African context, the Constitutive Act of the African Union (AU)[12] endorses the concept of 'peace' and determines to 'promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[13] Of great significance is article 4(h), which entrenches the protection of civilians from genocide, war crimes and crimes against humanity through military intervention by member states. This article is further characterised by[14]

> the respect for democratic principles, human rights, the rule of law and good governance … the sanctity of human life, condemnation and

8 http://www.cppi.co/2-principle-of-peace.html (accessed 25 July 2015).

9 As above.

10 Signed on 26 June 1945 in San Francisco and came into force on 24 October 1945 (my emphasis).

11 See, eg, the requirements of sec 7(2) of the Constitution of the Republic of South Africa, 1996, which obligates the state to ensure the enjoyment of human rights by ensuring their fulfilment.

12 Adopted in 2000 at the Lomé Summit (Togo) and entered into force in 2001.

13 See the Preamble.

14 See arts 4(m) & (o).

rejection of impunity and political assassination, acts of terrorism and subversive activities.

This commitment is a 'source of redress and as a standard by which to measure the reasonableness of the promotion of human rights'.[15] The significance of 'peace' in the Constitutive Act is supplemented by article 11 of the African Charter on Democracy, Elections and Good Governance,[16] as state parties are obligated to 'develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace'. Reardon asserts that the affirmation of 'peace' is a legitimate commitment that embraces its infusion into the rights domain as a framework that[17]

- offers lively and effective means to develop the capacity to be human and prepare citizens to devise and engage on the debates of human rights promotion;
- is integral to human rights that without peace, there is a lack of the primary component of their core and essential substance;
- is the essence and arbiter of human rights, antithesis of violence, touching on multiple and complex aspects of human experience;
- is a means to cultivate transformational thinking which lies in viewing human rights norms and standards as integrated ethical system;
- is the sum and ethos of the values and principles of human rights taken as a whole is or would be – peace;
- is the specific indicator and a particular measure of progress towards the substantive translation of human rights into reality;
- puts flesh on the bones of the abstraction of human rights and provides details of how to bring the flesh to life.

These principles are essential for the justifiability of 'peace' as a value in the general system of human rights in Africa, considering the historical context in which these rights were used as a justification in the struggle against colonialism, a system which had no respect for these rights. The Constitutive Act of the AU, for example, endorses the assertion and acknowledges the role of human rights in the struggle against colonialism. The acknowledgment is based on the following fundamental principles envisaged in its Preamble, as the Act recalls, first, the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation. Second, it considers the Organization of African Unity (OAU) since its inception and the role it has played in the liberation and the attainment of the unity of our continent and a unique framework it has provided for our collective action in Africa and in our relations with the rest of the world;[18] and third, its determination to promote and protect human and peoples' rights, consolidate democratic

15 J Dugard *International law: A South African perspective* (2010) 25.

16 Adopted on 30 January 2007 and entered into force on 15 February 2012, https://www.au.int/en/treaties/african-charter-democracy-elections-and-governance (accessed 11 April 2017).

17 BA Reardon 'Human rights learning: Pedagogies and politics of peace' lecture delivered for the UNESCO Chair for Peace Education Master Conference at the University of Puerto Rico, 15 April 2009.

18 See Preamble of the Constitutive Act.

institutions and culture, and to ensure good governance and the rule of law.[19]

It is in this context that the discourse of human rights cannot be undertaken in isolation from its historical context in Africa. The history is essential in evaluating the various strategies and methodologies that may strengthen a comprehensive and integrated approach in ensuring respect for all human rights.[20] In a nutshell, this history enables[21]

> the acquiring of the capacity to restore and recall the legal encounters of the state with social reality, to learn from them and modify their own functioning in order to enhance their own self-awareness and ability to assimilate past experiences.

2.2 Peace: Discourse of the value-based approach to human rights

The discourse of human rights is clouded by what appears to be a legalistic approach that has been adopted by African governments in the promotion of these rights. An inflexible approach to the evolution of the principles of human rights, for example, is characterised, first, by the rules that highlight the need to legally recognise human rights and to institutionalise their respect through the adoption of various instruments. Second, an inflexible approach manifests itself in the structures and institutions, which relate to the structural divisions of powers and resources in society and mechanisms that exist to handle conflicts that may arise in this regard. Third, this approach is characterised by the relationships which refer to the relevance of rights for organising and governing the interaction between state and citizens, and amongst individuals and groups in society. Lastly, an inflexibility in approach appears from processes that underscore the importance of aiming for legitimacy and sustainability by taking care of how issues of access, protection and identity are addressed, paying attention to dignity, participation, inclusion, protection and accountability.[22] This approach, for example, is evident in the inclusion of 'peace' as a right in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[23] Article 10 of this Protocol guarantees women a

19 As above.

20 B Hart & M Saed 'Integrating principles and practices of customary law: Conflict transformation, and restorative justice in Somaliland' (2010) 3 *Africa Peace and Conflict Journal* 1.

21 BM Zupančič 'Constitutional law and the jurisprudence of the European Court of Human Rights: An attempt at a synthesis' (2003) 1 *Journal of Constitutional Law and Philosophy of Law* 58.

22 M Parlevliet 'Conflict prevention in Africa: A matter of containment or change? The role of civil society in preventing deadly conflict in Africa' in E Sidiropoulos (ed) *A continent apart: Kosovo, Africa and humanitarian intervention* (2001) 61, quoted in V Dudouet & B Schmelzle (eds) *Human rights and conflict transformation: The challenges of just peace* (2010).

23 Adopted by the African Union on 11 July 2003, Maputo, Mozambique.

peaceful existence and the right to participate in the promotion and maintenance of peace. For their part, states are required to take all appropriate measures to ensure the increased participation of women:

(a) in programmes of education for peace and a culture of peace;

(b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;

(c) in the local, national, regional, continental and international decision-making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;

(d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women.

This reference is a consolidation of the argument in the article that the above factors and their linkage to article 10 indicates their limitation in deepening the approach in advancing human rights because of a diminished emphasis on institutional and structural conditions which are pivotal in highlighting the protracted socio-political ills that bedevil post-colonial Africa. African states have not infused the values that are attached to the rights to ensure their sufficiency in the broader conceptualisation of all the rights. This conclusion is drawn from the non-inclusion of 'peace' as a value in the African Women's Protocol, and including other African instruments that seek to protect and promote human rights.[24] The significance of 'peace' is indirectly unearthed in the application and interpretation of various provisions of these instruments as interpreted by the courts.[25] The indirect application is also subject to interpretation by various scholars on the impact of a particular judgment on human rights promotion.[26]

The infusion of 'peace' as a foundational value in the promotion of human rights in Africa, as affirmed by Goonesekere,[27] involves the analysis of the challenges from a holistic perspective of human rights and related obligations of states; the development of steps that have to be taken to ensure the implementation of the identified rights and how they can be supported and facilitated by mutual co-operation; the establishment of the mechanisms to monitor the implementation of rights in recognition of the fact that human rights are not necessarily through the legalistic approach that they have to be enforced; and the participation of civil society with a view to making a

24 See eg the African Charter.

25 L Michael 'Jurisprudential analysis of the African Court on Human and Peoples' Rights: From 2004 to 2010' (2012) *African Yearbook of International Law* 1.

26 R Cole 'The emerging jurisprudence of the African Court on Human and Peoples' Rights – *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* (order for provisional measures)' (2012) 14 *University of Botswana Law Journal* 147.

27 S Goonesekere 'A rights-based approach to realising gender equality' http://www.un.org/womenwatch/daw/news/savitri.htm (accessed 28 July 2015).

difference in the decision-making process.[28] These principles denote the several strengths of the value-based approach, which include the establishment of specific government accountability in promoting peace; addressing a broad range of legal, socio-political and cultural determinants of peace; the emphasis on the importance of setting specific goals and targets for the achievement of human rights; the monitoring and evaluation of the progress made towards the achievement of human rights; insistence on good governance; and stressing the need for transparency and participation in efforts to secure human rights.[29]

This provision of a value-based approach underpins 'peace' as a value which can serve as a vehicle for unity, solidarity and peace, as well as an instrument for democracy and sustainable development which the vision of the region should encompass in order to eliminate the various factors that may compromise the promotion and protection of all human rights. Such elimination has the potential to ensure balancing human and sustainable development, the protection of the environment and integration of the contemporary and traditional humanistic values.[30] It epitomises the particular standards that are built into the rights framework concerning the historical, civilisational, cultural and semantic connotations in the broader framework of human rights.[31]

The importance of 'peace' as a value in human rights promotion indirectly derives from article 29(1) of the African Charter, which traces the foundations of 'peace' in family structures by endorsing the duty of the person, as it provides that the individual shall also have the duty to 'preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need'. Article 29 further provides for individual duties to:

> (4) preserve and strengthen social and national solidarity, particularly when the latter is threatened;
> (5) preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
> ....
> (7) preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society; and
> (8) contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

28 As above.

29 A Chapman 'The foundations of a human right to health: Human rights and bioethics in dialogue' (2015) 17 *Health and Human Rights Journal* 2.

30 UNESCO 'Learning to live together in peace and harmony: Values education for peace, human rights, democracy and sustainable development for the Asia-Pacific region' (1998) http://unesdoc.unesco.org/images/0011/001143/114357eo.pdf (accessed 23 July 2015).

31 Zupančič (n 21 above).

The individual duties are an endorsement of a broader approach to human rights promotion, which should not be limited to legalistic approaches of the rights framework but be inclusive of other values that may enhance the development of a process that is sustainable. The interaction of the two (rights and values) is important for any sustainable development that may yield positive results for the advancement of 'peace' as a value in human rights protection. Goonesekere argues that the essence of the interaction of rights and values reinforces the language of 'peace' as a legitimate claim to be articulated with moral authority which other approaches lack. Second, he asserts that the interrelationship of rights and values is a language which is recognised by the powerful and which stimulates in many deep chords of response.[32] Third, the interdependence has the potential to empower individuals and communities at grassroots level on the importance of human rights. These factors are further qualified by the genuineness of the value approach as an important goal in itself.[33]

The integration of the two (rights and values) concretises an argument for the advancement of Africa in[34]

> building on its own foundations and ensure that there is much to be learned from the continent about leading a good and harmonious life, taking care of each other, respect the wisdom of older people and being one with nature and spiritual world.

These principles are essential for the legitimacy of 'peace' as a founding value for the promotion of human rights. The affirmation of 'peace' is qualified by its flexibility and the reference to the eternal values and principles of fairness, equity, justice, reasonableness and good faith in light of the public interest which should conform to the basic values of the various instruments that Africa has developed in the promotion of human rights.[35]

However, and as mentioned above, Africa faces various challenges that have a direct impact on the promotion of human rights.[36] These challenges further lead to a minimalistic approach in the development of various approaches to the evolution of a system of human rights.[37] They threaten the centrality of 'peace' as a value in the general system of human rights in Africa. As mentioned before, the intention in the article is not to examine Africa's political context but to acknowledge

32 Goonesekere (n 27 above).

33 As above.

34 B Brock-Utne 'Peace research with a diversity perspective: A look to Africa' http://www.gmu.edu/programs/icar/ijps/vol9_2/Brock-Utne_92IJPS.pdf (accessed 25 July 2015).

35 See 'Foreword' by DH van Zyl in J Church et al *Human rights from a comparative and international perspective* (2007).

36 E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

37 TF Yerima 'Comparative evaluation of the challenges of African regional human rights courts' (2011) 4 *Journal of Politics and Law* 1.

by way of the example of the recent wave of attacks against black people of foreign origin in South Africa, the clear evidence of the challenges faced by Africa. The underlying causes of these attacks, allegedly indirectly, are driven by the quest for the promotion of human rights.[38] There is a contestation between the locals and foreign nationals over the socio-economic space, the resolution of which is essential for devising mechanisms that will assist in the determination and articulation of what constitutes the value of 'peace' in human rights promotion.

These challenges are further evident in the instability encountered in Lesotho, a member state of the Southern African Development Community (SADC). Lesotho has not been politically stable since the attempted *coup* on 21 August 2014. Lesotho was forced into early elections in February 2015, a situation in which the SADC played a significant role and deployed the Deputy-President of the Republic of South Africa.[39] Briefly, Lesotho was plunged back into turmoil after the elections with the resultant death of Lieutenant-General Maaparankoe Mahao, who allegedly was brutally murdered by soldiers that were sent to arrest him on suspicion of being the mutiny leader.[40] South Africa, previously viewed as a leading democracy in Africa, is at a constitutional crossroads amid calls for the resignation of President Zuma following the reshuffling of the cabinet and the dismissal of Minister of Finance and his deputy. A motion of no confidence in the President has been tabled in parliament and demands for his removal from office which are traceable to his association with the Gupta family, who are regarded as controlling the President in respect of the way in which the country is run.[41]

Notwithstanding Africa's challenges, which directly or indirectly are linked and attributed to the general failure of political leadership in Africa, of further and greater concern is the role of the West and especially of the United States of America (USA) in Africa's affairs. This role amounts to interference that relegates the role of the AU to a sphere without international significance on matters that affect the continent as a result of the financial clout of the USA. This

38 G Maina et al 'It's not just xenophobia' 29 March 2011 http://www.accord.org.za/publication/its-not-just-xenophobia/ (accessed 11 April 2017).

39 T Simelane 'Watch: Lesotho PM refutes political instability' 17 June 2015 http://www.enca.com/africa/watch-lesotho-pm-refutes-political-instability (accessed 3 August 2015).

40 S Hofstatter & K Sutherland 'Lesotho general told of death plot' 6 July 2015 http://www.timeslive.co.za/thetimes/2015/07/06/Lesotho-general-told-of-death-plot (accessed 4 August 2015).

41 See Public Protector Report entitled 'State capture: Investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and directors of state-owned enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family businesses' No 6 of 2016/2017, http://www.da.org.za/wp-content/uploads/2016/11/State-of-Capture-14-October-2016.pdf (accessed 12 April 2017).

involvement raises the question whether the promotion of fundamental values within the framework of 'peace' is subject to the economic and political power of the USA: How does Africa use 'peace' as a value in the promotion of human rights if the undertaking is clouded by the economic and political exploitation of Africa's situation? This question is inspired by how the USA, at times, prescribes how African countries should solve their problems, as if they do not have their own political and economic 'home': the African Union. The AU has its shortcomings, which are not the subject of the article, but it is better placed to devise some mediating and consensus-seeking measures that have the potential to produce lasting political solutions rather than the imposition of Western ideology in resolving Africa's challenges.[42]

The strategic diplomacy of the AU in addressing Africa's problems in ensuring the preservation and upholding of stability in African countries, at face value and on assumption herein, directly harnesses the argument in the article for 'peace' as a fundamental strategy for human rights protection. The involvement of the AU in African countries does not mean interference in the regulation of their internal affairs but the rejection of dictatorship; it does not adopt a 'silent rule' and does not criticise a particular state in respect of the way in which it upholds the protection of the rights of its citizens.[43] The establishment of the Peace and Security Council[44] (PSC) of the AU as a standing decision-making body responsible for the maintenance of continental peace and security is indicative of Africa's advances in promoting 'peace' in Africa which does not need a 'remote-control approach' from Westerners. The principle of non-interference is linked directly to sovereignty, by which state parties respect the independence of each other in the regulation of their internal authorities, subject to the prescribed minimum standards as required by national and international laws.[45] 'Sovereignty', in essence, is defined as a 'legal status from which certain legal consequences, in particular rights, being intertwined with obligations, are derived'.[46] Peters argues that the 'status is limited by human

42 'African Union will not observe elections in Burundi' http://www.aljazeera.com/news/2015/06/african-union-observe-elections-burundi-150628172409440.html (accessed 31 July 2015).

43 M Wood 'Non-intervention (non-interference in domestic affairs)' https://pesd.princeton.edu/?q=node/258 (accessed 4 May 2016).

44 See Protocol Relating to the Establishment of the Peace and Security Council of the AU, adopted in Durban, South Africa, and entered into force on 26 December 2003, http://www.peaceau.org/en/page/38-peace-and-security-council#sthash.IYgiVNjZ.dpuf (accessed 11 April 2017).

45 A Benoist *What is sovereignty*? (1999) 101 http://www2.congreso.gob.pe/sicr/cendocbib/con2_uibd.nsf/A20317BBCECF9E1E0525770A00586F60/$FILE/what.pdf (accessed 12 April 2017).

46 A Peters 'Humanity as the A and Ω of sovereignty' (2009) 20 *European Journal of International Law* 514.

rights because it is from the outset determined and qualified by humanity and has a legal value to the extent that it respects human rights, interests and thus needs'.[47] The upholding of the intersection of the principles of non-interference and sovereignty has the potential to cause a widespread migration of refugees in search of security and the protection of their rights.[48] In turn, this is likely to have an impact that threatens the prospects of 'peace' as foundational to security and to its successful integration in the domestic framework of the law.

It is acknowledged that Africa falls within the framework of the community of nations. However, the constant interference by the West in Africa's domestic affairs undermines the ability and skill of African leaders to resolve Africa's issues in a manner befitting the continent. The instruments that so far have been adopted, the established institutions and the way in which the AU has handled some of the problematic situations in Africa shows an awareness of Africa's wavering support for the advancement of 'peace' as a value that has the potential to promote human rights. The Libyan crisis in 2011, which could have plunged the continent into turmoil, is one of the few examples where the AU showed collective responsibility and leadership in handling the situation without interference by Western countries. Africa has the potential, on its own, to establish harmonious relationships that are likely to affirm the value-based approach of 'peace' in the protection and promotion of human rights. In turn, this potential envisions the argument in the article for the use of 'peace' as a strategic foundational value for the promotion of human rights.

3 Conclusion

The article argues that Africa is faced with a pressing need to integrate 'peace' as a value into the domain of human rights protection on the continent. The integration of 'peace' as a value and a right is a strategic direction in the establishment of harmonious relations among African countries torn by conflict and violence which, in turn, compromise the promotion of human rights. The article, therefore, points out that it is evident and possible that 'peace' should be adopted as a strategic value that may be infused into the rights framework. Its elements provide a foundation within which Africa can aspire to succeed. Notwithstanding the various challenges faced by Africa, the value-based approach of 'peace' has the potential to promote a legalistic and rigid framework in the promotion of human rights. As matters now stand, 'peace' is indirectly applied as a value in the interpretation of the provisions of the various instruments Africa adopted in order to address the socio-political ills it faces. However,

47 As above.

48 Eg, President Robert Mugabe has constantly objected to the critiques in respect of the way in which fundamental rights were being undermined in Zimbabwe, leading to the migration of his citizens for better opportunities.

there is still an opportunity for the integration of 'peace' as a value in the broader rights framework.

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An unintended legacy: Kwame Nkrumah and the domestication of national self-determination in Africa

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Summary

In the early 1950s, the right to self-determination was a concept rich with disruptive potential for pre-independence Africa. Some saw the application of self-determination as an opportunity to redraw the continent's colonial borders; others believed it would lead to a pan-African union of states. Through an analysis of legal, historical and political material, this article argues that between 1958 and 1964 Ghana's first President, Kwame Nkrumah, although ideologically a pan-Africanist, played a pivotal but unintentional role in entrenching colonial era borders in Africa. The article identifies three key ways in which Nkrumah shaped the law of self-determination in Africa: first, by actively campaigning against 'tribalism' in Ghana; second, by enlisting the UN to prevent the secession of Katanga in 1960, thereby creating a crucial precedent; and, third, by playing a leading role in establishing the OAU in 1963, which went on to endorse the legal validity of colonial frontiers. In this way, Nkrumah helped settle arguments around the authentic self-determination unit in Africa, forging an unintended legacy that continues to shape the legal and political contours of the continent to the present.

Key words: *self-determination; Banjul Charter; Ghana; Kwame Nkrumah; Organisation of African Unity; African Union; pan-Africanism;* uti possidetis

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1 Introduction

In the 1950s self-determination was a concept 'loaded with dynamite',[1] and this was no more the case than in pre-independence Africa. There were some who argued that self-determination should be seized as an opportunity to redraw the continent's colonial borders, while others believed that the application of the principle should lead to a pan-African union of states. All that was certain was the disruptive potential of self-determination. The article argues that during the crucial period between 1958 and 1964, Ghana's first President, Kwame Nkrumah, played a pivotal but unintentional role in settling these arguments. Although ideologically a pan-Africanist, Nkrumah helped entrench colonial era borders in Africa. The article identifies three key ways in which Nkrumah shaped the law of self-determination in Africa: first, by actively campaigning against 'tribalism' in Ghana; second, by enlisting the United Nations (UN) to prevent the secession of Katanga in 1960, thereby creating a crucial precedent; and, third, by playing a leading role in establishing the Organisation of African Unity (OAU) in 1963, which went on to endorse the legal validity of colonial frontiers. In this way, Nkrumah helped settle arguments around the authentic self-determination unit in Africa, forging an unintended legacy that continues to shape the legal and political contours of the continent to the present.

The article will draw out the unintended legacy of Nkrumah by briefly outlining the transatlantic education informing his beliefs on self-determination in the 1940s and 1950s, and how he applied or modified these beliefs during his time in power post-1952. The article then establishes Nkrumah's influence over the three key factors between 1958 and 1964 that shaped the law of self-determination in Africa, and demonstrates how these precedents continue to influence treaty and case law to the present. After considering some exceptions to the principle of *uti possidetis juris*[2] and evolving standards, the article concludes by comparing Nkrumah's legacy with his intentions, and assessing whether the two might in the future be reconciled. In approaching the topic, the article makes use of Mayall's phrase 'the domestication of national self-determination', defined by Koskenniemi to denote the restriction of self-determination to the decolonisation project alone.[3] This restriction is made possible through the principle of *uti possidetis,* which requires that the frontiers of a state follow the boundaries of its predecessor state.

1 D Philpott 'In defense of self-determination' (1995) 105 *Ethics* 352.

2 *Uti possidetis juris* (*uti possidetis*) is defined by *Black's law dictionary* as 'the doctrine that colonial *administrative* boundaries will become international boundaries when a political subdivision or colony achieves independence'. BA Garner et al *Black's law dictionary* (2007) 1582.

3 M Koskenniemi 'National self-determination today: Problems of legal theory and practice' (1994) 43 *International and Comparative Law Quarterly* 242.

2 Nkrumah's evolving views on self-determination

2.1 Origins of the concept of self-determination

In its 1975 *Western Sahara* Advisory Opinion, the International Court of Justice (ICJ) described the essential component of self-determination as 'the freely-expressed will of the people'.[4] Using this definition as a guide, the origins of the modern concept of self-determination arguably may be traced back to the late eighteenth century, when the Declaration of Independence of the United States of America (US) stated that governments derived 'their just powers from the consent of the governed'. In the decades following, the leaders of the French Revolution framed their own demands in terms of popular sovereignty.[5]

At the conclusion of World War I, self-determination re-emerged as a core principle of the Fourteen Points championed by US President Woodrow Wilson, which formed the basis of peace negotiations. While the ideal of self-determination remained mostly unrealised at this time, the concept subsequently was reflected in article 22 of the Covenant of the League of Nations, which devised the mandate system as a 'compromise solution' between self-determination and the interests of the major powers.[6] At this time, self-determination remained a political rather than a legal concept. However, this changed during and following World War II. The 1941 Atlantic Charter and the 1945 UN Charter both affirmed peoples' rights to self-determination, laying the foundations – whether deliberately or not – for the independence and decolonisation movements that would unfold in the 1950s and 1960s.

2.2 A pan-African conception of self-determination

Readers will likely be familiar with the varied and tumultuous life of Ghana's first President, Kwame Nkrumah. However, for purposes of the article some key events are worth highlighting. Born in 1909 in the British colony in West Africa, then known as the Gold Coast, Nkrumah worked as a teacher in his home country until the age of 26. In 1935, he sailed for the United States, obtaining a Bachelor of Arts and a Bachelor of Theology degree from Lincoln University. He also earned two Master's degrees from the University of Pennsylvania in 1942 and 1943, in education and philosophy respectively.[7] During his time in the United States, Nkrumah read Hegel, Karl Marx, Engels, Lenin and Mazzini and, in his own words, 'made time to acquaint myself with as many political organisations in the United States as I

4 *Western Sahara* (Advisory Opinion) (1975) ICJ Reports 81.
5 D Thürer & T Burri 'Self-determination' (2008) *Max Planck encyclopedia of public international law.*
6 Thürer & Burri (n 5 above).
7 RY Owusu *Kwame Nkrumah's liberation thought: A paradigm for religious advocacy in contemporary Ghana* (2005) 99.

could … the Republicans, the Democrats, the Communists and the Trotskyites'.[8] During this frenetic period of academic and political education, Nkrumah developed the political philosophies that he would later bring with him to office in Ghana. In the early 1940s, he articulated a belief in the need for 'complete revolutionary change of the colonial system'[9] in Africa, to be replaced by a pan-African union unencumbered by colonial borders.[10] In this sense, Nkrumah was arguing for self-determination in Africa in the form of state integration on a continental scale – with independence as a crucial first step.

2.3 1945 to 1952: From London to Accra

Nkrumah followed his time in the United States with spells at the London School of Economics, University College London and Gray's Inn from 1945 to 1946. At this time, Africa consisted of over 40 countries, all but four of which – Ethiopia, Liberia, Egypt and South Africa – were controlled by a colonial power. However, with World War II concluded, change seemed increasingly inevitable. In October 1945, Nkrumah was a prominent delegate at the historic Pan-African Congress in Manchester, along with WEB DuBois, CLR James, Jomo Kenyatta, and 200 others. A declaration written by Nkrumah and endorsed by the Congress affirmed 'the right of all colonial peoples to control their destiny',[11] and another resolution similarly called for 'the implementation of the principles of the Four Freedoms and self-determination in the Atlantic Charter everywhere'.[12]

Following this Congress, Nkrumah founded the West African National Secretariat (WANS), which had the realisation of 'United West African National Independence' as its primary objective.[13] In February 1946, WANS held its first conference in London, with resolutions calling for 'the complete liquidation of the colonial system' and stating that 'existing territorial divisions in Africa [are] … inimical to the best interests of the African peoples'.[14] Given Nkrumah's central role in WANS, we can intuit that these resolutions reflect his own thinking on the topic at the time. Nkrumah's publications during the period provide further insight into how he thought the principle of self-determination should be applied in Africa. In September 1946, he wrote in the Nigerian newspaper *The Comet* that 'in all matters pertaining to the destiny of West Africa, personal and tribal differences, opinions and shortcomings must not be allowed to

8 K Nkrumah *Ghana: The autobiography of Kwame Nkrumah* (1957) 45.
9 A Biney *The political and social thought of Kwame Nkrumah* (2011) 24.
10 Biney (n 9 above) 15.
11 Biney 32.
12 The 5th Pan-African Congress 'Resolutions of the Pan-African Congress Manchester 1945' reproduced in C Legum *Pan-Africanism: A short political guide* (1965) 154.
13 Biney (n 9 above) 32.
14 M Sherwood 'Pan-African conferences, 1900-1953: What did "pan-Africanism" mean?' (2012) 4 *The Journal of Pan-African Studies* 111.

hamper our struggle for … unity'.[15] In the 1947 pamphlet *Towards colonial freedom*, he went a step further, calling for a West African 'national entity'.[16] At this stage, it appears that Nkrumah was grappling with whether to forge an African or West African union. However, what is not in doubt is his commitment to decolonisation and the reordering of colonial borders.

In late 1947 Nkrumah returned to the Gold Coast to take up the post of general secretary with the United Gold Coast Convention (UGCC), a recently-established political movement that aimed to end colonial rule. [17] In this position, Nkrumah's efforts were focused on the realisation of self-determination within the Gold Coast, with his pan-African ambitions taking a back seat.

3 Nkrumah and the concept of self-determination: 1951-1966

3.1 The period to 1960

After a period of 14 months in prison – as punishment for promoting an illegal strike – Nkrumah was released in February 1951 and in March 1952 elected to the newly-created position of Prime Minister of the Gold Coast. During the subsequent period of shared government with the British colonial administration, known as the dyarchic partnership, Nkrumah published little and focused on the practical matter of governing. His biographer, Ama Biney, has argued that Nkrumah's ambitions for continental self-determination contracted during this period, and he was 'focused on the narrower aim of territorial independence before West African unity'.[18] Upon leading the Gold Coast to independence in March 1957 and becoming Prime Minister of the renamed Ghana, Nkrumah once again broadened the scope of his ambition, stating that 'our independence will be meaningless unless it is linked up with the total liberation of Africa'.[19]

In 1958 Nkrumah convened the first Conference of Independent African States in Accra and was intimately involved in its preparations.[20] Among the resolutions arising from that conference – attended by representatives from Ghana, Libya, Ethiopia, Liberia, Morocco, Tunisia, Sudan and the United Arab Republic – were an affirmation of 'unswerving loyalty to and support of the Charter of the United Nations' and 'respect for the sovereignty and territorial

15 Sherwood (n 14 above) 111.
16 K Nkrumah *Towards colonial freedom: Africa in the struggle against world imperialism* (1962).
17 Biney (n 9 above) 35.
18 Biney 48.
19 BBC World Service 'Kwame Nkrumah's vision of Africa' *BBC* 14 September 2000 http://www.bbc.co.uk/worldservice/people/highlights/000914_nkrumah.shtml (accessed 24 January 2016).
20 Biney (n 9 above) 136.

integrity of all nations'. Another meeting in Accra in 1958 with which Nkrumah was closely involved, the All-African People's Conference, took a different tack. In a series of resolutions titled Frontiers, Boundaries and Federations, the Conference denounced 'artificial frontiers drawn by imperialist powers' and called for their abolition 'at an early date'.[21] As can be seen from these divergent resolutions, the form that self-determination would take in Africa was still very much undetermined in 1958.

In the following year, 1959, Nkrumah met with President Tubman of Liberia and President Sékou Touré of Guinea in the Liberian village of Sanniquellie to discuss African unity. Following the meeting, the three leaders released a Declaration of Principles affirming that 'each state and Federation, which is a member of the Community, shall maintain its own national identity and constitutional structure'.[22] This compromise reflects a softening of Nkrumah's strident pan-African conception of self-determination in favour of an acknowledgment of the necessity of maintaining the territorial integrity of each individual state during the decolonisation project.

During this crucial time in the development of the law of self-determination in Africa, Nkrumah was also increasingly warning of the threat posed by 'balkanisation'. By this, he meant the splintering of states into groups based on pre-colonial tribal lines. Nkrumah argued that balkanisation of this kind would divide Africa into 'small, weak and unstable states', paving the way for neo-colonial interference.[23] To this end, Nkrumah's government in 1957 declared a ban on tribal flags in Ghana and passed an Act prohibiting organisations from emphasising their 'racial or religious affiliations'.[24] This forced emphasis on national rather than tribal identity was a reflection of Nkrumah's pragmatism, given that the colonial borders of Ghana cut through 17 major tribes.[25]

3.2 1960: Crisis in the Congo

In 1960, Nkrumah – now President of Ghana – took his battle against balkanisation to the Republic of the Congo (now the Democratic Republic of the Congo (DRC)) during the attempted secession of Katanga. In his adopted role as pan-African statesman, Nkrumah acted as envoy between the UN, colonial powers and the Congolese leader Patrice Lumumba. Crucially, Nkrumah paid no credence to the claims of the Kantangese separatists, instead directing his efforts towards maintaining the borders that the Congo had inherited from

21 S Lalonde *Determining boundaries in a conflicted world: The role of* uti possidetis (2002) 115-116.

22 C Legum *Pan-Africanism: A short political guide* (1965) 45.

23 B Neuberger 'The African concept of balkanisation' (1976) 14 *Journal of Modern African Studies* 523.

24 Avoidance of Discrimination Act 38 of 1957 (Ghana).

25 W Zartman *International relations in the new Africa* (1966) 108.

Belgium. In a speech to the Ghanaian National Assembly in August 1960, Nkrumah said that the 'greatest danger that Africa faces today is balkanisation' and that the crisis in the Congo represented a 'turning point in the history of Africa'.[26] As Biney has noted, 'the principle of the indivisibility of Ghana and the Congo was sacrosanct and Nkrumah was prepared to defend it'.[27]

Nkrumah emphasised these sentiments in an address to the UN in September 1960. 'The Congo, including Katanga and Kasai, is one and indivisible', he said. 'Any other approach is mere wishful thinking, for not all the mineral wealth in that integral part of the Congo can create Katanga as a separate state.'[28] Nkrumah was the first African leader to join Lumumba in appealing to the UN to help restore the Congo's territorial integrity.[29] These efforts contributed to the adoption of UN Security Council Resolution 161 of 21 February 1961, which expressed grave concern at 'the prevalence of conditions which seriously imperil peace and order and the unity and territorial integrity of the Congo, and threaten international peace and security'.[30] This resolution, along with UN Security Council Resolution 143 from 1960,[31] authorised the use of force to preserve the Congo's territorial integrity. Ghana, under the direction of Nkrumah, was one of the first countries to contribute troops to the UN operation in the Congo in July 1960.[32] These Ghanaian troops were joined by almost 20 000 personnel from 30 countries during the period to July 1964. This episode, described variously as a 'game-changing precedent'[33] and an 'important landmark',[34] demonstrated that the UN was prepared to sanction the use of force to quell a secession attempt in Africa. It is possible that the multi-national intervention would have occurred without Nkrumah's promotion. However, his eloquent advocacy for the Congo's territorial integrity played an essential part in rallying support from countries within and outside Africa. Furthermore, as Simpson has noted, this strong stance of the UN,[35]

> supported by Nkrumah and other African leaders, provided a basis for the Congo, Nigeria and other multi-ethnic countries threatened by secessionist

26 K Nkrumah 'Africa's challenge' speech delivered to the Ghanaian National Assembly, Accra, Ghana, 6 August 1960.

27 Biney (n 9 above) 160-161.

28 K Nkrumah et al 'Africa speaks to the United Nations: A symposium of aspirations and concerns voiced by representative leaders at the UN' (1962) 16 *International Organization* 316.

29 Biney (n 9 above) 160-161.

30 United Nations Security Council (UNSC) Resolution 161 (21 February 1961) UN Doc S/RES/161.

31 UNSC Resolution 143 14 July 1960 UN Doc S/RES/143.

32 R Cavendish 'Upheaval in the Congo' (2010) 60 *History Today.*

33 J Genser & B Ugarte 'Evolution of the Security Council's engagement on human rights' in J Genser & B Ugarte (eds) *The United Nations Security Council in the age of human rights* (2014) 10.

34 M Shaw *Title to territory in Africa: International legal issues* (1986) 183.

35 B Simpson 'The Biafran secession and the limits of self-determination' (2014) 16 *Journal of Genocide Research* 339.

movements to take whatever actions necessary to preserve their territorial integrity.

The Congo precedent quickly gained endorsement from regional and judicial bodies. In early 1961, a conference in Casablanca attended by Nkrumah – along with heads of state from Mali, Guinea, Morocco and representatives from Libya and the Algerian Republic – strongly supported the territorial integrity of the Congo.[36] This was followed by the Lagos Conference of African States in 1962, at which attendees proclaimed the principle of respect for existing borders in Africa, and adopted a Charter affirming that 'each state has the right of defence of its territorial integrity'.[37] The actions of the UN in protecting the Congo's territorial integrity were also found to be legitimate by the ICJ which, in an advisory opinion of July 1962, pronounced that expenses incurred during the operation were within the meaning of article 17(2) of the UN Charter.[38]

3.3 Origins of the Organisation of African Unity

With this precedent established, Nkrumah continued to take a leading role in organising newly-independent African states into a formal union. In 1963, he was instrumental in the creation of the Organisation of African Unity (OAU) at the Summit Conference of Independent African States in Addis Ababa.[39] Nkrumah had intended, ahead of the Addis Ababa conference, that the formation of the OAU would mark the first step in a 'United States of Africa' controlled by a centralised government.[40] This vision was shared by the so-called 'Casablanca group' of nations – of which Ghana was a member – which favoured political integration as a prerequisite for economic integration and a socialist path to economic development.[41] By contrast, the 'Monrovia group' favoured a gradualist approach to African unity that, instead of 'political integration of sovereign states', would entail 'unity of aspirations and of action'.[42] At the conference, the arguments of the Monrovia group prevailed. Despite Nkrumah's advocacy, the OAU Charter in articles 2 and 3 explicitly stated that the

36 Legum (n 22 above) 192-199.

37 Shaw (n 34 above) 184.

38 *Certain Expenses of the United Nations (article 17, paragraph 2 of the Charter)* (Advisory Opinion) (1962) ICJ Reports 151 179-180.

39 O Onwumere 'Pan-Africanism: The impact of the Nkrumah years, 1945–1966' in T Falola & N Afolabi (eds) *Trans-Atlantic migration: The paradoxes of exile* (2008) 237.

40 L Farmer 'Sovereignty and the African Union' (2012) 4 *Journal of Pan-African Studies* 96.

41 S Wapmu 'In search of greater unity: African states and the quest for an African Union government' (2009) 1 *Journal of Alternative Perspectives in the Social Sciences* 650.

42 B Franke 'Competing regionalisms in Africa and the continent's emerging security architecture' (2007) 9 *African Studies Quarterly* 34.

purpose and principles of the OAU included protecting the sovereignty and territorial integrity of African states.[43] Emerson concludes that[44]

> the net effect of such pronouncements [in the Charter] as of the relevant sections of the 1960 UN Declaration is for all purposes to deny the legitimacy of any further disintegration or reshaping which impairs the integrity of the colonially defined states.

Notwithstanding his reservations, Nkrumah authorised the signature and ratification of the Charter by Ghana, and in September it entered into force after the requisite two-thirds of the 32 independent African states had also done so.[45] Shaw has noted that the Charter did not 'specifically refer to the sanctity of the colonial borders',[46] although any ambiguity on this point was erased in 1964 when the OAU met in Cairo. Arising from this meeting was the Cairo Declaration, which declared that 'all member states pledge themselves to respect the borders existing on their achievement of national independence'.[47] Somalia and Morocco resisted the Resolution, but it was adopted by the OAU as a whole. While Nkrumah had said that the crisis in the Congo was 'the turning point in African history', the Cairo Resolution was of at least equal long-term significance in shaping the law of self-determination in Africa. In this regard, Shaw has written that 'the border resolution can be said to have marked the acceptance by Africa as a whole of a new territorial regime, one based on the legal validity of the colonial frontiers of independent states'.[48] This marked a dramatic change from just six years earlier, when the All-African Peoples Conference had denounced the continent's 'artificial frontiers'. As arguably the most important individual behind the creation of the OAU, Nkrumah's influence helped pave the way for this increasing acceptance of colonial era borders, influencing the development of the law of self-determination in Africa thereafter.

3.4 Placing Nkrumah's stance in context

Before assessing Nkrumah's ongoing impact in shaping the law of self-determination as it would be applied in Africa, it is helpful to briefly consider the factors that informed his stance during the crucial period between 1958 and 1964. First and foremost, political pragmatism played a role; Nkrumah was an idealist, but also a canny and practical-minded politician. Thus, his homilies against tribalism and

43 Charter of the Organisation of African Unity (adopted 23 May 1963, entered into force 13 September 1963) 479 UNTS 39.

44 R Emerson 'Pan-Africanism' (1962) 16 *International Organization* 35.

45 C Legum 'The Organisation of African Unity: Success or failure?' (1975) 51 *International Affairs* 208.

46 Shaw (n 34 above) 185.

47 Organisation of African Unity 'Resolutions adopted by the first ordinary session of the Assembly of Heads of State and Government held in Cairo 17-21 July 1964' (1964) (Cairo Declaration).

48 Shaw (n 34 above) 186.

balkanisation were directed, in part, at people from the cocoa-producing Ashanti region who resisted Ghanaian federalism and formed their own separatist group, the National Liberation Movement.[49] Notwithstanding this public stance against tribalism, Nkrumah was still prepared to use tribal loyalties as a lever to achieve political goals. In 1960, Ghana made an unsuccessful claim for the southeast corner of Côte d'Ivoire, on grounds of 'tribal unity'.[50] This claim formed part of an ongoing feud between Nkrumah and Côte d'Ivoire's independence leader, Félix Houphouët-Boigny. At around the same time, Nkrumah called for the integration of Togo into Ghana, also on the grounds of tribal unity.

Nkrumah's promotion of nationalism as a means of protecting state borders also had a pragmatic purpose. Even as President of Ghana he continued to believe in a pan-African union of African states with a centralised government and shared economic and military functions.[51] It was no secret that Nkrumah saw himself as the likely leader of this federated United States of Africa,[52] although his public position was that he was 'prepared to serve … under any African leader who is able to offer the proper guidance in this great issue of our time'.[53] When, in 1963, the African heads of state chose to establish the OAU in such as way as to protect colonial borders, Nkrumah reluctantly signed the Charter. It is likely that he saw the maintenance of state stability as a necessary stepping stone towards genuine pan-Africanism.[54] Nkrumah could not have anticipated, however, that through endorsing territorial integrity in this way, he was helping to lay the groundwork for the transformation of 'artificial' [55] colonial borders in Africa into a tangible and permanent reality.

4 Nkrumah's unintended legacy: *Uti possidetis* in Africa

4.1 Pre-1958 potential of self-determination in Africa

The writer and journalist Hardy recently wrote that 'many thought Africa's borders would change in the late 1950s and early 1960s, when most African nations broke free from colonial rule'.[56] Indeed, before it was 'domesticated' in Africa in the 1960s, the disruptive potential of the principle of self-determination was immense. As

49 Biney (n 9 above) 45.
50 Shaw (n 34 above) 201.
51 K Nkrumah 'Proposal for a union government of Africa' speech at the OAU Summit Meeting, Cairo, Egypt, 19 July 1964.
52 Biney (n 9 above) 145.
53 K Nkrumah 'Speech to positive action conference for peace and security in Africa' Accra, Ghana, 7 April 1960.
54 African Union 'Kwame Nkrumah: The permanent relevance of a road-not-taken' 21 May 2013 http://summits.au.int/50th/50th/speeches/kwame-nkrumah-permanenet-relevance-road-not-taken (accessed 24 January 2016).
55 K Nkrumah 'Letter to President Boigny' 14 January 1965 NAG: SC/BAA/430.
56 S Hardy 'A brief history of mapping' (2015) *Chimurenga Chronic* 2-3.

Koskenniemi has argued, there is a revolutionary sense of national self-determination, linked to the principle's enlightenment origins, which 'far from supporting the formal structures of statehood provides a challenge to them'.[57] When it was first formally articulated as a principle of international law at the time of World War I, self-determination was used as a vehicle for the re-division of Europe, rather than the maintenance of prior borders.[58] In the 1921 *Aaland Islands* case, the Commission of Rapporteurs recognised this revolutionary potential of self-determination in a classic statement:[59]

> To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the state as a territorial and political unity.

This potentially disruptive power of self-determination remained unresolved in the 1940s. During this decade, Aimé Césaire and Léopold Sédar Senghor argued that self-determination should be separate from state sovereignty, and decolonisation seized as an opportunity to remake the world.[60] Some in the United States viewed self-determination not so much as an opportunity, but as a 'Pandora's box that might lead to state-fragmentation, genocide, or the proliferation of states too small or too primitive to merit self-government'.[61] And it was not just abroad that this potential was manifest: American Communists in 1939 were calling for the creation of an independent state in the South of the United States as an expression of 'black self-determination'.[62]

In the African context, the revolutionary threat posed by self-determination was noted in the 1920s by the Gold Coast nationalist Kobina Sekyi, who warned against Africa following the way of the Balkans.[63] As noted above, the 'balkanisation' trope was revived in the 1950s by Kwame Nkrumah – among other African leaders – to argue against tribalism and small states. The fact that such arguments were deemed necessary demonstrates that the disruptive potential of self-determination was very much extant in Africa in the 1950s. As seen in the previous section of the article, however, events between 1958 and 1964 in which Nkrumah played a leading role helped defuse the revolutionary potential of self-determination in Africa by linking it to

57 Koskenniemi (n 3 above) 246.
58 J Anaya *Indigenous peoples in international law* (2004) 99.
59 *Aaland Islands* case (1920) League of Nations Official Journal Special Supplement 3.
60 G Wilder *Freedom time: Negritude, decolonisation and the future of the world* (2015).
61 B Simpson 'The United States and the curious history of self-determination' (2012) 36 *Diplomatic History* 676.
62 Simpson (n 61 above) 678.
63 JA Langley *Pan-Africanism and nationalism in West Africa 1900-1945: A study in ideology and social classes* (1973) 98.

the principle of *uti possidetis.* The remainder of this section will demonstrate how treaty and case law embedded this trend into the law of self-determination in Africa from 1964 to the present.

4.2 International law position on *uti possidetis* post-1964

Nkrumah was forcibly deposed in 1966 in one of six military *coups* in Africa that year. However, the two key international events over which he had an influence – the UN intervention in the Congo and the formation of the OAU – continued to shape the law of self-determination in Africa. In 1966, the International Covenant on Civil and Political Rights (ICCPR)[64] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[65] were adopted by the UN General Assembly. In their shared first article, the ICCPR and the ICESCR state that 'all peoples have the right of self-determination' and state parties to the Covenants 'shall promote the realisation of the right of self-determination'. The UN Human Rights Committee subsequently clarified the implications of common article 1 in its General Comment 12 of 1984.[66] As Shaw has noted, rather than sanctioning external self-determination, the Committee took the view that self-determination operated 'within the territorial framework of independent states [and] cannot be utilised as a legal tool for the dismantling of sovereign states'.[67]

In 1967 the membership of the OAU, building on their 1964 Cairo Resolution, adopted a resolution on the Biafran situation in Nigeria, declaring its 'condemnation of secession in any member states'.[68] In this regard, it must be noted that despite the evolving norm of *uti possidetis* in Africa and the Katanga precedent, a minority of states (Côte d'Ivoire, Gabon, Tanzania and Zambia) did recognise and aid Biafra. In 1970, six years after the Cairo Declaration, the UN General Assembly Declaration on Principles of International Law reaffirmed states' territorial integrity, while also emphasising the importance of states conducting themselves in accordance with the self-determination of peoples.[69]

As Judge Yusuf of the ICJ noted in 2013,[70] the principle of territorial integrity enunciated in the Cairo Resolution is similar to Principle III on

64 International Covenant on Civil and Political Rights, UN General Assembly (19 December 1966).

65 International Covenant on Economic, Social and Cultural Rights, UN General Assembly (16 December 1966).

66 UN Human Rights Committee 'CCPR General Comment No 12: Article 1 (Right to self-determination), The right to self-determination of peoples' (13 March 1984).

67 M Shaw 'The heritage of states: The principle of *uti possidetis juris* today' (1996) 67 *The British Year Book of International Law* 123.

68 Organisation of African Unity 'Resolution on Situation in Nigeria' (1967) AHG/Res.51 (IV).

69 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) 24 October 1970.

70 *Frontier Dispute (Burkina Faso/Niger)* (Judgment) ICJ Reports 2013.

the inviolability of frontiers in the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe. That Principle states that 'the participating states regard as inviolable all one another's frontiers as well as the frontiers of all states in Europe'.[71] The sentiments of the Cairo Resolution can also be found in the African Charter on Human and Peoples' Rights (African Charter), which entered into force in 1986. The African Charter affirms in article 20 the 'inalienable right to self-determination' of peoples, while also balancing this in article 29(5) with a duty incumbent upon the individual to 'preserve and strengthen the national independence and the territorial integrity of his country'.[72] However, as will be seen in the discussion of the *Katanga* case below, these competing provisions of the African Charter were later interpreted conservatively to provide a presumption in favour of territorial integrity, except in the event of human rights abuses or a denial of the right to participate in government.[73] This narrow interpretation of the right to self-determination in the African Charter is also evident in a report adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2005, which states:[74]

> The right to self-determination as entrenched within the provisions of the OAU Charter as well as the [African] Charter cannot be understood to sanction secessionist sentiment. Self-determination of peoples must therefore be exercised within the inviolable national boundaries of the state with due regard for the sovereignty of the nation-state.

Similar to the African Charter, the 1993 Vienna Declaration and Programme of Action balances the recognition of the 'inalienable' right to self-determination with 'the territorial integrity or political unity of sovereign and independent states'.[75] Finally, in 2001, when the OAU was reconstituted as the African Union (AU), its Constitutive Act in article 4(b) echoed the language of the 1964 Cairo Resolution, requiring 'respect of borders existing on achievement of independence'.

4.3 Case law post-1964

In addition to the treaty law outlined above, there is a wealth of case law endorsing the sanctity of colonial borders and the domestication of national self-determination in Africa. In this way, judicial bodies have cemented in international law the principle espoused in 1964 by

71 Organisation for Security and Co-operation in Europe 'Conference on security and co-operation in Europe (CSCE): Final Act of Helsinki' (1 August 1975).

72 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 *ILM* 58.

73 *Katangese Peoples' Congress v Zaire* (Merits) (2000) AHRLR 72 (ACHPR 1995) (*Katanga* case).

74 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005), adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session.

75 Vienna Declaration and Programme of Action, UN General Assembly (12 July 1993) A/CONF 157/23.

Nkrumah's errant creation, the OAU. In its 1971 Namibia advisory opinion, the ICJ made its first reference to self-determination, interpreting it as the right of former colonies to independence.[76] Four years later, in the *Western Sahara* opinion, the Court did not directly discuss or endorse *uti possidetis*, but did again emphasise that the right of self-determination was a basic principle of the decolonisation process.[77] Just over a decade later, in 1986, the ICJ provided a crystal-clear endorsement of *uti possidetis* in Africa in the *Frontier Dispute (Burkina Faso/Mali)* case. The Chamber began its analysis by emphasising in paragraph 20 the 'exceptional importance' of *uti possidetis* 'for the African continent and for the two parties'.[78] Later in the same paragraph, the Chamber stated that 'it [*uti possidetis*] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'. In making this finding, the Chamber in paragraph 22 drew support from the 1964 Cairo Resolution on Border Disputes:

> At their first summit conference after the creation of the OAU, the African heads of state, in their Resolution … deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organisation.

The resonance between this endorsement of the colonial borders in the *Burkina Faso/Mali* judgment and the 1964 Cairo Declaration has been noted by Maogoto, who wrote of the ruling: 'A political statement in 1964, some two decades later, had meshed with a judicial pronouncement.'[79] This pronouncement led the Chamber to decide that the two states in the matter – Burkina Faso and Mali – had an obligation to respect pre-existing international frontiers. Following this decision, the principle of *uti possidetis* has also been found to apply to maritime boundaries in Africa. In an Arbitral Award case of 1989 between Guinea-Bissau and Senegal, the Tribunal decided that 'from a legal point of view, there is no reason to establish different regimes dependent of which material element [land or sea] is being delimited'.[80] This finding represents a significant contribution to developing state practice on maritime delimitation in Africa.

The 1992 *Katanga* case is also of significant normative value, as it was the first decision of the African Commission to address the possible right to external self-determination in post-independence Africa. In the case, the African Commission was called on to decide whether people in the region of Katanga in Zaire (as it was then

76 K Roepstorff *The politics of self-determination: Beyond the decolonisation process* (2012) 18.

77 *Western Sahara* (Advisory Opinion) (1975) ICJ Reports.

78 *Frontier Dispute (Burkina Faso/Mali)* (Judgment) (1986) ICJ Reports.

79 J Maogoto 'Somaliland: Scrambled by international law?' in D French (ed) *Statehood and self-determination: Reconciling tradition and modernity in international law* (2013) 216.

80 SN Lalonde & MG Kohen 'Determining boundaries in a conflicted world: The role of "*uti possidetis*"' (2004) 98 *American Journal of International Law* 133.

known) could exercise their right to self-determination in the form of secession or independence. The claim was brought under article 20(1) of the African Charter. Mhango has stated that in its decision, the African Commission 'relied on the Cairo Resolution in setting the standard by which the right to self-determination would be implemented in post-independence Africa'.[81] As noted above, the Commission found that invoking the principle of self-determination was not enough. In the absence of 'concrete evidence of violations of human rights', it was obliged 'to uphold the sovereignty and territorial integrity of Zaire'.[82] Mhango asserts that this decision, coupled with the ICJ ruling in the *Frontier Dispute (Burkina Faso/Mali)* case, means that 'claims of self-determination in the form of secession are [now] prohibited under the African Charter in favour of claims that can be achieved without altering existing state boundaries'. Regardless of whether this is categorically true, there is no doubt that the decision in the *Katanga* case assisted in carrying forward the principle of *uti possidetis* that had been articulated in the 1964 Cairo Resolution.

Case law cementing the principle of *uti possidetis* in Africa has continued from the *Katanga* case to the present. In deciding a border dispute between Libya and Chad in 1994, the ICJ endorsed a colonial era treaty between Libya and France from 1955, even though the treaty was no longer in force.[83] A 1996 decision by a delegation of the African Commission – sent to Senegal with the aim of resolving the Casamance separatist movement – considered grounds for independence including 'historical legitimacy', but ultimately rejected the claim in favour of preserving Senegal's territorial integrity.[84] Another significant decision is the *Kasikili/Sedudu Island* case of 1999, involving Botswana and Namibia.[85] In this matter, the court held that while Namibia had historically occupied the island, a treaty between two colonial powers (Germany and England) from 1890 was of greater value in establishing the boundary between the two nations. This decision demonstrates the prominence accorded to *uti possidetis* in Africa, as the Chamber valued the principle above evidence of actual human occupation.

The 2002 *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* also provides evidence of the ongoing influence of the OAU's 1964 Cairo Resolution. The ICJ Chamber in this matter

81 M Mhango 'Governance, peace and human rights violations in Africa' (2012) 5 *African Journal of Legal Studies* 199.

82 *Katanga* case (n 73 above).

83 *Territorial Dispute (Libyan Arah Jamuhiriya/Chad)* (Judgment) (1994) ICJ Reports.

84 African Commission on Human and Peoples' Rights 'Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights: 1-7 June 1996' (1996).

85 *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) (1999) ICJ Reports.

invoked the Cairo Resolution in paragraph 77 of their decision, and went on to state:[86]

> This principle clearly means that Nigeria could not challenge today a boundary which existed for 47 years before its independence and which Nigeria itself unequivocally accepted as the boundary between its territory and that of Cameroon from 1960 to 1977.

The 2005 *Frontier Dispute (Benin/Niger)* case concerned a situation in which both parties agreed to be bound by *uti possidetis,* even though at the time of independence the 'territorial boundaries were no more than delimitations between different administrative divisions or colonies subject to the same colonial authority'.[87] In its decision, the Chamber emphasised that the principle of *uti possidetis* had on multiple occasions been recognised in the African context, and that 'it was recognised again recently, in article 4(b) of the Constitutive Act of the African Union'.[88] A subsequent decision of the ICJ, the *Frontier Dispute (Burkina Faso/Niger)* ruling of 2013,[89] settled a boundary dispute between the two nations with reference to a map published by a French government agency in 1960. In paragraph 63 of the judgment, the Chamber noted that 'amongst the rules of international law applicable to the dispute' is 'the principle of the intangibility of boundaries inherited from colonisation'. The Chamber also endorsed a 2009 Special Agreement between Niger and Burkina Faso, which used similar wording to the 1964 Cairo Resolution.[90] In this way, the Court indicated that the principle of *uti possidetis* was just as applicable in contemporary Africa as it was in 1964, when the assembled African leaders in Cairo adopted their historic resolution. In other words, Nkrumah's unintended legacy continues to unfold.

5 Exceptions and evolving standards

5.1 Outlying cases

The narrative of the section above suggests an iron-clad endorsement of *uti possidetis* in Africa within international treaty and case law. The actual story, however, is slightly more nuanced, and punctuated with exceptions to the principle. One of the first exceptions occurred even before the 1964 Cairo Resolution was adopted, in the case of Somaliland. A former British protectorate, Somaliland attained independence on 26 June 1960[91] only to unite five days later with the Trust Territory of Somalia.[92] The union was enacted with no popular

86 *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening*) (Judgment) (2002) ICJ Reports.
87 *Frontier Dispute (Benin/Niger)* (Judgment) (2005) ICJ Reports.
88 As above.
89 *Frontier Dispute (Burkina Faso/Niger)* (Judgment) (2013) ICJ Reports.
90 *Frontier Dispute (Burkina Faso/Niger)* (n 89 above) 63.
91 R Rahn 'Curious case of Somaliland' *Washington Times* 6 January 2005.
92 Maogoto (n 79 above) 210.

vote and no attempt to gauge the opinion of the population of either part of the country. Yet, despite subsequent movements towards statehood, Somaliland to this day remains 'tied … through the independence union [of 1960]'.[93] Poore has argued that the case of Somaliland represents an exception to *uti possidetis* because 'the new borders [of the Republic of Somalia] clash with those delineated by Great Britain, France, Ethiopia, and Italy during the colonial period'.[94] Maogoto stated that the borders of the Republic of Somalia 'breach' the 1964 Cairo Resolution, and blames this on 'the two Somalias' … rush to union'.[95]

The case of Eritrea and Ethiopia also represents an instance where borders were drawn up and sanctioned in the years after World War II in conflict with the principle of *uti possidetis*. During the colonial period, Ethiopia and Eritrea had remained separate states: From 1890 to 1935, Ethiopia was an independent member of the international community, while Eritrea was a colony of Italy.[96] This arrangement was enshrined in three boundary agreements concluded between Italy and Ethiopia in 1900, 1902, and 1908. Nonetheless, UN General Assembly Resolution 390(V) of 1950 recommended that Eritrea and Ethiopia be joined in a federation 'under the sovereignty of the Ethiopian Crown'.[97] After the two countries were formally joined in 1952, Ethiopia declared the boundary agreements and the Eritrean Constitution null and void, and incorporated Eritrea into Ethiopia as a province.[98] This laid the groundwork for a decades-long independence movement within Eritrea, which culminated with Ethiopia recognising Eritrea's sovereignty in 1993. Fighting continued, however, and in 2000 a new peace treaty was signed in Algiers, mediated by Rwanda and the United States. Per article 4(1) of the Algiers Peace Agreement, the boundary dispute between Eritrea and Ethiopia was settled with regard to colonial agreements from the early twentieth century.[99] Thus, the principle of *uti possidetis* was belatedly applied to the territories, with the effect that the boundary of 1935 between Eritrea and Ethiopia remains the boundary of today.

Another exception to the application of *uti possidetis* in Africa can also be found in the successful secession of South Sudan from Sudan in 2011. When Sudan gained independence in 1956, respect for colonial frontiers required that South Sudan remain a part of the

93 Maogoto 212.
94 B Poore 'Somaliland: Shackled to a failed state' (2009) 45 *Stanford Journal of International Law* 142.
95 Maogoto (n 79 above).
96 *Decision regarding delimitation of the border between Eritrea and Ethiopia,* Reports of International *Arbitral Awards*, United Nations Vol XXV (13 April 2002) 83-195.
97 Report of the United Nations Commission for Eritrea, UN General Assembly Resolution 390(V) 2 December 1950.
98 *Decision regarding delimitation of the border between Eritrea and Ethiopia,* Reports of International Arbitral Awards, United Nations Vol XXV (13 April 2002) 83-195.
99 Peace Agreement between Ethiopia and Eritrea signed on 12 December 2000 in Algiers.

country, as the two parts had been 'officially united' by Britain at the 1947 Juba Conference.[100] This adherence to a border created for the 'administrative convenience of British colonialists' joined people separated 'by two of the continent's biggest religious and linguistic divides'.[101] Following two wars for independence fought by South Sudan over 60 years, South Sudan was permitted a referendum for independence outside of colonial borders. This was against the initial wishes of the AU, which believed that independence for the south would lead to further conflict.[102] Following the vote, South Sudan became an independent nation in July 2011. One consequence of the division is that the Abyei area remains in Sudan, even though its residents are primarily Dinka – the largest ethnic group in South Sudan. In October 2013, residents of the Abyei region held a unilateral referendum in which 99 per cent of voters chose to join South Sudan. The vote was condemned by the AU as 'unacceptable and irresponsible', indicating that the AU was keen to ensure the division of Sudan against the principle of *uti possidetis* remains an outlying case, rather than setting a precedent that other contested regions[103] may be tempted to replicate.[104]

5.2 Evolving standards

While the principle of *uti possidetis* was enforced with rigour during the decolonisation process, there are signs that a reassessment of the form it should take is underway – in Africa, and elsewhere. This is evident in the 1995 Constitution of Ethiopia, which in article 39(1) provides its ethnic units with the 'unconditional right to self-determination, including the right to secession'.[105] The 1996 Constitution of South Africa also provides for self-determination, recognising in section 235 the 'right of self-determination of any community sharing a common cultural and language heritage'.[106]

At a regional level, article 20 of the African Charter, which entered into force in 1986, has been interpreted to entail the 'possible application of the principle of the right of peoples to self-determination in a post-decolonisation context'.[107] The article leaves open the possibility of external self-determination, an open conflict with the principle of *uti possidetis*. Article 20(2) of the African Charter

100 M Sterio *The right to self-determination under international law* (2013) 165.

101 Sterio (n 100 above) 166.

102 J Gettleman 'In Sudan, a colonial curse comes up for a vote' *New York Times* 8 January 2011.

103 Eg Western Sahara, Somaliland, the Ogaden region in Ethiopia or the Cabinda enclave in Angola.

104 A Lucey 'The referendum in Abyei is an ongoing challenge for the African Union' (2013) Institute for Security Studies.

105 Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995.

106 The Constitution of the Republic of South Africa, 1996.

107 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 268.

also arguably permits 'the right to rebellion'[108] in cases of extreme oppression. In this sense, the Charter could be said to make provision for the violent form of self-determination Fanon spoke of during his 1958 address to the All-African People's Conference in Accra.[109] While the African Charter, therefore, provides a relatively wide scope for recognising self-determination claims, the Constitutive Act of the AU is less permissive. It contains no direct reference to self-determination, although it does state in article 3(h) that one of the objectives of the AU is to promote and protect human rights in accordance with the African Charter. As the case of South Sudan demonstrates, however, the AU is firmly in favour of maintaining territorial integrity, except in the most extreme cases and where external pressure is applied. In this way, it can be seen that the AU is endeavouring to limit any potential evolution in the concept of self-determination in Africa through a conservative interpretation of the African Charter and its own Constitutive Act.

Internationally, the trend towards a post-*uti possidetis* interpretation of the principle of self-determination is also evident. In 1991, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) declared that self-determination 'is not confined to a right to be enjoyed by formerly colonised peoples. It is not a right to be enjoyed once only and thereafter to be forever lost.'[110] Similarly, the Supreme Court of Canada in 1998 recognised the right of self-determination as a general principle of international law, which may in certain circumstances be extended to secession outside the colonial context, overruling the principle of territorial integrity.[111] The Independent International Commission on Kosovo has also affirmed this point, stating in the Kosovo Report of 2000 that the moral and political duty of the international community 'arguably … extends to the realisation of the right of self-determination for the people of Kosovo'.[112]

Commentators have seized on these developments as evidence of a 'new definition' of self-determination. In 2006, Hannum wrote:[113]

> Following several years of indecision, the international community has moved towards a new definition of self-determination … [that] continues to exclude the possibility of unilateral, non-consensual secession, but has become infused with broadly defined human, minority and indigenous rights.

108 Ouguergouz (n 107 above) 267.

109 Republished in F Fanon *The wretched of the earth* (1965).

110 UNESCO 'Statement to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities' (1991) UN Doc E/CN.4/Sub.2/1992/6 para 3(d).

111 *Reference re Secession of Quebec* (1998) 2 SCR 217.

112 Independent International Commission on Kosovo *The Kosovo Report: Conflict, international response, lessons learned* (2000) 186.

113 H Hannum 'Self-determination in the 21st century' in E Babbit & H Hannum (eds) *Negotiating self-determination* (2006) 61.

Anaya has signalled the end times for *uti possidetis,* noting that 'under contemporary international law … the doctrine of sovereignty and its Charter affirmations are conditioned by … human rights values'.[114] Taking a different tack, Koskenniemi has written of the 'post-modern challenge' to African states' territorial integrity in the form of tribalism and 'the establishment of self-defence communities'.[115] Flourishing informal economies, which in some African countries account for up to 65 per cent of gross domestic product (GDP),[116] are also said to be an example of this ceding of state power to regional and local communities. Such developments are significant as they represent a modern sanctioning of the 'balkanisation' and tribalism that Nkrumah warned of during his time. This is not necessarily a negative result: As the cases of Eritrea and Sudan have taught us, the ideological maintenance of a border delineated at independence can pose a far greater threat than secession. Furthermore, as Singapore[117] (and perhaps Monaco) demonstrate, a state's small size need not act as a barrier to its success.

6 Conclusion

Freed from the constraints of power in 1966, Nkrumah revived and redoubled his strident pan-African beliefs while living in exile in Conakry. 'Yes, indeed, the African revolution should recognise none of the colonial frontiers between African territories or states', he wrote in 1967. 'They are indeed artificial boundaries.'[118] Despite his protestations, however, Africa was veering down a different course. Since 1964 the sanctity of the continent's colonial borders has been endorsed by treaty and case law, with only a handful of outlying exceptions. At a time when almost 80 per cent of Africa is still off limits to travellers from within the continent who do not hold a visa, the pan-African ideal seems as distant as ever.[119] Rather than African unity, the opposite trend – towards tribalism, decentralisation and secession – has emerged on the continent, as the evolving standards outlined above illustrate. Were he alive today, Nkrumah would likely decry this development as harmful 'balkanisation'. However, it is this 'post-modern' path upon which self-determination seems set to continue.

114 Anaya (n 58 above).

115 Koskenniemi (n 3 above).

116 International Monetary Fund 'Sub-Saharan Africa regional economic outlook: Restarting the growth engine' May 2017 x.

117 J Irving 'Self-determination and colonial enclaves: The success of Singapore and the failure of theory' (2008) 12 *Singapore Yearbook of International Law* 97.

118 Biney (n 9 above) 169.

119 African Development Bank Group 'Africa Visa Openness Report 2017' (2017) 12.

As the article has shown, the principle of *uti possidetis* played a dominant role in the application of self-determination in Africa during the independence era, and its limitation thereafter. Nkrumah's unintended propagation of this principle, which laid the foundations for the domestication of national self-determination in Africa, was threefold. First, he sought to limit tribalism in Ghana in favour of nationalism; second, he led the intervention in the Congo in 1960 to prevent external self-determination by the Katangese people; and, third, he was instrumental in the establishment of the OAU, which in 1964 made an unequivocal statement in favour of *uti possidetis* that became a cornerstone of African regional law and politics.[120] In this way, Nkrumah helped settle arguments around the authentic self-determination unit in Africa, and forged an unintended legacy that continues to shape the legal and political contours of the continent to the present.

120 S Dersso 'International law and the self-determination of South Sudan' (2012) Institute for Security Studies.

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Domestic servitude and ritual slavery in West Africa from a human rights perspective

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Summary

The article examines two examples of human rights violations, namely, domestic servitude and ritual slavery, which are considered forms of contemporary slavery, as they involve the exploitation of labour and the violation of the right to property. It is argued that the current international protection of children's rights is incapable of abolishing ritual slavery and domestic servitude in countries of West Africa, as children and teenagers are still threatened by the practice of vidomegon *in Benin,* trokosi *in Ghana, and* vudusi *in Togo. The purpose of the article is to analyse West African forms of ritual slavery and domestic servitude and to demonstrate that the shortcomings of the international children's rights protection system emanate from the inconsistency of international and African perceptions of childhood. With this in mind, the focus is on the conceptual differences between the UN Convention on Children's Rights, the relevant ILO Conventions, the African Charter on the Rights and Welfare of the Child and the shortcomings in the definition of slavery in the Slavery Convention of 1926, as well as the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.*

Key words: *ritual slavery; domestic servitude; West Africa; children's rights; contemporary slavery; child labour*

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1 Introduction

Human Rights Watch raised the alarm in 2015, claiming that[1]

> children have been injured – and, in at least one case, killed – in mine collapses, and suffered from pain and respiratory problems caused by their work [in Ghana]. They also risk brain damage and other life-long disabilities from mercury poisoning. Most children who work in mining attend school, and some work specifically to cover school-related costs. However, many attend school irregularly or drop out.

Gold mining in Ghana is but one of the industries in West Africa, apart from the cocoa industry in Côte d'Ivoire, where children are forcibly employed. Furthermore, various religious practices in some West African countries use children, especially girls, in service as domestic servants or even as sex slaves. The current analysis regards child labour and ritual forms of labour exploitation of children as forms of contemporary slavery, as they amount to 'forced labour without payment' with 'the control without ownership; violence (or the threat of violence); coercion (loss of freedom and choice); and exploitation (of labour power through unpaid work)'.[2] In other words, the lack of payment and the violent control over the right to free movement of the person concerned distinguishes slavery from other forms of employment. In addition, contemporary forms of slavery, such as forced labour, child labour, domestic servitude, sexual slavery, debt bondage, forced marriage and human trafficking, have to be distinguished from traditional slavery of the period from the sixteenth to the nineteenth centuries, when slavery was practised around the world, and when the international human rights conventions in effect outlawing slavery did not exist. Furthermore, present-day slavery is not only in the obvious form where one person owns another person (traditionally called 'chattel slavery'). Slavery is illegal everywhere and, therefore, to perpetuate it, corruption and crime are involved. The power of the slave owner is always subject to the power of the state. Slavery can only continue to exist if governments permit this, and some writers claim that government corruption is a leading cause of the persistence of slavery.[3]

According to the statistics of the Australian Walk Free Foundation, 29,8 million people were considered to be victims of contemporary slavery worldwide in 2013, while this number increased to 35,8 million in 2014, due to the more refined methodology of the

1 Human Rights Watch 'Ghana: Child labour taints gold supply chain' 10 June 2015, https://www.hrw.org/news/2015/06/10/ghana-child-labor-taints-gold-supply-chain (accessed 8 March 2015).

2 K Manzo 'Modern slavery, global capitalism and deproletarianisation in West Africa' (2005) 106 *Review of African Political Economy* 522.

3 'Modern slavery' http://www.bbc.co.uk/ethics/slavery/modern/modern_1.shtml (accessed 29 April 2017).

research into slavery.[4] In 2015, 45,8 million people were reported to be victims of some form of modern slavery.[5] According to the Walk Free Foundation, modern slavery means 'human trafficking, forced labour, debt bondage, servile marriage, and the sale and exploitation of children'.[6] With this number, the Walk Free Foundation eclipsed the 2012 data of the International Labour Organisation (ILO) about people suffering from forced labour. According to the ILO, 20,9 million people were forced to work under violent circumstances.[7] This data again confirms the worldwide existence of contemporary slavery of which forced labour is one type. The victim is threatened with punishment and his or her rights to work and to free movement are violated.

Despite the high number of victims, there still is no unanimous agreement among the international community about a definition of slavery. However, it is necessary to arrive at a definition in order to prohibit the trade in slaves and human trafficking. Slavery is a *ius cogens* norm in international law and the prohibition upon slavery applies unconditionally.

Nevertheless, a few practices confirm the existence of contemporary slavery, for instance those in West Africa. There, the international protection of children's rights fails as ritual slavery and domestic servitude occur. The survival of exploitative domestic and religious practices is proof that international human rights law has as yet been unable to put the relevant conventions into practice. Despite the fact that every country in Africa has ratified the Convention on the Rights of the Child (CRC), and 41 out of the 54 African countries have signed and ratified the African Charter on the Rights and Welfare of the Child (African Children's Charter), illegal practices that deprive children of their rights to liberty and education are rife in certain parts of Africa.[8] The article examines three forms of regional human rights violations, namely, *vidomegon* in Benin, *trokosi* in Ghana, and *vudusi* in Togo, and considers them forms of contemporary slavery due to their exploitative character. The author argues that as children and teenagers are still victims of these exploitative practices, it is evident that the current international protection fails to protect children's rights in West Africa.

Two obstacles to the abolition of the illegal practices in the region are identified. The international child protection systems aimed at the abolition of ritual slavery and domestic servitude are full of

4 Walk Free Foundation 'The global slavery index 2014' http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/Global_Slavery_Index_2014_final_lowres.pdf (accessed 25 March 2015).

5 Walk Free Foundation 'The global slavery index 2015' http://assets.globalslaveryindex.org/downloads/Global+Slavery+Index+2016.pdf (accessed 25 June 2016).

6 Global slavery index 2015 (n 5 above) 12.

7 ILO *Global estimate of forced labour* (2012) 13.

8 African Commission on Human and Peoples' Rights Ratification table: African Charter on the Rights and Welfare of the Child (2015).

shortcomings. On the one hand, the international normative framework of children's rights is insufficient, as it does not effectively recognise the regional differences of the role of the child in society. On the other, the international human rights instruments addressing the abolition of forms of contemporary slavery are continuously suffering from the problems of national implementation. However, the article does take into consideration the fact that the survival of contemporary slavery practices can be explained by economic necessity, poverty, and economic inequality in the region. However, since *vidomegon, trokosi* and *vudusi* affect mainly children in a few countries of West Africa, the article argues that inconsistencies in the international and regional perceptions of children's rights thwart the abolition of slavery in contemporary West Africa.

2 Domestic servitude and ritual slavery in Benin, Ghana and Togo

The situation of children in West Africa does not conform to the environment required by international human rights instruments. Ike and Twumasi-Ankrah describe childhood in West African countries as riddled with 'poverty, malnutrition, child labour, rural-urban migration, ignorance and lack of education, parental lack of financial support and maintenance of children'.[9] Furthermore, in 2007 the Global Fund of Children claimed that[10]

> children in West Africa are more likely to be raped, trafficked, beaten or abused and are less likely to go to school or receive proper health care or be properly nourished compared with fifteen years ago, despite binding legislations meant to improve children's situation.

Because of these unfavourable circumstances, domestic servitude and ritual slavery are deeply rooted in a few West African societies and are systemic forms in African traditional religions. The vicious cycle of poverty, technological underdevelopment and rising demand for unskilled workers is confirmed by the existence of *vidomegon* (translated as 'placed children' in Fon, the main spoken language of the country) in the commercial centres of Benin which are the breeding grounds of child labour for children of the ages of five to 14 years.[11] *Vidomegon* constitutes a real problem in Beninese society, decades after the country's independence: According to 2008 data from the United Nations Children's Fund (UNICEF), around 500 000 children, mainly girls, work as slaves of the merchants of the big

9 M Soussou & J Yogtiba 'Abuse of children in West Africa: Implications for social work education and practice' (2009) 39 *British Journal of Social Work* 1219.

10 As above.

11 UNICEF 'Benin factsheet 2008. *Note de briefing sur le programme protection*' (2008) http://www.unicef.org/wcaro/WCARO_Benin_Factsheet_Protection-fr-Nov07.pdf (accessed 27 February 2015).

markets.[12] However, Benin referred to the issue of *vidomegon* in 2013 to the United Nations (UN) Committee on the Elimination of Discrimination against Women, as a past threat against human rights in the country and as an already-prohibited activity. In their reply to the concerns of the Committee, they stated that 'it was a cultural tradition; when parents could not afford to send their children to school, they sent them away to receive an education and care by a wealthier family'.[13] The country proudly announced that[14]

> considerable work was being done to prevent children from being kept in domestic servitude. The issue had been publicised on television, and people who tried to sell their children at markets were arrested, and their children were sent to school.

Although the authorities in Benin consider *vidomegon* as an already-abolished form of servitude, local non-governmental organisations (NGOs) continue to claim that children are transferred by trafficking networks between West and Central African countries.[15] Morganti emphasises that the term *vidomegon* was used in the beginning to refer to domestic servants in the revolutionary period (1972-1989). She describes the phenomenon as follows:[16]

> People of the countryside started to place their children in urban households in order to get back a sum for the children's work. Originally, the aim of *vidomegon* was a good practice for girls to learn about the housework. But as soon as the guardian starts to maltreat the child by giving him or her instructions in exchange of accommodation and nutrition, this is the point when *vidomegon* is born in its current sense. The child is not there to learn anymore, but to serve.

The recruitment of girls for commercial tasks and domestic housework has accelerated in West Africa in the past three decades. Although it seems to be beneficial for traffickers and urban households, it is considered illegal according to article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.[17] In Benin, it is mainly in Cotonou, the administrative capital, where the demand for child labour is high.[18] Merchants employ children to sell their products in the city's biggest markets or force them to do domestic work. Furthermore, children regularly

12 As above.

13 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Committee on the Elimination of Discrimination against Women considers report of Benin' (2013) (accessed 20 January 2016).

14 As above.

15 S Morganti 'À l'écoute des victimes: Les défis de la protection des vidomègon au Bénin' (2014) 4 *Autrepart* 78.

16 Morganti (n 15 above) 81.

17 The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' (UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, General Assembly Resolution 55/25 of 15 November 2000).

18 M Boni Teiga 'Vidomegon, les enfants-esclaves du Benin' (2011) http://www. slate afrique.com/731/vidomegon-enfants-esclaves-benin (accessed 27 February 2015).

suffer physical abuse by their 'masters' when they make any mistakes in their work.[19]

The high demand for labour in Benin is met by a large number of children sent from other West and Central African countries that, at the same time, accept children from Benin for labour. Children from Equatorial Guinea, Cameroon, Gabon, the Democratic Republic of the Congo and Côte d'Ivoire all are involved in the regional network of human trafficking that provide children for the domestic market. The international media started dealing with child labour when the ship, Etinero, limped into the port of Cotonou in Benin on 17 April 2001. Investigations revealed that the children who left the ferry after three weeks at sea had been destined to join the 200 000 children sold every year in Africa's modern slave trade.[20] The children were supposed to work as housemaids for their masters in Gabon who had bought them from the traffickers.[21] The case of the Etinero illustrates the cruel reality of domestic servitude in West Africa. Children are sold and resold, sometimes until they have grown up. They are deprived of the right to live in a family, to live as a child and to go to school. They are not aware of their rights and the possibilities that could help them avoid being trapped in labour. They forget their parents and, as they get into domestic servitude at an early age, even their language. According to UNICEF, the situation seems to have become very serious. In 2014, UNICEF stated that through flourishing trafficking, 200 000 children are trafficked annually in West Africa alone, and are then forced into domestic or ritual servitude.[22] However, available data about the number of victims is contested between the various parties involved. Governments tend to give lower numbers, while NGOs and the media usually report higher numbers in order to draw attention to the problem. Therefore, research can rely only on the estimation of UNICEF which gauges that worldwide 150 million children were routinely engaged in paid or unpaid forms of work during the period 2001 to 2014,[23] and that 25 per cent of these children worked in sub-Saharan Africa, the highest average among the regions.[24] This means that around 38 million children are vulnerable to forced labour and to physical and mental exploitation in sub-Saharan Africa.[25] Sawadogo is of the opinion that these numbers are the consequence of the structural difficulties of West African

19 As above.

20 'The slave children' (2001) http://news.bbc.co.uk/2/hi/programmes/correspondent/1519144.stm (accessed 10 March 2015).

21 As above.

22 UNICEF 'An estimated 150 million children worldwide are engaged in child labour' (November 2014), http://data.unicef.org/child-protection/child-labour#sthash.k3HKz6pm.dpuf (accessed 24 March 2015).

23 As above.

24 As above.

25 As above.

economies. He examines the widespread network of forced child labour in West African countries by claiming that[26]

> [t]he fast growth of West African populations, the uncontrolled urbanisation in the region, poor security, and economic hardships associated with wide inequalities in the distribution of wealth, contribute to an increased salience of human trafficking as an available option, to break out of poverty.

Human trafficking networks active among West and Central African countries are the main organisers of child labour. Child labour and servitude often seem to be logical alternatives for children, as parents argue that national governments are not able to provide the minimum conditions for education. Due to a lack of schools and no functional education system, families in West Africa claim that they would prefer sending their children to earn money for the family instead of sending them to school where they would only waste their time. Unfortunately, children are in a disadvantaged position, if one considers that, according to Vernor Muñoz Villalobos, the Special Rapporteur on the Right to Education from 2004 to 2010,[27]

> [a]lthough a good number of African countries have nominally provided for the right to free and compulsory primary education, only [two] African countries[28] could be declared, in 2006, to provide a 'proper' free and compulsory primary education.

For governments that have signed and ratified the CRC, it is an obligation to provide education under healthy and stable conditions. If education is not accessible to children, they lose the most basic opportunity to be rescued from the exploitative practices that still exist in their countries. Having acknowledged these dangers, the UN included universal primary education in the Millennium Development Goals (MDGs) that were supposed to have been reached by 2015. This is one of the most crucial development areas in the field that is able to contribute to the abolition of contemporary slavery.

Despite the fact that domestic servitude is widespread in Benin, there have been initiatives in the country to outlaw these systematic human rights violations. Therefore, it cannot be said that Benin did not intend to execute its duties related to the CRC or the African Children's Charter. According to article 7 of the 2006-04 Law,[29]

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26 W Sawadogo 'The challenges of transnational human trafficking in West Africa' (2012) 13 *African Studies Quarterly* 96.

27 J Sloth-Nielsen & B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 343.

28 Madagascar and Mauritius.

29 Benin Parliament 'La loi 2006-04 du 10 avril 2006 portant conditions de déplacement des mineurs 2006-04' http://www.nouvellesmutations.com/2007/11/06/loi-n%C2%B02006-04-du-05-avril-2006-portant-conditions-de-deplacement-des-mineurs-et-repression-de-la-traite-des-enfants-en-republique-du-benin/ (accessed 12 August 2015).

> [n]o child can be moved out from his or her country of birth and be separated from his or her biological parents or from the person having authority over him or her without the special permit from the competent administrative authority of his place of residence except judicial decisions or matters especially recommended by the social and health services.

Article 4 of the 2006-04 Law clarifies what Beninese law makers understand to be exploitation, emphasising that the practice of domestic servitude and other forms of forced employment are illegal. According to Law 2006-04,[30]

> exploitation means … all forms of slavery and similar practices, debt bondage and serfdom, and forced or compulsory labour, using children in armed conflicts or for the removal of organs, using or offering children for prostitution the production of pornographic works or for pornographic performances, using or offering children for illicit activities, the works that by their nature and/or their conditions in which they are carried out, are likely to harm the health, the security and the morality of the child or to release himself or herself.

Even though Beninese legislation prohibits a wide list of practices, including the still-flourishing *vidomegon,* the government does not acknowledge the existence of contemporary slavery in the country. Despite being a signatory to the CRC and the main international human rights instruments that proscribe contemporary slavery,[31] Benin has yet to ratify the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Even though Benin was the first African country to pass an anti-human trafficking Bill in 1961, because of the lack of financial backing to implement the anti-slavery efforts, the government's willingness to establish national legal frameworks that outlaw domestic servitude and other forms of contemporary slavery is highly questionable.

In Ghana, the practice of *trokosi* provides an example of ritual slavery. According to this practice, virgin girls are given to south-eastern village priests as a way of appeasing the gods for crimes committed by family members.[32] According to the ideology of *trokosi,* 'once given to the priest, a girl becomes his property and is forced to carry out domestic tasks such as cooking and washing, as well as farming and fetching water'. After the onset of menstruation, the bondage also involves sexual servitude.[33] The practice of *trokosi* is still flourishing in the rural areas of Ghana, despite the amendment of the

30 As above.

31 Benin ratified the 1926 Slavery Convention and its Protocol of 1953 in 1962 and also ratified the ILO 182th Convention on the Worst Forms of Child Labour in 2001.

32 V Mistiaen 'Virgin wives of the fetish gods – Ghana's *trokosi* tradition' (2013) http://news.trust.org//item/20131003122159-3cmei/ (accessed 13 January 2016).

33 N Ben-Ari 'Liberating girls from *trokosi* in Ghana' (2001) *UN Africa Recovery* http://www.un.org/en/africarenewal/subjindx/childpdf/childgha.pdf (accessed 20 March 2015).

Ghanaian Criminal Code in 1998 to protect the victims of ritual slavery.[34] However, since then no priest has been sentenced to imprisonment.[35] *Trokosi*, a classical example of ritual slavery, is[36]

> a tradition [that is also] practiced in neighbouring Benin and Togo, [and] is deeply rooted in the beliefs and identity of the Ewe (ay-vay) people. It serves rural communities' need for justice and meets the material and sexual needs of the fetish priests. But it is also considered a spiritual act and as such it is, along with female genital mutilation, one of the most difficult human rights violations to eradicate.

Although *trokosi* occurs in Benin and Togo, most of the information about this practice emanates from Ghanaian NGOs such as International Needs Ghana, the latter being central to the release and rehabilitation of victims of *trokosi*.[37] It negotiates the return of these women and girls to their families or communities, provides housing, food, counselling, schooling and courses on income-generating skills. Survivors for Change, a human rights organisation formed by survivors of *trokosi,* also advocates law enforcement measures against the practice, and launched its own campaign to seek support from various government ministries and international ambassadors based in Accra.[38] The organisation Equality Now, which has focused on discrimination, sexual violence, trafficking and female genital mutation since 1992, is deeply concerned that, after a few years of judicial prohibition of *trokosi,* several thousands of girls and women are reported to still be in ritual servitude.[39] Unfortunately, the illegality of *trokosi* is not evident in the West African countries concerned as, on the one hand, there is a crucial lack of reliable data due to the underground and illegal nature of ritual slavery. On the other hand, as some traditionalist groups in Ghana argue, the practice is part of culture and, therefore, the law should not destroy it.[40] For instance, representatives of the Afrikania Mission[41] are said to be

34 B Nicholas 'Legal immanence: religion, mythology, and the influence of the divine' (2011) 8 *US-China Law Review* 483.

35 Mistiaen (n 32 above).

36 As above.

37 S Aird 'Ghana's slaves to the gods' (2000) https://www.wcl.american.edu/hrbrief/v7i1/ghana.htm (accessed 25 March 2015).

38 'Slavery in Ghana: The *trokosi* tradition' (2002) http://www.equalitynow.org/node/185 (accessed 23 March 2015).

39 As above.

40 'Afrikania Mission straightens record on *trokosi*' (2012) http://www.modernghana.com/news/398477/1/afrikania-mission-straightens-record-on-trokosi.html (accessed 20 March 2015).

41 Afrikania Mission is a neo-traditional movement established in Ghana in 1982 by a former Catholic priest, Kwabena Damuah, who resigned from the church and assumed the traditional priesthood titles Osofo Okomfo. The Mission aims to reform and update African traditional religion, and to promote nationalism and pan-Africanism. Rather than being a single new religious movement, Afrikania also organises various traditional shrines and traditional healers into associations, bringing unity to a diffused system and thereby a greater voice in the public arena (for further details, see http://what-when-how.com/religious-movements/afrikania-mission-religious-movement/).

exerting pressure to prevent the enforcement of the law, and to have persuaded some priests that it is their right to continue the tradition.[42] They deny the existence of ritual slavery within the religion by claiming that the report of International Needs Ghana contains false information about African traditional religion.[43] Defending allegations of ritual slavery in shrines, the Afrikania Mission refers to its own report stating that the *trokosi* shrine system does not exist in Ghana.[44] Nevertheless, they confirm that the so-called *trokosi* shrines 'were a complex of many institutions including healing centres, pharmacies, places of devotional service, refuge sanctuaries, schools, conservatories of culture and morality, lodges of esoteric knowledge and courts for the administration of justice'.[45] The two practices are so closely related that they require follow-up by national and international human rights organisations in order to avoid an increase in the number of victims of contemporary slavery.

Claims of NGOs about the existence of ritual slavery in Ghana are also regularly reviewed by the US State Department, which states that *trokosi* is a religious practice 'involving a period of servitude lasting up to 3 years'.[46] However, *trokosi* is mentioned neither in the 2014 nor in the 2015 Trafficking in Persons (TIP) report, as among human trafficking-related human rights violations in Ghana. The US Secretary of State makes the reasonably generic observation that[47]

> Ghanaian boys and girls are subjected to forced labour within the country in fishing, domestic service, street hawking, begging, portering, artisanal gold mining, and agriculture. Ghanaian girls, and to a lesser extent boys, are subjected to prostitution within Ghana. Child prostitution is prevalent in the Volta region and is growing in the oil-producing western regions.

However, the exploitation of children within the religious framework of *trokosi* has not been confirmed by the US Secretary of State.

Nevertheless, NGOs are still gathering information from victims about alleged sexual exploitation in the form of ritual slavery. Within the framework of *trokosi*, the religious context persuades parents that it is their duty to the priests to send their children to live and work for the shrines. The fact that awareness about *trokosi* is more widespread among national NGOs than the US authorities illustrates that, although ritual slavery has for decades been present in Ghanaian society, it has been hidden from the authorities because of its clandestine and ambiguous religious background. Due to general corruption and bribery in the judicial system, and the denial of traditional religious groups, victims of ritual slavery in Ghana do not

42 Afrikania Mission (n 42 above).
43 As above.
44 As above.
45 As above.
46 United States Department of State 'Trafficking in persons report' (2014) 185 http://www.state.gov/documents/organization/226846.pdf (accessed 25 March 2015).
47 United States Department of State (n 48 above) 186.

receive the required attention from national human rights mechanisms.[48] The US Department of Labor, for example, evaluated the efforts of Ghana in abolishing the worst forms of child labour in 2015 as moderate. Although Ghana aimed to eliminate the worst forms of child labour in West Africa by 2015 through the implementation of a regional action plan with 14 other Economic Community of West African States (ECOWAS) countries, it did not participate in any activities under this policy in 2015.[49] The national human rights mechanism has also been weakened by the fact that the government has not ratified the UN CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Additionally, the US Department of Labor emphasises that[50]

> [r]esource constraints severely limited the government's ability to fully implement policies and social programs during the reporting period. The government of Ghana also has not provided any funding for anti-trafficking enforcement efforts or programs to protect victims of human trafficking.

These efforts are necessary as *trokosi* violates article 14 of the Ghanaian Constitution, which states that '[e]very person shall be entitled to his personal liberty and no person shall be deprived of [it]'.[51] Moreover, article 16 provides that '[n]o person shall be held in slavery or servitude [and] no person shall be required to perform forced labour', repeating the principles of the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[52] Even though Ghana has adopted the required legal instruments against slavery and child labour, thanks to the 1992 Constitution, the Child's Act 560 of 1998 and the Labour Act 651 of 2003, not one person has yet been prosecuted for ritual servitude.[53]

In addition, *vudusi*, a type of voodoo practice through spiritual entities, is widespread in neighbouring Togo. According to Walk Free Foundation's Global Slavery Index published in 2013,[54]

48 A Laing 'Ghana suspends seven High Court judges over bribe-taking film' *The Telegraph* 6 October 2015, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/ghana/11915763/Ghana-suspends-seven-high-court-judges-over-bribe-taking-film.html (accessed 3 April 2016).

49 United States Department of Labor 'Findings on the Worst Forms of Child Labor' https://www.dol.gov/sites/default/files/images/ilab/child-labor/Ghana.pdf (accessed 4 June 2017) 6.

50 As above.

51 Constitution of Ghana (1992) http://www.ghanaweb.com/GhanaHomePage/republic/ constitution.php (accessed 15 September 2016).

52 As above.

53 UN Special Rapporteur on Violence against Women 'Ghana – *trokosi* – Ritual servitude and sexual abuse' (2008) http://www.wunrn.com/news/2008/03_08/03_17_08/031708_ghana.htm (accessed 18 August 2015).

54 Walk Free Foundation 'Global slavery index 2013' (2013) 59 http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/2013GlobalSlaveryIndex.pdf (accessed 15 March 2015).

> [w]here voodoo is practised, a lot of children, mainly virgin girls, are given to the voodoo idol gods. The children have no word or choice in being given into the practice by their parents or by other family members, and they are horrified at the duties they are forced to perform for these 'gods'.

Therefore, the girls who become victims of *vudusi* become the wives or slaves of the 'voodoo gods'. They may be considered victims of contemporary slavery as their right to free movement is violated and they are exploited economically and sexually. No attempt has so far been made to survey the number of children that in reality are affected by *vudusi* in Togo.[55] Therefore, the limited information about the extension of ritual slavery in Togo comes from victims of shrine slavery after they have been freed, and it is almost impossible to obtain preliminary interviews while the children are still under the influence of and subject to the order of the shrines.[56] Due to this clandestine feature, providing protection to children in Togo is difficult as neither regional nor international organisations have a clear picture of exactly how many children are influenced by ritual slavery in the country. The initiatives of Every Child Ministers (ECM), a Christian anti-slavery group, are exceptions, as they conducted an investigatory mission in 2005 in Togo to see how many victims should be helped. Based on the conclusion of this investigation, ECM launched a teacher-training and awareness-raising programme in 2007 about *vudusi.*[57] The struggles of ECM indicate a lack of information available to national decision makers, convincing them that the spectrum of the problem is no longer widespread. As a consequence, there is a decline in attention paid to the problem by Togolese authorities. In Togo, similar to the situation in Ghana and Benin, there is an apparent lack of governmental commitment to investigation, resource allocation, enforcement of laws, and the development of comprehensive awareness raising, child protection and family welfare programmes. Therefore, the existence of domestic servitude and ritual slavery leads to an endangered psycho-social development of children in the sub-region due to unfavourable economic and social conditions. Consequently, as is outlined below inconsistencies in the understanding of human rights are not the sole reason for ongoing exploitation, but represent serious challenges to the international protection of children's rights, and cause problems in the implementation on the ground of international human rights instruments. These dysfunctionalities are further intensified by poverty and economic inequalities in the micro-environment of potential victims.

55 As above.

56 As above.

57 'Freeing *vudusi* – Children given to voodoo idol gods' http://www.ecmafrica.org/projects/find-project-by-topic/ritual-slavery--abuse/vudusi-slave-children-in-togo (accessed 20 January 2016).

3 Lack of international agreement about contemporary forms of human rights violations

The occurrence of *vidomegon* in Benin, *trokosi* in Ghana and *vudusi* in Togo confirm that children are still being threatened by domestic servitude and ritual slavery in some countries of West Africa, despite the fact that the special needs of children have been the priority of the international and regional protection of human rights since the foundation of the UN and the African Union (AU).[58] As a consequence, it is crucial to understand that domestic servitude and ritual slavery are forms of contemporary slavery since their victims are exploited by the practices. The prohibition of slavery, child labour, forced labour and human trafficking has been the focus of the UN legal framework since its foundation. The international conventions of the UN and the International Labour Organisation (ILO) provide the normative dimension for the protection of the rights of the victims, demanding local authorities to abolish the still-existing regional forms of human rights violations.

First and foremost, international law forbids domestic servitude and ritual slavery.[59] As forms of slavery, their prohibition belongs to the category of *ius cogens* norms in international law, meaning that this principle has to be applied unconditionally regardless of the fact that countries have ratified the relevant conventions.[60] However, the adoption and implementation of abolition programmes are hindered by the fact that neither in international law nor in academic discourse is there consensus about which practices should be considered slavery. Those advocating the protection of human rights cannot even agree on the difference between traditional and contemporary slavery. As a consequence, we cannot expect there to be structured systems of protection in the region concerned when even the UN incorporates human trafficking completely into the definition of slavery. Furthermore, several governments conflate human smuggling with human trafficking as two equivalent phenomena on the level of policy-making and official communication.[61]

58 The Organisation of African Unity, the predecessor of the African Union, adopted the African Charter on the Rights and Welfare of the Child in 1990 and in 2003 it added the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

59 United Nations 'Report of the Temporary Slavery Commission to the Council of the League of Nations' (A.17.1924.VI.B) quoted in 'The suppression of slavery' Memorandum submitted by the Secretary-General to the *Ad Hoc* Committee on Slavery, United Nations document ST/SPA/4 (1951) para 22.

60 D Weissbrodt 'Abolishing slavery and its contemporary forms' (2002) 3 http://www.ohchr.org/Documents/Publications/slaveryen.pdf (accessed 29 April 2017).

61 R Weitzer 'Human trafficking and contemporary slavery' (2015) 41 *Annual Review of Sociology* 225.

The Victims of Trafficking and Violence Protection Act (TVPA), adopted in 2000 in the United States, can be considered an exception since it clearly states that[62]

> [t]rafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700 000 persons annually, primarily women and children, are trafficked within or across international borders.

According to the definition in the TVPA, human trafficking[63] is[64]

> the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Being the highest normative instrument to condemn human trafficking, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (Palermo Protocol) also concentrates on the elements of deception and force when defining human trafficking. However, it completes the definition with reference to the vulnerability of the victim, the abuse of power, and the enforcement of control over the individual to the point of exploitation.[65] However, Weitzer exhorts that, although the Palermo Protocol may be regarded as a milestone in the fight against contemporary forms of systematic human rights violations, it lacks the definition of what is meant by exploitation, abuse of power, vulnerability and even control.[66] Because of this defective notion, the Protocol cannot be applied successfully to concrete cases. Alternative indicators, such as violence, fraud or force, enable a more concrete measurement of human trafficking, as it would bring the specific cases closer to the definition in the legal instrument.[67]

62 United States Department of State 'Victims of Trafficking and Violence Protection Act 2000' http://www.state.gov/documents/organization/10492.pdf (accessed 15 September 2016) sec 102/b/1.

63 It is important not to confuse human trafficking with human smuggling, since the victims of human trafficking, considered a form of contemporary slavery, start the journey as a consequence of violence, force, threat or attractive promises. On the other hand, in the case of human smuggling the travellers themselves pay the fee of the trip to the smuggler. Human smuggling is an illegal, criminal act that cannot be considered slavery due to the lack of the practice of property rights, force and the exploitation of labour.

64 United States Department of State (n 62 above) sec 103/8.

65 United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en (accessed 9 June 2016).

66 Weitzer (n 61 above) 225.

67 Weitzer 226.

According to Rassam, the Palermo Protocol complements but does not supersede the already-existing international conventions on the 'white commerce of slavery'.[68] Although the Protocol provides a more layered definition of human trafficking that includes forced prostitution, slavery and forced labour, Rassam warns that it only had the potential of breaking with the tradition of earlier conventions, and demands that states make greater efforts in the protection of trafficked people.[69]

Human trafficking provides connections to other forms of exploitation: It has close links to both domestic servitude and ritual slavery, since trafficked victims can easily end up as servants in another country. However, it is still important to clarify whether moving a victim from one place to another should be a crucial element in the crime of human trafficking. If the answer is in the affirmative, local forms of contemporary slavery such as domestic servitude, debt bondage and ritual slavery, would fall outside of the scope of international law offering protection from human trafficking. Unfortunately, both the Palermo Protocol and the TVPA leave the geographical movement of the victim out of consideration and they exclusively accentuate the recruitment, acceptance and hiding of the individual when defining human trafficking.

Inconsistencies in the protection available to victims further deepen when considering that neither the TVPA of the United States nor the Palermo Protocol deals with contemporary slavery as an individual human rights violation. Both documents primarily stress the protection of those victims that have been transferred over national borders, and do not deal with local forms of exploitation, such as the various forms of child labour. Although slavery is mentioned in these two legal documents, no mention is made of the fact that new forms of contemporary slavery, including domestic servitude or ritual slavery, should be regarded and dealt with as individual infringements. Even though the efforts of the UN Special Rapporteur on Contemporary Slavery have contributed to the abolition of contemporary slavery, this has not been enough to cause the UN to adopt an international human rights instrument that acknowledges the need for protection against contemporary forms of slavery.

International law still considers the Slavery Convention of 1926 as the main definition to be used for contemporary infringements. The Convention describes slavery as the practice of property rights, as it states that 'slavery is the status or condition of a person over whom

68 Y Rassam 'International law and contemporary forms of slavery: An economic and social rights-based approach' (2003) 23 *Penn State International Law Review* 812.

69 As above.

any or all of the powers attaching to the right of ownership are exercised'.[70] Thus,[71]

> [h]istorical and modern slavery are connected by the condition where more people practise authority over another person, the victim … like an object or a property, restrict his or her movement, humiliate his or her human dignity, exploit him or her through manipulation and/or threat and/or mental and physical abuse.

The definition of slavery was expanded by the General Assembly of the UN in 1956 when the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery was attached to the Slavery Convention of 1926. Here, debt bondage and serfdom were added to the notion of slavery and the modern forms of slavery were regarded more broadly. The Convention referred to the most vulnerable victims, namely, women and children, by mentioning sexual exploitation, forced marriage and child labour.[72]

Bales and Robbins emphasise the *ius cogens* power of the prohibition of slavery in connection with the significance of the Supplementary Convention of 1956. They argue that, since the fight against slavery has become one of the crucial tasks of the UN, it has to be regarded as a *ius cogens* norm. Therefore, the rights to a life, and freedom from slavery, have to be considered absolute norms by international law, and slavery is a crime against humanity under the jurisdiction of the International Court of Justice. Irrespective of whether a country has ratified the international conventions dealing with slavery, it has to be considered an international crime.[73] Obviously, humiliation is a permanent feature of contemporary slavery. However, this concept is still void, as it does not permit a clear understanding of contemporary, diverse forms of human rights violations. It only emphasises the practice of property rights, mental and/or physical abuse and control.

As far as contemporary slavery is concerned, its definition has to be extended to include forced, arbitrary abuse of the victim's labour. This applies to forced labour, child labour, domestic servitude, ritual slavery, sexual slavery and debt bondage. This approach was adopted in a regional court case in 2008 when the ECOWAS Community Court of Justice ruled that slavery did not exist only where there is 'power of ownership', but may include other forms of control. In the judgment

70 OHCHR Slavery Convention (1926) http://www.ohchr.org/EN/Professional Interest/ Pages/SlaveryConvention.aspx (accessed 6 April 2016) art 1.

71 V Mihalkó et al *Modernkori rabszolgaság képzési kézikönyv* (*Contemporary slavery handbook*) 43.

72 United Nations 'Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery' (1956) http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx (accessed 28 April 2017) art 1.

73 K Bales & PT Robbins 'No one shall be held in slavery or servitude: A critical analysis of international slavery conventions' (2001) 2 *Human Rights Review* 22.

of *Hadijatou Mani Koraou v The Republic of Niger*,[74] the Court condemned the Republic of Niger for a violation of articles 1, 2, 3, 5, 6 and 18(3) of the African Charter on Human and Peoples' Rights (African Charter). In this case the victim suffered not only from being the property of his or her master, but also from sexual and labour exploitation, including domestic servitude.[75] While this case partly confirms the existence of slavery in certain countries of Africa, it also emphasises the need for a well-defined concept of slavery that respects its contemporary context. For instance, the autocratic disposal of the labour force distinguishes the practices belonging to contemporary slavery from other forms of exploitation, such as organ trafficking or prostitution.

4 Inconsistency in international law and the regional interpretation of children's rights

The protection of children from domestic servitude and ritual slavery has been guaranteed in the human rights framework since 1989 when the CRC was adopted by the UN. Manzo states that this type of protection mechanism 'universalised a Western model of childhood with an 18-year time period characterised by school, play and freedom from responsibility'.[76] The Convention emphasised that children would need special attention in the field of education and health. Even though this protection was to be universal, Manzo argued that it included controversies about the image of protection guaranteed for children. Nhenga-Chakarisa emphasises that it renewed our understanding of the concept of child labour, although it did not define the term. He argues that '[a]lthough CRC was not the first UN Convention to provide for child labour, it enlarged the scope of the prohibition of economic exploitation'.[77] The enlarged scope appeared in the recognition of[78]

> the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

74 (2008) ECOWAS Court of Justice 4 https://www.unodc.org/res/cld/case-law-doc/traffickingpersonscrimetype/ner/2008/h_m__v__republic_of_niger_html/Hadijatou_Mani_v._Republic_of_Niger_Community_Court_of_Justice_Unofficial_English_translation.pdf (accessed 27 April 2017).

75 *Hadijatou Mani Koraou* (n 74 above) 2.

76 Manzo (n 2 above) 395.

77 T 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* 164.

78 United Nations. 'Convention on the Rights of the Child' (1989) art 32 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (accessed 3 March 2015).

According to Bass, although the CRC 'uses privileged and idealised Western concepts of childhood', it fails to acknowledge the cultural differences that influence the lives of children, especially in developing countries.[79] Bass's opinion is shared by Morganti, who criticises the legislative measures that recently have been adopted against child labour, as they do not take into account local perceptions of childhood.[80] As a consequence, governments of countries where children are exploited can argue that the CRC refers to a Westernised model of protection, while regional social practices in countries such as Togo, Ghana, and Benin are core parts of the national culture. As a result, the international protection of human rights cannot efficiently intervene with their sanctions and due to ignorance about regional practices, the international mechanisms cannot provide the intended universal protection. Consequently,[81]

> [t]he provision of child welfare programmes and services has been largely left to foreign and local non-governmental organisations [as in case of Ghanaian NGOs against *trokosi*] – and UN agencies such as UNICEF, Save the Children, and Plan International, instead of well-financed public, child welfare agencies, staffed by professionally-trained social workers.

The protection of exploited children is further specified and complemented by the conventions of the ILO. Since 1919, the ILO has been the most pivotal forum in the campaign for human conditions of employment, including efforts against child labour. With the aim of protecting employees, it adopted ten conventions between 1919 and 1965 concerning the minimum age for admission to employment and work, and it subsequently decided to consolidate all these conventions into the Minimum Age Convention 138 of 1973 (Convention 138). The efforts of the CRC to protect children from exploitation were earlier foreshadowes by the ILO Forced Labour Convention 29 of 1930 (Convention 29) that had as its focus labour exploitation. However, it is disappointing to note that, even though decision makers in the ILO had in 1930 agreed to 'suppress the use of forced or compulsory labour in all its forms within the shortest possible period', children are exploited in most of the countries of the world.[82] Furthermore, it provided an open-ended definition of forced labour, without listing specific prohibitions. Article 2 defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[83] Despite having outlawed a wide range

79 L Bass *Child labour in sub-Saharan Africa* (2004)19.

80 Morganti (n 15 above) 84.

81 Soussou & Yogtiba (n 9 above) 1221.

82 ILO Forced Labour Convention (1930) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312174 (accessed 15 September 2016) art 1.

83 D Frey & C Fletcher 'Protocol to ILO Convention No 29: A step forward for international labour standards. Human rights brief' 2 http://hrbrief.org/2015/05/protocol-to-ilo-convention-no-29-a-step-forward-for-international-labour-standards/ (accessed 15 September 2016).

of exploitations, Convention 29 has not been able to provide an environment for state agencies in which ILO principles are efficiently implemented in order to protect the victims. Frey and Fletcher agree that[84]

> despite the broad range of coverage offered by [this convention], there was a feeling that additional measures were needed to eradicate modern forms of forced labour by addressing gaps in implementing the conventions.

In the case of efforts by the ILO to cover the implementation gaps in the field of forced labour, the UN showed a consistent interest reconciliation. Because of the contribution of the International Labour Office and the ILO Committee on Forced Labour, the General Conference of the International Labour Conference adopted a Protocol to Convention 29 on 11 June 2014. Being neither a new convention nor a soft law recommendation, the Protocol has acknowledged human rights violations, including the role of human trafficking in providing large numbers of victims to different forms of forced labour. Therefore, it states that 'the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour'.[85] Following a victim-centred approach, articles 3 and 4 require 'access to appropriate and effective remedies' to ensure that states do not penalise victims for 'their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour'.[86] Frey and Fletcher believe that '[t]he Protocol has the potential to help countries focus on eradicating both challenges, simultaneously and with equal vigour'.[87] Furthermore, the Protocol was born after having reviewed the gaps of Convention 29 and it puts meaningful emphasis on prevention, identification and the treatment of the root causes of slavery. Despite promising a basis for the international protection against forced labour via its Protocol, success depends, firstly, on the ratification and, secondly, on the implementation.

Since the adoption of Convention 29, the ILO has been focusing on other dimensions of labour that presumably influence the exploitation of children. For instance, Mavunga, quoting Myers, claims that '[Convention 138] was adopted not only to cater for the needs of children but also as a response to the fear that the participation of children in work undermines adult jobs and incomes'.[88] According to

84 As above.
85 Frey & Fletcher (n 83 above) 3.
86 Frey & Fletcher 4.
87 As above.
88 R Mavunga 'A critical assessment of the Minimum Age Convention 138 and the Worst Forms of Child Labour Convention 182 of 1999' (2013) 16 *Potchefstroom Electronic Law Journal* 126.

article 1 of Convention 138, member states are encouraged to[89]

> undertake to pursue national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to work to a level being consistent with the fullest physical and mental development of young persons.

However, the Convention does not specify what kind of practices should be targeted by national legislation. Since it is left to member states to define child labour on their own, the difference in the definitions can have a negative impact on the universal implementation of the Convention. Only article 3 provides states with a guideline regarding the minimum age of employment of a child, stating that '[t]he minimum age … shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years'.[90] Unfortunately, the persistence of domestic servitude and ritual slavery that affects children and teenagers in large numbers in some African countries illustrates that the implementation of the Convention leaves much room for improvement.

Furthermore, the Convention does not impose an obligation on member states to take any specific measures beyond drafting legislation to ensure the effective abolition of child labour. Due to these shortcomings, the author agrees with Mavunga that Convention 138 does not provide much guidance to member states as to what ought to be the nature of the national fight against child labour. Mavunga confirms the point that efforts directed at abolishing human rights violations such as domestic servitude and ritual slavery can only be efficient if they target poverty and some of its effects, such as absenteeism from school, with social policies.[91] It is only by targeting socio-economic challenges that child labour can be abolished. If parents find proper employment and children are educated under humane conditions, families will not find themselves economically trapped and will not feel themselves compelled to send their children away to work for the benefit of the family.

ILO Convention 182 generally prohibits the worst forms of child labour by suggesting that children are victims of economic and sexual exploitation and in such cases suffer from the loss of personal freedom and freedom of movement. Convention 182 expresses the reality of contemporary slavery. In article 3, it specifies the worst forms of child labour as[92]

89 ILO No 138 Minimum Age Convention (1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312283 (accessed 6 July 2016) art 1.

90 Art 3 ILO No 138 Minimum Age Convention (n 89 above).

91 Mavunga (n 88 above) 127.

92 Art 3 ILO Convention 182 The Worst Forms of Child Labour (1999) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182 (accessed 15 September 2016).

> all forms of slavery, or practices similar to slavery, such as the sale and trafficking of children, debt bondage, serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

There are critical views regarding Convention 182 such as that it concentrates on core criminal actions, yet the ILO has very little competence in criminal justice systems.[93] However, Mavunga defends the ILO's efforts, claiming that the fact that the ILO deals with the tripartite relationship between the employer, the government and the employee shows that its concerns are predominantly in the area of labour.[94] For instance, Convention 182 does not only demand national authorities to[95]

> prevent the engagement of children in the worst forms of child labour; provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration; and ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour; [but it also orders that they should] integrate provision and application of penal sanctions or, as appropriate, other sanctions that would contribute to the prevention of the further extension of child labour.

The UN offered their ready-made universal, Westernised concept of children's rights protection to African countries which these countries adapted to their local contexts. As a result, the Organisation of the African Union (OAU) became the first continent-wide organisation to adopt a regional human rights instrument with respect to the rights of children, specifically adapted to the conditions of societies in the region. It prides itself as respecting children's rights from an 'African' perspective. Therefore, the preservation of African cultural norms would actually presuppose stricter and more efficient national systems of protection against child labour and not the survival of systemic, illegal practices of exploitation.

The fact that the African Children's Charter can be regarded as the 'African' version of the CRC means that it imposes certain 'responsibilities' on children towards their family, society, the state and other legally-recognised communities and the international community.[96] Here, the OAU took into consideration the peculiar importance of children not only in the family but also in society. It emphasised the fact that children not only exist in society in the sense of being persons who should be protected but, apart from that, they are also core members of the community. Therefore, apart from their rights, they have certain responsibilities, first and foremost towards

93 D Smolin 'Strategic choices in the international campaign against child labour' (2000) 22 *Human Rights Quarterly* 973.

94 Mavunga (n 88 above) 158.

95 Art 7 ILO Convention (n 92 above).

96 Art 31 African Charter on the Rights and Welfare of the Child (1990) http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf (accessed 25 March 2015).

their parents and to society. In other words, African societies 'do not view the individual as an autonomous being possessed of rights above and prior to society'.[97] Consequently, today African children are still considered as having the responsibility to work for the cohesion and sustenance of their families, to put their physical and intellectual abilities at the service of their communities and to preserve cultural values in their relations with others.[98] This is used by fishermen, merchants and parents who send their children away with strangers as an argument to make children work without a salary and under inhuman conditions. However, the special importance of belonging to a community and respect towards the family can never be the justification of exploitation in an environment where international and regional human rights instruments outlaw such practices. As Sloth-Nielsen and Mezmur argue,[99]

> culture should not be relied on as a basis for diminishing protected rights. Where positive, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by a cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other.

However, article 15 of the African Children's Charter protects the responsibility to work only by stating that '[e]very child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development'.[100]

The cohabitation of the rights and responsibilities of children in Africa was confirmed by the decision of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in the case of the *Centre for Human Rights, University of Pretoria and La Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal* in 2014. The African Children's Committee protected the rights of the *talibés* (young boys aged four to 12 years) who allegedly suffered forced begging by their instructors (*marabouts*). The children had daily targets to meet and if they could not reach these targets, it resulted in their beating and punishment at the hands of the *marabouts*.[101] These children were victims of contemporary slavery since their lives were controlled by their instructors: They were forced to work under violent conditions, and

97 Nhenga-Chakarisa (n 77 above) 169.

98 As above.

99 Sloth-Nielsen & Mezmur (n 27 above) 350.

100 Art 15 African Children's Charter.

101 *Centre for Human Rights, University of Pretoria and La Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal* (2014) African Committee of Experts on the Rights and Welfare of the Child https://www.crin.org/en/library/legal-database/centre-human-rights-university-pretoria-and-la-rencontre-africaine-pour-la (accessed 29 April 2017).

slept in overcrowded rooms or outside, with little or no access to clean water or sanitation, leaving them susceptible to contracting various diseases.[102]

As a result, the African Children's Committee claimed that[103]

> although the Senegalese government was not directly responsible for the abuse of the *talibés* and that it had in fact taken legislative measures against begging and child trafficking, these measures alone were insufficient to protect the rights of the *talibés*.

The exploitation of the *talibés* resulted in breaches of several articles of the African Children's Charter, namely, breaches of article 4 (the best interests of the child); article 5 (the right to survival and development); article 11 (the right to education); article 14 (the right to health and health services); article 15 (relating to child labour); article 29 (prohibition of sale, trafficking and abduction of children); article 16 (protection against child abuse and torture); and article 21 (protection against harmful and social practices).[104]

The judgment in this case illustrates that regional and national institutions of human rights protection should be aware that domestic servitude, ritual slavery and other forms of contemporary slavery occur in certain African countries. This is despite several international human rights instruments prohibiting slavery, in general, and different forms of contemporary slavery that are in force in these countries. However, the author is convinced that the implementation of the international, regional and national instruments for protection against *vidomegon, trokosi* and *vudusi* will be difficult until there is a single and universally-adopted definition of child labour, together with the introduction of international protection against contemporary slavery. At present, the ILO Conventions approach child labour in terms of a minimum age of employment. The CRC views child labour not in terms of the activity, but in terms of the effect of the activity on the child concerned. The CRC deems any form of labour unacceptable if it is detrimental to the development of the child, regardless of whether it takes place in a workplace or at home.[105] On the other hand, the African Children's Charter merely prohibits the economic exploitation of a child and any work that has the same elements as those prohibited under the CRC. However, the controversial relationship between the CRC and the African Children's Charter, without the acknowledgment of African social specificities and the implementation gaps among ILO Conventions, suggests a lack of consistency both in the definition of child labour under international law and in the implementation of efforts to combat the practice.

102 As above.
103 As above.
104 As above.
105 Nhenga-Chakarisa (n 77 above) 177.

Thus, the international community should dedicate a legal instrument to the definition of contemporary forms of labour and sexual exploitation affecting millions of children worldwide. It has to respect the local interpretation of the role of the child in society, and it also has to oblige state parties to introduce measures for raising awareness regarding contemporary slavery and for integrating it as a crime into the criminal codes of countries, in order that the perpetrators may be held responsible for human rights violations. Only once the international community can expand its activities in the fight against slavery beyond the role of the UN Special Rapporteur on Contemporary Forms of Slavery, and state parties are obliged to make their own national efforts dedicated to abolishing contemporary slavery, will it be possible for victims to access support beyond that of local NGOs in order to gain protection of their rights.

5 Conclusion

When children are exploited, they are forced to work under inhuman conditions without receiving a salary, proper nutrition and accommodation. They suffer physical and sexual abuse. In order to better understand the push and pull factors of the current forms of child labour and labour exploitation, the article discussed a number of examples of continued exploitation in West Africa, such as ritual slavery in Ghana and Togo through the practices of *trokosi* and *vudusi*, and domestic servitude in Benin with an analysis of *vidomegon*. Arguing that these practices involve a series of human rights violations and exploitation, the article regards them as forms of contemporary slavery. These illegal practices still flourish in West Africa, despite the fact that they are outlawed by national authorities and international human rights instruments. This is because the implementation of national and regional efforts to abolish domestic servitude and ritual slavery is weakly monitored.

The current international law on contemporary slavery remains ineffectual, as it fails to understand diverse forms of human rights violations, emphasising only the practice of the denial of property rights, mental and/or physical abuse and control. The definition of contemporary slavery should be extended to include a condition that relates to the forced and arbitrary abuse of a victim's labour. This connects slavery with forced labour, child labour, domestic servitude, ritual slavery, sexual slavery and debt bondage. The autocratic disposal of the labour force distinguishes practices belonging to contemporary slavery from other forms of exploitation, such as organ trafficking and prostitution. Due to the lack of a unanimously-accepted notion of contemporary slavery in international law, the article urged activists/the UN/AU to adopt an international human rights convention solely dedicated to the modern forms of sexual and labour exploitation. However, the argument of the article did not neglect to acknowledge the significance of the ECOWAS Community

Court judgment in the case of *Hajidatou Mani v Niger* and the expanded notion provided by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of the fight against slavery. These have both contributed to a better understanding of how slavery-like practices currently affect millions of people and how international law should regard these infringements in order to abolish them.

The conceptual argument of calling for a new human rights instrument dedicated uniquely to contemporary slavery provided the background for an introduction to the forms of child exploitation in three West African countries. The article then examined children's rights with special attention to the different perspective of protection provided by the international and the African human rights instruments. Here, the distinct perception of childhood and the role of the child in society result in conflict among international and local organisations fighting against ritual slavery and domestic servitude. Therefore, current forms of child exploitation, such as *vidomegon*, *trokosi* and *vudusi*, can only be eliminated definitively if the international and regional human rights protection systems, in the framework of the UN and the AU, respect and acknowledge both the rights and the responsibilities of the African child.

Clearly, the agenda for human rights protection both internationally and in Africa should be to harmonise inconsistencies and reconcile international and regional norms. However, the article does not argue that granting children more robust rights would lead to the elimination of domestic servitude and ritual slavery in West Africa. As was seen in the example of *vidomegon,* parents send their children away from home, sometimes into a neighbouring country, as they do not see any alternative to earning a living. To them this still seems a better idea than sending their children to school. Therefore, international and regional efforts have to target not only the harmonisation of rights on the level of human rights instruments, but they also have to alleviate economic problems and increase the levels of education. This should be the priority of local and regional social policies, so that illegal practices do not present advantageous opportunities for families to send their children away to work.

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Violent attacks against persons with albinism in South Africa: A human rights perspective

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Summary

South Africans living with albinism are among the most marginalised and vulnerable of the country's citizens, yet very little attention is given to protecting them from human rights violations, threats and violent crime. Although the extent of violent crimes targeting South Africans with this condition has not reached the levels encountered in other African countries, new evidence indicates a surge in violent crimes against persons with albinism. The vulnerability of these persons requires immediate attention before it spirals out of control. It is clear that a case is to be made for compelling, in particular, the state to intervene. Based on the groundbreaking decision of the South African Constitutional Court in the Carmichele *case, this article begins a debate on the state's affirmative duty to prevent, investigate and punish violent acts against persons with albinism, as it is feared that the incidents reported in South Africa may trigger copycat crimes. Provisions from international and regional human rights instruments relevant to the issues faced by persons with albinism highlighted in the article are explored briefly.*

Key words: *albinism; genetics; brutal killings; popular culture; cultural beliefs; stereotypes; right to life; right to dignity; right to freedom and security of the person*

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1 Introduction and contextual background

On 25 September 2015, two 19 year-old men pleaded guilty in the Vryheid Regional Court to the murder of Thandazile Mpunzi, a 20 year-old woman with albinism, and each was sentenced to 20 years' imprisonment.[1] Mpunzi's mutilated and skinned remains were found in a shallow grave after the suspects had confessed and led the police to the site.[2] The National Prosecuting Authority recorded that the 17 year-old boyfriend of the deceased had her murdered so that he and his friends could use her body parts for *muti*.[3] The Court heard that traditional healer Bhekukufa Gumede had told the deceased's boyfriend that 'muti mixed with the body parts of a person with albinism would make them rich'.[4] On the basis of this the accused concocted a plot to kill Thandazile Mpunzi to obtain her body parts.[5] On the afternoon of 1 August 2015, Mpunzi's boyfriend lured her to a remote area in the Phelandaba area of Emanguzi in Northern KwaZulu-Natal, where Mabuza and Khumalo attacked and strangled her before taking her body to a nearby forest.[6] The assailants met the following day, mutilated the deceased's body and left with certain body parts.[7] They later buried the remains of the body in another forest.[8]

Thandazile Mpunzi was a victim of violent attacks and killing of persons with albinism for ritual purposes. Based on the belief that the body parts of persons with albinism have extraordinary powers, unscrupulous dealers have resorted to harvesting their body parts with the expectation that these can be used to help them become rich.[9] The body parts are allegedly used as ingredients in rituals, concoctions and potions on the basis of the claim that their magic will bring prosperity to the user.[10]

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1 ECR News Watch 'KZN murder: Two suspects plead guilty' https://www.ecr.co.za/news-sport/news/kzn-albino-murder-2-suspects-plead-guilty/ (accessed 10 January 2017).

2 TIMES Live 'Commissioner outraged with the murder of albino woman' http://www.timeslive.co.za/local/2015/08/22/Commission-outraged-at-killing-of-albino-woman (accessed 10 November 2015).

3 IOL Crime & Courts 'Boyfriend jailed for albino *muti* murder' http://www.iol.co.za/news/crime-courts/boyfriend-jailed-for-albino-muti-murder-1990611 (accessed 10 January 2017).

4 As above.

5 As above.

6 As above.

7 As above.

8 As above.

9 CNN http://www.cnn.com/2009/WORLD/africa/11/29/tanzania.personswithalbinism/index.html (accessed 5 January 2017).

10 J Schühle 'Medicine murder of people with albinism in Tanzania – How casino capitalism creates rumourscapes and occult economies' (2013) 2 *Centre for Area Studies Paper Series* 18. Also see SM Uromi 'Violence against persons with albinism and older women: Tackling witchcraft accusations in Tanzania' (2014) 2 *International Journal of Education and Research* 323 328; I Nzangi 'Securing the

At the same time, persons with albinism have been ostracised and even murdered for exactly the converse reason, namely, because they are considered a curse and to bring bad luck on a community.[11] Underlying all these perceptions is the failure to see albinism for what it is: a medical condition,[12] one of an incredibly rare group of diseases, presenting as pigmentation variance in the skin, hair and/or eyes, owing to hereditarily-blocked melanin synthesis.[13]

In another alarming case as recently as 28 June 2016, a four year-old boy with albinism was reportedly kidnapped in Empangeni, KwaZulu-Natal.[14] The incident sparked an uproar as the community expressed their anger over the alleged kidnapping.[15] During the investigation leading to an arrest, police followed up information received about a woman who was purportedly arranging to sell a child with albinism for R100 000 to a well-known community member who is also a traditional healer in Emanguzi.[16] The 28 year-old woman was apprehended by police and the child was reunited with his family.[17]

The body parts of persons with albinism are believed to sell for enormous sums of money, and the fact that trading in albino body parts constitutes such a lucrative enterprise and a way to make quick money is an incentive for inhuman acts such as these.

Although the extent of violent crimes targeting South Africans with albinism has not reached the levels encountered in other African countries, an increase has in recent times been observed, the above-mentioned cases being but two examples. In South Africa, attacks often go unreported and undocumented due to the code of silence

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rights of people with albinism in Tanzania mainland: The fight against social exclusion' unpublished Master's dissertation, Erasmus University, 2009 41-42.

11 Uromi (n 10 above) 327. Also see R Feragen *The albino stage witness* (2002) 445; United Nations General Assembly *Report on Persons with Albinism*, A/HRC/24/57, 12 September 2013 5.

12 LP Twohig & V Kalitzkus *Social studies of health, illness and diseases: Perspectives from the social sciences and humanities* (2008) 115.

13 W Horobin (ed) *Diseases and disorders* (2008) 29; JE Richards & RS Hawley *The human genome: A user's guide* (2010) 35; A Denniston & PI Murray *The Oxford handbook of ophthalmology* (2009) 518; J Thomas & P Kumar *Clinical paediatric dermatology* (2013) 114; BR Kutzbach et al 'Evaluation of vision-specific quality-of-life in albinism' (2009) 13 *Journal of American Association for Paediatric Ophthalmology and Strabismus* 191-195; CK Robert *A dictionary of genetics* (2006); M Neighbors & J Tannel-Hill *Human Diseases* (2015) 458. Also see M Cummings *Human heredity: Principles and issues* (2009) 58-64; AH Robins *Biological perspectives on human pigmentation* (1991) 14; PJ Russell *Fundamentals of genetics* (2000) 186.

14 IOL 'Cops arrest trafficker, albino child still missing' http://www.iol.co.za/news/crime-courts/cops-arrest-trafficker-albino-child-still-missing-2042005 (accessed 30 September 2016).

15 As above.

16 As above.

17 E-News 'Child living with albinism in KZN escapes death' http://www.enca.com/life/kzn-traditional-healers-fighting-against-targeting-of-albinos (accessed 10 January 2016).

surrounding such crimes as well as the vulnerability of the targeted population.[18]

In recent times, however, a number of attacks against persons with albinism have been reported in Africa. A July 2015 report compiled by Under the Same Sun (UTSS) Canada and Tanzania documented 148 killings of and 232 attacks on people with albinism across 25 African countries. The statistic for attacks includes survivors of mutilation; persons with albinism seeking asylum; incidents of violence against persons with albinism; and the desecration of graves. Of the 25 countries listed in the report, Tanzania is responsible for the majority of killings and attacks.

The mysterious abduction and killing of persons with albinism evoke feelings of uneasiness and insecurity in their communities[19] and make them reluctant to walk, travel or stay alone because of the possible dangers.[20] As a vulnerable minority group, persons with albinism are in need of social and legal protection in order to enjoy the full spectrum of fundamental rights, including the right to life and freedom of movement. The safety and security of persons with albinism require immediate attention before crimes against them spiral out of control. Having said that, it is clear that there is a case to be made for compelling the state, in particular, to intervene. Based on the Constitutional Court's groundbreaking decision in *Carmichele v Minister of Safety and Security*,[21] the article starts a debate on the duty on the state to prevent, investigate and punish violent acts against persons with albinism, as it is feared that the incidents reported in South Africa and elsewhere in Africa may trigger copycat crimes. Provisions from international and regional human rights instruments relevant to the issues faced by persons with albinism highlighted in the article are explored briefly.

2 Need for protection by the state in situations of risk

It is clear that the killing of persons with albinism has a range of negative repercussions and has established persons with albinism as a vulnerable group of people who are deserving of the same rights to safety and security as any other person. Vicious attacks and killings have significantly curtailed their freedom of movement as they hide in fear. Some learners with albinism have left school out of fear for their safety and those who do still attend school find it difficult to

18 United Nations Human Rights Council Advisory Committee *Preliminary study on the situation of human rights of persons living with albinism* A/HRC/AC/13/CRP.1 30 July 2014 15.

19 MM Masanja et al 'Albinism: Awareness, attitudes and level of albinos' predicament in Sukumaland, Tanzania' (2014) 3 *Asian Journal of Applied Science and Engineering* 14 15.

20 Masanja et al (n 19 above) 15; Schühle (n 10 above) 15.

21 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

concentrate on their studies. Although this remains speculation,[22] it is very likely that some of the children with albinism who vanished without a trace have been victims of *muti* murders, given the number of such murders reported across African countries. The brutal killing of Thandazile Mpunzi in KwaZulu-Natal in 2015, similarly, is cause for great concern.

Violent acts resulting in death or grave physical harm encroach upon a person's right to life and physical integrity.[23] The Constitution, in section 12(1)(c), specifically protects the right to be free from all forms of violence 'from either public or private sources'.[24] Further protection is found in section 12(1)(d),[25] which addresses the right not to be tortured in any way, while section 12(1)(e) provides for the right not to be treated or punished 'in a cruel, inhuman or degrading way'.[26]

The nature of the killing of persons with albinism is brutal. Knives and machetes are reportedly the objects used to cut limbs, breasts and other body parts off the helpless screaming victims.[27] In the gruesome murder of Mpunzi mentioned previously, the victim was mutilated and skinned. There clearly is no room for the age-old concept of humanness, *ubuntu*,[28] in such violent behaviour. These brutal murders fail to honour the fundamental *ubuntu* values of life and human dignity. It is self-evident that there is no dignity in dying in this way.

Within the South African context, there has been very limited debate on the state's obligation to protect persons with albinism from violence. In the interests of identifying the most effective way of preventing these violent acts, what follows is an explanation of why the author supports the way in which the *Carmichele* case deals with private violence with the intention of giving value to constitutional protection; particularly the protection of the right to life, dignity and freedom from violence.

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22 PA Carstens 'The cultural defence in criminal law: South African perspectives' (2004) 37 *De Jure* 312 http://www.isrcl.org/Papers/Carstens.pdf (accessed 22 January 2017).

23 United Nations General Assembly (n 11 above) 7. Also see D Bruce 'Killing and the Constitution: Arrest and the use of lethal force' (2003) 19 *South African Journal on Human Rights* 430.

24 Sec 12(1)(c) Constitution of the Republic of South Africa, 1996.

25 Sec 12(1)(d) South African Constitution.

26 Sec 12(1)(e) of the South African Constitution reads as follows: 'Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.'

27 S Larson 'Magic, mutilation, and murder: A case for granting asylum to Tanzanian nationals with albinism' (2011) 2 *Pace International Law Review* 15-16.

28 J le Roux 'The impact of the death penalty on criminality' http://www.isrcl.org/Papers/LeRoux.pdf (accessed 22 January 2016). Le Roux defines *ubuntu* as a culture in which communality and the interdependence of the members of a community are emphasised. An outstanding feature of *ubuntu* is the value it puts on life and human dignity. The notion that the life of another person is at least as valuable as one's own is emphasised.

The South African vision of a society founded on the recognition of human rights means that everyone is obliged to value the right to life and the right to dignity.[29] In the landmark case of *Makwanyane,*[30] Langa J made reference to South Africa's dark history in which the value of life and human dignity were 'demeaned'. He blamed political, social and other factors for having created a climate of aggression which has resulted in a culture of 'retaliation and vengeance'.[31] In the process, the major loss was that of reverence for life and the intrinsic worth of every human being.[32] By retaining a form of punishment which failed to hold the dignity of the person and the value of human life in high regard, the state played a part in this disintegration.[33] Bearing in mind that the state directs society's actions, in South Africa's new constitutional dispensation the state is obliged to guide society to respect the law and to demand that the killings come to an end and that human life and dignity are honoured.[34] By implication, the state must also say no to the infringement of a criminal's right to life and dignity.[35]

The state has a duty to respect, protect, promote and fulfil the rights contained in the Bill of Rights.[36] In terms of the right to life, this translates into both negative and positive duties.[37] The negative dimension of the right to life entails the duty not to take someone's life.[38] The right to life can be construed positively as placing a duty on the state to protect the lives of its citizens.[39] This argument was advanced in the *Makwanyane* case as justification for the retention of the death penalty.[40] The Attorney-General's argument that the deterrent and preventative effects of the death penalty are an example of the state's duty to protect the right to life was rejected by the court.[41]

The right to life entails the protection of a person's life against possible attack.[42] At the very least, the positive duty imposed on the state by the right to life means that it is obliged to protect its citizens

29 *S v Makwanyane* 1995 (3) SA 391 (CC) para 24.
30 *Makwanyane* (n 29 above) para 144.
31 As above.
32 As above.
33 As above.
34 As above.
35 *Makwanyane* (n 29 above) para 22.
36 I Currie & J de Waal *The Bill of Rights handbook* (2013) 262.
37 Currie & De Waal (n 36 above) 262. Sec 11 of the South African Constitution states that '[e]veryone has the right to life'.
38 Currie & De Waal (n 36 above) 262.
39 As above.
40 *Makwanyane* (n 29 above) para 193.
41 Currie & De Waal (n 36 above) 262.
42 B Mathieu et al *The right to life in European constitutional and international case law* (2006) 9.

from 'life-threatening attacks'.[43] In the *Carmichele* case,[44] this duty was emphasised in the context of the protection of the public by police officials and prosecutors.

The law dictates that under certain circumstances the state has a positive obligation to exercise due diligence, meaning that it ought to take all reasonable measures under the circumstances to prevent someone from infringing upon another's right to life in situations where they know or should know that such a risk exists.[45] The obligation arises in cases where the state has a significant influence over the person committing the infringement or is under a duty of care with respect to the victim.[46]

In the *Carmichele* case, the Court further observed that[47]

> [t]he police [are] one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime,

thus suggesting that gender is of necessity a factor in determining wrongfulness. This observation has been interpreted as meaning that other pertinent factors may warrant the protection of certain other groups, given that the police have a broad duty to safeguard the most vulnerable members of society.[48] In light of the increase in violent attacks against persons with albinism, the failure of the South African government to provide this vulnerable group with sufficient protection offers an analytical basis for imposing a duty upon the government to do so.

Grounded on a synthesis of the Constitutional Court's influential decision in the *Carmichele* case, such an affirmative duty entails the prevention, investigation and punishment by the state of violent acts against persons with albinism. Only by imposing this positive responsibility will persons with albinism be able to fully and freely exercise their rights and enjoy the new constitutional era.

In discussing the state's common law duty to protect human life, the Court in the *Carmichele* case adopted and embraced the positive dimensions in *Osman v United Kingdom*:[49]

> It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place

43 Currie & De Waal (n 36 above) 261.

44 *Carmichele* (n 21 above) paras 26, 28 & 30. Also see J Burchell *Principles of criminal law* (2013) 79-86.

45 Human Rights First 'Combating xenophobic violence: A framework for action' (2011) http://www.humanrightsfirst.org (accessed 10 February 2017).

46 As above.

47 *Carmichele* (n 21 above) para 62.

48 V Reddy et al 'Cloud over the rainbow nation: "Corrective rape" and other hate crimes against black lesbians' (2007) 5 *Human Science Research Council Review* 10 11.

49 *Osman v United Kingdom* 29 EHHR 245 para 115.

> effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

The positive obligation of the state to prevent violations by non-state actors has developed as a standard of due diligence, a concept acknowledged in the law of torts.[50] It is a duty of conduct, meaning that, if the state takes all reasonable measures within its authority to prevent the infringement of human rights, it will not be held accountable should such infringement nonetheless occur.[51] Seen as a due diligence duty, prevention is the manifestation of protection.[52] Due diligence demands such reasonable preventative measures as could be expected of governments under comparable circumstances. Perhaps the situation in some parts of Africa could be instructive in this regard, particularly in light of the fact that some African states have taken reasonable action to prevent violent attacks against persons with albinism. These will be used as examples in the course of this discussion.

In the case of the gravest violation of the rights of a person with albinism, namely, depriving them of their life and bodily integrity, it is worthless to offer subsequent compensation for something that cannot be reinstated. Although the protection in the Bill of Rights is relied upon to censure the conduct of perpetrators, litigation against perpetrators of violent acts against persons with albinism is likely to do little or nothing at all to address the misconceptions about albinism and attitudes towards people with the condition. On these grounds, it is argued that the state must take responsibility for protecting persons with albinism from violent crime and must ultimately be held answerable for its failure to act.

The litigation in the *Carmichele* case advances a strategy for bringing a protective suit against the state based on the contention that the state has a duty to protect persons with albinism from violent acts. In light of the rising statistics discussed earlier and the extreme likelihood that persons with albinism will be victims of a violent crime at some point in their lives, a group of persons with albinism could bring a suit and make a persuasive case that the court should not wait

50 DM Chirwa 'In search of philosophical justifications and suitable models for the horizontal application of human rights' (2008) 8 *African Human Rights Law Journal* 305. Also see DM Chirwa 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 13-14.

51 Chirwa (n 50 above) 305.

52 H Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1980) 55; A Eide 'Economic, social and cultural rights as legal rights' in A Eide et al (eds) *Economic, social cultural rights: A textbook* (1995) 21 37. Also see *Velásquez Rodríguez v Honduras* IACHR [1988] (Ser C) No 4.

for a further case of victimisation before taking action. Although violent acts against persons with albinism generally are widespread, the recent consecutive incidents of abduction and murder of two children with albinism in KwaZulu-Natal clearly indicate that this region is a hotspot for violent crimes against persons with albinism, and point to a need for sustained security efforts in the area. All possible interim and preferably even long-term measures to halt this continued crime are urgently needed before the numbers spiral out of control.

Section 38 of the Constitution establishes comprehensive standing rights for those wishing to challenge the constitutionality of the state's action or inaction. Building on the *Carmichele* case with regard to the eligibility of vulnerable groups to approach the Constitutional Court to lodge a complaint about the violation of their rights which are enshrined in the Constitution, the author recommends that a suit be brought by a group of persons with albinism who are at risk of violent crime, or by other interested parties, or by albinism activists, to preventatively contest the constitutionality of the state's failure to protect persons with albinism. In its capacity as the highest court and supervisory body on constitutional compliance, the Constitutional Court has an obligation to act as the judicial arm of this vulnerable group of people and should exert pressure on the government of South Africa to make every effort to ensure their safety.

The state's duty to protect can entail (i) protection from violence; (ii) thorough investigation of incidents of violence; and (iii) mechanisms for holding violators accountable, including remedies for the victims.[53]

With reference once again to the concept of due diligence as necessitating such reasonable measures of prevention as could be expected from governments under comparable circumstances, this discourse now turns to measures taken by Tanzania, specifically in terms of the prevention and investigation of violent crimes against persons with albinism.

As the country with the highest incidence of violence against persons with albinism in Africa, Tanzania has implemented successful mechanisms for dealing with such crimes. Existing security structures in communities have been strengthened, particularly in schools. A substantial number of children are known to be in shelters for children with albinism who have been displaced by attacks, and these centres are regularly inspected for any abuse of or discrimination against these children. Tanzania has also developed a national institutionalised mechanism for the protection and promotion of the rights of persons with albinism. Measures include ensuring that national human rights institutions effectively monitor the human rights position of people with albinism. Furthermore, the Tanzanian government has taken

53 RJ Cook 'States responsibility for violation of women's human rights' (1994) 7 *Harvard Human Rights Journal* 127.

steps to deal with the root causes of attacks and discrimination against people with albinism, notably by proactively contesting the stigma, false perceptions and myths surrounding the condition through ongoing awareness-raising campaigns on the scientific truth about albinism. The state is tasked with conducting fact-finding investigations wherever there is evidence of grave and widespread incidents of violence and discrimination against persons with albinism. Over 225 unlicensed witchdoctors were arrested and held to account in a crackdown on the murder of persons with albinism, and in 2016 witchdoctors were banned in Tanzania.[54] It is clear that the Tanzanian government has taken stringent measures to protect persons with albinism and these reportedly have been successful in reducing the incidence of killings.[55]

In assessing the possibility to use such measures in South Africa, it is important to reflect on the lessons from the *Carmichele* case. Subsequent to *Carmichele*, the threat of a potential suit led to improvements in police investigations of violence against women; a victory in terms of imposing an obligation on the police to protect women from violence.[56] A preventive suit affirming the state's failure to do enough to prevent violent crimes against persons with albinism, as well as the threat of possible subsequent suits, could perhaps have a comparable result, predominantly in terms of compelling the state to take action to transform the attitudes and deficiencies in policing and safety infrastructure that allow for violent acts against persons with albinism.

In South Africa, there is little systematic evidence of a state response to the violence against persons with albinism. The author is aware of only one document compiled by the state in 2013, namely, the Ekurhuleni Declaration on the Rights of Persons with Albinism.[57] On paper the declaration seems promising, but a follow-up on the progress made in implementing its provisions reveals that the state is still falling short of meeting its commitments.

Three of the declaration's important recommendations in terms of violent crime against persons with albinism are:[58]

(1) that systems be established for comprehensive data collection on human rights violations perpetrated against persons with albinism;

54 D Smith 'Tanzania bans witchdoctors in attempt to end albino killings' https://www.theguardian.com/world/2015/jan/14/tanzania-bans-witchdoctors-attempt-end-albino-killings (accessed 22 January 2017).

55 DH Salewi 'The killing of persons with albinism in Tanzania: A social-legal inquiry' unpublished LLM dissertation, University of Pretoria, 2011 37.

56 M Govender 'Domestic violence: Is South Africa meeting its obligations in terms of the women's convention' (2003) 19 *South African Journal on Human Rights* 675.

57 Department of Women, Children and People with Disabilities 'Ekurhuleni Declaration on the Rights of Persons with Albinism' 25-27 October 2013 http://www.gov.za/ekurhuleni-declaration-rights-persons-albinism (accessed 8 March 2017).

58 Arts 15, 16 & 17 Ekurhuleni Declaration on the Rights of Persons with Albinism (n 57 above).

(2) that legislation be developed to enforce punitive action against perpetrators of violence against persons with albinism; and
(3) that the South African Human Rights Commission launch an investigation into incidents of human rights violations against persons with albinism.

Between 2009 and 2016, I was unable to source any extensive public reporting by the South African Human Rights Commission on violence against persons with albinism, and to date there has been no change. This makes it difficult to determine the exact nature of the problem and to identify the type of measures that would be most effective in dealing with it. Although the state has announced that there is a need for the development of legislation to enforce action against perpetrators of violence against persons with albinism, an extensive literature search yielded no information on even the drafting, let alone implementation, of specific legislation or measures for its enforcement.

Given the perceptions and attitudes that give rise to violence against persons with albinism, unquestionably the major challenge for the state is to enlighten the public by demystifying the condition of albinism through raising awareness of the condition and ensuring compliance with the fundamental rights protection afforded by the Constitution and other existing human rights instruments.

3 National and international human rights framework applicable to the killing of persons with albinism

Section 39 of the South African Constitution states that a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom (subsection (a)), must consider international law (subsection (b)), and may consider foreign law (subsection (c)).[59]

Section 231(2) & (3) of the Constitution states that an international agreement binds South Africa once the treaty has been approved by the National Assembly and the National Council of Provinces, except if it is self-executing or of a technical, administrative or executive nature.[60] In addition, section 232 determines that customary international law is law in South Africa, unless it is inconsistent with

59 Sec 39 of the South African Constitution reads as follows: '(1) When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

60 Sec 231 of the Constitution of 1996 reads as follows: '1 The negotiating and signing of all international agreements is the responsibility of the national

the Constitution or legislation.[61] Under section 233 of the Constitution, South African courts are obliged to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[62] Provisions contained in international and regional human rights instruments which are relevant to the issues faced by persons with albinism, as highlighted in the article, are briefly explored below.

In November 2007, South Africa ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD),[63] which is the most recent significant international human rights instrument relating to disability. The Preamble and article 1 of the CRPD affirm the social dimension of disability by stating that the definition of disability ought to be based on the social aspect of attitudinal and physical barriers that prevent persons with disabilities from effectively contributing to society.[64] The CRPD looks beyond the question of 'access to the physical environment' and tackles concerns of equality and the elimination of legal, social and attitudinal obstacles to the involvement of people with disabilities.[65] This social approach to disability shifts the focus from individuals and their physical or mental deficits to the manner in which society embraces or rejects them.[66] Instead of disability being seen as unavoidable, it is viewed as a product of unfavourable social arrangements that can be transformed or even eliminated.[67]

The CRPD accepts that impairment and the environment interact to produce the experience of disability when people with impairments

60 executive. 2 An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). 3 An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. 4 Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. 5 The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

61 Sec 232 of the Constitution reads as follows: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

62 Sec 232 of the Constitution of 1996 reads as follows: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

63 Convention on the Rights of Persons with Disabilities (CRPD).

64 SA Scott 'New category of colour: Analyzing albinism under Title VII of the Americans with Disabilities Act' (1999) 2 *Journal of Gender, Race and Justice* 514.

65 Scott (n 64 above) 514.

66 T Shakespeare *Disability rights and wrongs revisited* (2014) 12.

67 Shakespeare (n 66 above) 12.

cannot participate in society on an equal basis. This more inclusive understanding of disability offers a more realistic framework for addressing the disadvantages commonly suffered by persons living with albinism. Their lifelong physical impairment means that these persons are continuously required to navigate circumstances arising from their distinctiveness. The social model of dealing with disability advances disability rights by removing the obstructions created by society.[68] Amongst others, the CRPD requires that state parties undertake to adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities.[69] Signatories to the CRPD are mandated to observe the provisions of the Convention by using them to drive domestic law and policy reforms.

Violent acts against persons with albinism have deprived them of their right to security of the person as protected by article 9 of the International Covenant on Civil and Political Rights (ICCPR).[70] Although article 9 is primarily concerned with issues of arrest and

68 P Hurpur 'Embracing the new disability rights paradigm: The importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability and Society* 4-5.

69 Art 8(1) of the CRPD reads as follows: '1 States Parties undertake to adopt immediate, effective and appropriate measures: (a) to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; (b) to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; (c) to promote awareness of the capabilities and contributions of persons with disabilities. 2 Measures to this end include: (a) initiating and maintaining effective public awareness campaigns designed: (i) to nurture receptiveness to the rights of persons with disabilities; (ii) to promote positive perceptions and greater social awareness towards persons with disabilities; (iii) to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market; (b) fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities; (c) encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention; (d) promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.'

70 Art 9 of the International Covenant on Civil and Political Rights (ICCPR) reads as follows: '1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2 Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

detention, it also has relevance for the protection of persons with albinism.[71] It is clear that these persons live in fear of their lives because of the ongoing killings, and may become housebound as they do not feel safe on the streets.[72] Many parents of children with albinism do not allow their children to walk to school.[73]

The killing of persons with albinism constitutes an infringement of the right to life as embodied in article 6 of the ICCPR,[74] which affords every human being 'the inherent right to life'.

Further, article 26 of the ICCPR protects everyone – and therefore also persons with albinism – from all forms of discrimination. Within the context of the article, it may be argued that persons with albinism are discriminated against by being singled out for *muti* murders. The relevance here of article 26 is that it imposes an obligation upon member states to put in place mechanisms to prohibit any form of discrimination. Such mechanisms must guarantee equal and effective protection against discrimination on the grounds of colour, social origin or health status.

In South Africa, the majority of victims of violence against persons with albinism are children, being the most fragile and vulnerable members of society.[75] Violence leading to death is a gross violation of a child's right to life under article 6 of the Convention on the Rights of the Child (CRC). South Africa ratified the CRC on 16 June 1995.[76] This provision obligates state parties to recognise children's inherent right to life. In addition, it obliges state parties to ensure the survival and optimal development of the child.

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71 A Alum et al *Hocus pocus, witchcraft, and murder: The plight of Tanzanian albinos* (2009) 13.

72 Alum et al (n 71 above) 41.

73 As above.

74 Art 6 of the ICCPR reads as follows: '1 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2 In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. 3 When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4 Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5 Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6 Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'

75 P Bukuluki 'Child sacrifice: Myth or reality' (2014) 41 *International Letters of Social and Humanistic Sciences* 2.

76 United Nations Human Rights Office of the High Commissioner 'Status of Ratification Interactive Dashboard' http://indicators.ohchr.org/ (accessed 5 March 2017).

Violent acts against children with albinism further constitute a violation of their right to education. Children with albinism may be afraid of or prevented from attending school for fear of being killed, as has been reported in some parts of South Africa.[77] The right to education is recognised in article 28 of the CRC.[78] In response to its obligations under the CRC, the Tanzanian government has introduced special measures to protect children living with albinism in the form of police escorts to accompany them to school.[79] Such efforts aimed at ending the violence against and murder of children living with albinism[80] suggest that the Tanzanian government is aware of its commitments in terms of the CRC.[81] As far as could be determined, no similar initiative exists in South Africa; certainly not one initiated by the South African government.

South Africa ratified the African Charter on Human and Peoples' Rights (African Charter) on 9 July 1996.[82] The African Charter guarantees the right to life under article 4 which reads as follows: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' In regulating the right to life, unlike other international and regional instruments, the African Charter is not supported by protocols that prohibit the death penalty,[83] but it does explicitly and strongly condemn the taking of any human life. The lives of persons living with albinism are also protected against arbitrary killing under the Charter. The African Charter does not

77 Alum et al (n 71 above) 42-44.

78 Art 28 of the Convention on the Rights of the Child (CRC) reads as follows: '1 States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means; (d) make educational and vocational information and guidance available and accessible to all children; (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2 States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3 States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.'

79 Alum et al (n 71 above) 42-44.

80 As above.

81 As above.

82 African Commission on Human and Peoples' Rights 'Ratification Table: African Charter on Human and Peoples' Rights' http://www.achpr.org/instruments/achpr/ratification/ (accessed 5 March 2017).

83 MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 189.

merely describe the right to life as the legal foundation of all other rights, but as a right that is linked to the moral, physical and spiritual existence of a human being.[84]

Similar to the CRC, the African Charter on the Rights and Welfare of the Child (African Children's Charter), ratified by South Africa on 7 January 2000, is a comprehensive document on the human rights of children and associated global principles and standards.[85] The Children's Charter came about because the member states of the Organisation of African Unity (OAU), now the African Union (AU), alleged that the CRC overlooked vital socio-cultural and economic issues specific to Africa.[86] The African Children's Charter acknowledges the child's distinctive and honoured position in African society, and that children require protection against abuse and must be granted special care.[87] In August 2015, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) conducted an on-site visit to the temporary holding shelters for children with albinism in the Lake Zone of Tanzania with the purpose of investigating the situation of the children hosted there.[88] The purpose of the investigation was to inspect the situation of children with albinism in the temporary holding shelters and also to assess the abuses and challenges faced by these children.[89] The Children's Committee was also tasked with identifying the causes resulting in the violation of the rights of children with albinism as well as imploring different stakeholders to assist with improving the protection of children with albinism in Tanzania.[90]

Subsequent to the on-site visit, the African Children's Committee compiled a report which noted that children in the temporary holding shelters are in an exceedingly vulnerable situation, which makes them easy targets for witchcraft.[91] The Committee also noted that the attacks and killings of children with albinism are extensive and are

84 Evans & Murray (n 83 above) 185.

85 United Nations Children's Emergency Fund 'The African Charter on the Rights and Welfare of the Child' http://www.unicef.org/esaro/children_youth_5930.html (accessed 10 October 2015).

86 O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underline and repeat the Convention on the Rights of the Child (CRC)'s provisions? Examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Sciences* 143.

87 Ekundayo (n 86 above) 147. 'One of the reasons for having an African Children's Charter was the feeling that Africa had been underrepresented during the drafting process of the CRC (only Algeria, Morocco, Senegal and Egypt participated meaningfully in the drafting process). A second reason was the thinking that Africa needed to have a charter for children which reflected the specifics of the African context.'

88 African Committee of Experts on the Rights and Welfare of the Child *Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters in Tanzania,* March 2016 2.

89 *Report* (n 88 above) 2-3.

90 As above.

91 *Report* (n 88 above) 16-18.

impeding on a wide range of human rights of the affected children.[92] In spite of some efforts by the Tanzanian government to deal with the situation, the African Children's Committee noted that the Tanzanian government had principally failed to fulfil its obligation under the African Children's Charter and other international and regional laws to protect the rights of children with albinism.[93] The Committee concluded that, even though the Tanzanian government had instituted these temporary holding centres to safeguard these children from violent attacks, the shelters no longer served their temporary purpose and were not serving the best interests of the children as they 'feature[d] more like detention centres than safe houses'.[94] The report also noted that such shelters were providing an appropriate escape strategy for parents who wanted to detach themselves from the obligation of caring for their children with albinism.[95] The Committee recommended that strategies be devised to provide these children with a family setting in order to end the permanent nature of the temporary holding centres.[96]

African children are notoriously exposed to various forms of maltreatment and deprivation, such as economic and sexual abuse, gender discrimination within educational and health care systems and involvement in armed conflict.[97] Additional child-related issues in Africa include child prostitution; early marriages; child-headed households; street children; and a range of difficulties associated with

92 As above.
93 As above.
94 As above.
95 As above.
96 As above.
97 The Preamble of the African Children's Charter reads as follows: 'The African member states of the Organization of African Unity, parties to the present Charter entitled "African Charter on the Rights and Welfare of the Child", *Considering* that the Charter of the Organization of African Unity recognised the paramountcy of human rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognised and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status; *Recalling* [that] the Declaration on the Rights and Welfare of the African Child (AHG/ST 4 Rev. 1) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its sixteenth ordinary session in Monrovia, Liberia, from 17 to 20 July 1979, recognised the need to take appropriate measures to promote and protect the rights and welfare of the African Child; *Noting with concern* that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care; *Recognising* that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding; *Recognising* that the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical,

migration and extreme poverty.[98] The African Children's Charter is an important instrument for the protection of the rights of children with albinism as it emphasises the protection of children from violence, discrimination, ill-treatment and negative social and cultural practices, including all forms of exploitation or sexual abuse and the kidnapping of and trafficking in children.

The above discussion highlights the fact that a more focused framework for the protection of the rights of persons with albinism is required at international level. Every state has a duty to honour the instruments and treaties which it has ratified.

As a constitutional democracy with a progressive Bill of Rights and a history of inequality, violence and discrimination, South Africa should make a special effort to ensure that the life, dignity and equal worth of all citizens are respected and to make adherence to the treaties and covenants discussed above a priority, particularly in terms of advancing the rights of persons living with albinism.

4 Conclusion

The article highlights cultural beliefs, superstitions, myths and false perceptions about albinism as the backdrop against which the violation of the rights of persons with albinism can be understood. In

mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security; *Taking into consideration* the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child; *Considering* that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone; *Reaffirming adherence* to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments of the Organization of African Unity and of the United Nations and in particular the United Nations Convention on the Rights of the Child, and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child …'

98 Preamble (n 97 above). Art 27 (on sexual exploitation) of the African Children's Charter reads as follows: '1 State parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.' Art 21 (on protection against harmful social and cultural practices) reads as follows: '1 State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status. 2 Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'

light of the prevalence of the intentional killing of persons with albinism, the article focuses on the way in which the current legal framework and, in particular, provisions on the right to life, dignity and freedom and security of the person enshrined in the Constitution, protect persons with albinism against violent attacks. The article critically assesses the impact of the brutal killings of persons with albinism in a democratic regime such as South Africa, and highlights the fact that people with albinism must be protected against physical attacks since the state has a duty to protect the right to life.

Although international human rights instruments cannot substitute domestic laws, they serve as an operational complement to domestic laws. The increase in violent attacks faced by persons with albinism calls for such a multi-faceted response. The international human rights instruments discussed in the article afford a distinctive basis for addressing the violent attacks and killings of persons with albinism. The position of the state as prime guardian for protecting the international human rights of persons living with albinism was emphasised, and the article calls on government to fulfil its international commitments towards protecting the rights of persons with albinism.

It is recommended that the Minister of Safety and Security appoints a task team to develop a strategy for implementing safety measures for persons with albinism. This strategy should be designed to put effective prevention plans and programmes into action to stop the spread of violence and crime against persons with albinism.

There is also a need for the general public to become involved in the protection of persons with albinism, rather than relying solely on the police, non-governmental organisations and human rights associations. A joint effort on the part of all stakeholders is needed if effective solutions are to be found. In addition, awareness campaigns about the plight of persons with albinism alone are not sufficient. It is recommended that the public be encouraged to devise and implement community-oriented security and policing initiatives in areas where persons with albinism reside, not as a substitute for formal policing, but as a complementary and supporting strategy.

While strict prosecution and severe sentencing of perpetrators of violence against persons with albinism should act as a deterrent, the South African government must be more vigilant and community advocacy should be a priority. If not contained and effectively addressed within a specific jurisdiction, dangerous beliefs such as those associated with albinism can easily spill over.

The trafficking in body parts of persons with albinism needs close scrutiny, and care must be taken to ensure that the implementation of the new Prevention and Combating of Trafficking in Persons Act[99] extends to cover the removal of body parts from persons with

99 Combating of Trafficking in Persons Act 7 of 2013.

albinism. In particular, the cross-border trade in body parts at border posts should be stopped.

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Establishing state liability for personal liberty violations arising from arrest, detention and malicious prosecution in Lesotho

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Summary

This article seeks to analyse the case law relating to infringements of the personal liberty rights of the individual through the traditional common law actions for damages for wrongful arrest, unlawful detention and malicious prosecution. These rights are often violated by the police – the principal law enforcement agents of government. Sometimes, too, non-law enforcement personnel of the Lesotho army unwittingly get embroiled in law enforcement duties, thereby involving the government in incurring liability in damages for the numerous human rights violations that trail their encounter with members of the public. Although there are provisions in the Constitution of Lesotho of 1993 through which the individual may ventilate his or her entrenched fundamental rights, victims of these breaches tend to enforce their security of the person and human dignity rights in the courts in Lesotho by way of the common law damages in delict. In an attempt to establish the liability of the state in this instance, one witnesses the interplay of the constitutional guarantee of rights, the protections afforded the individual through the Criminal Procedure and Evidence Act of 1981 and the common law cause of action. The present investigation concentrates on the primary problem of establishing the liability of the state first and foremost, as an assessment of the quantum of the damages recoverable is an exercise a court can undertake only after the liability issue has been resolved or ascertained. This contribution, therefore, examines the many instances whereby, in the purported performance of law enforcement duties of the state, the police and army personnel have infringed the rights of the citizens and, in the process,

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expose the brutal nature of the injuries the victims have suffered and the role the courts have played in their endeavour to uphold the rights to security of the person and human dignity as well as to maintain the rule of law in Lesotho.

Key words: *personal liberty rights; human dignity; wrongful arrest; malicious prosecution; unlawful detention; state liability for police brutality; military involvement in law enforcement duties; disregard for the rule of law*

1 Introduction

A perusal of the fundamental rights provisions in the Constitution of Lesotho of 1993[1] reveals that there are at least three constitutional routes through which a person unlawfully arrested or detained can ventilate such an infringement. To begin, any person who is unlawfully arrested or detained can claim compensation in terms of section 6(6) which guarantees the individual the right to personal liberty.[2] Besides section 6(6), there is the general right of access to the courts to enforce a breach or threatened infringement of any of the rights entrenched in Chapter II of the Constitution embedded in section 22. The complainant is entitled, by virtue of this guarantee, to apply to the High Court for redress.[3] In turn, the High Court is vested with the jurisdiction to enforce the right allegedly infringed or threatened with infringement and, in the process, it is empowered to make such order, issue such process and give such directions as it considers appropriate in the circumstances.[4] In this regard the court is empowered to make a declaratory judgment which states the rights of the applicant, or issues other forms of interdicts (mandatory or prohibitive) when approached to do so.[5] The courts in Commonwealth jurisdictions where similar constitutional provisions exist have interpreted this clause to entitle the applicant to the award of damages for breaches of the guaranteed fundamental rights in appropriate cases.[6]

Apart from the 'compensation' and 'constitutional damages' routes, there is yet a third source derived from the reading together of

1 Constitution of Lesotho or Constitution.

2 Compare sec 3(6) 1966 of the Constitution of Lesotho.

3 Sec 22(1) 1993 Constitution of Lesotho.

4 Sec 22(2) Constitution of Lesotho.

5 C Okpaluba 'Redress for breach of fundamental rights in Nigeria' (1981) 23 *Journal of the Indian Law Institute* 205-226.

6 *Maharaj v Attorney-General of Trinidad and Tobago (2)* [1979] AC 385 (PC); *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 (PC) (Trinidad and Tobago); *Simpson v Attorney-General* [1994] 3 NZLR 667 (NZCA); *Taunoa v Attorney-General* [2008] 1 NZLR 429 (NZSC) (New Zealand); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC) (South Africa).

sections 22(1) and (2)(b) which complement each other. Section 22(1) provides that in the case of a detained person, any other person can approach the court on his or her behalf alleging an infringement of the rights of the detained person. In terms of section 22(2)(b), the court can 'issue such process' as it may consider appropriate. This recourse contemplates, among others, a process akin to the common law writ of *habeas corpus*,[7] whereby a court can order that a detained person be brought before it without further delay for the purposes of determining the lawfulness or otherwise of the detention. This process usually is not an action for damages but an application for the immediate release of the person unlawfully detained.[8] It often is a prompt remedial action rather than the action for damages which happens *ex post facto*.[9] This research has shown that, unlike in *habeas corpus* applications, there appears to be no decided case(s) to suggest that litigants in Lesotho have explored the options of compensation or constitutional damages causes of action to ventilate breaches of their personal liberty rights.

However, neither constitutional damages as a cause of action nor the problems inherent in their quantification are dwelt upon in the article. Rather, this presentation critically analyses the wealth of case law where plaintiffs have claimed damages through the traditional common law cause of action with regard to wrongful arrest, detention and malicious prosecution in Lesotho.[10] The inquiry closely follows the process adopted by the courts in the adjudication of these issues. The investigation, in essence, commences with establishing the liability of the defendant which, in turn, involves identifying the rights alleged to have been infringed.[11] In this context, one encounters the interplay of the constitutional rights to personal liberty and security of the person, the dignity and reputation of the individual, on the one hand, and the circumstances in which that infringement occurred, on the other. The origin of the right infringed or the process may be found in the Constitution or the Criminal Procedure and Evidence Act 9 of 1981 (CPEA).[12] Then follows the problematic quantification exercise which is usually the last in the sequence. The inquiry into the quantification aspect is omitted from the present discussion due to

7 See eg *Maseko v Attorney-General* LAC (1990-1994) 13.

8 See eg *R v Governor of Brixton Prison, Ex Parte Armah* [1968] AC 192 (HL); *R v Home Secretary, Ex Parte Khawaja* [1984] AC 74 (HL).

9 See AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 781; HWR Wade & C Forsyth *Administrative Law* (2009) 505.

10 See eg *Nkofi v Ramoreboli* [2014] LSHC 65 (12 August 2014) paras 4-7.

11 *Kopo and Kopo v Commander of Lesotho Defence Force* [2011] LSHC 122 (9 March 2011) paras 29-34; *Kalaile v Commissioner of Police* [2011] LSHC 130 (20 September 2011) para 15.

12 As amended by the Criminal Procedure and Evidence (Amendment) Act 10 of 2002.

space constraints but, owing to its relevance to the subject matter, it is undertaken elsewhere.[13]

It is clear from this study that there is a looming over-intrusiveness of the Lesotho military in the law enforcement sphere in the Kingdom where, in the normal course of things, it does not ordinarily have a role to play.[14] A distinction should be drawn between the military dabbling with mundane law enforcement of its own volition, a territory unfamiliar to soldiers as against their functioning in the more familiar military terrain under the relevant national legislation.[15] This issue recently arose as a challenge to the jurisdiction of the High Court in an application for *habeas corpus* by a detained senior military officer.[16] It was argued that the High Court, not sitting as a review court, lacked the jurisdiction to order the placing of Brigadier Mareka under open arrest when such discretionary power was vested in the defence force.[17] It was further contended before the Court of Appeal that the High Court had no jurisdiction to substitute the decision of the defence force with its own, as only the defence force is by law given the discretion to make such a decision which would place a person under closed or open arrest. In any event, the High Court did not sit as a reviewing court, nor did it sit as a constitutional court in terms of section 22 of the Constitution. The Court of Appeal rejected these arguments for the following reasons: First, not only because the applicant, the wife of the detainee, had *locus standi* to launch the *habeas corpus* application in terms of section 22(1) of the Constitution, but also because the High Court, in terms of sections 22(2)(a) and (b) of the Constitution, has inherent jurisdiction to hear and determine any application made pursuant to section 22(1), or to deal with any question arising in relation to any proceedings under subsection 22(3). The Court was unequivocal in holding that the High Court had jurisdiction to hear and determine issues arising from the present application related to the right to life under section 5; the right to personal liberty in terms of section 6; and freedom from inhuman treatment in section 8.[18] The Court further held, given the nature of the process with which the High Court was concerned, namely, an application for *habeas corpus,* that the question of the legality of the continued detention of Brigadier Mareka was squarely in issue before the court *a quo*, so that the Crown had to legally justify the arrest and continued detention of the Brigadier. Accordingly, it

13 C Okpaluba 'Damages for wrongful arrest, detention and malicious prosecution in Lesotho: The problem of quantum' (forthcoming).

14 See the judgment of Mahase J in the *habeas corpus* case of *Lerotholi v Commander of Lesotho Defence Force* [2007] LSHC 8 (2 July 2007). See also K Ramjathan-Keogh 'Trampling on the rule of law in Lesotho' *Daily Maverick* 30 October 2015.

15 See eg *Commander of Lesotho Defence Force & Others v Rantuba & Others* LAC (1995-1999) 687 discussed below, para 2.2.

16 See *per* Moiloa J, *Mareka v Commander LDF* [2015] LSHC 26 (1 July 2015) para 6.

17 See the Court of Appeal decision in *Commander LDF v Mareka* [2015] LSCA 23 (7 August 2015) paras 6, 12 & 26.

18 *Mareka* (n 16 above) para 6.

was totally irrelevant whether the High Court acted under its administrative law review power under the common law exercised in terms of rule 50 of the High Court Rule, or as a court competent to enforce a subject's right to liberty guaranteed under sections 5, 6 and 8 of the Constitution.[19]

From what follows it also appears that even the police, the constitutionally-empowered law enforcement agency of the state, tends to operate in apparent and, sometimes, complete disregard for the rights of the citizen and the rule of law. The cases of torture and brutality encountered in the article abundantly illustrate a total disrespect for due process, which is precisely the opposite of what the Constitution mandates and promotes and the CPEA protects.

2 Relevant constitutional guarantees and statutory protections

Although the current Constitution of Lesotho cannot strictly be termed a Westminster model constitution since the Kingdom abandoned her original Westminster Constitution of 1966 and after some two decades of dictatorship and military rule made a new Constitution in 1993. However, both Constitutions are, for the purposes of the protection of fundamental human rights and freedoms, one and same thing except for minor alterations. For instance, section 4, which lists all the guaranteed rights, and section 6 of the 1993 Constitution dealing with the right to personal liberty literally are similar in terms to the provisions of sections 1 and 3 of the independence Constitution of 1966. One peculiarity of both Constitutions is that in their guarantee of the right to personal liberty, in some instances, they incorporate established common law personal liberty rights[20] and, in other instances, constitutionalise the criminal procedural safeguards embedded in the criminal procedure legislation which pre-dated the independence Constitution. Accordingly, the lawfulness or otherwise of an arrest and detention often tends to depend on what provision of the personal liberty right in the Constitution was violated or the Criminal Procedure and Evidence Act that was contravened.

19 *Mareka* (n 16 above) para 12.

20 The often-cited speech of Lord Atkin at the Privy Council in *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 670 is a classic illustration of the attitude of the common law under discussion here. Extolling the English common law reference to the liberty of the individual even in the thriving days of colonialism, Lord Atkin emphasised: 'In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.'

2.1 Right to personal liberty

Arrest or detention is an exception to the constitutional prohibition that a person shall not be arrested or detained without the authority of the law in terms of section 6(1) of the 1993 Constitution if it was upon reasonable suspicion that the person had committed or was about to commit a criminal offence under the law of Lesotho.[21] In section 6(2) it is provided that any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language he understands, of the reasons for his arrest and detention. In terms of section 6(3)(b) any person who is arrested or detained upon reasonable suspicion that he or she has committed or is about to commit a criminal offence and who is not released

> shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within forty-eight hours of his arrest or from the commencement of his detention, the burden of proving that he has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

It is further provided in section 6(5) that if any person arrested or detained upon reasonable suspicion that the person has committed or is about to commit a criminal offence is not tried within 'a reasonable time', then

> without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

As one would expect in any fledgling democracy where the military constantly plays the role of neutralising the rule of law and the enforcement of fundamental human rights and freedoms, some of these provisions have come up for interpretation and enforcement in the courts. A few examples will suffice. In *Bolofo v DPP,*[22] the Court of Appeal was considering an appeal on an application for bail which the court rightly observed required it to balance two competing interests, namely, the interests of the criminal detainees in their basic right to liberty, on the one hand, and the interests of the community in criminal suspects being prosecuted, on the other. After deliberating upon the provisions of sections 6(3)(b) and 6(5) (on personal liberty) and 12(1), (2) and (8) (on the right to a fair trial) of the Constitution, Steyn P, who delivered the judgment of a unanimous court, held that the Constitution was not enacted merely for purposes of promoting the Kingdom as a country that expresses a commitment to acceptable international norms and standards of behaviour. Rather, it is a solemn and effective covenant regulating the relationship between the Crown

21 Sec 6(1)(e) Constitution of Lesotho.
22 LAC (1995-1999) 231.

and its citizens.[23] Further, although the Constitution provides for the basic right to personal liberty, as well as the presumption of innocence in criminal matters and speedy trials, in Lesotho delayed criminal trials are unfortunately the rule and not the exception,[24] a state of affairs that is unacceptable in a civilised state. The lengthy detention of suspects without trial is an arbitrary form of punishment which negates the right to liberty and the right to be presumed innocent. An accused person, who is deemed innocent until proven guilty by the Constitution, is entitled, once indicted, to be tried expeditiously.[25] The President of the Court of Appeal observed:[26]

> These provisions can only be meaningful if all those involved in the administration of justice perform their duties in a manner consistent with the ethos and the values that underpin them. This obligation rests on those who are part of the cohesive unit that administers criminal justice. Those involved include the following: the police officer that exercises the power of arrest and first detention; the judicial officer who is seized with responsibility to decree the continued detention of the accused or his release on bail in terms and conditions upon which this is to occur and regulates the conduct of the trial; the Director of Public Prosecutions who determines whether and when a prosecution should be instituted and upon which charges and who exercises a discretion as to whether to oppose bail or not; the High Court and this court as final arbiters of the fate of the accused; and ultimately the prison authorities who are obliged to see to the protection of the public by ensuring the secure incarceration of the committed prisoner and to see to his possible rehabilitation. Even the social services that facilitate the reintegration of the released prisoner into society is part of such a unit.

Another illustration which leads us more directly to the issue at hand – establishing liability for the purposes of wrongful arrest and unlawful detention – is *Maseko v Attorney-General*,[27] which reached the Court of Appeal as an application for *habeas corpus* and concerned the validity of the arrest and detention of the appellant in purported compliance with the provisions of section 13(1) of the Internal Security (General) Act 24 of 1984. In order to decide whether the arrest and detention were illegal, the Court of Appeal, *per* Ackermann JA, posed the following three questions: (a) Was the appellant at any time material to his arrest informed by or on behalf of the person arresting him of the reasons for his arrest and, if not, did such failure render the arrest unlawful? (b) Must the arresting officer be the member of the police force to have the reasonable suspicion required by section 13(1) of the Act or would it be sufficient if a second respondent entertained it? (c) Did second respondent, on the facts, discharge the onus of proving reasonable his suspicion that the appellant was a person involved in subversive activity? The Court's

23 *Bolofo* (n 22 above) 247D-E.
24 *Bolofo* 249F-G/H; *Letsie v DPP* LAC (1990-1994) 246 258J-259E.
25 *Bolofo* (n 22 above) 249I/J; *S v Geritis* 1966 (1) SA 753 (W) 754.
26 *Bolofo* 248I/J-249D.
27 LAC (1990-1994) 13.

answers to these three questions are dealt with in the sub-headings below.

2.1.1 Reason for arrest

The Court held that an arrested person was entitled to be informed in substance of the reason for the arrest. All along this has been a requirement of the common law,[28] the application of which was not excluded by section 13(1) of the Act.[29] The facts of *Maseko*, however, reveal that the appellant was never adequately informed of the reason for his arrest, thus rendering the arrest and detention illegal. Ackermann JA held, once it is accepted that such reasons have to be furnished to the person being arrested, then it is irrelevant for purposes of determining the extent to which the arrestee must be informed whether the arrest is with or without warrant. In effect, the rules established for determining how fully the reasons have to be explained in the case of an arrest with a warrant are equally applicable to the case of an arrest in terms of section 13(1).[30] It would not have been sufficient merely to have told the appellant that he was being arrested in terms of the Act or on account of the Act, as he could not from such information have determined whether he was being arrested in terms of section 13(1) on a charge of sabotage, or because he was a member of an unlawful organisation, or of unlawfully possessing a dangerous weapon, or for public indecency, or for a breach of the peace, or for intimidation or annoyance. The bare information that he had been arrested in terms of section 13(1) would not have served the purpose mentioned above:[31]

> In fact, the position is not far removed from that of a policeman who, in a country where the criminal law is codified, arrests a person and only tells such a person that he is being arrested for breaching the criminal code. It would not even have been sufficient … to have told appellant that he was being arrested because of a suspicion that he was reasonably suspected of being involved in subversive activity.

The definitions of subversive activities in section 3(1) of the Act cover a wide field. This is greater reason why the arrested person must know in substance the particular acts he is suspected of having committed or conspired to commit.[32]

Granted that at the time *Maseko* was decided the 1966 Constitution of Lesotho had long been suspended, such that the determination of the issues involved in that case could only have been based on the CPEA or the common law or both. As has been observed, it was the common law principle that came to the rescue of

28 See *Christie v Leachinsky* [1947] 1 All ER 567 (HL) 573A & C-E; *Walker v Lovell* [1975] 3 All ER 107 (HL) 115; *Brand v Minister of Justice* 1959 (4) SA 712 (A) 718B-C.

29 See now sec 6(2) Constitution of Lesotho.

30 *Maseko* (n 27 above) 29F-G.

31 *Maseko* 31B-E/F.

32 *Maseko* 32E-F.

the appellant. In the more recent case of *Kalaile v Commissioner of Police*,[33] the plaintiff could have relied on the constitutional or statutory protection or both, but he preferred to challenge the unlawfulness of his arrest in terms of section 32(4) of the CPEA because he had not been informed of the reason for his arrest.[34] It was for the arrestor to prove that it was lawful.[35] The judge was not convinced by the defendant's version of events, and found that there was 'a malicious ring' to the conduct of the officers who, as it were, approbated and reprobated: They arrested the plaintiff and, at the same time, wanted to let him go. Finally, they rearrested and detained him and, for that matter, beyond the 48 hour limit before taking him to court. There was no doubt that the officers as peace officers arrested the plaintiff for an alleged offence committed in their presence. As Harms DP observed, this power of arrest without a warrant could be used 'to arrest for petty crimes such as parking offences, drinking in public and the like'.[36] Again, even if police officers have the power and discretion to arrest, this power must be exercised within the bounds of rationality.[37] Chaka-Makhooane J accordingly held that the police officers clearly had the discretion and power to arrest which they could have used rationally: They could have warned the plaintiff. Rather, by adopting an attitude whereby the plaintiff either showed remorse or faced arrest and detention, their action smacked of *mala fides*. The police officers thereby acted unreasonably in arresting the plaintiff. They did not use their power and discretion rationally.

Adopting further the South African Supreme Court of Appeal judgment in *Sekhoto*,[38] the learned judge held that the suspected offence was relatively trivial and, consequently, the arrest was unnecessary and any form of detention was certainly irrational and unjustified. Indeed, there was no reasonable explanation for keeping the plaintiff in police cells for that length of time, even if it was still within the 48-hour period, for an alleged offence that was so trivial that the officers themselves were willing to release the plaintiff on warning.[39]

33 *Kalaile* (n 11 above).

34 *Nqumba v State President* 1987 (1) SA 456 (E); *Thamae v COP* [2001] LSCA 129 (4 December 2001).

35 *Maseko* (n 27 above) 17-18.

36 *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 6.

37 *Sekhoto* (n 36 above) para 14.

38 As above.

39 For a recent South African case on warning, see the Constitutional Court judgment in *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC). Although this case concerned whether in exercising their discretion to arrest a child, the police officers took into consideration the best interests of the child in terms of sec 28(2) of the 1996 Constitution, the Court took the opportunity to emphasise the duty on the part of the police in terms of sec 40(1) of the CPA to consider and weigh all the facts carefully and exercise a value judgment whether an arrest could be justified. In the instant case, they could have issued the child a

2.1.2 Who should entertain the suspicion?

As far as this question is concerned, the Court held that it was the police officer effecting the arrest who was required by section 13(1) of the Act to entertain the requisite suspicion. The police officer who arrested the appellant did so because he had the statutory power to effect such an arrest. He was neither an agent, servant nor instrument of anyone in this regard. In exercising his section 13(1) powers he had to satisfy himself that he was entitled to do so. The power of arrest in this instance was not different from an arrest under the CPEA. For, although the Minister of Police may be held liable in delict for the wrongful arrest of a person, the decision to arrest that person remains within the discretion of the police officer.[40] He or she is not compelled to arrest,[41] neither can the arrest be effected in obedience to superior orders[42] nor carried out merely to make a point to colleagues that he or she was not racist.[43]

Thus, in delivering judgment for a full court of the Lesotho Court of Appeal in *Jobo & Others v Commander, Lesotho Defence Force & Others,*[44] Chinhengo AJA held that the legislature in enacting the Lesotho Defence Force Act of 1966 had reposed the power on the manner of custody or form of arrest of an accused member of the force remanded for further investigation, summary trial or trial by court martial, on the unit commander. Consequently, a court cannot be called upon to scrutinise the merits of the unit commander's decision, but it may be called upon to scrutinise the manner in which that decision was arrived at. In doing so the court will have regard to the *Wednesbury* principles embedded in the modern concepts of illegality, irrationality and procedural impropriety.[45] Therefore, when in his judgment *a quo* Peete J stated that his court was not sitting to review the decision of the Lesotho defence force (LDF),[46] the Acting Justice of Appeal wondered[47]

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warning and made the father who was present undertake to bring the child to court when requested to do so. See the discussion of this case by C Okpaluba 'The end of the search for a fifth jurisdictional fact on arrest on reasonable suspicion: A review of contemporary developments' (2017) 30 *South African Journal of Criminal Justice* (forthcoming).

40 This is notwithstanding the fact that the officer was armed with a warrant: *Sekhoto* paras 28-29; *Domingo v Minister of Safety and Security* [2013] ZAECGHC 54 (5 June 2013) paras 2-3 & 7.

41 *Maseko* (n 27 above) 33C-H. See also *Minister of Police v Gamble* 1979 (4) SA 759 (A) 765G-768E; *Mhlongo & Another NO v Minister of Police* 1978 (2) SA 551 (A) 556G-567B.

42 *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E) paras 10-11.

43 *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (N) para 41.

44 [2015] LSCA 38 (5 November 2015) (*Jobo* case).

45 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

46 *Jobo & Others v Commander, Lesotho Defence Force & Others* [2015] LSHC 25 (18 June 2015) para 30.

47 *Jobo* (n 44 above) para 35.

> on what basis, if not review, one may ask, would he have made the following pronouncements – that the decision to place detainees under close or open arrest must be justified by the circumstances; section 87 was not complied with; the holding charges belatedly communicated to the detainees cured any illegality that may have occurred; and the failure of the LDF to furnish to the applicants before him the remand warrants and signed written reports were antithetical to the rule of law and due process.

Yet the case in hand calls upon the court to scrutinise the decision of the LDF on the basis of illegality and irrationality, as it has been established that a person exercising public power must act within the powers lawfully conferred upon him,[48] and its exercise should not be arbitrary or irrational.[49] In effect the decision of the person placed in authority must not be unreasonable and that no reasonable authority would ever consider making it. In order to avoid falling into such a pitfall, the decision maker, according to the *Wednesbury* unreasonableness principle, must take into account (relevant) factors that ought to be considered and not take into account (irrelevant) factors that ought to be avoided.[50]

2.1.3 Proving the reasonableness of the suspicion

Having found the arrest in *Maseko* to be unlawful on other grounds, the court was not compelled to but did find it advisable to deliver an opinion on the issue of reasonable suspicion as it pertained to the case. It was held that the jurisdictional facts justifying arrest under section 13(1) were not dependent on the subjective state of mind of the arresting member of the force, but on an objective criterion, depending on proof by the second respondent that he, as a matter of fact, entertained the requisite suspicion and that such belief was reasonable in all the circumstances. In effect, the existence of the 'reasonable suspicion' is objectively justiciable.[51] In any event the court must decide whether the suspicion was entertained and whether it was reasonable. In order so to decide, Ackermann JA referred to the following judgments:

- Lord Devlin said in *Shaban Bin Hussein v Chong Fook Kam*[52] that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the

48 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56.

49 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa* 2000 (2) SA 674 (CC) para 20.

50 *Jobo* (n 46 above) para 36. See the following English cases: *Holgate-Mohammed v Duke* [1984] AC 437 (HL) 443; *Al Fayed* & *Others v COP for the Metropolis* [2004] EWCA Civ 1579 (CA) paras 82-83; *Castorina v Chief Constable of Surrey* [1996] LGR 241 (CA) 249. See also the New Zealand cases of *Nielsen v Attorney-General* [2001] 3 NZLR 433 (CA); *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC); *Whithair v Attorney-General* [1996] 2 NZLR 45 (HC); *Fok Lai Ying v Governor in Council* [1997] 3 LRC 101 (PC).

51 *Maseko* (n 27 above) 34C-E. See also *Minister of Law and Order v Hurley* 1986 (3) SA 568 577I-583H.

52 [1969] 3 All ER 1626 (PC) 1628.

obtaining of *prima facie* proof is the end. Thus reasonable suspicion cannot be equated with *prima facie* proof.

- Scott LJ had held in *Dumbell v Roberts*[53] that the requirement that before arresting the police officer must satisfy himself that there in fact existed reasonable grounds for suspicion of the arrestee's guilt, is limited to the police having nothing near a *prima facie* case for conviction.
- Wentzel JA of the Lesotho Court of Appeal held in *Solicitor-General v Mapetla*[54] that, although a suspicion may not be equated with *prima facie* proof it must be reasonable: It must be such that a reasonable person in possession of the facts would agree that there was reasonable ground to suspect that the person involved was concerned in subversive activity.[55]

As there was no iota of evidence leading to the ground upon which the arrestors in *Mapetla* based their suspicion that the senior and respectable chief in that case was involved in any subversive activity against the state, so, also, the officer concerned in *Maseko* did not possess the necessary suspicion, thus rendering the arrest and detention in both cases illegal. Accordingly, the allegations by the second respondent against the appellant did not objectively amount to suspicion of involvement in subversive activity, far less a reasonable one, so that the requirements of section 13(1) had not been satisfied. The border line between capricious or arbitrary arrest and the safeguard afforded the citizen is the requirement of reasonableness on the part of the arresting authority. Thus, Ackermann JA held that a bald statement that the appellant had indulged in subversive activities, as defined in the Internal Security Act, was insufficient without supplying the information on which that suspicion was held. It was not sufficient merely to state a conclusion without supplying some information on which such a conclusion or suspicion was based. To begin with, the evidential burden of proof could only be discharged by proof of facts. Again, by not proving facts in support of the conclusion, the court would be precluded from assessing the reasonableness of the conclusion or suspicion and, thereby, precluded from the finding that the onus has been discharged. The reasonableness of the suspicion could only be assessed from the facts shown, not the conclusion drawn.[56]

53 [1944] 1 All ER 326 (CA) 329.

54 [1985] LSCA 126 (26 July 1985).

55 For more recent South African cases on reasonable suspicion to arrest and the legal justifiability of the detention, see C Okpaluba 'Reasonable suspicion and conduct of the police officer in arrest without warrant: Are the demands of the Bill of Rights a fifth jurisdictional fact' (2014) 27 *South African Journal of Criminal Justice* 325.

56 *Maseko* (n 27 above) 35C/D-F. In *Phiri v Commander, RLDF* LAC (1990-1994) 233 238 B/C-E, Steyn JA held that having regard to the draconian nature of the Lesotho Paramilitary Force Act 13 of 1980 as amended by Order 3 of 1990, departing as it were from the principle that a subject should not be deprived of his or her liberty without due process, and having regard to the nature of the discretion conferred on the commander of the army in the instant case, it was only the commander who could properly depose of his own mental processes as

2.2 Right to legal advice

Following the unrest which had occurred in Lesotho on 15 October 1998, the respondents in *Commander of Lesotho Defence Force & Others v Rantuba & Others,*[57] all members of the LDF, were arrested and detained by the military authorities for allegedly having participated in a mutiny. They were denied access to their legal advisers. Their wives, therefore, made an urgent application for an order directing the appellants to allow the detained persons' access to their legal advisers and an order that they be charged or released forthwith. Two issues arose for determination before the Court of Appeal: (a) the entitlement of a person detained, under the military law of Lesotho, to access to a legal adviser; and (b) whether the order of the High Court directing that the detainee be charged within eight days or released had been correctly granted.

The full court of the Lesotho Court of Appeal held that at common law, there was a fundamental or basic right of access to legal advice,[58] which is a corollary of the right of access to court and is a right that survives incarceration. Such right may exist even where the right to legal representation has been lawfully excluded. Although this right may be taken away or attenuated by legislation,[59] the Constitution has not removed it. In any case, the onus of proving such taking away or attenuation is on the person who so asserts.[60] Section 24(3) of the Constitution did not exempt the military from its provisions since that section is not included in those specifically mentioned as affected by military law. In *Jobo*[61] the full court of the Court of Appeal held that an understanding of the provisions of section 24(3) of the Constitution started by appreciating the essence of section 2 of the same Constitution, which makes the Constitution the supreme law of Lesotho such that any other law that is inconsistent with it, to the extent of the inconsistency, shall be void. With this in mind, it follows that section 24(3) could not have authorised parliament to enact a law that would go against the fundamental premise of the Constitution, that is, a law that does not accord with the principle of constitutionalism. For instance, a court martial cannot lawfully be

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to whether he actually formed the necessary opinion which led to the arrest and detention of the persons concerned and deposed to the facts he relied upon to do so. In other words, the available evidence and circumstances of the case were not sufficient to support the view that the commander relied on evidence and circumstances to form the necessary opinion.

57 LAC (1995-1999) 687 (*Rantuba*).

58 *Rantuba* (n 57 above) 691A-B. See also *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 187; *R v Slabbert* 1956 (4) SA 18 (T) 21G; *Brink v COP* 1960 (3) SA 65 (T); *S v Shabangu* 1976 (3) SA 555 (T) 558.

59 *Whittaker v Roos and Bateman* 1912 AD 92 122-123; *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) 39C-E; *Mandela v Minister of Prisons*1983 (1) SA 938 (A) 957D-F.

60 *Rantuba* (n 57 above) 691D-F/G. See also *During NO v Boesak* 1990 (3) SA 661 (AD) 673G-H & 674B-C; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (AD) 153D-I.

61 *Jobo* (n 44 above) paras 25-27 & 70-71.

established or vested with powers that 'collide with the principles and the spirit of the Constitution'.[62] The Court of Appeal further upheld *per* Maqutu J[63] to the effect that as much as military law is the basis of discipline in the armed forces, therefore a disciplined force could not be based on the ordinary law applicable to civilians.

However, it does not follow from this that those who join the armed forces should be required to surrender the right to be treated fairly or that they should be expected to waive their human rights. In other words, a member of the force, whatever his or her rank, does not cease to be a citizen so as to lose his or her constitutionally-guaranteed rights. The truth of the matter is that while a member of the armed forces remained subject to the ordinary laws of the state he or she is also subordinate to an 'entirely distinct code of military law'. The LDF Act and Regulations contain a number of provisions designed to procure, secure and ensure the legality of arrests and detention of soldiers suspected of having committed offences and these provisions are consistent with the Constitution. However, because these provisions restrict the ordinary rights of persons affected by them, they must be interpreted strictly.[64] Commenting on the judgment of Hlajoane J in the second of the consolidated *Jobo* appeals, Chinhengo AJA held:

> The judge *a quo* was of the view that the appellants contended that the respondents' rights under Chapter II have been taken away by section 24(3) of the Constitution. She could not have been correct. Neither did the appellants hold that the respondents have no rights at all nor could they have validly taken that position, assuming they so contended.

The Acting Justice of Appeal referred to *Mandela v Minister of Prisons*[65] and *Rantuba* for the proposition that a detainee under military law retains his common law rights unless such rights, expressly or by necessary implication, have been attenuated by statute. The same must be the position with respect to rights under Chapter II. As stated in *Rantuba*, the retention of rights guaranteed under Chapter II is not a matter which depends upon the conferral by statute, but rather on whether the statute attenuates (those rights). This means that the rights under Chapter II may be attenuated by military law but not extinguished. 'Attenuate' ordinarily means to weaken or reduce in force or effect; to weaken; to dilute. The rights under Chapter II, therefore, may only be 'weakened' or 'diluted' under a military law in order to align them with the exigencies of the military.

Further, referring to *Sekoati & Others v President of the Court Martial & Others*,[66] the court addressed the issue of judicial independence in

62 Approving *per* Maqutu J *Rantuba & Others v Commander, Lesotho Defence Force & Others* CIV/APN/418/98; [1998] LSCA 110 13.
63 *Rantuba* (n 62 above) 12-13.
64 *Mbali v Minister of Police* 1954 (2) SA 596 598C.
65 1983 (1) SA 938 (A).
66 LAC (1995-1999) 812 827F-828C & 831H.

the context of section 12(1) as read with section 118(2) of the Constitution, which provides a clear basis for understanding the scope, import and effect of section 24(3).[67] It was held in that case that the framers of the Constitution deliberately enacted the unique section 24(3) in order to define a different legal regime to govern military affairs through military tribunals which are different from civilian courts. In effect,[68]

> [t]he Lesotho Constitution creates a particular legal regime for the military in general and courts-martial in particular. The full panoply of fundamental rights is expressly not available to the military. Courts-martial must nevertheless be independent – but in the sense and to a degree appropriate to their inherent nature as military, not civilian, courts.

The Court of Appeal then held that the appellants in *Jobo* could never take the position that members of the military have been stripped of their fundamental rights and freedoms under Chapter II. The rights of military personnel, in terms of section 24(3), are attenuated to the extent provided in the LDF Act and the regulations made thereunder. Section 24(3) provides for the limitation of fundamental rights and freedoms of military personnel by a military law, but only to the extent that the limitation is fair, reasonable and justifiable in a democratic society based on principles and objectives of the Constitution. However, no issue has been raised of the current military law not measuring up to this standard.[69]

In short, the common law right of access to legal advice had not been removed by the Constitution.[70] Nor is there anything in the Lesotho Defence Force Act 4 of 1996 which could be read as having removed the right of access to legal advice in respect of military personnel. The Court further held that the commander of the army did not possess the power to choose to permit or deny access to legal advisers by detainees, as this right has been conferred by the common law and not by statute.[71] Finally, there is no evidence to show that the detainees' access to legal advisers would impact negatively on

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67 Sec 24(3) of the Constitution of Lesotho 1993 provides: 'In relation to any person who is a member of a disciplined force raised under a law of Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 5, 8 and 9.'

68 LAC (1995-1999) 812 831H.

69 *Jobo* (n 44 above) para 71.

70 *Rantuba* (n 57 above) 695D.

71 *Rantuba* 695C. Compare *Thornhill v Attorney-General of Trinidad and Tobago* [1980] 2 WLR 510 (PC) where, approving the judgment of Georges J, the Privy Council held that the right of a person arrested and detained as the appellant found himself on 17-20 October 1973, to consult a lawyer of his choice was spelt out in sec 2(c)(ii) of the Constitution of Trinidad and Tobago 1962 and proclaimed by sec 1 to be a right that had existed on the coming into force of the Constitution and had continued to exist. Therefore, if there was a law in force in Trinidad and Tobago, whether written or as part of the unwritten common law which empowered the police to prevent a person in the situation of the appellant from exercising that right, it was for the respondents to prove that it did not infringe that right.

internal stability, more especially because the commander had arbitrarily permitted the detainees' access to their family members while denying them access to their legal advisers.

2.3 The charge or release issue

The second issue in *Rantuba* related to the interpretation and application of the provisions of section 6(3) of the 1993 Constitution, which requires arrested and detained persons to be brought to court expeditiously (normally within 48 hours) or to be released. It was held that this principle applied to military personnel save to the extent that they were governed by special legislation, as provided for in section 24(3) of the Constitution.[72] Further, in the prevailing circumstances of instability in the country arising from mutiny by soldiers, there had not been an undue delay in investigating allegations against the detainees and bringing them to trial in terms of the applicable legislation, namely, section 89 of Lesotho Defence Force Act 4 of 1996 and the relevant rules and regulations. In the circumstances, the trial court was wrong to have fixed a period of eight days within which the detainees were to be charged or released.[73]

2.4 Torture, inhuman and degrading treatment

Section 8(1) of the Constitution of Lesotho clearly protects everyone from torture or inhuman or degrading punishment or other treatment.[74] These provisions notwithstanding, acts of cruelty are from time to time perpetrated by the Lesotho military, as can be seen in the following cases. For instance, the dastardly and barbaric acts witnessed in *Mohlaba & Others v Commander, Royal Lesotho Defence Force & Another*[75] prompted Leon JA to liken the treatment meted out to the appellants as reminiscent of the exercise of the KGB and the Gestapo, and the treatment meted out to the late Steve Biko of South Africa, which conduct called for the strictest censure in Lesotho.[76] The appellants were held in detention in deplorable conditions for a considerable period. They were tortured and assaulted. The plaintiffs were suspected of misappropriating certain moneys at the Labour Construction Unit; they were detained and taken to the 'torture

72 *Rantuba* (n 57 above) 695G.

73 *Rantuba* 697D-E. As was the case in *Letsie v Commander, Royal Lesotho Defence Force & Another* Civ/T/538/05 (28 July 2009) (*Letsie*) para 26, the defendants in *Mokebe v Policeman Mphats'oane & Others* CIV/T/115/07 (25 February 2009) did not contest liability. Indeed, they did not even plead. Chaka-Makhooane J, therefore, had to assume the facts pleaded by the plaintiff who had been arrested and detained without being charged or brought to court. The plaintiff alleged that he had been unlawfully and maliciously arrested and detained for 58½ hours, which was longer than the 48 hours within which the arresting officer should have brought him before court. According to the judge (para 30), '[i]t is trite that the lawful period of detention is forty-eight hours'.

74 Compare sec 5(1) of the 1966 Constitution.

75 LAC (1995-1999) 184.

76 *Mohlaba* (n 75 above) 191F/G-H.

chamber'. Although the manner of their torture differed, the general conditions of their detention, food and absence of facilities were similar.

The facts of *Mohlaba* were in many ways more or less replicated in *Letsie v Commander, Royal Lesotho Defence Force & Another*[77] with regard to the treatment by the Lesotho military of one of its high-ranking officers. First, the claim was for pain and suffering arising out of torture and assault by members of military intelligence and military police. Second, the defendants admitted liability, and the High Court of Lesotho was called upon to determine the issue of *quantum*. Although the insanitary conditions of detention of the plaintiff in *Letsie* was equally deplorable, it was the torture that appeared more pronounced than in the *Mohlaba* case. In *Letsie*, the plaintiff alleged that he had been insulted, belittled and humiliated before his junior officers. The trial judge had to accept the evidence of the plaintiff, which was not contested by the defendants. The Court of Appeal had to take into account the facts of these two cases, including the version of the torture involved, in quantifying the damages awarded in each case.

2.4.1 Justice Peete on the 'sub-culture of brutality'

In *Kopo and Kopo v Commander LDF,*[78] Peete J addressed what he called 'the sub-culture of atrocity, brutality and inhuman treatment' that appeared to pervade the interaction between the members of the Lesotho military and the community at large. The judge was commenting on the amounts claimed by the plaintiffs as being rather high and that they ought to be reduced, but that 'what remains unmoved or unshakable are the sad and somber facts of the arrest and detention, their unlawfulness, their unfoundedness and absence of just cause'. Recounting the sordid facts of this case, better expressed in the judge's own words, Peete J said:[79]

> The first plaintiff, a retired soldier of high standing, was arrested in public – probably in full view of his work mates; was handcuffed and bundled into an army van at gun point and driven post haste to Ratjomose barracks – subjected to rigorous interrogation that was based on misinformation about ABC links. The first plaintiff was continuously kept handcuffed for about 26 hours and not temporarily allowed even a free hand to enable him pass water on his own. An ordinary Mosotho man values his manhood and his 'penis' as one of his most private and precious assets of his body. A youngish soldier, Mofomobe had an unpleasant duty to unzip the pants of the first plaintiff and take out his penis so that he could pass water. This disgraceful humiliation was done twice. One wonders: Having arrested, searched and handcuffed first plaintiff, why was first plaintiff's other hand [not] let free and he be escorted under armed guard to the toilet so that he might be able to relieve himself? The only other motive – beside alleged security reasons – could only be to humiliate first plaintiff where it hurt

77 Civ/T/538/05 (28 July 2009); LAC (2009-2010) 549.
78 [2011] LSHC 122 (9 March 2011).
79 *Kopo and Kopo* (n 78 above) paras 38-39.

> most – his private manhood! Humiliation suffered by him was most extreme and hurtful to any reasonable, decent, respectable and right thinking Mosotho man. At any rate, none of the senior army officers thereat could have tolerated the said treatment meted unto themselves. The Biblical advice '… do unto others as you would like them do unto yee …' still has a moral force even in our courts! The treatment meted to first plaintiff was atrocious, humiliating and shameful as well as unbefitting the serving members of the LDF. Brutality, atrocity and cruelty, besides being wholly uncivilized, dehumanizes other beings. Not only delictual but criminal liability may be attracted. Brutality and inhuman or sadistic treatment have been outlawed by many international instruments, especially the 1948 Universal Declaration of Human Rights. To allow, or to tolerate or to condone acts of cruelty and inhumanity tarnishes both our national image and our very civilization.

The acts of torture, inhuman or degrading treatment have remained unabated in Lesotho for it appears that at the slightest sign of political upheaval, one or other section of the Kingdom's military would take the law into its own hands, and this recourse finds expression in the arrest, detention and kidnapping of members of the other section or group in the army. Quite recently, while hearing the applications for *habeas corpus* in the case of *Jobo & Others v Commander, Lesotho Defence Force & Others*,[80] Peete J once more reverted to the issue. Several serving soldiers were arrested under section 86 of the Lesotho Defence Force Act 4 of 1996 on charges under sections 48 and 49 of the Act, and the question before court was whether such arrests were unlawful, amounting to kidnapping or abduction. Delivering his judgment, Peete J made the following remarks:[81]

> Today, we live in a democratic Lesotho and it is imperative that all institutions and organs of state – without exception – must discharge their functions according to the Constitution, to the law and in a civilised manner; brutality, cruelty or sadism cannot be countenanced by this court because all such are evil acts against our human nature as Basotho and are acts that violate even the will of God. Foot shackles – this court observed – indeed remind one of the days of slavery when men and women in West Africa were tightly shackled and shipped across the Atlantic Ocean to North America. During some of these perilous journeys, some slaves were often thrown overboard to enlighten the ships during ocean storms! Slavery in whatever form or shape is therefore totally outlawed on absolute terms in section 9 of the Constitution of Lesotho ... Sitting through all the *habeas corpus* proceedings, the court has strongly deprecated and bemoaned the manner in which the detainees are publicly brought to court in shackles and chains and handcuffs.[82] Whilst the Lesotho Defence Force authorities have – and the court thanks them for this – dutifully and correctly complied with and respect *habeas corpus* orders, all detainees regardless of rank should be treated and escorted in a humane and civilised

80 [2015] LSHC 25 (18 June 2015).

81 *Jobo* (n 46 above) paras 7-8.

82 *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC), where Manyarara AJ condemned in no uncertain terms the placing of prisoners in 'leg irons' as an infringement of their rights to human dignity under art 8 of the Constitution of Namibia 1990. For other cases of cruel and inhuman treatment, see *Namunjepo v Commanding Officer, Windhoek Prisons* 1991 (3) SA 76 (NmS); *Taunoa v Attorney-General* [2008] 1 NZLR 429 (NZSC); *Peters v Marksman* [2001] 1 LRC 1 (St Vincent and the Grenadines).

> manner that accords with human dignity and respect. This is not negotiable because its repetition will tarnish the reputation of Lesotho in the international landscape and perhaps irreversibly so.

Commenting further on the said sub-culture, the judge observed as follows:[83]

> A sub-culture of atrocity, brutality and inhuman treatment should not be allowed to flourish in the armed forces; besides dehumanizing the victims, it promotes a self-perpetuating desire of revenge and retribution and can manifest itself in terrible and long lasting post-traumatic effects to all persons concerned. It also has a rippling labeling effect throughout the military institution. Very high standards of behaviour and discipline are required from the army personnel and at times these high standards call for high personal sacrifice of life and limb and at the expense of their own human rights.[84] A soldier obeys commands at all times and much has been said and written about the topic 'Obedience to Superior Orders'.[85]

These comments were prompted by a number of incidents. First, the detained soldiers were brought to court in leg shackles and handcuffs and were being escorted by masked and heavily-armed security personnel. Second, each soldier testified in court of having been subjected to cruel treatment and showed the court fresh and deep cuts and bruises on their wrists, probably caused by tightened handcuffs.[86]

3 Where liability is conceded

A common feature discernible from these cases can be put as follows: (a) that there is the tale of brutality by the police and army officers on individual citizens on the pretext of enforcing the law; and (b) that the concessions that are made in most of the cases can be baffling. Most often the defendant does not dispute liability and *quantum* remains the only issue for the court to determine.[87] Where this happens one can only ascertain the grounds that led to liability being conceded from the facts upon which the quantification analysis was

83 *Kopo and Kopo* (n 78 above) paras 40-41.

84 Sec 24(3) Constitution of Lesotho.

85 See eg *R v Mokhantso* CRI/95/02; MJ Osiel 'Obeying orders: Atrocity, military discipline, and law of war' (1998) 86 *California Law Review* 938.

86 *Jobo* (n 46 above) para 5.

87 Eg, in *Molise v Officer Commanding Thaba Tseka Police Post* [2013] LSHC 74 (11 March 2013) paras 10 & 13-18, the plaintiff abandoned his claim for unlawful arrest and detention for alleged stock theft because the police had reasonable suspicion to that effect while the defendants did not contest his claim for assault in police custody. Mahase J emphasised that an assault in whatever form is a delict affecting a person's bodily integrity and a breach of the fundamental right to the protection against torture or inhuman or degrading punishment or other such treatment by anybody upon a human being under sec 9(1) of the Constitution of Lesotho. The judge held that as a human being his right to be treated 'humanely and with dignity are protected under the Constitution'. The plaintiff's evidence that he had been subjected to torture, inhuman and degrading punishment for one hour by police officers whose duty it was to uphold the rule of law and to

undertaken by the court. In such a situation the discussion centres on those instances (a) where assaults were committed for no apparent reason; (b) where the plaintiff was detained on no legal basis; and (c) where the parties agree on the terms of settlement, whether one of them can renege on those terms or opt out of the agreement. While the first two issues are discussed below, the latter point is discussed in the context of quantification, the classification where it belongs.

3.1 Assault for no just cause

The alleged 'offence' of the plaintiff in *Morobi v Commissioner of Police*[88] was that he was being disrespectful to government officials simply because, when the police officers asked him to stop, he did not get out of the car but merely lowered his window. In the process of barraging the plaintiff with questions the officers spotted an incorrect entry of the expiry date of the plaintiff's learner's licence of which the plaintiff was not even aware. Instead of arresting him, if they had reasonable grounds to suspect that he had committed an offence, they embarked on inflicting a physical assault on him, using pepper spray in his eyes and ears and assaulting him with police sticks. They demanded money, which the plaintiff did not have. They left him waiting at the scene of the incident for several hours as instructed, but they did not return. A medical report confirmed an assault on the plaintiff's ribs with a blunt instrument; a severe degree of force was used causing injury to life, with a 'moderate, degree of immediate disability – moderate degree of long term disability – partial'. The plaintiff used to work at a place where he carried bags of seeds which he could no longer do after the assaults. The assaults took place in public and, as a pastor, his congregation started to look at him differently after the attacks. All these factors caused humiliation and a lowering of his dignity.[89]

The recent case of *Mokaka v Commissioner of Police*[90] is another case of assault involving no arrest or detention.[91] The police officers had ordered the plaintiff, a construction worker, returning from a circumcision school, to drop his stick and raise his hands, which he

protect him was not contradicted. However, it was more disturbing to find that the cattle allegedly stolen by him were not found in his possession, and it was for that reason that the police released him from custody. Meanwhile, the 'unjustified brutal torture and assault' which the judge found 'shocking and deplorable' and 'clearly criminal offences' had taken place. In other words, the cattle in question had been found but not in the plaintiff's possession, even though the police had already subjected the plaintiff to 'intensive, prolonged brutal assault and torture on a suspicion that it was the plaintiff who had stolen same'.

88 [2012] LSHC 1 (9 February 2012).

89 *Morobi* (n 88 above) paras 20-21 & 27. See also *Raposholi v Commissioner of Police & Another* [2007] LSHC 67 (30 May 2007); *Makhasane v Commissioner of Police* [2011] LSHC 20 (3 January 2011).

90 [2014] LSHC 47 (11 February 2014).

91 See also *Lephatsoe Lebajoa v Commissioner of Police* [2007] LSHC 156 (31 May 2007); *Malatsi Lebajoa v Commissioner of Police* [2010] LSHC 99.

did. One of the police officers assaulted him with the stick and left with it. Medical evidence showed that the plaintiff had sustained a 'deformed left forearm, reduced range of movement at the elbow joint as well as pain and tenderness over the deformed part of the arm'. As a result of the injuries sustained, the plaintiff will 'not be able to do normal work at his place of employment because of the reduced range of movement'. The assault was inflicted in full public view where some villagers had gathered nearby, apparently to watch the incident. The court had no difficulty in accepting the plaintiff's evidence, as collaborated by eye witness testimony, as more probable than the entire afterthought story of the defendant, which Monapathi ACJ described as 'not only riddled of improbabilities and absurdities but also preposterous and laughable. Suffice to say that no reasonable court may accept it.'[92]

3.2 Where there was no basis for detention

Although the defendants in *Kopo and Kopo v Commander LDF*[93] admitted that the plaintiff had been taken in for questioning, they conceded that there was no lawful basis whatsoever for detaining him. Even after his release the following day, no further investigation or steps were taken regarding any involvement of the plaintiff in the prevailing insurgency, which was the reason for his arrest in the first instance. Peete J considered 'aggravation and humiliation' and the 'sub-culture of brutality and inhuman treatment'[94] involved in this case before the issue of *quantum*. The trial judge referred to *Mohlaba*,[95] where Leon J described the treatment meted out to the plaintiff as 'barbaric' and 'disgraceful', and observed that the aggravation was very extreme, and detentions very lengthy. The judge also referred to *Letsie*, where Scott JA found the type of treatment received by the plaintiff as 'almost too ghastly to contemplate'.[96] The only difference between these cases and *Kopo and Kopo* was that the officer had neither been tortured nor physically assaulted, but otherwise he was 'grossly humiliated both during the relentless interrogation and when he was caused to urinate with the help of a junior officer unzipping his pants and taking out his penis to urinate'.[97]

4 Unlawful arrest and detention

Except in those instances where, as has been observed, police officers have displayed wanton abuse of their powers by inflicting physical

92 *Mokaka* (n 90 above) para 18.
93 *Kopo and Kopo* (n 78 above).
94 *Kopo and Kopo* paras 38-41.
95 *Mohlaba* (n 75 above) 191G & J.
96 *Letsie* (n 73 above) para 14.
97 *Kopo and Kopo* (n 78 above) para 44.

injuries by way of assault on hapless individuals without any provocation whatsoever and without any intention of arresting or detaining their victims and, therefore, the claims did not include wrongful arrests or detentions, most of the cases discussed and those to be discussed later in the article involve claims for wrongful arrest and detention. For instance, there are the cases of *Mapetla v Solicitor-General*[98] and *Kopo and Kopo v Commander LDF*,[99] where there were arrests and detentions for no apparent reason. Similar are the cases on torture: *Mohlaba v Commander, Royal Lesotho Defence Force & Another*,[100] and *Letsie v Commander, Royal Lesotho Defence Force.*[101] Since these cases have already been discussed in the article, it will suffice to limit the present discussion to the case cited below.

Having held in *Lethole v Commissioner of Police*[102] that in terms of section 6 of the Constitution it is every citizen's right to enjoy his or her right to personal liberty and not to be arrested or detained save as may be authorised by law, Majara J proceeded to hold that this right 'is one of the most fiercely-guarded fundamental rights in a constitutional democracy' and any interference with it must be done under very compelling and lawful circumstances, to the extent that even where the subject is detained by law enforcement agents, 'it should only be for the purpose of bringing him to court and for no other reason least of all an unlawful one'.[103] This argument is in line with the reasoning of the South African Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto*,[104] where Harms DP reiterated the purpose of an arrest given the controversy that trailed that case to the Appeal Court. He held, first, that it was clear that the power to arrest was to be exercised only for the purpose of bringing the suspect to justice; however, the arrest was but one step in that process.[105] Second, the arrestee was to be brought before court as soon as was reasonably practicable,[106] and the authority to detain the suspect from that moment on was at the discretion of the court.[107]

98 [1984] LSHC 123 (29 November 1984).
99 *Kopo and Kopo* (n 78 above).
100 *Mohlaba* (n 75 above).
101 *Letsie* (n 73 above).
102 [2014] LSHC 74 (12 August 2014).
103 *Lethole* (n 102 above) para 15. See also *S v Malinga* 1962 (3) SA 377 380.
104 *Sekhoto* (n 36 above).
105 *Sekhoto* para 43.
106 Sec 35(1)(d) 1996 Constitution.
107 *Sekhoto* (n 36 above) para 44. In *Directorate of Corruption and Economic Offences v Dlamini* LAC (2009-2010) 173 para 12, it was held that the respondent's arrest had been unlawful as he had been arrested by officers of the directorate who purported to act pursuant to a warrant of arrest to effect the arrest which was not directed at them but at peace officers as defined in sec 3 of the CPEA, which definition does not include the directorate officers. However, it was held that, when the respondent was taken to the magistrate's court and remanded in custody to await trial on specific criminal charges, the detention that followed was lawful and not tainted by the prior unlawful arrest. See further *Abrahams v Minister of Justice* 1963 (4) SA 542 (C) 545G-546A; *Isaacs v Minister van Wet en Orde* [1996] 1 All SA 343 (A) 351.

5 Malicious prosecution

It is universally accepted that there are four well-recognised elements that a plaintiff in an action for malicious prosecution must prove in order to succeed.[108] It is also well known that these requirements originated in English law[109] and were imported into the Australian,[110] Canadian,[111] Namibian,[112] New Zealand,[113] South African[114] and other Commonwealth jurisdictions.[115] The same four elements that are required in those other jurisdictions are to be proved under the Lesotho law of delict.[116] These are that (a) the defendant set the law in motion, that is, initiated, instituted or continued the

108 All four elements of malicious prosecution have recently been analysed by C Okpaluba "'Prosecution" in an action for malicious prosecution: A discussion of recent Commonwealth case law' (2013) 2 *Journal of South African Law* 236; C Okpaluba 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions' (2013) 16 *Potchefstroom Electronic Review* 241; C Okpaluba 'Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth decisions' (2012) 37 *Journal for Juridical Science* 65.

109 *Per* Lord Keith, *Martin v Watson* [1996] AC 74 80C; *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 paras 26-27; *Alford v Chief Constable of Cambridgeshire Police* [2009] EWCA Civ 100 paras 48 & 153; *Howarth v Gwent Constabulary* [2011] EWHC 2836 (QB) paras 130-131; *Qema v News Group Newspapers Ltd* [2012] EWHC 1146 (QB) para 2.

110 *Beckett v NSW* [2013] HCA 17 para 4, *A v New South Wales* (2007) 230 CLR 500 502-503;

111 *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC) para 42, *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9 para 123, *Miazga v Kvello Estate* [2009] 3 SCR 339 para 3, *NB Real Estate Association v Estabrooks* 2014 NBCA 48 para 22.

112 *Meyer v Felisberto* 2014 (2) NR 498 para 22, *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) 404F.

113 *Deliu v Hong* [2013] NZHC 735 para 68; S Todd (ed) *The law of torts in New Zealand* (2009).

114 *Minister of Safety and Security NO v Schubach* [2014] ZASCA 216 para 11; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 16; *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 8; *Bayett & Others v Bennett & Others* [2012] ZAGPJHC 9 para 167; *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 (E) 373E-G.

115 See eg Trinidad and Tobago *Imran Khan v Attorney-General* Claim CV2012-04559 (17 November 2014) para 46; *Morgan v Attorney-General of Trinidad and Tobago* Claim CV2013-03924 (20 February 2015) para 12, *Wills v Voisin* [1963] 6 WIR 50.

116 *Kalaile* (n 11 above) para 21. In addition to these four elements on which the plaintiff must satisfy the court on a preponderance of probabilities, Mamba J would include (a) the fact that the police who arrested the plaintiff was at the time acting in the course and within the scope of his or her employment as servant of the state; and (b) that his or her arrest and detention were both unlawful – *Simelane v COP* [2010] SZHC 67 (22 April 2010) para 9. In Botswana, Sarkodie-Mensah J in *Moleboge v Botswana Police Service* [2006] 1 BLR 430 433G added to the four ingredients (a) that the defendant acted with *animus iniuriandi* – quite apart from being actuated by malice; and (b) that the plaintiff suffered as a result, that is, the damage factor. See also *per* Rannowane J in *Khulumani v Attorney-General of Botswana* [2010] BWHC 297 (24 September 2010) para 28. Compare *Thokwane v Attorney-General* (1998) BLR 221 230 (*per* Aboagye J); *Gaokibegwe v Mokokong* [2009] BWHC 77 (20 March 2009) para 7 (*per* Kirby J) where the five features enumerated included the element of damages but excluded the factor of *animus iniuriandi* as distinct from malice.

proceedings;[117] (b) the defendant acted without reasonable and probable cause;[118] (c) the defendant acted with malice (or *animo iniuriandi*);[119] and (d) the prosecution failed.[120] Although damage is not often included in this list, it is most probably assumed, as in most torts or delict actions, that damage must be proved in order to succeed in such a claim.

That the foregoing applies to Lesotho is garnered from the judgment of Cullinan CJ in *Moloi v Director of Public Prosecutions*,[121] which case arose in the context of contempt of court. In that case the Chief Justice extensively reviewed the law of malicious prosecution from its early beginnings; the misgivings expressed by Professor Lee earlier in the twentieth century; and the absence of reasonable and probable cause in the Roman-Dutch origins of the action.[122] The Chief Justice also made reference to the South African courts embracing the proof of both an indirect or improper motive on the

117 For a review of recent Commonwealth case law, see C Okpaluba 'Does "prosecution" in the law of malicious prosecution include malicious civil proceedings? A Commonwealth update' (forthcoming) 2017 *Stellenbosch Law Review.*

118 A more incisive deliberation on this element of malicious prosecution was conducted by the High Court of Australia in *A v New South Wales* (2007) 230 CLR 500 (HCA); the Court of Appeal of New South Wales in *State of New South Wales v Quirk* [2012] NSWCA 216, both of which dealt extensively with the burden of proof; and the Privy Council in *Trevor Williamson v Attorney-General of Trinidad and Tobago* [2014] UKPC 29. See C Okpaluba 'Between reasonable and probable cause and malice in the law of malicious prosecution: A Commonwealth update' (2016) 37 *Obiter* 265.

119 *Professor Dlamini v Attorney-General of Swaziland* [2007] SZSC 1 (6 November 2007).

120 In line with this requirement, therefore, a cause of action for malicious prosecution arises when criminal proceedings have been concluded in a plaintiff's favour or when the prosecution authorities decide not to prosecute. So, where there is no evidence to show that the criminal proceedings had terminated in the plaintiff's favour or that the Attorney-General or Director of Public Prosecutions (DPP) had decided to withdraw the criminal charge, the cause of action for malicious prosecution does not arise: *Kolane v Attorney-General* LAC (1990-1994) 73 74G/H-J. See also *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 (E) 375. It has been held that entering a *nolle prosequi* is termination of prosecution in favour of the plaintiff – *Beckett v NSW* 2013 HCA 17 (8 May 2013). Suppose the DPP intimates to the court that he no longer wants to proceed with the prosecution of the case in court, could the trial judge ignore or overrule this information and nonetheless proceed with the trial to judgment? The Court of Appeal answered that question in the negative in *Mōsōla v R* LAC (1970-1979) 406 413. It held that the trial judge had no choice but to terminate the proceedings in the circumstances since the DPP was the supreme authority on the question whether a prosecution be discontinued or not as laid down in sec 8(5) of the Criminal Procedure and Evidence Proclamation 59 of 1938. As the dominant litigant, the DPP had the power to withdraw a charge at any stage of the proceedings and no court can prevent him or her from doing so, just as no court can force him or her to prosecute.

121 [1990] LSHC 44 (27 June 1990). This same judgment of Cullinan CJ is also presented in LESLII as [1990] LSCA 105 (27 June 1990) (*Moloi*).

122 *Moloi* (n 121 above) 12; RW Lee 'Malicious prosecution in Roman-Dutch law' (1912) 29 *South African Law Journal* 22.

part of the defendant and of the absence of reasonable and probable cause.[123] In particular, mention was made of the elements of malicious prosecution, as was stated by Wessels JA in *Moaki v Reckitt & Colman (Africa) Ltd,*[124] and the fact that it had been established in *Hart v Cohen*[125] and *Lemue v Zwartbooi*[126] that the plaintiff's remedy was provided by the *actio iniuriarum* and, therefore, he or she must allege and prove that the defendant intended to injure him or her – constituting either *dolus directus* or *dolus indirectus.*[127] Finally, the court adopted the above-mentioned four elements which a plaintiff must prove, as was stated by Jansen JA in *Lederman v Moharal Investments Ltd.*[128]

Cullinan CJ held that the 'first requisite' clearly showed that the proceedings had been instituted by the Public Prosecutor, singled out by the plaintiff in the pleadings, who was acting under the powers delegated to him by the DPP under section 6 of the CPEA.[129]

> It is the third requisite which apparently needs to be stated 'in a mould more consistent with the terminology' of the *actio iniuriarum*. I think it sufficient to then simply say that the plaintiff must prove that the defendant acted *animo iniuriandi*.

To that extent, where a defendant has acted without reasonable and probable cause, it does not necessarily imply that he acted *animo iniuriandi* as well, notwithstanding the fact that the want of reasonable and probable cause might at the trial afford evidence of the fact that he acted *animo iniuriandi.* Similarly, proof of want of reasonable and probable cause does not cast upon a defendant the onus of proving that he did not act *animo iniuriandi.*[130] Although there was no express averment that the prosecutor acted *animo iniuriandi,* as was stated in *Moaki,*[131] where the implication of *dolus* necessarily flows from the other averments in the pleadings, that would be sufficient. In the

123 *Moloi* (n 121 above) 13; *Estate Logie v Priest* 1926 AD 312 315, 323 & 325.

124 1968 (3) SA 98 (AD) 103-104.

125 16 SC 363.

126 13 SC 403.

127 *Moloi* (n 121 above) 18. These principles apply to the institution of legal proceedings generally in Lesotho, for it was held in *Gupta v Holy Names High School* LAC (1970-1979) 129 138C-G that where legal rights have been infringed, the injured party is entitled to set the law in motion against the party who caused the infringement without incurring liability; but when this is done without justification in fact and with intent to injure, he commits an injury for which he is liable in damages. The institution of legal proceedings is justified when there is a reasonable and probable cause for its institution, which means an honest belief founded on reasonable grounds that the institution of civil proceedings was justified. The *actio iniuriarum* is the remedy of a person who claims that he has been injured in this way. Where relief is claimed by this action, the plaintiff must prove that the defendant had the requisite direct or indirect intention to injure.

128 1969 (1) SA 190 (AD) 196.

129 *Moloi* (n 121 above) 20.

130 *Moloi* 21 adopting *per* Wessels JA in *Moaki* (n 124 above) 105 & 106.

131 *Moaki* (n 124 above) 104. See also *per* Van der Heever J in *Foulds v Smith* (1950) 1 SA 1 (AD) 11.

present case there was an averment of malice and thereafter an averment of *iniuria*. From this, the implication that the public prosecutor acted *animo iniuriandi* flows.

In respect of the absence of reasonable and probable cause, the Chief Justice held that, while the public prosecutor's interpretation of the particular passage in Gardiner and Lansdown[132] was incorrect, this nonetheless did not affect the plaintiff's liability in the matter, and the prosecutor's view of such liability was correct. It may be said that a difficult question of law was involved here, and it was not evidence of absence of reasonable and probable cause that a mistake has been made as to such question.[133] It was held that there was no evidence before the court that the prosecutor himself did not believe in the plaintiff's guilt. Indeed, he testified that he had intended to make submissions on the law to the learned trial magistrate, but was given no opportunity to do so. As the record indicated the magistrate 'quite irregularly' entered a verdict without reasons and without calling for submissions. Had the proceedings been handled otherwise, it would have been clear that the information before the prosecutor, in all the circumstances, was of such a nature as to lead a reasonable person to conclude that the plaintiff was probably guilty. The plaintiff, therefore, failed to prove want of reasonable and probable cause.[134] Cullinan CJ concluded his judgment in *Moloi* by saying the following:[135]

> In any event, as to whether or not the prosecutor acted *animo iniuriandi*, there are two items of evidence which in any way give rise to that aspect. The plaintiff is a well-to-do and well-known businessman. The public prosecutor testified that he knew of the plaintiff, but did not know him personally, that is, before the prosecution. There is the aspect that he knew of the relationship of the police woman to the plaintiff, but that might well be consistent with the remainder of his evidence … Even if the prosecutor did not tell the truth in the matter … that [did] not necessarily indicate an intent to injure the plaintiff. The only evidence which could be remotely indicative of any such intention is the aspect that the prosecutor has charge of a further possible prosecution against the plaintiff, that is, in respect of an allegation of occupying land without proper authority, contrary to section 87(1) of the Land Act. No charge had been preferred, however, and it was the prosecutor's position that he had taken instructions from the Director of Public Prosecutions in the matter. In all the circumstances, I cannot say that such evidence establishes that the prosecutor probably intended to injure the plaintiff.

The question in *Director of Public Prosecutions v Mofubetsoane*[136] was whether the respondent had succeeded in proving ownership of the vehicle, the robbery of which he had been justifiably prosecuted for, even though the prosecution was abortive. The fact that the vehicle at one time had been registered in the respondent's name did not materially advance his case. There were many ways in which

132 *South African criminal law and procedure* (1957) 1125.
133 *Moloi* (n 121 above) 30; *Phillips v Naylor* (1859) 4 H & N 565.
134 *Moloi* 31.
135 *Moloi* 31-32.
136 LAC (2009-2010) 79.

registration could be achieved without proper proof of ownership. There were no probabilities that favoured his evidence as against that of the other witnesses, who gave more compelling evidence including convincing documentation and corroborating evidence.[137] The Court of Appeal held that his claim for the return of the vehicle or damages in lieu thereof should have been dismissed by the trial court and that, in order to establish a claim for malicious arrest, detention and prosecution, it would have been necessary for the claimant to prove, *inter alia*, that the police in arresting, detaining and causing him to be prosecuted, acted without reasonable and probable cause and with malice (or *animo iniuriandi*).[138] However, on the information available at the time to the police and the prosecuting authorities, the decision to prosecute the claimant could not have been unreasonable or tainted by impropriety. There was no proof of malicious conduct on the part of the arrestors nor on the part of those concerned.[139]

The plaintiff in *Kalaile v Commissioner of Police*[140] was arrested by the police for having committed an offence in contravention of section 70(6)(j)(10) of the Road Traffic Act 1981. Apparently without introducing themselves, the police officers, who were not in uniform, took the plaintiff's cellular phone and his car keys, leaving his taxi where it was, unattended. Riding in their car, the officers, at some point, wanted to release the plaintiff but the latter refused, whereafter they rearrested him, took him to their station and locked him up from 29 to 31 March 2009 when he was eventually brought to court and was acquitted. Since the lawfulness or otherwise of the arrest and detention in this case has been discussed earlier, all that is necessary to ascertain here is the trial court's judgment on the malicious prosecution aspect of this case.

Chaka-Makhooane J held that the plaintiff had shown that the defendants had set the law in motion and that the criminal prosecution had ended in his acquittal. Therefore, the court had to consider the elements of absence of reasonable and probable cause and malice. With regard to reasonable and probable cause, the judge accepted the popular South African judicial opinion that it means, in the context of malicious prosecution, an honest belief founded on reasonable grounds that the institution of prosecution was justified, and that the concept had both subjective and objective elements.[141] If the police had such an honest belief in the guilt of the plaintiff, would they have been willing to let him go? This evidence cast doubt on the reasonableness of their conduct. They claimed that the plaintiff had parked his taxi in the road, yet they snatched his keys from the

137 *Mofubetsoane* (n 136 above) para 12.

138 *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 8.

139 *Mofubetsoane* (n 136 above) para 13.

140 [2011] LSHC 130 (20 September 2011).

141 *Kalaile* (n 11 above) para 21. See also *Prinsloo v Newman* 1975 (1) SA 481 (A) 495H.

ignition, ordered him to ride with them, leaving the taxi exactly where they claimed it was obstructing traffic, for another 30 minutes or so. The judge held that this was not the conduct of an objectively-reasonable person who ought to use ordinary care and prudence.[142] By leaving the vehicle in an obstructive state, the defendants failed to objectively exercise reasonable measures as would be expected of police officers in their situation and, thus, the plaintiff succeeded in discharging the onus of proving absence of reasonable and probable cause. It was further held that the police officers had been intent on prosecuting the plaintiff knowing that it would in all probability injure his good name. They foresaw that the course of prosecuting the plaintiff was wrong, but they persisted in order to 'nail' him for daring to refuse to accept his keys and cellular phone. Thus, the detention and prosecution followed in spite of the possibility that they were acting wrongly. The officers as servants of the defendants acted with malice which, in the context of the *animo iniuriandi*, means not only the intention to injure, but also the consciousness of wrongfulness.[143] The plaintiff was also successful in proving that the defendants had acted maliciously.[144]

6 Conclusion

As is the case with courts in other parts of the Commonwealth, there is no doubt that the courts in Lesotho regard the right to personal liberty as one of the most fundamental of all constitutionally-entrenched rights. They have said this in so many words, and have striven to demonstrate in the many cases reviewed in the article their disapproval of numerous deprivations of this right every time they have had the opportunity to do so. They have pronounced on cases where persons have been arrested unlawfully, detained without reasonable suspicion and prosecuted without reasonable or probable cause, as well as maliciously. The courts have described the excesses of the police and military personnel as the 'sub-culture of brutality and inhuman treatment', as in *Kopo and Kopo v Commander LDF*[145] and *Jobo & Others v Commander, Lesotho Defence Force & Others,*[146] and as 'barbaric' and 'disgraceful' with reference to the treatment meted out to the plaintiff in *Mohlaba.*[147] The courts, from time to time, have been called upon to adjudicate over acts of indignity perpetrated against alleged criminal offenders who, more often than not, turned

142 *Kalaile* para 24. See also *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 20.
143 *Prinsloo v Newman* (n 141 above).
144 *Kalaile* (n 11 above) paras 25-26.
145 *Kopo and Kopo* (n 78 above).
146 *Jobo* (n 46 above).
147 *Mohlaba* (n 75 above) 191G & J.

out not to have been linked to any offence, or in any way broken the law.[148]

Given the frequent occurrence of acts of torture perpetrated on arrested and detained persons in Lesotho, it appears that the time has come for the government of the Kingdom to honour her international obligations by considering translating into her domestic law the provisions of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,[149] by enacting a comprehensive law to curb torture, cruel, inhuman and degrading treatment and all its ramifications. It is one thing to ratify a convention and another to reduce its contents into municipal legislation[150] in order to make its contents enforceable in the municipal courts. Even though section 8 of the Constitution of Lesotho guarantees everyone the right not to be tortured, inhumanly or degradingly treated, it would appear that this is not enough to restrain the Lesotho military and the police from perpetrating such acts of inherent indignity on human beings at their whims and caprices. Apart from enacting a law to define the various acts of torture, to prohibit, prevent and combat torture and other offences associated with the torture of persons, and to impose adequate punishment against offenders, there is one very important aspect of the Convention which Lesotho must start implementing forthwith. This is the requirement embedded in article 10, which enjoins state parties to[151]

> ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention and imprisonment.

It is clear from the case law that the military personnel and law enforcement agents in Lesotho, by their conduct, have displayed abysmal knowledge of the constitutional prohibition of torture. Even if they have been trained in terms of article 10, it is evident that they have not been properly schooled and should be taught again and again to respect the right to human dignity of the individual.

148 Eg *Morobi* (n 88 above).

149 Adopted by the UN on 10 December 1984 and entered into force on 26 June 1987.

150 Compare the Prevention and Combating of Torture of Persons Act 13 of 2013 (RSA).

151 A Commission of Inquiry into Public Disturbances 1998 131 also recommended 'a comprehensive retraining programme for police and army personnel' in order to achieve 'a gradual phasing out of persons who are unsuitable, particularly having regard to the need for a professional and a political army and police force'.

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Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence

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Summary

In a country such as Zimbabwe where many are deprived of opportunities and resources owing, in part, to injustices of the past, socio-economic rights are of the outmost importance. As a result, the new Constitution of Zimbabwe, adopted in 2013, expressly provides for socio-economic rights. While these are yet to be extensively tested, two cases discussed in the article illustrate the willingness of the courts to enforce these rights. In the Mushoriwa *case, it is shown that state as well as non-state actors have to refrain from negatively interfering with constitutionally-protected and enforceable socio-economic rights. The* Hopcik *case shows that there is a positive obligation on the state, which may involve the allocation of resources, to ensure that socio-economic rights are realised. These two cases serve as a good platform from which the courts can continue to develop the jurisprudence on socio-economic rights in Zimbabwe. It is suggested that guidance in dealing with more complex socio-economic rights cases can also be obtained from South African jurisprudence, particularly from the* Grootboom *case.*

Key words: *socio-economic rights; trends; emerging jurisprudence; justiciability; institutional protection; constitutional protection; judicial enforceability; transformative constitution; Zimbabwe*

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1 Introduction

In Zimbabwean history, the year 2008 is remembered for unprecedented levels of socio-political upheaval. Politically, for the first time since independence, motions were set into action for the country to be governed under a Government of National Unity (GNU).[1] The need for the GNU came as a result of the 2008 parliamentary and presidential elections which were marred by violence. As a result of the divisive political rift, mass killings occurred, some unreported, creating social instability.[2] Economically, the year 2008 marked Zimbabwe's highest ever recorded inflation rate, estimated at 231 million per cent per annum.[3] Consequently, shortages of food and currency, severe poverty and price increases, amongst other challenges, became the Zimbabwean way of life. These challenges left the standard and quality of life substantially diminished. Also, as a result of the reduction in resources available to the state, the capacity to deliver basic services was limited.

In this context, the year 2008 epitomised the worst form of socio-economic challenges in the post-colonial era. From 2008 onwards, Zimbabwe became a state in transition, awaiting the development of a more comprehensive constitution, before further democratic elections could be conducted.[4] After the formation of the GNU, efforts were made to ensure that the socio-economic rights[5] of

1 The negotiations for the power-sharing deal were mediated by former South African President Thabo Mbeki, from 31 July 2008, although, technically, the GNU was formed on 13 February 2009. The GNU comprised of a coalition government of the three major political parties in Zimbabwe. This union followed the signing of the Global Political Agreement (GPA) by the parties concerned.

2 See S Chan & R Primorac *Zimbabwe since the unity government* (2013) 8. In this period, it is alleged that eight opposition supporters were killed, while at least 20 000 people were left displaced following the destruction of their homes.

3 WJ Baumol & AS Blinder *Economics: Principles and policy* (2011) 506. Some economists have argued that inflation rose higher that 231 million per cent. However, their contestations have not been accepted widely.

4 Art II of the GPA, which contained the declaration of commitment, noted: 'The parties hereby declare and agree to work together to create a genuine, viable, permanent, sustainable and nationally acceptable solution to the Zimbabwean situation and in particular to implement the following agreement with the aim of resolving once and for all the current political and economic situations and charting a new political direction for the country.' With regard to the transition, it is important to read art II together with art VI which gave effect to an agreement to draft constitutional measures. Art II acknowledged that the Lancaster House Constitution (1979) was merely an apparatus to transfer power from the colonial authority to the people of Zimbabwe and, as such, the constitution-making process would be a people-driven process. Amongst other conditions, art VI provided that a Select Committee of Parliament (with members of the representative parties) be set up to draft the constitution-making process. The draft Constitution as recommended by the Select Committee of Parliament would be subjected to a referendum.

5 Socio-economic rights are human rights related to the basic necessities of life, such as the right to food; the right to shelter; the right to education; and the right to work. See http://www.lrfzim.com/wp-content/uploads/2015/05/Simplified-Version-of-the-Declaration-of-Rights.pdf (accessed 13 March 2016).

citizens were given priority.[6] Hence, there was a need for a new constitution, including a seminal declaration of rights (bill of rights). This was not a desire unique to Zimbabwe, but rather a need for any society emerging from conflict or a period of struggle, such as the period of election violence Zimbabwe had just emerged from.[7]

In 2013, Zimbabwe finally adopted a new Constitution (Constitution of Zimbabwe),[8] providing for socio-economic rights.[9] After the dawn of the new Constitution, it becomes important to take stock of the state's progress in protecting and promoting socio-economic rights, to ensure that their effects filter down to the ordinary man on the street.[10] The article examines the preliminary socio-economic rights debate, outlines the international socio-economic rights framework, assesses the constitutional protection of socio-economic rights in Zimbabwe, and evaluates the prospects and challenges for the enforcement of socio-economic rights by the Zimbabwe Human Rights Commission (ZHRC) and the courts. The article then explores the empowering nature of socio-economic rights in a transformative constitution and, lastly, a number of conclusions are offered.

2 Preliminary socio-economic rights debate

As has been the case in many jurisdictions, in Zimbabwe there were those vying for and against the inclusion of socio-economic rights in the Zimbabwean Constitution.[11] One of the arguments for the protection of socio-economic rights in the Constitution was that Zimbabwe was a state in transition after repression.[12] As a result,

6 The GNU managed to finalise the constitution-making process in 2013, ushering in a new constitutional era with a much broader protection of rights. In addition to the efforts by the GNU to constitutionalise the protection of economic, social and cultural rights, there were also efforts by civil society and the citizenry to entrench these rights into the Constitution, as evidenced by the signing of the Zimbabwe People's Charter, in February 2008, by nationals representing various cross-sections of various communities, across the length and breadth of the country. The People's Charter contained what was termed 'a justiciable Bill of Rights that recognises civil, political, social, economic, cultural and environmental rights'. See the Zimbabwe People's Charter, adopted at the People's Convention, Harare, Zimbabwe, 9 February 2008, available at http://www.kubatana.net/html/archive/cact/080209pc.asp (accessed 13 March 2016).

7 C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2 *Law, Democracy and Development* 153.

8 Constitution of Zimbabwe Amendment Act 20 of 2013.

9 Constitution of Zimbabwe (n 8 above) Ch 4.

10 The socio-economic rights in the Declaration of Rights are modelled along socio-economic rights in the South African Bill of Rights, which arguably contains the most comprehensive constitutional protection of socio-economic rights, as well as international human rights instruments.

11 See Heyns & Brand (n 7 above) 9.

12 Zimbabwe, at the time, was under a GNU, which was as a result of political violence during the 2008 elections.

there were hazards in marginalising socio-economic imperatives.[13] The argument espoused socio-economic rights as a moral prerogative in the theory of justice.[14]

Another argument in favour of socio-economic rights to be included in the Constitution of Zimbabwe was that it would be an important step towards the adoption of a rights-based approach to social policy.[15] Herein, the inclusion of socio-economic rights would ensure that the underpinning rights in regional and international human rights instruments, such as the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (African Charter), were respected and promoted.[16] The inclusion of socio-economic rights in the Constitution of Zimbabwe would merely ensure the domestic accountability of Zimbabwe's obligations to already-accepted and ratified human rights treaties, rather than the extension of existing commitments, in addition to those already in existence.[17] In terms of these human rights instruments, socio-economic rights are the indispensable and inalienable rights of all human beings.[18]

Another related argument was that, in Zimbabwe, the protection of socio-economic rights was a necessity because the nation was recovering from an unpalatable period of hyper-inflation in which many citizens were subjected to deplorable living conditions.[19] Herein, at least half the population was dependant on food aid and many were exposed to hunger and chronic malnutrition.[20] Furthermore, almost three million people were affected annually by malaria, and nearly 100 000 by cholera, with at least 4 000 fatalities.[21] In a report providing for options for the constitutional protection of socio-economic rights, the Zimbabwean Lawyers for Human Rights and its partners noted:[22]

> People around the world, including in Zimbabwe, face levels of deprivation that undermine their ability to live with dignity. Hunger, homelessness, lack of education and preventable disease are not simply social problems

13 I Muvingi 'Sitting on powder kegs: Socio-economic rights in transitional societies' (2009) 3 *The International Journal of Transitional Justice* 163. The argument, therefore, was that the constitutional protection of socio-economic rights was a transitional justice imperative.

14 Muvingi (n 13 above) 3.

15 T Masuka 'The new Constitution of Zimbabwe and its implications for social workers' (2014) 2 *Journal of Social Welfare and Human Rights* 29.

16 For a detailed discussion, see Masuka (n 15 above) 29.

17 http://hrp.law.harvard.edu/wp-content/uploads/2009/08/Zimbabwe_6.23.09.pdf (accessed 13 March 2016).

18 See, eg, the Universal Declaration, Preamble; arts 1, 2, 17, 22, 25 & 27.

19 http://hrp.law.harvard.edu/wp-content/uploads/2009/08/Zimbabwe_6.23.09.pdf (accessed 13 March 2016).

20 As above.

21 As above.

22 As above.

> caused by inadequate resources but can also be violations of international legal obligations to respect, protect and fulfil fundamental human rights. Governments have a responsibility to respond and ameliorate these violations, which threaten principles of human dignity.

One of the most significant arguments in favour of constitutional socio-economic rights was that they were indivisible, interdependent and interrelated to civil and political rights. Those in favour of this argument were of the view that socio-economic rights formed part of a larger network of rights which were symbiotic and mutually reinforcing.[23] The substance of their argument was based on the fact that, without socio-economic rights, civil and political rights would have been of a purely nominal character.[24] Conversely, without civil and political rights, socio-economic rights would not be sustainable.[25] Therefore, the standalone civil and political rights in the Lancaster House Constitution were purely nominal, and had to be pursued in synergy with socio-economic rights.

Apart from the arguments in favour of the constitutional protection of socio-economic rights, there were also arguments against the constitutional protection of socio-economic rights as justiciable fundamental rights. These arguments are couched within the liberal consensus on universal human rights, namely, that there is a hierarchy of rights, with civil and political rights at the top of this hierarchy.[26] According to Evans, this argument stems from the fact that civil and political rights impose a 'negative obligation' (demanding forbearance), while socio-economic rights impose a 'positive obligation' (demanding a redistribution of resources).[27] Therefore, it would seem that civil and political rights would take the apex position in the hierarchy as they are 'an easy way out', because they are easier to guarantee. This is unlike socio-economic rights that demand the mobilisation and rearrangement of national resources to assist those who cannot provide the material means for a decent life for themselves.[28] In this case, socio-economic rights remain aspirational rather than judicially-enforceable rights.[29]

For example, the initial drafters of the draft Zimbabwean Constitution (Kariba Draft Constitution) were of the view that socio-economic rights were not fundamental rights. They felt that socio-economic rights rather were national objectives.[30] Hence, in the Kariba Draft Constitution, socio-economic rights appeared as national

23 As above.
24 Annotations on the Text of the Draft International Covenant on Human Rights, prepared by the UN Secretary-General, UN Doc A/2929, 1955 7.
25 As above.
26 T Evans 'A human right to health' (2003) 23 *Third World Quarterly* 200.
27 As above.
28 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 191.
29 I Trispiotis 'Socio-economic rights: Legally enforceable or just aspirational' (2010) 8 *Opticon 1826* 1.
30 Annexure B to the Kariba Draft Constitution, Chapter II, Part 2.

objectives that would guide all organs of state and government, including local government.[31] Consequently, in creating and executing their policy towards the creation of a just, free and democratic society, all arms of government had to take into account the socio-economic objectives. The questionable challenge, however, to socio-economic objectives was that they were directory in nature.[32] This meant that socio-economic objectives were desirable but still optional.[33] The failure by an arm of government to comply with the socio-economic objectives would, therefore, at most result in a penalty, fine, review, revision or further compliance.[34] Thus, the main problem with the placement of socio-economic rights as socio-economic national objectives in the Constitution of Zimbabwe was that they would not be mandatory.[35]

3 International human rights instruments

The Universal Declaration contains both socio-economic rights and civil and political rights.[36] Socio-economic rights are encompassed in articles 16 and 22 to 27 of the Universal Declaration.[37] These provisions entitle the right to marry, to have a free choice in marriage and to found a family;[38] the right to choose employment, and to form labour unions;[39] the right to rest and leisure, including reasonable limitation to working hours;[40] the right to a standard of living adequate for health and well-being;[41] the right to education;[42] and the right to participate freely in the cultural life of the community,

31 Kariba Draft Constitution, Chapter II, Part 2. Secs 25, 28, 29, 30 & 31 of the Kariba Draft Constitution dealt with work and labour relations, education, shelter, health services and social welfare, respectively. Sec 22(1)(c) of the Kariba Draft Constitution, the national objective on children, also contained socio-economic provisions, specifically for children.

32 Kariba Draft Constitution, sec 14 (nature of objectives).

33 AB Kafaltiya *Interpretation of statutes* (2008) 105.

34 As above.

35 The Kariba Draft, thus, offered weak constitutional protection of socio-economic rights as national objectives. Interestingly, however, despite the fact that the most socio-economic rights contained in the Constitution as socio-economic objectives, the right to agricultural land acquired for resettlement and other persons was contained in the Kariba Draft Constitution as a fundamental right together with the right to property. There have been arguments that these rights could be excluded from socio-economic rights, if the guiding principle is to look at socio-economic rights as contained in the ICESCR. This is despite the fact that, eg, the right to property is a traditional economic right. See JA Mavedzenge & DJ Coltart *A constitutional guide towards understanding Zimbabwe's fundamental socio-economic and cultural human rights* (2014) 12, for a deeper discussion.

36 See I Merali & V Oosterveld *Giving meaning to economic, social and cultural rights* (2011) 1.

37 Arts 16, 22, 23, 24, 25, 26 & 27 Universal Declaration.

38 Art 16 Universal Declaration.

39 Art 23 Universal Declaration.

40 Art 24 Universal Declaration.

41 Art 25 Universal Declaration.

42 Art 26 Universal Declaration.

to enjoy arts and to share in scientific development.[43] Article 22 denotes that the realisation of these socio-economic rights is indispensable to the dignity of a person.[44] Accordingly, socio-economic rights must be realised through national effort and international co-operation dependant, however, on the organisation and resources of each state.[45]

Over the years, the Universal Declaration has evolved to become the cornerstone of international human rights law,[46] despite its non-binding nature.[47] The norms crystallised in the Universal Declaration were articulated in subsequent legally-binding treaties, such as the ICESCR; the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

With regard to socio-economic rights, the ICESCR is the most relevant treaty in protecting these rights. In general, the Preamble to the ICESCR states:

> [I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and what can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as well as his civil and political rights …

The Preamble of the ICESCR captures the idea that, ultimately, the enjoyment of socio-economic rights is intricately connected to freedom. Without freedom, there is no chance that an individual may enjoy her socio-economic rights, let alone her civil and political rights. Hence, fundamental rights and freedoms are interdependent and interconnected. Although the Preamble is not binding, it encapsulates the spirit of the ICESCR.[48]

More specifically, the ICESCR contains provisions that bestow socio-economic rights. It notes that` everyone has the right to work in just

43 Art 27 Universal Declaration.

44 Art 22 Universal Declaration.

45 As above.

46 See eg S Joseph & A McBeth (eds) *Research handbook on international human rights law* (2010) 2; M Karavias *Corporate obligations under international law* (2013) 75; L Cotula *Human rights, natural resources and investment law in a globalised law: Shades of grey in the shadow of the law* (2012) ch 2.

47 The Universal Declaration was not adopted by the General Assembly as a legally-binding instrument. Arguably, its contents have, however, been accepted as norms of customary international law and are viewed by some as evolving customary law. There have been arguments that the contents of the Universal Declaration have now been accepted as fundamental principles of international law and, as such, no deviation from these principles would be permissible. This is, however, a debate that falls outside the scope of this article. See Joseph & McBeth (n 46 above) 2 and Karavias (n 46 above) 2.

48 See, generally, R O'Keefe & CJ Trans *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A commentary* (2013) 30.

and favourable conditions;[49] the right to form or join a trade union of his or her choice;[50] the right to social security (including social insurance);[51] the right to protection of the family;[52] the right to an adequate standard of living (inclusive of adequate food, clothing, housing and incessant enhancements of living conditions);[53] the right to the highest attainable standard of physical and mental health;[54] and the right to education (free primary education, the progressive introduction of free secondary education, and accessible higher education, progressively made free).[55]

Moreover, each member state to the ICESCR should to the highest possible extent of its available resources, individually or through international co-operation, seek to progressively achieve the full realisation of socio-economic rights.[56] This entails that a member state can use all appropriate means, including the promulgation of new legislation, to fulfil socio-economic rights.[57] Importantly, however, socio-economic rights may be subject to limitations, only to the extent necessary, in order to ensure the proper functioning of a democracy.[58]

Apart from the ICESCR, the African Charter also is useful as it is the African vanguard for the promotion of fundamental rights and freedoms. The African Charter draws inspiration from other international human rights instruments protecting socio-economic rights, such as the ICESCR.[59] The Charter recognises that without

49 Art 7 ICESCR.
50 Art 8 ICESCR.
51 Art 9 ICESCR.
52 Art 10 ICESCR.
53 Art 11 ICESCR.
54 Art 12 ICESCR.
55 Art 13 ICESCR.
56 Art 2 ICESCR.
57 As above.
58 Art 4 ICESCR. Eg, sec 86 of the Constitution states that fundamental rights and freedoms guaranteed in the Declaration of Rights must be exercised reasonably. The section notes that these rights may be limited only in terms of the law of general application to the extent that such a limitation is reasonable, necessary and justiciable in an open and democratic society. This limitation can occur in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest. Sec 86(3) lists rights which can never be limited. However, this list only consists of civil and political rights. Before any right is limited, it must be examined whether there are not any less restrictive means to achieve the purpose. In addition, the relationship between the limitation and its purpose must be reviewed.
59 Other instruments from which the African Charter draws inspiration include the Universal Declaration; the ICCPR; the ICERD; the CEDAW; the CRC; the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; the Convention on the Rights of Persons with Disabilities; the European Social Charter; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Declaration of the Rights and Duties of Man; and the American Convention on

socio-economic rights, a person's dignity is endangered.[60] Individuals are then exposed to numerous threats to their survival and well-being, including marginalisation and economic impoverishment.[61] Therefore, in providing for socio-economic rights, member states must take into account the entire way of life of their people.[62]

In addition, the African Charter entrenches the freedom of profession;[63] the right to property;[64] the right to work;[65] the right to health;[66] the right to education;[67] the right to housing;[68] the right to social security;[69] the right to food;[70] the right to water and sanitation;[71] and the right to protection of the family.[72] The rights guaranteed in the African Charter, however, are not all the rights guaranteed in the ICESCR. Some of the rights in the ICESCR are implied in the African Charter. For example, in *Social and Economic Action Centre (SERAC) & Another v Nigeria*,[73] the African Commission on Human and Peoples' Rights (African Commission) held that the rights to food and shelter were implicit in the African Charter.[74] This was reiterated in the Tunis Reporting Guidelines.[75]

Member states must ensure that socio-economic rights are available, adequate, accessible (physically and economically) and acceptable.[76] The African Charter imposes obligations on member states to respect, protect, promote and fulfil socio-economic rights.[77] The fulfilment of socio-economic rights nevertheless is subject to available resources and progressive realisation.[78] There are, however, minimum core obligations with which the state must comply.[79] As far as possible, each member state must maintain the minimum level of

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Human Rights and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights. See State Party Reporting Guideline for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines), adopted 24 November 2011. See also http://www.achpr.org/sessions/51st/resolutions/223/ (accessed 13 March 2016).

60 Tunis Reporting Guidelines (n 59 above) 6.
61 As above.
62 As above.
63 Art 8 African Charter.
64 Art 14 African Charter.
65 Art 15 African Charter.
66 Art 16 African Charter.
67 Art 17 African Charter.
68 Arts 14, 16 & 18(1) African Charter.
69 Arts 4, 5, 6, 15, 16, 18(1), (2) & (4) African Charter.
70 Arts 4, 16 & 22 African Charter.
71 Arts 4, 5, 15, 16, 22 & 24 African Charter.
72 Art 18(1) African Charter.
73 (2001) AHRLR 60 (ACHPR 2001).
74 Judgment paras 64-66 & 59-63.
75 Tunis Reporting Guidelines (n 59 above) 48-53.
76 Tunis Reporting Guidelines 10-11.
77 Tunis Reporting Guidelines 11.
78 Tunis Reporting Guidelines 12.
79 Tunis Reporting Guidelines 3.

socio-economic rights in the African Charter.[80] Whether or not the state has resources, the minimum core obligations cannot be dispensed with.[81] In addition, there also is an immediate obligation on states to take steps towards the realisation of socio-economic rights, through the implementation of a quantifiable national plan of action. States should also guard against any measure(s) that may affect the enjoyment of socio-economic rights.[82]

Notwithstanding the above, states should ensure that individuals have ready access under domestic law to effective remedies and redress.[83] The Tunis Reporting Guidelines detail how these rights should be interpreted and applied, making the African Charter a practical document for the protection of socio-economic rights in Africa.[84]

From the above discussion, it may be noted that international human rights instruments are paramount to the protection of socio-economic rights. Equally important, however, is the status of these instruments in the domestic legal system. The 2013 Constitution, in contradistinction to the Lancaster House Constitution, provides clarity on the status of international documents. Section 327 of the Constitution states that[85]

> [a]n international treaty which has been concluded or executed by the President or under the President's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe until it has been approved by an Act of Parliament.

Put more simply, international treaties in Zimbabwe are binding only once they have been enacted into law by parliament, with the President's authority.[86] Important also is the fact that the state is enjoined in section 34 of the Constitution to ensure that all international agreements to which Zimbabwe is a party are incorporated into domestic law.[87]

To date, Zimbabwe has signed and ratified most of the key human rights instruments,[88] but is yet to domesticate these through national

80 Tunis Reporting Guidelines 13.

81 Should a state fail to comply with the minimum core obligations, it must be able to prove that it has allocated all available resources towards meeting the minimum core obligations.

82 Tunis Reporting Guidelines (n 59 above) 14.

83 Tunis Reporting Guidelines 14.

84 There are, however, other instruments, but for the purpose of this article, the discussion has been focused on the Universal Declaration, the ICESCR and the African Charter, as the most robust documents dealing with socio-economic rights.

85 Sec 237 Constitution of Zimbabwe.

86 http://www.academia.edu/4690926/The_Application_of_International_Law_in_Zimbabwe_in_light_of_the_New_Constitution_and_the_Doctrine_of_National_Sovereignity (accessed 29 March 2017).

87 Sec 34 Constitution of Zimbabwe.

88 Eg, the African Charter on the Rights and Welfare of the Child; the ICCPR, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

law to ensure their full implementation.[89] Most notably, and in connection with socio-economic rights, Zimbabwe has not domesticated the African Charter and the ICESCR.[90] The implication of this in a dualist state,[91] such as Zimbabwe, is that citizens cannot claim rights or protections which are provided for by these treaties as they have not been made part of national law through an Act of Parliament (as required by section 327 of the Constitution). There is, therefore, an urgent need to add these instruments to the government's 'list of international instruments for which domesticating Bills are required'.[92] The ongoing process of aligning old laws with the new Constitution could also be used as a platform to kick-start this process.[93]

In addition, Zimbabwe has not accepted the jurisdiction of the African Court on Human and Peoples' Rights (African Court) or made a declaration under article 34(6) to the Court Protocol.[94] In addition to this, Zimbabwe has not become a state party to the Optional Protocol to the ICESCR. This creates numerous challenges in terms of protecting socio-economic rights. Most importantly, this limits the avenues for claimants of rights to have forums where they can seek recourse in the case of a violation of their rights.

An interesting juxtaposition can be found in the way in which customary international law and international treaties are dealt with in terms of the Constitution. In terms of section 326 of the Constitution, customary international law is deemed to be a part of Zimbabwean law unless it is inconsistent with the Constitution or an Act of Parliament.[95] This is unlike international treaties which need to be incorporated by an Act of Parliament. The implication of this is that if a case is brought on the basis of a violation of a principle of customary international law, the courts can rely on customary international law as it is deemed part of the law. Customary international law in Zimbabwe, therefore, is more than merely a source of interpretation.

Women in Africa; the ICERD; and CEDAW.

89 A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 474.

90 https://www.newsday.co.zw/2015/12/12/zim-urged-to-domesticate-human-rights-treaties/ (accessed 4 April 2017). In 2013, the former Minister of Justice, Patrick Chinamasa, disturbingly noted that there were no proper records of the treaties the country had signed and ratified to facilitate domestication.

91 A dualist state is one which views international law and domestic law as two separate orders. For international law to be binding in such a system, it must, therefore, be domesticated via legislative measures. Sec 327 of the Constitution of Zimbabwe concretises Zimbabwe's position as a dualist state. See http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/bangamwabo.pdf (accessed 5 April 2016).

92 http://thezimbabwean.co/2017/03/zimbabwe-human-rights-commission-report/ (accessed 5 April 2017).

93 http://archive.kubatana.net/docs/demgg/ciz_crisis_report_issue_243_131203.pdf (accessed 5 April 2017).

94 As above.

95 Sec 326 Constitution of Zimbabwe.

As regards international treaties, agreements and conventions, a case for the violation of these would only be successful if such treaty, convention or agreement has been incorporated into domestic law by an Act of Parliament.

4 Constitutional protection of socio-economic rights

The Constitution of Zimbabwe is the supreme law of the land.[96] It provides a 'yardstick for determining lawful government action and protecting individual rights'.[97] It also embodies the need to entrench democracy, good, transparent and accountable government as well as the rule of law.[98] Furthermore, the Constitution embeds the commitment to uphold and defend fundamental human rights and freedoms.[99]

Chapter 4 of the Constitution of Zimbabwe, the Declaration of Rights, expressly provides for socio-economic rights.[100] These include the freedom of profession, trade or occupation;[101] labour rights;[102] property rights;[103] the rights to agricultural land;[104] the right to education;[105] the right to healthcare; and the right to food.[106] As a result, considerable constitutional protection of socio-economic rights is attained.[107]

These rights impose upon the state an obligation to respect, promote and fulfil them.[108] A similar obligation also is imposed on non-state actors through the horizontal application of the Bill of Rights.[109] This is so because many of the provisions in the Constitution would be superfluous if non-state actors could not be held accountable to constitutional mandates.[110] For instance, the right to safe, clean and potable water in section 77(a) of the

96 Sec 2(1) Constitution of Zimbabwe.
97 http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP108055.PDF (accessed 5 March 2017).
98 Preamble Constitution of Zimbabwe.
99 As above. Fundamental rights and freedoms are founding values and principles to which the Constitution aspires.
100 Annex C to the Lancaster House Agreement, 21 December 1979, Southern Rhodesia Constitutional Conference held at Lancaster House, London.
101 Sec 64 Constitution of Zimbabwe.
102 Sec 65 Constitution of Zimbabwe.
103 Sec 71 Constitution of Zimbabwe.
104 Sec 72 Constitution of Zimbabwe.
105 Sec 75 Constitution of Zimbabwe.
106 Sec 77 Constitution of Zimbabwe.
107 T Chivuru 'Socio-economic rights in Zimbabwe's new Constitution' (2014) 36 *Strategic Review for Southern Africa* 118.
108 Sec 44 Constitution of Zimbabwe.
109 As above.
110 AR Welch 'Obligations of state and non-state actors regarding the right to water under the South African Constitution' (2005) 1 *Sustainable Development Law and Policy* 63.

Constitution cannot be realised if private actors such as construction companies are putting potable water to waste.[111] Questions, however, remain as to whether positive obligations may also be placed upon non-state actors.

Interestingly, some socio-economic rights also are contained in Chapter 2 of the Constitution as national objectives.[112] For example, section 13(3) of the Constitution provides that the state and all institutions and agencies of government must protect and enhance the right of the people, particularly women, to equal opportunities in development. This approach is different to that in the South African Constitution, which makes reference only to rights in the Bill of Rights.[113]

The socio-economic rights contained in Chapter 2 of the Constitution are merely non-justiciable national objectives, which should not be conflated with justiciable Chapter 4 rights. It is also worth noting that the non-justiciable rights in Chapter 2 should, in theory, be protected by interpreting the wide justiciable rights in Chapter 4.

Commenting upon the socio-economic rights in Chapter 2, Chivuru notes that these rights place a minimum burden on the state.[114] In his view, the state is not obliged to respect and promote these rights.[115] He reasons that as Chapter 2 contains national objectives, 'it would create a political and societal space for a just and democratic society'.[116]

The Constitution, 'in describing the rights it enshrines', in part mirrors the language used by the drafters of the South African Constitution, in an act of 'constitutional borrowing'. It uses inclusive language such as 'everyone has the right to' or 'the Bill of Rights applies to all law, and binds the legislature, the executive the judiciary and all organs of state'.[117]

The language and contents of the Zimbabwean Constitution also depict the influence of international law instruments such as the ICESCR and the African Charter, which similarly give prominence to fundamental human rights and freedoms. For instance, all the socio-economic rights contained in the ICESCR are reflected in the Zimbabwean Constitution. These include the freedom of profession,

111 Sec 77(a) Constitution of Zimbabwe.

112 Chapter 2 Constitution of Zimbabwe.

113 Chapter 2 Constitution of the Republic of South Africa, 1996. It has been argued that the South African Constitution has the most comprehensive constitutional protection of socio-economic rights.

114 Chivuru (n 107 above) 118.

115 This is a similar argument to the one contained in the draft Constitution that provided for socio-economic objectives, a provision which was discarded in the final Constitution. See sec 2 for the implication of socio-economic objectives.

116 Chivuru (n 107 above) 118.

117 See Ch 2 of the South African Constitution.

trade or occupation; labour rights; the right to education; the right to health care; and the right to food and water.[118]

However, the Constitution does not borrow from the Directive Principles of State Policy.[119] The phraseology used in these two instruments is significantly different. For example, the Directive Principles speak to the provision of free and compulsory education for children while, on the other hand, the Zimbabwean Constitution alludes to free and compulsory basic education for children and higher and tertiary education.[120] The language used in the Zimbabwean Constitution, therefore, is much broader than that in the Directive Principles.

While the Zimbabwean Constitution provides for the constitutional protection of socio-economic rights, this is not enough to ensure the realisation of these rights. Their enforcement needs a sound institutional framework. At the international level, most human rights instruments prescribe that states must institute domestic mechanisms or measures to protect and promote human rights.[121]

In Zimbabwe, there are two main institutions enforcing human rights – the ZHRC and the courts. While both institutions are important in the enforcement of human rights, it is perhaps arguable that courts have a more prominent role to play. Nonetheless, the role of the ZHRC in enforcing socio-economic rights will first be dealt with, whereafter the judicial enforcement of socio-economic rights is considered.

5 Enforcement of socio-economic rights by the national human rights commission

Chapter 12 of the Constitution establishes independent institutions supporting democracy, which will be referred to as 'Chapter 12 institutions'. These autonomous institutions are charged with the task of strengthening democracy in Zimbabwe through (i) support for the entrenchment of human rights; (ii) the elevation of sovereignty and the interests of the people; (iii) the advancement of constitutionalism; (iv) the elevation of accountability and transparency in public institutions; (v) the facilitation of the adherence to democratic values and principles by all state-related actors; and (vi) the promotion of remedies for injustices.[122] Notwithstanding the fact that Chapter 12 institutions must discharge their duties without fear, favour or

118 The Constitution further introduces other rights not contained in these instruments, such as the right to agricultural land.

119 http://www.constitution.org/cons/india/p04.html (accessed 27 February 2017).

120 Sec 27 Constitution of Zimbabwe.

121 L Chiduza 'The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights' (2015) 19 *Law, Democracy and Development* 148.

122 Sec 233 Constitution of Zimbabwe.

prejudice[123] and without being subject to the direction or control of anyone,[124] their conduct must, however, be consistent with the Constitution.[125] Nonetheless, in the execution of their duties, Chapter 12 institutions must be accountable to parliament to ensure the efficient performance of their functions.[126]

One of the institutions established in terms of Chapter 12 is the ZHRC.[127] The ZHRC is a national human rights institution (NHRI) entrusted with the responsibility of, amongst other things, the protection, promotion, development and attainment of fundamental rights and freedoms at all levels of society.[128] Its focus is particularly geared at the broader human rights issues related to fundamental rights and freedoms.[129]

The ZHRC wields the power to at any time require any person, institution or agency, state or otherwise, to report to the Commission on what measures they have taken to protect and fulfil the rights in the Declaration of Rights.[130] It may also require from any of these actors information necessary to compile a report relating to human rights to be submitted to any regional or international body, treaty or agreement to which Zimbabwe is a state party.[131]

In terms of section 323 of the Constitution, the ZHRC, as an independent commission, must annually submit a report to parliament via the responsible Minister.[132] However, in certain instances, when the Commission believes that a particular matter should be given attention by parliament, the matter of which relates to fundamental rights and freedoms, it may through the appropriate Minister submit a report to parliament pertaining to such matter.[133]

The mandate of the ZHRC differs from that of its South African counterpart, the South African Human Rights Commission (SAHRC), which has a twofold mandate.[134] First, its general mandate is to monitor and assess the protection and promotion of all human rights. Second, the special mandate is with respect to socio-economic rights. This mandate arose as a result of South Africa's turbulent history, which led to the disenfranchisement of the majority. In terms of this

123 Sec 235(1)(c) Constitution of Zimbabwe.
124 Sec 235(1)(a) Constitution of Zimbabwe.
125 Sec 235(1)(b) Constitution of Zimbabwe.
126 Sec 235(1)(c) Constitution of Zimbabwe.
127 Sec 242 Constitution of Zimbabwe. The ZHRC was established in 2009 under the auspices of the GNU, after the disputed 2008 elections.
128 Sec 243(1)(b) Constitution of Zimbabwe.
129 Sec 243 Constitution of Zimbabwe.
130 Sec 244(1)(a) Constitution of Zimbabwe.
131 Sec 244(1)(b) Constitution of Zimbabwe.
132 Such a report must be filed before the end of March of the year following that to which the report relates.
133 Sec 244(2) Constitution of Zimbabwe.
134 D Horsten 'The role played by the South African Human Rights Commission's economic and social reports in good governance in South Africa' (2006) 9 *Potchefstroom Electronic Law Journal* 179.

mandate, the SAHRC requests from organs of state information pertaining to socio-economic rights. The lack of a secondary mandate of the ZHRC, as the one entrusted to the SAHRC, does not diminish the pedestal role required of the ZHRC.

According to the African Commission, NHRIs play a central role in ensuring the protection of socio-economic rights.[135] The United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) notes:[136]

> [N]ational institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.

As a result, it is paramount that, within the functioning of NHRIs adequate regard be given to socio-economic rights in the all the undertakings of such institutions.[137]

The challenge that continues to hamper the proper functioning of the ZHRC is that of funding. Operations of the Commission have been hamstrung by this financial crisis, which led to the resignation of the first Chairperson of the Commission, Reg Austin.[138] In the first four years of operation, the Commission had virtually no budget.[139] By 2013, the government had steadily increased funding, but it still stood at a measly US $2 million. This eased the challenges of the ZHRC, leading to increased capacity utilisation, with 62 per cent of staff posts being filled by 2014.[140] In a paper examining the prospects and challenges of the ZHRC, Chiduza concluded that for the ZHRC to effectively discharge its duties, it must be adequately funded.[141]

These financial challenges of the ZHRC continue despite the fact that section 322 of the Constitution specifically states that parliament, as the custodian of the legislative processes, must ensure that adequate funds are available for use by commissions, to enable them to successfully discharge their duties. This is further reinforced in section 325 of the Constitution, which resoundingly states that the state must provide sufficient funds to commissions and other institutions established in terms of the Constitution to guarantee their proper functioning. The state has to begin prioritising the appropriation of funds for the ZHRC (and other commissions and

135 Tunis Reporting Guidelines (note 59 above) 18.
136 ESCR Committee General Comment 10.
137 Horsten (n 134 above) 178-179.
138 'ZHRC hamstrung by funding: Mugwadi' *The Independent* 29 August 2014.
139 As above.
140 As above.
141 Chiduza (n 121 above) 174.

constitutionally-established institutions) so that it does not have to rely on donors to cover parts of its shortfalls.[142]

6 Judicial enforcement of socio-economic rights

The courts are vested with judicial authority which is derived from the people of Zimbabwe.[143] According to section 164 of the Constitution, '[t]he courts are independent and are subject only to [the] Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice'.[144] It is important to note some of the principles guiding the judiciary including, but not limited to, the following, that (a) justice must be done to all, irrespective of status;[145] (b) justice must not be delayed and, to that end, members of the judiciary must perform their duties efficiently and with reasonable promptness;[146] (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.[147]

The last principle above, espoused in section 165(1)(c) of the Constitution, is of particular interest to this article. Section 165(1)(c) is instructive in respect of the role of the courts in safeguarding human rights and freedoms and the rule of law. The question, therefore, that arises is what the role of the courts is in safeguarding and promoting socio-economic rights. I am of the view that the point of departure to answer this question is to first examine the meaning of judicial enforcement.

Mbazira expresses the view that judicial enforcement refers to the role of court in satisfying the transformative vision of the Constitution in moving from the socio-economic deprivation of the majority to the equitable distribution of resources.[148] Another view is to look at judicial enforcement, as not only recognising the need for government to account to democratic processes, but also ensuring that accountability is possible through litigation.[149] Judicial enforcement, therefore, ensures that the rights, freedoms and guarantees in the Constitution can be litigated should they be violated.

142 Currently, 30% of the income of the ZHRC comes from the donors while the remaining 70% comes from the government.

143 Sec 162 Constitution of Zimbabwe.

144 Sec 164 Constitution of Zimbabwe.

145 Sec 165(1)(a) Constitution of Zimbabwe.

146 Sec 165(1)(b) Constitution of Zimbabwe.

147 Sec 165(1)(c) Constitution of Zimbabwe.

148 CC Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) 14 *African Human Rights Law Journal* 661.

149 Ngang (n 148 above) 661.

The Constitution[150] and Zimbabwe's commitment to international human rights instruments impose an obligation on the courts to enforce socio-economic rights.[151] Therefore, when the state fails to honour its obligation to protect, promote and fulfil socio-economic rights, the court should question this failure and take measures to ensure that the state fulfils its obligations.[152] According to the International Forum for Jurists:[153]

> Courts and quasi-judicial bodies have an important role to play in the legal enforcement of economic, social and cultural rights. Judicial remedies can provide remedies in individual cases, and can directly or indirectly result in substantial changes in domestic law and policy.

According to section 85(1) of the Constitution, an aggrieved member of society can approach the court to contend an alleged or potential violation of fundamental rights and freedoms guaranteed in the Declaration of Rights (for example, a violation of socio-economic rights). In response to the contention, the court may grant appropriate relief, which may include a declaration of rights or an award of compensation.[154] Mavedzenge and Coltart aver that the court may also award a prohibitive interdict,[155] a *mandamus*,[156] or a structured interdict in the case of a violation of socio-economic rights.[157] In the case of legislation prohibiting the full enjoyment of socio-economic rights, the court can also order a declaration of invalidity in terms of section 175(6)(b) of the Constitution, which grants the court the discretion to make an order that is just and equitable.

Section 85(1) of the Constitution was invoked in the 2016 case of *Mudzuru*.[158] Here, the applicants applied to the Constitutional Court in terms of section 85(1) of the Constitution asking the Court to interpret and apply constitutional provisions as they related to early

150 Sec 165(1)(c) Constitution of Zimbabwe.

151 See sec 3.

152 Ngang (n 148 above) 662.

153 http://www.icj.org/wp-content/uploads/2015/07/Universal-Judicial-Enforcement-ESCR-Geneva-Forum-Series-2-Publications-Conference-Report-2015-ENG.pdf (accessed 13 March 2016).

154 Sec 85(1)(e) Constitution of Zimbabwe.

155 A prohibitive interdict will stop or deter the ongoing violation of a right. See Mavedzenge & Coltart (n 35 above) 17-18 for a discussion on the various remedies available.

156 As above. In this context, a *mandamus* could be applied to force a respondent to perform a certain action or fulfil the disputed right.

157 As above. Under a structured interdict, a perpetrator is compelled to take measures to cure the violation of a right under the direction and supervision of the court.

158 *Mudzuru & Another v Ministry of Justice, Legal and Parliamentary Affairs (NO) & Others* (Const Application 79/14) [2015] ZWCC. In this case, the Constitutional Court found sec 22(1) of the Marriage Act and any law, custom and practice which authorises child marriages unconstitutional (inclusive of the Customary Marriages Act [Chapter 5: 07], to the extent that it permitted child marriages).

child marriages.[159] The Court also dealt with the question of whether the applicants had *locus standi* to engage in public interest ligation to enforce the rights in the Bill of Rights.[160]

In interpreting the Bill of Rights, the Constitutional Court noted that the courts had to develop 'new clear and precise jurisprudence'.[161] The Court argued that the Constitution was a transformative document that sought to create a break with the past[162] and, accordingly, had to be interpreted progressively, generously and purposefully.[163] Importantly, the Court also noted that it was common cause, when interpreting the Bill of Rights, to seek guidance from international jurisprudence and international instruments, particularly those ratified by Zimbabwe.[164]

Accordingly, the Constitutional Court noted that, pursuant to section 44 of the Constitution, there was an obligation to protect every right in the Declaration of Rights, regardless of the socio-economic standing of the rights bearer.[165] The Court then used the following imagery:[166]

> Like a shepherd who cannot escape liability for a lost sheep by claiming ignorance of what happened to it, the state is expected to know what is happening to fundamental rights and freedoms enshrined in Chapter 4 [Declaration of Rights]. It is under an obligation to account, in the public interest, for any infringement of a fundamental right even by a private person.

The intention of the Court in the above imagery was to show that the courts have a vested obligation to ensure that fundamental rights and freedoms can be enjoyed in practice.[167] The Court further argued that section 85(1) provided an opportunity for multiple interests of different sections of society to find redress from the Court.[168] The Court reasoned that the objective of such a wide representation was

159 In analysing this issue, the Court noted that, while there was no standing to bring the matter under sec 85(1)(a) of the Constitution, there was, however, sufficient interest under sec 85(1)(d), as children's rights were of a public concern. The Court, however, cautioned that, in future, the unlimited right of access offered by sec 85 could be replaced with the 'interest of justice' rule. See judgment (n 158 above) 22.

160 The second issue was whether sec 78(1) of the Constitution set the minimum marriageable age in Zimbabwe at 18. The third issue was whether sec 22(1) of the Marriages Act was invalidated by secs 78(1) and 81(1).

161 *Mudzuru* judgment (n 158 above) 8.

162 *Mudzuru* judgment 9.

163 *Mudzuru* judgment 8-9.

164 *Mudzuru* judgment 42.

165 *Mudzuru* judgment 12.

166 *Mudzuru* judgment 13.

167 *Mudzuru* judgment 14.

168 As above. Sec 85 of the Constitution provides that the enforcement of fundamental rights and freedoms can be done by any of the following persons, namely, (a) any person acting on their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members.

to dismantle the formal barriers in the legal system and, in so doing, to provide tangible, significant, justice for the masses.[169] The Constitutional Court noted:[170]

> The right to access justice, which itself a fundamental right, must be made available to a person who is able to, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.

Consistent with the judgment delivered by Chaskalson P in *Ferrreira v Levin NO & Others*,[171] the Constitutional Court argued for a broad approach so that rights can enjoy full constitutional protection.[172] In this bid, the Court observed:

> The liberation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under [section] 85(1) of the Constitution to adopt a broad and generous approach to standing. The approach must eschew over reliance on procedural technicalities, to afford full protection to the fundamental human rights and freedoms enshrined in Chapter 4.

The judgment by Malaba DCJ in the *Mudzuru* case is very informative with regard to the interpretation and enforcement of fundamental rights and freedoms. The judgment illustrates the need for a broad approach to ensure that fundamental rights and freedoms are protected. As envisaged by sections 85(1)(a)-(e), anyone who feels aggrieved that their socio-economic rights are being violated can approach the courts. One could even go as far as litigating socio-economic rights on the basis of public interest.[173]

The *Mudzuru* case underscored the resolve of the Constitutional Court in upholding fundamental right and freedoms, more broadly. However, socio-economic rights are yet to be extensively tested in Zimbabwean courts. With regard to the negative interference in socio-economic rights, the case of *Farai Mushoriwa v City of Harare* (*Mushoriwa* case)[174] is worth mentioning.

The facts of the matter, which were not contested by the parties, were that the applicant was a lawful tenant occupying flat 12 of the Northcliff block of flats in the City of Harare,[175] while the respondent was the City of Harare, a duly-constituted urban municipal authority in terms of the Urban Councils Act [29:15].[176] The City of Harare was the sole supplier of domestic water in the city, including to the block of flats where the applicant resided. During May 2013, the applicant

169 *Mudzuru* judgment 14.
170 As above.
171 CT5/95 1996 ZACC 27.
172 *Mudzuru* judgment (n 158 above) 15.
173 Sec 85(1)(d) Constitution of Zimbabwe.
174 (HC 4266/13) [2014] ZWHHC 195.
175 *Moshoriwa* judgment 1.
176 As above.

received a bill of US $1 700 for the purported rendering of water services.[177] The applicant disputed the amount in question, and that he owed any amount to the respondent.[178] On 31 May 2013, the respondent then shut off the water supply of the applicant, leading to the urgent application by the applicant to the High Court.

The respondent argued that in terms of section 8 of the City of Harare's water by-law read together with '[section] 198(3) and [section] 69 of the third schedule to the Urban Councils Act it is clothed with unfettered discretion to disconnect water supplies to a citizen at will without recourse to the courts of law'.[179] The counter-argument of the applicant was that '[t]he by-law relied upon by the [r]espondent [w]as *ultra vires* section 198 as read with [section] 69(2)(e) of the third schedule to the parent Act and [section] 77 of the Constitution'.[180]

The applicant sought a spoliation order and an interdict as an interim measure.[181] Herein, the applicant pursued the restoration of his power supply. As a final order, the applicant sought an order showing the following:

(a) the termination by the respondent of the applicant's water supply on the basis of a disputed water bill and in the absence of a court order is unlawful self-help;

(b) that the respondent and all its employees be interdicted from interfering in any way whatsoever with, disrupting or terminating the applicant's water supply without a court order;

(c) that the respondents shall pay all of the cost of the suit on the higher scale of legal practitioner and client scale only if it opposes the application.

Section 77 of the Constitution provides for the right to food and water. It states:

> Every person has the right to –
>
> (a) safe, clean and potable water; and
>
> (b) sufficient food;
>
> and the state must take reasonable legislative and other measures, within the limits of resources available to it, to achieve the progressive realisation of the rights set out in this section.

The High Court in this matter first noted the obligation in section 44 of the Constitution to protect fundamental rights and freedoms imposed on all persons, natural and juristic, including every institution and agency of government at every level. It observed that in this

177 *Moshoriwa* judgment 2.
178 As above.
179 *Moshoriwa* judgment 3.
180 *Moshoriwa* judgment 4.
181 *Moshoriwa* judgment 1.

particular case, the respondent was an institution of local governance and was therefore obligated not to deny citizens water without just cause.[182] It noted that the role of the courts in promoting and safeguarding fundamental rights and freedoms, as guaranteed in section 165(1)(c) of the Constitution, was essential to the functioning of the rule of law.

In attempting to interpret the role of the court in protecting and promoting socio-economic rights, in particular the right to water and food, the High Court quoted the words of Francis Bennion, in his book *Statutory interpretation* (1984), where he stated:[183]

> A court is an agency charged with the function of exercising the judicial power of the state. Only a court as thus defined has the power authoritatively to determine what the law is, and therefore what is the legal meaning of a relevant enactment.

The High Court was of the view that Bennion's statement accorded with section 171 of the Constitution. Pursuant to section 171, the High Court has jurisdiction over all civil and criminal matters, with unlimited jurisdiction throughout the country, except in cases where the power of the Court has been expressly limited by parliament.[184]

The High Court noted that it had been conferred powers by the Constitution, as the supreme law of the land, to rule over this matter and subsequently to make a determination.[185] Resultantly, the Court took the view that it could, therefore, not abdicate its function because of an errant and unlawful municipal by-law, which was contrary to the spirit of the Constitution as well as the enabling statute.[186]

More specially, the High Court noted that section 8 of by-law 164 of 1913 was inconsistent with the Constitution and the enabling statute in more than one way.[187] As a point of departure, section 8 of by-law 164 enabled the respondent to 'arbitrarily deprive citizens of their fundamental right to water without compensation contrary to [section] 85 of the Constitution which entitles an aggrieved person to appropriate compensation whenever his fundamental right has been violated'.[188] To add to that,[189]

> in the event of a disputed bill it unlawfully confer[red] the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law contrary to the provisions of [section] 69 of the third schedule to the Act as read with [section] 165 (1)(c) of the Constitution. By so doing the by-law allows the [r]espondent to be the sole arbiter in its

182 *Moshoriwa* judgment 5.
183 As above.
184 *Moshoriwa* judgment 6.
185 As above.
186 As above.
187 As above.
188 As above.
189 As above.

> own case contrary to the well-established common law maxim that no one should be a judge in his own case.

Section 8 of the by-law did not serve a public function, and was rather in violation of basic legal principles (such as that the Harare City Council could be a judge in its own case).[190] In the opinion of the Court it was notorious that the City Council could exercise its right to collect debts by willy-nilly barring citizens' access to water, a fundamental right, without affording them recourse to the law and courts; in clear violation of public interest, the enabling statute and the Constitution.[191] The Court observed that in a similar case, *City of Cape Town v Strumpher* (pre-2013 Constitution),[192] the court had come to the same conclusion.[193] The High Court then granted the interim relief, and ordered that the respondent, through his legal counsel, show why the final relief should not be granted.[194]

The *Mushoriwa* case demonstrates that when faced with a challenge to socio-economic rights, the court will not hesitate to grant appropriate relief.[195] The court, therefore, showed that it has the power to adjudicate on matters concerning the infringement of socio-economic rights without fear, favour or prejudice.[196] Furthermore, the courts are alert to usurpers of power who abuse their authority to violate socio-economic rights, to the detriment of society.[197] For these reasons, the courts can then be said to be custodians of the enforcement of socio-economic rights.

The *Mushoriwa* and *Mudzuru* cases both dealt with the 'negative interference of rights with enjoyment of existing rights'. However, in most instances, the challenge with socio-economic rights claims 'is mostly with enforcing positive claims', for instance, the duty of the state to provide for the guaranteeing of socio-economic rights. A good case in point is the recent case of *Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare* (*Hopcik* case).[198]

In this case, the applicant, Hopcik Investment (Pty Ltd), sought an order compelling the respondents, the Minister of Environment, Water and Climate and the City of Harare, to supply 15 000 litres of potable water per week to its premises.[199] The application followed the failure by the City of Harare to supply water in the area in which the applicant's property was situated (Ballantyne Pak, Harare) for a

190 As above.
191 As above.
192 (104/11) (2012) ZASCA.
193 Judgment 6.
194 Judgment 7.
195 Secs 85(1) & 175(6)(b) Constitution of Zimbabwe.
196 Judgment 7.
197 As above.
198 HH 137-16 & HC 1796/14.
199 *Hopcik* judgment 1.

period of three years.[200] In contrast, other properties in Harare had access to a constant supply of water.[201]

While the applicant acknowledged that the City of Harare faced certain challenges that hindered the provision of water to all residents, they were of the view that not sufficient steps had been taken to ensure the equitable distribution of water to all inhabitants.[202] Further to this, the applicant submitted that the City of Harare was derelict of its duty to supply water to all residents.[203]

In response to the contentions of the applicant, the City of Harare argued that it was embattled with a myriad of challenges; most notably financial constraints.[204] Also, the City of Harare cited a significant growth in the urban population that resulted in the demand for water outstripping supply.[205] Furthermore, the City of Harare also highlighted the need to factor in the turbulent economic climate which made it difficult to adequately maintain critical infrastructure such as water pipes.[206] Finally, the City of Harare noted that erratic rainfall had also exacerbated the situation. It is against this background that the City of Harare argued that it had been unable to guarantee the applicant the minimum 15 000 litres of water they sought.

As part of its arguments, the City of Harare noted that the legislature had envisioned such a situation when they drafted section 183(1) of the Urban Councils Act,[207] which used the word 'may' in relation to the ability of the Council to supply water to its residents. The exact language used is as follows:[208]

> (1) A council may provide and maintain a supply of water within or outside the council area and for that purpose the council may –
>
> (a) in accordance with the Water Act [Chapter 20:22] take such measures and construct such works, whether inside or outside the council area, as it considers necessary for the purpose of providing and maintaining a supply of water;
>
> (b) enter into agreements for the purchase and sale of water and for any other thing necessary in connection with the maintenance and supply of water.

The argument of the City of Harare pursuant to this provision holds weight; nevertheless, it negates the constitutional mandate in section 77 of the Constitution providing everyone with the right to water, a right in respect of which the state must take reasonable legislative and

200 *Hopcik* judgment 2.
201 As above.
202 As above.
203 As above.
204 As above.
205 *Hopcik* judgment 3.
206 As above.
207 [Chapter 29: 15].
208 Sec 183(1).

other measures, within its resources, to progressively realise the right. While section 77 speaks generally about the state, the Preamble to Chapter 14 of the Constitution provides that there must be a devolution of power and responsibilities given to lower tiers of government so as to ensure the equitable allocation of national resources. This is reinforced in section 264 of the Constitution on the devolution of governmental powers and responsibilities.

Notwithstanding the above, both respondents submitted that they were taking steps to alleviate the dire situation.[209] They averred that they had engaged various stakeholders, including investors and partners. Through these engagements, they had subsequently managed to receive loans which they hoped to utilise to ease the situation.[210] In addition to this, the Minister had also signed a number of 'memorandums of understanding and agreements with different countries and construction companies with the objective of building dams, drilling of boreholes so as to improve water supply'.[211] Based on these actions, the respondents hoped to see changes in the water supply in the near future.[212]

In looking at the arguments of both parties, the High Court noted that the right to water was the most basic of rights and was recognised as a human right by the United Nations General Assembly through Resolution 64/292 of 28 July 2010.[213] This Resolution places an obligation on states to take measures to ensure that its citizens have access to safe, sufficient, affordable, quality and physically-accessible water.[214] To meet this mandate, state parties, therefore, have to make financial resources available so as to aid in capacity building and technology transfer.[215] The High Court further noted that this right to water was also entrenched in other international instruments, such as CEDAW, the CRC and the ICESCR.[216] In terms of this right to water, the Court noted that there was entitlement to access to a minimum amount of water necessary to sustain life and health.[217] To concretise this argument, the High Court noted the South African case of *Mazibuko*,[218] where the Constitutional Court held that the entrenchment of the right of access to water was not surprising because of its centrality in human life.[219]

Focusing on legislation, the High Court noted that the right to water in section 77 of the Constitution was introduced as an

209 *Hopcik* judgment 2.
210 As above.
211 As above.
212 As above.
213 *Hopcik* judgment 3.
214 As above.
215 As above.
216 As above.
217 As above.
218 *Mazibuko & Others v City of Johannesburg* (CCT 39/09) (2009) ZACC.
219 *Hopcik* judgment 4.

enshrined constitutional right in recognition of the right to water. This was in line with the UN Resolution of 28 July 2010 which placed an obligation on the state to provide water.[220]

Turning to the realisation of this right, the High Court cited the primary obligation to ensure this right as being placed on the state, through the first respondent.[221] However, the state had to take measures to ensure the implementation of the right, which included ceding some of the responsibility to the second respondent through the Water Act and the Urban Councils Act.[222] To ensure the effectiveness of this delegation, the state had to ensure that the local authorities have enough power and resources to perform this function.[223]

In conclusion, the High Court noted that the respondents had both failed to take reasonable steps to address the challenges.[224] The Court further highlighted the curious disparity in the manner in which water was distributed to different residents in the town. It underscored the need to provide water in a manner which was fair and equitable to all residents. Where challenges existed in particular areas, measures had to be taken to alleviate this plight, including making use of technology.[225] Consequently, the failure of the respondents was a breach of section 77 of the Constitution. The High Court then made the order that the respondents, jointly and severally, be responsible for ensuring a supply of water to the applicant's premises.[226]

Similar to the *Mushoriwa* case, the Court once again noted the need to respect and promote socio-economic rights. Differently, however, this case illustrated that there was a positive obligation on the state to ensure that socio-economic rights are met, which obligation also involves the allocation or redistribution of resources. While the Court dealt with this issue of positive enforcement of rights, there were more arguments and considerations which could have been taken into account. The High Court seems to have superficially treated the issues and marginalised broader socio-economic rights considerations. The *Grootboom* case is a good example of which considerations ought to be taken into account when dealing with the positive enforcement of rights.[227]

In this case, an application was brought by several individuals, including children, who had illegally moved onto private land as a

220 As above.
221 As above.
222 As above.
223 As above.
224 *Hopcik* judgment 6.
225 As above.
226 *Hopcik* judgment 7.
227 *Government of the Republic of South Africa & Others v Grootboom* Case CCT 11/00.

result of the appalling conditions they were living in while awaiting low-cost housing.[228] They were subsequently evicted and moved to a sports field where they could not erect shelters after their material had been destroyed during the eviction. On application, they were granted relief to the effect that the government had to provide them with shelter until they secured permanent accommodation pursuant to section 28(1)(c) of the South African Constitution. This decision by the High Court was then taken on appeal. The respondents argued that the right to housing was a minimum core obligation which the state had to comply with, subject to section 26. The Constitutional Court noted:[229]

> Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought not to have been made. However, section 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its section 26 obligations … The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

This case was a landmark case in the enforcement of positive socio-economic rights. It addresses concerns that were not properly addressed, in the Zimbabwean context, in the *Hopcik* case (the Constitution contains a provision similar to section 26 of the South African Constitution).

First, the *Grootboom* case eases 'separation of powers concerns'. It is a stellar example of how the judiciary can force the executive the obligation to ensure that socio-economic rights are protected, promoted and realised. Second, and closely connected to the first, the *Grootboom* case debunks the myth that socio-economic rights are purely aspirational and should be left in the hands of politically-accountable politicians.[230] From this case, the Zimbabwean courts can learn that the judicial enforcement of these rights is essential in the realisation of these rights.

Third, the *Grootboom* case settles polycentric arguments. These arguments centre upon the premise that courts are poorly equipped to deal with issues the consequences of which go beyond the parties involved.[231] While all justiciable rights, to some degree, entail polycentric elements, scholars have noted that polycentricity is considerably high in socio-economic rights litigation.[232] The *Grootboom* case bears testimony to the fact that the merits of these arguments are significantly limited. The Constitutional Court adequately dealt with competing arguments and inter-acting variables in enforcing the socio-economic rights of the litigants. This was

228 *Hopcik* judgment para 3.
229 *Grootboom* judgment paras 95-96.
230 Trispiotis (n 29 above) 3.
231 As above.
232 L Lazarus et al (eds) *Reasoning rights: Comparative judicial engagement* (2014) 320.

notwithstanding the alleged inadequate training of judges on policy matters. The Zimbabwean courts can thus use this judgment as a benchmark to assert their competence in dealing with these issues.[233] However, it should be cautioned that the curriculum of the Bachelor of Laws (LLB) degree in Zimbabwe is not as broad and interdisciplinary as that in South Africa. Furthermore, the lack of specialised interdisciplinary post-graduate legal programmes also is a cause for concern. These factors could adversely affect the enforcement of socio-economic rights in Zimbabwe.[234]

Fourth, Zimbabwe may also learn that the judicial enforcement of socio-economic rights reinforces the political legitimacy of policies that support this vision.[235] In the Zimbabwean context, this would support controversial policies such as the Indigenisation and Economic Empowerment Policy, the Land Reform Policy and the Zimbabwe Agenda for Sustainable Socio-Economic Transformation, which focus on realising socio-economic rights of previously-marginalised individuals.

Finally, an important aspect of the *Grootboom* judgment was the potential effect of the internal limitation on enforcing or realising socio-economic rights. The Constitutional Court grappled with an extremely constrained budget for housing and the progressive realisation of this right.[236] In approaching this challenge, the Court noted the following, that (i) what are considered as reasonable measures should be interrogated from the prism of the three spheres of government (national, provincial and local government) and in view of the Bill of Rights as a whole;[237] (ii) the drafters had foresight of the fact that socio-economic rights could not be realised immediately, but this did not deprive these rights of their meaningful content;[238] and (iii) only what is possible within the current resources is expected, thus requiring a balance between goals and means.[239]

In Zimbabwe, Chapter 4 socio-economic rights also are constrained by similar limitations such as progressive realisation, reasonableness of measures and the availability of resources. These internal limitations, coupled with the general limitation to rights in section 87 of the Constitution, could potentially limit 'the protection and possible enforcement of Chapter 4 socio-economic rights'. This further is exacerbated by the fact that most of the socio-economic rights in the

233 See, generally, RE Kapindu 'Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities' (2013) 13 *African Human Rights Law Journal* 140.

234 See, eg, http://www.gzu.ac.zw/bachelor-of-laws-llb-honours-degree/ (accessed 5 March 2016).

235 The International Institute for Democracy and Electoral Assistance 'Social and economic rights' (2014) *Constitution Building Primers* 6.

236 *Grootboom* judgment para 14.

237 *Grootboom* judgment para 44.

238 *Grootboom* judgment para 45.

239 *Grootboom* judgment para 46.

Bill of Rights are of a basic nature. An approach such as that in *Grootboom* could assist in restricting the challenges brought by the internal and general limitations.

7 Empowering nature of socio-economic rights under a transformative constitution

Socio-economic rights are empowerment rights: They allow socially-vulnerable and marginalised individuals and groups to use the legal process in order to obtain the satisfaction of their essential socio-economic needs. Socio-economic rights empower people who are subject to the jurisdiction of a state to demand that that state acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, these rights progressively enable citizens to hold government accountable for the manner in which it seeks to hold government accountable for the manner in which it seeks to pursue the achievement of social and economic welfare and development.[240]

The profound quote above from the work of Kapindu speaks to the aspirations of the nation (Zimbabwe), as seen through the national objectives in Chapter 2 and the resolve to protect fundamental rights and freedoms in Chapter 4 of the Constitution (Declaration of Rights). The Constitution of Zimbabwe came into being after a prolonged period of colonialisation in the past and, more recently, a turbulent political environment that led to the signing of the Global Political Agreement (GPA) and the creation of an inclusive government. Therefore, it was imperative that the Constitution be clothed as a transformative one. Such a constitution would aid in healing past injustices, and charting an inclusive future where all citizens could equitably enjoy the resources of the country and share in its prosperity.

In a transformative constitution, socio-economic rights allow those at the bottom of the barrel of society, who wield neither material nor political power, the opportunity to have access to adequate socio-economic conditions. Without adequate socio-economic conditions, the poor cannot maintain their dignity. To these members of society, civil and political rights mean nothing without accompanying socio-economic rights which, to them, are more real. For example, imagine a citizen and his family living on the banks of the Mukuvisi river in Harare. To this person, the right to vote means a chance in four or five years to change politicians who are removed from the plight he and his family bear testimony to. The protection of the right to food, for example, would be very real to them as this would determine what meal their family will or will not have. Socio-economic rights accrue quite naturally to the rich and elitist by virtue of the pedestals on

240 Kapindu (n 233 above) 126.

which they sit in society. It is quite impossible to find a rich person who could be deprived of the right to food, as they can easily buy or, in certain instances, import the food they need for their family.

The reality of our African societies is that poverty is a scourge that is omnipresent in the lives of the majority of our people. Poverty, coupled with a lack of opportunity, significantly diminishes socio-economic conditions. The Constitution of Zimbabwe instituted significant protection for socio-economic rights in order to mitigate the effects of poverty and the lack of opportunity. However, this is not enough as these provisions need teeth through judicial enforcement.

In a transformative constitution, such as the Constitution of Zimbabwe, the protection and legal enforcement of socio-economic rights ensure that there is equality and justice for all. Society cannot heal if the gap between rich and poor continues to widen, and the poor are left to live in abject poverty without basic socio-economic needs. The provision of socio-economic rights in the Constitution ensures that the aspirations of the founding fathers that fought for the liberation of Zimbabwe are realised. This leads to the creation of an egalitarian, prosperous and democratic society, built on the principles of freedom, equality, peace, justice and tolerance, where the country can search for new frontiers under a common destiny.

8 Conclusion

Zimbabwe's economic landscape is still littered with the effects of the 'white colonial regime' that disenfranchised the masses, and shifted economic power into the hands of a few (the white minority). To date, as a result of prolonged deprivation of opportunity, coupled with political misdirection, many are still deprived of their basic socio-economic needs. While the masses are still unable to provide for themselves, a new form of black elite has emerged, leading to a two-pronged elite system (black elite and white elite). A transformational constitution was an appropriate action in order to balance the economic scale of society. The Constitution seeks to create an equal society, where all can share in the resources and prosperity of the country.

The article revealed that, although there was initial resistance to include socio-economic rights as justiciable rights, the new Constitution includes judicially-enforceable socio-economic rights in the Declaration of Rights. The provision for socio-economic rights in the Constitution was shown to reinforce socio-economic rights in regional and international human rights instruments, such as the Universal Declaration, the ICESCR, the CEDAW, the CRC and the ICERD. It was shown that in terms of institutions, the ZHRC has been awarded significant powers to deal with issues relating to socio-economic rights and fundamental rights and freedoms. The state, however, needs to appropriate more resources to the ZHRC, in order for it to operate at full capacity and discharge its mandate efficiently.

The article showed the steadfastness of the judiciary in upholding fundamental rights and freedoms, including socio-economic rights. The *Mudzuru* case proved that even in public interest cases, the courts will protect and enforce any rights in the Bill of Rights. More specific to socio-economic rights, the *Mushoriwa* case showed that the courts would not hesitate to develop a socio-economic rights jurisprudence. Accordingly, a wide approach to the interpretation of fundamental rights and freedoms so that all rights and freedoms could be comprehensively covered was adopted in the case. The *Hopcik* case demonstrated that in cases of the positive enforcement of rights, the courts would not hesitate to enforce on the state its duty to mobilise resources to ensure socio-economic rights. Finally, the article suggests that, in developing socio-economic right in the future, the courts could benefit from South African jurisprudence, in particular the *Grootboom* case.

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The rights to life, health and development: The Ebola virus and Nigeria

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Summary

The Ebola virus disease outbreak in West Africa which started in Guinea in December 2013, as confirmed by the World Health Organisation in March 2014, was reported to have killed approximately 11 310 people in Guinea, Liberia and Sierra Leone between December 2013 and March 2016. On 20 July 2014, the virus was imported into Nigeria through an infected Liberian-American citizen who had travelled from Liberia to Nigeria, arriving at the Murtala Mohammed International Airport in Lagos. The article examines the duty of the Nigerian government to protect Nigerian citizens from contracting and dying from Ebola by ensuring, in practical terms, that the right to life of every Nigerian, as enshrined in section 33 of the Constitution of the Federal Republic of Nigeria 1999, is protected. Furthermore, it is argued that the Nigerian government owes a duty of care to its citizens to a level that ultimately ought to enable each Nigerian to enjoy adequate medical services and infrastructural development in the healthcare sector. This duty of care can be traced to article 22 of the African Charter on Human and Peoples' Rights which confers a legally-binding right to development on African

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peoples. The article examines the justiciability of these rights under domestic and international law and identifies the potential legal liability of the Nigerian government, as well as the possible remedies available to the relatives of victims of the virus in Nigeria in the event of such liability. More broadly, the authors use Ebola to explore the notion of 'pragmatic development' – and ask what this means (or ought to mean) in a contemporary African context, within Nigeria's socio-economic rights framework, and the role that international human rights law can play in helping to solve Nigeria's chronic healthcare services and infrastructural deficit.

Key words: *international human rights; constitutional law; right to development; Ebola virus outbreak*

1 Introduction

According to the World Health Organisation (WHO), 28 616 suspected and confirmed cases of the Ebola virus disease (EVD) was reported in West Africa, with 11 310 confirmed deaths between December 2013 and March 2016 when the Public Health Emergency of International Concern (PHEIC) related to Ebola in West Africa was lifted.[1] The outbreak started in Guinea in December 2013 and was confirmed as such by the WHO in March 2014.[2] On 20 July 2014, the virus was imported into Nigeria through Mr Patrick Sawyer, an infected Liberian-American citizen who had travelled to Nigeria from Liberia, arriving at the Murtala Mohammed International Airport in Lagos.

On arrival in Nigeria, Mr Sawyer collapsed at the airport and was rushed to First Consultants, a leading private hospital in Obalende, Lagos Island. There he was treated by a team of medical personnel led by the late Dr Ameyo Adadevoh, who was able to diagnose EVD after Sawyer had spent four days at the institution. Sawyer was treated for malaria, having initially denied any previous contact with EVD-infected persons. Once the Lagos State government was informed of the diagnosis, a frantic effort to contain the spread of the disease began at all levels of government – from tracking all primary and secondary contacts to quarantining them for the 21-day period mandated by the WHO. Thankfully, through these proactive measures, Nigeria's last case was reported on 8 September 2014 and the country was declared free from EVD on 20 October 2014.[3]

1 World Health Organisation 'Situation report: Ebola Virus Disease 10 June 2016' http://apps.who.int/iris/bitstream/10665/208883/1/ebolasitrep_10Jun2016_eng.pdf?ua=1 (accessed 6 April 2017).

2 World Health Organisation 'Ebola virus outbreak' (Ebola Situation Report 2 March 2015) http://who.int/csr/disease/ebola/en/ (accessed 15 March 2016).

3 World Health Organisation 'Nigeria is now free of Ebola virus transmission' (Ebola Situation Assessment 20 October 2014) http://www.who.int/mediacentre/news/ebola/20-october-2014/en/ (accessed 15 March 2016).

That the Nigerian government (with some help from the international community) reacted swiftly and effectively in handling the outbreak of EVD in the country is not in contention, and the government has received international commendation for this. However, although Nigeria has been declared Ebola-free,[4] to better prepare for the future a critical appraisal must be conducted of the actions or inactions that led to the introduction of EVD into Nigeria and even the perceived lapses in the government's response, in order to distil important lessons for future health challenges from such deadly viruses.

The article examines the duty of the Nigerian government to protect Nigerian citizens from contracting and dying from EVD by ensuring, in practical terms, that the right to life of every Nigerian, as enshrined in section 33 of the Constitution of the Federal Republic of Nigeria 1999 (CFRN), is protected. Furthermore, it may be argued that the Nigerian government owes a duty of care to its citizens to ultimately enable each Nigerian to enjoy adequate medical services and infrastructural development in the healthcare sector. This duty of care can be traced to article 22 of the African Charter on Human and Peoples' Rights of 1981 (African Charter), which confers a legally-binding right to development on African peoples.

The article examines the justiciability of these rights and identifies the potential legal liability of the Nigerian government by virtue of duties conferred on the government by the relevant international human rights norms, the African Charter and the CFRN, as well as the possible remedies available to the relatives of victims of EVD in Nigeria in the event of such liability. More broadly, the authors utilise the Ebola case to explore the notion of 'pragmatic development' and what this means (or ought to mean) in a contemporary African context, within Nigeria's socio-economic rights framework; and what role international human rights law can play in helping to solve Nigeria's chronic services and infrastructural deficit in the healthcare sector. This endeavour has become important in light of the rapid increase in the number of infectious diseases presently ravaging the world and the cross-border transmission of these diseases.[5] Part two of the article analyses the legal basis, meaning and scope of the rights to life and health within the context of the EVD outbreak, the obligations of states with respect thereto and the nexus or implication between these two rights and the right to development. Part three sets out the legal basis of the right to development and articulates what development should mean within an African context. Part four

4 As above.

5 See, eg, Yahoo Health 'Zika virus declared global health emergency' https://www.yahoo.com/health/zika-virus-declared-global-health-emergency-185933502.html (accessed 2 February 2015); 'Government screens for Zika at airports, borders' *The Guardian* http://www.ngrguardiannews.com/2016/02/govt-screens-for-zika-at-airports-borders/ (accessed 12 February 2016).

applies this analysis to the Ebola case in Nigeria, while part five concludes with recommendations for the future.

2 Government's legal liability in relation to the rights to life and health in the Nigerian public health setting

This section interrogates the meaning and content of the rights to life and health within the context of the outbreak of epidemics and infectious diseases and sets out the obligation of states in relation thereto.

2.1 Meaning, scope and legal liability of Nigeria in relation to the right to life in the context of public health

Among the rights guaranteed by human rights norms and standards, the right to life occupies pride of place. It is agreed that the right has become part of the corpus of customary international law. The reason for this assertion is simple: The right to life, by popular consensus of states, first provided for in article 3 of the Universal Declaration of Human Rights (Universal Declaration) appears to have become part of some provisions of the Declaration that have been incorporated into the corpus of customary international law binding on all states.[6] This can be gathered from the fact that the right has become an important feature, even if on paper, of international,[7] regional[8] and domestic bills of rights of most civilised states.[9] Although the right to life is provided for in many international, regional and domestic bills of rights, as mentioned above, only the provisions of the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), the African Charter and the CFRN in relation to the right to life will be examined in the article. The reason for this is that only these instruments have either been ratified and/or domesticated.[10]

6 Hannum has, correctly in our view, argued in this regard that while there may be controversy whether all the provisions of the Universal Declaration have become part and parcel of customary international law, there appears to be little argument that many provisions of the Declaration today reflect customary international law. H Hannum 'The Universal Declaration in national and international law' (1998) 3 *Health and Human Rights* 148-149.

7 Arts 3 & 6 Universal Declaration and ICCPR respectively.

8 Art 4 American Convention on Human Rights; art 2 European Convention for the Protection of Human Rights and Fundamental Freedoms; art 4 African Charter.

9 See eg sec 33 of the CFRN.

10 Although the Universal Declaration has not been ratified by Nigeria, Nigeria's legal liability in relation thereto can be found under customary international law, as discussed above. The ICCPR, on its part, was ratified by Nigeria on 29 July 1993. See OHCHR 'Status of ratification by treaty and by country' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN (accessed 15 December 2015). As regards the African Charter, Nigeria ratified and domesticated the Charter in 1983 via the African Charter (Ratification and Enforcement) Act Cap A9 LFN 2004.

Having made this preliminary point, we below proceed to examine the particular content of the right to life and the obligation on Nigeria within the context of the outbreak of epidemics and infectious diseases.

As stated earlier, the Universal Declaration is the first international human rights instrument which provides for the right to life. Article 3 of the Universal Declaration affirms 'the right of everyone to life, liberty and security of the person'. Article 6(1) of the ICCPR echoes this provision of the Universal Declaration and provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The right to life is a right which appertains to every person as a result of being human. It has, therefore, been argued correctly that a reference to the right to life as an inherent right in the ICCPR suggests that the right exists quite apart from any recognition in positive law.[11]

In its interpretation of article 6 of the ICCPR, the United Nations (UN) Human Rights Committee (HRC), the quasi-judicial body responsible for the interpretation and enforcement of the ICCPR, explains that the right to life is a supreme right which cannot be derogated from even in times of a life-threatening public emergency.[12] In addition, the right is said to have assumed the status of peremptory norms of international law, the arbitrary deprivation of which is prohibited by the international law rule of *jus cogens.*[13] In the view of the HRC, state parties have the supreme obligation to prevent all acts which may cause the arbitrary deprivation of life and, broadly interpreted, the right to life includes the obligation of states in the public health setting to adopt positive measures to increase life expectancy through the prevention and elimination of epidemics.[14]

The African Commission on Human and Peoples' Rights (African Commission), the quasi-judicial body mandated with the interpretation and enforcement of the African Charter, echoed this interpretation of the right to life by the HRC above. In the recent case of *Sudan Human Rights Organisation & Another v Sudan,*[15] the Commission explains that the right to life in article 4 of the African Charter[16] is a basic and supreme right of human beings without which all other rights are meaningless. According to the African Commission, this right in its broad interpretation includes a positive

11 See, eg, CH Heyns *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* A/68/382 (13 September 2013) para 31 https://www.justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf (accessed 10 December 2015).

12 HRC General Comment 6 para 1.

13 HRC General Comment 24 paras 8 & 10; Heyns (n 11 above) para 30.

14 HRC General Comment 6 para 5.

15 (2009) AHRLR 153 (ACHPR 2009) para 146.

16 Art 4 of the African Charter provides: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right.'

obligation on state parties to take positive and proactive steps to protect citizens from outbreaks of infectious diseases.[17] Thus, where the state has not been proactive or has failed to exercise sufficient care and due diligence to prevent events and circumstances that may occasion the loss of life of persons within its jurisdiction, this may generate a responsibility for the state notwithstanding the fact that the violating act(s) is not directly imputable to the state, as is the case with the importation of EVD into Nigeria by Patrick Sawyer. The state is also obliged to provide reparations to victims of violations.

With regard to the CFRN, the right to life is guaranteed under section 33. Section 33(1) guarantees to every person the right not to be intentionally deprived of life except with respect to carrying out the sentence of a court for a criminal offence of which a person has been found guilty in Nigeria. Section 33(2) of the CFRN, however, provides seven different limitations of the right to life guaranteed under section 33(1). According to the provisions of section 33(2), a person shall not be deemed to have been deprived of his life in contravention of section 33(1), if such person dies from (i) force reasonably necessary to protect any person from unlawful violence; (ii) force reasonably necessary to defend property;[18] (iii) force reasonably necessary to effect a lawful arrest; (iv) force reasonably necessary to prevent the escape of a person who is lawfully detained;[19] (v) force reasonably necessary to suppress a riot; (vi) insurrection; or (vii) mutiny.[20] Thus, if a person dies from the application of reasonable and proportionate force in furtherance of any of the seven purposes or objectives outlined above, such death is not regarded as the deprivation of life within the meaning of section 33 of the CFRN.

Section 33 of the CFRN consequently has been rightly criticised as the very negation of the religious concept of the right to life which presupposes that life and the accompanying right to it is God-given and can, therefore, be taken only by God.[21]

However, it is suggested that despite the numerous exceptions to the right to life under the CFRN outlined above, the obligation on states under international human rights standards and norms identified earlier in the article to act with due diligence to increase life expectancy through the elimination of epidemics in the public health setting are equally applicable to Nigeria by virtue of its subscription to, ratification and domestication of the human rights instruments examined here.

17 African Commission General Comment 3 para 41.
18 Sec 33(2)(a) CFRN.
19 Sec 33(2)(b) CFRN.
20 Sec 33(2) CFRN.
21 A Uchegbu 'The concept of "right to life" under the Nigerian Constitution' in JA Omotola (ed) *Essays in honour of Judge TO Elias* (1987) 136.

Having identified and discussed the Nigerian government's legal liability in relation to the right to life above, we proceed to examine the Nigerian government's liability in relation to the right to health.

2.2 Meaning, scope and legal liability of the Nigerian government in relation to the right to health in the context of public health

The right to health is an essential right without which other rights may be meaningless.[22] A person who is critically ill with no access to appropriate and adequate healthcare is unlikely to appreciate, much less exercise, the rights to personal liberty, freedom of movement, religion, expression, shelter, privacy, among others. Such a person is also most likely to have his or her dignity and autonomy, values central to human rights norms, impacted in significant ways. Thus, although the right to health may not yet have attained the notoriety in recognition nearing that of the right to life, the right is nevertheless also an important feature of international[23] and regional[24] instruments and an emerging feature of domestic bills of rights.[25]

The right to health has two components. The first relates to the availability of timely and appropriate healthcare, while the second relates to the protection of public health through measures such as the provision of potable water and health-related education and information.[26] It is important to note here that the public health dimension of the right to health through the prevention of diseases and the safeguarding of the health of the general populace is much more important in the African context than the availability and provision of health care for individuals because of the issue of resource constraints in poor countries.[27]

However, the use of the term 'right to health' is not without objection. Some scholars have argued that 'the right to healthcare' and 'the right to health protection' are a more apt description of the legal guarantee of the right to health because health itself cannot be guaranteed.[28] It has, however, been argued that the legal guarantee of the right to health goes beyond the mere provision of healthcare and health protection; that the term 'right to health', therefore, is more inclusive and a better reflection of the different components and entitlements under the rubrics of the right to health as provided for in

22 See also *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80.
23 Arts 25(1) & 12 Universal Declaration and ICESCR respectively.
24 Eg, art 16 African Charter.
25 Secs 27(a) & (3) Constitution of the Republic of South Africa, 1996; secs 43(1)(a) & (2) Constitution of Kenya, 2010.
26 AR Chapman 'Core obligations related to the right to health and their relevance for South Africa' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 45.
27 Chapman (n 26 above) 53.
28 B Toebes 'Towards an improved understanding of the international human right to health' (1999) 21 *Human Rights Quarterly* 662-663.

international, regional and some domestic human rights instruments.[29] In addition to this, Ngwena and Cook argue that there is necessarily no real conflict between the different terms since the ultimate objective of the different nomenclatures is the 'realisation of highest attainable standard of health'.[30] Consequently, the term 'right to health' will continue to be used in the article to refer to the right under examination in this subsection, except where the texts or provisions of an instrument examined dictate otherwise.

Although the right to health is guaranteed under other international and regional human rights instruments, some of which Nigeria is a party to,[31] dealing with the thematic issues of women, children and other minority and vulnerable groups within the context of the present discussion, however, only the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter and the CFRN will be considered as they are relevant because of their ratification and/or domestication.[32]

When the right to health under international law is mentioned, article 12 of the ICESCR generally is regarded as the most comprehensive reference point. According to article 12(1) of the ICESCR, state parties to the Convention 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. As to the meaning of the right to health, the Preamble to the Constitution of the WHO has defined it as the 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[33] This meaning of the right to health, however, was rejected by the Committee on Economic, Social and Cultural Rights (ESCR Committee), the quasi-judicial body responsible for the exposition and enforcement of the ICESCR.[34]

According to the ESCR Committee, the right to health is not a right to be healthy, but rather is composed of certain freedoms and entitlements.[35] These freedoms include the freedom to have charge and dominion over one's health and body and the freedom to be free from undue intrusion and coerced medical experimentation and treatment, while entitlements include a system of health protection which guarantees equal opportunities for people to enjoy the highest possible standard of health. The ESCR Committee reiterates that the

29 As above.

30 C Ngwena & R Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 107-108.

31 See eg Ngwena & Cook (n 30 above) 108-111 for a review of some of the relevant instruments.

32 The ICESCR was ratified on the same day Nigeria ratified the ICCPR, on 29 July 1993. See OHCHR 'Status of ratification by treaty and by country' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN (accessed 15 December 2015).

33 Cited by Toebes (n 28 above) 663.

34 ESCR Committee General Comment 14 para 4.

35 General Comment 14 para 8.

notion of 'highest attainable standard of health' is to be understood only as the entitlement of a person to the enjoyment of requisite facilities, conditions, goods and services that make the realisation of the highest attainable standard of health possible.[36]

Five different obligations of states are deduced by the ESCR Committee from the exposition of article 12 of the ICESCR, namely, the general obligation of states; the specific obligation of states; the international obligation of states; the core obligation of states; and the obligation of states to provide reparations and remedies for violations of the Covenant.[37]

In the context of public health, the focus of the present discussion, the fourth obligation, namely, the core obligation of states, is the most germane.[38] This obligation mandates states to ensure access to health facilities, goods and services, especially for vulnerable groups without discrimination; to ensure everyone's freedom from hunger by ensuring access to a minimum essential supply of nutritionally-adequate and safe food; to ensure access to basic shelter and sanitation and an adequate supply of potable water; the provision of essential drugs; and equitable distribution of health facilities, goods and services.[39] More importantly for the present discourse, this obligation also entails the provision of immunisation against major infectious diseases in the community; the prevention, treatment and control of epidemic and endemic diseases; the provision of education and information about the main health problems in the community, including methods of prevention and control; and the provision of appropriate training for health personnel.[40]

According to the ESCR Committee, the core obligation of states identified above is non-derogable under any circumstances whatsoever.[41] Thus, unlike other obligations of states which may be subject to the availability of resources in furtherance of article 2(1) of the ICESCR, states cannot use the non-availability of resources as an excuse for not complying with their core obligation under article 12 of the ICESCR. This stance marks a departure from the earlier position of the ESCR Committee in General Comment 3 where the Committee appeared to be of the view that the non-availability of resources may excuse states from discharging its minimum core obligation to realise socio-economic rights.[42]

36 General Comment 14 para 9.
37 General Comment 14 paras 30-62.
38 General Comment 14 paras 43-45.
39 General Comment 14 para 43.
40 General Comment 14 para 44.
41 General Comment 14 para 47.
42 See also Ngwena & Cook (n 30 above) 117. It should be pointed out here that the concept of the minimum core obligation of states in the realisation of socio-economic rights is not a generally-accepted concept. It has, eg, been rejected by the South African Constitutional Court which in its stead substituted the concept of reasonableness review, which is limited to enquiring whether governmental acts

In addition to the stated obligations above, states are also obliged to provide remedies and reparation to victims of violations of the right to health.[43] Reparations and remedies may be in form of restitution, compensation, satisfaction or assurances of non-repetition.[44]

According to the ESCR Committee, therefore, the prevention, control and treatment of epidemics and endemic diseases are one of the core obligations of state parties to the ICESCR for which no derogation is permitted.

The meaning and scope of the right to health and obligations imposed, as espoused by the ESCR Committee above, have been echoed by the African Commission with respect to article 16 of the African Charter.[45] Although the Commission did not define the right to health, it concedes that it is not a right to be healthy.[46] In addition, the African Commission sets out the components of the right to health as an inclusive right which consists of both health care and underlying preconditions of health as described by the ESCR Committee above; access to requisite health-related information and education; the right to be free from unwarranted intrusion; coerced medical treatment and experimentation; and freedom from compelled sterilisation and inhuman and degrading treatment.[47]

The obligations of state parties under article 16 of the African Charter also include a minimum core obligation in terms similar to that espoused by the ESCR Committee.[48] These include the formulation of national plans, policies and systems; cross-cutting obligations to respect and protect the right to health; and disease-specific obligations which, in relation to endemic and epidemic diseases, include the obligation of state parties to establish a national mechanism for the prevention and treatment of such diseases;[49] and the provision of effective domestic remedies for victims of violations.[50]

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and omissions and laws and policies adopted to further the realisation of socio-economic rights are reasonable in the circumstances. See, eg, *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 and *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (10) BCLR 1033 (CC).

43 ESCR Committee General Comment 14 paras 59-62.

44 General Comment 14 para 59.

45 Art 16 of the African Charter provides: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people.'

46 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (African Commission Principles and Guidelines) para 61 http://www.achpr.org/files/instruments/economic-socialcultural/achpr_instr_guide_draft_esc_ rights_eng.pdf (accessed 30 December 2015).

47 African Commission (n 46 above) paras 60-66.

48 Apart from having content similar to that of the ESCR Committee, the African Commission also views the minimum core obligation of states on socio-economic rights as non-derogable. See African Commission (n 46 above) para 17.

49 African Commission (n 46 above) para 67.

50 African Commission paras 21-25.

With regard to the provisions of the CFRN, the right to health is provided for in section 17(3)(d). According to the provisions of this sub-section, 'the state shall direct its policy towards ensuring that … there are adequate medical and health facilities for all persons'. The nature and scope of Nigeria's socio-economic rights regime, of which the right to health is a part, have been discussed more adequately elsewhere.[51] We, therefore, think that no useful purpose will be served in repeating the same here. However, suffice it to say here that the right to health, like other socio-economic rights contained in the Fundamental Objectives and Directive Principles of State Policy Chapter (Chapter II) of the CFRN, cannot be enforced before any court of law in Nigeria.

The above conclusion notwithstanding, that is not to say that the interpretation or argument for the non-justiciability of socio-economic rights in Nigeria in principle is correct. There are at least three reasons for this contention. First, it is a clear rule of international law that a state cannot rely on the provisions of its domestic law to violate its international law obligations. This conclusion finds support in the decision of the Economic Community of West African States (ECOWAS) Court of Justice in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*,[52] where the Court held that Nigeria could not rely on the provisions of its domestic law to violate its obligations under an international treaty, in this case the African Charter.

Second, Nigeria has a separate obligation under international law to take legislative and other measures to transform socio-economic rights into subjective rights in Chapter II of the CFRN.[53] This Nigeria appears to have done through the domestication of the African Charter and the enactment of other socio-economic rights-related statutes in Nigeria.

Third, there is also a separate obligation incumbent upon the Nigerian judiciary to interpret, as far as possible, domestic laws in conformity with the state's obligations under international law.[54] At least two cases from the Nigerian High Courts have, in apparent furtherance of the latter principle, affirmed the right to health in article 16 of the African Charter. In the first, *Odafe & Others v Attorney-General & Others,*[55] the court read the torture and non-discrimination provisions of the CFRN and the African Charter together to find a violation of the right to health of HIV-positive prisoners who were denied the requisite medical treatment. In the second, *Gbemre v Shell*

51 AE Akintayo 'Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010' (2014) 4 *African Human Rights Law Journal* 562-567.

52 (2009) AHRLR 331 (ECOWAS 2009).

53 See eg African Commission (n 46 above) para 21.

54 African Commission (n 46 above) para 25.

55 (2004) AHRLR 205 (NgHC 2004).

Petroleum Development Company Nigeria Limited & Others,[56] the court read the right to life and dignity provisions of the CFRN and the African Charter together with the right to health to find a violation of the right to a healthy environment of the people of the Nigerian Niger Delta whose environment and health were being negatively impacted by the gas-flaring activities of the first respondent. These cases clearly show that some civil and political rights in the CFRN and the African Charter can be interpreted to protect important aspects of the right to health.

The foregoing suggests that notwithstanding the claim of non-justiciability of socio-economic rights under the CFRN, Nigeria is bound by and has the various obligations espoused above in relation to the right to health in Nigeria.

However, having said that, it is pertinent to point out that a close connection exists between the full realisation of other human rights and the right to development.[57] As rightly noted by Uchegbu, for instance, the right to life in modern time must now be related to the quality of life.[58] According to him, it is useless for the law to guarantee the mere right to exist without also guaranteeing the availability of basic facilities such as food, health, shelter and education, which will make such existence and life meaningful and worthwhile.[59] The ESCR Committee has rightly observed that socio-economic rights are significantly related to the right to development.[60] Thus, the rights to life and health are related to other rights and significantly connected to the right to development. The impact of the EVD in Liberia, Sierra Leone and Guinea, three countries with significantly less-developed economies and health care systems than Nigeria, where the virus killed thousands of people as opposed to about nine who lost their lives to the disease in Nigeria, drives this point home very strongly. Related to this are the immense resources needed to ensure the adequate and ongoing presence of requisite mechanisms and facilities needed to secure and fully realise the rights under discussion. There, therefore, is no doubt that the rights to life and health in the context of the EVD importation into and outbreak in Nigeria are rights which are unrealisable in the general environment of extreme poverty and under-development obtainable in most countries in sub-Saharan Africa, including Nigeria. The foregoing scenario directly implicates and calls into being the right of Nigerian citizens to development. We consequently turn to an examination and analysis of the scope and contours of the right to development.

56 (2005) AHRLR 151 (NgHC 2005).
57 See eg ESCR Committee General Comment 3 paras 8 & 14.
58 Uchegbu (n 21 above) 151.
59 Uchegbu 151-152. See also, on the same point, JN Aduba *The right to life under the Nigerian Constitution: The law, the courts and reality* (2011).
60 ESCR Committee General Comment 3 paras 8 & 14.

3 Right to development under regional and international human rights law

Perhaps the most nebulous of rights conferred on Nigerian citizens in the present instance pertains to peoples' right to development (PRTD) as contained in the African Charter as well as the right to development (RTD) in the Universal Declaration of the Right to Development of 1986 (UNDRTD).

3.1 Right to development under the African regional framework

In 1981, the African Charter was adopted by all African states to promote and protect the human rights and basic freedoms of Africans across the continent. Article 22 of the African Charter confers a legally-binding right to development on African people.[61] This is currently the only explicit article dedicated solely to the right to development.[62] However, the conversion of this right into justiciable law under national constitutions of African countries has been limited, as demonstrated by the Nigerian Constitution. Based on the wording of the African Charter and the duties imposed by it on states as well as individuals, at least on paper, the African system became an example of a human rights regime that is duty-oriented, particularly duties on individuals, than the universal human rights system.[63] Significantly, the African Charter went further than the universal human rights framework of the day and the European and American regional human rights systems with the introduction of the first legally-binding article expressly conferring an individual and collective right to development.[64]

Article 22(1) of the African Charter provides:

> All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

61 Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights*, 27 June 1981 CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) art 22 http://www.achpr.org/instruments/achpr/ (accessed 14 April 2014).

62 N van der Have 'The right to development: Can states be held responsible?' in D Foeken et al (eds) *Development and equity: An interdisciplinary exploration by ten scholars from Africa, Asia and Latin America* (2014) 159.

63 As above; H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 920.

64 TF Yerima 'The African Charter on Human and Peoples' Rights: A critique, and in comparison with other regional and international human rights instruments' in A Ibidapo-Obe & TF Yerima (eds) *International law, human rights and development* (2004) 63.

Article 22(2) complements this position by presenting the duty of states, individually or collectively, to ensure the exercise of the right to development.[65] In article 22, the drafters of the African Charter appear to draw from both article 22 of the Universal Declaration[66] and Article 1(1) of the ICESCR[67] in an attempt to convey a comprehensive right, with an attendant duty.

However, although the PRTD has been called for by African human rights activists since the 1960 and 1970s, the volume of advocacy on article 22 of the African Charter has been far less than expected. Out of over 220 communications submitted to the African Commission since its inauguration in 1987,[68] only seven have expressly relied on article 22 in their claims. The first of these claims was submitted in 1994 against the government of Zimbabwe, but was later withdrawn.[69] Furthermore, of these seven communications, only four were decided on the basis of the merits of the case.[70]

As a result, the African Commission has had only a handful of opportunities to make pronouncements on the PRTD. Unfortunately, the Commission was deprived of an important opportunity to make an express pronouncement on article 22 in its landmark decision

65 See art 22 of the African Charter. Other treaties of the era with development components include the International Convention on the Elimination of all Forms of Racial Discrimination; the Declaration on Permanent Sovereignty over Natural Resources; the Convention for the Prevention and Punishment of the Crime of Genocide; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

66 Art 22 of Universal Declaration states: 'Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

67 Art 1(1) of the ICESCR states: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

68 The African Commission was established to provide oversight and interpretation of the African Charter and is a quasi-judicial body. Although the Commission only gives recommendations that are not legally-enforceable judgments, these judgments are persuasive and generally well respected.

69 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) (decided on merits); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (decided on merits); *Socio Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008) (ruled inadmissible); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) (ruled inadmissible); *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) (decided on merits); *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) (decided on merits); *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995) (withdrawn).

70 Four cases were decided on merit, two ruled inadmissible, and one was withdrawn.

involving the Nigerian government in 2001, *Social and Economic Rights Action Centre (SERAC) v Nigeria,*[71] when it made a number of important development-related pronouncements on the African Charter. In that case, SERAC alleged that the (then) military government of Nigeria had been involved directly in oil production through the state-owned oil company, the Nigerian National Petroleum Company (NNPC), and as the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people of Southern Nigeria. The Commission went on to state that, *inter alia*, the last layer of the government's obligation requires the state to fulfil the rights and freedoms it willingly undertook under the various human rights regimes by actively deploying the state's machinery towards the practical realisation of such rights.[72]

The situation has since been remedied partly by the African Commission's landmark decision in the *Endorois* case.[73] In this case, the complainants alleged violations of the PRTD resulting from the displacement of the Endorois community, an indigenous community in Kenya, from their ancestral lands without adequate consultation or compensation for their loss of property, the disruption of the community's pastoral enterprise or the right to practise their religion and culture as the Endorois people.[74] According to the Endorois, by creating a game reserve on their land over 30 years ago, the Kenyan government had disregarded national law, Kenyan constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to development.[75] Citing the African Commission's reasoning in *SERAC* above, the Endorois community noted the importance of choice to the rights holders' well-being and the 'liberty of their action', which is tantamount to the choice embodied in the right to development and must, therefore, be respected by the Kenyan government. In pronouncing their findings of a violation of the complainants' PRTD by the respondents, the African Commission stated:[76]

> The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development.

71 *SERAC* (n 61) above.

72 *SERAC* para 47.

73 *Endorois* case (n 69 above) paras 22 & 297-298.

74 Citing itself in the *Ogoni case*, the African Commission ruled that the Endorois are a 'people', a status entitling them to benefit from the importance of community and collective identity in African culture, which is recognised throughout the African Charter.

75 *Endorois* case (n 69 above) para 75.

76 *Endorois* case para 277.

> Fulfilling only one of the two prongs will not satisfy the right to development.

In finding against the respondent state, The African Commission noted that the Endorois community had suffered a violation of article 22 of the Charter,[77] and went on to enumerate the duties of the Kenyan government, stating that it 'bears the burden for creating conditions favourable to a peoples' development'. The respondent state is obligated to ensure that the Endorois are not left out of the development process or benefits.

While the jurisprudence from the *Endorois* case is extremely helpful, the PRTD is still being considered from the position of the state's internal obligations to its own citizens.[78] What remains untested is the external duty of an African state to any group of African people. In the current analysis of the Ebola case study, apart from the direct analogy regarding the duty of the Nigerian government to peoples on Nigerian territory in the area of due diligence and care, as well as the provision of adequate healthcare systems, this situation credibly raises the question of the liability of the government of Liberia to the Nigerian people with respect to the entry of the EVD into Nigeria from Liberia.

3.2 Right to development under international law

Milestones in the evolution of the universal right to development, and later rights-based development, are well demarcated in the literature.[79] Generally, the International Bill of Rights, comprising the Universal Declaration, the ICCPR and the ICESCR, is the precursor to the RTD.[80] Although none of these international instruments expressly mentions the RTD, article 22 of the Universal Declaration states as follows:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

77 *Endorois* case para 290.

78 M Salomon *Global responsibility for human rights* (2007); M Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in S Marks (ed) *Implementing the right to development: The role of international law* (2008) 17.

79 A Sengupta 'Conceptualising the right to development for the twenty-first century' in Office of the High Commissioner for Human Rights *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 67.

80 See M Craven *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development* (1998).

The RTD also echoes article 28 of the Universal Declaration in seeking international co-operation among states.[81] It recognises that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. Salomon has noted that the RTD derives its 'intellectual origins and legal claims'[82] jointly from articles 28, 55 and 56 of the United Nations Charter. It is upon this foundation that the building blocks of the United Nations Declaration on the Right to Development and the RTD that it proclaims have their origin.

Originally perceived as a 'third generation' or 'solidarity' right,[83] which was generally propagated by developing countries, the RTD was universally established by article 1(1) of the UNDRTD, which states:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Furthermore, articles 2(3) and 3(3) declare a duty on states to formulate appropriate national development policies, and to co-operate with each other in ensuring development and eliminating obstacles to development respectively.[84]

It is now generally accepted that these provisions allude to both an individual and a collective right, and that the actual holders of this collective right are 'the people', with obligations resting on national governments as well as a duty of international co-operation amongst governments.[85]

81 S Fukuda-Parr 'The right to development: Reframing a new discourse for the twenty-first century' (2012) 79 *Social Research* 839.

82 Salomon *Global responsibility for human rights* (n 78 above) 4; Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' (n 78 above) 17.

83 S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137. In the 1970s and 1980s the RTD was introduced as one of several rights belonging to a third 'generation' of human rights. The first generation consisted of civil and political rights conceived as freedom from state abuse. The second generation consisted of economic, social and cultural rights, claims made against exploiters and oppressors. The third generation consisted of solidarity rights belonging to peoples and covering global concerns such as development, environment, humanitarian assistance, peace, communication and common heritage.

84 As above.

85 Fukuda-Parr (n 81 above). RTD commitments have implications for numerous questions of public expenditure priorities, incentive policies, and regulation. They extend to both national and international domains, and apply to co-operative action with other states in areas of trade, migration, finance, technology transfer, environmental commons, peace and security.

Although the UNDRTD is a declaratory statement of the UN General Assembly, elements of the RTD have subsequently been echoed in various treaties,[86] and arguments have been made that the UNDRTD has attained the status of customary international law.[87] In the 1990s the United Nations Development Programme (UNDP), with the launch of its Human Development Reports, shifted the focus of the international community onto human well-being, and not economic growth, as the purpose and end of development.[88] Nevertheless, unresolved issues around the conceptualisation, legality and justiciability of the RTD still persist.[89]

In the 1990s a renewed focus on the RTD took the form of instituting a follow-up mechanism by the appointment of an Independent Expert in 1998 (and later a High Level Task Force), as well as the establishment of an Open-Ended Working Group on the RTD (WG) by the UN Economic and Social Council on the recommendation of the Commission on Human Rights.[90] The High Level Task Force (HLTF), supporting the WG, articulated the 'core norms' of the RTD as[91]

> the right of peoples and individuals to the constant improvement of their well-being and to a national and global environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.

This definition of the RTD as going beyond mere economic development to encompass the constant improvement of the well-being of persons in an environment conducive to equitable, participatory and human-centred development which is respectful of all human rights is the one adopted here.

Prior to this, the Independent Expert on the RTD at the time, prominent Indian economist Arjun Sengupta, further articulated the RTD in his reports.[92] He stipulated four key components of the RTD, stating that '[t]he human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realised'.[93] He stated that the RTD

86 T Kunanayakam 'The declaration on the right to development in the context of United Nations standard-setting' in Office of the High Commissioner for Human Rights (n 79 above) 17-48.

87 Van der Have (n 62 above) 157.

88 K Manzo 'Africa in the rise of rights-based development' (2003) 34 *Geoforum* 437.

89 B Hamm 'A Human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005; Sengupta (n 79 above) 67 74.

90 Marks (n 83 above) 139. The independent expert was to present a study on the current state of progress in the implementation of the right to development to the working group at each of its sessions as a basis for a focused discussion, taking into account the deliberations and suggestions of the working group. The purpose of the working group was to monitor and review the progress of the independent expert and report back to the Commission.

91 Report of the High Level Task force A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010 8.

92 Sengupta (n 79 above).

93 As above.

requires both negative (prevention) and positive (promotion or protection) actions from states.[94]

In applying the RTD to the present case, the problems of non-justiciability and poorly-defined state liability make it difficult to hold the Nigerian government accountable for a breach of a duty under the RTD. However, an interesting discussion, which falls outside the purview of the current article, is the level of accountability which can be imputed to the global community of states and international organisations to ensure that Ebola, whenever it again appears in West Africa or elsewhere, receives prompt and adequate assistance under the duty of 'international co-operation' highlighted in several universal human rights declarations and conventions, including those mentioned above. The response of the international community to the crisis in West Africa was delayed, with unfortunate results.

4 Development human rights and the Ebola case in Nigeria

Having dealt with the meaning and scope of the right to development above, we turn below to an assessment of the Nigerian state's action and inaction to the importation and outbreak of EVD in Nigeria *vis-à-vis* the state's obligations under norms of human rights discussed above. In order to set the proper tone for that analysis, however, we first describe the types and characteristics of EVD and the nature of its outbreak in Nigeria.

EVD is a deadly disease, the fatality rate of which is put at around 50 per cent and sometimes ranges between 25 and 90 per cent.[95] EVD is caused by a virus of the *Filoviridae* family of the Ebola virus genus.[96] Five species of EVD have been identified: the Zaire ebolavirus; the Sudan ebolavirus; the Tai forest ebolavirus; the Bundibugyo ebolavirus; and the Reston ebolavirus.[97] The Reston ebolavirus has not yet been implicated in any human infection, and the 2014 outbreaks in West Africa has been traced to the Zaire ebolavirus species.[98]

EVD is found in monkeys, gorillas and chimpanzees and is transmitted to humans. It is spread among humans through contact with the bodily fluids of infected persons; for instance, the sweat, saliva, faeces, urine, vomit or blood of infected persons, and surfaces and material contaminated with any such fluids.[99] Even the semen

94 Sengupta (n 79 above) 67 74.
95 WHO 'Ebola virus disease: Fact sheet' http://www.who.int/mediacentre/factsheets/fs103/en/ (accessed 7 April 2017).
96 CDC 'Ebola (Ebola Virus Disease)' https://www.cdc.gov/vhf/ebola/pdf/ebola-fact sheet.pdf (accessed 7 April 2017).
97 As above.
98 As above.
99 WHO (n 95 above).

and vaginal fluid of infected persons are said to be suspect.[100] EVD can also be transmitted through contact with the corpses of persons that had died from the disease.[101] Outbreaks of the disease used to occur in remote villages, but major urban centres and rural areas are becoming hotspots of recent outbreaks.[102] In hot, humid and densely-populated urban centres of sub-Saharan Africa where direct contact with people and their fluids, especially sweat, is almost unavoidable and where funeral ceremonies and contact with the bodies of the dead is almost routine, the mode of transmission of EVD is potentially a particularly serious public health problem.

EVD is also very difficult to detect. Detection of the virus is only possible after the onset of symptoms. Even then, it may take up to three days after symptoms appear before the virus reaches detectable levels in persons infected and, although several experimental treatments for Ebola are available, there is yet no known cure or approved vaccine for the virus. Therefore, recovery from the disease largely depends on the quality of care received and the immune system of an infected person.[103]

As stated in the introduction, the index case, Mr Patrick Sawyer, an infected Liberian-American citizen, introduced EVD into Nigeria on 20 July 2014. This introduction started an outbreak in Nigeria which lasted 93 days and infected 19 people of which seven died.[104] Once the introduction of EVD into the country was confirmed, the Nigerian government and other stakeholders and its international partners swung into action to contain the outbreak. Several strategies, ranging from contact tracing, isolation, quarantine, effective supportive management of those infected and massive public education were employed to contain the outbreak. Screenings at Nigeria's port of entry were also stepped up. According to Oleribe et al, 'more than 890 persons were followed up, isolated or quarantined within the period [of the outbreak]'.[105] The promptness of the Nigerian government's response and the robustness of the strategies employed defied 'mathematical projections' of the outbreak in Nigeria and led to the early and successful containment of the outbreak for which the

100 CDC (n 96 above).

101 WHO (n 95 above).

102 As above.

103 CDC (n 96 above).

104 WHO 'WHO declares end of Ebola outbreak in Nigeria' http://www.who.int/mediacentre/news/statements/2014/nigeria-ends-ebola/en/ (accessed 20 April 2017). There is a discrepancy in the literature regarding the number of the people who were infected with or died from EVD in Nigeria. Oleribe et al, for instance, put the number of infected and deceased at 20 and nine people respectively. OO Oleribe et al 'Nigerian response to the 2014 Ebola viral disease outbreak: Lessons and cautions' (2015) 22 *The Pan African Medical Journal* http://www.panafrican-med-journal.com/content/series/22/1/13/full/#.WP8PuKK1vDc (accessed 24 April 2017).

105 Oleribe et al (n 104 above); WHO 'Ebola situation in Port Harcourt, Nigeria' http://www.who.int/mediacentre/news/ebola/3-september-2014/en/ (accessed 24 April 2017).

government received world accolades.[106] This, however, is not without some lapses before the outbreak and during the containment process. The specifics of some of these lapses will be discussed below when Nigeria's response to the outbreak is assessed. As stated in the introduction, Nigeria was declared Ebola-free by the WHO on 20 October 2014. Having briefly described EVD, its outbreak in Nigeria and the response of the Nigerian government thereto, we now turn to an assessment of the Nigerian government's response in keeping with its human rights obligations.

The existence of duties on the part of the Nigerian government to provide continuous development in the nation's boundaries, in this case, through the provision of improved healthcare services and the protection of the lives and livelihood of human beings, is enshrined in the CFRN as well as other regional and international conventions to which Nigeria is a party, as pointed out above. What remains to be properly ascertained is the level of obligations placed on states to foster the development of citizens – whether as individuals or peoples. In this context, it becomes important to question what the notion of 'development' means (or ought to mean) in its most pragmatic sense in a contemporary African context. Indeed, what role can international human rights law and development policy play in helping to solve Africa's chronic underdevelopment in the future, particularly in areas such as healthcare systems and delivery, as seen in the incidence of the current EVD outbreak in West Africa?

With the expiry of the 2015 deadline for the attainment of the world's Millennium Development Goals (MDGs) and its replacement with Sustainable Development Goals (Global Goals) on 25 September 2015, it has been rightly noted that while there has been some improvement under the MDGs' initiative, the development statistics regarding a large part of sub-Saharan Africa still contrast sharply with the situation in other regions of the world, particularly Organisation for Economic Co-Operation and Development (OECD) countries.[107] The healthcare deficit is particularly glaring in the areas of maternal and infant mortality available to people living in this region, which touches on their right to life, health and development in a larger context. Nevertheless, the duty owed to Nigerians by the Nigerian government is to provide readily-available, affordable, high-quality healthcare to every Nigerian. This can be achieved if the government prioritises its duty in this regard, with the realisation that the state can

106 Oleribe et al (n 104 above).

107 N Udombana 'The summer has ended and we are not saved! Towards a transformative agenda for Africa's development' (2005) *San Diego International Law Journal* 5. Udombana quoted the defunct Organisation of African Unity (OAU) as stating: 'We have noted, at the close of the 20th century, that of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned.' In a similar vein, he noted that 'Africa remains the poorest continent despite being one of the most richly-endowed regions of the world'.

be held accountable for a failure to execute (or reasonably attempting to execute) its duties in this area.

Nevertheless, the Nigerian government at both federal and state levels rose to the 'EVD occasion', receiving international acclaim. Despite this international acclaim, however, Bello has pointed out that there is a robust legal regime in Nigeria to effectively and adequately respond to the EVD threat, but that the Nigerian government is remiss in its response and management of the outbreak in at least three instances.[108] First, prior to the importation of EVD into Nigeria by Sawyer, the President of Nigeria could have declared the neighbouring countries of Liberia, Sierra Leone and Guinea infected areas and issued travel restrictions on persons entering and coming from these countries to Nigeria. This was indeed essential because of the virulent nature of the disease and the mobility of Nigerians and other West African citizens who are known to travel to and from Nigeria from all parts of West Africa and beyond. Second, the government of Nigeria could have initiated compulsory submission to medical examination and screening at all ports of entries into Nigeria. This, Bello said, could have detected the first case. Third, Bello argues that the proactive enforcement of the relevant Nigerian laws would have ensured that the necessary force was used to prevent those under quarantine for suspected EVD cases and those undergoing treatment from leaving the isolation centres. The failure of the Nigerian government to do this resulted in some people evading the isolation centres and precipitating the outbreak in Port Harcourt, which led to an increase in the infection and death toll from EVD in Nigeria.[109]

Of course, the adoption of these coercive measures, among others, are potential violations of the rights to freedom of movement, personal liberty, privacy and non-discrimination, among other rights, not only of those already infected with the disease but also those who were at risk of infection. This concern became even more important when regard is had to the fact that the use of coercion in the context of EVD was a key concern during the outbreak of the disease in Guinea, Sierra Leone and Liberia, where governments resorted to extreme coercive measures to keep people and communities suspected of having the disease at bay.[110] However, while it is generally accepted that measures to enforce public health must be underlined by a rights-based approach that recognises the human rights, agency and participation of individuals and the accountability of the state, these individual rights are to be balanced against the rights of the public to be protected against outbreaks of infectious

108 A Bello 'A review of the legal framework for managing outbreak of infectious diseases in Nigeria' (2015) *The Journal of Private and Property Law* 60-61.

109 WHO (n 105 above).

110 PM Eba 'Ebola and human rights in West Africa' http://www.thelancet.com/journals/lancet/article/ PIIS0140-6736(14)61412-4/abstract (accessed 20 April 2017).

diseases and epidemics such as EVD, and where there is a conflict between the two, the rights of the public must take precedence.[111]

It should, therefore, be noted that the adoption of measures to increase life expectancy through the prevention and treatment of epidemics, to act with due diligence to prevent violations of rights and where violations have taken place, to provide victims with reparation are minimum core obligations of the Nigerian government in relation to both the rights to life and health, as pointed out previously. It has also been pointed out that these minimum core obligations are non-derogable on any ground whatsoever, including the non-availability of resources. The failure of the Nigerian government to prevent the entry of EVD into Nigeria in spite of the availability of a robust legal regime to do what is necessary, and the lapses in the proper enforcement of the requisite quarantine, which led to the escape of some people from quarantine and the consequent spread of the outbreak in Port Harcourt, are violations of the Nigerian government's obligation to protect citizens' rights to life and health from violations by third parties and a breach of the state's minimum core obligations, as pointed out above.

In addition, while the declaration of neighbouring countries as EVD-infected areas and the issuance of travel restrictions can be done easily enough, the medical examination and screening at all Nigeria's ports of entry and the forcible quarantine of all suspected cases are things that require an immense deployment of resources, personnel and equipment to effectuate. This is the development dimension of the omission. The failure by the Nigerian government to deploy the necessary resources, personnel and equipment to ensure the protection of the relevant rights is also a violation of the country's obligation under the right to development to ensure the constant improvement of the well-being of persons within its jurisdiction in an environment conducive to equitable and human-centred development respectful of all human rights.

The article has demonstrated that in the case of Ebola, the Nigerian government had the obligation to protect the rights of every person living within its borders in terms of a duty of care to prevent the deadly virus from coming into the country by taking adequate precautions to prevent its spread. A similar duty can also be imposed on the government of Liberia for failing to take sufficient steps to prevent the exit of the first case from its territory into Nigeria and, by extension, also the governments of Guinea and Sierra Leone. While the Nigerian government has rightly received international accolades for its management of the EVD outbreak in Nigeria, the article has shown that Nigeria could have done better had it been more proactive and diligent. This lack of due diligence, which resulted in

111 L London 'What is a human rights-based approach to health and does it matter' (2008) 10 *Health and Human Rights* 65.

the violation of the rights to life, health and development, will give rise to the obligation of the state to pay reparations.

Although no amount of compensation or reparation is an adequate substitute for human life, the payment of some kind of compensation or reparation nevertheless in this instance serves as a vindication of the rights of the victims of EVD in Nigeria. It, therefore, is suggested that all relatives and dependants of those who lost their lives in the unfortunate incident, especially the medical personnel that bore the brunt of the disease in Nigeria, should be adequately compensated. Those who survived the infection should be compensated for having their rights to health imperilled. The First Consultants Hospital, where EVD first surfaced, and which was shut down for months, should be compensated for their loss of income during the period of the closure and for other incidental losses arising from EVD in the hospital. This in fact is the least that the Nigerian government can do in relation to the rights violated for its negligence and lack of due diligence which occasioned EVD in Nigeria.

5 Conclusion

At present, the jurisprudence on the PRTD in Africa may not have had much impact in the universal human rights arena. Apart from the difficulty in adjudicating socio-economic rights cases on the continent,[112] this presumed lukewarm attitude on the part of advocates might not be unconnected to the fact that while article 22(2) of the African Charter confers an obligation on African states, individually and collectively, to 'ensure' that the PRTD is protected or attained, there is insufficient guidance as to what this duty entails in practice and how the duty could or should be achieved. Thus, perhaps influenced by the nebulous nature of the RTD at the universal level, a perceived vagueness about the level of a legally-enforceable implementation of a state's duty to ensure African peoples' development could be responsible for the minimal application of article 22 by advocates across the continent.

However, in order to promote an in-depth understanding of what 'development' is or ought to mean, and the obligations that can lawfully be imputed to states for the violation of this right in Africa, we have in the article attempted to articulate the core content of what development is or should mean within the African context. This was done through the examination and analysis of the meaning and contents of the rights to life and health, their links with the right to development and the obligations imposed on the Nigerian state in the context of the EVD scourge in Nigeria.

112 T Bulto 'The indirect approach to promote justiciability of socio-economic rights of the African Charter on Human and Peoples' Rights' in R Murray (ed) *Human rights litigation and the domestication of international human rights standards in Africa* (2010) 134-167.

As we look to the future of the PRTD and its contribution to international human rights law, more Africans must deliberately and actively engage in article 22 advocacy with a view to realising the continent's development. The justiciability of the PRTD presents a germane opportunity to African peoples, which should be fully maximised, and the EVD case in Nigeria could well test the effectiveness of this right as a development tool on the continent. It is toward the realisation of this objective that the article is geared.

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A step forward in the protection of urban refugees: The legal protection of the rights of urban refugees in Uganda

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Summary

Forced displacement and rising numbers of urban refugees over the past three decades have emerged as a burning human rights concern. The rights of refugees and their protection by states have long been recognised by international law. The primary international human rights instruments that promote and protect the rights of refugees in Africa are the 1951 UN Convention Relating to the Status of Refugees, its 1967 Protocol, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Uganda, a state party to the 1951 Convention and the 1969 Convention, has adopted laws to promote and protect the rights of refugees in this country. These include the 1995 Constitution, the Refugees Act of 2006 and the Refugees Regulations of 2010 which guarantee the rights of refugees to reside in on-camp settings, and to work and make a living. However, it is argued that one of the gaps in the national framework is the protection of the rights of refugees residing in urban settings. The international and regional refugee laws are not clear on the benchmark against which to appraise state compliance. In light of

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the foregoing, the article explores the normative content of the 1995 Constitution and Ugandan Refugee Act of 2006, and observes that these laws and policies are progressive and yet generally fall short of most international human rights standards and best practices. Therefore, it argues that the progressive legal framework is not sufficient if not backed by a responsive and appropriate administrative system that is procedurally fair and just.

Key words: *forced migration; international human rights law; refugee law; refugees; urban refugees*

1 Introduction

The world's refugee problem[1] is one of the most complicated challenges facing the international community today.[2] Studies estimate that there are millions of refugees in Africa who are vulnerable to abuse and, therefore, are in need of protection to ensure that their human rights and fundamental freedoms are not violated. More than half of the world's refugees reside in urban areas.[3] In Uganda it is particularly urban refugees[4] that require special protection since the Refugees Act of 2006 provides that refugees who live outside of the provided camps do not qualify for protection and humanitarian assistance from the government and the United Nations High Commissioner for Refugees (UNHCR).[5] The Ugandan government argues that '[i]n practice, this provision encourages refugees to reside in settlements to their own advantage in terms of physical protection and material support as well as in the interest of national security',[6] and discourages those who cannot support themselves from remaining in the city.[7]

This practice obliquely coerces refugees to dwell in rural resettlements. Consequently, most urban refugees who do not want to reside in the settlements end up residing in 'slums' or informal

1 The 1951 Convention defines a refugee as a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country'. See art 1(A)(2) of the UN Convention Relating to the Status of Refugees, 28 July 1951. The 1969 OAU Convention offers an extended definition to include 'people fleeing external aggression, occupation, foreign domination or events seriously disturbing public order'. See art 1(2) of the 1969 AU Convention Governing Specific Aspects of Refugee Problems in Africa.

2 UNHCR *World at war: Global trends: Forced displacement in 2014* (2014) 2.

3 UNHCR (n 2 above) 13.

4 Kibreab defines urban refugees as those refugees who drift to cities and towns in pursuit of making a living. See G Kibreab 'Eritrean and Ethiopian urban refugees in Khartoum: What the eye refuses to see' (1996) 39 *African Studies Review* 154.

5 Art 44 Ugandan Refugees Act 21 of 2006.

6 J Bernstein & MC Okello 'To be or not to be: Urban refugees in Kampala' (2007) 24 *Refuge* 47.

7 Bernstein & Okello (n 6 above) 48.

settlements on the fringes of urban areas.[8] This circumstance impedes the protection and realisation of their rights, including access to services and opportunities that exist in the urban areas.[9] International refugee law guarantees the rights of all refugees, including the right to housing;[10] the right to work;[11] the right to education;[12] the right to access the courts;[13] the right to freedom of movement within the territory;[14] as well as the right to be issued with identity and travel documents[15] for refugees to live decent lives.[16]

Uganda is a state party to the 1951 UN Convention Relating to the Status of Refugees (1951 Convention) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention).[17] Uganda adopted the Refugees Act 21 of 2006[18] to domesticate these international instruments. Since Uganda adopts the dualist approach to international law,[19] an international instrument becomes part of domestic law only after the government through parliament has passed an enabling Act to give force to that particular treaty.

The enforcement of the above-mentioned treaties has been characterised by major complications and sensitivities.[20] Referring explicitly to the protection of refugees, Goodwin-Gill argues that '[p]rotection policies must be derived from the principles explicit or implicit in the existing law as developed and interpreted in practice as well as from the principles of fundamental human rights acknowledged by the international community'.[21] He contends this has become necessary as 'it appears that protection had lost ground to the politics of solutions and to the even more uncertain politics of

8 A Lucia 'Challenges and livelihood strategies of Darfurian refugees living in Kampala, Uganda' MA thesis, University of San Francisco, 2012 2.

9 S Pavanello & M Montemurro 'Displacement in urban areas: Implications for humanitarian action' (2010) 34 *Forced Migration Review* 57.

10 Art 21 1951 Convention (n 1 above).

11 Arts 17, 18 & 19 1951 Convention.

12 Art 22 1951 Convention.

13 Art 16 1951 Convention.

14 Art 26 1951 Convention.

15 Arts 27 & 28 1951 Convention.

16 ZA Lomo 'The struggle for protection of the rights of refugees and IDPs in Africa: Making the existing international legal regime work' (2000) 18 *Berkeley Journal of International Law* 6.

17 N Omata & J Kaplan 'Refugee livelihoods in Kampala, Nakivale and Kyangwali refugee settlements: Patterns of engagement with the private sector' (2013) 95 *Refugee Studies Centre Working Paper Series* 6.

18 Ugandan Refugees Act (n 5 above).

19 This implies that international treaties to which Uganda is signatory are not part of Ugandan law until they have been adopted through domestic statute.

20 M Shah Alam 'Enforcement of international human rights law by domestic courts: A theoretical and practical study' (2006) 53 *Netherlands International Law Review* 400.

21 GS Goodwin-Gill 'The dynamic of international refugee law' (2014) 25 *International Journal of Refugee Law* 651.

migration'.[22] In a different study Goodwin-Gill further argues that 'the conception of the refugee as an unprotected individual should be divorced from the politics of the moment and located in a space where the refugee can be recognised as a person with dignity, worth and basic human rights'.[23]

Conversely, Lucia argues that the emergence of urban refugees and their peculiar challenges pose numerous challenges to host states, the UNHCR and non-governmental organisations (NGOs) providing protection services to them.[24] These challenges affect their performance and service delivery and make it difficult for the rights of urban refugees to be protected. It is within this context that the protection of the rights of urban refugees in Uganda is discussed. The article examines the existing domestic laws and policies on refugee rights protection in Uganda, and critically assesses their compliance with international human rights standards.[25] After the introduction follows a descriptive overview of the international and regional laws that safeguard the protection of urban refugees. Section three examines the legal mechanisms for protecting the rights of urban refugees in Uganda with an emphasis on those rights in the 2006 Refugees Act that particularly fall short of regional and international human rights standards. Section four concludes that the existing national legislation provides insufficient protection to the rights of refugees and makes some suggestions as to how this situation can be improved.

2 Protection of urban refugees: International and regional laws

The peculiar protection and material needs of urban refugees in recent decades have received much-needed attention. Urban refugees as a class of refugees are entitled to protection under international law, more particularly under international human rights law and international refugee law.[26] These laws provide the framework within which the protection of and assistance to refugees should be undertaken. Over the past three decades urban refugees have been regarded as atypical and, at times, as illegal and offensive to the state establishment. This view is particularly prominent in most African countries where urban communities are now hosting a bulk of the forcefully-displaced population. The unwillingness or rebuff of

22 Goodwin-Gill (n 21 above).
23 GS Goodwin-Gill 'The politics of refugee protection' (2008) 27 *Refugee Survey Quarterly* 8.
24 Lucia (n 8 above) 2.
25 Office of the United Nations High Commissioner of Human Rights (OHCHR) *Frequently-asked questions on a human rights-based approach to development cooperation*: HR/PUB/06/8 (2006) 15.
26 Goodwin-Gill (n 23 above).

governments to recognise urban refugees is contradictory to historic and customary practice, where 'people recognised as refugees have been of urban origin and have established a safe haven in urban environments'.[27] This is because in the urban environment refugees can locate places of transitory protection, where they are more dependent on their own networks and personal resilience,[28] since the UNHCR provides minimal support to this vulnerable group of refugees in the areas of accommodation and food, livelihood, and limited access to education and healthcare.[29]

Governments, international institutions and agencies often have minimal information on urban refugees[30] as compared to encamped refugees 'who are generally supervised with their identity and location known'.[31] For instance, urban refugees are usually unmanaged, discrete and unregistered, and are regarded as 'spontaneous' or 'self-settled' refugees – those who have abandoned the encampment regime.[32] Different from the camps, urban refugees are scattered, making it more difficult for service providers to correctly appraise their needs.[33] For example, a 2008 report by UNHCR revealed that 'about 30 per cent of the essential needs of refugees are not being met'.[34] These most basic needs include livelihoods, health and education for their children.[35] The ability of refugees to access education and health, particularly in an urban context, depends on their ability to generate an income.

Urban refugees face other extreme challenges that do not affect those residing in camps and settlements.[36] Campbell contends that '[w]hile refugees who remain in camps and settlements have access to basic provisions such as shelter, food and water, refugees residing in urban areas have no choice but to be self-reliant'.[37] The International Rescue Committee contends that in most cases urban refugees do not have legal recognition and protection in the host country, making it more complicated to access basic services as well as exposing them to abuse and exploitation.[38] Even though they lack proper identification

27 G Hoffstaedter 'Between a rock and a hard place: Urban refugees in a global context' in K Koizumi & G Hoffstaedter (eds) *Urban refugees: Challenges in protection, services and policy* (2016) 1-10.

28 As above.

29 UNHCR *UNHCR policy on refugee protection and solutions in urban areas* (2009) http://www.unhcr.org/refworld/docid/4ab8e7f72.html (accessed 7 April 2017).

30 P Marfleet '"Forgotten", "hidden": Predicaments of the urban refugee' (2007) 24 *Refuge* 36-45.

31 As above.

32 As above.

33 See Hoffstaedter (n 27 above) 1-10.

34 Voice of America *UNHCR: Thousands of refugees in camps, urban areas left without basic aid* (2008).

35 See Hoffstaedter (n 27 above) 1-10.

36 As above.

37 EH Campbell 'Urban refugees in Nairobi: Problems of protection, mechanisms of survival, and possibilities of integration' 2006 (19) *Journal of Refugee Studies* 396.

38 International Rescue Committee *Urban refugees* (2012) 1.

and documents, Bailey argues that 'they must find employment and face the threat of detention, deportation or forced relocation'.[39] Even in countries where they do have legal recognition and protection, urban refugees are frequently faced with harassment by police, including physical abuse, intimidation, illegal detention and demands for bribes. Women refugees are particularly vulnerable to physical and sexual abuse.[40]

In most African countries plagued by economic crises and social problems, refugees are used as convenient scapegoats. For instance, in Sudan, Buscher observes that 'the local population accuses refugees of being responsible for higher rents, intermittent shortages of basic necessities, overcrowded schools and inadequate healthcare facilities, increasing crime rates and other urban ills'.[41] In most African countries 'landlords and employers often take advantage of urban refugees who do not have legal protection by charging them higher rents or paying them less than locals with equivalent skills'.[42] There is also a misconception among governments that refugees in urban areas cause an increase in crime rates in the cities.[43] Meanwhile, Landau and Jacobsen observe that 'migrants and refugees are far more likely to be victims of crime or police harassment than locals'.[44] Particularly, the experiences of urban refugees in cities such as Cairo, Johannesburg, Kampala and Khartoum are typified by a high level of helplessness due to the subjective enforcement of international and national protection regimes.[45] In practice, therefore, the laws are often an impediment rather than a solution. For example, these laws are used to perpetuate their status as refugees indefinitely.[46] In light of the foregoing, the international and regional mechanisms governing the protection of refugees are discussed with reference to refugees in urban settings.

2.1 Protecting urban refugees under the international human rights system

Six decades after the adoption of the 1951 Convention, the fundamental rights and freedoms of refugees and asylum seekers are still being contested on political, economic, legal and humanitarian

39 B Sarah 'Is legal status enough? Legal status and livelihood obstacles for urban refugees' MA thesis, The Fletcher School, Tufts University, 2004 31.

40 Marfleet (n 30 above) 36-45.

41 B Dale 'Case identification: Challenges posed by urban refugees' Annual Tripartite Consultations on Resettlement, June 2003.

42 As above.

43 See Hoffstaedter (n 27 above) 1-10.

44 LB Landau & K Jacobsen 'Refugees in the new Johannesburg' (2004) 19 *Forced Migration Review* 44-46.

45 A Fábos & G Kibreab 'Urban refugees: Introduction' 2007 (24) *Refuge* 3-8.

46 G Kibreab 'Refugeehood, loss and social change: Eritrean refugees and returnees' in P Essed et al (eds) *Refugees and the transformations of societies: Agency, policies, ethics and politics* (2004) 19–30.

grounds.[47] The Universal Declaration of Human Rights (Universal Declaration) can be considered as the bedrock of international human rights law.[48] Although declarations are non-binding, United Nations (UN) declarations with the backing of the UN General Assembly (UNGA) present strong expressions of the principles of international law.[49] The Universal Declaration offers some level of protection for urban refugees, despite its non-binding nature, as well as its lacking a treaty body to monitor member states' compliance with the obligations imposed by it. The 1968 Proclamation of Tehran calls the Universal Declaration 'a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community'.[50] Therefore, it has been argued that the Universal Declaration has acquired the status of *jus cogens* through the frequent reaffirmations by the UNGA, other international institutions and governments.[51] *Jus cogens*, unlike treaty law, is binding on all states, cannot be derogated from[52] and evolves through 'consistent and general practices of states emanating from a sense of legal and moral obligation'.[53] Undoubtedly, the Universal Declaration has incontestable 'political standing and symbolic significance'[54] as a universally-recognised enumeration of fundamental human rights and freedoms.[55] Article 14(1) of the Universal Declaration provides that 'everyone has the right to seek and to enjoy in other countries asylum from persecution',[56] thus representing the first attempt to make the right to seek refuge a universal right.

The core objective of the Universal Declaration, namely, that of culminating in binding human rights instruments,[57] came to fruition when the International Covenant on Civil and Political Rights

47 Goodwin-Gill (n 21 above).

48 WA Schabas *The Universal Declaration of Human Rights: The* travaux préparatoires *Vol 1, October 1946 to November 1947* (2013) 37.

49 J Morsink *The Universal Declaration of Human Rights: Origins, drafting, and intent* (1999) 146.

50 Proclamation of Teheran, Final Act of the International Conference on Human Rights UN Doc A/CONF 32/41 3 (1968) para 2.

51 H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995) 25 *Georgia Journal of International and Comparative Law* 287.

52 *Portugal v India* 1960 ICJ 123 135. Fernandez J was of the opinion that '[i]n principle, special rules prevail over general rules but there are exceptions to this principle because no special rules prevail over *jus cogens*'.

53 Art 38(1)(b) of the Statute of the International Court of Justice states that '[s]ources of international law applied by the Court includes international custom evidenced by general practice accepted as law'.

54 K Decker et al 'Human rights and equitable development: Ideals, issues and implications' background paper for the World Development Report (2006) 10.

55 L Henkin 'The International Bill of Rights: The Universal Declaration and the Covenants' in R Bernhardt & JA Jolowicz (eds) *International enforcement of human rights* (1987) 1.

56 Arts 14(1) & (2) Universal Declaration.

57 TRG van Banning *The human right to property* (2002) 42.

(ICCPR)[58] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[59] were adopted in 1966. Discrimination on the grounds of a person's status is proscribed by both Covenants.[60] The ICESCR guarantees the rights of refugees to the enjoyment of just and favourable conditions of work,[61] to an adequate standard of living, including adequate food and housing,[62] and intellectual property.[63] Through General Comments, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has also considered the application of the principle of non-discrimination to specific covenant rights, including the rights to housing, food, education, health, water, work and social security.[64]

On the other hand, the ICCPR provides that '[e]veryone lawfully within the territory of a state shall within that territory have the right to liberty of movement and freedom to choose his residence'.[65] This right, however, may, be restricted through the provisions of national law.[66] It also protects 'aliens' from illegal expulsion.[67] The Human Rights Committee (HRC) explains that article 12 implies that[68]

> [t]he enjoyment of Covenant rights is not limited to citizens of States Parties but also available to all individuals, regardless of nationality or statelessness, such as asylum seekers and urban refugees, who may find themselves in their territory or subject to their jurisdiction,

thus guaranteeing the enjoyment of rights in the ICCPR also to urban refugees.

58 ICCPR, 19 December 1966, 999 UNTS 171.
59 ICESCR, 16 December 1966, 993 UNTS 3.
60 Art 2(2) ICESCR; arts 2(1) & 26 ICCPR.
61 Art 7 ICESCR.
62 Art 11 ICESCR.
63 Art 15(b) ICESCR.
64 The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 4 on the right to adequate housing (1991); General Comment 13 on the right to education (art 13) (1999); General Comment 14 on the right to the highest attainable standard of health (art 12) (2000); General Comment 18 on the right to work (art 6) (2005); and General Comment 19 on the right to social security (2008).
65 Art 12(1) ICCPR.
66 Art 12(3) of the ICCPR states that '[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.
67 Art 13 of the ICCPR states that '[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law'.
68 Human Rights Committee General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant states that '[t]he Covenant rights apply to all persons who may be within their territory and to all persons subject to their jurisdiction'.

Since its adoption the 1951 Convention has remained the bedrock of refugee-specific rights under international law. Central to the provisions in this Convention is 'access to work and social security',[69] as is clearly emphasised by the *Ad Hoc* Committee on Statelessness and Related Problems, who stated in 1950 that[70]

> [t]he new refugee convention should make refugees self-reliant in the host countries. They must be integrated into the economic system of the countries of asylum and should be able to provide for their own needs and those of their families, unless they consent to repatriation. This is necessary because it is critical for the refugee to enjoy an equitable and stable status as well as to lead a normal existence and be integrated rapidly.

This implies that refugees are entitled to basic survival and dignity rights, as well as access to domestic courts for the enforcement of such rights. The 1951 Convention also recognises the risk of economic marginalisation and exploitation for refugees and, therefore, enfranchises refugees within the social welfare system of the host state.[71]

It must, however, be noted that all the substantive rights other than non-discrimination, freedom of religion, access to the courts and *non-refoulement* may be waived during the signing or ratification of or accession to the Convention by a state.[72] This loophole has the potential of weakening the protection that the 1951 Convention offers to urban refugees as repressive states can waive other critical rights that are crucial to the basic and survival needs of refugees, in general, and urban refugees specifically.

In order to establish a body to oversee the application of the conventional rights enshrined in the 1951 Convention, article 35(1) obliges state parties to[73]

> co-operate with the UNHCR or any other agency of the UN which may succeed it in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

This provision further charged the UNHCR to 'supervise international conventions providing for the protection of refugees and recognise that the effective co-ordination of measures taken to protect the rights of refugees will depend upon the co-operation of States with the UNHCR'.[74] This demand underscores the critical role of the co-operation between the UNHCR and states in protecting the rights of all refugees. Kalin considers these obligations as highly versatile and

69 International Refugee Organisation 'Communication from the International Refugee Organisation to the Economic and Social Council' UN Doc E/1392, 11 July 1949 35–37.

70 Memorandum by the Secretary-General to the *Ad Hoc* Committee on Statelessness and Related Problems UN Doc E/AC.32/2, 3 January 1950 6–7.

71 JC Hathaway *The rights of refugees under international law* (2005) 96.

72 The UNHCR Executive Committee 'Agenda for Protection' UN Doc EC/52/SC/CRP.9/Rev1, 26 June 2002 Part III, Goal 1, Point 1.

73 Art 35(1) 1951 Convention (n 1 above).

74 As above.

evolutive.[75] However, since article 35(1) of the 1951 Convention does not put a time or functionality restriction on the relationship between state parties and the UNHCR, 'the duty to co-operate also follows the evolutive duties of the UNHCR'.[76]

In 2009, the UNHCR adopted the Policy on Refugee Protection and Solutions in Urban Areas (Urban Refugee Policy) to safeguard and protect the rights of urban refugees. The policy is underpinned by two key principled objectives:[77]

> [f]irst, to guarantee the recognition that urban areas are legitimate places for refugees to live and enjoy their rights; and second, to expand the protection space entitled to urban refugees as well as the organisations that assist them.

Based on these objectives, the policy stresses that '[u]rban refugees like other refugees are entitled to protection and other durable solutions and hence they must be able to enjoy their rights provided in the 1951 Convention as well as in other refugee and international human rights laws'.[78] Therefore, it advances that the rights of refugees and the obligations of key actors[79] towards them are not affected by their location, their means of arrival in urban areas or their status (or lack thereof) in national legislation.[80]

The rights of refugees have also been recognised in some group-specific treaties. Adopted in 1954, the Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention), while not expressly providing for the rights of refugees, contains several provisions requiring states to respect the rights of 'non-nationals' to association,[81] access to courts,[82] wage-earning employment,[83] housing,[84] education[85] and public relief,[86] by obliging state parties to treat aliens staying lawfully in their territories the same as their nationals. The 1961 Convention Relating to the Reduction of Stateless Persons (1961 Statelessness Convention) contains similar provisions.[87]

Article 15(4) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obliges member states to

75 W Kalin 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond' in E Feller et al (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (2003) 615.

76 V Turk *The UNHCR's supervisory responsibility* (1992) 162.

77 UNHCR (n 29 above) 5.

78 As above.

79 Key actors include the UNHCR, governments and other humanitarian organisations delivering services to refugees.

80 UNHCR (n 29 above) 3.

81 Art 15 1954 Statelessness Convention.

82 Art 16 Statelessness Convention.

83 Art 17 Statelessness Convention.

84 Art 21 Statelessness Convention.

85 Art 22 Statelessness Convention.

86 Art 23 Statelessness Convention.

87 Art 13 UN Convention Relating to the Reduction of Stateless Persons.

'accord to men and women the same rights with respect to the law relating to the movement of persons and the freedom to choose their residence and domicile'.[88] Similarly, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) describes a migrant worker as a person who engages in a paid activity outside his country of nationality,[89] while article 1(1) declares that the Convention is applicable to all migrant workers except otherwise provided by law without distinction to ethnic or social origin, nationality, economic or other status.[90] In addition, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) guarantees 'the adequate development and protection of vulnerable racial groups for them to enjoy their human rights and fundamental freedoms'.[91]

The 1989 Convention on the Rights of the Child (CRC) obliges 'State Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status *inter alia* of the child's parents, legal guardians or family members'.[92] Specifically addressing the situation of refugees, article 22 obliges state parties to[93]

> take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the states are parties.

This provision obliges states to adopt measures to guarantee that refugee children are accorded appropriate protection and humanitarian support as set out in the various refugee and human rights instruments. Finally, the purpose of the Convention on the Rights of Persons with Disabilities (CRPD), as set out in article 1, is to seek 'to promote, protect and guarantee the full and equal enjoyment of all human rights and basic freedoms by all persons with disabilities (PWDs)'.[94] Similar to other group-specific treaties, all the rights contained in this Convention cover refugees with disabilities.

From the previous analysis, it may be concluded that refugee protection represents a point of concern for all the major universal human rights treaties.

88 Art 15(4) CEDAW.
89 Art 2(1) ICMW.
90 Art 1(1) ICMW.
91 Art 2(2) CERD.
92 Art 2(2) CRC.
93 Arts 22(1) & (2) CRC.
94 Art 1 CRPD.

2.2 Protecting urban refugees under the African human rights system

When analysing the African human rights system, it is clear that the 1981 African Charter on Human and Peoples' Rights (African Charter) contains similar provisions as enshrined in other regional instruments. It affirms that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions'.[95] Scholars contend that the wording of article 12(3) of the African Charter – 'in accordance with the laws of those countries and international conventions' – could be used as a claw-back clause, limiting the impact of this right.[96] Subsequently, article 11(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[97] (African Women's Protocol) reinforces the specific protection needs of women refugees in Africa, obliging state parties[98]

> to protect asylum-seeking women and refugees against all forms of violence, rape and other forms of sexual exploitation, and that their perpetrators are brought to justice before a competent criminal jurisdiction.

This requirement implies that states have a duty to protect refugee women from all forms of violence and exploitation due to their sexuality and vulnerability, as well as to ensure that perpetrators are penalised.

Similarly, the African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for the protection of rights of refugee children in Africa. The Charter obliges state parties to[99]

> take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the Charter and other international human rights and humanitarian instruments to which the state is a party.

This provision contextualises the CRC provision on refugee children in Africa and reinforces the special place of the child in the African context. It further ensures that the special needs of refugee children

95 Art 12(3) African Charter.

96 G Okoth-Obbo 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79.

97 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa AHG/Res.240 (XXXI) June 1995, Addis Ababa, Ethiopia.

98 Art 11(3) African Women's Protocol.

99 Art 23(1) African Children's Charter.

are duly recognised, promoted and guaranteed at the regional level. Additionally, article 23(3) provides that[100]

> [w]here no parents, legal guardians or close relatives of the refugee child can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

In 1969, the Organisation of African Unity (OAU) – now the African Union (AU) – adopted a regional refugee convention which provides for the definition of a refugee,[101] which is considered more inclusive and progressive than other regional conventions.[102]

Dealing with the specific protection needs of refugees in Africa, article 2(1) of this Convention obliges[103]

> member states to use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

Despite the relevance of this provision to protecting the rights of urban refugees in Africa, oppressive states can exploit the excesses by adopting repressive laws to the contrary. Additionally, the Convention provides that 'granting asylum to refugees is a peaceful and humanitarian act which shall not be treated as an unfriendly act by any member state'.[104] Oloka-Onyango has observed that article 2(1) of the 1969 OAU Convention is one of the most significant contributions to refugee jurisprudence in general.[105] The facilitative role of the UNHCR in international refugee protection is underscored in the Convention by obliging all member states to co-operate with its activities.[106] It further observes in the strongest terms that '[t]he Convention shall be the effective regional complement to the 1951 Convention in Africa'.[107] Rwelamira states that '[a]lthough the legal purposes of the Convention are essentially limited … it is a landmark

100 Art 23(3) African Children's Charter.

101 The definition of refugee in art 1 of the 1969 Convention incorporates the definition of the 1951 Convention removing the temporal or geographic restrictions with further extension in the definition. Para 2 of art 1 provides that '[t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

102 J Crisp 'Africa's refugees: Patterns, problems and policy challenges' (1999) 16 *UNHCR New Issues in Refugee Research* 6.

103 Art 2(1) 1969 OAU Convention.

104 Art 2(2) 1969 OAU Convention.

105 J Oloka-Onyango 'Plugging the holes: Refugees, OAU policy and the practices of member states' (1986) USC Issue Brief, Washington DC.

106 Art 8(1) 1969 OAU Convention.

107 Art 8(2) 1969 OAU Convention.

event for refugee law and policy'.[108] Okoth-Obbo, however, contends that the central role assigned to national legislations in granting asylum under the Convention implies that if a state adopts a stringent refugee policy, in effect it can undermine the realisation of the provisions in the Convention.[109]

At the sub-regional level Uganda is a member of the Common Market for Eastern and Southern Africa (COMESA), the International Conference on the Great Lakes Region (ICGLR), the Inter-Governmental Authority on Development (IGAD) and the East African Community (EAC). There are various provisions in the treaties and related protocols of these regional bodies that are pertinent to the protection of refugees. For instance, article 104(1) of the EAC Treaty obliges member states to adopt measures to achieve the free movement of persons, labour and services and to enjoy the right of establishment of their citizens within the community.[110] Article 124(4) also obliges member states to establish common mechanisms for the management of refugees in the community.[111] Although the treaty does not directly contain provisions that protect the rights of refugees, article 104 has the potential to be applied to refugees in terms of movement, employment and residence. Also, article 10(2)(b) of the Protocol to the EAC Treaty on Peace and Security tasks member states to incorporate the 1951 Convention and the 1969 OAU Convention into their national legislations.[112] Member states are also to institute mechanisms to facilitate the family reunification of refugees.[113]

Article 164 of the COMESA Treaty provides for member states to[114]

> adopt at the individual, bilateral and regional levels appropriate measures to progressively realise the free movement of persons, labour and services as well as to ensure the enjoyment of the right of establishment and residence by their citizens within the common market.

Also, article 13A of the Agreement Establishing the IGAD obliges member states 'to respect the basic rights and fundamental freedoms of the peoples of the region to benefit from emergency and other forms of humanitarian assistance'[115] and to 'facilitate repatriation and reintegration of refugees, returnees and displaced persons in co-operation with appropriate government and non-governmental organisations in accordance with international, regional and national

108 MR Rwelamira 'Two decades of the Convention Governing the Specific Aspects of Refugee Problems in Africa' (1989) 1 *International Journal of Refugee Law* 557.

109 Okoth-Obbo (n 96 above) 79.

110 Art 104(1) EAC Treaty.

111 Art 124(4) EAC Treaty.

112 Art 10(2)(b) Protocol to the EAC Treaty on Peace and Security (EAC Peace Protocol).

113 Art 10(2)(e) EAC Peace Protocol.

114 Art 164(1) COMESA Treaty.

115 Art 13A(q) Agreement Establishing the Intergovernmental Authority on Development (IGAD Agreement).

laws'.[116] Furthermore, article 12 of the Pact on Security, Stability and Development,[117] adopted by the ICGLR, makes specific provision for displaced people.[118] Article 13 of the related Protocol to the Pact on Property Rights of Returning Persons[119] encourages member states to protect the property of displaced persons. In addition to specific pacts on displacement, the ICGLR has provisions on freedom of movement and residence for citizens of the Great Lakes region which are potentially applicable to refugees. On this premise the laws governing refugee protection in Uganda are examined below.

3 Protecting the rights of urban refugees in Uganda: Analysis of the legal framework

Uganda has committed itself to protecting the rights of urban refugees by ratifying several international and regional human rights instruments that guarantee the rights of refugees. These include the 1951 Convention which Uganda ratified on 27 September 1976;[120] the CERD ratified on 21 November 1980;[121] the ICCPR and ICESCR ratified on 21 June 1995 and 21 January 1987 respectively;[122] and the CEDAW that was ratified on 22 July 1985.[123] Furthermore, the CRC was ratified on 17 August 1990,[124] and the Convention on Migrant Workers and CRPD were ratified on 14 November 1995[125] and 25 September 2008[126] respectively.

116 Art 13A(s) IGAD Agreement.

117 ICGLR 'The pact on security, stability and development for the Great Lakes region' December 2006, amended November 2012.

118 ICGLR 2004 Protocol on the Protection and Assistance to Internally-Displaced Persons.

119 ICGLR 2006 Protocol on the Property Rights of Returning Persons.

120 UN Treaty Collection, Convention relating to the Status of Refugees 28 July 1951 https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en (accessed 10 October 2015).

121 UN Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination 7 March 1966 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (accessed 10 October 2015).

122 UN Treaty Collection, ICCPR of 16 December 1966 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 10 October 2015); UN Treaty Collection, ICESCR of 16 December 1966 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed 10 October 15).

123 UN Treaty Collection, Convention on the Elimination of All Forms of Discrimination, 18 December 1979 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 10 October 2015).

124 UN Treaty Collection, Convention on the Rights of the Child 20 November 1989 https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (accessed 10 October 2015).

125 UN Treaty Collection, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 18 December 1990 https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en (accessed 10 October 2015).

126 UN Treaty Collection, Convention on the Rights of Persons with Disabilities

At the regional level, Uganda ratified the African Charter on 10 May 1986,[127] the African Women's Protocol on 22 July 2010[128] and the African Children's Charter on 17 August 1994.[129] The Constitution, along with several laws, subsidiary legislation and policies, relate to the rights of urban refugees in Uganda. Amongst them the most relevant are the Constitution, the Refugee Act of 2006 and its Regulations of 2010, discussed below.

3.1 Setting the basis for the protection of refugee rights in Uganda: Role of the 1995 Constitution

Article 45 of the Constitution provides that '[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically provided under the Bill of Rights shall not be regarded as excluding others not specifically mentioned'.[130] This provision implies that the human rights enshrined in international and regional instruments ratified by Uganda cannot be excluded from the rights guaranteed in the Bill of Rights. However, the impressive international legal framework has not always in practice translated into respect for the human rights of urban refugees. The rule of law and respect for and promotion of human rights remain weak. For instance, Human Rights Watch and other human rights organisations have continually observed gross human rights violations, such as arbitrary detention and the use of torture by the government.[131] Since Uganda's independence, although human rights have received at least some legislative attention, 'the specific rights of refugees have been neglected notwithstanding the country's long history as a refugee-hosting nation'.[132] After a history of political and constitutional instability, the Constituent Assembly of Uganda promulgated a new Constitution in 1995.[133] The new Constitution

13 December 2006 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (accessed 10 October 2015).

127 AU 'Ratification Table: African Charter on Human and Peoples' Rights' http://www.achpr.org/instruments/achpr/ratification/ (accessed 10 October 2015).

128 AU 'Ratification Table: Protocol to the ACHPR on the Rights of Women in Africa' http://www.achpr.org/instruments/women-protocol/ratification/ (accessed 10 October 2015).

129 African Commission 'States – Uganda' http://www.achpr.org/states/uganda/ratifications/ (accessed 10 October 15).

130 Art 45 Ugandan Constitution (1995).

131 See Human Rights Watch 'Uganda: Act swiftly on long-term detainees' Press Release, http://www.hrw.org/en/news/2009/06/24/uganda-act-swiftly-long-term-detainees (accessed 23 October 2015); and Human Rights Watch 'Uganda: Kenyan activists at risk of torture' Press Release http://www.hrw.org/en/news/2010/09/16/uganda-kenyan-activists-risk-torture (accessed 23 October 2015).

132 M Sharpe & S Namusobya 'Refugee status determination and the rights of recognized refugees under Uganda's Refugees Act 2006' (2012) 24 *International Journal of Refugee Law* 563.

133 Preamble, para 1 1995 Constitution (n 130 above).

seeks to strengthen the framework for the protection and preservation of fundamental human rights and freedoms.[134] To realise this goal, Chapter Four contains a Bill of Rights which guarantees the fundamental human rights and freedoms that must be respected and upheld by all organs of state, private entities and individuals alike.[135]

Although the rights of urban refugees are not explicitly provided for, the Bill of Rights guarantees an entire set of human rights to 'all persons' and, in some instances, 'everyone'. Article 21(1) provides that '[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'.[136] In this regard, Mulumba and Olema contend that the phrase 'all persons' includes refugees and, therefore, it may be argued that this guarantees the rights of urban refugees to equality and freedom from discrimination.[137] On the other hand, the same authors have observed that in practice refugees have been denied certain privileges guaranteed under the Bill of Rights.[138] For instance, refugees residing in urban areas are denied protection and humanitarian assistance by the government and the UNHCR in compliance with the Act on the ground that they must reside in approved rural settlements or camps in order to qualify for this.[139] The Constitution further guarantees the right of every person to own property either individually or with others,[140] although non-Ugandans can claim only leaseholds under the Land Act, and not absolute ownership. Nevertheless, as in the case of many constitutions, this right may be limited based on requirements enshrined in the Constitution.[141]

Article 28(1) provides for the right to a fair hearing in the determination of civil rights and duties or criminal charges.[142] Critical to the rights of refugees, article 29(1) guarantees and protects the right of every person to freedom of conscience, expression, movement, religion, assembly and association.[143] Article 30 entitles all persons to the right to education.[144] In strong wording, article 32(2) prohibits all laws, cultures, customs and traditions which are against

134 Preamble, para 3 1995 Constitution.
135 Art 21(2) 1995 Constitution.
136 Art 21(1) 1995 Constitution.
137 D Mulumba & WM Olema *Policy analysis report: Mapping migration in Uganda* (2009) 27.
138 Mulumba & Olema (n 137 above) 28.
139 Art 44 Ugandan Refugees Act (n 5 above).
140 Art 26(1) 1995 Constitution (n 130 above).
141 Art 26(2) of the Constitution (n 48 above) entitles the state to compulsorily acquire the property of any description when the following conditions are met: (a) the acquisition is necessary for public use or in the interest of defence, public safety, public order or public health; and (b) the acquisition is made under a law which provides for prompt payment of fair and sufficient compensation with the grant of access to court for any aggrieved party.
142 Art 28(1) 1995 Constitution (n 130 above).
143 Art 29(1) 1995 Constitution.
144 Art 30 1995 Constitution.

the dignity, welfare or interests of women or any other marginalised groups covered by article 32(1).[145] As argued above, refugees are globally recognised as a marginalised group[146] and, hence, fall within the ambit of this constitutional provision. However, the Constitution consists of principles that can be weighed against each other, and the rights guaranteed in article 29 may consequently be limited and weighed against other rights. For instance, article 43 provides for limitations to the rights enshrined in article 29 in order to respect the fundamental rights of others or the public interest. Nevertheless, the limitations based on public interest may not go beyond what is acceptable and demonstrably justifiable in a free democratic society, or what is provided for by the Constitution.

Article 40 provides for the right of all persons to work under satisfactory, safe and healthy conditions as well as guaranteeing equal payment for equal work without discrimination.[147] It further guarantees the right of every person in Uganda to practise their profession and to undertake any lawful occupation, trade or business.[148] It also entitles any person appearing before any administrative body or official the right to be treated fairly and justly as well as the right to apply to a court of law regarding any administrative decision taken against them.[149]

Furthermore, the Constitution entitles a child to basic education the provision of which shall be the duty of the state and the parents of the child.[150] This particular provision makes it difficult for refugee children to access basic education when their parents cannot fulfil this duty due to their economic conditions. It further provides that no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of any religious or other opinion.[151] Article 34(7) states that '[t]he law shall accord special protection to orphans and other vulnerable children'.[152] These provisions are to be welcomed, but face enforcement challenges due to other counteractive government policies and laws. For instance, a study conducted by the Women's Refugee Commission revealed that many urban refugees are vulnerable and live in extreme poverty, unable to pay for their basic needs such as rent, and therefore sleep on the streets, eat less frequently and engage in negative economic strategies.[153] These situations can adversely affect their children who

145 Art 32(2) 1995 Constitution.
146 M Sommers 'Urbanisation and its discontents: Urban refugees in Tanzania' (1999) 4 *Forced Migration Review* 22.
147 Arts 40(1)(a) & (b) 1995 Constitution (n 130 above).
148 Art 40(2) 1995 Constitution.
149 Art 42 1995 Constitution.
150 Art 34(2) 1995 Constitution.
151 Art 34(3) 1995 Constitution.
152 Art 34(7) 1995 Constitution.
153 Women's Refugees Commission *The living ain't easy: Urban refugees in Kampala* (2010) 2.

may drop out of school to take up work. The study further indicates that, due to the lack of physical protection, some refugee women and girls walk in groups to avoid sexual harassment.[154]

The Constitution further provides that every person who has legally and voluntarily migrated to and has been residing in Uganda for a minimum of 20 years shall be registered as a citizen upon application for such purpose.[155] However, studies have revealed that the acquisition of citizenship in Uganda is extremely difficult due to the cumbersome process, which makes it difficult for refugees to acquire citizenship.[156]

Moreover, since refugees are forcefully displaced, no amount of time can alter their migration status and, hence, this disqualifies them from seeking citizenship based on article 13 of the Constitution. Unless this constitutional provision is amended to accord refugees the ability to apply for registration as citizens, the provision would continue to be a mockery of the length of stay of urban refugees in Uganda. Without explicitly mentioning 'refugees' in the clause, it could be argued that the word 'persons' encompasses 'refugees' as well and, as a consequence, the provision could have given urban refugees the right to regularise their stay in Uganda. Unfortunately, there has not been any court decision on the inclusion or exclusion of refugees based on this provision.

The progressive provisions in the Constitution are welcome steps since they ensure a largely human rights-compliant approach to protecting the rights of urban refugees. However, a critical assessment of these provisions reveals some inherent weaknesses. First, the failure to explicitly recognise the rights of refugees is a major gap and generates controversy in claiming the rights of refugees, in general, and urban refugees particularly. Such non-recognition can be used to justify various administrative and judicial actions that hinder the rights of urban refugees in Uganda. International best practice requires that the rights of refugees should be clearly guaranteed in national constitutions in order to offer effective protection.[157]

3.2 A step forward to protection: The Refugees Act of 2006 and the Refugees Regulations of 2010

The Refugees Act was tabled in parliament in 1998 and passed in 2006. It entered into force in 2008, and became operational by the passing of the Refugees Regulations in 2010. Buwa argues that developments in Uganda from the 1990s, including progress in political, economic, social and legal spheres, reinforced the government's resolve to measure up to international standards in

154 As above.

155 Art 13(2) 1995 Constitution (n 130 above).

156 Refugee Law Project *Refugees in the city: Status determination, resettlement and changing nature of forced migration in Uganda* (2002) 6 Working Paper 9.

157 Mulumba & Olema (n 137 above) 27.

refugee protection.[158] The 2006 Act, therefore, was adopted to give effect to these treaties.[159] This desire becomes apparent when considering the government's admittance of the repealed Control of Aliens and Refugees Act (CARA) as wholly inadequate in protecting refugees.[160] The Refugee Act of 2006 provides a comprehensive legislative framework for the protection of the rights of urban refugees and other related matters.[161] Although it was expected that the Act would make more elaborate provisions to particularly fill most of the gaps in the Constitution relating to refugee protection, it failed for several reasons.

Article 3(2) grants the government the discretionary right to grant or deny the application for refugee status of any person.[162] This discretionary right derogates from international refugee law standards it aims to uphold.[163] The article also establishes an Office for the Commissioner for Refugees and other procedural matters regarding the administration of refugees and related matters. The Office undertakes all administrative matters relating to refugees in Uganda and, in that capacity, co-ordinates both government and non-governmental activities concerning refugees.[164] The establishment of a specialised office for the administration of refugee matters is very progressive and strengthens the institutional mechanism for the protection of urban refugees.

Article 11 establishes the Refugee Eligibility Committee (REC) tasked to consider and handle all applications for refugee status.[165] The REC consists of officials from 10 different government departments, with the UNHCR attending in an advisory capacity. The omission of civil society from the REC may create the perception that the government prioritises state interests instead of the protection needs of refugees and asylum seekers, since there is limited participation by civil society organisations that usually act as a watchdog over government actions. The UNHCR is also allowed to receive applications for refugee status on behalf of the Office of the Commissioner for Refugees.[166] This permission is commendable in view of the high volume of applications the Commissioner's office handles and the inadequate staff and logistical resources it faces.

158 MG Buwa 'Critique of the Refugees Act, 2006' (2007) Refugee Law Project Policy Paper 1.
159 Arts 28(a) & (b) Ugandan Refugees Act (n 5 above).
160 Buwa (n 158 above) 1.
161 Art 8 Ugandan Refugees Act (n 5 above).
162 Art 3(2) Ugandan Refugees Act.
163 Buwa (n 158 above) 6.
164 Art 8(1) Ugandan Refugees Act (n 5 above).
165 Art 12 Ugandan Refugees Act.
166 Arts 19(2) & (3) Ugandan Refugees Act.

Article 16 sets up the Appeals Board with appellate functions[167] regarding decisions of the REC on issues of law and procedures.[168] The Board lacks the power of an appellate body despite its ability to set aside the decisions of the REC, and the fact that the decision of the Board is final.[169] This causes the appeal process to fall short of the constitutional imperative of just and fair administrative actions as well as the right to apply to a competent court against any decision taken against them.[170] However, Sharpe and Namusobya contend that applicants whose applications are rejected during the appeal may apply for a judicial review at a court of competent jurisdiction.[171]

Progressively, article 28 entitles urban refugees to all the rights guaranteed under the 1951 Convention and the 1969 OAU Convention and other relevant international treaties to which Uganda is a party.[172] Therefore, all refugees have the right to be issued with identity cards for purposes of identification and protection,[173] and to stay in Uganda.[174] Nevertheless, there appears to be a discrepancy between the law and what is on the ground. For example, it has been reported that the office of the Prime Minister has begun to permit refugees to remain in Kampala as well as other cities by providing then with identity documents on condition that they can prove 'self-sufficiency'.[175] The office argues that by demanding evidence of employment and residency, refugees who cannot sustain themselves in the cities are discouraged from remaining in the cities. However, limiting the issuing of identity documents to refugees who can prove 'self-sufficiency' by using such arbitrary criteria is discriminatory and violates the letter and spirit of the 1951 Refugee Convention. The 1951 Convention does not link refugee status to their economic status.

The Act further provides for urban refugees to own property[176] and to transfer assets,[177] to have access to education, and accords them the same treatment as nationals regarding basic education.[178] To assist urban refugees to become self-reliant, the Act guarantees their right to engage in agriculture, industry, commerce and crafts and to set up other ventures in accordance with applicable laws.[179] Refugees

167 Art 17 Ugandan Refugees Act.
168 Art 21 Ugandan Refugees Act.
169 Art 21(4) Ugandan Refugees Act.
170 Art 42 Ugandan Refugees Act.
171 Sharpe & Namusobya (n 132 above) 561.
172 Art 28 Ugandan Refugees Act.
173 Art 29(1)(a) Ugandan Refugees Act.
174 Art 29(1)(b) Ugandan Refugees Act.
175 D Ssemugenyi 'Challenges to refugees' freedom of movement in Uganda: A case of self-settled refugees In Kisenyi, Kampala' unpublished MA thesis, Norwegian University of Science and Technology, 2011.
176 Art 29(1)(e)(i) Ugandan Refugees Act (n 5 above).
177 Art 29(1)(e)(ii) Ugandan Refugees Act.
178 Art 29(1)(e)(iii) Ugandan Refugees Act.
179 Art 29(1)(e)(iv) Ugandan Refugees Act.

also have the right to practise their qualified professions.[180] Refugees enjoy the same level of protection regarding intellectual property as nationals.[181] This measure reinforces the rights of urban refugees to be gainfully employed and to contribute to the sustainable socio-economic development of the host country. In practice, however, this situation is different, since the Act provides that refugees have the right to work just like 'aliens in similar circumstances'.[182] For instance, it is reported, contrary to the claims by the office of the Prime Minister, that once a refugee is in the country he or she is allowed *de facto* to work,[183] the Immigration Department wrongfully interprets 'aliens in similar circumstances' to mean that refugees require work permits just as aliens require work permits to enter the country.[184] This lack of clarity, as well as the varied enforcement of the provision guiding employment of refugees, implies that government officials, potential employers and refugees are often deceived. Employers, therefore, are wary of hiring refugees. It is also reported that refugees who engage in formal work are frequently besieged by government and immigration officials and are consistently exploited and discriminated against in accessing employment.[185]

The Act also guarantees the right of urban refugees to non-political associations.[186] This right emanates from article 3 of the 1969 OAU Convention forbidding refugees from engaging in subversive activities against any state. In this sense, the Act bans refugees from engaging in any political activity, which seriously affects the rights of urban refugees to expression, association, assembly and academic freedom as guaranteed, for instance, in the Constitution,[187] the Universal Declaration,[188] the ICCPR[189] and the African Charter.[190] The scope of this provision is thus too wide.

The Act further provides for the right of refugees to access a court of law, including legal assistance, in compliance with the relevant laws.[191] The freedom of movement of refugees within and outside Uganda is also guaranteed[192] and they are entitled to be issued travelling documents.[193] This right, however, can be restricted on the

180 Art 29(1)(e)(vii) Ugandan Refugees Act.
181 Art 29(2) Ugandan Refugees Act.
182 Arts 29(e)(v) & (vi) Ugandan Refugees Act.
183 Women's Refugees Commission (n 153 above) 9.
184 As above.
185 As above.
186 Art 29(1)(g) Ugandan Refugees Act.
187 Arts 29(1) & (e) 1995 Constitution (n 130 above).
188 Arts 19 & 20 Universal Declaration.
189 Art 19 ICCPR.
190 Art 10 African Charter.
191 Art 29(1)(h) Ugandan Refugees Act.
192 Art 30(1) Ugandan Refugees Act.
193 Art 30(2) Ugandan Refugees Act.

grounds of national security, public health, public order and public morals as well as for the protection of the rights of others.[194] In this regard, Buwa has argued that the restrictions imposed on this right curtailed its protective value since the directives given by the commissioner may be arbitrary.[195] Despite the legal rights of refugees, it has been reported that refugees are unable to easily cross international borders due to limited access to conventional travel documents.[196] Furthermore, although refugees who may wish to travel outside Uganda are entitled to conventional travel documents, experience has shown that not all refugees are entitled to these documents as they are issued only to those refugees travelling for resettlement or on health grounds. This situation encumbers businesses and trading activities operated by refugees in Uganda with Rwanda, Kenya and South Sudan.

It is worth noting that in the Act the description of family to include spouses, children and other dependents is in line with the African conception of family.[197] This description offers a protective tool in processing resettlement to third countries as durable solutions, especially as third-country resettlement is increasingly becoming inevitable in Uganda due to the overburdened case loads and resource constraints, as well as the protracted conflicts in neighbouring countries.[198] This situation requires burden sharing and extended protection through third-country settlement. Nevertheless, this broader definition of 'other dependents' may pose practical challenges that may impede third country and burden-sharing administrative processes.

The Act recognises the special protection needs of refugee women and children and guarantees their rights and welfare accordingly. It entitles refugee children to the rights and freedoms enshrined in the Ugandan Children Act,[199] the African Children's Charter[200] and the CRC.[201] However, this is not the reality. For example, even though the government provides universal primary education, making the seven years of primary school free for four children per family, government schools in Kampala commonly do charge fees.[202] Students also pay for uniforms, other educational supplies and meals, making the cost of primary school prohibitively high for both urban refugees and the urban poor alike. The Women's Refugees

194 As above.
195 Buwa (n 158 above) 16.
196 Women's Refugees Commission (n 153 above) 2.
197 Art 2 para 19 Ugandan Refugees Act.
198 Buwa (n 158 above) 4.
199 Art 32(2)(a) Ugandan Refugees Act.
200 Art 32(2)(b) Ugandan Refugees Act.
201 Art 32(2)(c) Ugandan Refugees Act.
202 A Bonfiglio 'Learning outside the classroom: Non-formal refugee education in Uganda' UNHCR Policy Development and Evaluation Service No 193, November 2010.

Commission contends that other barriers, such as discrimination in admission procedures, by which limited seats go to non-nationals, language barriers, adjustment to a new curriculum, and the psychosocial needs of conflict-affected refugee children, affect the access of urban refugees to public schools. As a result, it is reported that more than half of the refugee children of school-going age in Kampala do not attend school, and less than 10 per cent of refugee students in Uganda are enrolled in secondary school.[203]

The Act also accords to refugee women equal enjoyment and protection of all human rights and freedoms regarding economic, social, cultural and other spheres as provided in the Constitution and other applicable laws in Uganda, including all the international instruments to which Uganda is a party, such as CEDAW[204] and the African Women's Protocol.[205] It also protects the right to marriage as respected by the laws of Uganda.[206]

In general, the Act complies with international refugee protection standards as grounded in the 1951 Convention and the 1969 OAU Convention. Nevertheless, there are some gaps and weaknesses which leave room for excesses due to glaring omissions in the Act. For instance, by focusing on protection for and assistance to encamped refugees, the Act undermines refugees' freedom of movement and the right to choose their place of residence, as enshrined by article 26 of the 1951 Convention. These weaknesses and gaps lower the compliance of the Act with international refugee law standards of protection and best practice.[207] Therefore, these gaps create several institutional and practical challenges that make it difficult for urban refugees to enjoy their rights.

To make the Act implementable, the Refugees Regulations of 2010, the first comprehensive regulatory framework, were formulated to address key issues in the management of refugees, including the rights of urban refugees.[208] The Regulations were introduced to guide the implementation of the Act[209] and, hence, contain similar provisions enshrined in the Act. The Regulations also recognise the general lack of consultation with urban refugees on issues pertinent to the protection of their rights.[210] They, therefore, emphasise as one of the principles the need for the participation of refugees in national and decentralised planning and policies at all levels.[211]

203 InterAid *Socio-economic baseline survey for urban refugees in and around Kampala (*2009) 11.
204 Art 33(2)(a) Ugandan Refugees Act.
205 Art 33(2)(b) Ugandan Refugees Act.
206 Art 34(2) Ugandan Refugees Act.
207 Buwa (n 158 above) 1.
208 Preamble Refugees Regulations 9 of 2010.
209 As above.
210 Preamble Refugees Regulations (n 208 above).
211 Art 61 Refugees Regulations.

The Regulations also provide for other vulnerable groups, such as HIV-positive refugees. They protect the application and subsequent stay of HIV-positive applicants from discrimination or prejudicial actions in any form,[212] further providing that such persons shall be given the favourable treatment given to nationals regarding access to healthcare and treatment.[213] The Regulations also protect stateless refugees from arbitrary discrimination on the basis of their statelessness, and grants them the eligibility to apply for citizenship upon satisfying the constitutional prescription for residence in Uganda.[214]

The Regulations further accord refugees from the East African Community (EAC) member states the enjoyment of all rights and benefits that Community nationals are entitled to in the treaty and protocols establishing the EAC.[215] This provision is very important because, according to the most recent statistics released by the UNHCR, about 30 per cent of refugees in Uganda are from EAC countries.[216] As in the case of the Act, the Regulations are very progressive, but contradict several constitutional imperatives.

4 Conclusion

The article aimed to establish whether the legal framework for protecting the rights of urban refugees in Uganda is in compliance with international human rights standards and best practices. The article confirmed that the rights of urban refugees have emerged at the international level through several factors; that they are specifically guaranteed in the Universal Declaration (which has emerged into a universal standard for human rights), through several subsequent group-based treaties and UNGA resolutions. In addition, the 1951 Convention and its 1967 Optional Protocol specifically protect the rights of urban refugees. Also, the rights of urban refugees are protected under the ICCPR, ICESCR, CEDAW and CRC, amongst others. The study also established that other soft law instruments developed by international organisations, including the UNHCR, provide additional clarity on procedural safeguards that should be adhered to in protecting the rights of urban refugees. Based on its international commitments, Uganda has followed suit and provided a progressive refugee protection regime, and recognises the rights of urban refugees in the Act and the Regulations. The article established that the adoption of the Refugees Act in 2006 and its Refugees Regulations in 2010 marked a significant achievement in terms of

212 Art 7(1) Refugees Regulations.
213 Art 7(2) Refugees Regulations.
214 Art 8(2) Refugees Regulations.
215 Art 9 Refugees Regulations.
216 UNHCR '2015 UNHCR country operations profile – Uganda overview' (2015) http://www.unhcr.org/pages/49e483c06.html (accessed 11 October 2015).

bringing Uganda's domestic legal framework in line with its regional and international obligations, thereby enhancing the protection of the rights of urban refugees in its territory.

However, the relevance of international and regional human rights and refugee law is not clear under the Act as well as the Regulations. Some of the particular shortcomings of the Act result in certain rights guaranteed to refugees under international and regional laws still being systematically violated in Uganda. In particular, refugees experience an infringement of their freedom of movement and of residence, as well as of association and expression. Refugees' rights to work, education and healthcare under the Act are also problematic. For instance, while the legislative intent appears to be in compliance with Uganda's international and regional human rights and refugee rights commitments, the Refugees Act is not clear on how urban refugees should go about exercising their right to work. In light of this lack of clarity, Uganda should make improvements in certain sections of the Refugees Act: Section 44, articulating the settlement policy, and section 35, limiting refugees' political activity, should be eliminated. Finally, section 29(1)(e)(vi) on the right to work (employment) should be illuminated, specifying that refugees should be treated like permanent residents for the purposes of their right to work. These amendments would create a protection-oriented domestic refugee rights framework that is more reflective of Uganda's international and regional commitments.

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The responsibility of businesses to prevent development-induced displacement in Africa

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Summary

Business-related development-induced displacement is a growing challenge in Africa. Thousands of individuals have been displaced due to private investment projects in various sectors, including the extractive industries, agriculture and infrastructural development. While much attention has been given to the responsibility of states as primary duty bearers in international law, the matter of the responsibility of businesses within the context of development-induced displacement has not been discussed. Utilising the United Nations Guiding Principles on Business and Human Rights, this article discusses the responsibility of businesses in preventing arbitrary development-induced displacement in Africa.

Key words: *business and human rights; internal displacement; development projects; Africa; corporate responsibility*

1 Introduction

Arising from the narrative of development-induced displacement is the tension between the development imperative of projects and the rights of persons likely to be displaced.[1] When African countries started gaining independence in the twentieth century, the implementation of development projects was considered a significant

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1 R Adeola 'The legal protection of development-induced displaced persons under the African Union IDP Convention' (2017) 10 *African Journal of Legal Studies* 1.

step in economically positioning Africa with the rest of the world.[2] Projects such as dams, urban highways, the extraction of natural resources and infrastructural development were central to national economic policies. While their potential for stimulating growth is often lauded, they also create socio-economic impoverishment for local communities. For decades, issues of inadequate consultation, insufficient compensation, coercion, unsuitable resettlement and violent displacement have characterised this form of displacement in Africa. Recognising the need to address the various root causes of internal displacement, including development-induced displacement, the African Union (AU) in 2009 adopted a regional framework on internal displacement.[3] In article 10 of the African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa (Kampala Convention), states are mandated to prevent displacement caused by projects carried out by public and private actors. Private actors in this provision refer to businesses. However, the Kampala Convention does not discuss what the responsibility of businesses entails within the context of development-induced displacement. With reference to the existing international framework on business and human rights, the article analyses the responsibility of businesses to prevent arbitrary development-induced displacement in Africa.

2 Business and development-induced displacement in Africa

One of the ways in which the adverse human rights impact of business activities has featured in Africa is in relation to development-induced displacement. In Africa, this impact has reverberated in the context of natural resource extraction. The coal-mining-induced displacement in Mozambique is instructive.[4] Between 2009 and 2014, more than 2 000 families were displaced from their place of residence in communities in the Tete province to make way for mining activities by corporate giants – Vale and Rio Tinto.[5] Although resettlement was initiated by the corporations and displaced persons were moved to Cateme village, Mwaladzi and a place called 25 de Setembro which is

2 SF Miescher & D Tsikata 'Hydro-power and the promise of modernity and development in Ghana: Comparing the Akosombo and Bui dam projects' (2009) 12/13 *Ghana Studies* 15.

3 African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted at the Special Summit of the African Union Heads of State and Government in Kampala, Uganda, 19-23 October 2009 (Kampala Convention).

4 In Mozambique, where coal constitutes about 61% of the country's minerals. See NA Besharati 'Raising Mozambique development through coal' South African Institute of International Affairs, Policy Briefing 56 September 2012 1.

5 M Lopes 'Miners Vale, Rio Tinto accused of neglecting displaced Mozambicans' *Reuters* 23 May 2013.

to the west of Moatize town,[6] there have been significant challenges with regard to their resettlement.[7] One of the challenges faced by resettled communities in Cateme and Mwaladzi is the insufficiency of arable land for food production. Farmlands provided were not suitable for the production of 'staple crops'.[8] In Cateme, for instance, families were promised two hectares of land for farming in order to maintain their livelihood.[9] However, only one hectare of land, described as 'unproductive farmland' – which was neither sufficient nor in close proximity to the houses of the resettlers – were provided.[10] Prior to resettlement, those resettled in Mwaladzi to make way for the Benga mine had access to water from the Revuboe river in Capanga.[11] However, in Mwaladzi, water insecurity has been an issue. In the first phase of the resettlement in Mwaladzi, families were moved before the provision of water amenities. While, unlike the first phase, better access to water was provided for those moved in the second phase, the provision was still inadequate.[12] In the resettlement of those displaced by Vale, there were discriminatory patterns. Households were deliberately divided into two, with the employed resettled in 25 de Setembro and the unemployed families resettled in Cateme village. Those resettled in 25 de Setembro were close to the mines and to Moatize and, as such, were close to the urban settlement. However, those relocated in Cateme village were 40 kilometres away from Moatize and experienced difficulties accessing jobs, being far away from the urban settlement. While creating geo-economic marginalisation, the resettlement kindles an impression that the

6 J Pedro 'Forced resettlements: From impacts to opportunities – The case of Moatize mine (Mozambique)' in A Afonso (ed) *Informality and urbanisation in African contexts: Analysing economic and social impacts* (2015) 69 72.

7 1 365 households living in Malabwe, Mithete, Chipanga and Bagamoyo were resettled by Vale within the period 2009 to 2010. The displaced persons were resettled in Cateme village and 25 de Setembro. Between 2009 and 2014, about 478 households were resettled from Capanga in the Tete region to Mwaladzi by Riverdale and Rio Tinto. During the first phase of the resettlement between 2009 and 2011, Riverdale and Rio Tinto resettled 85 households. It further resettled 358 households, comprising around 2 100 individuals, between 2013 and 2014. Human Rights Watch '*What is a house without food?' Mozambique's coal mining boom and resettlements* (2013) 8 44; Lopes (n 5 above); S Lillywhite et al *Mining, resettlement and lost livelihoods: Listening to the voices of resettled communities in Mualadzi, Mozambique* (2015) 1-2.

8 Human Rights Watch (n 7 above) 8.

9 A Macheve 'The impact of coal mining on the living conditions of rural communities in Mozambique: A case study of Cateme' (2014) 64 https://open.uct.ac.za/bitstream/item/14692/thesis_hum_2014_macheve_aj.pdf?sequence=1 (accessed 19 April 2016).

10 C Jentzsch 'Mozambique: Photographs from the promised land' *The Guardian* 21 January 2013.

11 S Lillywhite 'Mining, resettlement and lost livelihoods: A case study of Mozambique' *Devpolicy* 21 July 2015.

12 Lillywhite et al (n 7 above) 15.

'uneducated and unemployed members of a community can be dumped anywhere'.[13]

Displacement within the context of gold mining in Ghana equally illustrates this concern. Between 1990 and 1998, over 30 000 people were displaced for gold mining activities in the Tarkwa region.[14] Although resettlement plans were often implemented by mining companies, in several instances the resettlement houses did not conform to the household sizes.[15] However, there are certain instances where compensation was not offered. For instance, in 1997, 45 people were evicted from the Nkwantakrom community in the western region of Ghana[16] to make way for the Ghanaian Australian Goldfields Mining Project (GAGMP) without proper consultation and compensation.[17] In a case instituted before the Tarkwa High Court, GAGMP argued that the Nkwantakrom community had not existed prior to their acquisition of the mining concession, hence inferring that the members of the community were not only encroachers but had settled on the land for the purpose of attracting compensation.[18] However, the Court rejected the argument, pointing out an underlying prejudice in the manner in which the community members had been treated. The Court observed that 'the attitude shown by the defendant right from the day of invasion [reveals] that the defendant [GAGMP] thinks of the plaintiffs [Nkwantakrom community] as weak and voiceless'.[19] As such, they were to be 'quiet if a wealthy and influential multinational company demolishes their place of abode and uses their land in the way it likes'.[20] This prejudice observed by the Court often resonates in the way in which displacement occurs in mining regions across Africa.

Another example is Kimberlite mining in Sierra Leone. Following the end of the war in Sierra Leone in the early 2000s, Koidu Holdings Limited (KHL) acquired mining rights in the Kono district for Kimberlite mining. In line with the Environmental Protection Act of 2000,[21] KHL commissioned an environmental impact assessment (EIA) which revealed that 4 537 people would be negatively affected. The

13 C Kabemba & C Nhancale 'Coal versus communities: Exposing poor practices by Vale and Rio Tinto in Mozambique' *Southern Africa Resource Watch*, Open Policy 2 January 2012 5.

14 T Akabzaa & A Darimani 'Impact of mining sector investment in Ghana: A study of the Tarkwa mining region' Structural Adjustment Participatory Review International (SAPRI), Draft Report 20 January 2001 44 http://www.saprin.org/ghana/research/gha_mining.pdf (accessed 19 April 2016).

15 Akabzaa & Darimani (n 14 above) 45.

16 *Nana Kofi Karikari & 44 Others v Ghanaian Australian Goldfields (GAG) Ltd* (2007) Suit LS.34/97 (*Karikari* case).

17 As above.

18 *Karikari* case (n 16 above) 3.

19 *Karikari* case 6.

20 As above.

21 Network Movement for Justice and Development 'Diamonds, blood and tears: The relationship between Koidu Holdings Ltd and the affected property owners of Kono' Focus on Mining Companies Series 1 (April 2010) 16.

EIA recommended that resettlement be carried out and the welfare of the vulnerable group be sought. However, KHL lingered for more than a year with the implementation of this recommendation, arguing that it was yet to make budgetary arrangements since the agreement it had with the government was to the effect that the land was vacant.[22] As such, any occupation was illegal. After erecting a 'few shambolic housing',[23] the company carried out blasting activities in contravention of the EIA. In early 2005, the local communities threatened massive protest, and in response KHL negotiated with the local communities and agreed that 'houses were to be constructed by community residents, and KHL was to bear the cost of construction materials, labour, and supervision'.[24]

In the context of oil mining, the situation in Sudan and Nigeria is instructive. In Sudan, between 1999 and 2002 the Greater Nile Petroleum Operating Company, comprising of a state-owned corporation in partnership with multinational companies such as Canadian-based Talisman, with the aid of the military engaged in the violent displacement of civilians for oil extraction.[25] El Jack notes that 'reports … documented that gunships regularly flew sorties form Heglig … attacking civilian settlements as part of an ongoing campaign to control territory that could be used for oil development.'[26] Villages in the eastern part of Heglig were destroyed by army officials in 1999, and attacks were launched against the Ruweng County in the Western Upper Nile, displacing many individuals and leaving over 6 000 houses burnt.[27] According to a 2002 report, the United Nations (UN) Special Rapporteur on the Situation of Human Rights in Sudan, there were accounts of 'scorched earth tactics used by air and ground forces to clear oil-rich areas, chase people out of their villages and ensure that they would not return'.[28]

In Nigeria, much of the displacement in the Niger Delta region has been predicated on spills from oil extraction in the region which

22 Network Movement for Justice and Development (n 21 above) 15.

23 As above.

24 O Bermúdez-Lugo 'The mineral industry of Sierra Leone' (2005) 34 *United States Geological Survey Mineral Yearbook* 1.

25 A El Jack 'Gendered implications: Development-induced displacement in Sudan' in P Vandergeest et al (eds) *Development's displacements: Ecologies, economics, and cultures at risk* (2007) 61 69.

26 As above.

27 L Moro 'Oil development-induced displacement in the Sudan' Sir William Luce Fellowship, Durham Middle East Papers 10 September 2009 13-14.

28 General Assembly 'Situation of human rights in the Sudan: Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Sudan, Gerhart Baum' Note by the UN Secretary-General, A/57/326 (20 August 2002) para 39.

government figures estimate at more than 7 000 between 1970 and 2000.[29] In the 1970s, one such instance of oil spillage was in Igolu village in Isokoland as a result of the activities of Shell, resulting in the displacement of over 2 000 individuals in 1973.[30] In the 1980s, oil spillage from Texaco-operated Funiwa well and Agip-operated Ogada Brass pipelines in the Niger Delta region severely affected several communities.[31] In 1998, oil spillage at Osima creek in Bayelsa resulted in eight days of fire outbreaks, the destruction of an estimated 400 houses and the displacement of 130 000 individuals.[32] Oil spillage from the Abiteye station operated by Chevron in the Delta state displaced over 10 communities and rendered hundreds of people homeless in 2007.[33]

Displacement for corporate agricultural investment has also featured across the continent. The situation of Kaweri Coffee Plantation (KCP) in Uganda is instructive. In 2000, the Neumann Kaffee Gruppe – a Hamburg-based multinational coffee company – wanted to establish a location to produce Robusta coffee. Around this time, Uganda was implementing an agricultural policy as part of its Poverty Eradication Action Plan (PEAP), primarily aimed at reducing poverty in Uganda to 10 per cent by 2017.[34] This agricultural policy – the Plan for Modernisation of Agriculture (PMA) – was aimed at eradicating poverty 'through a profitable, competitive, sustainable and dynamic agricultural and agro-industrial sector'.[35] In order to realise this goal, there were plans to convert subsistence-based agriculture to commercial agro-production. In this context, the purported investment by the Neumann Kaffee Gruppe was a timely

29 J Vidal 'Shell oil spills in the Niger Delta: "Nowhere and no one has escaped"' *The Guardian* 3 August 2011.

30 SR Akinola 'Resolving the Niger Delta crisis through polycentric governance system' paper presented during the Fall 2003 Colloquia, organised by the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, USA, December 2003 20; LT Ajibade & AA Awomuti 'Petroleum exploitation or human exploitation? An overview of Niger Delta oil producing communities in Nigeria' (2009) 3 *African Research Review* 111 114.

31 I Okonta & O Douglas *Where vultures feast: Shell, human rights and oil* (2003) 113; O Owolabi & I Okwechime 'Oil and security in Nigeria: The Niger Delta crisis' (2007) 32 *Africa Development* 1 13.

32 CO Opukri & IS Ibaba 'Oil-induced environmental degradation and internal population displacement in Nigeria's Niger Delta' (2008) 10 *Journal of Sustainable Development in Africa* 173 184.

33 E Arubi 'Oil spill displaces 10 Ijaw communities' *Vanguard* 13 February 2007.

34 MC Muduuli 'Uganda's poverty eradication action plan: National sustainable development strategy principles tested' presentation at the International Forum on National Sustainable Development Strategies (NSDSs), convened by the United Nations Department for Economic and Social Affairs (DESA) in Accra, Ghana, 7-9 November 2001 1; Ugandan Ministry of Finance, Planning and Economic Development 'Poverty reduction strategy paper: Uganda's poverty eradication action plan: Summary and main objectives' Poverty Reduction Strategy Paper March 2000.

35 Ministry of Agriculture, Animal Industry and Fisheries and Ministry of Finance, Planning and Economic Development 'Plan for modernisation of agriculture: Eradicating poverty in Uganda: Government strategy and operational framework' Government Strategy and Operational Framework Kampala, Uganda, 2000 VI.

opportunity as such investment, which had the potential of realising the export-oriented agricultural transformation, could have a positive long-term impact on poverty eradication.

In 2001, the Ugandan government entered into an investment agreement with Neumann Kaffee Gruppe for the establishment of a large-scale coffee plantation in Uganda. For Neumann Kaffee Gruppe's large-scale investment in the coffee sector of Uganda's agricultural economy, the Ugandan Investment Authority acquired 2 510 hectares of land from a freehold title holder by the name of Kayiwa and leased the land for a period of 99 years to the Neumann Kaffee Gruppe for the establishment of the KCP.[36] However, the land was not vacant. Under Ugandan law, there is recognition of dual tenure of land, in which case both a registered title holder and a squatter, either as lawful or *bona fide* occupant, can have an interest in a piece of land.[37] In situations where land inhabited by these occupants is sought to be expropriated, negotiations on compensation should take place. However, displacement was carried out without proper negotiations.[38]

In a meeting held on 15 June 2001, the occupants were told to vacate the land by 31 August 2001.[39] They were informed that the landlord had acquired alternative land for their resettlement and would compensate them.[40] Although lawful occupants – about 2 per cent of those evicted – were compensated, the land given 'often was too small … [and] in some instances particular plots were allocated twice'.[41] Bona fide occupants were neither compensated nor resettled. Before the expiry of the notice, between 17 and 21 of August 2001, about 401 peasant families (2 041 individuals) were forcibly evicted from their residences in four villages in the Mubende district of central Uganda to make way for the plantation.[42] On

36 Neumann Kaffee Gruppe 'Chronology of events, Kaweri Coffee Plantation: 2000-2013' (2013) 1-2, http://www.nkg.net/userfiles/Documents/2013-04-16%20Chronologie%20-%20ENG.pdf (accessed 19 April 2016).

37 Art 29 of the Land Act defines both lawful and *bona fide* occupants. One distinguishing factor between lawful occupants and *bona fide* occupants is that lawful occupants reside on the land with the permission of the land owner, while *bona fide* occupants are those who have acquired an interest in the land by remaining on the land unchallenged by the registered holder for a period of 12 years. Uganda: Land Act, Cap 227 (1999), sec 29; C Mbazira 'Land grabbing in Uganda by a multinational corporation (World Court of Human Rights)' in M Gibney & W Vandenhole (eds) *Litigating transnational human rights obligations: Alternative judgments* (2014) 186 196.

38 C Mbazira 'Foreign investment and land grabbing' panel discussion at the Regional Seminar on ETOs and Access to Natural Resources, Kampala, Uganda 19 August 2014.

39 *Baleke & 4 Others v Attorney-General & 2 Others* (2013) UGHC 52 (*Baleke* case).

40 As above.

41 Wake Up and Fight for Your Rights Madudu Group and FIAN Deutschland *Complaint against Neumann Kaffee Gruppe on violation of the OECD Guidelines for Multinational Enterprises* (2009) 11 http://www.oecdwatch.org/cases/Case_167/788/at_download/file (accessed 19 April 2016).

42 As above.

24 August 2001, KCP was inaugurated. Following its inauguration, agents of the Neumann Kaffee Gruppe cleared the area, uprooting the cultivated crops of those displaced from the land.[43]

In more recent times, large-scale agricultural investment projects by Chinese companies across Africa has heightened the risk of this form of displacement.[44] In Nigeria, about 150 000 farmers – representing 36 communities – are at risk of losing 12 000 hectares of farmland following a Memorandum of Understanding between the Jigawa state government and a Chinese company for sugarcane plantation.[45] Not only have these communities not been given alternative lands, but the compensation offered to them has been inadequate.[46] As at 2014, about 10 million hectares of land had reportedly been acquired by Chinese firms across Africa for agricultural purposes.[47] With growing food insecurity on the continent, such large-scale land grabs and displacement of communities only deepens the poverty crisis.

While revealing the magnitude of the problem, these cases underscore the need to address business-related development-induced displacement. International human rights law is clear on the obligation of states to regulate private actors in preventing violations of human rights by third parties.[48] A combined reading of articles 3(1)(h), (1)(i) and 10 of the Kampala Convention requires states to address business-related development-induced displacement. However, the Kampala Convention does not provide the yardstick for assessing the responsibility of businesses. Within the context of the existing international framework on business and human rights, the article advances a discourse on what the responsibility of business entails. In

43 *Baleke* case (n 39 above).

44 R Adeola 'Why the African Union must press ahead with a business and human rights policy' *The Conversation* 8 May 2017.

45 VA Yusuf & AM Hamagan '36 Jigawa communities lose farms to Chinese plantation' *Daily Trust* 9 February 2017.

46 S Tukur 'Investigation: How Jigawa government's land grab for Chinese firm threatens livelihood of 150 000 citizens' *Premium Times* 7 April 2017.

47 A Saldinger 'How much agricultural land is China actually grabbing in Africa?' *Devex* 8 May 2014.

48 In *Velásquez-Rodríguez v Honduras*, the Inter-American Court of Human Rights emphasised that a wrong act in violation of human rights which is not directly attributable to a state can invoke the responsibility of that state where the state fails to exercise due diligence in preventing a violation or ensuring accountability for such violation. In the *NGO Forum* case, the African Commission on Human and Peoples' Rights equally emphasised that a state will incur responsibility for acts of private actors where it fails to exercise due diligence. In *Opuz v Turkey*, the European Court of Human Rights inferred that due diligence obligation requires a state to take specific measures commensurate with the need to protect human rights against violations. In the *SERAC* case, the African Commission emphasised that this requires the establishment and preservation of an 'atmosphere or framework by an effective interplay of laws and regulations'. *Velásquez-Rodríguez v Honduras* IACHR (29 July 1988) Ser C No 4 para 172; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 143; *Opuz v Turkey* ECHR (9 June 2009) Application 33401/02 paras 148-149; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 46.

setting the stage, it is useful to consider corporate responsibility under international law.

3 Corporate responsibility under international law

The notion of corporate (or business) responsibility has been a subject of much contention in and outside international legal scholarship. As far back as 1970, Friedmann asserted that the responsibility of business was profit,[49] and businessmen who speak of corporate responsibility are 'unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades'.[50] By this, Friedmann was casting aspersion on the notion of corporate social responsibility that had evolved in the seminal work of Abrams, Bowen and Keith and in the earlier intellectual debates of businessmen and scholars at the Harvard Business School in 1929 and 1932.[51] Like Friedmann, Levitt described corporate social responsibility as a '[p]hilistinic form of self-flattery'.[52] However, the intellectual credence of such position has been challenged vigorously. Developments in the international sphere since 1972 have equally rendered the narrative of responsibility solely as profit redundant.

In 1972, the involvement of the US-based International Telegraph and Telephone Corporation in the political process in Chile instigated political debate on corporate responsibility in international law.[53] The UN Economic and Social Council passed a resolution requesting the UN Secretary-General to engage eminent persons 'to study the role of multinational corporations and their impact … also their implications for international relations'.[54] Recognising that 'fundamental new problems have arisen as a direct result of the growing internationalisation of production as carried out by multinational corporations',[55] the Group of Eminent Persons recommended that the complexities of these relations needed to be addressed without delay. The UN subsequently established a Commission on Transnational

49 M Friedmann 'The social responsibility of business is to increase its profit' *The New York Times* (13 September 1970).

50 As above.

51 See WB Donham 'Business ethics – A general survey' (1929) 7 *Harvard Business Review* 385; M Dodd 'For whom are corporate managers trustees' (1932) 45 *Harvard Law Review* 1153-1154; F Abrams 'Management's responsibilities in a complex world' (1951) 29 *Harvard Business Review* 29; H Bowen, *Social responsibilities of the businessman* (1953); D Keith 'Can business afford to ignore social responsibilities?' (1960) 1 *California Management Review* 70.

52 T Levitt 'The dangers of social responsibility' (1958) *Harvard Business Review* 41.

53 J Anderson 'Memos bare ITT try for Chile *coup*' (Washington Merry-Go-Round) *The Washington Post* 21 March 1972.

54 The UN Economic and Social Council Resolution 1721 (LIII), 2 July 1972.

55 UN Economic and Social Council 'The impact of multinational corporations on the development process and on international relations', Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, UN Doc E/5500/Add.1 (Part 1) 24 May 1974 808.

Corporations (UNCTC) to explore the 'possibility of concluding a general agreement on multinational corporations, enforceable by appropriate machinery, to which participating countries would adhere by means of an international treaty'.[56] Accordingly, the UNCTC started to negotiate a Draft Code of Conduct on Transnational Corporations.[57] Although in the end the process failed, the Draft Code reflected an overwhelming *zeitgeist* for corporate responsibility at the international level.[58]

In 1976, the Organisation for Economic Co-operation and Development adopted a Declaration on International Investment and Multinational Enterprises.[59] In 1977, a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted by the International Labour Organisation (ILO).[60] Following the 1999 World Economic Forum in Davos, a set of Global Compacts for businesses was agreed, traversing, among others, principles on human rights and environmental protection.[61] In 2003, a set of Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises was developed by a sessional Working Group set up by the Sub-Commission on Human Rights of the UN Commission on Human Rights.[62] The Sub-Commission adopted these Draft Norms. While the Commission on Human Rights took no further action on the Draft Norms,[63] it requested the UN Secretary-General in 2005 to 'appoint a special representative on the issue of human rights and transnational corporations'.[64] Among other duties, the special representative was to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[65] In the same year, the UN Secretary-General appointed John Ruggie who, over a

56 UN Economic and Social Council (n 55 above) 835.

57 I Bantekas 'Corporate social responsibility in international law' (2004) 22 *Boston University International Law Journal* 309 318.

58 KP Sauvant 'The negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16 *Journal of World Investment and Trade* 11 20.

59 Organisation for Economic Co-operation and Development *OECD Declaration and Decisions on International Investment and Multinational Enterprises* (1976).

60 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Council of the International Labour Office at its 204th session in Geneva, Switzerland (1977).

61 UN Global Compact 2000.

62 Draft United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003.

63 DM Chirwa 'State responsibility for human rights' in MA Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (2010) 409.

64 UN Commission on Human Rights 'Human rights and transnational corporations and other business enterprises' E/CN.4/RES/2005/69 20 April 2005.

65 UN Commission on Human Rights para 1(a); T Thabane 'Weak extraterritorial remedies: The Achilles heel of Ruggie's "Protect, Respect and Remedy" framework and guiding principles' (2014) 14 *African Human Rights Law Journal* 43 46.

period of six years and 47 international consultations on all continents, developed the United Nations 'Protect, Respect and Remedy' Framework for Business and Human Rights (Guiding Principles).[66]

While there are discussions at the international level on a binding human rights framework on business and human rights, the Guiding Principles represents the first international consensus among states and businesses on corporate responsibility in international law, specifically with respect to human rights. Although non-binding, it has been hailed as 'a lasting beacon for business entities',[67] and 'guidance that will contribute to enhancing standards and practices with regard to business and human rights'.[68]

In understanding the responsibility of businesses in the context of development-induced displacement, the Guiding Principles are important. However, before this discussion is advanced, it is important to consider the normative framework on development-induced displacement in Africa. This is considered in the next section.

4 Regional norm on development-induced displacement

Article 10(1) of the Kampala Convention provides that 'as much as possible' development-induced displacement must be prevented. It is important to understand this provision in view of the objective of article 4(4) of the Kampala Convention, which seeks to prohibit 'arbitrary' displacement.[69] While not placing an absolute prohibition on development-induced displacement, which will presuppose that all development projects likely to have a negative impact must to be stopped, the Kampala Convention seeks to mitigate the tension between the development imperative and human rights by setting two key requirements. First, there should be prior impact assessments before the implementation of development projects in line with article 10(3).[70] Second, there should be informed consultation as required under article 10(2).[71]

66 UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 21 March 2011 (Guiding Principles).

67 'Business and human rights: Interview with John Ruggie' *Business Ethics* 30 October 2011.

68 UN Human Rights Council 'Human rights and transnational corporations and other business enterprises' A/HRC/17/L.17/Rev.1 15 June 2011 para 4.

69 For a discourse on arbitrary displacement in the context of development-induced displacement, see Adeola (n 1 above).

70 Art 10(3) of the Kampala Convention provides that '[s]tates parties shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project'. Kampala Convention (n 3 above) art 10(3).

71 Art 10(2) of the Kampala Convention provides that '[s]tates parties shall ensure

A relevant question, resonating from the provision of article 10(2) of the Kampala Convention, is what kind of engagement or consultation is proposed. Should it be an engagement that seeks merely to legitimise or rubber-stamp projects, or should it be the meaningful involvement of persons likely to be displaced? In view of the accepted wisdom of proffering African solutions to African problems, it is essential to consider the nature of consultation in African traditions and customs.[72] In Southern Africa, among the Tswana people of Botswana, there is a *kgotla* system, recognised by the government as a traditional institution for settling matters.[73] At the *kgotla*, members of a community gather to deliberate on issues affecting them, and decisions in the *kgotla* are reached through consensus.[74] Similar practices exist under the *baito* system in Eritrea and the *gumi gayo* system among the *borana* of Kenya and Ethiopia.[75] Under these systems, the local assembly gathers to deliberate on issues of concern to the community and decisions are taken by consensus.[76] Among the Maasai of Kenya and the Akans of Ghana, the lineages are the political entities.[77] These lineages are represented in the town council by an *abusua panyin* who ensures that members of the lineages are consulted on issues affecting them. The significance of this is expressed in the proverb that 'one head does not go into council'[78] and that 'wisdom is like a baobab tree; no one individual can embrace it'.[79] These traditional mechanisms illustrate that consensual decision-making processes are integral to African

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that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects'. Kampala Convention (n 3 above) art 10(2).

72 This rhetoric is often used to reinforce the need for a continent-conceived solution to continental challenges. In understanding the concept of human dignity, the African custom of *ubuntu* is often utilised as a societal valve. In conceptualising the role which the Panel of the Wise should play within the African Peace and Security Architecture, reference has been made to similar structures within African traditional systems. There is a growing consensus that conceptualisation and clarification for certain norms and institutions can be advanced by referring to African customs and traditions.

73 A Griffiths 'Between paradigms: Differing perspectives on justice in Molepolole, Botswana' (1996) 36 *Journal of Legal Pluralism* 195 197-200.

74 KC Sharma 'Role of traditional structures in local governance for local development: The case of Botswana' Paper for the Community Empowerment and Social Inclusion Programme, World Bank Institute (2003).

75 K Tronvoll *Mai Weini, a highland village in Eritrea: A study of the people, their livelihood, and land tenure during times of turbulence* (1998) 277.

76 Bereketeab observes that the *baito* system is characterised by three significant features: '(i) direct democracy; (ii) consensus-based decision making; and (iii) the three functions of governance incorporated in one'. R Bereketeab 'Conceptualising civil society in Africa: The case of Eritrea' (2009) 5 *Journal of Civil Society* 35 41.

77 FM Deng *Identity, diversity, and constitutionalism in Africa* (2008) 88; AA An-Na'im *African constitutionalism and the role of Islam* (2010) 37-38; A Leftwich *Redefining politics: People, resources and power* (2013) 73; HB Mitchell *Root of wisdom: A tapestry of philosophical traditions* (2014) 382.

78 SJ Salm & T Falola *Culture and customs of Ghana* (2002) 61.

79 D Stewart & C Swanson *Wisdom from Africa: A collection of proverbs* (2005) 10.

traditional systems. Lending credence to this assertion, Ake argues that 'traditional African political systems were infused with democratic values. They were invariably patrimonial and consciousness was communal; everything was everybody's business, engendering a strong emphasis on participation.'[80] As such, consultation was a two-way deliberative process geared towards resolving issues and reaching certain goals.

The African concept and tradition of consultation is one that reflects the well-established notion of 'free, prior and informed consent'. The Kampala Convention similarly recognises the right of displaced persons to participate in decision-making processes and to make choices. Within the context of article 10(2) of the Kampala Convention, persons likely to be displaced are to be afforded the space to make and exercise choices on feasible alternatives to the development projects prior to its implementation. A question that derives from this assertion is how this should be realised in the context of development-induced displacement. In answering this question, it is necessary to examine the notion of free, prior and informed consent (FPIC).

In development practice, the notion of consent is contentious. The idea of project-affected persons being able to decide on the implementation of a project is often resisted as a developmental anathema. Much of the tension between states and indigenous communities in various parts of the world evinces this reality. In Africa, the situation is no less different given the displacement of indigenous populations across various parts of the continent for development projects. In a wave of evictions orchestrated by the Botswana government in 1997, 2002 and 2005, the San were removed from their settlements in the Central Kalahari Game Reserve (CKGR) to make way for tourism.[81] Similarly, in Kenya, the Sengwer peoples in the Cherangany Hills were displaced in 2014 for the Natural Resource Management Project developed to harness natural resources and stimulate economic development. While an Indigenous Peoples' Planning Framework was developed emphasising participatory forest management,[82] its objective was not respected.[83] However, the displacement of indigenous communities without their FPIC is contrary to the international human rights obligations of states.[84]

80 C Ake 'Rethinking African democracy' (1991) 2 *Journal of Democracy* 32 34.

81 *Sesana & Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006).

82 Republic of Kenya 'Indigenous peoples' planning framework for the Western Kenya community driven development and flood mitigation project and the natural resource management project' 2006, Office of the President and Ministry of Water and Irrigation and Ministry of Environment and Natural Resources.

83 C Kline 'Sengwer of Kenya forcibly evicted from ancestral forest' *IC Magazine* 1 February 2014.

84 UN Committee on the Elimination of Racial Discrimination 'General Recommendation 23: Rights of indigenous peoples' UN Doc A/52/18 annex V (1997); United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 13 September 2007. See AO Jegede 'Rights away from home:

Under article 4(5) of the Kampala Convention, states are required to ensure the protection of 'communities with special attachment to, and dependency on, land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests'.[85] A pertinent concern from this provision is whether the fact that a project is for a 'compelling and overriding public interest' will constitute an exception to protecting indigenous populations. In seeking to avoid circumstances where the Kampala Convention may fall short of protection, articles 20(1) and (2) provide that no provision of the Kampala Convention shall be interpreted as affecting the existing protection of internally-displaced persons in international human rights law.

In international human rights law, FPIC is central to any expropriation of indigenous peoples' land and territories. The African Commission on Human and Peoples' Rights (African Commission) has equally emphasised that where a project will have a 'major impact' on indigenous peoples' land rights, their FPIC must be obtained.[86] From the African Commission's jurisprudence, a state will not be excused from this duty because a project is for a 'compelling and overriding public interest'. It is important for FPIC to be understood as a continuum based on negotiations between the state and an indigenous population. Lending credence to this assertion, a 2017 report adopted by the African Commission's Working Group on Indigenous Populations/Communities emphasised that FPIC must be understood as 'a continual dialogue and negotiation between indigenous populations/communities and external actors engaged with activities on their lands'.[87]

While it does not suggest a right to veto, what it implies is for states to foster an indigenous peoples-led model of development. In many cases, the arbitrary displacement of indigenous populations has been due to a neglect of this principle. In the case of the San peoples displaced from the CKGR, for instance, the government of Botswana could easily have arrived at a consensus with the San peoples through an indigenous peoples-led model of conservation which was sustainable, given that the San peoples had coexisted with the flora and fauna in the CKGR and their traditional knowledge had contributed to the development of the biomass.

Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58 75.

85 Art 4(5) Kampala Convention (n 3 above).

86 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 134.

87 African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs *Extractive Industries, Land Rights and Indigenous Populations'/ Communities' Rights*, Report of the African Commission's Working Group on Indigenous Populations/Communities (2017) 44.

While international human rights law is fairly established on the fact that obtaining consent is integral to the expropriation of indigenous peoples' lands,[88] a significant concern relates to the applicability of this principle in relation to non-indigenous communities. From an ethical perspective, the refusal to obtain consent may constitute a denial of autonomy and dignity. However, a relevant question is whether the refusal to obtain consent in the context of development-induced displacement amounts to a violation of human rights. In answering this question, it is relevant to consider the notion of 'development', which is the narrative on development-induced displacement.

There are two significant approaches to understanding the notion of development: the traditional and the modern approaches.[89] The crux of the traditional approach to development is development as economic growth to the exclusion of any socio-economic or environmental impact. However, in response to the realisation that growth in gross domestic income does not always translate into an increase in human capabilities, a significant shift emerged in development practice.

The modern approach to development incorporates those factors considered as externalities in the traditional approach, such as social, political, cultural and environmental concerns. Adopting a human-centric view of development, the modern approach to development requires that development plans, programmes and projects must be done with a view to increasing human capabilities.[90] The right to development lends credence to this approach in emphasising that development encompasses 'economic, social, cultural and political' concerns.[91]

In realising the right to development, participation is key.[92] Participation not only validates the development process, but it also affords a space for meaningful engagement for individuals affected to determine the trajectory of development as they conceive it. Hence,

88 R Goodland 'Free, prior and informed consent and the World Bank Group' (2004) 4 *Sustainable Development Law and Policy* 66 67; B McGee 'The community referendum: Participatory democracy and the right to free, prior and informed consent' (2009) 27 *Berkeley Journal of International Law* 570 572; T Zvobgo 'Free, prior and informed consent: Implications for transnational enterprises' (2012) 13 *Sustainable Development Law and Policy* 37; M Barelli 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and challenges ahead' (2012) 16 *International Journal of Human Rights* 1; P Hanna & F Vanclay 'Human rights, indigenous peoples and the concept of free, prior and informed consent' (2013) 31 *Impact Assessment and Project Appraisal* 146.

89 DD Bradlow 'Development decision-making and the content of international development law' (2004) 27 *Boston College International and Comparative Law Review* 195.

90 Bradlow (n 89 above) 207.

91 Art 1 Declaration on the Right to Development UN Doc A/RES/41/128 4 December 1986.

92 Art 2(3) Declaration on the Right to Development (n 91 above).

there is a level of consent to the process that should resonate. In the context of development projects, individuals bound to be affected by the development plan should be afforded the space to exercise consent where the trajectory of their own development is to be affected. Article 7(3)(c) of the UN Guiding Principles on Internal Displacement (GPID) iterates the centrality of consent to the protection of persons bound to be internally displaced by emphasising that the 'free and informed consent of those to be displaced shall be sought'.[93] The Kothari Principles and the Kampala Convention, similarly, emphasise the pertinence of free and informed choice in fostering durable solutions to internal displacement concerns.[94] Hence, while the refusal to 'obtain' consent may not violate human rights, the refusal to 'seek' consent will be at variance with international human rights law provisions.

There are two crucial requirements of the obligation to seek consent. First, the demands of persons likely to be displaced must be requested and given due consideration. The rationale for this requirement derives from the fact that legitimate consent can only be derived from an understanding of the demands of persons likely to be displaced. Second, there must be a deliberation process in which persons likely to be displaced are consulted and their demands are discussed with them with a view of reaching a reasonable compromise. In the process of seeking consent, it is important to ensure that civil society groups that can proffer constructive guidance in the deliberation process are involved.[95]

93 UN Commission on Human Rights 'Guiding Principles on Internal Displacement' UN Doc E/CN.4/1998/53/Add.2 11 February 1998 (GPID); see also UN Human Rights Council 'Basic principles and guidelines on development-based evictions and displacement' Doc A/HRC/4/18 annex I (5 February 2007) (Kothari principles); R Adeola 'The right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement' (2016) 16 *African Human Rights Law Journal* 83 95.

94 Art 11(2) Kampala Convention (n 3 above); para 56(e) Kothari Principles (n 93 above).

95 The benefit of civil society involvement resonates within the context of the Lesotho Highland Water Development Project (Highland Project). The Highland Project was birthed from a treaty between South Africa and Lesotho. The objective of the Highland Project was to give water to South Africa and electricity to Lesotho. For the creation of the project, a multi-dam scheme was developed. The first phase involved two sub-phases: 1A and 1B. In Phase 1A, the Katse and Muela dams were constructed along the Malibamats'o and Nqoe Rivers. Over 20 000 individuals were affected. In Phase 1B, the Mohale dam was created along the Senqunyane river. This dam affected about 7 400 persons. Together, all three dams affected over 27 400 people and led to the loss of grazing fields, arable lands and agricultural products which were sources of income of the affected communities. Through the involvement of civil society organisations, such as Transformation Resource Centre, the Highland Church Action Group, International Rivers, and Environmental Monitoring Group, key issues relating to the socio-economic and environmental impacts of the Highland Project on project-affected persons have been spotlighted. Treaty on the Lesotho Highlands Water Project between the government of the Kingdom of Lesotho and the government of the

Central to the notion of consent are three pertinent elements encased in the words 'free', 'prior' and 'informed'.[96] The word 'free' contemplates the absence of intimidation and manipulation. Within the contemplation of 'free' consent are four key requirements.[97] First, project-affected persons should be afforded an enabling environment to determine the timeline, location, language and format of deliberations. Second, the deliberation process must be transparent. Third, all categories of persons without recourse to gender or disability must be involved in the deliberation process. Fourth, deliberations should be devoid of coercion.

'Prior' consent requires that the process must be done before the implementation of the project.[98] This is important to avoid rubber-stamping the process and to grant project-affected persons adequate opportunity to engage in the consideration of feasible alternatives. There are three crucial preconditions to prior consent. First, project-affected persons should be given time to comprehend and consider information on the intended project. Second, the information must be given prior to the initiation of the development project. Third, the duration of the deliberation process must be respected.

The third central theme of the consent process is information. The word 'informed' requires that adequate knowledge should guide the decision-making process. There are three key elements of 'informed'

Republic of South Africa (1986); ML Thamae 'A decade of advocacy for dam-affected communities' in ML Thamae & L Pottinger (eds) *On the wrong side of development: Lessons learned from the Lesotho highlands water project* (2006); V Mashinini 'The Lesotho highlands water project and sustainable livelihood' *Africa Institute of South Africa Policy Brief* 22 (June 2010) 1 3 http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-22.-The-Lesotho-Highlands-Water-Project-and-Sustainable-Livelihoods.pdf (accessed 29 September 2016); Global Non-violent Action Database 'Basotho people demand compensation for Lesotho Dam construction, 2001-2005' http://nvdatabase.swarthmore.edu/content/basotho-people-demand-compensation-lesotho-dam-construction-2001-2005 (accessed 29 September 2016); 'Lesotho Highlands Water Project: A dam fine mess' *Pambazuka News* 13 October 2005 http://www.pambazuka.org/land-environment/lesotho-highlands-water-project-dam-fine-mess (accessed 29 September 2016); PJ Nelson & E Dorsey *New rights advocacy: Changing strategies of development and human rights NGOs* (2008) 128; PH Letsebe 'A study of the impact of Lesotho highland water project on residents of Khohlo-Ntso: Is it too late for equitable benefit sharing?' (2012) 39 http://wiredspace.wits.ac.za/bitstream/handle/10539/12271/Phoebe%20Harward%20Letsebe%20Thesis.pdf?sequence=2 (accessed 29 September 2016); S Rosenberg & RF Weisfelder *Historical dictionary of Lesotho* (2013) 413; S Christie '"White gold" leaves a dark stain in Lesotho' *Mail and Guardian* 5 September 2014; RK Hitchcock 'The Lesotho Highlands water project: Dams, development, and the World Bank' (2015) 3 *Sociology and Anthropology* 526 527 532; R Meissner *Interest groups, water politics and governance: A case of the Lesotho Highland Water Project* (2015) 53-54.

96 To understand the doctrine of FPIC, it is relevant to consider the Guidelines on Free, Prior and Informed Consent developed by the United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation Programme (UN-REDD Programme). These guidelines offer an insight into the normative content of FPIC. UN-REDD Programme *Guidelines on Free, Prior and Informed Consent* (2013).

97 See UN-REDD Programme (n 96 above) 18.

98 UN-REDD Programme 19.

consent.[99] First, the information must contain essential facts relating to the development project and how it will affect project-affected persons. Second, the information must be understandable by the various categories of project-affected persons, including persons with disabilities. Third, the information must be detailed and reliable. By implication, the information on which consent is based must be comprehensive and not altered or misrepresented.

Businesses are not left out of this obligation in article 10(1) of the Kampala Convention. To understand what is expected of businesses, the next section applies the Guiding Principles.

5 Responsibility of businesses in development-induced displacement

Under the Guiding Principles, the responsibility of businesses is to respect human rights. Businesses must refrain from taking actions that can violate human rights. In respecting human rights, businesses are required to exercise due diligence.[100] Exercising due diligence means avoiding harm.

In relation to development-induced displacement, businesses must implement the two-fold requirement in avoiding harm. The Guiding Principles lend credence to this two-fold requirement.

Article 18 of the Guiding Principles requires businesses to ensure 'meaningful consultation with potentially affected groups'.[101]

99 As above.

100 This duty requires businesses to 'avoid infringing on the … rights of others … and address human rights impacts with which they are involved'. This duty requires businesses not to take any measures that will violate human rights and to ensure redress where these impacts occur during its activities. Some scholars have argued that there is a positive element to this obligation in addition to the obligation to refrain, as businesses are 'required not just to avoid the passive avoidance of harm' but also to take steps to ensure that such harm is addressed in accordance with human rights law. Muchlinksi argues that the positive element of this obligation is reflected in more detail in the obligation on businesses to exercise due diligence. Corporate due diligence contemplates the steps a corporation must take to ensure that the human rights impacts of its activities are prevented or addressed. Art 17 of the Guiding Principles sets out the perimeter of the due diligence obligation, requiring that it should encompass 'adverse human rights impacts' which a corporation 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'. Human Rights Council 'Protect, respect and remedy: A framework for business and human rights' Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Summary, A/HRC/8/5 7 April 2008; Guiding Principles (n 67 above) art 11; R Lindsay et al 'Human rights responsibilities in the oil and gas sector: Applying the UN guiding principles' (2013) 6 *Journal of World Energy Law and Business* 2 12; P Muchlinski 'Implementing the new UN corporate human rights framework: Implications for corporate law, governance and regulations' (2012) 22 *Business Ethics Quarterly* 145 148.

101 Art 18(b) Guiding Principles (n 66 above).

A 'meaningful' engagement in consultation will invariably foster a consensual outcome. In the commentary, the Guiding Principles require businesses to consult directly with affected groups 'to assess their human rights impacts accurately'.[102] Such adequate assessment will be near impossible if consultation is merely an opinion-gathering process. Since the aim of such accurate assessment of the human rights impact of a proposed project is to address these impacts, seeking the FPIC of persons likely to be displaced is essential.[103]

The second responsibility on businesses is to conduct prior-impact assessment.[104] An assessment of prior impacts of development projects will provide information for proper consultation with project-affected persons on feasible alternatives to the project likely to occasion displacement.[105] It equally gives an indication of the issues that may arise from the implementation of the development project requiring significant attention. While article 10(3) of the Kampala Convention mentions 'socio-economic' and 'environmental' impacts, the Guiding Principles specifically require human rights impact assessment.[106] An application of human rights impact assessment ensures recourse to existing international human rights standards, including instruments relating to specific groups such as women, children, persons with disabilities and indigenous peoples. For persons with disabilities, such recourse will ensure that reasonable accommodation is made in the provision of resettlement. For indigenous peoples, a rights-based approach will foster respect for land rights and self-determination. Utilising human rights as the standard for impact assessment will ensure that disruptions that do not fall squarely within socio-economic and environmental impacts are assessed, such as cultural disruptions and disintegration of communal bonds intrinsic to the rights to culture, association and assembly.

In operationalising this two-fold requirement, three steps are pertinent in line with the Guiding Principles. First, a policy statement detailing respect for human rights must be adopted and internalised. In addition to reflecting human rights generally, businesses with operations that may occasion displacement should also reflect the protection of development-induced displaced persons in their policy statements. An example of a good human rights statement for reference is the Human Rights Policy of Coca-Cola which, while articulating respect for human rights, highlights nine thematic areas of relevance to Coca-Cola's bottling activities.[107] Tullow Oil's Human Rights Policy Statement presents a best practice on incorporating FPIC

102 Art 18 Guiding Principles (Commentary).
103 This is equally consistent with art 7(3)(c) of the GPID. See GPID (n 93 above) art 7(3)(c).
104 Art 10(3) Kampala Convention (n 3 above).
105 See Adeola (n 1 above) 8-9.
106 Art 18 Guiding Principles (n 66 above).
107 The Coca-Cola Company *Human Rights Policy* (2014).

in a policy statement. In its policy statement, Tullow Oil commits 'to obtain the informed agreement of project-affected communities early in the project cycle, and prior to major project developments or changes that would significantly affect them'.[108] The Policy Statement further commits Tullow Oil to 'engage meaningfully with and obtain broad community support from impacted communities throughout the project life cycle'.[109] In incorporating prior impact assessments, businesses may consult the model utilised in BP's Business and Human Rights Policy.[110] However, a more favourable approach is to articulate that international human rights standards will significantly inform the prior assessments of the impacts of a proposed project.

Second, there must be a systematic internalisation of the two-fold requirement 'into internal control and oversight systems'.[111] This is essential in building corporate culture of respect for human rights. A systematic internalisation of this requirement will require the training of staff including top-level management. Businesses will also need to ensure that they incorporate this requirement into contractual agreements with firms outsourced to address the needs of project-affected persons. However, a central component of internalisation is the establishment of an operational level grievance mechanism that is independent, transparent and impartial and whose decisions are respected. The mechanism must fulfil the eight criteria set out in the commentary on article 31 of the Guiding Principles and significantly 'focus on reaching agreed solutions through dialogue'.[112]

A third step is tracking. Businesses should track the progress of their response to the two-fold requirement of preventing arbitrary development-induced displacement.[113] Tracking is essential for businesses to be well-informed about their performance.[114] The Guiding Principles require that tracking should be based on 'appropriate qualitative and quantitative indicators'[115] and draw on responses from external and internal informers.[116] Businesses should further employ means such as 'performance contracts', 'reviews', 'surveys' and 'audits' in evaluating their performance.[117] Businesses

108 Tullow Oil *Tullow Oil PLC Policy Statement: Human rights* (2016).

109 As above.

110 BP's Business and Human Rights Policy reflects the commitment of the business 'to work to embed human rights into environmental and social impact assessments as appropriate'. BP *Business and Human Rights Policy* (2013).

111 UN Human Rights Council 'Business and human rights: Further steps toward the operationalisation of the "protect, respect and remedy" framework' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/14/27 9 April 2010 para 83.

112 Art 31 Guiding Principles (n 66 above) (Commentary).

113 Art 20 Guiding Principles.

114 As above.

115 Art 20(a) Guiding Principles.

116 Art 20(b) Guiding Principles.

117 As above.

should develop means of receiving useful feedback from the project-affected communities, external sources including civil society organisations, state and traditional mechanisms and also independent human rights experts which it employs to assess its human rights performance.

6 Conclusion

The emphasis in the Kampala Convention on business-related development-induced displacement is significant for two reasons. First, it recognises that development projects occasioning displacement on the continent are not implemented only by states but also by businesses. Second, it emphasises the need for businesses to assume a form of responsibility to displaced communities and to address the negative impact that may result from development projects. In understanding this responsibility, the article argues that the Guiding Principles are relevant. The Guiding Principles mandate businesses to respect human rights and, as such, to respect human rights standards in avoiding harm. In the context of development-induced displacement, this responsibility requires businesses to implement the two-fold requirement integral to preventing arbitrary development-induced displacement, namely, free, prior and informed consent and prior impact assessment. The article argues that in implementing this responsibility, businesses should adopt policy commitments detailing respect for human rights and the protection of development-induced displaced persons in line with the two-fold requirement. Businesses should internalise the commitment through training, contract documents and operational level grievance mechanisms. Businesses should also track progress and receive feedback on progress from external oversight and monitoring mechanisms.

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Rule of law or *realpolitik*? The role of the United Nations Security Council in the International Criminal Court processes in Africa

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Summary

At its inception in 1998, the International Criminal Court was perceived as a permanent solution to the problem of lack of accountability for past crimes. Despite their initial excitement about the Court, the African Union and its state parties have made an about-turn and they now seek an African solution to Africa's problem of impunity. Central to this ICC-AU collision is the role played by the United Nations Security Council in the Court's processes. The UNSC has failed to apply the doctrines of referral and deferral equally. According to the AU, it has selectively exercised its referral powers with respect to African-based situations, yet heinous crimes committed in other areas go unnoticed. The UNSC has also been selective in the recognition and waiver of immunities for international crimes in favour of the interests of its permanent members. While it is a reality that international criminal justice operates in an environment instilled with politics, such politics seldom reflect Africa's interests. These factors have heavily compromised the legitimacy of UNSC's role in the Court processes. Thus, in its own legal framework, the AU asserts that its heads of state enjoy absolute immunity from prosecution. This position, however, is problematic for several reasons. For example, how does one reconcile a state's obligations under the Rome Statute, which abhors immunities, and that of the Malabo Protocol, which upholds immunities? Second, the Malabo Protocol lacks a clear distinction between immunity ratione personae *and immunity* ratione materiae*. The Protocol also is not clear on the nature of its immunity* ratione materiae*. However, although the AU and its member states are vehemently opposed to impunity, it does little to combat the vice. It is in this context that the article critically*

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analyses the role of the UNSC in the processes of the ICC and how this has impacted on Africa's perception of the Court.

Key words: *ICC-AU collision; Africa and the ICC; UN Security Council; referral of cases to ICC; UN Security Council and recognition and waiver of immunities; immunity for international crimes*

1 Introduction

The adoption and entry into force of the Statute establishing the International Criminal Court (ICC) raised much hope, with some commentators describing it as a 'Grotian' moment for international law.[1] At its inception in 1998, the ICC was perceived as offering a permanent solution to the problem of accountability for past crimes. With a clearly-defined mandate embodied in a philosophy to shun impunity,[2] the ICC exercises jurisdiction over the most serious crimes of concern to the international community.[3] Its objectives are, therefore, to prosecute those perpetrators bearing the greatest responsibility and to ensure reparation to victims.[4] This may explain the initial excitement about the ICC among member states of the African Union (AU). The majority of African states took part in the negotiation rounds and the signature and ratification of the Rome Statute.[5] In 2003, the Democratic Republic of the Congo (DRC) was the first state to trigger the ICC jurisdiction through its self-referral mechanism. Efforts by African states and the international community to rid the continent of impunity through 'self-referrals' and referrals by

1 CC Jalloh 'Africa and the International Criminal Court: Collision course or co-operation' (2011-2012) 34 *North Carolina Central Law Review* 203. Jalloh uses the term 'Grotian' to illustrate the significance of the ICC as an international institution. He argues that since the establishment of the UN in 1945, the ICC is the most significant international institution of the 20th century. According to the author, the term 'Grotian' finds its import in the founder of the international law, Hugo Grotius.

2 Rome Statute of the International Criminal Court, para 5, Preamble underscores that the philosophy underlying the Rome Statute is to put an end to impunity for the perpetrators of crimes of concern to the international community, thus contributing to their prevention.

3 Art 5 Rome Statute. These crimes include genocide, war crimes and crimes against humanity.

4 Art 75 Rome Statute.

5 Thirty-three African states are parties to the Rome Statute. In comparison to other continents, Africa has the largest membership to the Court; M du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' (2008) ISS Paper 173 on the general involvement by African states and regional blocks in the various processes leading to the adoption of the Rome Statute; M du Plessis 'The International Criminal Court that Africa wants' (2010) ISS Monograph 172.

the United Nations (UN) Security Council (UNSC) to the ICC ensued.[6] This euphoria has come to naught. The enthusiasm about the ICC being the solution to impunity seems to have faded as numerous criticisms continue to be levelled against it amidst calls by the AU for *an African solution to Africa's problem of impunity*.[7]

The UNSC is one of the central players in international criminal justice whose political acumen compromises effective collaboration between Africa and the ICC. General criticism against the UNSC may be traced back to the aftermath of World War II. Packaged as 'victors' justice', the big five – China, the United States of America (US), France, Russia and Great Britain – formed themselves into permanent members of the UNSC, bestowing upon themselves the veto power. The undemocratic nature of the UNSC in relation to veto powers, coupled with the fact that chapter VII of the Charter of the United Nations (UN Charter) bestows the UNSC with primary jurisdiction over matters of peace and security, which makes binding decisions, has exposed the UNSC to criticism amidst calls for the reform of its membership.[8]

The UNSC has equally faced regional criticism from the AU and its member states for its imposing powers in numerous Court processes, mainly manifested through the exercise of its referral and deferral powers. In fact, the article argues that the UNSC is at the centre of the AU and ICC collision.[9]

In this regard, the article critically analyses the role of the UNSC in the processes of the ICC and how this has impacted on Africa's perception of the Court. After a brief introduction follows an analysis of the UNSC's powers of referral and deferral of situations and cases to the Court. This is followed by a critique of the UNSC's role in the question of immunity in relation to the Court. The article further evaluates Africa's position in this discourse. Finally, conclusions are drawn.

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6 For a chronology of African cases referred to the ICC and their respective trigger mechanisms, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2008) 8 *African Human Rights Law Journal* 274; A Usacka 'Promises fulfilled? Some reflections on the International Criminal Court in its first decade' (2011) *Criminal Law Forum* 473-492; O Maunganidze & A Louw 'Mali: Implications of another African case as Mali self-refers to the ICC' AllAfrica.com 24 July 2012, as cited in M du Plessis 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (2012) *ISS Paper* 214 on Mali's most recent 'self-referral' and its implications.

7 African Centre for the Constructive Resolution of Disputes 'The report by the AU Panel of the Wise: Strengthening relations with similar regional mechanisms' (2013) 30 underscores the call for 'African solutions' (my emphasis).

8 AS Akpotor & PE Agbebaku 'The United Nations reforms and Nigeria's quest for permanent seat' (2010) 24 *Journal of Social Science* 51; S Tharoor 'Security Council reform: Past present and future (2011) 24 *Carnegie Council for Ethics and Global Affairs* https://www.carnegiecouncil.org/publications/journal/25_4/essay/001.html/:pf_printable (accessed 8 July 2014).

9 Other commentators also share this view. D Tladi 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African Year Book on International Law* 29.

2 Referral and deferral powers of the United Nations Security Council

The UNSC and the ICC are independent entities.[10] The UNSC is able to refer a situation to the ICC, thus prompting the Court to exercise its jurisdiction over international crimes.[11] In line with these powers, the UNSC has previously referred the situation in Sudan and Libya to the ICC. However, it is of concern that the UNSC has exercised its referral powers with respect to African-based situations, yet heinous crimes committed in other areas go unnoticed. In this regard, the case of Israel and Palestine is an illustration. Following Hamas's electoral win in 2006 and 2007, Israel and Palestine have been involved periodically in hostilities.[12] For example, on 27 December 2008, Israel launched the famous 'operation cast lead' against Palestine. During the three-week operation, Israel carried out 2 360 air strikes combined with ground assaults.[13] This left 50 000 Palestinians displaced, 1 300 Palestinians dead and more than 5 300 wounded.[14] Of these 34 per cent were children.[15] In response, Hamas bombed Israel, killing three civilians and wounding more than 500 others, while nine Israeli soldiers were killed in Gaza.[16] Again, on 7 July 2014 Israel launched 'operation protective edge' in which numerous atrocities were committed.[17] It has generally been agreed that international crimes – within the jurisdiction of the ICC – were committed in Gaza[18] To date, these crimes do not seem to have persuaded the UNSC to refer these situations for possible investigation and prosecution.

Incidents in Guantanamo Bay parallel those over which the ICC jurisdiction has been or is being exercised in Africa. Despite the UN finding that Guantanamo Bay was characterised by massive violations of human rights and humanitarian law, coupled with the UN's call for

10 Art 2(1) of the Relationship Agreement between the UN and the ICC recognises the Court as an independent judicial body with international legal personality. Art 2(2) of this Agreement further calls upon the two institutions to respect each other's status and mandate.

11 Art 13(b) Rome Statute.

12 OTP-ICC 'Report on preliminary examination activities' (2016) 25 https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (accessed 22 March 2017).

13 Y Ronen 'ICC jurisdiction over acts committed in the Gaza strip: Article 12(3) of the ICC Statute and non-state entities' (2010) 8 *Journal of International Criminal Justice* 3.

14 S/PV.6077 (2009) http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza%20SPV6077.pdf (accessed 9 June 2014)

15 As above.

16 Ronen (n 13 above) 3-4.

17 OTP-ICC (n 12 above) 25.

18 Human Rights Council 'Human Rights in Palestine and other occupied Arab territories: Report of the United Nations fact-finding mission on the Gaza conflict' A/HRC/12/48 25 September 2009 paras 482-1335 http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed 9 June 2014).

its closure,[19] Guantanamo Bay is still in operation with no condemnation or even preliminary investigations for crimes against humanity. Similarly, in 2014 'unthinkable atrocities' were committed in Syria under the leadership of Bashar Hafez al-Assad, yet the UNSC remained unmoved.[20] More so, the merciless killing of civilians in Iraq by American forces and the controversial use of drones,[21] which have been classified as possibly constituting war crimes,[22] have seemingly not attracted any form of intervention from the UNSC. This fortifies the perception that the UNSC serves the interests of major powers. I am, however, aware that attempts by the UNSC in this regard are likely to face challenges that may render prosecution efforts futile. It cannot be ignored, for instance, that a probable veto by the US is most likely, given the reality that any such case directly implicates the US who is a member of the UNSC. It is, however, not sufficient that the UNSC has made no such initiatives. An initiative of this nature is most likely to assuage concerns of African states, the AU and like-minded scholars that the ICC is Afro-centric.

While crimes of similar magnitude are committed elsewhere on the globe, the UNSC has been quick to refer African-based situations to the ICC and is most hesitant to refer situations from other regions. As far as Africa is concerned, the UNSC has adopted a very liberal interpretation of article 12 of the Rome Statute. The UNSC's referral of Libya and Sudan to the Court – both non-state parties to the Rome Statute – best exemplifies this.[23] Legally, this is a sound step. Article 25 of the UN Charter recognises the binding nature of UNSC decisions on member states. The UNSC's decisions on referral and

19 Commission on Human Rights 'Report on the situation of detainees at Guantanamo Bay' E/CN.4/2006/120 27 February 2006, parts II, III & V. These atrocities were characterised by extreme interrogation techniques, the conditions of detention, the use of excessive violence, and the transfer of prisoners to countries that pose a serious risk of torture, violating the basic human right to be free from torture. Centre for Constitutional Rights 'Report on torture and cruel, inhuman and degrading treatment of prisoners at Guantanamo Bay, Cuba' (2006) 14-29 http://ccrjustice.org/files/Report/ ReportOnTorture.pdf (accessed 29 March 2017).

20 Amnesty International 'Syria war: Unthinkable atrocities documented in report on Aleppo' https://www.theguardian.com/world/2015/may/05/syria-forces-war-crime-barrel-bombs-aleppo-amnesty-report (accessed 22 March 2017); BBC 'UN implicates Bashar al-Assad in Syria war crimes' *BBC News* 2 December 2013 http://www.bbc.com/news/world-middle-east-25189834 (accessed 22 March 2017).

21 R Thakur 'International criminal justice: At the vortex of power, norms and a shifting global order' in C Samford & R Thakur (eds) *Institutional supports for the international rule of law* (2014) 43-44.

22 P Alston 'Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions' A/HRC/14/24/Add.6 (2010) paras 43 & 72. The UN Special Rapporteur, Philip Alston, argues that the use of drones may constitute war crimes.

23 United Nations Security Council Resolution 1593, S/RES/1593, 31 March 2005 – referring Sudan to the ICC; United Nations Security Council Resolution 1970, S/RES/1970, 26 February 2011 – referring Libya to the ICC.

deferral are made in terms of Chapter VII of the UN Charter. Thus, such referrals do not necessarily require state consent.[24] Nonetheless, genuine questions such as why this should only be exercised in Africa must be tackled. Despite the imminent possibility of a veto, the UNSC ought to have made attempts to refer the Gaza situation much earlier, or it could as well refer incidences in Guantanamo Bay. I am aware of the complex questions arising from UNSC's referrals to the ICC.[25] First, given the political dynamics of the UNSC, such referrals are likely to be 'nothing more than point scoring'.[26] This is because of the high probability of such a resolution failing to pass. Second, although such referrals are motivated by the need to end bloodshed, the Darfur referral was incapable of having this effect.[27] Nonetheless, the failure to equally apply the doctrine of referral compromises the legitimacy of the UNSC's role in the Court's processes.

The Rome Statute allows the UNSC not only to refer cases to the ICC[28] in which international crimes have been committed, but also to defer cases from investigations or prosecution by the ICC.[29]

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; *that request may be renewed by the Council under the same conditions*.

According to Nsereko, even though the wording is couched as a 'request', in reality this is a command to the Court to defer its jurisdiction.[30] Similarly, while the deferral is initially limited to 12 months, the UNSC has the power under article 16 of the Rome Statute to subsequently renew it on similar conditions. This, however, may be indefinite since the Rome Statute does not seem to impose any time limitations on such renewals, implying that the UNSC has the absolute power to obstruct any probable prosecution that may not be in their interest.

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24 As member states to the UN Charter, it can be argued that Sudan and Libya are bound by their international obligations emanating from the Charter, specifically under art 39 which allows the UNSC to 'determine the existence of the any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'; and art 25 according to which UN members 'agree to accept and carry out the decisions of the Security Council'. It can thus be argued that the UNSC acts within its mandate by referring cases to the ICC as a way of restoring or maintaining international peace or security.

25 D Tladi 'ICC and UNSC: Point scoring and the cemetery of good intentions' *ISS Today* 10 October 2014 https://issafrica.org/iss-today/icc-and-unsc-point-scoring-and-the-cemetery-of-good-intentions (accessed 6 June 2017).

26 As above.

27 As above.

28 Art 13(b) Rome Statute.

29 Art 16 Rome Statute (my emphasis).

30 DN Nsereko 'Triggering the jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Law Journal* 268.

Connivance within the UNSC on how to maintain control over the Court seems to have begun much earlier during the drafting of the Rome Statute. It is worth noting that article 23(3) of the draft Rome Statute (drafted by the International Law Commission (ILC) provided:[31]

> No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

This draft, which was most preferred by the 'big five',[32] essentially forbids the ICC from prosecuting any case arising from a situation that the UNSC was dealing with under Chapter VII of the UN Charter unless the UNSC so decided. Effectively, the UNSC had become the ICC's gatekeeper.[33] Through this provision the US, in particular, wanted to have effective control of all ICC prosecutions.[34] It would, therefore, have the ability to block any unfavourable prosecutions, especially those relating to its nationals.[35] The draft of the International Law Commission (ILC) made it possible to bar the Court's jurisdiction from certain situations, especially where the interests of the 'big five' were at stake. Middle power and developing countries found this provision an encroachment on judicial independence.[36] Although this particular provision was done away with, the Rome Statute in article 16 continues to bestow deferral powers upon the UNSC. A deferral would effectively have similar consequences as was the initial intention – to keep the ICC at bay where the UNSC was dealing with a situation. It may be argued that the UNSC, eventually, indirectly managed to retain the ILC draft provisions intended to bar the Court from situations seized by the UNSC under chapter VII of the UN Charter. In this case, the only difference is that there has to be a deferral.

The AU has seriously lamented the UNSC's discriminatory approach in the implementation of this power. For example, the AU has

31 *Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court,* Extract from the Yearbook of the International Law Commission, 1994 UN Doc A/49/10 27 http://legal.un.org/ilc/documentation/english/ A 49 10.pdf (accessed 5 June 2014).

32 CC Jalloh et al 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 16.

33 WA Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (2004) 15 *European Journal of International Law* 701 715.

34 As above.

35 As above.

36 P Kirsch & T Holmes 'Developments in International criminal law: The Rome conference on the International Criminal Court: The negotiating process' (1999) 93 *American Journal of International Law* 2.

previously sought to have the UNSC defer the indictment of the Sudanese President as well as the Kenyan cases.[37] South Africa and Libya also jointly proposed the inclusion of a deferral of the ICC proceedings against Al Bashir in the resolution renewing the mandate of the African Union/United Nations Hybrid Operation in Darfur (UNAMID). The United Kingdom, the US and France opposed a deferral. The US threatened to veto a deferral, forcing the adoption of a compromised Resolution 1828 in which the UNSC took note of the AU's request for a deferral and their intentions to further consider the issue.[38] Kenya subsequently sought a UNSC deferral of its cases under article 16. In January 2011, the AU endorsed this request. The UNSC then engaged Kenya in a dialogue on 18 March 2011 and later in an informal discussion on 8 April 2011.[39] The subsequent inaction by the UNSC in these matters prompted the AU to express its displeasure.[40] As a result, the AU declared its non-co-operation with the ICC in so far as the arrest and surrender of Al Bashir were concerned.[41] This further prompted the AU to recommend an amendment to article 16 of the Rome Statute to allow the General Assembly of the UN (UNGA) to exercise the power to defer cases where the UNSC had failed to do so within six months.[42] The basis of this proposal was the UN General Assembly Resolution 377A(V), the 'Uniting for peace resolution'. In August 1950, the Union of Soviet Socialist Republics (USSR) vetoed a US draft resolution condemning North Korea's continued defiance of the UN. This prompted the US to persuade the UNGA to 'claim for itself subsidiary responsibility with regard to international peace and security'[43] in line with article 14 of the UN Charter, which allows it

37 Ext/Assembly/AU/Dec.1 (2003) 3 'Decision on Africa's relationship with the International Criminal Court' Extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia. It is instructive to note that the Court has since terminated the case against Uhuru Muigai Kenyatta, the current President of Kenya, for lack of sufficient evidence to prosecute the case. *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11.

38 Resolution 1828 (2008), adopted by the Security Council at its 5947th meeting, on 31 July 2008, para 9.

39 L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' (2012) 9 *Friedrich Ebert Stiftung* http://library.fes.de/pdf-files/iez/08948.pdf (accessed 19 June 2017).

40 Assembly of the African Union 13th ordinary session 1-3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec 243-267 (XIII) Rev.1 Assembly/AU/Decl.1- 5(XIII), Assembly/AU/Dec.245(XIII), Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) Doc Assembly/AU/13(XIII) 1.

41 As above. This position was reiterated by the heads of state of the AU in its 5th summit in Kampala. See Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/10(XV), 15th ordinary session of the AU Assembly, Kampala, Uganda, 25-27 July 2010.

42 AU ministerial meeting on 6 November 2009, prior to the 8th Assembly of State Parties in The Hague; Jalloh et al (n 32 above) 9.

43 C Tomuschat 'Uniting for peace' United Nations audiovisual library of international law.

discretion to 'recommend measures for peaceful adjustment of any situation'.[44]

> Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise it primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain and restore international peace and security.

The International Court of Justice (ICJ) has upheld the validity of this resolution. In its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, the ICJ confirmed that the UNGA could properly be seized of a matter in case of inaction on the part of UNSC.[45] Thus, both UNGA and UNSC can deal in parallel with the same matter concerning the maintenance of international peace and security.[46] The AU's suggested proposal was, therefore, not off the mark but well-grounded in international law and practice.

This suggestion, however, raised numerous genuine legal concerns. The first is the import of article 16 of the Rome Statute. In reality, the crimes under the Rome Statute are similar to and can be subject to the UNSC's mandatory powers under Chapter VII of the Charter of the United Nations. In this regard, the US ambassador to the Rome conference underscored the need to guard against conflicts of interest.[47]

> The Council's mandatory chapter VII powers will be absolutely essential to the workings of the Court – not only for enforcement but also to ensure the true universality of its jurisdiction and powers. From the point of view not only of law but of vital policy, the Court must operate in coordination – and not in conflict – with the Security Council and its role and powers under the UN Charter.

This implies that if the UNSC is seized of a matter under chapter VII – conducting an investigation to determine whether it constitutes a threat to international peace – then the Office of the Prosecutor (OTP) must refrain from conducting any investigations in the matter where the UNSC requests otherwise. This further explains the import of article 23(3) of the draft Rome Statute. The spirit of the draftsmen seemed to guard against a conflict of interest between the ICC and

44 UNGA Resolution 377 A, Part A.

45 ICJ Reports, Advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004 3 paras 13-42.

46 As above.

47 B Richardson 'Statement in the plenary session of the UN Diplomatic conference of plenipotentiaries on the establishment of an international criminal court' 19 June 1998 in J van der Vyver 'International human rights: American exceptionalism: Human rights, international criminal justice and national self-righteousness' (2001) 50 *Emory Law Journal* 798-799.

the UNSC where the UNSC was dealing with a situation. In both the Darfur and Libyan cases, although the AU sought the UNSC to defer the situations, the UNSC was not seized of these situations. In fact, it was the UNSC that referred the two situations to the Court. It would have been ridiculous for the UNSC to seek a deferral of situations it was not dealing with, as there was no conflict of interest as envisaged under article 16.

More so, an African expert study group has asked whether the proposed change under article 16 fits well with the powers bestowed on the UNGA under the UN Charter or whether it introduces a conflict that will yet again necessitate an amendment of the UN Charter, since an amendment under the Rome Statute cannot purport to amend the UN Charter.[48] Alternatively, it may also be asked whether the Rome Statute can be amended in a way that conflicts with the UN Charter.

Some scholars have observed that the UNGA cannot make such a decision since, first, under the UN Charter, unlike the UNSC, it has no mandate to make binding decisions. In the case of the Rome Statute, it would only make sense if such a decision to defer was binding on the Court.[49] More so, the request for a deferral should be made when the situation in question is a threat to peace and security, in which case only the UNSC has a mandate to make such a determination.[50]

Since the UN Charter and the Rome Statute are two independent legal regimes, it has been argued that nothing bars the Rome Statute from providing the UNGA with the power to make binding decisions in relation to the deferral of cases.[51] Conversely, the UNSC cannot, in theory, exercise its powers under the UN Charter to make binding decisions to the ICC unless it has been expressly provided for under the Rome Statute, which article 16 does.[52] Similarly, the fact that the UN Charter bestows upon the UNSC the primary mandate over peace and security would not bar the UNGA from deferring cases, unless the UNSC is dealing with the matter. Besides, even though the maintenance of peace and security is a power vested primarily in the UNSC, the UN Charter also envisages some limited and secondary circumstances under which the UNGA can have such powers.[53] However, this stance has been dismissed by some international scholars who argue that it would be unsuitable to change the roles of the UNGA and UNSC in relation to the ICC.[54]

48 As above.

49 D Akande et al 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' ISS Africa position paper.

50 As above.

51 As above.

52 As above.

53 Arts 10, 12 & 14 of the UN Charter.

54 E de Wet 'Africa and international justice: Participant or target. Speaking notes on the AU's proposed amendment of art 16 of the Rome Statute' at the conference on the Al Bashir warrant, 26 April 2010, cited in Akande et al (n 49 above) 15.

Interestingly, while it has become impossible for the UNSC to defer ongoing African cases, perhaps on sound legal grounds, it has been easy for the UNSC to pre-emptorily defer cases relating to any 'would-be' American national indictees of the ICC. This should, however, not be read as the US's demonstrated ability or willingness to conduct prosecutions at national level. The following discussion dismisses this kind of thinking.

On 14 December 1995, the leaders of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia signed a peace agreement.[55] This prompted the UNSC to adopt several resolutions aimed at settling the conflict in the region.[56] Key among these includes Resolution 1035 of 1995 establishing the United Nations International Police Task Force and a UN Civilian Office in Bosnia and Herzegovina (UN Mission in Bosnia and Herzegovina).[57] Resolution 1422 of 12 July 2002 is also remarkable in the sense that it was adopted immediately after the coming into force of the Rome Statute on 1 July 2002. This implied that members of the forces committing international crimes were likely to face prosecution before the ICC. The US sought to have its nationals exempted from prosecution at the ICC.[58] Initially this proposal was overwhelmingly opposed by states.[59] The US, however, threatened to veto the resolution and also to withhold its funding of the UN peace-keeping operations if its text was not adopted.[60] On 30 June 2002, the US actualised its first threat and vetoed the draft resolution following the UNSC's refusal to adopt its text.[61] In fear of another US veto, the UNSC accepted the compromised version incorporating the US text that deferred all ICC investigations under article 16, to be automatically extended for 12 months, without limit. In its Resolution 1422 of 12 July 2002, the UNSC essentially gave immunity from prosecution to US nationals for their future acts and omissions amounting to international crimes in the UN Missions in Bosnia and Herzegovina. The resolution reads:

> 1 *Requests,* consistent with the provisions of article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the

55 Bosnia and Herzegovina – UNMIBH Mandate, http://www.un.org/en/peace keeping/missions/ past/unmibh/mandate.html (accessed 8 June 2017).

56 http://www.un.org/Depts/DPKO/Missions/unmibh/unmibhDrs.htm (accessed 8 June 2017).

57 Para 2, Resolution 1035 of 1995 adopted on 21 December 1995, S/RES/1035 (1995).

58 Amnesty International 'The International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' https://www.google.com/#q=America+excludes+its+national+from+ICC+ prosecution,+the+security+council+resolution+1422+of+12+July+2002 (accessed 8 June 2017).

59 Amnesty International 'The International criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' 8.

60 Amnesty International (n 59 above) 15.

61 Amnesty International 16.

> Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
>
> 2 *Expresses* the intention to renew the request in paragraph 1 under the same conditions each July for further 12-month periods as may be necessary.

A deferral under article 16 was not applicable in this context. The ICC had not yet been seized of the matter. Despite heavy criticism and complaints against the discriminatory nature of this resolution,[62] it was renewed in 2003.[63] Again, a similar resolution was adopted the same year with regard to the Security Council's Multinational Stabilisation force for Liberia.[64] UNSC Resolution 1970 which, *inter alia*, referred Libya to the ICC has attracted similar criticism, as Libya is not a member state of the Rome Statute.

While this seems a *prima facie* embrace of impunity, some scholars have adopted a much more liberal interpretation. They argue, for example, that the only problem with this provision is procedural – that the exemption is only limited to the jurisdiction of the ICC and not of other national states.[65] As such, it is argued that this resolution was well-founded under the UN Charter, as it does not rubberstamp impunity since it is not concerned with the question as to whether or not to have the individuals exempted from prosecution, but relates to where they should be prosecuted.[66]

Such an interpretation is not only faulty but also ignores reality. Intuiting that this resolution allows the subjection of US nationals to national justice processes is pure fallacy. In fact, acting in anger over the rejection of the American proposal that a clause be inserted in the Rome Statute proclaiming that the Court will not have jurisdiction over American nationals, the US enacted domestic legislation called the American Service Members Protection Act 2002 (also known as the 'Hague Invasion Act'). According to this law, the US sought to cushion its nationals and citizens of 'allied countries' from the ICC and related national prosecutions including, where necessary, the use of

62 Security Council 4772 Meeting 12 June 2003, S/PV.4772, http://www.iccnow.org/documents/UNSCpv1422debate12June03.pdf (accessed 5 June 2014); N Jain 'A separate law for peacekeepers: The clash between the Security Council and the International Criminal Court' (2005) 16 *European Journal of International Law*; Jalloh et al (n 32 above) 18-20; Jallo et al (n 49 above) 8.

63 S/RES/1487 (2003).

64 S/RES/1497 (2003).

65 S Zappala 'The reaction of the US to the entry into force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and article 98 Agreements' (2003) 1 *Journal of International Criminal Justice* 116 121-122.

66 As above.

military force and other penal sanctions to member states of the Rome Statute who may attempt to carry out such prosecutions.[67] State parties to the North Atlantic Treaty organisation (NATO), however, are exempt from these penal sanctions.[68] Any objective interpretation of this type of legislation only works to fortify the concept of US *exceptionalism* from the ICC's processes. Of greater concern is the fact that neither the Court nor the UNSC condemned these acts. Notably, however, the Obama administration re-engaged the ICC albeit in a very cautious manner. During this era, the secretary of State, Hillary Clinton, publicly regretted that the US was not a member state to the Rome Statute,[69] despite the fact that they neither ratified the Statute nor did they reject the Bush administration's 'unsigning' of the Statute. In November 2009, for the first time, the US participated in the annual meeting of ICC member states, the Assembly of State Parties.[70] It subsequently sent a delegation to the ICC review conference in Kampala in 2010. It remains to be seen how subsequent administrations will take over this perceived 'non-party co-operation'.

Although the UN Charter affirms equality among all nations 'large and small',[71] therefore abhorring any form of distinction, these unequal standards were further made explicit in the Darfur case. While seeking criminal accountability for atrocities committed in Darfur, UNSC Resolution 1593 referred the situation in Sudan to the ICC. Interestingly, while accountability seemed most imminent for Sudan, the same resolution sought to shield US nationals from similar accountability,[72] perhaps in a bid to prevent a US veto. It is important to note that the existence of domestic prosecution of US nationals was neither a factor that was considered during the adoption of this resolution, nor did the US representative support the Court's jurisdiction over nationals of non-member states to the Rome

67 Coalition for the International Criminal Court 'US Congress passes Anti-ICC "Hague Invasion Act"' http://www.iccnow.org/documents/07.26.02ASPAthruCongress.pdf (accessed 4 June 2014).

68 As above.

69 JB Bellinger 'A global court quandary for the president' *Global Policy Forum* 10 August 2009 https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html (accessed 9 June 2017).

70 B Evans-Pritchard & S Jennings 'US takes cautious steps towards ICC' *Global Policy Forum* 10 August 2009 https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html (accessed 9 June 2017).

71 Art 2(1) UN Charter.

72 S/PV.5158 (2005) http://www.amicc.org/docs/SC%20Meeting%20Record%201593.pdf (accessed 9 June 2014). During this meeting, the US ambassador to the UNSC, Mrs Patterson, states: 'The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute … The language providing protection for the United States and other contributing states is precedent-setting, as it clearly acknowledges the concerns of states not party to the Rome Statute and recognizes that persons from those states should not be vulnerable to investigation or prosecution by the ICC, absent consent by those states or a referral by the Security Council.'

Statute.[73] If anything, the US abstained from voting on the resolution. Paragraph 6 of this resolution reads as follows:[74]

> [N]ationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to operations in Sudan … unless such exclusive jurisdiction has been expressly waived by that contributing state.

The inclusion of this clause was profoundly criticised as discrimination on the basis of nationality.[75] Yet, the ICC accepted the Darfur referral without condemning its exclusiveness. More so, the Court has not made any pronouncements regarding the discriminative nature of these resolutions. Indeed, the UNSC's powers of referral and deferral have significantly affected the credibility and legitimacy of the Court.[76]

The centrality of the interest of the 'big five' and, in particular, the US in the role of the UNSC is also manifesting with reference to the crime of aggression. Although it took until 2010 to get a definition of the crime incorporated in the Rome Statute, the ILC draft code already bestowed upon the UNSC the primary power to determine acts of aggression before any complaint relating to the crime is lodged under the Statute.[77] This reassured the US of its control of the Court in relation to the crime of aggression.[78] A similar provision was later incorporated under sub-articles 15*bis* (6) & (7) of the Rome Statute. Ultimately, the 'big five' have the monopoly to determine which acts amount to aggression before any probable investigations or prosecutions of the crime.

The UNSC is the entrusted ultimate custodian of political decisions on referral and deferral, especially regarding non-member states. Its permanent members – with veto powers – are not members to the Rome Statute. Its power of referral has only been exercised with regard to two African countries. How then does one strike a balance between the delicate reality of trusting UNSC custodianship of such powers and Africa's concern that the ICC is a stooge for the West? Perhaps what will ultimately mollify Africa's fears is 'a strong,

73 http://www.un.org/press/en/2005/sc8351.doc.htm (accessed 7 April 2016).

74 S/RES/1593 (2005), Resolution 1593 (2005) http://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf (accessed 9 June 2014).

75 G Sluiter 'Obtaining co-operation from Sudan – Where is the law?' (2008) 6 *Journal of International Criminal Justice* 880-881.

76 L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' March 2012 http://library.fes.de/pdf-files/iez/08948.pdf (accessed 6 June 2017)

77 Art 23(2) Report of the International Law Commission on the work of its forty-sixth session: Draft Stature for an International Criminal Court (n 14 above).

78 Schabas (n 16 above) 717-718.

independent and successful ICC'[79] devoid of 'cynical exercise of authority by great powers'.[80]

3 Intercourse between the role of the United Nations Security Council and immunities for international crimes

Although the UNSC has the mandate to refer a situation to the Court, the decision on who to investigate or prosecute lies entirely with the Office of the Prosecutor (OTP). Yet, the UNSC plays a central role in the recognition and waiver of immunity for senior state officers, where the OTP chooses to proceed with investigations or prosecutions against such individuals. Thus, the role of the UNSC in relation to immunity for international crimes is well understood when analysed through its referral of situations in non-member states to the Rome Statute to the ICC, and the extent to which member states not expressly mentioned in the resolution are required to co-operate with the prosecuting mechanism, especially in light of the immunity enjoyed by non-member states.

Tladi agrees that 'the duty to co-operate under the ICC Statute cannot deprive non-state parties of their rights in respect of immunities under customary international law'.[81] It follows that member states to the Rome Statute will be acting inconsistently with their obligations under international law if they were to arrest and surrender individuals from non-member states without the consent of such a state. However, it is my opinion that while high-ranking state officials of non-member states to the Rome Statute – but who are UN member states – enjoy immunity, the UNSC arguably has powers to waive this immunity by exercising its mandate under Chapter VII of the UN Charter.[82] The Charter permits the UNSC to take all necessary measures to restore international peace and security where it determines a threat.[83] This malleable discretion includes referring officials from member states to the UN Charter to the ICC even if their

79 Jalloh et al (n 32 above) 12.

80 W Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 333.

81 D Tladi 'Immunities (article 46A*bis*)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 212.

82 The ICC has made similar observations. *The Prosecutor v Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir), ICC-02/05-01/09, 13 June 2015 para 6; *The Prosecutor v Al Bashir*, (Decision on the co-operation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09 9 April 2014 para 29.

83 Arts 39, 41 & 42 UN Charter.

respective states are not parties to the Rome Statute.[84] Essentially, the UNSC, in the spirit of preserving peace and security, can waive personal immunities applicable to state officials in both international and national courts.

Some scholars have argued that the wording of a resolution by the UNSC affects the extent to which states are bound, in the sense that the obligation to co-operate in such a case will be limited only to those states expressly mentioned, or directed to do so by the UNSC's resolution, thus relieving other member states of this obligation.[85] Resolution 1593, for example, reads as follows:[86]

> The Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.

Resolution 1593 seems to obligate only 'Sudan and all other parties to the conflict in Darfur' to co-operate with the Court, while it merely urges all other states and organisations to co-operate fully. Gaeta faults the requirement of this provision calling upon member states to the Rome Statutes to co-operate in the arrest and surrender of Al Bashir. Gaeta distinguishes the question of 'whether the rules of customary international law bar the exercise of criminal jurisdiction by an international criminal court' from the question of 'whether states can lawfully disregard those rules in order to comply with a request for arrest and surrender'.[87] Gaeta argues that even though personal immunities are not applicable in international criminal courts, this does not also imply their inapplicability in the arrest and surrender by national authorities of other states.[88] Asking other states to arrest and surrender Al Bashir is tantamount to asking states to disregard the personal immunities he enjoys under customary international law.[89] As head of state, Al Bashir is protected by personal immunities, and calling upon member states to the Rome Statute to arrest and surrender him is a violation of customary international law principles.[90] Since the contracting parties consented to derogate from

84 Art 13(b) of the Rome Statute allows the ICC to exercise its jurisdiction on a referral by the Security Council under Chapter VII of the Charter of the United Nations.

85 D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 341.

86 Art 2 Security Council, Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting, 31 March 2005, S/RES/1593 (2005).

87 P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 325.

88 As above.

89 As above.

90 Gaeta (n 87 above) 319.

the rules of immunities, Gaeta contends that this derogation should only apply among the contracting parties.[91]

According to Gaeta, the ICC required a waiver by the government of Sudan of the immunities enjoyed by President Al Bashir before requesting his arrest and surrender.[92] Indeed, article 98(1) of the Rome Statute provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity.

A literal interpretation of this clause leads to Gaeta's conclusion. However, he fails to appreciate the role of the UNSC in the ICC processes. It is not true that a referral by the UNSC should have the effect of turning the ICC into a subsidiary of the UNSC for it to vest a request of the ICC with the binding force of a Security Council decision under Chapter VII of the UN Charter. Since a referral by the UNSC in anchored in Chapter VII of the UN Charter, it has the twin effect stated earlier, namely, waiving personal immunities and also subjecting the referred non-member states to the Rome Statute to its provisions as though they were contracting states. As such, the exception under article 98(1) does not apply.[93] Tladi, however, dismisses this reasoning and argues that the UNSC can only change the rules of international law expressly and not impliedly.[94] I find this reasoning flawed for two reasons. First, it was not possible for the UNSC to address the issue of immunity in Resolution 1593. This resolution merely referred the situation in Darfur to the Court and the OTP later made the decision to attack Al Bashir. Second, if the UNSC had not impliedly waived Al Bashir's immunity, then it would have heeded the AU's call to defer Al Bashir's prosecution on the basis of his immunities. The failure by the ICC Pre-trial Chamber to clarify the authority of the UNSC in the Court processes, particularly regarding the waiver of immunities, fortifies initial fears that the UNSC is the ICC's gatekeeper. For example, while denying Al Bashir immunities, the ICC has on different occasions contradicted its own legal reasoning. In its decision to seek the co-operation of Malawi and Chad, Pre-trial Chamber I applied the doctrine of implicit waiver of immunities by the UNSC.[95] Subsequently, Pre-Trial Chamber II

91 As above.

92 Gaeta (n 87 above) 329.

93 D Tladi 'The duty on South Africa to arrest and surrender President Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1041; Akande (n 85 above) 43.

94 Tladi (n 93 above) 1043.

95 Decision pursuant to art 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the co-peration requests issued by the Court with respect to the arrest and surrender of Omar Al Bashir, paras 36-43; Decision pursuant to art 87(7) of the Rome Statute on the refusal of the Republic of Chad

rejected this approach while seeking the co-operation of the DRC. The Court upheld the applicability of article 98(1) of the Rome Statute and insisted on the removal of immunity as a prerequisite.[96] Yet, when seeking South Africa's co-operation, the Court revisited the waiver of immunities theory.[97] The forthcoming decision of Pre-Trial Chamber II on South Africa's non-compliance in the arrest and surrender of Al Bashir and the validity of its referral to the UNGA or UNSC is likely to provide much-needed guidance in this regard.

Tladi further argues that the exception under article 98(1) applies to a state and diplomat, but Al Bashir is neither a state nor a diplomat.[98] This interpretation is grossly defective. The notion of state immunity refers to functional immunity as this type of immunity accrues to the state and not the individual. [99] A state is barred from exercising its jurisdiction 'over foreign officials for acts carried out in the conduct of their official duties. Such acts are attributable to the state rather than the individual.' [100] Individual liability, therefore, does not arise.[101] The individual is a mere agent of his or her state.[102] Al Bashir falls perfectly under this category of immunities. Tladi, however, agrees that if the UNSC places an obligation on all states, which is the case with Resolution 1593, to arrest and surrender, then article 103 of the UN Charter 'trumps over other obligations'.[103]

The UN Charter binds all its members 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'.[104] All member states to the UN, therefore, are bound by UNSC decisions. More so, a resolution adopted by the UNSC is subsidiary in rank to the UN Charter. Thus:[105]

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to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmed Al Bashir, para 13.

96 *The Prosecutor v Al Bashir* (Decision on the Democratic Republic of Congo regarding Omar al-Bashir's arrest and surrender to the Court) paras 26 & 27.

97 n 82 above, para 6.

98 As above.

99 *R v Bow Street Stipendiary Magistrate & Others, Ex Parte Pinochet (No 1)*; D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 638.

100 G Boas *Public international law: Contemporary principles and perspectives* (2012) 272.

101 A Cassese 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium* case' (2002) 13 *European Journal of International Law* 853 862; A Day 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v Congo* wrong' (2004) 22 *Berkeley Journal of International Law* 489.

102 DS Koller 'Immunities of foreign ministers: Paragraph 61 of the Yerodia judgment as It pertains to the Security Council and the International Criminal Court' (2004) 20 *American University International Law Review* 14. This becomes very important in order to protect a diplomat from having diplomatic functions lead to criminal liability.

103 Tladi (n 93 above) 1045.

104 Art 25 Charter of the United Nations.

105 Art 103 UN Charter.

> In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Agreed that if there is a conflict between the Rome Statute requirement of a waiver under article 98(1) and the UNSC decision emanating under Chapter VII of the UN Charter, the latter obligation prevails in accordance with article 103 of the UN Charter. Although Gaeta dismisses this kind of reasoning, his proposal is less convincing. It cannot be true that article 103 'involves the absence of any responsibility for the breach of bilateral or multilateral obligations existing outside the Charter'.[106] Thus, not only will state officials of non-parties to the Rome Statute be bound by the Rome Statute provisions on immunity as though they were parties, but all member states to the UN Charter will also be obliged to co-operate with the Court in their arrest and surrender. The requirement to co-operate is nonetheless also binding on all member states to the UN by virtue of articles 25 and 103 of the UN Charter. This explains the ICC's finding that both the DRC and South Africa were bound by this resolution[107] despite the fact that the resolution is not expressly directed at them.

UNSC decisions on referral and deferral are political in nature. The silence of the UN Charter and the Rome Statute on whether or not the UNSC can rely on immunity as the basis of a deferral does not imply that it cannot be a ground for consideration by the UNSC. Besides, although article 27 of the Rome Statute is explicit that immunity shall not be a ground for non-prosecution, it can be argued that a deferral does not bar future prosecution. It can be adopted merely as a temporary reprieve for as long as an individual occupies the relevant office. Thus, the UNSC's adoption of a deferral is neither equivalent to authorising the commission of international crimes nor a measure that results in the furtherance of these crimes.[108] If anything, the UNSC does not adopt a deferral without adequate measures to ensure the non-recurrence of these crimes. This thinking is not at all hypothetical. When seeking a deferral of the Kenyan cases before the ICC, the letter signed by AU member states broadly relied on the argument that such prosecution undermined 'the ongoing efforts in the promotion of peace, national healing and reconciliation'.[109]

106 Gaeta (n 87 above) 327.

107 *The Prosecutor v Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir), ICC-02/05-01/09, 13 June 2015 paras 6-8; *The Prosecutor v Al Bashir* (Decision on the co-operation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09 9 April 2014 paras 28-31.

108 *Bosnia and Herzegovina v Yugoslavia* (Serbia and Montenegro), separate opinion (Judge *ad hoc* Hersch Lauterpacht), Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJReports (1993) 407 440 para 100.

109 S/2013/624, Enclosure 2, 4 http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/624 (accessed 29 July 2015).

Although the UNSC failed to adopt this resolution, the members who abstained neither explained their reasons as being the absolute bar of immunity under article 27, nor did those who voted in favour explain their reasons as a recognition of immunity.[110] Until the UNSC makes such clarification, it may be argued that there is a likelihood that the UNSC can adopt the deferral of a case from the ICC on the basis that an accused person enjoys immunity until the end of their rule.

Ultimately, through the exercise of its referral and deferral powers, the UNSC can alter the order of immunity as a custom applicable to non-member states to the Rome Statute. Thus, although Sudan and Libya are members to the UN Charter, neither is party to the Rome Statute. However, Sudan and Libya are still bound by the Rome Statute as though they were members by virtue of UNSC Resolutions 1593 and 1970 adopted under Chapter VII of the UN Charter referring the case to the Court. Similarly, all member states to the UN not expressly mentioned in such resolution are required to co-operate with the prosecuting mechanism.

Notably, however, in the same way in which the Security Council has selectively bestowed immunity on the basis of article 16, it has also been criticised for its selectivity in waiving this immunity under Chapter VII of the UN Charter.

4 A critique of the African position

4.1 Africa's response to the United Nations Security Council's role and immunity for international crimes

Understandably, African states assert that their heads of state enjoy absolute immunity from prosecution. This has been asserted specifically with respect to attempts to prosecute Al Bashir and Uhuru Kenyatta of Kenya and, previously, Gaddafi. The AU has gone further and incorporated this position regarding heads of state immunity within the statute of the proposed African regional criminal court:[111]

> No charges shall be commenced or continued before the Court against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Africa seems to be on its way to developing a new norm on the issue of immunity for international crimes. However, the position adopted by the AU is problematic for several reasons. First, this provision assumes that the Malabo Protocol is the primary international treaty

110 Seven members to the UNSC voted in favour of the resolution while eight members abstained from voting. See Security Council Meeting coverage of 15 November 2013, http://www.un.org/press/en/2013/sc11176.doc.htm (accessed 29 July 2015).

111 Art 46A*bis* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

on criminal law. What happens to African states that are likely to become parties to the Malabo Protocol and are also parties to the Rome Statute, which abhors any form of immunity, and the UN Charter? How does one reconcile a state's obligations under the different treaties?

Second, the Protocol does not distinguish clearly between immunity *ratione personae* and immunity *ratione materiae,* and is not clear on the nature of its immunity *ratione materiae.* Though vaguely phrased, I am convinced, along with Abraham, that this provision bestows personal immunity.[112] The wording 'during their tenure of office' implies personal immunity since this type of immunity attaches to the office and only exists during ones' tenure in office. Yet, the inclusion of 'other senior state officials based on their function' could naturally imply functional immunity. One could argue that the qualification on functional immunity is only applicable to senior state officers and not to all those officials listed earlier.

Another possible interpretation is that this provision applies to both types of immunities for all the listed state officials. However, this in itself is problematic. First, this provision can be taken as providing absolute personal immunity to a wide range of 'other senior state officials'. Given the nature of personal immunities, this implies that no senior AU state officer can be prosecuted for international crimes until such time as the official relinquishes power. Regarding immunities *ratione materiae*, the Protocol envisages the possibility of future prosecution after the officers involved leave office. The Protocol, however, does not seem to foresee the very real possibility that state officers who engage in the commission of international crimes may fail to relinquish power for fear of prosecution. Should such officers be allowed to continue with the atrocities until their tenure in office is over? What if they never leave office? Does this imply that the world should sit back and watch their citizens suffer? It is also not clear who is included under the phrase 'other senior state officials'. If all state officials enjoy absolute immunity *ratione personae,* for whom, then, is the chamber being created? What about the victims of serious violations? How does one reconcile these immunities with the duty to hold accountable the perpetrators of past crimes as an effective remedy to victims? In light of all these concerns, one needs no further analysis to see the probable confusion that is likely to hamper Africa in its fight against impunity, through this legal framework.

The Protocol, therefore, has rightfully raised eyebrows as some scholars refer to it as a rubber stamp to impunity.[113] According to Abraham, for example, this amendment 'represents a major setback in the advance of international criminal justice; in fact, it can only be construed to be in the interest of those African leaders fearful of an

112 G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs Occasional Paper 209 (2015) 14.

113 Abraham (n 112 above) 15.

end to a culture of impunity'.[114] Besides, Murungu observes that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.[115] The effect of such a provision is that it not only denies justice to the victims but that it is also detrimental to the fight against impunity.[116] It indicates retrogression in the war against impunity for international crimes. Seemingly, the need to recognise the immunity of heads of state and government and other state officials must have been a major drive in expanding the mandate of the African Court. It may also be argued that the reluctance to ratify the Malabo Protocol by African states is a possible indication that its adoption may have been a mere political threat and not an expression of genuine intention.

Even as the political elites within the AU insist on the recognition of immunity for state officials, some states, such as Botswana, have held differing opinions, especially where international crimes are alleged to have been committed.[117] Yet, other African jurisdictions have adopted the contents of article 27 of the Rome Statute in their domestic legislation, thereby denying immunity to their own state officials for international crimes.[118]

For its part, the AU argues that the position adopted under the Malabo Protocol resonates with international customary law.[119] Tladi faults the AU's reasoning on two grounds. First, he argues as follows:[120]

> The rationale for immunity of states and their officials, namely, the sovereign equality of states, does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states.

Tladi's argument is self-conflicting. Elsewhere in the article he argues that the practice of *ad hoc* tribunals is evidence of state practice in the denial of immunity for international crimes. When this position ceases to be palatable, he conveniently turns back and argues that the practice of international courts and tribunals cannot be deemed a

114 Abraham 14.

115 C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) *9 Journal of International Criminal Justice* 1063 1077.

116 JN Kariri 'Can the new African Court truly deliver justice for serious crimes?' *ISS Today* (2014) http://www.issafrica.org (accessed 10 March 2017).

117 M Kersten 'Backing the ICC: Why Botswana stands alone amongst the AU states' http://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/ (accessed 10 March 2015); Voice of America 'Botswana supports International Criminal Court' http://www.voanews.com/content/botswana-supports-international-criminal-court/1764960.html (accessed 10 March 2015).

118 Art 50(2)(n) Constitution of Kenya 2010; sec 27(1) International Crimes Act of Kenya (2008); sec 4(2)(a) Implementation of the Rome Statute of the International Criminal Court Act of 27 of 2002 of South Africa; art 25(1) ICC Act of Uganda (2010); art 7 Burkina Faso, Loi 052-2009/AN of 3 December 2009.

119 Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1 October 2013 para 9.

120 Tladi (n 81 above) 212.

practice of the respective states since, though created by states, these courts and tribunals are not in themselves states. I nevertheless agree with Tladi that international institutions created by states are themselves independent of states in the sense that they are separate legal persons. However, the basis of negotiating international treaties establishing these courts is in itself reliant on the principle of the sovereign equality of states. Impliedly, states expect to be accorded a similar status under custom unless they expressly state otherwise in the negotiated legal instrument. This affirms the reasoning in the ICJ judgment that immunity *rationae materiae* is excluded through such an express provision contained in the establishing statutes of international criminal tribunals. In fact, the very lack of sovereign equality of states in the practice of the ICC is at the heart of African states' grievances.

Tladi is not alone. Gaeta has also previously argued that 'the very rationale for the rules of personal immunities is lacking when criminal jurisdiction is instead exercised by an international criminal court'.[121] Supposing that Tladi and Gaeta are correct, does this imply that the exercise of international criminal justice has no impact whatsoever on the sovereign equality of states? Second, what about the need for consistency and certainty of legal norms in international criminal justice, especially in the fight against impunity? Akande has acknowledged the far-reaching consequences that the exercise of international criminal jurisdiction has for the sovereign equality of states and their international relations.[122] It cannot be ignored that international criminal justice is fully dependent upon state co-operation in facilitating its investigations and prosecutions. Thus, divorcing national state practices and interstate doctrine of sovereign equality from the exercise of international criminal jurisdiction is tantamount to an artificial practice of international criminal jurisdiction.[123]

Tladi further argues that 'while the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, extending this immunity to international courts and tribunals would require evidence of practice of states accepted as law to this effect', which state practice does not exist.[124] In this regard, Tladi refers to ICC decisions seeking to exclude international crimes from the application for immunities.[125] Although there may seem to be a trend of excluding immunity for international

121 Gaeta (n 87 above) 320.

122 D Akande 'International law immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 417.

123 P Wardle 'The survival of head of state immunity at the International Criminal Court' (2011) 18 *Australian International Law Journal* 183.

124 Tladi (n 81 above) 213.

125 Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Co-operation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011 para 23.

crimes, clearly this has been shrouded with inconsistency in the law of some key international treaties such as the Rome Statute. In fact, the fact that all the treaties establishing *ad hoc* tribunals had to expressly exclude immunity implies that failing to do so, immunity would have automatically attached under custom. The ICJ categorically observed that immunities as a custom would be exempt from application to international crimes where the establishing statute of an international criminal court expressly provided so.[126] Thus, contrary to Tladi's criticism, Africa's arguments cannot be entirely irrelevant. They are in fact squarely within the dictates of international custom.

In my opinion, African states are more interested in protecting the dignity of their state officials, especially heads of state, rather than combating for international crimes. Indeed, the AU has firmly reiterated its commitment to fighting impunity in the region as reflected in article 4(o) of the Constitutive Act of the AU.[127] Article 4 of the Constitutive Act underscores the principles of respect for human rights, the sanctity of life, the rejection of impunity and the need for member states to live in peace and security. In sum, these principles seek to protect civilian populations from violations of their human rights, particularly their right to life. In fact, where a government is persistently abusing these rights to the level of war crimes, crimes against humanity or genocide, articles 4(h) and (j) bestow upon the AU the right to intervene militarily in order to restore peace and security. Besides, the AU principle of non-indifference that translates into a traditional African saying that 'you do not fold your hands and just look on when your neighbour's house is on fire'[128] negates any tolerance for impunity. Therefore, it cannot be envisaged that the AU will sit back and watch its leaders commit these atrocities.

More so, the threats by African states to withdraw from the Rome Statute should not be interpreted as furthering impunity. Amidst its withdrawal from the Rome Statute, South Africa emphasised its commitment to the fight against impunity.[129] This implies that the acts of withdrawing or threats of withdrawal are not informed by the urge to embrace impunity. Rather, it is a statement confirming political and legal grievances against the ICC that remain unresolved. South Africa, Uganda and the DRC are some of the African states that

126 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3, (*Arrest Warrant* case) para 61.

127 Art 4(o) of the Constitutive Act of the AU provides that '[t]he Union shall function in accordance with the following principles … respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities'. Paras 11-12 Preamble, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights; para 2 PSC/MIN/Comm(CXLII), Communiqué of the 142nd meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 21 July 2008.

128 B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 819-820.

129 Rome Statute of the ICC: South Africa: Withdrawal, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf (accessed 23 March 2017).

have loudly criticised the ICC, yet these are some of the states whose domestic practice demonstrates robust positive complementarity in prosecuting international crimes.[130] However, although the AU and its member states are vehemently opposed to impunity, it does little to combat the vice. A mere willingness to genuinely investigate and prosecute the perpetrators of these crimes at the national level automatically avoids an ICC process and is at the heart of the principle of complementarity. Yet, the AU has been protective of President Al Bashir of Sudan without any alternative mechanisms to hold him accountable for alleged war crimes, genocide and crimes against humanity,[131] despite the existence of reasonable grounds to believe that he did commit these crimes.

I am, nevertheless, persuaded by scholars who persist in arguing the applicability of immunity as a norm of customary international law.[132] However, I acknowledge that, unlike immunity *rationae personae* which is absolute, immunity *rationae materiae* can be ignored if the acts in question constitute international crimes or otherwise upon a waiver by the state concerned. This is because international crimes can never be deemed state functions. Yet, the Malabo Protocol is capable of multiple other interpretations of the notion of immunity. All these forms of interpretation have inherent limitations in so far as their effectiveness in the fight against impunity in the region is concerned. If one interprets the clause as according absolute personal immunity, this not only delays prosecution but, in some instances, there is also the possibility that those leaders who cling to power until their death may never be prosecuted. It is, therefore, not enough that the Protocol envisages the probability of future prosecution, once an officer is out of office. Again, such an approach is likely to be perceived as targeting opponents of the government. The AU, therefore, must reconsider its position on this clause. More so, in order to remove any obstacles to their accountability, African states should also adopt mechanisms that guarantee the removal from office of officials accused of international crimes to enable effective accountability measures to be taken against them, including possible prosecution.

Imposing criminal accountability through the prosecution of sitting heads of state has so far proven to be an act of futility. If the Sudanese and Kenyan experiences are anything to go by, such leaders will always frustrate prosecution efforts, either by exacerbating the volatile

130 OA Maunganidze & A du Plessis 'The ICC and the AU' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 72-76.

131 'ICC Case information sheet: Omar Hassan Ahmed Al Bashir' https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf (accessed 9 June 2017).

132 S Papillon 'Has the United Nations Security Council implicitly removed El Bashir's immunity?' (2010) 10 *International Criminal Law Review* 275-288.

conflicts or by refusing to co-operate with the prosecuting mechanisms, thereby compromising any effective prosecution.[133] Given that international criminal mechanisms do not have a police force to effect their arrest warrants and must depend on individual states to arrest suspects, enforcing such warrants becomes nearly impossible. Any legal framework on prosecuting international crimes must be sensitive to these realities in order to avoid the current situation where the law seemingly exists in vain. As to whether introducing absolute immunities for sitting heads of state and all other state officials is the correct way for Africa to go remains the most controversial debate in international criminal law.

3.2 The ICC as a neo-colonial conspiracy

Arguably, the bias in the UNSC's role in the Court processes is a major reason informing the African perception of the ICC as a conduit of Western imperialism.[134] Both academic scholars and politicians share this philosophical rather than legal criticism against the ICC. Odero describes the ICC's operations in Africa as a 'neo-colonial conspiracy'.[135] He perceives the ICC as a continuation of the colonial philosophy by powerful states through the use of a criminal mechanism as a tool for controlling and dominating less powerful states.[136] Paul Kagame – the Rwandan President – shares this viewpoint. He has previously dismissed the ICC stating that 'Rwanda cannot be part of that colonialism, slavery and imperialism'.[137] Similarly, referring to the ICC arrest warrant against Al Bashir, the then AU Chairperson, Muamar Gaddafi, termed it an attempt by the West to re-colonise their former colonies.[138] The Organisation of Islamic

133 *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 (Notice of withdrawal of the charges against Uhuru Muigai Kenyatta) 5 December 2014. In the Kenyan case, the prosecutor of the ICC was forced to withdraw her case due to lack of sufficient evidence resulting from frustration of her witnesses. See http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx (accessed 4 August 2015) These can be compared with the historic indictment of Slobadan Milosevic by the ICTY while he was still the head of state of the Federal Republic of Yugoslavia, and that of Charles Taylor while he was still the President of Liberia. In both cases, the trials commenced after they had stepped down from power.

134 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity' Report of the AU Panel of the Wise (2013) 46 http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf (accessed 15 April 2016); Tladi (n 9 above) 29 61, citing Mr Abdul Sabdrat, Minister of Justice of the Republic of Sudan, at the Meeting of Ministers of Justice and Attorneys-General of the African Union on Legal Matters 3-4 November 2008.

135 S Odero 'Politics of international criminal justice: The ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator theory' in C Murungu C & J Biegon (eds) *Prosecuting international crimes in Africa* (2011).

136 As above.

137 Du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' (n 5 above) 1.

138 'Sudan leader in Qatar for summit' *BBC News* London 29 March 2009) http://news.bbc.co.uk/2/hi/7970892.stm, cited in K Ambos 'Expanding the focus of the

Conference (OIC) has also described Al Bashir's indictment as being 'selective and of double standards'.[139]

Perhaps the fear of African countries that view international criminal law as a 'neo-colonial conspiracy' is well founded. According to Third World Approaches to International Law (TWAIL), international law as a concept provides the organic kernel through which 'dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised'.[140] Mahmood Mamdani, a respected African scholar who perceives the ICC as the 'new humanitarian order', echoes this.[141] In the language of Mamdani's new humanitarian order, citizens are not bearers of their full range of rights.[142] Rather, they are 'passive beneficiaries of an external responsibility to protect'[143] – recipients of charity. Accordingly, '[t]he emphasis on big powers as the protectors of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers of justice internationally'.[144] This renders the ICC a Western court designed to prosecute African crimes. He further points out the colonial powers as the genesis of this era, when they claimed 'to protect the vulnerable groups'.[145] Certainly, TWAIL scholars argue that the expansion of colonialism was essentially the key not only to the development of international law, but also accorded the character of universality of international law.[146]

While Africa suffered under colonialism, scholars on TWAIL further claim that international law was at the time used 'to justify and legitimise the suppression of Third World peoples and was therefore instrumental in the shaping of the power and subordination presently inherent in the colonial order'.[147] In this historical context, one is compelled to listen to Africa's search for a more legitimate way out. In

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African Criminal Court' in WA Schabas et al (eds) *The Ashgate research companion to international criminal law: Critical perspectives* (2013) 505.

139 'Final Communiqué of the Expanded Meeting of the Executive Committee of the OIC at the level of Permanent Representatives on the ICC's Moves Targeting HE The President of Sudan' New York 27 March 2009 para 3, as cited in Tladi (n 9 above) 62.

140 BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 15.

141 M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' *Pambazuka News* 17 September 2008 http://www.pambazuka.org/en/category/features/ 50568 (accessed 20 June 2017).

142 As above.

143 As above.

144 As above.

145 As above.

146 A Anghie & BS Chimni 'Third World approaches to international law and individual responsibility in conflicts' (2003) 2 *Chinese Journal of International Law* 84-89; CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 496.

147 Anghie and Chimni (n 146 above) 88; Odero (n 135 above) 155; Jalloh (n 146 above) 496.

fact, impunity is not part of African values, as often reiterated by the AU and its inter-governmental bodies as well as individual African heads of state.[148]

Advocates of the ICC as a neo-colonial conspiracy would, therefore, readily argue that the ICC – just like colonialism – is alienating Africa from its values while reinforcing Western values;[149] that Western values foster inequality where people from certain regions seem to be the prime targets of the Court; and that individualism is at the centre of ICC operations, which values are alien to Africa.[150] Accordingly, skin colour and material wealth seem to be central determinants of ICC indictees.[151] On the contrary, African approaches to criminal justice underscore equality and togetherness as some of their traditional principles. This has prompted Africa to search for a self-executing solution within the sphere of international criminal justice. Eberichi further observes that the AU's resistance to the ICC is partly influenced by a general feeling that the ICC is being controlled by states that fan the rampant conflicts on the African continent by suppling weapons.[152] As such, the international community that is complicit to conflicts in Africa lacks the moral authority to enforce accountability for international crimes resulting from such conflicts.[153]

These differences in value systems, which have led to indictments against African heads of state, are key factors, according to some commentators, informing the adoption of the Malabo Protocol. [154] Perhaps this is an initiative geared towards a self-reliant Africa in prosecuting international crimes. Arguably, therefore, once this form of independence eventually is achieved, perhaps through the entry into force of the Malabo Protocol, it may appease the predominant fear among Africans that Africa is an experimental farm for the ICC,[155] or that the ICC is 'Europe's Guantanamo Bay' for Africans.[156] Yet it cannot be ignored that most post-independence African leaders have

148 AU Peace and Security Council PSC/MIN/Comm(CXLII) 'Communiqué of the 142nd meeting of the PSC Council' para 2 http://www.iccnow.org/documents/AU_142-communique-eng.pdf (accessed 30 May 2014).

149 T Major & TM Mulvihill 'Julius Nyerere (1922-1999), an African philosopher, re-envisions teacher education to escape colonialism' (2009) 3 *Journal of Marxism and Interdisciplinary Inquiry* 15.

150 As above.

151 Major & Mulvihill (n 149 above). Similar arguments have been fronted against colonialism.

152 I Eberechi 'Armed conflicts in Africa and Western complicity: A disincentive for African Union's co-operation with the ICC' (2009) 3 *African Journal of Legal Studies* 55; O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: The way forward' (2015) 23 *African Journal of International and Comparative Law* 99.

153 As above.

154 Art 9 Malabo Protocol; C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067-1088.

155 Jalloh (n 1 above) 203.

156 D Hoile *The International Criminal Court, Europe's Guantamo Bay?* (2010).

ruled with high levels of autocracy and, in most cases, contributed to the commission of heinous violations of human rights.

5 Conclusion

The article set out to critically analyse the role of the UNSC in ICC processes. Other than laying down Africa's argument that the ICC lacks independence from the West, the article has further argued that the UNSC continues to be manipulated by the West to act in their interests. While it is a reality that international criminal justice operates in an environment instilled with politics, such politics seldom reflect Africa's interests. A judge of the ICC has since acknowledged that even though politics and state interests present a delicate balance with the rule of law, these continue to be an important obstacle to the effective operations of the Court.[157]

Further, the article has demonstrated the way in which Africa perceives the role of the UNSC in the ICC as a continued perpetuation of neo-colonialism; a tool that the West clings to in order to ensure continuous control of their former colonies. According to African voices, this is the reason why the UNSC is eager to refer to the ICC African situations unlike other regions of the globe that equally engage in similar or worst atrocities. Indeed, the role of the UNSC in the ICC remains problematic. Nonetheless, prosecuting African heads of state or perpetrators of international crimes ought not to be one of these problems. The AU and its member states can do much within their national and regional frameworks to ensure effective accountability for international crimes.

157 HP Kaul 'The International Criminal Court: Current challenges and perspectives' (2007) 6 *Washington University Global Studies Law Review* 575.

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Recent developments

Human rights developments in the African Union during 2016

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Summary

During the year 2016 several significant normative developments were recorded in the African human rights system. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa was adopted but is yet to be ratified by any member state. The African Court delivered three merit decisions dealing with the right to fair trial and the right to political participation: a judgment on reparations; one ruling on jurisdiction; and one ruling on a review application. Despite this positive outlook, Rwanda's withdrawal of its article 34(6) declaration allowing direct access by individuals and NGOs posed a real challenge to the Court's legitimacy in cases with sensitive political implications. Both the African Commission and African Children's Committee made progress on the examination of state reports. As far as communications are concerned, the African Commission delivered seven merit decisions, while the African Children's Committee delivered two decisions on the merits and one ruling on admissibility. The African Children's Committee's decision on the age of childhood in Malawi, which was reached through an amicable settlement, led to constitutional amendments increasing the

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age of adulthood from 16 to 18 years. Finally, the trial and conviction of former Chadian dictator, Hissène Habré, by the Extraordinary African Chambers served as a breath of fresh air in the fight against impunity for human rights violations in Africa.

Key words: *African Union; African Commission on Human and Peoples' Rights; African Court on Human and Peoples' Rights; African Committee of Experts on the Rights and Welfare of the Child; Extraordinary African Chambers*

1 Introduction

The article highlights important developments in the African human rights system in the course of 2016. It considers normative developments within the African Union (AU) and jurisprudential developments within the judicial, quasi-judicial and hybrid organs of the AU. In particular, the article reviews the work of the African Commission of Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee); and the Extraordinary African Chambers.

2 African Union political organs and normative developments

The single most important normative development in the African human rights system in the year under review was the adoption by the AU Assembly on 31 January 2016 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Persons Protocol). This Protocol defines 'older persons' as individuals aged 60 years and above,[1] and obliges state parties to[2]

> ensure that the 1991 United Nations Principles of Independence, Dignity, Self-Fulfilment, Participation and Care of Older Persons are included in their national laws and are legally binding as the basis for ensuring their rights.

Among its substantive provisions, the Protocol prohibits all forms of discrimination against older persons,[3] including discrimination in the area of employment,[4] and obliges state parties to ensure the development of new legislation and/or the review of old legislation to ensure that older persons receive equal treatment and protection[5] and

1 Art 1 Older Persons Protocol.
2 Art 2(2).
3 Art 3.
4 Art 6(1).
5 Art 4(1).

are provided with legal assistance to protect their rights.[6] State parties are further obliged to ensure that legislation recognises the rights of older persons to make decisions concerning their own wellbeing;[7] to 'be provided with legal and social assistance in order to make decisions that are in their best interests and wellbeing';[8] and that 'the rights of older persons to express opinions and participate in social and political life' are protected.[9] Also covered are their rights to pension and social protection;[10] prohibition of and protection from harmful traditional practices;[11] the rights of older women to protection from 'violence, sexual abuse and discrimination based on gender';[12] abuses related to property; land rights;[13] and inheritance.[14] Other provisions include financial support to older persons who take care of vulnerable children;[15] the protection of older persons with disabilities;[16] protection during armed conflict and disasters;[17] access to healthcare[18] and education, including information technology skills;[19] participation in recreational activities;[20] and access to infrastructure.[21]

State parties undertake to indicate in their periodic reports to the African Commission measures they have taken to implement the provisions of the Protocol.[22] The African Commission is also mandated with the interpretation and enforcement of the Protocol and may refer any matters regarding the interpretation and enforcement of the Protocol to the African Court.[23] In appropriate instances – where the state party concerned has made a declaration accepting the direct jurisdiction of the African Court in terms of the Protocol establishing the Court – the Court has the mandate to hear disputes arising out of the application or implementation of the Older Persons Protocol.[24] The Older Persons Protocol enters into force 30 days after receipt of the 15th ratification. No state has yet signed or ratified the Protocol. The Older Persons Protocol presents an important avenue for the promotion and protection of the rights of older persons on the

6 Art 4(2).
7 Art 5(1).
8 Art 5(2).
9 Art 5(3).
10 Art 7.
11 Art 8.
12 Art 9(1).
13 Art 9(2).
14 Art 9(3).
15 Art 12.
16 Art 13.
17 Art 14.
18 Art 15.
19 Art 16.
20 Art 17.
21 Art 18.
22 Art 22(1).
23 Arts 22(2) & (3).
24 Art 22(4).

continent. However, its impact ultimately depends on how quickly states will ratify and diligently implement it.

Another important development regarding the AU political organs was the recommendation by the AU Executive Council in July 2016 to the AU Assembly to amend article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights to include the African Children's Committee in the list of entities entitled to refer cases to the African Court.[25] This follows the advisory opinion of the African Court that the African Children's Committee cannot refer contentious cases submitted to it to the African Court because of the textual omission of the Committee from the African Court Protocol.[26] However, at the end of 2016 this amendment process had not yet been completed.

3 African Commission on Human and Peoples' Rights

3.1 Sessions

The African Commission held four sessions in 2016: the 19th extraordinary session (16-25 February); the 58th ordinary session (6-20 April); the 20th extraordinary session (9-18 June); and the 59th ordinary session (21 October- 4 November). These sessions were held at the seat of the African Commission in Banjul, The Gambia, or in the territory of any state party that invited the Commission.[27]

3.2 State reporting

At the 19th extraordinary session held in February, the African Commission adopted Concluding Observations on the reports of Sierra Leone and Kenya,[28] while the Commission considered the periodic reports of Mali, Namibia and South Africa at its April session. The periodic reports of Mauritius and Côte d'Ivoire were considered at

25 Executive Council 'Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child' Doc EX.CL/977(XXIX) para 8, https://issafrica.org/pscreport/uploads/31275-ex_cl_dec_919_-_925_and_928_-_938_xxix_e.pdf (accessed 7 April 2017). For a further discussion, see F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (on file with author).

26 Advisory Opinion 2/2013, The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court and Human and Peoples' Rights (5 December 2014).

27 Rule 28 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

28 Final Communiqué of the 19th extraordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 16-25 February 2016 para 18.

the November session.[29] The Commission published the status of reporting as at 2016, which revealed that fewer than half the member states have been reporting regularly. Only 19 states (Algeria, Burkina Faso, Côte d'Ivoire, Djibouti, Ethiopia, Kenya, Liberia, Mali, Malawi, Mauritius, Mozambique, Namibia, Niger, Nigeria, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa and Uganda) have up-to-date reports; two states (Gabon and Sudan) have one report overdue; seven states (Angola, Burundi, Cameroon, Democratic Republic of the Congo, Libya, Rwanda and Togo) have two reports overdue; five states (Benin, Botswana, Congo, Madagascar and Tanzania) have three reports overdue; 14 states (Cape Verde, Central African Republic, Chad, Egypt, The Gambia, Ghana, Guinea, Lesotho, Mauritania, Seychelles, Swaziland, Tunisia, Zambia and Zimbabwe) are in arrears in respect of more than three reports; while six states (Comoros, Eritrea, Guinea-Bissau, Equatorial Guinea, São Tomé and Principe and Somalia) have never submitted a report.[30] The statistics reveal that, generally, the reporting status of state parties to the African Charter is not impressive.

At the February extraordinary session, the African Commission adopted Concluding Observations on the reports of Sierra Leone. At its June session, the Commission considered and adopted Concluding Observations on periodic reports presented at its 57th and 58th ordinary sessions by Algeria, South Africa and Namibia,[31] while at the November session it adopted the Concluding Observations on the periodic report of Mali.[32] The Concluding Observations of the June and November sessions were not available to the public at the time of writing. However, in its Concluding Observations and recommendations to the combined reports of Sierra Leone, the Commission commended the government for ratifying on 3 July 2015 the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) and noted the moratorium on the death penalty as no death sentence has been carried out since 1998. It identified as a source of concern the fact that Sierra Leone is yet to domesticate the African Charter within its legal system and the lack of information on issues such as the prohibition of torture and cruel, inhuman and degrading treatment; the right to liberty and security of the person; conditions in prisons and detention centres; and economic, social and cultural rights.[33] The Commission called upon

29 Final Communiqué of the 59th ordinary session of the African Commission on Human and Peoples' Rights, 21 October-4 November 2016, Banjul, The Gambia (November Communiqué) para 25.

30 40th Activity Report of the African Commission on Human and Peoples' Rights, submitted in accordance with art 54 of the African Charter on Human and Peoples' Rights, December 2015-April 2016, para 14.

31 Final Communiqué of the 20th extraordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 9-18 June 2016.

32 November Communiqué (n 29 above) para 27.

33 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the

the government to address these issues in its next report and urged it to ensure that the next report includes the legislative, policy, institutional and programmatic measures that have been taken to implement the African Women's Protocol.

3.3 Resolutions, guidelines and General Comments

The African Commission adopted 37 resolutions in 2016. These resolutions can be divided into four categories: resolutions relating to the human rights situation in specific states; resolutions relating to general human rights themes; resolutions dealing with the functioning of the Commission; and resolutions dealing with working groups. Some resolutions fall outside this categorisation, such as the resolution on the criteria for granting and maintaining observer status to non-governmental organisations (NGOs) working on human and peoples' rights in Africa and a resolution on the collaboration between the Commission and partners on promoting the revised United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners.

As far as the resolution on the criteria for the granting and maintaining of observer status of NGOs is concerned, it will be recalled that the Executive Council in 2015 requested the Commission to review its criteria for the granting and maintaining of observer status to NGOs (observer status criteria), following the granting of observer status to the Coalition of African Lesbians (CAL).[34] The Executive Council specifically requested the withdrawal of the observer status granted to CAL, and to take into consideration 'fundamental African values' in the review of the criteria for granting observer status.[35] The Commission acknowledges that the adoption of the new resolution on the observer status criteria flows from the request by the Executive Council.[36] However, the new observer status criteria are almost identical to the previous ones, with minor differences such as the substitution of the OAU Charter with the AU Constitutive Act and the inclusion of the African Women's Protocol as part of the values to which the activities and objectives of an NGO seeking observer status must conform.[37] There is no provision expressly requiring that 'fundamental African values' should be taken into account when granting observer status to NGOs as requested by the Executive Council. What is curious, though, is the substitution of

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African Charter on Human and Peoples' Rights, adopted at the 19th extraordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 16-25 February 2016.

34 M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532 537; see also Executive Council Decisions ExCL/887(XXVII) and EXCL/Dec.902 (XXVIII) Rev1.

35 As above.

36 African Commission 'Resolution on the Criteria for the Granting and Maintaining of Observer Status to Non-Governmental Organisations working on Human and Peoples' Rights in Africa', adopted at 59th ordinary session held from 21 October-4 November 2017 in Banjul, The Gambia, preambular paras 8 & 9.

37 African Commission (n 36 above) para 2(a).

the African Charter with the 'Preamble of the African Charter'.[38] Whilst it may reasonably be speculated that the Commission may deliberately have done this as a way of complying with the Executive Council request, since the Preamble of the African Charter provides that 'historical tradition and the values of African civilisation' should 'inspire and characterise … the concept of human and peoples' rights',[39] it is trite that reference to the African Charter includes its Preamble. Reference to the African Charter as in the previous criteria would thus have sufficed for this purpose. The new observer status criteria, therefore, do not achieve anything different from the previous ones.

Regarding the resolutions dealing with specific states, the African Commission adopted resolutions on the human rights situation in Congo, Sahrawi Arab Democratic Republic, Gabon, Ethiopia, Burundi, The Gambia and Nigeria (the human rights situation of the abducted Chibok girls and others abducted). In its resolution on The Gambia, the Commission condemned the use of force against protestors and members of the opposition, restrictions on the right to freedom of expression and access to the internet by the government. The Commission called on the government to stop the use of force against its population, to ensure free, fair and peaceful elections and to pardon persons incarcerated for opposing reforms of the Election Amendment Act. Arguably, as revealed later by the brief political instability and repression that resulted from the opposition's victory in the elections, this resolution constitutes an early warning on the situation in The Gambia.

Resolutions dealing with a general human rights theme focus on the proposal for the extension of the deadline for the study of transitional justice in Africa; climate change and human rights; the right to dignity and freedom from torture or ill-treatment of persons with psychological disabilities in Africa; the fight against impunity; the situation of human rights defenders in Africa; the right to education; human rights issues affecting the African youth; elections; human rights in conflict situations; the situation of migrants; indigenous populations/communities; internally-displaced persons; woman human rights defenders; freedom of information and expression on the internet; policing and assemblies; and extractive industries in Africa.

With regard to resolutions dealing with the functioning of the African Commission, the Commission adopted a resolution on the establishment of a Resolutions Committee. This resolution is important to the functioning of the Commission in that the Resolutions Committee has been charged with ensuring the proper publication and popularisation of all adopted resolutions through

38 As above.
39 African Charter, preambular para 5.

appropriate means, including by a compilation and analysis of all resolutions of the Commission.[40]

Resolutions focusing on working groups relate to the modification of the mandate of the working group on specific issues relevant to the work of the Commission; the appointment of expert members of the working group on indigenous populations or communities; the appointment of a new expert member of the working group on the rights of older persons and persons with disabilities; the appointment of an expert member of the working group on indigenous populations or communities; and the appointment of an expert member of the working group on economic, social and cultural rights. These working groups perform the important function of enhancing the promotional mandate of the Commission in specific human rights fields.[41] Hence their appointment is strong testimony to the commitment of the Commission to the investigation, research into and intervention on pertinent issues relating to human rights in Africa.

3.4 Communications

The African Commission considered 31 communications during its 19th extraordinary session, while 11 communications were considered at the 58th ordinary session. Out of the 31 communications considered at the 19th session, the Commission delivered seven decisions on the merits. These are Communication 355/07, *Ezzat & Enayet v Egypt*; Communication 385/10, *ICJ v Kenya*; Communication 392/10, *Me Theogene Muhayeyezu v Rwanda*; Communication 408/11, *Jose Alidor Kabambi v DRC*; Communication 423/12, *Mack Kit v Cameroon*; Communication 428/12, *Dawit Issak v Eritea*; and Communication 433/12, *Ngandu v DRC.* None of these decisions was publicly available at the time of writing.

The African Commission granted one review application (Communication 383/10, *Al-Asad v Djibouti*), while oral hearings were scheduled for two communications (Communication 370/09, *Social and Economic Rights Action Centre v Nigeria*; and Communication 376/09, *Acleo Kalinga (represented by REDRESS, OMCT and IRCT) v Uganda*. The Commission scheduled two communications (Communication 459/13, *Dev Hurnam v Mauritius* and Communication 434/12, *Filimao Pedro Tivane (represented by Dr Simeao Cuamba) v Mozambique*) for referral to the African Court while one communication (Communication 425/12, *Abiodun Saburu (represented by Legal Defence Assistance Project) v Nigeria*) was struck out for want of diligent prosecution. The Commission granted provisional measures in four communications (Communication 586/15, *Dr Osama Yassin (represented by European Alliance for Human Rights) v The Arab Republic*

40 Resolution 338: Resolution on the Establishment of a Resolutions Committee – ACHPR/Res 338(LVIII) 2016, adopted at the meeting of the African Commission in its 58th ordinary session held in Banjul, The Gambia, from 6-20 April 2016.

41 F Viljoen *International human rights law in Africa* (2012) 377.

of Egypt; Communication 591/15, *El Sayed Mossad v The Arab Republic of Egypt*; Communication 600/16, *Patrick Gabaakanye (represented by Dingake Law Partners, DITSHWANELO and REPRIEVE) v Botswana*; and Communication 602/16, *Lofty Ibrahim Ismail Khalil & 3 Others v Arab Republic of Egypt*). At the time of writing, rulings on provisional measures were not publicly available for commentary.

Of the 11 communications considered at the 58th session, provisional measures were given in respect of four communications (Communication 610/16, *Abdul Rahman Osama (represented by European Alliance for Human Rights & 2 Others) v The Arab Republic of Egypt*; Communication 609/16, *Prince Seraki Mampuru (on behalf of Bapedi Mamone Community under the leadership of Kgosi Mampuru III) v the Republic of South Africa*; Communication 611/16, *Omar Hegazy's (represented by the Organisation of European Alliance & 2 Others) v The Arab Republic of Egypt*; and Communication 612/16, *Ahmed Mohammed Aly Subaie v The Arab Republic of Egypt*). No ruling on any of the four communications is publicly available for commentary. No decision was given on merit at the 58th ordinary session.

4 African Court on Human and Peoples' Rights

4.1 Composition

The term of office of four of the judges of the court – Augustino Ramadhani (Tanzania, President); Elsie Thompson (Nigeria, Vice-President); Fatsah Ouguergouz (Algeria); and Duncan Tambala (Malawi) – ended on 5 September 2016. Two new judges – Ntyam Ondo Mengue (Cameroon) and Marie Thérése Mukamulisa (Rwanda) – were elected at the 27th ordinary session of the AU Assembly[42] and sworn in at the 42nd ordinary session of the Court. It is worth noting that even though there were four vacancies available, the Assembly decided to postpone the election of the two additional judges to the January 2017 session to ensure that only 'female candidates from the northern and southern regions of the AU were nominated for election'.[43] This was to ensure that there was both gender and regional balance on the Court in accordance with articles 12(2) and 14(2) and (3) of the Court's Protocol and Executive Council Decision EXCL/907 (XXVIII).[44]

A new bureau of the Court was also elected at the 42nd ordinary session to replace the retiring judges with Justice Sylvian Ore (Côte

42 African Union Assembly 'Decision on the appointment of four (4) judges of the African Court on Human and Peoples' Rights', Doc EXCL/990(XXIX) para 2.

43 AU Assembly (n 42 above) para 3.

44 As above. Executive Council Decision EXCL/907 (XXVIII) Rev1 deals with the 'modalities on implementation of criteria for equitable geographical and gender representation in the African Union organs', which require that each of the five regions of the AU shall have at least two representatives on the African Court, and at least one judge from each region must be a woman.

d'Ivoire) elected as the Court's new President and Justice Ben Kioko (Kenya) as Vice-President for a two-year term.

4.2 Sessions

The African Court held four ordinary sessions in 2016. These were the 40th, 41st, 42nd and 43rd ordinary sessions of the Court which were held from 19 February to 18 March, 16 May to 3 June, 5-15 September and 31 October to 18 November respectively. The sessions were all held at the seat of the Court in Arusha, Tanzania.

4.3 Ratifications and withdrawals

Chad deposited the instrument of ratification of the Court Protocol on 8 February 2016, bringing the total number of ratifications to 30, while Benin on the same day deposited its article 34(6) declaration allowing direct access to the Court by individuals and NGOs, increasing the number of declarations to eight.[45] However, in a rather unfortunate turn of events, Rwanda withdrew its article 34(6) declaration citing, principally, the fact that the Court had allowed access by persons convicted by national courts of serious crimes (genocide).[46] While member states should reasonably be able to withdraw their declarations, as subsequently held by the Court,[47] what is disturbing about Rwanda's withdrawal is the reason given as justification. Rwanda's justification assumes that there are categories of persons who should not be able to have access to the Court because of crimes they are alleged to have committed. This kind of reasoning is not only wrong as it is discriminatory, but also fundamentally goes against the very mandate of the Court, which is to ensure access to justice in the protection of human rights irrespective of the designation of the person(s) seizing its jurisdiction. Rwanda's withdrawal and subsequent refusal to participate in further proceedings also undermine efforts to strengthen African institutions to ensure accountability for human rights violations and cast further doubt on the seriousness of African states to ensure the effectiveness of African human rights institutions. Rwanda's actions further set a bad precedent for member states to withdraw their declaration whenever they disagree with the Court on any matter. This has the potential to weaken the Court and may possibly lead to self-censure by the Court in order not to get involved in confrontations with

45 African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court of Human and Peoples' Rights' http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf (accessed 17 March 2017).

46 Centre for Human Rights 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html (accessed 28 March 2017).

47 See *Ingabire Victoire Umuhoza v Republic of Rwanda* – Appl 003/2014.

member states. This should also be a cause for introspection for advocates calling for the *en bloc* withdrawal of African states from the ICC with a view towards the establishment of criminal chamber of the African Court.

4.4 Hearings and decisions

At the 40th ordinary session, the African Court held two public hearings for the cases of *Action pour la Protection des Droits de l'Homme* APDH v Republic of Côte d'Ivoire – Appl 001/2014 and *Ingabire Victoire Umuhoza v Republic of Rwanda* – Appl 003/2014 – and delivered judgment in the case of *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* – App 006/2013. The Court delivered four judgments at its 41st ordinary session[48] and one each at the 42nd[49] and 43rd[50] ordinary sessions. These cases are discussed below.

In *Wilfred Onyango Nganyi & Others*, the applicants, all citizens of Kenya, brought the case against Tanzania alleging that their right to be tried within a reasonable time and to be provided with legal aid had been violated contrary to article 7 of the African Charter. The case flowed from a criminal case against the applicants, which had been pending before the national courts since 2006. The respondent state objected to the admissibility of the case, among others on the ground that the failure of the applicants to cite the specific provisions of the African Charter alleged to have been violated made the application incompatible with the Constitutive Act of the African Union and, therefore, inadmissible. The Court held that it was not necessary for the applicants to cite specific provisions of the African Charter alleged to have been violated. What was important was that human rights provided for in the African Charter were alleged to have been violated even if no specific provisions were cited. On the merits, the Court found the respondent state in violation of the right to be tried within a reasonable time as the criminal case against the applicants had been pending for almost a decade. The Court also held that the respondent state was under an obligation to provide the applicants with legal aid when the judicial authorities realised they had no legal representation, even if this was not requested. The failure to provide the applicants with legal aid, therefore, amounted to a violation of the right to a fair trial provided for by article 7 of the Charter.

Frank David Omary & Others concerned an application for review of the judgment of the Court (the initial judgment) rendered on 28 March 2014, pursuant to article 28(3) of the Court's Protocol and

48 *Frank David Omary & Others v United Republic of Tanzania* – Appl 001/2012, *African Commission on Human and Peoples' Rights v Libya* – Appl 002/2013, *Lohe Issa Konate v Burkina Faso* – Appl 004/2013, & *Mohamed Abubakari v United Republic of Tanzania* – Appl 007/2013.

49 *Ingabire* (n 47 above).

50 *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire* – Appl 001/2014.

Rule 67(1) of the Rules of Court. The applicants, former employees of the East African Community (EAC), had seized the Court in January 2012 alleging that the respondent had failed to pay the entirety of their pension and terminal allowance as contained in a Mediation Agreement of 1984. The applicants alleged that this conduct of the respondent violated various provisions of the Universal Declaration of Human Rights (Universal Declaration), namely, article 7 on non-discrimination; article 8 on the right to an effective remedy; article 23 on the right to work and fair remuneration; article 25 on the right to an adequate standard of living; and article 30 on the obligation to refrain from acting in breach of the rights contained in the Universal Declaration. The applicants also alleged that they had been subjected to police brutality in violation of the Declaration. In the initial judgment, the Court unanimously ruled the application inadmissible for non-exhaustion of local remedies and held that the matter had not been unduly prolonged.[51] The applicants submitted documents they claimed to be new evidence of the undue prolongation of their case and the exhaustion of local remedies. The Court found that the documents submitted had previously been submitted and considered in the initial application and, therefore, did not qualify as new evidence.[52] The Court further held that in terms of article 28(3) of the Court's Protocol and Rule 67(1) of the Rules of Court, a review application was admissible only if there was the 'discovery of evidence which was not within the knowledge of the party at the time the judgment was delivered' and is 'filed within six months after the party acquired knowledge of the evidence so discovered'.[53] These requirements are cumulative and the absence of one requirement renders the application inadmissible.[54] The application consequently was dismissed.

African Commission on Human and Peoples' Rights v Libya concerned an application filed on behalf of Saif Al Islam Kadhafi, the son of the former leader of Libya, who was being held in detention in a secret location in Libya. Mr Kadhafi had not been charged with any offence nor brought before court, but was denied access to his lawyer and family. His detention had been extended several times in his absence without him being represented by his lawyer. The African Commission alleged that the treatment of Mr Kadhafi was in violation of the right to liberty and security of the person and the right to a fair trial contrary to articles 6 and 7 of the African Charter respectively. Before the Court could deliver judgment, it received reports that the Azize Court of Tripoli had sentenced Mr Kadhafi to death. The African Court issued a second provisional order requesting the respondent state to take all necessary measures to preserve the life of Mr Kadhafi and to refrain from any acts that could cause him irreparable harm. On the

51 Para 37.
52 Paras 45 & 46.
53 Para 33.
54 Para 52.

merits, the Court held that even in the face of the security problems faced by the respondent state, it still had the obligation to guarantee the right to personal liberty and a fair trial in terms of articles 6 and 7 of the African Charter respectively. This case is particularly important as it was the first time the Court has delivered a judgment on merits in a case referred to it by the African Commission.

Lohe Issa Konate v Burkina Faso concerned the determination of reparations due by the respondent state, which had been found to be in violation of the right of the applicant to freedom of speech through the use of criminal defamation law to sentence the applicant to one year's imprisonment contrary to article 9 of the African Charter. The applicant requested that the criminal conviction be expunged in addition to compensation for loss of work and equipment. The respondent state did not raise any objections to expunging the criminal conviction and, therefore, this was endorsed by the Court. The Court, however, held that it had no jurisdiction to set aside the fines imposed on the applicant as it was not an appellate court. This was a rather strange conclusion given the fact that the Court had previously held in *Alex Thomaz v United Republic of Tanzania* and *Abubakari Mohamed v United Republic of Tanzania* that in terms of article 27(1) of the African Court Protocol it has the power to release an applicant from prison under special circumstance (even though the Court did not in these cases order the release of the applicants). Therefore, it is peculiar that the Court deems itself capable of ordering the release from prison of a convicted applicant in some cases but is incapable of setting aside a fine in this case. Regarding the award of compensation, the Court held that it would award compensation on the basis of equity even where the applicant did not have documentary proof of the amount claimed. The Court, therefore, awarded the applicant compensation for, among others, loss of income, moral damage and medical expenses. The respondent state was also ordered to review the fines imposed on the applicant downwards to comply with the requirements of necessity and proportionality.

In *Mohamed Abubakari v United Republic of Tanzania* the applicant had been sentenced to 30 years' imprisonment for armed robbery. The applicant alleged that his right to a fair trial had been violated by, among others, the failure by the respondent state to investigate his allegations of a conflict of interest on the part of the prosecutor, and the failure by the respondent state to inform him of his right to a lawyer and to provide him with legal aid throughout the proceedings before the national courts. The respondent state raised objections on several grounds to the jurisdiction of the Court and the admissibility of the case, including on the ground that re-examining the evidence on which the applicant had been convicted would amount to the African Court serving as an appellate court to the domestic courts contrary to the Court's Protocol. Another ground of objection to the admissibility of the case was that the applicant had failed to cite any specific provisions of the African Charter alleged to have been violated and,

therefore, the application was incompatible with the Constitutive Act of the AU. Regarding the challenge to its jurisdiction, the Court held that it was not precluded from examining whether 'procedures before national courts are consistent with the international standards established by the [African] Charter or other applicable human rights instruments'. The Court also held that it was not fatal if the applicant failed to cite the specific provisions of the African Charter alleged to have been violated. What was important was that the applicant alleged violations of rights enshrined in the African Charter. On the merits, the Court held that allegations relating to the conflict of interest on the part of the prosecutor should have been taken seriously by the respondent state as it had the potential to impact on the applicant's right to a fair trial. The failure on the part of the respondent to investigate the allegation of bias on the part of the prosecutor, therefore, amounted to a violation of the applicant's right to a fair trial under article 7 of the African Charter. The Court also held that the failure by the respondent state to provide legal aid to the applicant, who was facing serious criminal charges, amounted to a violation of his right to a fair trial under article 7 of the African Charter. However, the Court refused the applicant's request to be released from prison, holding that it would only do so under 'special and compelling circumstances', without elaborating on the nature of the 'special and compelling circumstances' which may persuade it to order such a remedy. The Court should elaborate on this in subsequent cases in order to guide applicants and their representatives on how to craft the remedies they seek from the Court. It is worth noting that in separate dissenting opinions, Justices Elsie Thompson and Rafaa Ben Achour disagreed with the decision of the majority to refuse the order to release the applicant. According to these dissenting opinions, the circumstances of this case satisfied the 'special and compelling circumstances' requirement, namely, the Court agreed that the applicant's conviction had been marred by irregularities and, therefore, amounted to a violation of the right to a fair trial; the applicant had already spent more than 18 years in prison; and the Court had ordered that the case should not be reopened before the national courts as this would lead to further injustice. Consequently, there could be no better 'reparatory' order that would be proper to remedy the violations suffered by the applicant in this case than an order for his release from prison.

Ingabire Victoire Umuhoza v Republic of Rwanda concerned the jurisdiction of the African Court to continue hearing a case given that the respondent state had submitted a notice of withdrawal of its declaration in terms of article 34(6) of the Court Protocol allowing direct access to the Court by individuals and NGOs. The case was filed with the Court on 3 October 2014, while the notice of withdrawal was deposited with the AU Commission on 29 February 2016. The respondent argued, among others, that it was only the AU Commission that could decide on its withdrawal and not the Court, and requested the Court to suspend proceedings. The applicant, on

the other hand, argued that in the absence of any provisions regarding withdrawal in the Court Protocol, the Court should apply article 56 of the Vienna Convention on the Law of Treaties (VCLT) in interpreting the Protocol. The applicant further argued that the respondent state had an obligation under the VCLT to comply with the Court Protocol in good faith under the principle of *pacta sunt servanda* and could only withdraw upon following the proper procedure, which must include a cooling-off period. The applicant further argued that based on the principle of non-retroactivity, the respondent's withdrawal, even if valid, would have no effect on pending cases. The Court held that in terms of articles 3(1) and (2) of the Court Protocol it has jurisdiction to entertain all disputes relating to the Court Protocol, including the issue of withdrawal of the article 34(6) declaration. On the validity of the withdrawal, the Court held that even though the Court Protocol was subject to the VCLT, the declaration being a unilateral act, the VCLT was not directly applicable but could be applied by analogy. The Court also held that even though the respondent was entitled to withdraw its declaration, this could not be done arbitrarily as it conferred rights on 'third parties, the enjoyment of which require legal certainty'. Withdrawal should, therefore, be preceded by a minimum of one year prior notice to ensure 'judicial security by preventing abrupt suspension of rights which impacts on … individuals and groups'. The withdrawal, therefore, only takes effect on 1 March 2017, one year after the notice. The Court further held that the notice of withdrawal had no effect on cases already pending before the Court.

In *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire*, the applicant alleged that Law 2014-335 amending Law 2001-634 of 2001 regulating the composition, organisation and functioning of the Independent Electoral Commission (IEC) was not in conformity with the African Charter on Democracy, Governance and Elections (African Democracy Charter) and the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol). The applicant's allegations related to the presence of a personal representative of the President, a personal representative of the president of the National Assembly, representation of, among others, the minister in charge of Territorial Administration and the Minister of Economy and Finance in the IEC, creating unequal treatment in the form of over-representation in the favour of the President. According to the applicant, this was in violation of an obligation of the respondent state to establish an independent and impartial electoral body as well as the right to equality before the law and equal protection of the law contrary to articles 3 and 13(1) & (2) of the African Charter, 10(3) and 17(1) of the African Democracy Charter, 3 of the ECOWAS Democracy Protocol, 1 of the Universal Declaration and 26 of the International Covenant on Civil and Political Rights (ICCPR). The Court first had to decide whether the African Democracy Charter and ECOWAS Democracy Protocol were human rights instruments in terms of article 3 of the Court Protocol, which it

concluded in the affirmative. On the merits, the Court held that the international instruments cited by the applicant did not prescribe any precise characteristics of an independent and impartial electoral body. An electoral body would, however, be deemed independent if 'it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality'. In this case, the imbalance in representation in favour of the ruling coalition amounted to a violation of its obligation to establish an independent and impartial electoral management body as provided for under article 17 of the African Democracy Charter and article 3 of the ECOWAS Democracy Protocol, which affects the right of every citizen to freely participate in the public affairs of his country in terms of article 13 of the African Charter. The Court also held that the impugned law violated the right to equal protection as the imbalance in representation within the IEC placed some candidates at an advantage over others. The respondent state was ordered to amend its electoral laws to comply with the relevant international instruments.

5 African Committee of Experts on the Rights and Welfare of the Child

5.1 Composition

In 2016, Mr Mohamed Ould Ahmedoudit H'Meyada from Mauritania was elected to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) as a replacement for Prof Julia Sloth-Nielsen who served a five-year term which expired in January 2016. Prof Sloth-Nielsen has been very influential in conducting several Children's Committee projects, such as the General Comment on article 6 of the African Charter which deals with birth registration, name and nationality.[55] Although in this case a female was replaced by a male, the Committee still retains a majority of women. The Committee is now composed of six women and five men.

5.2 Sessions

The African Children's Committee holds an ordinary session twice a year. At the ordinary sessions, state parties' reports, complementary reports by civil society organisations (CSOs), communications, requests for investigation and other requests submitted to the Committee are examined. Some activities during these sessions are

55 AU Executive Council elects a new member of the African Children's Committee http://www.acerwc.org/au-executive-council-elects-a-new-member-of-the-acerwc/ (accessed 27 February 2017).

open while others are restricted.[56] The Committee held two sessions in 2016: the 27th ordinary session (2-6 May 2016); and the 28th ordinary session (21 October-1 November 2016). The 27th ordinary session was held at the headquarters of the AU Commission in Addis Ababa, Ethiopia, while the 28th ordinary session along with the 12th pre-session was held jointly with the 59th ordinary session of the African Commission in Banjul, The Gambia.

5.3 State reporting

At its 28th ordinary session, the African Children's Committee considered the state reports from Eritrea, Cameroon, Ghana and Sierra Leone. The Concluding Observations of the Committee in respect of these states were not available at the time of writing.

5.4 Communications

The Children's Committee handed down a decision in *Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi,*[57] and heard arguments in the case of *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania*[58] at the 28th ordinary session, and a ruling on one communication (*African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan*).[59]

Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi was a communication in relation to the provision of section 23 of the Malawian Constitution which defines a child as any person under the age of 16 years. The complainant submitted that the provision contravened article 2 of the African Children's Charter, which defines a child as a person below the age of 18 years of age. The complainant also alleged that the provision was incompatible with article 1 (obligations of state parties) and article 3 (non-discrimination) of the Children's Charter as it excluded Malawian children between the ages of 16 and 18 years from the protection accorded to them under the African Children's Charter.

However, the case was not heard as to its substance as parties had submitted a request for an amicable settlement. The request for amicable settlement was granted by the Committee in line with section 13 of the Revised Communication Guidelines, which permits the parties to a communication to resort in settling their dispute amicably any time before the Committee decides on the merits of the communication. After having deliberated on the details of the terms and conditions of the amicable settlement agreement, the Committee

56 African Committee of Experts on the Rights and Welfare of the Child http://www.acerwc.org/session-reports/ (accessed 27 February 2017).
57 Communication 004/Com/001/2014 (accessed 27 February 2017).
58 Communication 007/Com/003/2015.
59 Communication 005/Com/001/2015.

decided to adopt the amicable settlement while it continued to be seized of the communication. Malawi has since amended its Constitution to increase the age of childhood to 18 years.[60] However, while an amicable settlement is indeed a recognised mechanism in the African Children's Charter, its weakness is evident. For instance, it has prevented an authoritative analysis and novel jurisprudence which would have emboldened advocacy for change in other states that have retained a similar provision in their legislative framework.

Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v the Republic of Mauritania was brought on behalf of two victims of slavery. The complainants alleged that the government of Mauritania had failed to effectively enforce its 2007 law which purportedly criminalises slavery, and that those convicted under the law did not receive sentences commensurate to the gravity of their actions. In addition, where lenient sentences had been given by its courts, the government of Mauritania had failed to ensure they appeal against the unduly lenient sentences. Hence, the complainants submitted that these failures constituted a violation by Mauritania of article 1 (obligations of state parties); article 3 (non-discrimination); article 4 (best interests of the child); article 5 (survival and development); article 11 (education); article 12 (leisure, recreation and cultural activities); article 15 (protection from economic exploitation); article 16 (protection against child abuse and torture); article 21 (protection against harmful social and cultural practices); and article 29 (prevention of sale, trafficking and abduction of children) of the African Children's Charter. Submissions addressing both admissibility and merits were lodged with the Children's Committee in December 2015. The Committee heard oral presentations by the parties at its 28th ordinary session and decided to undertake an on-site investigation in Mauritania early in 2017.[61]

In *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan*, the complainants challenged a decision made by Sudan revoking a young Sudanese woman's citizenship rights. The woman, born to a Sudanese mother and South Sudanese father, was not allowed to obtain a Sudanese national identity card merely because her father's last name indicated that he was from South Sudan. In arriving at a ruling that the matter was admissible, the African Children's Committee noted that the requirement of exhaustion of local remedies in section IX(1)(E) of the Revised Guidelines for the consideration of communications did not apply to this case as there are no remedies to be exhausted at the national level. The Committee also held that the fact that the person involved had attained majority did not exclude

60 'Parliament amends child age to 18 years' http://www.times.mw/parliament-amends-child-age-to-18-years/(accessed 25 February 2017).

61 African Children's Committee '28th Session of the African Committee of Experts on the Rights And Welfare of the Child (ACERWC) 21 October-1 November 2016, Banjul, The Gambia: Draft report', ACERWC/ RPT(XXVIII) 20.

the competence of the Committee to receive a communication on violations that had occurred while the complainant was still a child. In terms of article 1(4)(A) of the Revised Guidelines for the consideration of communications, the Committee's jurisdiction is determined by the child's age at the time of the alleged violation which, in this case, was 17 years and 10 months. On this basis, the Committee concluded that the communication submitted by the authors had fulfilled all the admissibility conditions laid down in the Committee's Revised Guidelines on Consideration of Communications and declared it admissible.[62]

5.5 General Comments and key discussions

The African Children's Committee considered the draft joint General Comment by the African Commission and the Committee on child marriage at both the 27th and 28th ordinary sessions.[63] The draft was presented by the Centre for Human Rights of the University of Pretoria, pursuant to article 6(b) of the African Women's Protocol which provides as follows:

> States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that (a) no marriage shall take place without the free and full consent of both parties; (b) the minimum age of marriage for women shall be 18 years.

Article 21(2) of the African Children's Charter further provides:

> Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

During the 28th session the Committee held a joint session with the African Commission at which two members each from the Committee and the Commission were assigned to work with the consultant towards the finalisation of the General Comment.[64] The formulation of a General Comment on child marriage is laudable and cannot come at a more auspicious period in Africa as, sadly, it remains a problem in most states in Africa.[65] This has been highlighted in the Concluding Observations of the Children's Committee on countries

62 Admissibility Ruling Communication 005/Com/001/2015; Decision on Admissibility 003/2016, December 2016.

63 African Children's Committee '27th Session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 2-6 May 2016, Addis-Ababa, Ethiopia: Report', ACERWC/RPT (XXVII) 14-15; African Children's Committee (n 61 above) 19.

64 African Children's Committee (n 61 above) 19.

65 'Ending child marriage in Africa. A brief by Girls Not Brides' http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf (accessed 25 February 2017).

including South Africa[66] and Nigeria,[67] and it has been the focus of a resolution by the African Commission.[68]

The African Children's Committee also considered and granted the application for observer status from *Terre des Hommes,* Holland, at the 27th session, having found that it met the requirements as stated in the Guidelines. This signifies that in line with the tradition of other intergovernmental bodies, an organisation need not originate from Africa to obtain observer status before the Committee. However, it is difficult to establish the number and focus of organisations with observer status with the Committee. It is time that the Committee includes on its website a section on NGOs with observer status. In addition to meeting the purpose of researchers and, indeed, the public who wish to have a quick impression of who and what these NGOs are, it will aid networking among the approved NGOs.

Another key event in 2016 was the presentation of the findings of the ongoing study on the impact on children in Africa of conflicts and crises by Pan-African Research Services (PARS). The session also hosted discussions on the need to incorporate SDGs and Agenda 2063 in the state reporting mechanism.

6 Extraordinary African Chambers

6.1 Establishment and jurisdiction

The Extraordinary African Chambers were created by an agreement between the AU and Senegal to try former Chadian dictator, Hissène Habré, and his accomplices for crimes allegedly committed between 1982 and 1990 while he was President.[69] The agreement was signed on 22 August 2012 for the establishment of the Chambers as a tribunal within the Senegalese judiciary and it was inaugurated in February 2013.[70] The charges proferred against Hissène Habré include

66 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, during in its 1st extraordinary session held on 6-11 October 2014, para 65.

67 Concluding Recommendations by the African Committee on Experts on the Rights and Welfare of the Child on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, at its 12th session considered Nigeria's initial and first country periodic report submitted in July 2006.

68 Resolution 292: Resolution on the Need to Conduct a Study on Child Marriage in Africa, adopted at the African Commission on Human and Peoples' Rights meeting at its 16th extraordinary session held from 20-29 July 2014 in Kigali, Rwanda.

69 P Fabricius 'Now to make this extraordinary court, ordinary' (2016) https://issafrica.org/iss-today/now-to-make-this-extraordinary-court-ordinary (accessed 28 March 2017).

70 R Adjovi 'Introductory note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese judicial system between the

war crimes, crimes against humanity and torture.[71] The African Chambers became a necessity following several unsuccessful attempts to prosecute Hissène Habré for crimes committed during his presidency. These efforts include the setting up of 'a Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories' by Chadian President Idris Itno Derby in 1990 which concluded, among others, that 'Habré's regime led to "more than 40 000 victims, more than 80 000 orphans, more than 30 000 widows, more than 200 000 people left with no moral or material support as a result of this repression"' and recommended the prosecution of the people involved in these crimes.[72] Chad subsequently prosecuted Habré *in absentia* in 2008 and sentenced him to death,[73] even though they failed to secure his extradition from Senegal and consequently were unable to enforce the sentence.[74]

Other attempts include efforts at prosecution within the Senegalese judicial system between 2000 and 2001, which were declared as lacking jurisdiction by the Court of Appeal and *Cour de Cassation* of Senegal.[75] The Committee Against Torture also issued a decision in 2006 in which it recommended that Senegal comply with its obligations under the Convention Against Torture (CAT) by either prosecuting or extraditing Habré.[76] Attempts by a group of victims to seek redress through the Belgian courts resulted in a dispute between Belgium and Senegal at the International Court of Justice which found on 20 July 2012 that Senegal had violated its obligations under articles 6(2) and 7(1) of the CAT by failing to investigate the alleged crimes committed by Habré and prosecuting him, and ordered Senegal to either prosecute or extradite Habré.[77]

Government of the Republic of Senegal and the African Union and the Statute of the Chamber (2013) 52 *International Legal Materials* 1020.

71 As above.

72 As above. See also Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, 'Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, reprinted in NJ Kritz (ed) *Transitional justice: How emerging democracies reckon with former regimes, Volume III: Laws, rulings, and reports* (1995) 51-79.

73 Adjovi (n 70 above); see also S Czajkowski 'Chad court sentences ex-dictator Habré to death in absentia' (2008) *Jurist* http://www.jurist.org/paperchase/2008/08/chad-court-sentences-ex-dictator-habre.php (accessed 5 April 2017).

74 Adjovi (n 70 above).

75 As above

76 As above*; Guengueng & Others v Senegal*, Merits, Committee against Torture, Decisions of the Committee Against Torture under Art 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/36/D/ 181/2001 19 May 2006) paras 9.6-9.12.

77 Adjovi (n 70 above); *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, *ICJ Reports 2012* 422 para 122. For a further discussion of this case, see S Shah 'Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*)' (2013) 13 *Human Rights Law Review* 351.

In the meantime, in 2005 Senegal had sought the assistance of the AU on issues concerning Habré, which resulted in the AU Assembly commissioning a committee of experts in January 2006 to advise the AU on the matter.[78] Based on the recommendations of the committee of experts, the AU Assembly mandated 'the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.[79] Senegal proceeded to amend its domestic laws to enable it to try Habré in response to the AU Assembly decision, However, this was challenged by Habré before the ECOWAS Community Court of Justice (ECOWAS Court) which held that the legislation adopted by Senegal which had retrospective effect was a violation of Habré's rights. The ECOWAS Court concluded that Habré could only be tried by an international or hybrid court.[80] The decision of the ECOWAS Court led Senegal to engage with the AU towards the establishment of the Extraordinary African Chambers, culminating in the signing of the Extraordinary African Chambers agreement and statute in 2012.[81]

The Extraordinary African Chambers have jurisdiction over genocide, war crimes, crimes against humanity and torture[82] committed over the period when Habré was in power and over any individual responsible for the commission of those international crimes during that period.[83] The Chambers comprise an investigative chamber, indictment chamber, trial chamber and appeal chamber.[84] The judges of the investigative and indictment chambers are of Senegalese nationality nominated by the Minister of Justice of Senegal and appointed by the Chairperson of the AU Commission. [85] The presiding judges of the trial and appeal chambers, however, are required to be of non-Senegalese nationality from another AU member state, who are nominated by the Minister of Justice of Senegal and appointed by the Chairperson of the AU.[86] The

78 Adjovi (n 70 above); African Union [AU], Decision on the Hissène Habré case and the African Union, AU Doc Assembly/AU/ Dec 103 (VI) http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20103%20(VI)%20_E.PDF (accessed 5 April 2017).

79 African Union Doc Assembly/Au/3 (Vii) https://www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assembly/au/3-vii (accessed 5 April 2017).

80 Adjovi (n 70 above) 1021; *Hissène Habré v Republic of Senegal*, Case ECW/ CCJ/ APP/07/08.

81 Adjovi (n 70 above).

82 Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1998, 30 January 2013 (EAC Statute), 52 ILM 1028 (2013) art 4.

83 Adjovi (n 70 above); EAC Statute art 3.

84 EAC Statute art 11.

85 Arts 11(1) & (2).

86 Arts 11(3) & (4).

Extraordinary African Chambers are mandated to impose penalties from 30 years' to life imprisonment.[87]

6.2 Hissène Habré trial and its implications

The Hissène Habré trial commenced on 20 July 2015 and was concluded on 11 February 2016, during which time a total of 96 witnesses testified, and 5 600 pages of transcripts and 56 exhibits were examined.[88] Habré was convicted of 'crimes against humanity of rape, sexual slavery, murder, summary execution, kidnapping followed by enforced disappearance, torture and inhumane acts'.[89] Habré was also convicted of 'war crimes of murder, torture, inhumane treatment and unlawful confinement committed against prisoners of war' and sentenced to life imprisonment.[90] These crimes were committed through the activities of the elite police force *Direction de la documentation et de la sécurité* (Documentation and Security Directorate (DSS)). Habré immediately appealed to the appeals chamber against his conviction, but judgment is yet to be delivered.[91]

The trial and conviction of Habré are 'an important and promising example of zero tolerance to impunity in Africa and also bring justice to victims of serious human rights violations constitutive of international crimes'.[92] It arguably provides renewed hope that African regional institutions are capable of tackling massive human rights violations and bringing perpetrators to justice, especially in the face of recent bad blood between the AU and the International Criminal Court (ICC).[93]

The *Habré* case also sets certain important milestones in international criminal justice. It is the first time that the domestic courts[94] of one country have successfully tried and convicted the former head of state of another country for serious violations of human rights.[95] While the International Criminal Tribunal for Rwanda

87 Art 24.

88 JP Pérez-León-Acevedo 'The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa' https://africlaw.com/2016/06/30/the-conviction-of-hissene-habre-by-the-extraordinary-chambers-in-the-senegalese-courts-bringing-justice-in-cases-of-serious-human-rights-violations-in-africa/ (accessed 6 April 2017). For the full case, see *Ministere Public v Hissein Habre* http://www.chambresafricaines.org/pdf/Jugement_complet.pdf (accessed 6 April 2017).

89 Pérez-León-Acevedo (n 88 above). See also Radio-Canada 'Former Chadian President Hissène Habré sentenced to life imprisonment' http://ici.radio-canada.ca/nouvelle/784314/hissene-habre-tchad-senegal-crimes-guerres-humanite (accessed 6 April 2017).

90 As above.

91 *Africanews* 'Chad: A new trial in the Hissène Habré case'.

92 Pérez-León-Acevedo (n 88 above).

93 As above.

94 Even though the EAC was established pursuant to an agreement between Senegal and the African Union, the Court is fully integrated into the Senegalese judiciary rather than as an independent international or hybrid court.

95 Pérez-León-Acevedo (n 88 above).

(ICTR) convicted Jean Kambanda, former Prime Minister of Rwanda, for genocide and crimes against humanity, the ICTR was a purely international tribunal set up by the UN Security Council, independent of the Rwandan judiciary.[96] Similarly, former Liberian President Charles Taylor was convicted by the Special Court for Sierra Leone (SCSL) for war crimes and crimes against humanity, but the SCSL, even though a hybrid court, was structured as an independent international organisation.[97] The *Habré* trial before the Extraordinary African Chambers provides an important reinforcement for the principles of subsidiarity of international tribunals and the complementarity between national courts and international tribunals.[98]

Significantly, the *Habré* case also serves as the first exercise of universal jurisdiction by the courts of one African country over crimes committed in another country.[99] The *Habré* case is also the first instance of a former head of state being convicted for personally raping a person and not merely being found responsible for rape committed by subordinates through the principle of command responsibility.[100] Furthermore, the *Habré* case represents the first time the AU has been involved in the establishment of an internationalised criminal court to successfully investigate, prosecute and convict perpetrators of serious human rights violations.

The *Habré* trial 'is also exemplary in showing how the fierce will of a handful of men and women … can literally lift mountains and end up in a long trial considered utopian'.[101] The *Habré* trial should encourage the many victims of massive human rights violations around Africa that they too may someday receive justice.

7 Africa's relationship with the International Criminal Court

The relationship between Africa and the International Criminal Court (ICC) remained tense, both at the AU level and among African member states. At the AU level, the AU Assembly continued to call on African member states to refuse to co-operate with the ICC

96 As above.
97 As above.
98 As above.
99 As above.
100 As above.
101 M Malagardis 'Hissène Habré condemned to perpetuity: A trial for history, but shares of sorry' *Liberation* 30 May 2016 http://www.liberation.fr/planete/2016/05/30/hissene-habre-condamne-a-la-perpetuite-un-proces-pour-l-histoire-mais-des-parts-d-ombre_1456113 (accessed 6 April 2017).

concerning the arrest warrant against Sudanese President Omar Al Bashir at both its 26th[102] and 27th[103] ordinary sessions.

Among individual African member states of the ICC, South Africa[104] and The Gambia[105] deposited instruments of withdrawal from the ICC, while Burundi[106] commenced internal processes towards withdrawal after the UN had launched investigations into allegations human rights violations in the country.

8 Conclusion

The year 2016 was declared by the AU as 'the African year of human rights with particular focus on the rights of women'.[107] While some progress was recorded in terms of the advancement of human rights in the AU, it was far too modest than would have been expected in a year so designated for human rights. As was the case previously, modest progress was made in the African human rights system during the year under review and some set-backs were also recorded. In terms of normative developments, the AU Assembly adopted the Older Persons Protocol which provides comprehensive protection of the rights of older persons and sets new standards that all member states must aspire to in the protection of older persons within their territories. Member states must embrace the ideals espoused in this Protocol, ratify it, adopt relevant domestic legislation to give effect to the Protocol and take necessary practical measures to implement its provisions. The Executive Council also recommended that the AU Assembly amend article 5(1) of the African Court Protocol to include the African Children's Committee as one of the entities empowered to refer cases to the Court.

Significant progress was also recorded in the jurisprudence of the African Court as the Court delivered six judgments during the year. While this is not optimal, it is a marked increase from previous years. In terms of substance, the Court delivered an important decision on

102 AU Assembly 'Decision on the International Criminal Court' Doc EXCL/952(XXVIII).

103 AU Assembly 'Decision on the International Criminal Court' Doc EXCL/987(XXIX).

104 M Nichols 'SA begins process to withdraw from International Criminal Court' *Mail and Guardian* 21 October 2016 https://mg.co.za/article/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc (accessed 2 June 2017).

105 A Withnall 'Gambia pulls out of "racist" ICC amid fears of a mass African exodus' *Independent* 26 October 2016 http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-south-africa-burundi-withdrawal-rome-statute-a7381336.html (accessed 2 June 2017).

106 Aljazeera 'Burundi moves to quit the International Criminal Court: Lower house of parliament passes draft law to exit ICC after UN launches probe into alleged human rights abuses' http://www.aljazeera.com/news/2016/10/burundi-moves-quit-international-criminal-court-161012132153065.html (accessed 2 June 2017).

107 African Union 'Declaration by the Assembly on the theme of year 2016' in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 165.

the right to political participation and, in particular, the organisation of electoral management bodies.[108] While this decision was delivered against Côte d'Ivoire, it is hoped that this will serve as a pivot for further challenges to similar arrangements in electoral management bodies across the continent. The African Court also handed down two significant judgments on the right to a fair trial and access to legal aid, holding that states have an obligation to provide legal aid to persons accused of serious crimes even if the accused person does not request legal aid.[109]

On the downside, the Court witnessed the first real challenge to its legitimacy when Rwanda withdrew its declaration allowing direct access by individuals and NGOs. While the Court stood its ground in not cowering to Rwanda's demand to protract all pending proceedings pursuant to the submission of its notice of withdrawal, it remains to be seen how the Court will handle its relationship with member states in the future.

On another encouraging note, an increasing number of states submitted reports to the African Commission and African Children's Committee. The Committee issued decisions on two cases[110] and one ruling on admissibility.[111] The communication against Malawi, decided through amicable settlement, has led to a constitutional amendment increasing the age of childhood from 16 to 18 years. The Children's Committee also considered the draft joint General Comment with the African Commission on child marriage – an invasive violation plaguing children's rights on the continent.

Arguably, the crowning moment of the year for human rights and the fight against impunity on the continent was the conclusion of the Hissène Habré trial, which culminated in the Extraordinary African Chambers sentencing Habré to life imprisonment. While the Habré scenario may not anytime soon be replicated in other jurisdictions around the continent, it offers hope of the possibilities for justice for the victims of massive violations of human rights in Africa.

108 *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire* – Appl 001/2014.

109 *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* – App 006/2013; *African Commission on Human and Peoples' Rights v Libya* – Appl 002/2013; *Mohamed Abubakari v United Republic of Tanzania* – Appl 007/2013.

110 *Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi,* Communication 004/Com/001/2014; *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania,* Communication 007/Com/003/2015.

111 *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan* Communication 005/Com/001/2015.

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Recent developments

Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion

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Summary

This article considers the long-awaited decision of the African Court on Human and Peoples' Rights in response to the application brought by the Nigerian NGO, Socio-Economic Rights and Accountability Project (SERAP), which sought guidance on the locus standi *of NGOs to seek advisory opinions from the Court on the meaning of certain provisions of the African Charter. The Court's decision endorses the access of the NGO sector in principle, but imposes a stringent procedural precondition of formal observer status accredited by the African Union, rather than a broader test of official status before other relevant bodies, such as the African Commission. The effect of this procedural restriction in practice limits the number of NGOs able to seek Advisory Opinions from the Court to a small subset of the NGOs active in human rights protection in Africa. The article considers whether the Court's approach in adopting this limitation is theoretically coherent and lawful, concluding that it is inconsistent with the proper approach to treaty interpretation at international law. Further, the article considers the broader implications of the Court's decision, and the risk that it will discourage NGOs from using the African Court as the authoritative forum to determine the meaning of the African Charter in favour of other tribunals with less restrictive*

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standing requirements, raising the potential for the fragmentation of African human rights jurisprudence.

Key words: *African Charter; advisory opinion; standing; treaty interpretation*

1 Introduction

On 26 May 2017, the African Court on Human and Peoples' Rights (African Court) delivered its long-awaited Advisory Opinion in response to the application brought by the very active Nigerian non-governmental organisation (NGO), the Socio-Economic Rights and Accountability Project (SERAP).[1] The SERAP application represents the first occasion on which the African Court has set out its thinking on the scope of NGO access to it, despite the fact that the Court has previously dealt with four separate applications from various NGOs in the period since 2012.[2] Since the previous four requests were each struck out on procedural grounds,[3] the 26 May 2017 opinion provides the first window onto the Court's substantive reasoning as to the *locus standi* of NGOs to seek advisory opinions under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[4] The implications of this first decision are substantial, given that the vast majority of such advisory opinion requests before the Court (five of the eight requests determined and the other three pending)[5] originate from NGOs. The decision confirms that NGOs, in principle, are capable of bringing applications for advisory opinions, but imposes a powerful restriction on the *type* of NGOs which will be eligible. In effect, this prohibits a large category of NGOs, including some of the most active participants in

1 App 001/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)* (Advisory Opinion).

2 Aside from the present application made by SERAP, the other applications are App 001/2012 (also made by SERAP); App 002/2012 (made by the Pan African Lawyers' Union and Southern African Litigation Centre); App 001/2014 (made by the Coalition on the International Criminal Court, Legal Defence and Assistance Project, Civil Resource Development and Documentation Centre, and Women Advocates Documentation Centre); and App 001/2015 (made by the Coalition on the International Criminal Court, Legal Defence and Assistance Project, Civil Resource Development and Documentation Centre, and Women Advocates Documentation Centre).

3 See Order of 15 March 2013 in relation to App 001/2012; Order of 15 March 2013 in relation to App 002/2012; Order of 5 June 2015 in relation to App 001/2014; and Order of 29 November 2015 in relation to App 001/2015.

4 OAU Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004.

5 See the listings provided on the Court's website, http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#finalised-opinions and http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#pending-opinions (accessed 31 May 2017).

strategic litigation on African human rights, from access to the African Court's advisory opinion procedure. As the article sets out, while the *in principle* endorsement of NGO access is to be welcomed, the rest of the Court's decision raises a series of concerns. However, in so far as the Court has failed to live up to its potential as the pre-eminent arbiter of human rights jurisprudence in Africa, other tribunals, such as the Court of Justice of the Economic Community of West African States (ECOWAS Court), are likely to become the favoured venues for determining significant questions on the meaning and scope of the African Charter on Human and Peoples' Rights (African Charter).[6]

2 Background to the decision

SERAP brought its application in reliance on article 4 of the Protocol, which provides that the Court may provide an advisory opinion '[a]t the request of a member state of the [African Union], the [African Union], any of its organs, or any African organisation recognised by the [African Union]'.[7] SERAP's argument with respect to its standing was that it came within the scope of the definition of an 'African organisation recognised by the [African Union]' and was therefore entitled to make the instant request.[8]

As for the substance of the request, SERAP sought the Court's opinion on the question of whether 'extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter', and highlighted article 2 (the right to freedom from discrimination on grounds including 'any other status'); article 19 (the right to equal protection of rights); article 21 (the right of states to dispose of natural resources 'in the exclusive interest of the people'); and article 22 (the right of peoples to development, and the duty on states to ensure the same).[9] SERAP sought, by way of the advisory opinion, a ruling on 'whether or not the growing poverty, under-development and grand corruption in Nigeria and elsewhere in Africa amount to violations of the human rights guaranteed under the African Charter'.[10]

Various parties submitted observations on SERAP. The Zambian government, the Cape Verde government, and the Centre for Human Rights at the University of Pretoria supported the position that SERAP

6 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

7 Art 4(1) Protocol. It is not in dispute that, following the replacement of the OAU with the AU in July 2002, references in the Protocol to the OAU ought to be read as references to the AU.

8 Para 6 Advisory Opinion (n 1 above).

9 Paras 2 & 3 Advisory Opinion.

10 See the report of the Request's contents in C Jannah 'SERAP loses case seeking to empower citizens to sue corrupt governments in African courts' *Daily Post Nigeria* 4 June 2017.

came within the scope of article 4 of the Protocol as an 'African organisation recognised by the [African Union]'.[11] The Ugandan and Nigerian governments, however, both objected on slightly different grounds. According to Uganda, the barrier to SERAP's request was that SERAP did not at all qualify as an 'organisation' in the relevant sense,[12] whereas the Nigerian government's position was that, while an organisation, it was not an organisation 'recognised by the [African Union]', and that recognition by an *organ of* the AU (namely, the African Commission on Human and Peoples' Rights (African Commission)) was not sufficient. According to Nigeria, 'there is a clear distinction between the AU and an organ of the AU. Recognition by an organ of the AU is not the same as recognition by the AU', and on that basis Nigeria invited the Court to decline jurisdiction.[13]

3 African Court's reasoning

3.1 'African organisation'

As a starting point, the African Court rejected the position of the Ugandan government, and concluded that the definition of 'an African organisation' could encompass an NGO, as long as it was duly registered according to the relevant laws in its jurisdiction, headquartered in an African country, and operating within Africa.[14] This clarification that NGOs can be 'organisations' for the purposes of article 4 of the Protocol is clearly correct. Interpreting article 4 in light of the text of the Protocol as a whole (following one of the standard rules of treaty interpretation at international law set out in the Vienna Convention),[15] it is significant that the term 'organisations' occurs elsewhere in the Protocol with the qualifiers 'intergovernmental organisations' (article 5(1)(e)) and 'non-governmental organisations' (article 5(3)). That usage demonstrates both that non-governmental organizations are known to, and contemplated by, the Protocol, and that, when unqualified, the term 'organisations' should embrace those NGOs.[16]

3.2 Recognition

However, the second half of the African Court's reasoning is surprising. The Court was minded to agree with the position

11 Paras 27, 30-31 & 33-36 Advisory Opinion.
12 Paras 25-26 Advisory Opinion.
13 Paras 28-29 Advisory Opinion.
14 Paras 46-51 Advisory Opinion.
15 Arts 33(1)-(2) UN Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980 1155 UNTS 331.
16 This point has been made previously. See F Viljoen *International human rights law in Africa* (2012) 447; F Viljoen 'Communications under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 130.

advanced by the Nigerian government to the effect that an NGO will only have standing to bring a request for an advisory opinion if that NGO has been granted observer status by the AU.[17] It is only through that process of observer accreditation to the AU, pursuant to the Criteria for Granting Observer Status and for a System of Accreditation within the African Union,[18] that the Court considers that an NGO qualifies as an 'African organisation recognised by the [African Union]' for the purposes of article 4 of the Protocol.

That approach was fatal to SERAP's request since SERAP, while recognised and granted observer status by the African Commission,[19] has *not* obtained accreditation and observer status under the separate AU procedure.

The Court's conclusion was based expressly on a textual analysis. As the Court notes, article 4 'makes reference only to organisations recognised by the African Union and says nothing about those recognised by an organ of the African Union'.[20] The Court contrasted this reference to the AU alone with the fact that, earlier in article 4, reference is made to both the AU itself and 'any of [the African Union's] organs'. According to the Court's reasoning, '[h]ad the authors of the Protocol wanted to also target African organisations recognised by an organ of the African Union, they would certainly not have hesitated to make this clear', and could expressly have referred to organisations with Commission observer status in article 4 if that is what was intended (noting that reference to such organisations is expressly made with respect to standing in relation to contentious cases).[21] The absence of that express reference, according to the Court, obliges the reader to conclude that organisations with observer status to the Commission are intentionally excluded from the list of organisations capable of making a request for an advisory opinion under article 4.[22]

3.3 Recalling the background to article 4

However, on further analysis the Court's interpretation of article 4, purportedly based strictly on the words of the Protocol, breaks down. First, while it is a trite observation to make, it is worth noting at the outset that, despite the Court's assertion, it is obvious that whatever the 'authors of the Protocol' in 1998 may have contemplated when referring to recognition by the OAU, it self-evidently cannot have

17 Para 60 Advisory Opinion.

18 Adopted at the 5th ordinary session of the Assembly of Heads of State and Government of the African Union, by Executive Council Decision EX.CL 195 (VII), Annex V of 1-2 July 2005.

19 Granted at the 43rd ordinary session of the African Commission on Human and Peoples' Rights, 7-22 May 2008.

20 Para 54 Advisory Opinion.

21 See art 5(3) Protocol and para 54 Advisory Opinion.

22 Para 55 Advisory Opinion.

been the procedure for observer accreditation adopted by the OAU's successor body, the AU, in 2005.

At the time of the drafting of the Protocol, systems had, of course, long existed whereby the OAU and the African Commission granted observer status to various NGOs, which entitled those bodies to attend meetings at the periodic sessions and to contribute in various ways to the deliberations of those bodies. Formalised processes for the OAU had been in place since at least 1967,[23] while the African Commission began granting observer status at its 3rd ordinary session in 1988.[24] Therefore, it would be theoretically plausible for the Court to have adopted a reading of article 4 to the effect that it intended to refer to African organisations recognised by the OAU, or its successor, according to the rules granting such recognition in force from time to time.

However, to adopt such an interpretation is to interpret the Protocol in a vacuum. As the recitals in the Preamble to the Protocol make clear, the Protocol was adopted in light of a 'firm conviction' on the part of the state parties 'that the attainment of the objectives of the African Charter … requires the establishment of an African Court … to complement and reinforce the functions of the African Commission'. Turning to the African Charter itself, one of the functions of the Commission under article 45, which the Court was intended to 'complement and reinforce' as it took over the judicial role, was to '[i]nterpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organisation recognised by the OAU'.[25] Accordingly, prior to the creation of the African Court, it was within the African Commission's mandate to receive and act upon requests for advisory opinions.

As a matter of fact, the African Commission was never faced with the need to opine on the scope of the term 'African organisation recognised by the OAU' in the African Charter, since only one advisory opinion has ever been requested of, or issued by, the Commission.[26] The limited use of the procedure may be explained by the fact that the Commission's regular meetings provide another forum for clarifying questions as to states' human rights duties by way of the proposal by NGOs of resolutions for decision.[27] Whatever may be the practicalities, as a matter of purposive interpretation, it would indeed

23 Adopted at the 9th ordinary session by Council of Ministers Decision CM/162/Rev.1, September 1967.

24 With the first organisations recognised being the African Association of International Law, the International Commission of Jurists and Amnesty International.

25 Art 45(3) African Charter.

26 Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (responding to a request from the Assembly of the African Union) adopted at the 41st ordinary session, 16-30 May 2007.

27 See V Nmehielle *The African human rights system: Its laws, practice, and institutions* (2001) 181-182.

be peculiar if the Charter, bestowing on the *Commission* the task of receiving requests for advisory opinions from a range of organisations concerned with the protection of human rights in Africa, had the effect of excluding the very organisations which the Commission had recognised as having particular expertise in the field by the grant of observer status. Interpreted in light of the purpose of the African Charter and the context of the pre-existing practice of the African Commission in granting observer status, it is submitted that the better view is that the reference in article 45(3) of the Charter to 'an African Organisation recognised by the OAU' should be interpreted as meaning an African organisation recognised by any of the organs of the OAU, including the African Commission.

Just as that is obviously a sensible purposive reading, it clearly is a reasonable reading of the text. It is a basic legal principle that a body may act through its agents, whether the body is constituted in private law, public law, or acts at the international plane. The International Law Commission, in its Draft Articles on the Responsibility of International Organisations, has reflected this principle in its draft article 6, which provides that '[t]he conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law'.[28] There can be no realistic debate but that the African Commission is an organ of the AU. While the basis of the Commission's authority derives from the African Charter, rather than subsidiary acts of the OAU/AU, the Commission has long operated on a day-to-day basis as the human rights promotion and protection arm of the OAU/AU, and is represented as an organ of the AU on the AU website.[29] Accordingly, the textual reading of the phrase 'African organisation recognised by the OAU' can embrace those organisations granted official recognition (via observer status) with the African Commission (acting on behalf of the OAU/AU). This reinforces the clear purposive sense in that interpretation, which would otherwise have left the Commission in the peculiar situation under the Charter of being disbarred from receiving requests from NGOs it had previously judged best placed to make such requests.

Against that background of the proper meaning of the term 'African organisations recognised by the OAU' in article 45(3) of the African Charter itself, it is simply perverse for the meaning of those same words, when repeated in article 4 of the Protocol, to change in such a way that a whole category of applicable NGOs – those recognised by the African Commission – lose their *locus standi* without any consideration of the issue. The *travaux préparatoires* certainly contain no mention that article 4 was considered to have any such

28 International Law Commission 'Draft articles on the responsibility of international organisations, with commentaries' (2011) II *Yearbook of the International Law Commission* art 6(1).

29 See https://www.au.int/web/en/organs/cj (accessed 7 June 2017).

effect.[30] Such an effect would also appear to frustrate the explicit purpose of the Protocol to 'complement and reinforce the functions of the African Commission' in human rights protection, rather than to retreat from that task.

The African Court's decision on the scope of article 4 of the Protocol, by simply ignoring the legacy of the same advisory opinion provision in the African Charter, is inconsistent with the purpose of the Protocol in building on the Charter, and inconsistent with the long-standing (if, admittedly, little-used) role of the advisory opinion process before the African Commission.

4 Implications for African human rights law

A decision which fails to properly interpret the meaning of the Protocol is *per se* problematic. However, this particular decision of the African Court raises particular concerns given that, by excluding an entire category of NGOs from access to the advisory jurisdiction of the Court, the Court sends a message that NGOs seeking clarification on difficult questions regarding the interpretation of African human rights law ought not to approach the Court.

That incentivises concerned NGOs to bring strategic litigation, or bring requests for advisory opinions in other, more accessible forums. One such forum, to which the African Court appears already to be surrendering control over the development of African human rights law, is the ECOWAS Court. The ECOWAS Court has taken an expansive approach to standing, ensuring that NGOs have access for the purposes of raising matters of public importance, even though the explicit terms of its Supplementary Protocol[31] do not expressly so provide.[32] That, combined with the absence of a requirement for the exhaustion of domestic remedies in human rights claims before the ECOWAS Court,[33] renders it a particularly attractive venue for strategic litigation to raise questions as to the scope and effect of the African Charter.

For the African Court to bar legitimate African NGOs from access to the advisory opinion procedure will only serve to hasten the move towards other tribunals, including the ECOWAS Court, when

30 The only substantive change to the wording of art 4 of the Protocol during the drafting process being the inclusion of the proviso that requests must not duplicate matters already under examination before the Commission. This proviso was introduced in the Addis Ababa Draft (1997).

31 ECOWAS Supplementary Protocol A/SP.1/01/05 amending the Preamble and arts 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol.

32 ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10 *The Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* Preliminary Objections Ruling of 10 December 2010 para 61.

33 ECW/CCJ/JUD/07/11 *Ocean King Nigeria Ltd v Senegal* (Judgment of 8 July 2011) para 41.

questions as to the meaning of the African Charter arise. This raises the real prospect of fragmentation of African human rights jurisprudence as between the African Court and the ECOWAS Court, and the undesirable consequence that either two different schools of jurisprudence may emerge as between the two tribunals applying the same Charter, or the AU's apex court loses control over the development of Charter jurisprudence to the ECOWAS Court. Neither outcome would ever have been intended by the authors of the African Charter and the African Court Protocol, but the African Court's misplaced claim of fidelity to the text of article 4 brings them a significant step closer.

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Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Michael Stein
Harvard Law School, United States of America

Johann van der Westhuizen
Retired Justice of the Constitutional Court of South Africa

Extraordinary lecturers

Adem Abebe
Senior Research Fellow, Max Planck Institute, Germany

Solomon Ebobrah
Professor of Law, Niger Delta University, Nigeria

Elizabeth Griffin
University of Essex

Enga Kameni
Manager, Legal Services, African Export-Import Bank, Egypt

Sarah Knuckey
Director, Project on Extrajudicial Executions, New York University School of Law, USA

Zonke Majodina
Previously of the South African Human Rights Commission and the UN Human Rights Committee

Karen Stefiszyn
Consultant

Advisory board

André Boraine
Dean, Faculty of Law, University of Pretoria

Edouard Jacot Guillarmod
Consultant

Johann Kriegler
Retired Justice of the Constitutional Court of South Africa

Bess Nkabinde
Justice of the Constitutional Court of South Africa

David Padilla
Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Sylvia Tamale
Makerere University, Kampala, Uganda

Johann van der Westhuizen
Retired Justice of the Constitutional Court of South Africa

Academic Programmes

- LLM/MPhil (Human Rights & Democratisation in Africa)
- LLM (International Trade & Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual & Reproductive Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Programmes at the Faculty of Law
- Gill Jacot Guillarmod Scholarship
- Disability Rights Scholarship Programme
- Alumni Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- African Moot Court
- Nelson Mandela World Human Rights Moot Court
- African Disability Rights Moot Court
- Extractive Industries (African Commission Working Group)
- Human Rights Clinics
- Human Rights Conferences
- Annual African Trade Moot

Research

- AIDS & Human Rights Research Unit
- Business and Human Rights Unit
- Disability Rights Unit
- Ending Mass Atrocities in Africa Conference
- FRAME
- Freedom of Expression & Access to Information
- Gender Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Unit (IDLU)
- International Law in Domestic Courts (ILDC)
- Unlawful Killings Unit
- Children's Rights Unit
- 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*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2016
Compiled by: I de Meyer
Source: http//www.au.int (accessed 15 June 2017)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	**20/11/16**	**10/01/17**
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	**30/11/16**
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		**03/01/11**		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	**10/01/11**	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	**06/10/10**	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			**23/02/17**
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
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					
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	
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**54**	**46**	**48**	**30**	**38**	**30**

* Additional declaration under article 34(6)
Ratifications after 31 July 2016 are indicated in bold