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Editorial

The publication of this issue of the *African Human Rights Journal* marks twenty years since the *Journal* first appeared in 2001. It appears at a time of considerable crisis and turmoil.

COVID-19

Since the last issue of the *Journal* that appeared at the end of 2019, the world has been engulfed by the devastating spread of the novel coronavirus, leaving in its wake a large number of deaths, and the disturbing effect of regulations promulgated in response to the pandemic. Although most African states (with the exception of South Africa) have up to mid-2020 been spared the pandemic's most distressing effects, the continent by no means has been left intact.

Each of the three human rights bodies of the African Union (AU) has in its own way responded by accounting for the implications of COVID-19 on its operation, and on its substantive mandate.

The African Court on Human and Peoples' Rights (African Court), for example, held virtual meetings to discuss pressing issues and measures to ensure the continuity of the Court's business; it suspended time limits in response to COVID-19; and it held its 57th ordinary session virtually, the first time it has ever done so. The African Commission on Human and Peoples' Rights (African Commission) also for the first time held its sessions virtually, with its 27th extraordinary session and its 66th ordinary session taking place on virtual platforms. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) plans to hold its 34th ordinary session at the AU Commission in Addis Ababa later this year.

Of the three bodies the African Commission has – understandably, given the nature and scope of its mandate – been the most active in

its response to COVID-19. It issued its first statement on the human rights aspect of COVID-19 on 24 March 2020, and after that issued numerous statements as a Commission, and in the name of its various special mechanisms. It also on several occasions used one of its most incisive tools, the issuing of urgent appeals, to address concerns requiring immediate action by states. It further directed press releases and other statements to specific states. States targeted in this way include Burundi, Libya, South Africa, Tanzania and Togo. The African Children's Committee formulated a 'Guiding Note on Children's Rights during COVID-19' covering an array of children's rights-adapted measures for states' integration into their COVID-19 response measures. Being dependent on the submission of cases to it, the African Court has not yet had the opportunity to deal with a case related to COVID-19.

Rush to withdraw article 34(6) declarations

A crisis of a different nature arose when, within the space of six months, three states followed Rwanda in withdrawing their declarations under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court (African Court Protocol), accepting the competence of individuals and non-governmental organisations (NGOs) enjoying observer status with the African Commission to submit cases directly to the Court. Rwanda withdrew its declaration on 24 February 2016; Tanzania did so on 21 November 2019; Benin followed on 24 March 2020; and the most recent was Côte d'Ivoire, whose notice of withdrawal was dated 28 April 2020. Since only ten states had ever made this declaration, it means that only six states now allow direct individual access to the Court. Given that by far the majority of cases emanated from the four withdrawing states, the immediate prospects of new cases reaching the Court look bleak. More disconcerting is the possibility of any of the six remaining states following the example of the withdrawing four, and the stifling effect these withdrawals may have on the likelihood of any more states making the article 34(6) declaration, or of any more states ratifying the Court Protocol.

This issue of the *Journal*

In the first three articles of this issue of the *Journal* the authors draw our attention to various aspects related to the African Court. Adjolohoun identifies surface and deep-seated factors that may explain the withdrawal by the four states from the African Court's direct individual access jurisdiction. At a surface level, he shows that each of the states faced adverse judgments related to important socio-

political issues of considerable domestic contention. At a more deep-seated level he argues that more pervasive issues are at play, which he categorises as ‘system design’ issues and as matters related to the Court’s exercise of its mandate (its ‘practice’). While also focusing on the African Court, Waschefort turns his analytical gaze to the Court’s subject-matter jurisdiction and interpretive competence in relation to international humanitarian law. Rodríguez and Álvarez place the Court’s rulings, orders and judgments in two cases concerning Libya in the territorial context of the conflict and instability in Libya and the temporal context following the Arab uprisings. They endeavour to draw lessons from these decisions to assess the consolidation and legitimation of the Court.

The next three contributions deal with issues of continental relevance. Ncube interrogates the Pan-African Parliament’s capacity to promote and protect human rights, in the process drawing scholarly attention to a much-neglected topic. Gravett deals with an issue of emerging interest and concern: the influence of the Chinese model of internet sovereignty in Africa. Twinomugisha examines the use of a rights-based approach, based on the right to health, to effectively address non-communicable diseases in Uganda.

The remaining articles are country-specific. Under the 2013 Constitution of Zimbabwe, judges of the Supreme Court have sat as the Constitutional Court to hear constitutional matters. From March 2020 the Zimbabwean Constitutional Court sits as a separate court in its own right. Mavedzenge takes stock of six years of human rights jurisprudence of the Supreme Court sitting as a Constitutional Court. Makanje considers the resource challenges to protecting vulnerable witnesses in Malawi. Maziwisa and Lenaghan critically examine access to the right to water for people living in rural Limpopo, a province in the northern part of South Africa. Kahn examines the extent to which the right to dignity extends to refugees in South Africa. Arendse deals with the right to basic education, which is enshrined in the South African Constitution (as it is in the constitutions of many other African states). She draws insights from a landmark decision by the South African Constitutional Court, *Governing Body of the Juma Masjid Primary School v Essa NO*, showing its impact on the decisions of other South African courts. Ayalew assesses the limits to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples’ Rights.

A recent publication of the Pretoria University Law Press (PULP), the edited volume *Exploring the link between poverty and human*

rights in Africa, brought together by the editors Durojaye and Mirugi-Mukundi, is reviewed by Mathiba.

We extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Foluso Adegalu; Daphine Agaba; Victor Ayeni; Gina Bekker; Rutendo Chinomona; Christian Aime Chofor Che; Helene dos Santos; Hlengiwe Dube; Charles Fombad; Lisa Forman; Michaela Hailbronner; Christof Heyns; Tomiwa Ilori; Anton Kok; Dan Kuwali; Sarah Mabeza; Konstantinos Magliveras; Tom Mulisa; Rachel Murray; Mwiza Nkhata; Mkhululi Nyathi; Paul Ogendi; Karabo Ozah; Misha Plagis; Michael Power; Thomas Probert; Solomon Sacco; Ann Skelton; Lee Stone; and Micha Wiebusch.

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A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights

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Summary: *In the space of four years, between 2016 and 2020, four of the ten states that had recognised the jurisdiction of the African Court on Human and Peoples' Rights to receive cases directly from individuals and NGOs withdrew their declarations made under article 34(6) of the Court Protocol. While this form of contestation is not unprecedented in the history of states' behaviour towards international courts, this article argues that the disengagement from the African Court's jurisdiction involves peculiarities that specifically relate to the Court's system design and its practice. The main contention in the article is that the declaration-based adherence to the African Court's jurisdiction is in crisis due to a cost-benefit imbalance. The article argues that although all four withdrawals resulted from decisions of the Court on important and contentious domestic socio-political issues, systemic features such as the lack of appeal, an overly restrictive review mechanism and the weak functioning*

* ENA, Licence (Benin) LLM LLD (Pretoria); sathorace@yahoo.fr. The opinions expressed in this article are the author's own and do not purport to reflect the opinions or views of the African Court on Human and Peoples' Rights. I am grateful to the *Journal* for editorial guidance, and to Ms Lee P Angel for her support in preparing this article.

of institutional shields contributed significantly to the withdrawal. The article also investigates administration of justice and judicial law making by the Court as factors that contributed to states' distrust, before proposing options to curb the crisis and regain state adherence.

Keywords: *African Court; article 34(6) declaration; individual access; indirect access; withdrawal; legitimacy; discontent management; system design; judicial law making; systemic reforms*

1 Introduction

The African Court on Human and Peoples' Rights (African Court), amid euphoria and expectation, was established as a fully-fledged judicial organ.¹ Yet, the Court arguably was born with congenital defects. In designing the Court, African Union (AU) member states put in place a two-tiered system of state adherence. Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) presents the first tier of acceptance, allowing for indirect access to the Court via the African Commission on Human and Peoples' Rights (African Commission). As at July 2020, 30 of the 55 member states of the AU had ratified the Protocol. Depositing a declaration under article 34(6) of the Protocol, thereby accepting direct access to the Court of individuals and non-governmental organisations (NGOs) enjoying observer status with the Commission, provides for the second tier of acceptance.² Only ten states, with Burkina Faso being the first in 1998 and The Gambia the last to do so in 2020, had ever adhered to both tiers.³

As the Court's operations intensified, the second tier has come to threaten the very operational viability of the institution. In the space of four years, between 2016 and 2020, four of the ten states that had previously filed it, withdrew their article 34(6) declaration: Rwanda in 2016, Tanzania in 2019, and Benin and Côte d'Ivoire in 2020. Between them, the four withdrawing states have approximately 85 per cent of the litigation before the Court. The remaining 15 per

1 See, in general, G Niyungeko 'La Cour africaine des droits de l'homme et des peuples: défis et perspectives' (2009) 79 *Revue Trimestrielle des Droits de l'Homme* 736; F Viljoen 'A human rights court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 77.

2 See art 34(6) African Court Protocol (adopted 1998, entered into force 2004).

3 The following states filed the declaration: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia.

cent of the Court's cases were brought against states that are either recently restored democracies, such as The Gambia and Tunisia, or post-transitional democracies grappling with terrorism or other forms of instability, such as Burkina Faso and Mali. Notably, none of the AU's 'big five' – Algeria, Egypt, Morocco, Nigeria and South Africa – has filed the declaration,⁴ nor has Ethiopia, which hosts the AU headquarters. It is beyond dispute that this emergent trend of withdrawal jeopardises the Court's mandate to protect human rights on the African continent.⁵

State contestation is not unique to the African Court. Rather, it reflects a global trend,⁶ exemplified by the withdrawals of France and the United States from the International Court of Justice (ICJ),⁷ and of Trinidad and Tobago and Peru from the Inter-American Court of Human Rights (Inter-American Court).⁸ Closer to the African Court, the Economic Community of West African States (ECOWAS) Court of Justice, the East African Court of Justice and the defunct Southern African Development Community (SADC) Tribunal have all faced various levels of contestation.⁹

4 The term 'big fives' refers to the five biggest contributors to the African Union budget. See T Gwatiwa 'America's snub of the African Union should spur regional powers into action' *The Conversation*, <https://theconversation.com/americas-snub-of-the-african-union-should-spur-regional-powers-into-action-77443> (accessed 14 July 2020); International Crisis Group 'Seven priorities for the African Union in 2018', <https://www.crisisgroup.org/africa/b135-seven-priorities-african-union-2018> (accessed 14 July 2020).

5 See J Biegon 'Tanzania: Withdrawal of individual rights to African Court will deepen repression', <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/> (accessed 14 July 2020).

6 See, in general, C McLachlan 'The assault on international adjudication and the limits of withdrawal' (2019) 28 KFG Working Paper Series, *The International Rule of Law – Rise or Decline?*, SSRN: <https://ssrn.com/abstract=3335394> or <http://dx.doi.org/10.2139/ssrn.3335394> (accessed 13 July 2020); M Wiebush et al 'Backlash against international courts: Explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197; X Soley & S Steininger 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' (2018) 14 *International Journal of Law in Context* 237; KJ Alter et al 'How context shapes the authority of international courts' (2016) 79 *Law and Contemporary Problems* 1.

7 See, in general, F Charbi 'Le déclin des déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de justice' (2002) 43 *Les Cahiers de Droit* 433.

8 See Soley & Steininger (n 6).

9 See KJ Alter et al 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293-297-298.

In examining the problem, labelling states as rogue and anti-rule of law may be attractive,¹⁰ but tells only part of the story. It is important, instead, to appreciate why states join an international regime such as the African human rights system. Theories explaining state adherence to international law and mechanisms include coercion, persuasion and acculturation.¹¹ With a specific emphasis on the benefits of adhering to international adjudication mechanisms, commentators have argued that states join despite their distrust in the systems because they balance the costs and benefits to them, and set up shielding mechanisms such as the requirement to make specific declarations recognising a body's jurisdiction or accepting individual access.¹² Accordingly, as to what motivates states to confront or disengage from international courts, empirical work has identified the cost of membership, the influence on the domestic political system, and the domestic impact of judgments.¹³ Ultimately, when the cost of adhering is significantly higher than the benefits, states may activate the shield by withdrawing.¹⁴

The current status of withdrawals from the jurisdiction of the African Court attests to the fact that states' trust in the Court is on the decline.¹⁵ In the wake of this trend, the all-important question is how the challenge to the Court's legitimacy should be addressed. In this article I advance the argument that the growing discontent among states must be addressed and redressed in a systematic manner with a view to curbing withdrawals and rebuilding state adherence.

10 See Biegon (n 5).

11 See OA Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 *Journal of Conflict Resolution* 588; DH Moore 'Signalling theory of human rights compliance' (2003) 97 *Northwestern University Law Review* 879.

12 See, in general, Gharbi (n 7); M Virally 'Le champ opératoire du règlement judiciaire international' (1983) 87 *Revue Générale de Droit International Public* 281; GL Scott & CL Carr 'The ICJ and compulsory jurisdiction: The case for closing the clause' (1987) 81 *American Journal of International Law* 57; J Soubeyrol 'Validité dans le temps de la déclaration d'acceptation de la juridiction obligatoire' (1959) 5 *Annuaire Français de Droit International* 232, 232-233.

13 See M Wiebusch & TG Daly 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294; Soley & Steininger (n 6) 237-242.

14 As above.

15 See N de Silva 'Individual and NGO access to the African Court on Human and Peoples' Rights: The latest blow from Tanzania' Blog of the *European Journal of International Law* 16 December 2019; T David & E Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African Court' Blog of the *European Journal of International Law* 19 May 2020; AK Zouapet 'Victim of its commitment ... You, passer-by, a tear to the proclaimed virtue': Should the epitaph of the African Court on Human and Peoples' Rights be prepared?' Blog of the *European Journal of International Law* 5 May 2020.

I begin the discussion by exploring the African Court's current jurisdictional crisis, focusing on the factors that precipitated the withdrawals. The discussion proceeds to demonstrate why and how the design of the system, the practice of the Court and the weak functioning of shielding mechanisms, including the African Commission, ignited a fast-tracked process of diminishing state cooperation. Finally, I expand on some of the solutions that in my view are most likely to help reinvigorate the Court's legitimacy and restore states' confidence in the system.

2 A jurisdictional and existential crisis

I argue that the Court faces a crisis that is jurisdictional and existential in nature, as the current state of affairs has a critical impact not only on the scope of intervention of the Court but also on its authority and legitimacy. The crisis is one of both substance and scope. Below, I analyse the language used as part of states' contestation, and consider the Court's response, while assessing the validity of the arguments arising from these statements.

The African Court faces a crisis in substance. The extent of withdrawal is a crisis as withdrawals are among the worst forms of contestation in the history of state-led challenges to international courts.¹⁶ Most severe of all would be for states to denounce the African Court Protocol, or not to renew the terms of judges, as has occurred in respect of the SADC Tribunal.¹⁷ Although it is not a statutory requirement in the Court Protocol that states should reveal the reasons for either making or withdrawing their article 34(6) declarations, all four states that withdrew have given some indication of their motivations. The discussion therefore relies on the language of contestation as a relevant prism through which to fully appreciate the nature of state discontent. In the analysis it is highlighted that all four withdrawals had remote or proxy grounds in the Court's rulings pertaining to socio-political issues that are of critical importance in the national sphere.

16 See, in general, Soley & Steininger (n 6), Gharbi (n 7) and McLachlan (n 6).

17 See E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 45; SH Adjolohoun 'The making and remaking of national constitutions in African regional courts' (2018) 1 *African Journal of Comparative Constitutional Law* 35.

2.1 Rwanda's abrupt withdrawal over a perception of Court partiality and matters related to genocide

Rwanda filed its declaration on 22 January 2013. When withdrawing it on 24 February 2016, Rwanda stated that it was doing so over 'a fugitive from – the Tutsi genocide – justice [who] has, pursuant to the above-mentioned Declaration, secured the right to be heard by the Honourable Court, ultimately gaining a platform for reinvention'.¹⁸

Subsequently, on 30 January 2017 the government of Rwanda informed the registry that it would no longer participate in proceedings before the Court on the grounds that the process with regard to cases involving Rwanda was not independent; that its outcome was pre-determined; and because the Court refused to hold a hearing in the matter of *Victoire Ingabire Umuhiza v Rwanda*¹⁹ to rule on the issue whether it was proper for genocide accused or convicts to be granted access.²⁰ The state also objected to the fact that the Court, without informing the parties, issued a substantive *corrigendum* signed only by the Court's President and not the full bench, as was the case with the initial decision.²¹

The Court formally responded to Rwanda's contestations through two channels. Regarding the withdrawal, the Court gave a judicial response through its ruling on jurisdiction of 3 June 2016 in the *Umuhiza* case.²² There, it ruled that the withdrawal was valid, would take effect after 12 months of the deposit of the withdrawal with the AU, and did not affect pending cases. On the administrative side, the registry of the Court informed the state that its cooperation with non-governmental institutions should not be read as an encroachment on the independence of the Court, and that Rwanda was free to raise the issue in the course of the proceedings. With respect to non-participation, the registry also communicated to the state that the

18 Republic of Rwanda 'Withdrawal for review by the Republic of Rwanda from the Declaration made under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights' 24 February 2016 para 6, <https://www.chr.up.ac.za/news-archive/2016/1241-report-rwanda-s-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court> (accessed 9 July 2020).

19 *Ingabire Victoire Umuhiza v Rwanda* (Procedure, Withdrawal) (2016) 1 AfCLR 562.

20 See D Pavot 'Le retrait de la déclaration du Rwanda permettant aux individus et ONG de saisir la Cour africaine des droits de l'homme et des peuples' (2017) 30 *Revue Québécoise de Droit International* 221 paras 35-37.

21 Pavot (n 20) para 36.

22 *Umuhiza* (Procedure, Withdrawal).

service of pleadings on both parties would proceed in adherence with the relevant rules.²³

I argue that the language used in Rwanda's communication is one of crisis, as it reveals an attack on the independence and legitimacy of the African Court. Whether the reasons advanced are legally tenable is another issue altogether. Allowing alleged genocide fugitives to file cases before the Court cannot in itself warrant a conclusion on the impartiality of the Court. A judicial institution operates based on statutes and neither the Court Protocol nor its Rules provide for the status of genocide convict as one of the criteria governing jurisdiction or admissibility.²⁴ The Court's response to the state's decision to cease participation is also legally sound given that service, the exchange of pleadings and default judgment were in accordance with statutory prescripts. The true reason for the withdrawal may well be, as some commentators suggest, that Rwexit – Rwanda's withdrawal of its declaration – sought to prevent the Court from revealing the state of socio-political governance in Rwanda.²⁵ Nevertheless, perhaps the Court should have granted the hearing on the question of whether suspects or convicts of crimes as grave as genocide should be allowed to submit a case to the Court. By doing so it would have used the opportunity to make a ruling on an interesting and important question at the intersection between international criminal and human rights law.

2.2 Tanzania's exit over litigation fatigue coated in justification based on reservation

The second state to withdraw its declaration was Tanzania, which did so on 21 November 2019. Its notice reads as follows: '[T]he declaration has been implemented contrary to the reservations submitted by the United Republic of Tanzania when making the declaration.'²⁶ The text of the declaration filed on 9 March 2010

23 Pavot (n 20).

24 See arts 3, 5 and 34(6) of the African Court Protocol; Rules 26, 33 and 40 of Court Rules (2010); and art 56 of the African Charter on Human and Peoples' Rights (adopted 1981, entered into force 1986). I make use of the 2010 Rules of Procedure of the Court for the sake of convenience as the new Rules, which entered into force on 26 June 2020, had yet to be published at the time of this writing.

25 See O Windridge 'Assessing Rwexit: The impact and implications of Rwanda's withdrawal of its article 34(6) declaration before the African Court on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 243; Wiebusch & Daly (n 13).

26 African Court 'Declarations entered by member states', <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> (accessed 9 July

states that access to the Court 'should only be granted ... once all domestic legal remedies have been exhausted and in adherence with the Constitution'.²⁷

The issue of the reservations and their validity formally arose for the first time when Tanzania adduced them as a ground for withdrawal. While international law allows states to make reservations to treaties,²⁸ or recognition of jurisdiction,²⁹ it is generally accepted that these limitations should not hamper the discretionary exercise by the tribunal of its jurisdiction.³⁰ As such, reservations should be clear, and not 'fake' or 'illicit'.³¹ 'Fake' reservations are those that are superfluous because they provide for an exception that is inherent in the applicable law.³² Against this understanding, Tanzania's reservation relating to the exhaustion of local remedies would not stand the test of validity as the reserved rule is already enshrined in the applicable law before the Court as a condition of admissibility under article 56(5) of the Charter, and Rule 40(5) of Court Rules.³³ 'Illicit' reservations are those that mainly touch on material jurisdiction.³⁴ Reservations on subjective national jurisdiction, for instance, fall under this category when they empty the declaration of its object and purpose.³⁵ Tanzania's second reservation that direct access for individuals and NGOs 'should only be granted ... in adherence to the Constitution' exemplifies an 'illicit' reservation. Such reservation is not in conformity with articles 5(3) and 34(6) of the African Court Protocol, which provide for the filing of the declaration as the sole condition of access. The reservation is 'illicit' in the sense that it annihilates the very purpose of the declaration, which is to allow direct individual access to the Court, including challenging the conformity of the Constitution with international law ratified by the concerned

2020).

27 As above.

28 See art 2(1)(d) Vienna Convention on the Law of Treaties 1969.

29 See J Basdevant *Dictionnaire de la terminologie du droit international* (1960) 535; S Rosenne *The law and practice of the International Court* (1965) 26.

30 See Gharbi (n 7) 442; E Neumayer 'Qualified ratification: Explaining reservations to international human rights treaties' (2007) 36 *The Journal of Legal Studies* 397; H de Fumel *Les réserves dans les déclarations d'acceptation de la juridiction obligatoire de la CIJ* (1962) 30.

31 See Gharbi (n 7) 445; WH Briggs 'Reservation to the acceptance of compulsory jurisdictions of the International Court of Justice' (1958) *RCADI* 229 232.

32 Gharbi (n 7) 445-448.

33 As discussed later in the article, the Court, as a matter of established case-law, has bypassed the rule and exempted applicants from exhausting non-judicial and extraordinary remedies.

34 Gharbi (n 7) 448-452.

35 See Case of Certain Norwegian Loans (*France v Norway*) ICJ Reports, 1957 9 ICJ.

state.³⁶ It is also not clear why Tanzania raised this reservation only in 2019 after having accepted the Court's 2013 judgment and having taken steps to bring its Constitution in line with the African Charter on Human and Peoples' Rights (African Charter) in the *Mtikila* case.³⁷

Tanzania's withdrawal came as the conclusion to an incremental contestation process, was not abrupt and could, therefore, have been foreseen and prevented. Some of the most systematic and consistent acts of contestation include objections to the African Court exercising both first instance and appellate jurisdiction,³⁸ and overstepping the authority of apex municipal courts on issues such as nationality³⁹ and the death penalty in respect of which the state consistently affirmed that sentences were valid under international law.⁴⁰

Prior to withdrawing its declaration Tanzania also took steps related to cooperation with the Court, including by seeking an extension of time in individual cases and initiating or participating in meetings between the registry, the Attorney-General and the Solicitor-General to discuss more effective judicial cooperation.⁴¹ There is no evidence that the proposals towards an improved judicial

36 See art 3(1) of the Protocol.

37 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (Merits) (2013) 1 AfCLR 34 para 82(3); *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599.

38 See, among others, *Ernest Francis Mtingwi v Republic of Malawi* (Jurisdiction) (2013) 1 AfCLR 190 para 14; *Alex Thomas v United Republic of Tanzania* (Merits) (2015) 1 AfCLR 465 para 130; *Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania* (Merits) (2017) 2 AfCLR 65 paras 27-40 (court of first instance or appellate court) para 39 (constitutional appeal); *Ingabire Victoire Umuhoza v Republic of Rwanda* (Merits) (2017) 2 AfCLR 165 paras 52-56 (Court of Appeal or legislative body) para 167 (repeal of national legislation); *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 paras 31-34 (first instance and appellate court); *Alfred Agbesi Woyome v Republic of Ghana* (Merits, 28 July 2019) para 28 (human rights jurisdiction of domestic courts; review jurisdiction).

39 See *Anudo Ochieng Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248; *Robert John Penesis v Tanzania*, AfCHPR (Merits, 28 November 2019).

40 See, among others, *Armand Guehi v Tanzania* (Provisional Measures) (2016) 1 AfCLR 587; *Ally Rajabu & Others v Tanzania* (Provisional Measures) (2016) 1 AfCLR 590; *Joseph Mukwano v Tanzania* (Provisional Measures) (2016) 1 AfCLR 655; *Amini Juma v Tanzania* (Provisional Measures) (2016) 1 AfCLR 658; *Oscar Josiah v Tanzania* (Provisional Measures) (2016) 1 AfCLR 665; *Marthine Christain Msuguri v Tanzania* (Provisional Measures) (2016) 1 AfCLR 711.

41 See African Court Activity Report 2018, <https://en.african-court.org/images/Activity%20Reports/Activity%20report%20January%20-%20December%20%202018.pdf> (accessed 19 July 2020), paras 19-20; Z Ubwani 'Dar, AU court discuss clearance of cases' *The Citizen* 20 August 2018, <https://www.thecitizen.co.tz/news/-Dar--AU-court-discuss-clearance-of-cases/1840340-4720454-7jys1dz/index.html> (accessed 18 May 2020); African Court 'The Solicitor-General of Tanzania Dr Clement Mashamba held discussions with the African

cooperation materialised in a timely manner. Options that could have contributed to alleviating Tanzania's litigation burden include pilot judgment procedures, amicable settlements, and joinder of cases.

It could be anticipated from the above engagements that Tanzania was not prepared to carry a technically-challenging and increasing international litigation load. The state's long-standing and consistent challenge to meet deadlines in dozens of competing proceedings only resulted in an ultimate attempt to face the burden by resorting to a wholesale extension of time.⁴² Seemingly, while the Court acceded largely to grant the requested extensions within the feasible time frames, Tanzania had reached litigation fatigue.

It is worth recalling that, at the time of withdrawal, Tanzania had been the defendant in 138 out of a total of 255 cases received by the Court.⁴³ In addition to dealing with such litigation load, Tanzania has to carry the burden of implementation of over 60 administrative, legislative, judicial and pecuniary orders resulting from the Court's judgments. Most notably, when since 2016 reparations proceedings began to mature, the total damages in all resolved cases reached TSh 154 110 000 (approximately US\$ 106 618). Considered in isolation, this figure may be relatively affordable to a state such as Tanzania. However, the perception might be different when the figure is examined in the context of the legitimacy debate. It is worth noting that Tanzania had to honour these orders, concurrently and cumulatively. At the time of withdrawal four of the non-pecuniary orders had been implemented, while the cumulated time allocated for implementation was three years for the pecuniary orders and four years for other types of orders.⁴⁴

Court's Registrar Dr Robert Eno in Arusha, TZ' August 2018, https://twitter.com/court_afchpr/status/1030449110388756487?lang=en (accessed 18 May 2020).

42 See, eg, *Dismas Bunyerere v Tanzania*, AfCHPR (Merits and Reparations, 28 November 2019) paras 10-15; *Ramadhani Issa Malengo v Tanzania*, AfCHPR (Jurisdiction and Admissibility, 4 July 2019) paras 10-13; *Shukrani Masegenya Mango & Others v Tanzania*, AfCHPR (Merits and Reparations, 26 September 2019); *Kijiji Isiaga v Tanzania* (Merits) (2018) 2 AfCLR 218 paras 13-24.

43 African Court Registry, List of cases received as at 13 July 2020. As at 13 July 2020 the state had been dealing with 143 of the 285 applications received since inception. At the same date it was still dealing with 108 pending cases, which is more than half of the total cases pending before the Court against all ten states that filed the declaration.

44 African Court Activity Report 2019, <https://en.african-court.org/images/Activity%20Reports/EN%20-%20EX%20CL%201204%20AFCHPR%20ACTIVITY%20REPORT%20JANUARY%20-%20DECEMBER%202019.pdf> (accessed 19 July 2020).

All judgments of the Court being final, it seems that in the circumstances no option other than withdrawal would have been the reasonable course of action for a state concerned. This account does not deny that withdrawing indisputably represents a setback for justice and rights protection guaranteed in the African Charter.

Although neither the notice of withdrawal nor an official statement mentioned it, there is reason to believe that the Court's ruling on sensitive issues of socio-political relevance in Tanzania may have contributed significantly to the withdrawal. Following its first ever judgment on the merits delivered in the *Mtikila* case, ordering Tanzania to amend its Constitution and allow independent candidatures, the African Court made several rulings that touch on the operation of the judiciary in Tanzania mainly with respect to fair trial rights.⁴⁵ Furthermore, in the matter of *Robert John Penessis v Tanzania* the Court ruled that Tanzania had violated the applicant's right to nationality in proceedings where all evidentiary options arguably had not been investigated, as discussed more fully later in the article.⁴⁶ In the case of *Ally Rajabu & Others v Tanzania* the Court also ruled that the provisions of the Criminal Code prescribing the mandatory death sentence in cases of murder violated the right to due process and life, and ordered that the Code be amended to remove the sentence.⁴⁷

With respect to the core operation of the domestic justice system, the Court has consistently held that the review of judgments and constitutional petitions for breach of fundamental rights are extraordinary remedies that an applicant is not compelled to exhaust under article 56(5) of the African Charter.⁴⁸ Besides, some of its leading rulings such as in the *Thomas*,⁴⁹ *Abubakari*⁵⁰ and *Onyango*⁵¹ cases may have been perceived as delegitimising domestic criminal policy, in that they indirectly reversed the rulings of the highest

45 See A Possi "'It is better that ten guilty persons escape than that one innocent suffer": The African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 311.

46 *Penessis* (Merits).

47 *Ally Rajabu & Others v Tanzania*, AfCHPR (Merits and Reparations, 28 November 2019), especially para 93. See also submissions of the respondent in the above cited matters involving the death penalty (n 40).

48 *Thomas* (Merits) paras 62–65; *Mtikila* (Merits) para 82(3); *Abubakari* (Merits) paras 67, 70, 72; *Christopher Jonas v Tanzania* (Merits) (2017) 2 AfCLR 101 para 44; *Onyachi & Njoka v Tanzania* (Merits) para 56.

49 *Thomas v Tanzania*, AfCHPR (Reparations, 4 July 2019).

50 *Abubakari v Tanzania*, AfCHPR (Reparations, 4 July 2019).

51 *Wilfred Onyango Nganyi & Others v Tanzania*, AfCHPR (Reparations, 4 July 2019).

court of the land and compensated persons found guilty of crimes by domestic courts.⁵²

2.3 Benin's withdrawal for economic interests and regime stability

Benin filed its declaration on 8 February 2016. The African Court received the first application involving this state on 27 February 2017, which was also the only case for the year 2017. As at 13 July 2020 the Court had received a total of 28 cases involving Benin, more than half filed by or about political opponents including matters related to the May 2020 local elections and the upcoming March 2021 presidential election.⁵³

In the notice of withdrawal dated 24 March 2020 the Benin government stated that it withdrew the declaration because the Court implemented it in a manner that was 'perceived as a licence to interfere with matters that escape its competence causing serious disturbance to the municipal legal order and legal uncertainty that is fully detrimental to the necessary economic attractiveness of State Parties'.⁵⁴ As '[o]ne of the regrettable interferences and annoying disturbances', specific mention is made of an order of the Court suspending the enforcement of a domestic court judgment for seizure of property to honour a bank loan in a commercial deal between private persons.

Subsequent to the filing of the notice of withdrawal, the Minister of Justice further explained Benin's decision to withdraw as the consequence of 'several inconsistencies in decisions rendered by the Court in the recent years that have led Rwanda and Tanzania to withdraw their declarations'.⁵⁵ He justified Benin's withdrawal by

52 See A Huneeus 'Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493, 502-505, 512-517; T Ginsburg 'The clash of commitments at the International Criminal Court' (2009) 9 *Chicago Journal of International Law* 499 511-512.

53 African Court Registry, List of cases received as at 13 July 2020.

54 République du Bénin, Ministère des affaires étrangères et de la coopération Notification de retrait de la déclaration de reconnaissance de compétence, 24 March 2020, <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> (accessed 14 July 2020) (translation from French provided by the author).

55 Gouvernement du Bénin 'Retrait du Bénin de la CADHP – Déclaration du Garde Des Sceaux, Ministre de la Justice et de la Législation relative au retrait de la Déclaration d'acceptation de la juridiction de la Cour Africaine des Droits de l'Homme et des Peuples pour recevoir les requêtes individuelles et des Organisations non-gouvernementales' 20 April 2020, <https://www.gouv.bj/>

the fact that it was ‘impossible to sanction – these inconsistencies – which the Court itself has not given the impression that it is keen on addressing’.⁵⁶ The Minister concluded the statement by reiterating that Benin remained a party to the Court Protocol and announcing that ‘the President has decided to present to his peers a reform of the judicial institutions aiming at accelerating the operation of an African Court of Justice and Human Rights as contemplated during the 3rd ordinary session of the Assembly ... in July 2004’.⁵⁷ The order referred to in the notice was that for provisional measures issued in the matter of *Ghaby Kodeih v Benin*.⁵⁸ In this ruling the Court directed Benin to suspend the transfer of the property deed to the creditor of the domestic court judgment in the *Kodeih* matter, as well as any measure of dispossession of the applicant.⁵⁹

It is of critical importance to first deal with the suggestion in the notice that the Court overstepped its powers by asserting jurisdiction in a matter that the state averred was commercial in nature, and thus beyond the Court’s jurisdictional purview as a human rights court. In my opinion, disputes that were originally commercial, criminal or labour law-related, or even inherently administrative or constitutional, may end up being catalogued as human rights matters as long as they involve violations of human rights contained in a relevant instrument.⁶⁰

As examined by domestic courts, the *Kodeih* matter is related to commercial and business law, and arose from a dispute between private entities. However, in the case before the African Court the applicant alleged the violation of his right to appeal on the ground that the domestic lower court issued a judgment that was rendered as final and proceeded to authorise the enforcement thereof. The applicant averred that doing so also violated his right to property, as execution of the judgment would involve transferring the deed of the property to the creditor. That such allegations fall within the jurisdiction of the African Court is beyond dispute. The issue may be elsewhere, namely, that the Court would not have exercised

[actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/](https://www.africancourt.org/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/) (accessed 12 May 2020).

56 As above.

57 As above.

58 *Ghaby Kodeih v Benin*, AfCHPR (Order for provisional measures, 28 February 2020).

59 *Ghaby Kodeih* as above, operative section.

60 See, eg, for the East African Court of Justice, *James Katabazi v Uganda* (2007) EALS Law Digest 29; *Hon Sitenda Sebalu v Secretary General of EAC* (2011) EALS Law Digest 110; and, for the African Court, *Jean-Claude Roger Gombert v Côte d’Ivoire* (Jurisdiction and Admissibility) (2018) 2 AfCLR 270.

jurisdiction while the matter was obviously still pending final adjudication in the domestic system and, therefore, it inevitably would have been found inadmissible for not exhausting domestic remedies.

The fact that the notice of withdrawal mentions the *Kodeih* matter only as ‘one of the instances of interference’ suggests that Benin had further reasons for discontent and disengagement. As a matter of fact, between November 2018 and April 2020 the Court issued no less than eight ‘critical’ decisions against Benin, most of them involving political opposition figures.

On 5 and 7 December 2018 the Court issued twin orders in the matter of *Sébastien Germain Ajavon (CRIET) v Benin*, the first reopening pleadings to receive further submissions by the applicant,⁶¹ and the second directing Benin to suspend the execution of a 20-year prison sentence for drug trafficking.⁶² In its report to the Court on implementation of the second ruling the state argued the material impossibility to enforce the order on the ground that the African Court had issued it *ultra vires*, and that the decision was in breach of its sovereignty.⁶³ The argument made earlier in the *Kodeih* matter applies here: The Court’s ruling cannot be challenged on jurisdiction as it acted within the Court Protocol and its Rules of Procedure. Be that as it may, Benin’s report to the Court already indicated a posture of defiance and hence foretold a looming crisis. The following decisions appeared to have turned the looming crisis into direct confrontation and, finally, into divorce.

On 28 March 2019 the Court delivered its judgment on the merits in the *Ajavon CRIET* case, where it found several violations, mainly related to the right to appeal, and ordered Benin to take measures to annul the 20-year sentence and amend its laws to allow appeal of the rulings of the Court for Economic Crimes and Terrorism (CRIET). On 5 February 2020 Parliament adopted an executive amendment Bill establishing an Appeals Chamber within the CRIET⁶⁴ in implementation of the judgment.⁶⁵ On 22 April 2020 the President

61 *Ajavon v Benin* (re-opening of proceedings) (2018) 2 AfCLR 466. CRIET stands for *Cour de Répression des Infractions Economiques et du Terrorisme* – Court for Economic Crimes and Terrorism.

62 *Ajavon v Benin* (Provisional Measures) (2018) 2 AfCLR 470.

63 See *Sébastien Germain Ajavon v Benin*, AfCHPR (Merits, 29 March 2019) para 22.

64 Loi No 2020-07 du 17 février 2020 portant création et composition de la CRIET.

65 Secrétariat général du Gouvernement ‘Compte rendu du Conseil des ministres’ 8 January 2020.

of the Supreme Court swore in the newly-appointed President of the CRIET Appeals Chamber.⁶⁶

In its judgment on reparations delivered on 28 November 2019 the African Court ordered various pecuniary reparations reaching an award totalling an unprecedented US\$ 66 million to the applicant for both material and moral damages.⁶⁷ While Benin did not express any official contestation to either the merits or reparation judgments, its submissions in both proceedings were that the Court lacked jurisdiction and that the matter was inadmissible.⁶⁸ With respect to admissibility, it appears that the applicant made no attempt to approach the Constitutional Court of Benin with a plea for the violation of his rights in the proceedings before the CRIET.⁶⁹

Less than three months after issuing the order for payment of US\$ 66 million in the *Ajavon CRIET* reparation judgment, the African Court on 28 February 2020 issued the order in the *Kodeih* case, as discussed earlier. Benin filed the notice of withdrawal less than a month later, on 24 March 2020. The last decision in the row is the order issued by the Court on 18 April 2020 in the *Ajavon – Local Elections* matter.⁷⁰ The applicant's case is that a set of new laws enacted in preparation of the 17 May 2020 local elections in Benin violated his right to political participation and generally constituted a setback to democracy and a breach of the Beninese peoples' right to elect their representatives. The Court ruled – exactly as the applicant had requested – that the elections should be suspended until it disposes of the merits of the case.

While this decision was issued subsequent to the article 34(6) withdrawal, there is evidence that the ruling exacerbated the state's contestation that the Court was overstepping its powers. As a matter of fact, the Minister of Communication stated at a press conference on 23 April 2020 that 'safeguarding the rights of a Benin national cannot override the normal functioning of our institutions. We will therefore be going to the poll comes 17 May.'⁷¹ According to him,

66 See TC Nagnonhou 'Chambre des appels de la Criet: La Cour suprême installe le président' *La Nation*, <https://lanationbenin.info/chambre-des-appels-de-la-criet-la-cour-supreme-installe-le-president/> (accessed 11 May 2020).

67 *Sébastien Germain Ajavon v Benin*, AfCHPR (Reparations, 28 November 2019), operative section.

68 *Ajavon* (n 63), sections on jurisdiction and admissibility.

69 *Ajavon* (n 63) para 79.

70 *Sébastien Germain Ajavon v Benin*, AfCHPR (Provisional Measures, 17 April 2020).

71 ORTB 'CADHP: Le Bénin retire le droit de saisine directe aux citoyens et Ong', <https://ortb.bj/politique/le-benin-ne-permet-plus-a-ses-citoyens-de-saisir-directement-la-cour-africaine-des-droits-de-lhomme/> (accessed 12 May 2020);

'[i]t stands beyond the jurisdiction of the African Court to order a state to suspend its electoral process, which is an act of sovereignty'. He concluded that '[t]he implementation of that order would be a miracle'.⁷²

In both the substantive perspective and that of good administration of justice, the order on the election poses serious problems to which I return later when discussing the systemic approach to understanding the jurisdictional crisis facing the African Court. Suffices at this point to observe that the *Kodeih* order is only one of the many reasons that are invoked to justify withdrawal in a more general bid to sustain regime stability. Benin's withdrawal can reasonably be seen as a preventive shield against a too intrusive Court that may as well, for instance, go as far as threatening the incumbent President's bid for a second term by reversing the outcome of the March 2021 presidential election should the case arise. As evidence to this hypothesis, there is a perceptible trend, beyond the scope of the African Court, to evade human rights accountability through rule of law autarchy or isolationism. Arguably, as the most revealing illustration, the Constitutional Court of Benin ruled in a decision dated 30 April 2020 that the enforcement of the ECOWAS Court Supplementary Protocol, which had entered into force upon signature under a provisional treaty clause and rulings made thereunder, was void for lack of ratification endorsement by the National Assembly.⁷³ Technically viewed, the ruling amounts to a withdrawal from the jurisdiction of the ECOWAS Court, for which the applicable statutes do not provide.

2.4 Côte d'Ivoire's unexpected but foreseeable exit based on pure politics

Of the four withdrawing states, Côte d'Ivoire had the least turbulent relationship with the African Court prior to withdrawing its declaration, which it filed on 23 July 2013. Within six years of the filing of the declaration the Court received only two applications against Côte

VOA 'Retrait du Bénin de la Cour africaine des droits de l'homme et des peuples', <https://www.voaafrrique.com/a/retrait-du-b%C3%A9nin-de-la-cour-africaine-des-droits-de-l-homme-et-des-peuples/5397460.html> (accessed 12 May 2020) (translation from French provided by the author).

72 VOA 'Retrait du Bénin de la Cour africaine des droits de l'homme et des peuples', <https://www.voaafrrique.com/a/retrait-du-b%C3%A9nin-de-la-cour-africaine-des-droits-de-l-homme-et-des-peuples/5397460.html> (accessed 12 May 2020) (translation from French provided by the author).

73 See DCC 20-434 of 30 April 2020, Constitutional review of the ECOWAS Court 2005 Supplementary Protocol.

d'Ivoire, of which it dismissed one.⁷⁴ The other case is that of *APDH v Côte d'Ivoire* in which the Court ordered the respondent to amend its law on the composition of the Independent Electoral Commission (*Commission Electorale Indépendante*) for breaching the principles of equality, independence and impartiality prescribed under the African Charter.⁷⁵ On 30 May 2019 the Ivorian Parliament enacted an executive Bill, which was introduced to give effect to the *APDH* judgment to amend the composition of the Electoral Commission.⁷⁶ Subsequently, on 10 September 2019 the Court received a new application in the matter of *Suy Bi Gohore & 8 Others v Côte d'Ivoire*, alleging that the new Electoral Commission law did not meet the standards set out in the *APDH* judgment and applicable international instruments.⁷⁷ The Court declined the order sought by the applicants that the electoral process should be halted, and appointments on the new Electoral Commission be suspended until the merit had been determined.⁷⁸

Côte d'Ivoire's notice of withdrawal dated 28 April 2020 included no reason for disengaging. However, in a *Communiqué du Gouvernement* dated 29 April 2020 the Minister of Communication stated that the withdrawal

came as a consequence of the serious and unacceptable actions of the African Court ... which not only constitute an infringement on the sovereignty of the State of Côte d'Ivoire ... but also tend by their nature to cause serious disturbances to the legal order of states and undermine the rule of law through the advent of a real legal uncertainty.⁷⁹

74 After this two-case timid start, in the first six years of the Declaration, litigation in the African Court rose against Côte d'Ivoire with 13 new applications within a week in 2019 alone making it a total of 18 applications as at 13 July 2020. African Court Registry, List of cases received as at 13 July 2020.

75 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (Merits) (2016) 1 AfCLR 668. It is worth recalling that prior to the *APDH* case the Constitutional Council of Côte d'Ivoire had twice ruled on the independence of the Electoral Commission with two opposing findings. See Arrêt No 20–2001 du 06 Août 2001, Cour Suprême de Côte d'Ivoire, Chambre Constitutionnelle; Décision No CI-2014–138/16–06/CC/SG du 16 Juin 2014, Conseil Constitutionnel de Côte d'Ivoire; Adjolohoun (n 17) 59–60.

76 RTI 'Côte d'Ivoire: Alassane Ouattara promulgue la loi sur la nouvelle Commission électorale', https://www.rti.ci/actualite_article.php?categorie=Politique&id=7458&titre=cote-d-ivoire-ouattara-promulgue-la-loi-sur-la-nouvelle-commission-electorale&page=78 (accessed 12 May 2020).

77 *Suy Bi Gohore & Others v Côte d'Ivoire*, AfCHPR (Order, 28 November 2019).

78 As above.

79 Gouvernement de Côte d'Ivoire 'Diplomatie: la Côte d'Ivoire retire la déclaration de compétence à la Cour africaine des droits de l'homme et des peuples', http://www.gouv.ci/_actualite-article.php?recordID=11086&d=5 (accessed 18 May 2020).

There is little doubt that the withdrawal on 28 April 2020 came in the aftermath of the African Court's order of 22 April 2020 in the case of *Guillaume Kigbafori Soro & 10 Others v Côte d'Ivoire*, which directed the Ivorian government to suspend the execution of the international arrest warrant against former Prime Minister and Speaker of Parliament Soro, and to release 19 members of his political party and followers on bail.⁸⁰ The applicants alleged that their detention violated their rights to a fair trial, and that the warrant was aimed at preventing Soro from standing as a candidate in the October 2020 presidential election.⁸¹

3 Understanding the crisis with reference to design and practice

In this part I argue that the crisis facing the African Court's justice system, on the one hand, is due to an imbalanced, inadequate and incomplete structural design and, on the other, related to the role of the Court and other stakeholders in managing the system.

3.1 System design prone to crisis

3.1.1 *The declaration as shield*

In my view, article 34(6) is a pertinent illustration of the weakness of the African Court justice system. The drafting history of the Court Protocol reveals that article 34(6), which conditions direct individual access on the filing of a declaration, did not form part of the text until the last stage of the process.⁸² Several unsuccessful attempts made by the Court itself to have the declaration repealed are reflective of its awareness that the declaration represents a hurdle to its effective operation.⁸³ Attempts to have the declaration removed also came from outside the Court, as exemplified by a lone practitioner's

80 *Guillaume Kigbafori Soro & Others v Côte d'Ivoire*, AfCHPR (Order for provisional measures, 22 April 2020), operative section.

81 *Soro* (as above) section on submissions of the applicants.

82 Travaux préparatoires of the drafting of the Protocol, Reports of the Government Experts meetings on the establishment of the African Court on Human and Peoples' Rights (1995, Cape Town; 1997, Harare; 1997, Nouakchott) (on file with author).

83 See African Court, Activity Report 2014 para 93(ii), <https://en.african-court.org/index.php/publications/activity-reports/1364-activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2014> (accessed 19 July 2020); Amnesty International 'Institutional reform of the African Union gains momentum' (July 2018) Issue 33 *AU Watch Newsletter* 7.

submission of the case *Femi Falana v African Union*, which the Court dismissed on the basis that it lacked jurisdiction over the AU.⁸⁴ The Court might have been offered another opportunity to rule on the issue, albeit indirectly, in the recently-filed case of *Glory Cyriaque Hossou and Landry Angelo Adhlakoun v Benin*, in which the applicants contend that Benin has violated the right of access to justice in the African Charter for withdrawing its declaration, and seek an order suspending the withdrawal.⁸⁵ The rationale behind these attempts to remove the declaration is that it renders the Court's remedial competence illusory.⁸⁶

However, even if article 34(6) detracts from the full potential of the Court, a plea for repealing it is overly optimistic and actually not advisable in the current context. I expound on the issue later when discussing how to enhance state adherence and oversight.

3.1.2 *Lack of appeal or meaningful review*

Pursuant to article 28(2) of the African Court Protocol, judgments of the Court are final. Therefore, there is no room for appeal whether for material or substantive errors – even where the Court would manifestly be misguided. Given the increasing trend of the Court to adjudicate on critical issues such as electoral disputes and awarding substantial damages, the right of states to appeal may make a significant difference to the likelihood of further article 34(6) withdrawals.⁸⁷ Without the possibility of recourse to a judicial appeal, states may well find disengagement the most appropriate means of protecting their sovereignty against an unfavourable ruling.

The procedure for review of decisions delivered by the African Court should also be explored as a factor contributing to the current withdrawal crisis. Article 28(3) of the Court Protocol appears to have tied the hands of the Court as reflected in Rule 67(1) which allows review only 'in the event of discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered'. However, the Court in designing its 2010 Rules arguably has underused the leeway of the Protocol that review shall be governed by 'conditions to be set out in the Rules'. The Court did not make use

84 *Femi Falana v African Union* (Jurisdiction) (2012) 1 AfCLR 118. See also IHRDA 'Human rights defenders appeal for direct access to the African Court', <https://www.ihrda.org/2011/03/human-rights-defenders-appeal-for-direct-access-to-the-african-court/> (accessed 14 July 2020).

85 Application No 16/2020, filed on 7 May 2020.

86 See, eg, *Falana v African Union* (Jurisdiction) paras 24-40.

87 Considering reasons adduced by the states that withdrew their declarations.

of the possibility to extend review cases from the traditional discovery of new evidence to a much more contextualised review for errors on material crafting, facts, law and legal interpretation. It instead took a literal and, therefore, very restrictive approach to the exercise of its discretion.⁸⁸ The standards of review remain unchanged under the new (2020) Rules, which entered into force on 26 June 2020.

3.1.3 *Ineffective institutional shields*

In weak or nascent international rule of law environments such as that of the African Court, a two-tiered structure – for example, with a quasi-judicial and judicial tier – may be needed to preserve the judicial tier from attacks before it has reached a certain level of maturity. Given its dialogical relationship with states, the African Commission should have played the role of filtering cases and shielding the Court from applications destined to cause major contestation. Unfortunately, it appears that challenges relating to leadership and institutional preservation did not allow an effective adjudicatory complementarity as would have benefited the African human rights system.⁸⁹ For instance, the Commission declined to examine the four cases that it received from the Court, apparently on the ground that these cases were transferred by judicial rulings rather than through administrative channels. In ten years of complementarity⁹⁰ the African Commission also submitted only three cases to the Court.⁹¹ As another consequence, the system did not take advantage of the fact that states are very likely to view institutional litigation by the Commission as less personalised, and thus more neutral, than proceedings generated by national political stakeholders or even civil society organisations.

88 See, eg, *Frank David Omary & Others v Tanzania* (Review) (2016) 1 AfCLR 383; *Rutabingwa Chrysanthe v Rwanda*, AfCHPR (Review, 4 July 2019).

89 N Udombana 'Meaningful complementarity/cooperation between the African Court and the African Commission, in comparative perspectives' Conference paper, Conference on the First Decade of the Creation of the African Court on Human and Peoples' Rights (2016), https://www.researchgate.net/publication/331330403_Meaningful_ComplementarityCooperation_Between_the_African_Court_and_the_African_Commission_in_Comparative_Perspectives (accessed 15 July 2020); ST Eboerah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) 22 *European Journal of International Law* 663.

90 See F Viljoen 'Normative, institutional and functional complementarity and distinctiveness' (2011) 18 *South African Journal of International Affairs* 191; Eboerah (n 89).

91 *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17; *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

The African Commission might also have been reluctant to file applications before the African Court for fear that the latter would examine the cases *de novo*, thus reopening issues already settled by the Commission.⁹² This fear arguably led the Commission never to invoke or apply Rule 118(1) of its 2010 Rules that governed the submission of decided cases to the Court.⁹³ Similarly, the two institutions did not show solidarity in complementarity when the Commission faced threats from the policy organs of the AU, or when the AU policy organs demanded that the Court retract the names of non-compliant states from its Activity Report.⁹⁴

The lack of adequate peer engagement among AU member states within the policy organs may also have sent the message that contestation would occasion little or no cost. For instance, the AU Executive Council did not face significant opposition from any AU member state when it barred the Court from mentioning non-compliant states by name in its Activity Report, despite the clear mandate to do so in article 31 of the Court Protocol. The Council also allowed a practice of challenging non-compliance reports by states that did not file the declaration and thus were not involved in any of the cases under consideration.⁹⁵ This situation is compounded by the minimalist monitoring mechanism established under article 29 of the African Court Protocol, whereby a mere call to comply stands as sanction for non-compliance.⁹⁶

3.2 Shortfalls in the African Court's practice

The deleterious effects of poor design may be ameliorated by a well-coordinated and purposive practice. As I argue below, a review of the African Court's practice reveals that regrettably it has not consistently sought to address or succeeded in addressing the design weaknesses of the system.

92 See Viljoen (n 90); Ebobrah (n 89).

93 Rule 118(1) of the 2010 Rules of the African Commission.

94 See SH Adjolohoun & S Oré 'Entre imperium illimité et decidendi timoré: La réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *Annuaire Africain des Droits de l'Homme* 341. See also Decision on the consideration of the 2017 Activity Report of the African Court, adopted by the Executive Council during its 32nd ordinary session (25-26 January 2018) Doc EX.CL/1057(XXXII).

95 Decision on the consideration of the 2017 Activity Report (n 94).

96 As above.

3.2.1 *Problematic timing of adjudication*

The limited acceptance by states of optional direct individual access placed the burden of litigating cases on a small number of states. Faced with a significant number of cases in respect of a single state, the Court may well from time to time have overlooked whether a specific decision was the most appropriate at the relevant time and within the particular institutional context.

Because the four withdrawing states have been litigating approximately 85 per cent of the total cases filed before the Court up to date, the Court from time to time had to issue several decisions against the same state within a short period, without necessarily giving proper thought to whether it was doing so at the most suitable time and in the best sequence. For instance, in the same year (2019), the Court delivered against Tanzania, a state already heavily burdened by remedial orders, a judgment in the *Rajabu* case outlawing the mandatory death penalty in cases of murder and a ruling effectively recognising the Tanzanian nationality of the applicant in the *Penessis* case. As stated earlier, the death penalty and nationality issues have deep social and political resonance in the country. In respect of Benin, the question may similarly be asked whether the *Kodeih* and *Ajavon Local Elections* orders should have been delivered at the particular time, and whether the two decisions should have been handed down at a two-month interval.

The issue of when the African Court delivers its rulings could also be relevant to whether seeking justice in the Court worsens the situation of an applicant. For instance, the decision to grant or deliver the *Soro* order apparently had the consequence of bringing forward former Speaker Soro's trial. An international arrest warrant by then had been pending for five months, with no trial date set. Almost immediately after the order had been delivered on 22 April 2020, a one-day trial was announced and held on 28 April 2020. Convicted of embezzlement and money laundering, the applicant was sentenced to 20 years' imprisonment, was ordered to pay a fine of €7 million, and was barred from civic duties for five years. Similarly, the *Ajavon Local Elections* order might have stood a better chance of being implemented had it been delivered several months prior to the elections, and had it covered only the situation of the applicant as was done in the *Houngue* case, discussed later.⁹⁷

⁹⁷ *Houngue Eric Noudehouenou v Benin*, AfCHPR (Provisional Measures, 6 May 2020).

The momentum of adjudication features critically in the *Ajavon Local Elections* case, referred to earlier. As a general rule, election adjudication inherently is of domestic and, more specifically, constitutional jurisdiction. According to practice, supreme or constitutional courts are time bound by electoral law, including the national constitution. It therefore is of critical importance for an international court vested with a related mandate to be conscious of these standards. In this case the Court received the application on 29 November 2019, and on 9 January 2020 received the specific request for provisional measures in respect of the elections to be held on 17 May 2020.⁹⁸ The Court issued the order suspending the elections on 17 April 2020, 30 days before the scheduled polling date.

In this instance, also, one cannot be blind to the contradictions in the Court's procedural practices. In its established practice the Court, in the interests of justice, had shortened time for the submission of pleadings or the implementation of orders.⁹⁹ Besides, it had precedent-based power to issue orders *suo motu* where the circumstances so require, as it did in the *African Commission (Libya Arab Spring)* case.¹⁰⁰ Yet, in the *Ajavon Local Elections* case the Court allowed exchanges of pleadings and processed an evidently urgent electoral matter for more than three months, only to suspend the elections 30 days before the scheduled election date. A similar trend is observed in the cases of *Jebra Kambole v Tanzania*, involving the constitutional ouster of the result of the presidential election from the Court's jurisdiction,¹⁰¹ and *Suy Bi Gohore Emile and Others v Côte d'Ivoire* challenging the composition of the Ivorian electoral

98 *Ajavon Local Elections* (Provisional Measures) paras 7-11.

99 See, eg, on time allocated to file submissions on provisional measures requests, reparations, and report on orders, *Nyamwasa & Others v Rwanda* (Interim Measures) (2017) 2 AfCLR 1 para 20; *Dexter Eddie Johnson v Ghana* (Provisional Measures) (2017) 2 AfCLR 155 para 6; *Ingabire Victoire Umuhoza v Rwanda* (Procedure) (2016) 1 AfCLR 553 paras 29, 30; *Syndicat des anciens travailleurs du group de laboratoire Australian Laboratory Services, ALS-Bamako (Morila) v Mali* (2016) 1 AfCLR 661 para 27; *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures 2) (2015) 1 AfCLR 150 para 11(iv); and *Lohé Issa Konaté v Burkina Faso* (Provisional Measures) (2013) 1 AfCLR 310 para 23(ii).

100 See, eg, *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17.

101 Application No 018/2018, filed on 4 July 2018. See African Court 'African Court on Human and Peoples' Rights to deliver three judgments on Wednesday, 15 July 2020', <https://en.african-court.org/index.php/news/press-releases/item/358-african-court-on-human-and-peoples-rights-to-deliver-three-judgments-on-wednesday-15-july-2020> (accessed 15 July 2020).

commission.¹⁰² In these two cases the Court delivered judgment on 15 July 2020, with forthcoming elections scheduled for October 2020 in both countries.¹⁰³

The Court's ability to be deliberate about the timing of its judgments is impaired by the non-permanent nature of the Court. With the exception of the President, all judges serve part-time. The Court's part-time nature allows for only four annual sessions of four weeks each. Given this factor and going by practice, the likelihood is slim of the Court ruling within a year on the merits of any case submitted to it. Suspending elections in April until the merits are decided, much later, as was done in the *Ajavon Local Elections* case, therefore amounts to postponing the election *sine die* with severe consequences for the country and government, including socio-economic and political upheaval. As discussed later in the article, the Court had fairer and more contextualised alternative options.

The Court's Order in the *Ajavon Local Elections* case also constituted an *ultra petita* remedy, which lacked purpose, context and fairness. The Court ordered Benin to provisionally suspend the election in order to uphold the rights of a single applicant without balancing all other interests involved. While the applicant made a request for suspension of the poll based on alleged violations of his own right and that of the citizens of Benin, he adduced no evidence to speak on behalf of the entire people of the country in elections involving over five million voters. As he is not an institution vested with civil society mission, the applicant also lacked standing to bring a public interest case. In this context, the balancing of rights arose prominently in the sense that the Court should have assessed the interests of the applicant and possibly those of his political party¹⁰⁴ against the interests of the rest of the country.¹⁰⁵ As the main normative reference of the

102 Application No 44/2019, filed on 10 September 2019. See *Suy Bi Gohore Emile and 8 Others v Côte d'Ivoire* AfCHPR (Provisional Measures, 28 November 2018).

103 See Gouvernement de Côte d'Ivoire 'Election présidentielle 2020: le gouvernement met tout en œuvre pour la transparence du scrutin', http://www.gouv.ci/_actualite-article.php?recordID=10900 (accessed 15 July 2020); L Kolumbia 'President Magufuli launches reelection bid, collects CCM nomination forms' *The Citizen*, <https://www.thecitizen.co.tz/news/President-Magufuli-launches-re-election-bid-/1840340-5577958-dd495q/index.html> (accessed 15 July 2020).

104 It must be noted that the Court has no precedent recognising this right to legal persons including political parties and the Charter contains no provision to that effect.

105 In practice, the Court has in several cases undertaken the balancing exercise and the limitation test was not new in its precedent. See, eg, *Lohé Issa Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314; *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

Court, the African Charter contains several limitations that call for rights balancing, such as legality,¹⁰⁶ national security, safety, health, *rights and freedoms of others*,¹⁰⁷ the *interests of the public and general interest*.¹⁰⁸

3.2.2 *Inconsistent assessment of evidence*

The African Court's practice with respect to assessing evidence may also have contributed to loss of confidence by the states that withdrew and other states generally. As discussed earlier, the Court did not properly consider submissions of the respondent regarding the effectiveness of the Constitutional Court as a remedy to exhaust in the *Ajavon CRIET* matter involving Benin. I consider two more cases. In the case of *Nguza Viking & Another v Tanzania* the Court held that a determination on evidence for identification falls within the exclusive preserve of national courts to which the African Court defers, unless admitting that the evidence would lead to a miscarriage of justice.¹⁰⁹ The Court thus dismissed the second applicant's alibi on the ground that domestic courts had rejected this evidence.¹¹⁰ Yet, it found a breach of right due to the domestic court's refusal to allow the impotence test requested by the applicant in a rape case.¹¹¹ The Court further affirmed the identification of the applicants, which domestic courts conducted during the trial by asking the applicants to shift seats whereas the victims had seen them twice prior to the identification during trial.¹¹²

The assessment of evidence also arises in the *Penessis* case where the Court factually established the applicant's citizenship based almost solely on a copy of his birth certificate.¹¹³ The respondent adduced extensive evidence, including copies of two passports (British and South African) bearing different names which the applicant used to seek entry into Tanzania.¹¹⁴ The applicant never justified the difference in the names on the two passports, which featured in the decisions of domestic courts that he submitted to the African Court in arguing the admissibility of his application.¹¹⁵

106 Arts 6, 7(2), 8, 9, 10.

107 Art 11.

108 Art 14.

109 *Nguza v Tanzania* (Merits) (2018) 2 AfCLR 287 para 89.

110 *Nguza* paras 102 & 105.

111 *Nguza* para 117.

112 *Nguza* para 105.

113 *Penessis* (Merits) para 78.

114 *Penessis* paras 79-83.

115 *Penessis* paras 4-8; 30-34; 51-70.

The Court's approach in these instances can only leave the impression that it does not give due consideration to submissions and evidence of respondent states. Decisions of the Court therefore may cause a sentiment of bias or unfairness to which states believe withdrawal is the effective response for lack of alternative means of contestation.

3.2.3 *Inconsistent and incomplete judicial restraint in respect of admissibility*

The admissibility-related law-making standards of the African Court are also questionable in relation to how it observes judicial restraint.¹¹⁶ For instance, the Court has consistently applied a very narrow approach to what constitutes 'domestic remedies' by exempting applicants from exhausting all remedies other than those that are *judicial* in nature and that fall strictly within the *ordinary* domestic court structure. As such, it found that article 56(5) of the African Charter does not require applicants to utilise the processes of review and constitutional petition for the protection of fundamental rights – merely because the Court considers them to be *extraordinary*.¹¹⁷

This approach is not consonant with judicial restraint as required by article 1 of the African Charter,¹¹⁸ which allows states to exercise discretion as to the format and structure of the 'domestic remedies' they design to implement the Charter. The task of the Court should merely be to ensure that the 'domestic remedy' is available, effective and sufficient, and meets the standard of fairness in its operation.¹¹⁹ The Court's case law is in line with this position, as illustrated in the *APDH* judgment on interpretation where it declined to guide Côte d'Ivoire on how to bring the composition of its electoral commission in line with its international obligations.¹²⁰ The Court arguably showed consistency in the case of *Umuhoza v Rwanda* where it undertook a wholesale factual and legal determination of which acts amount to a denial of genocide after domestic courts had ruled on

116 See *Vásquez Vejarano v Peru* Case 11.166, Inter-Am CHR, Report 48/00; *Dahlab v Switzerland* Application 42393/98, ECHR 2001-V; *Leyla Sahin v Turkey* Admissibility and Merits, App 44774/98, ECHR 2005-XI. See also, in general, M Killander 'Interpreting regional human rights treaties' (2010) 7 *SUR – International Journal on Human Rights* 145.

117 See, eg, *Thomas* (Merits), *Mtikila* (Merits) and *Abubakari* (Merits).

118 See *Constitutional Rights Project v Nigeria* (2000) AHRLR 241 (ACHPR 1999) para 26 and Killander (n 116).

119 See Killander (n 116); *Vejarano v Peru*, *Dahlab v Switzerland*, *Leyla Sahin v Turkey* (n 116).

120 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (Interpretation) (2017) 2 AfCLR 141.

the issue.¹²¹ The problem is that in the *APDH* and *Umuhoza* cases the Court did not follow its own established precedent on deference and judicial restraint as set out in the earlier-cited *Nguza* judgment. A comparison between the *Thomas*, *Mtikila*, *Abubakari*, *Umuhoza*, *APDH* and *Nguza* judgments reveals inconsistencies in the Court's approach to deference and restraint.

Going by the Court's position on what constitutes a 'domestic remedy', most constitutional tribunals in Francophone or civil law Africa would fail to meet the standard of a valid remedy under article 56(5) as most of them do not belong to the *ordinary* judicial apparatus.¹²² Yet, many of these institutions are vested with both material and personal jurisdiction to handle human rights complaints, including in the application of the African Charter.¹²³ Sadly, in years of law making, from the *Mtikila* judgment in 2013 to *Thomas* (2015), *Abubakari* (2016) or *Owino* (2017), the Court has not set clear and principle-based standards for assessing judicial and ordinary remedies.

A case in point on the nature of domestic remedies, particularly in civil law Africa, is that of *Ajavon CRIET*. Notably, in determining admissibility, the African Court set out the traditional two-prong test of an existing and effective remedy. Allegations of the applicant were in relation to administrative, criminal and constitutional remedies. Unfortunately, after establishing that the Constitutional Court existed as a remedy that the applicant could have approached,¹²⁴ the African Court omitted to assess the effectiveness of this remedy. In reaching the conclusion that the 'application cannot be dismissed for non-exhaustion of local remedies', the Court reasoned that the 'prospect of success of *all existing remedies* was marginal',¹²⁵ and 'inferred that the particular circumstances of the case rendered the remedies inaccessible and ineffective'.¹²⁶

Such reasoning and conclusion may be questionable in Benin's institutional context. The Constitutional Court of Benin has jurisdiction to adjudicate human rights petitions by individuals and groups.

121 *Umuhoza* (Merits) paras 69-74.

122 In respect of the African Commission, see *Human Rights Council & Others v Ethiopia* Communication 445/13 [2015] ACHPR paras 64, 69, 70; Adjolohoun (n 17) 47-50.

123 A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 281.

124 *Ajavon CRIET* (Reparations) paras 100-102.

125 My emphasis.

126 *Ajavon CRIET* (Merits) para 116.

It has developed an extensive and rich case law including decisions made in direct enforcement of the African Charter.¹²⁷ In the context of the African Court's ruling on the merits in the *Ajavon CRIET* case, the Benin Constitutional Court in DCC 19-055 of 31 January 2019 declared unconstitutional article 12(2) of the law establishing the CRIET for being contrary to article 3 of the African Charter and article 26 of the Constitution. The Constitutional Court issued its ruling two months prior to the African Court's finding that the applicant in the *Ajavon CRIET* case did not need to approach the Constitutional Court as the 'circumstances of the case rendered the remedies inaccessible and ineffective'.¹²⁸ In its reasoning the African Court did not allude to or assess submissions by the respondent on the effective operation of the Constitutional Court.¹²⁹

Another admissibility-related law-making practice of the Court that does not sufficiently take into account state sovereignty and judicial deference is the unprincipled application of the theory of a 'bundle of rights'. The practice consists in declaring an application admissible on all issues raised by the applicant by bundling them together mainly on the ground that domestic courts ought to have been aware of other issues while examining only the one issue that was actually brought to their purview.¹³⁰

Arguably, there is a strong connection between claims of withdrawal for breach of sovereignty and an unprincipled observance of judicial restraint. An inconsistent or unprincipled application of article 1 of the African Charter might have caused the Court to assess facts and evidence previously adduced and determined before national courts in a jurisdictional fiction.¹³¹ By doing so, the Court obviously was not cognisant of the 'fourth instance formula'.¹³² Consequently,

127 H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011).

128 *Ajavon CRIET* (Merits) para 116.

129 *Ajavon CRIET* (Merits) paras 78-79.

130 *Thomas* (Merits) para 60; *Nguza* (Merits) para 53; *Owino & Njoka* (Merits) para 54; *Guehi* (Merits and Reparations) para 50.

131 *Mtikila* (Merits) paras 66-75; 101-105, 107; *Abubakari* (Merits) paras 105, 107-112. See also SH Adjolohoun 'Jurisdictional fiction? A dialectical scrutiny of the appellate competence of the African Court on Human and Peoples' Rights' (2019) 6 *Journal of Comparative Law in Africa* 2.

132 See D Rodríguez-Pinzón 'The 'victim' requirement, the fourth instance formula and the notion of 'person' in the individual complaint procedure of the Inter-American human rights system' (2001) 7 *ISLA Journal of International and Comparative Law* 369 376-380. See also Case 9260, Inter-Am CHR 154, OEA/ser L/V/II.74, doc 10 rev (1998); and *Mikhail Mirilachvili v Russia* App 6293/04, 11 December 2008 para 161.

this practice may lead to an excessive or undue reliance on and interpretation of municipal law to ultimately establish a violation of international law.¹³³

3.2.4 *Strategy-blind provisional orders*

The practice of the African Court in relation to provisional orders raises issues. Recourse to provisional measures by its nature does not determine the merits of a matter. Orders in that regard should therefore be handled with extreme caution. The Court's practice in this respect is to assert jurisdiction *prima facie*, essentially in respect of material and personal jurisdiction. The Court, however, does not consider the *prima facie* admissibility of the matter. By at this initial stage determining the *prima facie* jurisdiction – but not the admissibility – of the matter, the Court's provisional measures order may override the admissibility of the matter in a way that causes unnecessary and unfair damage to the respondent. In the *Kodeih* case, for instance, it should from the onset have been obvious to the Court that remedies within the legal order of Benin still had to be exhausted and that the matter most likely was inadmissible.¹³⁴ In such an instance judicial economy and fairness demand a preliminary ruling on admissibility. Doing so would have saved the Court the difficulty of having to, in its provisional measures order, first suspend the enforcement of a domestic decision with the costly associated consequences, only to eventually have to declare the matter inadmissible. It is curious why the Court embraces a quasi-systematic *prima facie* approach to jurisdiction but not to admissibility in instances such as this.

Another serious concern about the systematic or frequent use of provisional orders is that they may have such far-reaching impact that they supersede the impact of the eventual merits decision. For example, in the *Ajavan Elections* matter the burden incurred by the Court's order to suspend the election includes technical budgeting of US\$12 million,¹³⁵ over two years of preparation, and the costs of campaigning. Should the alleged violations be established, the Court will issue further orders on the merits and reparation including monetary compensation and costs of potential legislative changes and rescheduling of the suspended elections. The Court's approach in

133 *Umuhoza* (Merits) paras 134-137, 150, 152-158, 161.

134 *Kodeih* (Provisional Measures) paras 4-10; 24-36.

135 See AP Aguehoude 'Budget des élections communales et municipales de mai 2020: Plus de 5 milliards pour la Cêna' La Nation, <https://lanationbenin.info/budget-des-elections-communales-et-municipales-de-mai-2019-plus-de-5-milliards-pour-la-cena/> (accessed 14 May 2020).

this regard amounts to double jeopardy and is counter-productive in the framework of international human rights adjudication involving sovereign states.

3.2.5 *Ruling by imperium versus substantiated reasoning*

While the history of the establishment of the African human rights system commands a well-reasoned and purposive approach to judicial law making,¹³⁶ there seems to be more than just an impression that the Court often adjudicates based on imperium rather than by substantiated reasoning. In other words, a finding or ruling by the Court often is pronounced on the mere basis of the Court's say-so, rather than on a sound and thorough reasoning supporting a particular conclusion. This increasing trend may well have been a cause of concern to withdrawing states.¹³⁷

An illustration of this trend is the Court's inadequate reasoning in the *Umuhoza* ruling on the very issue of withdrawal. In its ruling the Court held that the declaration, and thus its withdrawal, constituted unilateral acts of the state outside the purview of the law of treaties.¹³⁸ However, the Court provided no reasons as to why and how a declaration should be considered a unilateral act in comparison with other traditional acts such as a declaration of war or the recognition of a state. Furthermore, the Court opted to read the words 'shall' and *doivent* as 'may' and *peuvent*, thus excluding possible political or judicial review of a state's refusal to make an article 34(6) declaration or to withdraw a declaration that it had filed.¹³⁹ The particular importance of this ruling required thorough and well-substantiated precedent-setting reasoning. The malaise ensuing from sloppy reasoning is illustrated by the Court's addendum to elaborate on the concerned holding,¹⁴⁰ to which Rwanda objected as one of its grounds of distrust in the independence of the Court.¹⁴¹

136 See SH Adjolohoun 'Les grands silences jurisprudentiels de la Cour africaine des droits de l'homme et des peuples' (2018) 2 *Annuaire Africain des Droits de l'Homme* 33-35. On judicial law making, which is referred to as the power or fashion of judges to make law through adjudication, see A Singh & MZ Bhere 'Judicial law-making: Unlocking the creative powers of judges in terms of section 39(2) of the Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 2.

137 See, in general, AD Olinga 'La première décision au fond de la Cour africaine des droits de l'homme et des peuples' (2014) 6 *La Revue des Droits de l'Homme* 1.

138 *Umuhoza* (Jurisdiction, Withdrawal).

139 As above, section on the validity of the withdrawal.

140 *Umuhoza* (Corrigendum, 5 September 2016).

141 Pavot (n 20).

Decisions of the Court in the *Nguza*, *Abubakari* and *Penessis* cases further illustrate a trend of ruling by imperium rather than by clearly-articulated reasoning. Opinions issued by dissenting or concurring judges in the *Ajavon CRIET* judgments on the merits and reparations¹⁴² raise the same concerns.¹⁴³

4 Reforming the African Court through structural and operational changes

In light of the ongoing assessment, there is a need to reform the Court to regain states' adherence, either through structural reform entailing re-designing some features of the court system, or by adapting elements of its practice. While some of the structure-related reforms should reasonably be contemplated in the mid-term, many operational and practice-related changes can be effected in the short term. These two categories of reforms are now briefly dealt with.

4.1 Redesigning a more balanced and purposive system

Systemic reform requires an understanding that the system reached early fatigue due mainly to imperfections in design. Institutional reform should aim at strengthening or adding benefits that balance the increased costs incurred by states as the system matures.

4.1.1 Structural changes: A two-tiered full-time Court

Ultimately, the AU should make the Court fully and permanently operational. The current part-time operation no doubt contributes to the rush in concluding deliberation and delivering decisions, challenges to adjudicate at the right time due to lower productivity versus constantly-rising dockets, substantive adjudication by orders, a dilemma between urgency and time-spread deliberations, adjudication fatigue due to repetitive deliberations, and slow and delayed justice owing to single-bench sittings. Making judges work full-time will also address the constraints of the quorum of seven

142 Separate Opinion of Gérard Niyungeko J (Merits); Separate Opinion of Chafika Bensaoula J (Merits); Dissenting Opinion of Gérard Niyungeko J (Reparations).

143 L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2018)' (2019) 120 *Revue Trimestrielle des Droits de l'Homme* 851; L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2015-2016)' (2018) 113 *Revue Trimestrielle des Droits de l'Homme* 128; Adjolohoun & Oré (n 94); Adjolohoun (n 136).

judges, and would open the possibility of chambers or sections consisting of three or four judges per chamber.¹⁴⁴

Operating a permanent court cannot be done effectively without debating on the issue of recruitment of judges. For institutional harmony, it could be envisaged to adjust the nomination and election standards of judges on those applicable to elected officers of the AU Commission. The introduction of dossier selection and the interviewing of the candidate judges by former judges of the Court and other international recognised experts in the field would improve the management of issues of belongingness, productivity, administrative accountability, expedient and stable administration of justice, and perhaps also judicial law making.¹⁴⁵

An assessment also reveals that the cost of running a full-time African Court would be the same as, if not lower, than what the current format incurs at least with respect to the financial implication of judges' remuneration.¹⁴⁶

There also is a need to establish an appellate chamber in view of the Court's often-repeated position regarding the importance of the right to appeal in domestic proceedings. The need for an appeals chamber is also demonstrated by the increased number of applications and orders, the increase in the quantum of reparation orders, and the reduction in the overall time for implementation especially concerning states honouring dozens of orders. The rise of cases touching on 'critical' social or political issues also demands two-tiered adjudication mechanisms, which largely applies expressly or by practice in other international regional or human rights courts.¹⁴⁷

4.1.2 Enhance state adherence and oversight

As alluded to earlier, it may be challenging to have the declaration repealed in light of responses to the various attempts so far made and in the current national and continental contexts. A more rewarding approach should be to manage the declaration regime by devising more incentives to join and to provide more alternatives to

144 See African Union Internal Audit Report on Performance Audit and Recruitment Process for the African Court on Human and Peoples' Rights for January 2015 up to September 2018 (2018) 13.

145 African Union (n 144) 11-15.

146 African Union (n 144) 12.

147 Notably, the East African Court of Justice has an appellate division and talks are proceeding with ECOWAS to establish an appellate section in its Court of Justice. See Alter et al (n 9) 304 316.

withdrawing. New incentives such as the review, appeal, systematic amicable settlement and other tools certainly bring about a framework for greater adherence.

State involvement may also be improved by strengthening the framework for supervision and enforcement of the African Court's decisions. At the political level the system should be upgraded to a more effective process than the mere monitoring of the Court's report by the Executive Council under article 29(2) of the African Court Protocol. On the judicial front, article 31 of the Protocol should be transformed into an express competence for the Court to receive non-compliance applications. The framework document currently pending adoption by the Executive Council may be helpful in this respect as it provides approaches that include the judicial, political, diplomatic and technical monitoring of implementation.¹⁴⁸

4.1.3 Re-design complementarity with the African Commission

From a comparative perspective, the African Court Protocol assigns a critical role to the African Commission in a *sui generis* African regional system, compared to the European and Inter-American human rights regimes. While it may be true that the Protocol does not provide for a detailed complementarity clause, articles 2 and 8 leave adequate room for the Commission and Court to devise additional tools that best serve collaborative complementarity within the system.

A first tool could consist of including in the Protocol or Rules a non-limited list of matters for which the African Commission would be the corridor to the Court, such as grave and massive violations, electoral matters and amicable settlement procedures. Under this type of litigation the Commission could also serve as a shield or filter for the Court on some 'critical' cases. As a response to the issue of the Court reversing findings of the Commission when the latter files applications, it is a cause of satisfaction that the Commission's 2020 Rules of Procedure provide for the filing of cases immediately after seizure.¹⁴⁹ Conversely, the provision that the Commission must seek the authorisation of the complainant before referring the case to the Court may be regressive, bearing in mind cases of public interest or general law development that go beyond subjective rights.¹⁵⁰ The Commission could also consider filing cases after seizure when it has yet to make any substantive finding or by litigating the violation

148 African Court, Activity Report 2019, paras 19, 60-61.

149 Rule 127(4), Draft Rules for Public Consultation (2020).

150 Rule 127(2).

of article 1 of the African Charter in cases where states have not implemented its findings or requests for provisional measures.

Another tool is to unequivocally in its Rules allow original complainants at the African Commission full standing as 'co-applicants' before the Court. This approach holds the particular advantage of having civil society organisations relieve the Commission of the burden of costly litigation.

4.2 Adjusting judicial practice

4.2.1 *More contextual review and interpretation of judgments*

Until its Protocol and Rules are amended, the African Court would gain by adjusting its practices on review and interpretation of judgments. By not objecting through amendments to years of jurisprudence, states have endorsed the interpretation of the law into *opinio juris communis* on issues such as the 'bundle of rights', 'extraordinary remedies' and '*prima facie* jurisdiction'.

Based on this acceptance, the Court should be able to extend the 'review' authorisation in the Protocol. The Court should extend its competence to '*review ... in the light of new evidence*' not only to errors, whether material or factual, but also to omissions to rule, and to determinations not suitable in the circumstances of the case. The Protocol leaves room for the Court to frame Rules 67 of its 2010 Rules towards a much more contextualised and purposive review. In my view, it is within the Court's discretion to tailor the Protocol's flexibility into an innovative judicial law making that interprets 'new evidence' as being new facts, information, or even argument.

Judicial practice may also have to be adjusted with respect to the interpretation of judgments. For instance, the fact that the respondents requested for interpretation in the matters of *Abubakari v Tanzania* and *APDH v Côte d'Ivoire* should have been seen as a *bona fide* attempt to attain clarity. In the first case the Court interpreted its general order of remedying the violation as including the specific option of releasing the applicant, which it had declined to grant in the merits judgment.¹⁵¹ Conversely, in the second case the Court declined to interpret the order of bringing the law in line with international norms on the ground that the request amounted to it indicating the manner in which to implement the merits

¹⁵¹ *Abubakari* (Interpretation) paras 28-39.

judgment, which is the responsibility of the respondent.¹⁵² The trend appears regressive and misguided. A state certainly would not seek interpretation of an order that is obviously vague if it did not intend implementing the decision. Therefore, the Court needs to carefully distinguish and consider interpretation requested in good faith in a manner that avoids reducing the likelihood of compliance and repeated adjudication on the same issues.

4.2.2 *Devising practical alternatives to part-time operation*

Inadequate judicial law making cannot be disconnected from rushed adjudication. The impression that the finalisation of matters does not receive sufficient attention cannot in turn be dissociated from the part-time operation of the Court. There should first be an inquiry into whether intersessional work at the Court has been as productive as it should be.¹⁵³ The higher number of decisions delivered from the time when the duration of sessions changed from two to four weeks cannot be an accurate parameter because the number of legal officers also almost doubled. Furthermore, most of the decisions accounting for the increase are provisional orders and procedural rulings that involve relatively or significantly less work than merit rulings.¹⁵⁴

Changing the picture requires innovative institutional adjustments that address constraints in the Protocol. The Court may need to adopt a situational interpretation to the part-time nature of its work. This approach could include setting up informal sections bound by the endorsement of the plenary, fully operating the judge-rapporteur mechanism, and enforcing the part-time scheme entirely by enhancing the work of judges during intersessions. The experience of remote operation and virtual sessions demanded by the COVID-19 lockdown has offered evidence that the Court can actually upgrade intersession work to its fullest and enhance its operation during in-person sessions. Doing so may demand a dramatic shift in working methods of both the registry and judges.

¹⁵² *APDH* (Interpretation) para 16.147.

¹⁵³ See, eg, African Union Audit Report, African Court on Human and Peoples' Rights from November 2016 to September 2017 (2018) 10.

¹⁵⁴ The Court implemented the four-week session from the first session of 2018. The Court in all delivered 67 decisions between 2006 and 2016; 37 decisions in 2017 and 2018; and 53 decisions in 2019 (including 24 orders of joinder and provisional measures). See African Court Registry, List of cases received as at 13 July 2020; *African Court Law Reports, Volume 1 (2006-2016)* and *Volume 2 (2017-2018)*.

4.2.3 *Purposive timing and mechanisms of adjudication*

The African Court should improve its time management. It may need to adopt a more context and issue-based approach to the scheduling, deliberation and disposal of cases. It would, for instance, be more context-informed to not deliver in a row rulings on very sensitive matters touching on issues as policy-entrenched as nationality, the death penalty, and elections. This adjustment of course should be implemented on condition that deferring a ruling on a matter requiring changes to the legislation on the death penalty but not the execution of that sentence would cause no or marginal impact.

With respect to electoral matters in particular, adjudication demands expediency. This applies to the use of *suo motu* powers bearing in mind competing international obligations of the states involved and domestic constraints. An effective time setting may require a thorough balancing of interests involved and drawing of the state's discretion or margin of action in implementing the African Charter. In this instance, adjudicating public international law in an era of increased sovereignty must give due consideration to topics relating to governance, such as elections or political disputes, which come before the Court under the cover of human rights. The proposal is not that the Court should compromise on fairness and justice, but it cannot be blind to the internal operation of states while adjudicating matters brought before it.¹⁵⁵ Urgency, expediency, special circumstances and fairness will remain the exceptions.

While dealing with cases that have a bearing on states' discretion, one recipe could also be to use more contextualised mechanisms such as water-testing adjudication, incremental law making, and purposive jurisdiction or admissibility filtering. These tools should be devised and used in a manner that takes proper cognisance of the domestic system, avoiding giving the impression that decisions of the Court are materially impossible to implement in the domestic context or render useless the remedy afforded to the applicants. In the same vein, the Court should embrace both effective task segregation between itself and domestic actors and adopt passive

¹⁵⁵ Soubeyrol (n 12) 239.

virtues.¹⁵⁶ Well-known practices include judicial deference and prudential self-restraint.¹⁵⁷

Similarly, there is a need to assess the administrative *prima facie* probe of admissibility by the registry and ensure that it informs options taken by the Court while examining requests for provisional measures. The purpose is to embrace a more cautious exercise of *prima facie* jurisdiction on a case-by-case basis.

In order to alleviate the litigation burden of respondent states, a change in practice may also gain from an enhanced recourse to more protracted and systematic amicable settlements, the merger of cases, and pilot judgment procedures. These methods may be more relevant where the cases involved are highly political in nature, may widely affect uninterrupted governance, or involve serious and massive violations.

4.2.4 *Strategic selection of most appropriate remedy*

In adjudication it may be critical to choose the most appropriate remedy according to timing, circumstances and domestic context. In the case of the African Court, there may not be a need to expressly include strategic remedy selection in its statutes, but rather to frame them in internal practice guidelines that would evolve over time and according to different circumstances. Such directive, for instance, would serve to guide the adoption of provisional orders in a manner that avoids any clashes with principles of fairness, equity, equality of arms, and balancing of all relevant constraints, interests and rights involved.

The African Court should also avoid making orders *ultra petita* as they may extend beyond what is necessary to safeguard the interests of the applicant, or may have the effect of prejudging the merits of the matter. The role of a fair adjudicator is not to grant a remedy merely because the applicant asked for it. Mostly, a range of possible remedies is open to an adjudicator in solving a dispute. The challenge

156 See AIM Bickel 'The Supreme Court 1960 term forward: The passive virtues' (1961) 75 *Harvard Law Review* 40 48-50; G Gunther 'The subtle vices of the passive virtues: A comment on principle and expediency in judicial review' (1964) 64 *Columbia Law Review* 1 3; SH Adjolohoun 'Made in courts' democracies? Constitutional adjudication and politics in African constitutionalism' in C Fombad (ed) *Constitutional adjudication in Africa* (2017) 248, 255-257, 267.

157 See AI Mendelsohn 'Judicial restraint in international law' (2010) 57 *The Federal Lawyer* 52 54; P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544 548.

is to choose from among these available solutions the most suitable remedy under the particular circumstances. Hypothetically, in the *Ajavon Local Elections* case a more sober adjudicator would have borne in mind the emergency of an electoral matter, shortened the time of adjudication to fewer days, resorted to its *suo motu* powers to issue orders, and done so well ahead of time. The situation could have been totally different had the Court, for example, issued its order 90 days instead of 30 days before the elections. Substantively, the Court should have also limited the order to the applicant and potentially his political party, instead of bringing a whole country to a standstill. Finally, the order subsequently issued by the Court in the *Houngue* case is evidence that the Court did not make the most suitable order in the *Ajavon Local Elections* case. In the *Houngue* case the Court ordered the same respondent to take measures to ensure the applicant's participation in the very elections it had just suspended.

The same argument applies with even greater force to the order for payment of US\$ 66 million issued in the *Ajavon CRIET* case.¹⁵⁸ The African Court should have been context-conscious that, as a matter of practice, states' directorates of litigation are budget-set by legislatures with a specific ceiling in terms of the amount of damages to disburse in a given year.¹⁵⁹ The Court is putting its legitimacy at stake if it gives the impression that it makes orders that are not likely to be implemented. Numerous orders due by Tanzania, including multiple monetary injunctions, also fall into this category, bearing in mind that Tanzania has implemented fewer than 15 per cent of the 60 orders so far issued by the Court against it.¹⁶⁰

4.2.5 *Judicial diplomacy*

Judicial diplomacy cannot be overlooked as a critical ingredient of the effective operation of an international human rights tribunal. Bearing in mind that international human rights litigation is a relatively recent phenomenon in Africa, the bureau and registry of the Court should on their own motion or jointly with the AU policy organs set out a framework for regular engagement with states. In its formation and effective implementation, international human rights law and its enforcement mechanisms undeniably are state-led. In contrast

158 *Sébastien Germain Ajavon v Benin* AfCHPR (Reparations, 28 November 2019).

159 SH Adjolohoun 'Giving effect to the human rights jurisprudence of the ECOWAS Court of Justice: Compliance and influence' LLD thesis, University of Pretoria, 2013 168-169.

160 See African Court, Activity Report 2019.

to their domestic counterparts, international human rights tribunals are *sui generis* in their establishment, the law that they enforce, and the litigants before them. A sign that judicial diplomacy remains a workable option even within the current context of crisis is that none of the four withdrawing states denounced the African Court Protocol. In fact, Benin and Côte d'Ivoire expressly stated that they remain parties to the Protocol, while Benin announced proposals for reform. Upon withdrawal of their article 34(6) declarations, Rwanda and Tanzania indicated that they intended to file the declaration afresh after a process of review.¹⁶¹

Judicial diplomacy should extend on a more systematic basis to civil society, including the academia and media, with the aim of regularly assessing the work of the Court and devising preventive means to sustain state adherence. Ultimately, the Court should set a warning and response system to allow for the airing of contestation. It does not appear that such has been done between the first withdrawal in 2016, and the three that occurred four years later within the span of six months. A practical way of implementing this proposal would be to establish an assembly of state parties as is known under the International Criminal Court regime.

5 Conclusion

It may be contended that Rwanda, Tanzania, Benin and Côte d'Ivoire have withdrawn from the African Court's direct individual jurisdiction to escape accountability.¹⁶² However, this article provides ample evidence that these states' disengagement was caused by factors that go beyond the specifics of the cases against them, and extend to challenges inherent to the system, and to the practice of the Court. The issues raised call for appropriate adjustments, as proposed and discussed above.

In terms of process, the proposed reforms may be designed and implemented within the framework of the larger reform process led by the AU, or as part of a separate process initiated by the Court. As a matter of strategy, it is in my view advisable that the Court takes the lead – as it is entitled to do under article 35(2) of the Protocol – so as to retain oversight both in terms of process and substance. Should states take the lead, they may legitimately tend to frame and effect changes informed by their misgivings, which may not offer the

161 Rwanda's notice of withdrawal (n 18) para 9.

162 See Biegona (n 5).

guarantee of a technically fair, objective and system oriented reform process.

Although this did not form part of the discussion, the importance of civil society in supporting cooperation between the AU, states and the African Court cannot be overemphasised. Civil society organisations also have a role in preserving the Court as a public service institution through accountability checks and by advocating reform that is likely to reinforce states' full adherence to the Court's jurisdiction.

The current political context in Africa suggests that if the Court is to survive as a source of legitimate supervisory authority, its support system must ensure a sustainable balancing of the various interests involved. Judicial law making should therefore evolve while balancing judicial activism and restraint. This approach requires going by the pace of democratic and constitutional governance on the continent. Going by the current state of affairs, there is no indication that the African Court of Justice and Human and Peoples' Rights will operate any time soon.¹⁶³ In any event, its provision granting immunity to incumbent heads of state and other challenges cast some doubt upon its future functioning. Hence, the most reasonable option is to improve the design and practice of the African Court, the only continental justice system that translates the AU's Agenda 2063 of a continent where justice, human rights and the rule of law matter. Both structural changes and adjustments to judicial practice are required to save the remaining article 34(6) declarations, to get the withdrawing states to return to the fold, to secure further adherence, and to restore the African Court's weakened legitimacy.

163 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not entered into force).

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The subject-matter jurisdiction and interpretive competence of the African Court on Human and Peoples' Rights in relation to international humanitarian law

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SUMMARY: *The African Court on Human and Peoples' Rights has a uniquely broad subject-matter jurisdiction that includes any 'relevant human rights instrument ratified by the states concerned' (article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights). This article considers the extent to which the Court's subject-matter jurisdiction includes international humanitarian law, and the related issue of the Court's interpretive competence. It is argued that the Court indeed is competent to directly apply norms of international humanitarian law. However, the circumstances under which it can do so are limited to two instances, namely, (i) where international humanitarian law norms are incorporated by reference into applicable human rights treaties; and (ii) in the likely scenario that the Court*

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regards some international humanitarian law conventions as having a human rights character, the primary rules of the applicable international humanitarian law obligations must entail an individual right. Whether a given international humanitarian law obligation entails an individual right is to be determined on a case-by-case basis and, in any event, such instances will be rare. As a consequence of the limited circumstances under which the Court can directly apply international humanitarian law, determining the extent to which the Court can rely on the interpretation of international humanitarian law in applying human rights norms remains pertinent. In this regard it is argued that the Court can rely on international humanitarian law in the application of human rights norms on two bases. First, considering the complementary relationship the Court has with the African Commission, the Court can rely on the African Charter's interpretation clause (articles 60 and 61). Second, the Court has an implied power to interpret international humanitarian law in applying human rights treaties, as this power is necessary for the Court to discharge its mandate.

Key words: *African Court on Human and Peoples' Rights; subject-matter jurisdiction; international humanitarian law; complementarity; contextual interpretation*

1 Introduction

There is general agreement that international human rights law and international humanitarian law co-apply during situations of armed conflict, and that their co-application is such that at times international human rights law norms are applied in a modified manner so as to ensure their mutual consistency with international humanitarian law.¹ A key example in this regard is the application of the right to life in a manner consistent with international humanitarian law – compliant lethal targeting during situations of armed conflict.² Accordingly, human rights enforcement mechanisms, such as those forming part of the European and Inter-American human rights systems, have recognised the need for contextual interpretation and application of international human rights law norms, consistent

¹ See *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (8 July 1996) (1996) ICJ Reports 226 para 25. Key contributions include N Lubell 'Challenges in applying human rights law to armed conflict' (2005) 87 *International Review of the Red Cross* 737-738; C Droege 'Elective affinities? Human rights and humanitarian law' (2008) 90 *International Review of the Red Cross* 525-527; and C Greenwood 'Human rights and humanitarian law – Conflict or convergence' (2010) 43 *Case Western Reserve Journal of International Law* 491-503-508.

² *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (n 1) para 25.

with the co-application of international humanitarian law.³ However, as these mechanisms have a patently human rights mandate and usually a narrow subject-matter jurisdiction limited to their own treaty regimes, they have adopted different approaches in this regard. These approaches are informed by each mechanism's defined competence and implied powers. In contrast to similar mechanisms, the subject-matter jurisdiction of the African Court on Human and Peoples' Rights (African Court) extends to 'any other human rights instrument' ratified by the parties before the Court.⁴

As the African Court is still in its formative years, many questions remain as to the approach it will adopt regarding its expansive subject-matter jurisdiction, including whether international humanitarian law conventions may be regarded as 'human rights instruments', and thus be open to application by the Court as part of its judicial function. Equally, the interpretive competence of the African Court with regard to international humanitarian law remains the subject of speculation and debate. These issues are of great significance, as Africa is the continent worst affected by armed conflict in the post-World War II era.⁵ Yet, the regulation of armed conflict in Africa, as well as the role of international humanitarian law in the African system, has received very little scholarly attention.⁶ The prevalence of armed conflict in Africa does not in and of itself inform the appropriateness or desirability of the African Court directly applying international humanitarian law instruments, but does speak to the

3 For a detailed analysis of the Inter-American system, see D Shelton 'Humanitarian law in the Inter-American human rights system' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 365; and for the European system, see K Oellers-Frahm 'A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 333.

4 Art 3(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 of 1998.

5 G Waschefort 'African and international humanitarian law: The more things change, the more they stay the same' (2016) 98 *International Review of the Red Cross* 593 595.

6 Waschefort discussed international humanitarian law in an African context; Waschefort (n 5) 593; Viljoen focused on an institutional perspective of international humanitarian law in the African system, as well as discussing the contributions of the African system to the development of international humanitarian law, while Hailbronner focused more on the normative dimensions to the relationship between international humanitarian law and international human rights law in the context of the African system. See F Viljoen 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in De Wet & Kleffner (n 3) 303; F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18; M Hailbronner 'Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339.

inevitability of the Court being confronted with these issues. The importance of adopting a sound and consistent approach regarding the African Court's mandate and interpretive competence, including regarding international humanitarian law, cannot be overstated, as it arises not only at the level of individual cases, but also with respect to the very sustainability of the Court.

The core values of the African Court include ensuring 'equal access to all potential users of the Court, [and being responsive] to the needs of those who approach the Court'.⁷ To achieve this, and indeed to achieve its mandate, the Court must ensure that potential litigants have appropriate guidance in determining which matters are properly justiciable before the Court, and have confidence in the consistency with which the Court will proceed in such matters. For the millions of victims of armed conflict on the African continent this specifically includes the clarification of the status of international humanitarian law under the Court's mandate. Indeed, the failure of the African Commission on Human and Peoples' Rights (African Commission) to adequately serve the needs of victims of armed conflict should not be replicated by the Court.⁸ The Court can only achieve this through the development of a rigorous body of jurisprudence.

The African Court finds itself at a critical juncture. The sustainability of the Court depends on it attracting a sufficient number of admissible cases. While 30 states have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), direct access to the Court for individuals and non-governmental organisations (NGOs) is afforded only in respect of state parties that have entered an optional declaration.⁹ To date, 10 states have made such declarations (Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia).¹⁰ However, Rwanda, Tanzania, Benin and Côte d'Ivoire have all issued notices withdrawing their declarations.¹¹ More than

7 <https://www.african-court.org/en/index.php/about-us/mandate-vision-mission-values> (accessed 27 May 2020).

8 Notwithstanding the prevalence of armed conflict on the African continent, and the African Commission's express powers to rely on international humanitarian law in interpreting the African Charter, as provided for in arts 60 & 61 of the Charter, the Commission has directly relied on international humanitarian law interpretation in only one communication (*Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003)).

9 Art 5(3) read with art 36(4) African Court Protocol. For ratification status, see https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf (accessed 27 May 2020).

10 https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf (accessed 27 May 2020).

11 Tanzania: <https://twitter.com/AfrimechsHub/status/1201572103176302592>; Benin: <https://www.banouto.info/article/POLITIQUE/20200423-retrait-du-bnin>

90 per cent of finalised cases that were admissible were instituted on the basis of such direct access.¹² In fact, Tanzania has been the respondent in more than half of the Court's finalised admissible cases. It appears that there has been some dissatisfaction along the lines that the Court is overstretching its mandate. In particular, Tanzania has objected to the Court exercising jurisdiction in a number of cases on the basis that the Court is exceeding its mandate in either acting as a court of first instance or an appellate court.¹³ While the merits of Tanzania's objections are beyond the scope of the present discussion, they do indicate that states' tolerance for perceived excesses in the Court exercising its mandate is very low. Should the Court regard international humanitarian law as fully justiciable, without adequate consideration of the legal-technical implications, the Court will likely open itself to further criticism on the basis of overstretching its mandate, which may result in further backlash. This concern is not purely theoretical as states, particularly the United States of America, have expressed their dissatisfaction with United Nations (UN) human rights mechanisms engaging in international humanitarian law interpretation, precisely on the basis that these states argue international humanitarian law to be beyond the remit of the relevant mechanisms.¹⁴ The answer is not for the African Court to adopt a defensive posture, bending to the anticipated whim and will of states, but instead to recommit itself to rendering high-quality judgments, staying within its current mandate, thereby confirming its legitimacy.

The African Court has the opportunity to develop a sound and consistent approach regarding international humanitarian law earlier in its life cycle than its sister courts in Europe and the Americas. The European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) both initially took a cautious and reluctant approach to their interpretative competence in relation to international humanitarian law.¹⁵ They appear to have avoided difficult questions regarding the impact of international humanitarian law on the application of

de-la-cour-africaine-les-clarifications-du-ministre-alain-orounla/; Côte d'Ivoire: http://www.gouv.ci/_actualite-article.php?recordID=11086 (accessed 27 May 2020).

12 <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 27 May 2020).

13 See, eg, *Armand Guehi v Tanzania* (7 December 2018) App 1/2015 paras 31-34 (*Guehi*); and *Ally Rajabu v Tanzania* (28 November 2019) App 7/2015 paras 21-31.

14 For a detailed discussion, see P. Alston et al 'The competence of the UN Human Rights Council and its Special Procedures in relation to armed conflicts: Extrajudicial executions in the "war on terror"' (2008) 19 *European Journal of International Law* 183.

15 Shelton (n 3) 365; Oellers-Frahm (n 3) 333.

human rights norms during armed conflict, rather than concluding that international humanitarian law indeed does impact upon the manner in which human rights are given effect to. It was only in 2014 with the *Hassan* case that the European Court for the first time truly informed its application of a human rights norm with reference to international humanitarian law principles.¹⁶ By stark contrast, in the wake of the International Court of Justice (ICJ) confirming the co-application of international humanitarian law and international human rights law during situations of armed conflict during 1996,¹⁷ the Inter-American Commission on Human Rights (Inter-American Commission) began directly applying principles of international humanitarian law.¹⁸ However, as Shelton submits, over time the approach of these mechanisms has somewhat converged – the European and Inter-American Courts have shown a greater willingness to engage with international humanitarian law progressively, while the Inter-American Commission has restrained itself in this regard.¹⁹

This contribution is organised into three parts. The first part considers the implications for the subject-matter jurisdiction and interpretive competence of the African Court, of provisions in human rights treaties that refer to state parties' international humanitarian law obligations. The second part focuses on the interpretive competence of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in respect of international humanitarian law. The last part considers the subject-matter jurisdiction and interpretive competence of the African Court as far as international humanitarian law is concerned.

2 Legal consequences of reference to international humanitarian law in human rights treaties

It is not uncommon for human rights treaties to contain provisions that refer to international humanitarian law obligations. The first to have done so is the UN Convention on the Rights of the Child (CRC), which requires parties to respect rules of international humanitarian

16 *Hassan v United Kingdom* ECHR (16 September 2014) App 29750/09 paras 76-77.

17 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (n 1) para 25.

18 Cerna identifies the impact of the 1996 ICJ finding by highlighting that during 1995 the Commission's findings with regard to situations of armed conflict were silent on the applicability of international humanitarian law, whereas by 1997 the Commission began directly applying international humanitarian law. Eg, in the *Milk* case the Commission found a violation of Common Article 3 to the Geneva Conventions of 1949. See CM Cerna 'The history of the Inter-American system's jurisprudence as regards situations of armed conflict' (2011) 2 *Journal of International Humanitarian Legal Studies* 31 fn 94.

19 Shelton (n 3) 371.

law relevant to the child.²⁰ Interestingly, the legal consequences of such references have received very little attention. Yet, these consequences can be very far-reaching, as is illustrated by the African Commission's interpretation of article 18(3) of the African Charter on Human and Peoples' Rights (African Charter), which provides that '[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'. While this provision does not refer to international humanitarian law obligations, the consequences of reference to women's and children's rights declarations and conventions follows the same legal contours as reference to international humanitarian law. The Commission has interpreted article 18(3) as incorporating in its entirety the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by reference into the African Charter.²¹ Accordingly, even states party to the African Charter that are not party to CEDAW incurs the totality of obligations in terms of CEDAW. Moreover, they are obliged to report to the African Commission on the implementation of CEDAW.²² By extension of logic it is reasonable to assume that a communication submitted before the African Commission, based on an alleged violation of CEDAW, may be admissible as it will be consistent with the African Charter.²³ This illustrates the importance of this issue for present purposes. If reference to international humanitarian law obligations is regarded as incorporating those obligations into a treaty in respect of which the African Court has subject-matter jurisdiction, the Court will likewise have jurisdiction in respect of the referenced international humanitarian law obligations.

The remainder of this part in the first instance considers the requirements and consequences of incorporation by reference in the law of treaties; second, the legal consequences of references to international humanitarian law obligations in human rights treaties; and, finally, the implications for enforcement mechanisms.

2.1 Incorporation by reference in the law of treaties

Incorporation by reference involves reference in one legal instrument (the incorporating instrument) to the content of a separate, pre-existing document (the referenced material), with the purpose of making the referenced material part of the incorporating

²⁰ Art 38(1) CRC.

²¹ F Viljoen *International human rights law in Africa* (2012) 253.

²² African Commission, *Guidelines for National Periodic Reports* (1989), part VII.

²³ Art 56(2) African Charter.

instrument, without reproducing its content.²⁴ To those bound by the incorporating instrument, the source of the obligation thus is the incorporating instrument, not the referenced document. The doctrine of incorporation by reference is well established in the common law tradition, and is used in different contexts, such as the law of succession, commercial contracts and legislative enactments.²⁵ As a legislative technique referential legislation is commonly used to incorporate treaties into domestic law. For example, article 7 of the Diplomatic Privileges and Immunities Act 1967 of Australia references and incorporates articles 1 and 22 to 24 of the Vienna Convention on Diplomatic Relations into Australian law. Reference is often made in legislation to external documents for purposes other than incorporating the referenced material, for example, informational and amendatory references.²⁶ As such, for incorporation by reference to occur, the referenced material has to be both referenced and incorporated. No clear criteria have developed across different legal systems for incorporation by reference, and the issue is to be determined on a case-by-case basis. In some instances the referenced material is very broadly defined, for example, in Florida state, still-in-force legislation incorporates 'the common and statute laws of England which are of a general and not a local nature ... down to the 4th day of July, 1776'.²⁷ With regard to the intention to incorporate, one finds that implicit incorporation sometimes is sufficient.²⁸ However, in such instances the material will generally only be deemed incorporated if it is necessary to consult the referenced material to determine the meaning of the referencing legislation.²⁹ It is submitted that the degree of specificity of the referenced material, and the extent to which the intention to incorporate is clearly articulated, are relational. That is to say, where the referenced material is broadly defined, the intention to incorporate will need to be expressly articulated, and *vice versa*. As far as the identification of the referenced material is concerned, the New South Wales courts in Australia held that '[i]f there is uncertainty as to what is the document to which the reference is made, no doubt the regulation would be invalid'.³⁰

24 JM Keyes 'Incorporation by reference in legislation' (2004) 25 *Statute Law Review* 180; FS Boyd 'Looking glass Law: Legislation by reference in the states' (2008) 68 *Louisiana Law Review* 1201-1210; HE Read 'Is referential legislation worthwhile' (1941) 25 *Minnesota Law Review* 263-266.

25 See eg CT Carr 'Legislation by reference and the technique of amendment' (1940) 22 *Journal of Comparative Legislation and International Law* 12-18; Keyes (n 24) 180.

26 Boyd (n 24) 1205-1210.

27 FLA STAT § 2.01 (2007).

28 See, eg, *Wigram v Fryer* (1887) 36 ChD 87, 56 LJCh 1098, also discussed by Read (n 24) 266.

29 Boyd (n 24) 1213.

30 *Wright v TIL Services Pty Ltd* [1956] SR (NSW) 413 421.

The practice of incorporation by reference frequently occurs in treaty law, for example, the Rome Statute of the International Criminal Court (Rome Statute) defines an ‘act of aggression’ as ‘the use of armed force by a state ... in any ... manner inconsistent with the Charter of the United Nations’.³¹ No criteria for incorporation by reference have developed in treaty law, and this issue has received scant attention in the literature. However, some discussion has taken place regarding the derogation clause of the European Convention on Human Rights (European Convention), which provides:³²

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention ... provided that such measures are not inconsistent with its other obligations under international law.

Buergenthal labels the reference to ‘other obligations under international law’ as ‘incorporation by reference’.³³ However, he argues that such obligations are limited to conventions to which the state is party.³⁴ These suggestions are mutually exclusive – the purpose of incorporation by reference precisely is that the incorporating instrument becomes the source of the obligation, making it irrelevant whether state parties are bound by the referenced material. In contrast, Meron adopts the correct legal position, as his analysis is premised on the understanding that when a provision is properly incorporated into a treaty, state parties are bound by that provision, regardless of whether they are party to the incorporated treaty.³⁵ Buergenthal’s use of ‘incorporation by reference’ seems to be a more informal use of this terminology. In any event, it is clear that article 15 of the European Convention does not amount to incorporation by reference, and that indeed it is limited to conventions to which the state is party.³⁶

In the context of treaty law, the question of whether incorporation by reference has occurred is not simply a matter of interpretation, but is one that strikes at the heart of the consensual nature of treaty obligations. The recognition of legal obligations emanating from provisions of a treaty that are referenced but not properly

31 Art 8bis(2) Rome Statute.

32 Art 15(1) European Convention.

33 T Buergenthal ‘International and regional human rights law and institutions: Some examples of their interaction’ (1977) 12 *Texas International Law Journal* 321-324.

34 Buergenthal (n 33) 324-325.

35 T Meron ‘Norm making and supervision in international human rights: Reflections on institutional order’ (1982) 76 *American Journal of International Law* 754-764.

36 This is clear in terms of the provision’s language, referring to ‘its [the state’s] other obligations under international law’. See also S Wallace *The Application of the European Convention on Human Rights to military operations* (2019) 193.

incorporated would conflict with the principle *pacta tertiis nec nocent nec prosunt* (a treaty does not create obligations for third states without their consent) for states that are not party to the referenced treaty.³⁷ Where a provision is properly incorporated by reference, this principle is not relevant, as ratification of the incorporating treaty amounts to an expression of consent. Even a liberal interpretation of the requirements of incorporation by reference will compel a conclusion that broad references to international humanitarian law, without identifying the relevant international humanitarian law obligations with some degree of specificity, nor clearly articulating an intention to incorporate, will not amount to incorporation by reference. Moreover, due to their potential for constant evolution, it is doubtful that norms of customary international law can be incorporated by reference.

Accordingly, the African Commission's approach to the incorporation of CEDAW into the African Charter is not good in law.³⁸ CEDAW is not identified with sufficient specificity, and the intention to incorporate is not clearly expressed. The Commission's interpretation rests largely on the fact that CEDAW predates the African Charter (which would be required for incorporation by reference). As the CRC postdates the African Charter, it equally is not regarded as incorporated. However, a range of other international declarations, which predate the African Charter, likewise provide for the protection of the rights of women and children, yet the African Children's Committee does not regard these as having been incorporated into the African Charter.³⁹

2.2 Reference to and recognition of external international humanitarian law obligations

The African Charter does not make reference to international humanitarian law, nor does it contain a derogation clause whereby international humanitarian law is referenced indirectly. However, a number of regional African human rights treaties include such provisions, and they often contain more extensive reference to international humanitarian law than conventions at the universal

37 Art 34 Vienna Convention.

38 For an opposing view, see Viljoen (n 21) 253.

39 Langley suggests that it is not only CEDAW that is incorporated, but also the Convention on the Political Rights of Women and the Declaration on the Elimination of Discrimination Against Women. However, this view is not consistent with the practice of the African Commission. See W Langley 'The rights of women, the African Charter, and the economic development of Africa' (1987) *Boston College Third World Law Journal* 217.

level or those emanating from other regional systems.⁴⁰ These include the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); and the Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Each of these treaties provides that state parties undertake to 'respect and ensure respect for rules of international humanitarian law' relevant to the subject-matter of the given treaty.⁴¹ The genealogy of this provision is important in determining its consequences. As previously noted, the first expression of this provision appeared in CRC, which provides that 'States Parties undertake to respect and to ensure respect for rules of international humanitarian law *applicable to them* in armed conflicts which are relevant to the child'.⁴² The *travaux préparatoires* indicate that the words 'applicable to them' were specifically inserted to make it clear that 'states are not obliged to respect "rules of law" contained in treaties to which they are not a party'.⁴³ As such, the source of legal obligation remains the international humanitarian law conventions to which the state in question is party, and not the provision of the human rights treaty referencing international humanitarian law.⁴⁴

In all three relevant African instruments the words 'applicable to them' were omitted in the general obligation to respect and ensure respect for international humanitarian law, raising the question of whether the legal consequences are affected. As these provisions clearly do not amount to an incorporation by reference, the effect is that the source of the obligation remains the international humanitarian law conventions to which the state in question is party, as is the case with CRC. Numerous further references to international humanitarian law are found in the African Children's Charter and the African Women's Protocol. However, these provisions expressly indicate that the referenced international humanitarian law obligations emanate from the international humanitarian law treaties

40 No convention within the European system contains direct references to international humanitarian law, and within the Inter-American system only art 29 of the Convention on Protecting the Human Rights of Older Persons of 2015 does so. However, this Convention has not generated any relevant practice.

41 Art 22(1) African Children's Charter; art 11(1) African Women's Protocol; and art 3(1)(e) Kampala Convention.

42 Art 38(1) CRC (my emphasis).

43 'Legislative history of the Convention on the Rights of the Child, Volume II' Office of the United Nations High Commissioner for Human Rights (2007) HR/PUB/07/1 para 126, <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf> (accessed 10 January 2020).

44 M Drumbi & J Tobin 'Article 38: The rights of children in armed conflict' in J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 1503 1516.

that the relevant state has ratified.⁴⁵ As such, these provisions clearly have no incorporating effect, and require no further discussion.

The Kampala Convention likewise contains a number of provisions referencing international humanitarian law, including the general obligation to respect and ensure respect for international humanitarian law.⁴⁶ Article 7 of the Kampala Convention is titled 'Protection and assistance to internally displaced persons in situations of armed conflict'. This provision applies only to armed groups, which are defined as 'dissident armed forces or other organised armed groups that are distinct from the armed forces of the state'.⁴⁷ Article 7(3) provides specifically that '[t]he protection and assistance to internally displaced persons under this article shall be governed by international law and in particular international humanitarian law'. This language is suggestive of an intention to incorporate international humanitarian law by reference. The provision prohibits members of armed groups from engaging in a closed list of nine specific categories of conduct against internally-displaced persons: carrying out arbitrary displacement; hampering protection and assistance; denying the right to live in satisfactory conditions; restricting freedom of movement; the recruitment of children; forcible recruitment, hostage-taking, sexual slavery and trafficking; impeding humanitarian assistance; harming humanitarian personnel or resources; and violating the civilian and humanitarian character of places of shelter.⁴⁸

The purpose of incorporating international humanitarian law appears to be motivated by two factors: first, the objective of creating obligations directly for armed groups, instead of relying on the 'respect, protect and fulfil' framework of international human rights law, which traditionally requires states to be the conduits of obligation for non-state entities.⁴⁹ Second, while the prohibited conduct is identified, the developed law emanating from international humanitarian law is to be applied to give substantive effect to the prohibitions. For example, the prohibited conduct includes 'recruiting children or requiring or permitting them to take

45 Arts 22(3) & 23(1) African Children's Charter; art 11(2) African Women's Protocol.

46 Arts 3(1)(e), 4(4)(b) & 5(8) Kampala Convention.

47 Art 1(e) Kampala Convention.

48 Art 7(5) Kampala Convention.

49 With regard to the state obligation to protect human rights in relation to the actions of non-state entities, see N Rodley 'Non-state actors and human rights' in S Sheeran & N Rodley (eds) *Routledge handbook of international human rights law* (2013) 523. With regard to international humanitarian law creating obligations for armed groups, see, eg, J Kleffner 'The applicability of the law of armed conflict and human rights law to organized armed groups' in De Wet & Kleffner (n 3) 49-64; M Sassòli *How does law protect in war?* (2011) 347-349.

part in hostilities under any circumstances'.⁵⁰ The question as to the age threshold and standard of the applicable obligation is then to be answered, depending on the nature of the conflict, with reference to article 77(2) of Protocol I Additional to the Geneva Conventions on the Protection of Victims of International Armed Conflicts (API), or article 4(3)(c) of Protocol II Additional to the Geneva Conventions on the Protection of Victims of Non-International Armed Conflicts (APII). Ironically, the prohibition of child use and recruitment contained in the African Children's Charter provides for a higher standard of protection than both Protocols.⁵¹ However, the incorporation of international humanitarian law is useful in providing unambiguously for these obligations to apply to armed groups. In this instance, the intention to incorporate is expressed clearly through the words 'shall be governed by' international humanitarian law, and the referenced material is sufficiently identified as those parts of international humanitarian law that regulate the nine forms of prohibited conduct.

2.3 Implications for enforcement mechanisms

The Kampala Convention undoubtedly falls within the jurisdiction of the African Court. As such, the incorporated international humanitarian law obligations will likewise fall within the jurisdiction of the Court when the Court applies article 7 of the Kampala Convention. However, as proceedings cannot be instituted before the African Court against armed groups, it is rather unlikely that the Court will apply international humanitarian law in this context.

The question remains as to what the legal consequences are where reference to international humanitarian law is made, but international humanitarian law is not incorporated. The African Children's Committee's first individual communication has bearing on this question. The *Hansungule* communication related to alleged children's rights violations in the context of the conflict between the Ugandan armed forces and the Lord's Resistance Army.⁵² The Children's Committee made reference to international humanitarian law in its analysis of the right to education, on the basis of article 22(1) of the African Children's Charter, which provides that 'State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed

50 Art 7(5)(e) Kampala Convention.

51 Art 22(2) African Children's Charter.

52 Communication 1/2005, *Hansungule & Others v The Government of Uganda* 21st ordinary session of the African Committee of Experts on the Rights and Welfare of the Child para 5.

conflicts which affect the child'.⁵³ With regard to the equivalent provision in CRC, Brett suggests that '[t]he logical interpretation ... is that it simply reinforces the obligations of states to abide by the humanitarian law by which they are already bound'.⁵⁴ However, the Children's Committee went further. In interpreting the right to education in light of applicable international humanitarian law, the Committee recognised that '[t]he principle of distinction under international humanitarian law demands that educational facilities are protected as long as they are civilian objects'.⁵⁵ However, on the basis of available evidence the Committee could not 'fault the margin of appreciation with which the state planned and conducted its military operations that could qualify as an indiscriminate attack on schools'.⁵⁶ As such, the Committee used a rather generic reference to international humanitarian law obligations (contained in article 22) as a vehicle through which to engage in contextual analysis that considers the impact of international humanitarian law on the state in giving effect to its human rights obligations.

Reference to international humanitarian law obligations in human rights treaties can have significant implications for the African Court. Where international humanitarian law obligations are both referenced and incorporated, as with article 7 of the Kampala Convention, the relevant international humanitarian law obligations are brought squarely within the subject-matter jurisdiction of the Court, but only when applying the provision of the Convention containing the reference. Reference to international humanitarian law obligations, without incorporating these obligations, has value in acknowledging the relevance of international humanitarian law as well as the nexus between the observance of international humanitarian law and the enjoyment of human rights. Moreover, the Court can use such references as an additional basis to engage in a contextual interpretation of the relevant human rights norm.

3 Interpretive competence of African quasi-judicial mechanisms in relation to international humanitarian law

The African Court Protocol is not a self-contained treaty but, instead, forms part of the African Charter regime. Moreover, the

53 *Hansungule* (n 52) para 66.

54 R Brett 'Child soldiers: Law, politics and practice' (1996) 4 *International Journal of Children's Rights* 115 116.

55 *Hansungule* (n 52) para 67.

56 *Hansungule* para 68.

complimentary relationship that the African Court shares with the African Commission is confirmed in the Court Protocol.⁵⁷ As a complimentary mechanism, the African Commission with its established practice and jurisprudence has a bearing on an enquiry into the African Court's interpretive competence.

Interpretation clauses contribute to the institutional competence of human rights enforcement mechanisms, by providing for external sources upon which the mechanism may rely in informing its interpretation of the rights that fall within its jurisdiction. The African Children's Charter's interpretation clause, which provides for the interpretive competence of the African Children's Committee, states as follows:⁵⁸

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

The scope of this clause does not expressly include parts of international law other than 'international law on human rights'. If international humanitarian law indeed is included in its scope, it then has to be by virtue of regarding international humanitarian law as part of 'international law on human rights'. In the *Hansungule* communication the African Children's Committee premised its discussion of international humanitarian law on article 22, which expressly references international humanitarian law obligations, and not the interpretation clause.⁵⁹ The Committee did reference the interpretation clause in the admissibility section of the finding, to justify its reliance on findings of the African Commission.⁶⁰ While not definitive, this suggests that the Committee did not regard the interpretation clause as also providing authority to interpret international humanitarian law and, by extension, that international humanitarian law does not form part of 'international law on human rights' for purposes of the interpretation clause.

The interpretation clause of the African Charter is two-tiered, and provides:⁶¹

57 Arts 2 & 8 African Court Protocol.

58 Art 46 African Children's Charter.

59 *Hansungule* (n 52) para 66.

60 *Hansungule* para 24.

61 Arts 60 & 61 African Charter.

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

The first tier largely mirrors the interpretation clause of the African Children's Charter, and focuses specifically on 'international law on human and peoples' rights'. The question of whether the first tier implicitly includes international humanitarian law is mooted by the second tier, which is open-ended, and contains no limitations with regard to the subject-matter of the sources of law taken into consideration. International humanitarian law conventions undoubtedly are captured in the second tier of the interpretation clause. The two-tiered approach serves an organisational function, distinguishing between the ability of the Commission to 'draw inspiration from' other human rights instruments on the one hand, and to 'take into consideration' sources not of a human rights character, that may assist in interpreting relevant human rights norms.

3.1 Practice of the African Commission

The African Commission has limited practice with regard to international humanitarian law. For the most part the Commission has limited itself to confirming the applicability of all Charter rights during situations of armed conflict.⁶² However, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda (DRC)* the Commission for the first time engaged in a more substantive analysis of specific international humanitarian law standards.⁶³ The *DRC* communication was an inter-state communication, relating to 'grave

⁶² See further Viljoen (2014) (n 6) 306-308; and Hailbronner (n 6) 347-348.

⁶³ *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) (*DRC*).

and massive violations of human and peoples' rights' committed by the armed forces of the respondent states on the territory of the DRC between August and November 1998.⁶⁴ The DRC's allegations primarily implicated the armed forces of Uganda and Rwanda, and alleged violations of a range of provisions of the African Charter, the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions of 1949, as well as API and APII.⁶⁵

The African Commission frequently relied on the interpretation clause of the Charter both in regard to the admissibility of the matter as well as the merits. The respondent states argued that the matter was inadmissible as it related to alleged violations of international humanitarian law, and did not fall within the mandate of the Commission. In this regard, the Commission held:⁶⁶

The effect of the alleged activities ... fall not only within the province of humanitarian law, but also within the mandate of the Commission. The combined effect of Articles 60 and 61 of the Charter compels this conclusion; and it is also buttressed by Article 23 of the African Charter.

The African Commission confirmed that the Geneva Conventions and API 'constitute part of the general principles of law recognised by African States',⁶⁷ and further confirmed that international humanitarian law conventions 'fall on all fours with the category of special international conventions'.⁶⁸ While the Commission indicated that international humanitarian law is merely to be taken into consideration in the 'determination' of the case,⁶⁹ it engaged in a detailed analysis of specific international humanitarian law provisions throughout the finding.

The African Commission's approach has led to divergent views as to whether it went beyond its authority to consider international humanitarian law conventions as subsidiary measures to determine the principles of law. Viljoen argues that the Commission appropriately sought interpretive guidance from international humanitarian law, in finding violations of human rights law.⁷⁰ International humanitarian law provisions were used to give 'concrete content to the rather abstract notions' of some features of the African Charter, for example, in the context of the Commission's analysis of the dumping of bodies and mass burials.⁷¹ Viljoen highlights that the Commission

64 *DRC* (n 63) paras 3-7.

65 *DRC* paras 3-9.

66 *DRC* para 64.

67 *DRC* para 70.

68 *DRC* para 78.

69 *DRC* para 70.

70 Viljoen (2014) (n 6) 314.

71 Viljoen (2014) 317.

confirmed ‘a definite dividing line between the “province” of international humanitarian law, on the one hand, and the human rights “mandate” of the Commission’,⁷² on the other, suggesting that international humanitarian law conventions do not form part of ‘international law on human and peoples’ rights’.⁷³ Accordingly, he concludes that the Commission held that it is not empowered to find violations of international humanitarian law, but it is empowered to rely on international humanitarian law in interpreting the rights within its subject-matter jurisdiction.⁷⁴ Hailbronner disputes this conclusion – she focuses strongly on the Commission’s detailed analysis of international humanitarian law, which at times is done without reference to rights contained in the African Charter.⁷⁵ For example, the African Commission found that taking article 56 of API and article 23 of the Hague Convention (II) into account, as read with the African Charter’s interpretation clause (articles 60 and 61), the besiegement of a hydro-electric dam in Lower Congo province amounted to a violation of the African Charter.⁷⁶ However, the Commission states in a later paragraph that the besiegement of the dam amounts to a violation of the right to property under the African Charter.⁷⁷ Hailbronner argues that during its analysis the Commission oscillated between applying international humanitarian law directly, and merely relying on international humanitarian law for interpretive purposes.⁷⁸ She expressly disputes Viljoen’s conclusion that ‘the African Commission has found only violations of human rights law, but in so doing, has sought interpretive guidance from international humanitarian law’.⁷⁹

The African Commission limited its finding to violations of the African Charter.⁸⁰ Viljoen is correct in concluding that the direct application of international humanitarian law does not fall within the mandate of the Commission. Hailbronner exaggerates the implications of the Commission’s detailed interpretation of international humanitarian law – regardless of the extent of discussion of international humanitarian law, the Commission did

72 Viljoen 308.

73 This conclusion is also supported by Hailbronner (n 6) 346.

74 Viljoen (2014) (n 6) 308.

75 Hailbronner (n 6) 350-352.

76 *DRC* (n 63) paras 83-84. It is interesting to note that the African Commission did not explicitly address the status of the Hague Convention (II) under art 61 of the African Charter, as it did in regard to the Geneva Conventions and Optional Protocols.

77 Art 14 African Charter; *DRC* (n 63) para 88.

78 Hailbronner (n 6) 349.

79 Viljoen (2014) (n 6) 314, quoted in Hailbronner (n 6) 350.

80 *DRC* (n 63) operative paragraph. The African Commission found violations of arts 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter.

not purport to find a violation of international humanitarian law. However, her critique of the Commission for poorly articulating its reasoning is well founded. Both Viljoen and Hailbronner suggest that the Commission's analysis of the besiegement of the dam links article 56 of API and/or article 23 of Hague Convention (II) to article 23 of the African Charter (providing for 'the right to national and international peace and security').⁸¹

This erroneous interpretation is based on the African Commission stating that 'the Respondent States are in violation of the Charter with regard to the just noted article 23'.⁸² The 'just noted article 23' refers to article 23 of the Hague Convention II, and not article 23 of the African Charter. Indeed, article 23 of Hague Convention II was discussed just prior to the sentence containing the words 'just noted'. This leaves open the question as to which provision of the Charter the respondent states had violated with regard to the besiegement of the dam. The subsequent paragraph of the finding cites the *Celebici* case of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as 'supportive of the Commission's stance'.⁸³ The relevant paragraph of the *Celebici* case upon which the Commission relied relates to the obligation of parties to conflict in relation to the private and public property of an opposing party, and specifically provides that 'private property must be respected and cannot be confiscated ... pillage is formally forbidden'.⁸⁴ This suggests that the Commission linked article 14, the right to property, to the besiegement of the dam.⁸⁵

This aspect of the Commission's finding is awkwardly drafted, leading to ambiguity, but from an international humanitarian law perspective this issue is important to address. Both articles 56 of API and 23 of Hague Convention (II) are quintessential international humanitarian law provisions. International humanitarian law is premised on the equality of belligerents, and thus operates without distinction as to wrongfulness in engaging in armed conflict. Along these contours, Schabas notes that the difficulty with reconciling international human rights law and international humanitarian law lies in

the failure to grasp an underlying distinction: international humanitarian law is built upon neutrality or indifference as to the legality of the

81 Hailbronner (n 6) 350; Viljoen (2014) (n 6) 316.

82 *DRC* (n 63) para 80.

83 *Prosecutor v Zejnir Delalic & Others* (16 November 1998) ICTY-IT-96-21-T (*Celebici* case) cited in *DRC* (n 63) para 85.

84 *Celebici* case (n 83) para 587, cited in *DRC* (n 63) para 85.

85 See also *DRC* (n 63) para 88.

war itself. Human rights law, on the other hand, views war itself as a violation. There is a human right to peace. Because of this fundamental incompatibility of perspective with regard to *jus ad bellum*, human rights law and international humanitarian law can only be reconciled ... if human rights law abandons the right to peace and develops an indifference to the *jus ad bellum*.⁸⁶

The existence of an international armed conflict in the DRC at the time is a precondition to the application of API and the Hague Convention (II) to the besiegement of the dam. Moreover, 'the legality of the war itself' is irrelevant in determining the lawfulness of the besiegement of the dam under international humanitarian law. In contrast, the wrongfulness of the respondent states engaging in an armed conflict in the DRC is central in determining a violation of the right to international peace and security. The African Commission did find a violation of article 23 of the African Charter, but this aspect to the analysis is dealt with separately to the issue of the besiegement of the dam. Moreover, the Commission's analysis and application of the right to national and international peace and security is done with direct reference to the prohibition on the use of force, and the associated UN Charter use of force regime. Therefore, suggesting that article 23 of the African Charter can be interpreted and applied in light of the referenced international humanitarian law provisions is nonsensical, and not supported by the finding of the African Commission.

The African Charter's interpretation clause affords the African Commission the interpretive competence to refer to international humanitarian law extensively, but no mandate to apply international humanitarian law directly. The scope of articles 60 and 61 may have consequences for the African Court. This will be discussed further below.

4 African Court on Human and Peoples' Rights

There are three avenues through which the African Court can engage with international humanitarian law, namely, (i) through reference to international humanitarian law in the substantive norms of relevant human rights treaties; (ii) by way of its subject-matter jurisdiction; and (iii) through its interpretive competence.

86 WA Schabas '*Lex specialis?* Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of *jus ad bellum*' (2007) 40 *Israel Law Review* 603.

With regard to the first category, it is important to recall that where there is a proper incorporation by reference of international humanitarian law obligations into a human rights treaty in respect of which the African Court may exercise subject-matter jurisdiction, the Court will have jurisdiction in respect of the incorporated international humanitarian law obligations. On the other hand, reference to international humanitarian law obligations that are not incorporated serves to acknowledge the relevance of international humanitarian law to the rights under discussion, as well as the nexus between the observance of international humanitarian law and the enjoyment of human rights, and provides a basis upon which to engage in contextual analysis that considers the impact of international humanitarian law on the state in giving effect to its human rights obligations. However, as the above discussion of 'reference to international humanitarian law in human rights treaties' specifically considered the African Court, there is no need for further consideration here.

In contrast to other human rights enforcement mechanisms, the African Court is endowed with a uniquely broad subject-matter jurisdiction, which extends to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned'.⁸⁷ Subject-matter jurisdiction determines which legal norms a given mechanism is empowered to apply as part of its judicial function, whereas the interpretive competence of a mechanism speaks to its competence to use sources not within its subject-matter jurisdiction to aid in giving meaning to the legal norms that are within its subject-matter jurisdiction. This part will consider the extent to which the subject-matter jurisdiction of the African Court includes international humanitarian law and, thereafter, the interpretive competence of the Court with respect to international humanitarian law.

4.1 Subject-matter jurisdiction

Upon the adoption of the African Court Protocol, leading commentators were divided on the question of whether the subject-matter jurisdiction of the African Court should be interpreted broadly or more restrictively. At one end of the spectrum, the apparent breadth of subject-matter jurisdiction was hailed, and it was argued that the only real restriction would be that the instrument in question

⁸⁷ Art 3(1) African Court Protocol.

be ratified by the parties before the Court.⁸⁸ On the other end of the spectrum, concern was expressed regarding the implications of such broad subject-matter jurisdiction.⁸⁹ To mitigate these implications, it was argued, the African Court should interpret restrictively what are 'relevant' treaties, so as to limit the Court to African regional human rights treaties⁹⁰ or, even more restrictively, to treaties 'that make express provision for adjudication by the ... Court'.⁹¹

It is clear that only treaties that are ratified by the states concerned fall within article 3. However, the African Court has made some questionable assertions regarding the status of the Universal Declaration of Human Rights (Universal Declaration) of 1948. In its analysis in *Anudo Ochieng Anudo v Tanzania* the Court acknowledged that the Universal Declaration is regarded as forming part of customary international law.⁹² However, in the operative part of the judgment, the Court ultimately found a violation of the right to nationality under article 15(2) of the Universal Declaration, without referencing either customary international law or a Charter provision.⁹³ More recently, in *Robert John Penessis v Tanzania*, the African Court again considered article 15(2) of the Universal Declaration. While the Court restated that the Universal Declaration forms part of customary international law, it considered the right to nationality in the Universal Declaration in light of article 5 of the African Charter.⁹⁴ The Court ultimately found a violation of the right to nationality 'as guaranteed by Article 5 of the Charter and Article 15 of the UDHR'.⁹⁵ More recently the Court found that it lacked subject-matter jurisdiction in regard to an alleged violation of the French Declaration of the Rights of Man and of the Citizen of 1789, as this declaration is not a human rights instrument open to ratification by states.⁹⁶ Finally, the African Court has not directly addressed the issue as to the meaning and importance of the word 'relevant' in article 3. Its practice indicates

88 See, among others, M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342-354; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256-268; GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431.

89 C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155-165-171; MJ Mujuzi 'The African Court on Human and Peoples' Rights and its protection of the right to a fair trial' (2017) 16 *Law and Practice of International Courts and Tribunals* 186-193.

90 Viljoen (n 21) 435-436; Heyns (n 89) 165-171.

91 Heyns (n 89) 168.

92 *Anudo Ochieng Anudo v Tanzania* (22 March 2018) App 12/2015 para 132(v).

93 *Anudo* (n 92) para 76.

94 *Robert John Penessis v Tanzania* (28 November 2019) App 13/2015 paras 85 & 103 (*Penessis*).

95 *Penessis* (n 94) para 168(v).

96 *Sebastien Germain Ajavon v Benin* (28 March 2019) App 13/2017 para 45.

that 'relevant' simply relates to whether the substance of the treaty reflects the violations of rights alleged in a given matter. The Court, for example, has consistently exercised subject-matter jurisdiction in respect of ICCPR.

4.1.1 Nature and character of 'human rights instruments' under the African Court Protocol

The legal consequences of a breach of a norm of international law are determined by the primary rule of the norm.⁹⁷ For present purposes, we can distinguish between (i) norms of which the primary rule entails human rights for individuals; (ii) norms of which the primary rule entails individual rights not of a human rights character; and (iii) norms of which the primary rules do not entail individual rights but only state responsibility. The African Court Protocol does not alter the nature of primary rules contained in third treaties, for example, international humanitarian law treaties. The consensual nature of treaty obligations dictates that states are bound only by the scope and content of norms to which they agreed. As such, regardless of how broad the Court Protocol purports to frame the Court's subject-matter jurisdiction, the African Court cannot apply norms the primary rules of which do not entail individual rights. However, where a norm indeed provides for individual rights, the Court has a margin of discretion as to how broad it interprets whether these rights amount to 'human rights'.

In the matter of *APDH v Côte d'Ivoire* (APDH) the African Court first engaged directly with questions as to whether a particular treaty or treaty provision qualifies as a 'human rights treaty'.⁹⁸ The APDH, an Ivorian NGO, alleged that structural changes to the Ivorian Independent Electoral Commission (IEC) were inconsistent with the requirements of independence and impartiality as provided for in the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance (ECOWAS Protocol).⁹⁹ In considering whether these instruments are included in the scope of article 3 of the African Court Protocol, the African Court held:¹⁰⁰

97 Art 33(2) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) *Yearbook of the International Law Commission* 2001, Vol II, Part Two 95, para 4.

98 *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire* (18 November 2016) App 1/2014 (APDH).

99 APDH (n 98) paras 3 & 20.

100 APDH para 57.

[I]n determining whether a convention is a human rights instrument, it is necessary to refer in particular to the purposes of such convention. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights.

This formulation suggests that the determinative factor is the 'purposes' of the treaty. These purposes are to be determined on the basis of expressly-enunciated rights, or mandatory obligations resulting in the enjoyment of such rights. There is debate as to whether the human rights character of an instrument is to be determined by the instrument holistically, or in relation to a given provision.¹⁰¹ The emphasis on the purposes of the instrument suggests that the focus is not on individual norms, but on the holistic character of the instrument. Nevertheless, the use of the plural suggests that the instrument can have more than one purpose.

The African Court illustrates what it means by the 'express enunciation of the subjective rights', as well as 'mandatory obligations' for the enjoyment of rights, by reference to articles 13 and 26 of the African Charter, respectively, not by reference to either instrument under consideration.¹⁰² Article 13(1) provides that '[e]very citizen shall have the right to participate freely in the government of his country', and article 26 provides that '[s]tates parties to the present Charter shall have the duty to guarantee the independence of the Courts'. Curiously, the Court neither identifies a provision that enunciates specific rights, nor creates mandatory obligations for the consequent enjoyment of rights, in either treaty.

Express enunciation of subjective rights of individuals

To date the only matter in which the African Court has been confronted with the question of whether a norm that enunciates a subjective right amounts to a human right is that of *Armand Guehi v Tanzania (Guehi)*. The material facts of this case related to the conviction and capital sentence of an Ivorian national in Tanzania for the murder of his wife. The alleged violations related to fair trial rights, the right to property, treatment in detention and the failure to provide consular assistance.¹⁰³ With regard to the alleged failure to provide consular assistance the applicant relied upon article 36(1)

¹⁰¹ See Viljoen (n 21) 437; and A Rachovitsa 'On new "judicial animals": The curious case of an African court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* 255 262.

¹⁰² *APDH* (n 98) paras 59-60.

¹⁰³ *Guehi* (n 13) para 9.

(b) and (c) of the Vienna Convention on Consular Relations (VCCR), which relates to the facilitation of 'the exercise of consular functions relating to nationals of the sending state'.¹⁰⁴ In particular, it provides that the authorities of the arresting state will 'inform the person concerned without delay of his rights under this sub-paragraph'.¹⁰⁵

The ICJ had twice previously been called upon to determine whether article 36(1) of the VCCR amounts to a human right, and both these matters related to capital sentences in relation to foreign nationals. In *Le Grand* the ICJ held that article 36(1) provides for obligations owed by the receiving state both to the individual as well as the sending state.¹⁰⁶ The ICJ characterised the obligations owed to the individual as 'individual rights', a violation of these rights were found to have occurred, and on this basis the ICJ held it not necessary to determine whether these individual rights amounted to human rights.¹⁰⁷ In the *Avena* case Mexico argued that article 36(1) amounted to a human right and that, as such, this right should be guaranteed in the territory of all state parties, and that this right 'is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right'.¹⁰⁸ The ICJ held:¹⁰⁹

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

Some commentators have concluded that the ICJ, at least in an *obiter dictum*, found that the individual rights espoused in article 36(1) are not human rights.¹¹⁰ However, this interpretation is not supported by the judgment. The Court expressly held that it need not decide on the human rights character of article 36(1). The Court's reference to Mexico's conclusions not being supported by the text and *travaux préparatoires* appear to relate more to the contention regarding the effect of violating the right to consular access and assistance than to characterising the right as a human right. Significantly, the Court focused its analysis on whether article 36(1) of the VCCR provides

¹⁰⁴ *Guehi* para 35.

¹⁰⁵ Arts 36(1)(b) & (c) VCCR.

¹⁰⁶ *LeGrand (Germany v United States of America)* (27 June 2001) (2001) ICJ Reports 466 para 77.

¹⁰⁷ *LeGrand* (n 106) para 78.

¹⁰⁸ *Avena & Other Mexican Nationals (Mexico v United States of America)* (31 March 2004) (2004) ICJ Reports 2004 12 para 124 (*Avena*).

¹⁰⁹ *Avena* (n 108) para 124.

¹¹⁰ *Rachovitsa* (n 101) 265.

individual rights, and not whether the VCCR, as a convention, is a human rights treaty.

Unfortunately, in the *Guehi* case the African Court neither analysed nor answered the question of whether article 36(1) of the VCCR amounts to a human rights treaty for purposes of article 3 and 7 of the African Court Protocol. While the Court recognised that the applicant claimed that the lack of consular assistance ‘deprived him of the possibility to enjoy assistance from his country with respect to the protection of his fair trial rights’,¹¹¹ it did not as such recognise a right to consular assistance. Instead, the Court determined that consular assistance ‘touches on certain privileges whose purpose is to facilitate the enjoyment by individuals of their fair trial rights’, and determined that article 7(1)(c) of the African Charter, read with article 14 of ICCPR, also guarantees the rights under article 36(1) of the VCCR.¹¹² This is a spurious claim, given that neither the African Charter nor ICCPR affords a right to consular assistance. Ultimately, the Court found that it had subject-matter ‘jurisdiction to examine the applicant’s allegation based on the above-mentioned provision of the [African] Charter’. The Court’s finding on the merits likewise proceeds on the basis that article 7(1)(c) of the African Charter encapsulates the allegations made on the basis of the VCCR, and the Court thus only applied the African Charter.

Mandatory obligations for the enjoyment of rights

In the *APDH* case the African Court concluded that it had subject-matter jurisdiction in relation to the African Democracy Charter and the ECOWAS Protocol, as the relevant obligations in these treaties are ‘aimed at implementing the rights prescribed by article 13 of the African Charter’.¹¹³ Moreover, it found violations of both treaties. The reasoning that a given treaty is aimed at implementing the rights contained in a third treaty, and as a result is brought within the subject-matter jurisdiction of the Court, is not expressly captured in the Court’s framework on mandatory obligations, as set out above. Moreover, it is questionable whether the purposes of a treaty can be determined by rights contained in a third treaty. It is striking that the Court never considered any provision from either the African Democracy or the ECOWAS Protocol, in analysing its subject-matter jurisdiction. It also never clearly links either the enunciation of specific rights or mandatory obligations on state parties with the enjoyment

111 *Guehi* (n 13) para 95.

112 *Guehi* paras 37-38.

113 *APDH* (n 98) para 63.

of rights. The Court's judgment leaves open the question of whether the primary rules of the relevant provisions of either the African Democracy Charter or the ECOWAS Protocol provide for individual rights.

In support of its position that the relevant treaties are included in the scope of its jurisdiction, the African Court relied on the European Court's judgment in *Mathieu-Mohin and Clerfayt v Belgium* (*Mathieu-Mohin*).¹¹⁴ In *Mathieu-Mohin* it was alleged that Belgium was acting in violation of article 3 of Protocol I to the European Convention, which provides that '[t]he High Contracting Parties undertake to hold free elections'. The European Court dismissed an argument that article 3 does not create individual rights, but merely state obligations, on the basis that the Preamble to the Protocol ensures 'the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention', and the fact that the Protocol explicitly provides that articles 1 to 4 'shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly'.¹¹⁵ What the African Court failed to appreciate is that there is a material distinction between a given obligation simply resulting in the factual better enjoyment of individual rights; and an obligation the primary rule of which provides for an individual right. In *Mathieu-Mohin* the European Court expressly confirmed that the relevant provision fell within the latter category. In *APDH* this was not considered at all.¹¹⁶ Therefore, a treaty provision does not have to expressly enunciate rights to entail individual rights. However, it is not enough that it merely provides for obligations that result in the better enjoyment of rights factually. The primary rules of these obligations must include legal entitlements for the individual, as was the case in *Mathieu-Mohin*.

There is a severe lack of rigor and specificity in the African Court's jurisprudence regarding its subject-matter jurisdiction to date – the Court has failed to develop a systematic approach or framework to be applied to determine whether a given treaty provision falls within its jurisdiction. The existing jurisprudence allows few definitive conclusions to be reached. The conclusions that can be reached include the inclusion of UN human rights treaties and treaties of regional economic communities (RECs) as 'relevant' human rights treaties; and that 'human rights instrument' includes not only treaties that enunciate rights, but also those that create mandatory

114 *Mathieu-Mohin and Clerfayt v Belgium* ECHR (2 March 1987) Series A 113, paras 46-51 (*Mathieu-Mohin*).

115 Art 5 Protocol 1 to European Convention.

116 See further Rachovitsa (n 101) 262.

state obligations for the consequent enjoyment of rights. However, the African Court should clarify at the earliest opportunity that it is not the form of expression that determines whether the norm presents an individual right but, instead, it is the primary rule of the specific norm that is determinative. Additionally, the circumstances are rare in which a norm that is expressed as a mandatory obligation for the consequent enjoyment of a right indeed amounts to an individual right. Finally, it is not sufficient that a norm contained in a treaty provides for an individual right, but the purposes of the treaty is determinative as to whether it falls within the Court's subject-matter jurisdiction. The focus of the enquiry will now shift to consider whether international humanitarian law conventions may be regarded as 'human rights instruments' for purposes of articles 3 and 7.

4.1.2 *International humanitarian law conventions as 'relevant human rights instruments'*

Provost calls for an 'interpretation of humanitarian law norms as standards of treatment or conduct rather than as rights of protected persons'.¹¹⁷ Sassòli et al confirm that with regard to international humanitarian law 'the majority view is that the state responsible for the violation has to compensate the state injured by the violation; it does not confer a right to compensation on the individual victims of violations'.¹¹⁸ The traditional approach suggests that, while individuals are the beneficiaries of many international humanitarian law provisions, they do not have associated individual rights. Instead, these obligations, and the concomitant legal entitlements, are owed *inter partes*. This traditional approach would then imply that international humanitarian law obligations cannot fall within the subject-matter jurisdiction of the African Court, as their primary rules do not entail individual rights. However, there is growing support for the idea that some international humanitarian law obligations indeed confer individual rights.¹¹⁹

The dissenting and separate opinions of Koroma and Cançado Trindade JJ, respectively, in the *Jurisdictional Immunities* case of the ICJ illustrates well the depth of disagreement on this issue. Cançado Trindade J was of the view that both article 3 of Hague Convention (IV) as well as article 91 of API 'confer the right to reparation at

¹¹⁷ R Provost *International human rights and humanitarian law* (2002) 28-30.

¹¹⁸ Sassòli (n 49) 387.

¹¹⁹ See, eg, T Meron 'The humanisation of humanitarian law' (2000) 94 *American Journal of International Law* 275.

international level to victims of those grave breaches',¹²⁰ while Koroma J is of the view that nothing in either convention supports this proposition.¹²¹ On the municipal plane, the courts of The Netherlands and Greece recognise individual rights conferred by international humanitarian law, yet the courts of Japan and the United States studiously reject such claims.¹²²

The Commentaries of the International Law Commission (ILC) to the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Draft Articles) recognise that 'an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States'.¹²³ Moreover, the ILC Commentary clarifies that the question of whether persons or non-state entities are entitled to invoke responsibility on their own account will be determined by the particular primary rule.¹²⁴ With reference to the Draft Articles and ILC Commentaries Sassòli concludes that individuals are beneficiaries of international humanitarian law obligations. Moreover, as a matter of substantive law, some provisions of conventional international humanitarian law afford individual victims a legal entitlement.¹²⁵ Sassòli suggests that the problem in giving effect to these legal entitlements is mostly procedural, as individuals do not have standing to access traditional implementation machinery. This approach is also reflected in the International Law Association's Declaration of International Law Principles on Reparation for Victims of Armed Conflict of 2010.

The ICC recently held that international humanitarian law does not recognise a 'general rule excluding members of armed forces from protection against violations by members of the same armed force'.¹²⁶ The notion of own force violations is incompatible with a framework premised solely on obligations owed *inter partes* – state responsibility is premised on injury caused to the state towards whom an obligation is owed as a result of an internationally wrongful act. Surely an adversarial party is not injured as a result of

120 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (3 February 2012) (2012) ICJ Reports 99 (*Jurisdictional Immunities*), dissenting opinion of Cançado Trindade J, para 70.

121 *Jurisdictional Immunities* (n 120), separate opinion of Koroma J, para 9.

122 For further discussion, see L Hill-Cawthorne 'Rights under international humanitarian law' (2017) 28 *European Journal of International Law* 1206-1207.

123 Art 28 Commentaries to the Draft Articles (n 97) 87-88 para 3.

124 Art 33(2) Commentaries to the Draft Articles (n 97) 95 para 4.

125 M Sassòli 'State responsibility for violations of international humanitarian law' (2002) 84 *International Review of the Red Cross* 418-419.

126 *Prosecutor v Bosco Ntaganda, Judgment on the appeal of Mr Ntaganda against the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9* ICC-01/04-02/06 OA5 (15 June 2017) paras 63-64.

own force violations. While this issue has generated much debate, there is growing recognition of own force violations in international humanitarian law.¹²⁷ This would not be possible if one strictly adheres to the traditional conception of international humanitarian law.

The traditional perspective of international humanitarian law rests on attributing certain characteristics to international humanitarian law as a regime. For example, according to Hill-Cawthorne whether one adheres to the traditional perspective, or instead recognises the individual rights perspective, rests on differences of opinion regarding the *raison d'être* of international humanitarian law.¹²⁸ In contrast, Sassòli takes a more measured approach, in determining that whether or not a given norm present standards of treatment of which individuals are both beneficiaries and rights holders is not dependent on overarching characteristics of international humanitarian law, but instead the legal character of the individual norm in question.¹²⁹

It is clear that there is significant support for the view that the primary rules of some norms of conventional international humanitarian law indeed provide for individual rights. However, as Sassòli suggests, this determination is to be made with reference to the specific norm in question.¹³⁰ The existence of individual rights in international humanitarian law does not necessarily imply that these are human rights. Moreover, as the Court held in *APDH*, the purposes of the convention should be determinative – this can be read, in more traditional international law language, as the object and purpose of the treaty. The Court will thus have to clear two hurdles in order to regard specific international humanitarian law norms as forming part of its subject-matter jurisdiction. First, it will have to determine that the object and purpose of the relevant international humanitarian law treaties include the advancement of human rights. Second, it will have to determine that the primary rules of the individual international humanitarian law norms it seeks to apply in fact entail an individual right. To do so, the Court cannot adopt the traditional approach to international humanitarian law, as discussed above. Given its finding in *APDH*, it is likely that the Court will regard the object and purpose of international humanitarian law obligations, particularly those relevant to the protection of victims

127 See, eg, J Kleffner 'Friend or foe? On the protective reach of the law of armed conflict' in M Matthee et al (eds) *Armed conflict and international law: In search of the human face* (2013) 285-302; PV Sellers 'Ntaganda: Re-alignment of a paradigm' (2018) *International Institute of Humanitarian Law* 1.

128 Hill-Cawthorne (n 122) 1191-1195.

129 Sassòli (n 125) 418-419.

130 As above.

of armed conflict (the law of Geneva), to include the advancement of human rights. However, even the most arduous supporter of the existence of individual rights in international humanitarian law would agree that the number of such international humanitarian law obligations is extremely limited. The Court thus can properly exercise subject-matter jurisdiction over a limited number of international humanitarian law obligations.

4.2 Competence of the African Court to interpret international humanitarian law

The conclusions reached above, namely, that the African Court has a narrow potential to apply international humanitarian law as part of its subject-matter jurisdiction, have the implication that a need remains for the Court to be able to have recourse to international humanitarian law more broadly in the interpretation and application of human rights norms. Also, international humanitarian law interpretation will often have a bearing on the application of a human rights obligation, without international humanitarian law being directly applied.

Article 7 of the African Court Protocol is titled ‘Sources of law’, and provides that the Court ‘*shall apply* the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned’. In distinction, article 3 is titled ‘Jurisdiction’ and provides that ‘the jurisdiction of the Court *shall extend to* all cases and disputes submitted to it concerning the interpretation and application of ... any other relevant human rights instrument ratified by the states concerned’. Deeming article 7 to be an interpretation clause, as most commentators do, leads to the absurd conclusion that the interpretation clause is superfluous, as the Court is mandated to directly apply each of the sources included in the presumed interpretation clause. Moreover, the lack of power on the part of the Court to interpret sources other than ‘relevant human rights instruments’ may detrimentally act as an incentive to interpret more expansively exactly what such relevant instruments are.¹³¹

¹³¹ The Court’s conclusion that the treaties under consideration in the *APDH* case were included in the meaning of art 3 was based on tenuous reasoning. Throughout the Court’s analysis, the relevant obligations are used as a basis to interpret the right to political participation in terms of art 13 of the African Charter. This approach is more reminiscent of drawing inspiration from a source of law in terms of an interpretation clause or implied powers than applying a treaty. As such, had this option been available to the Court more expressly, it may rather have relied on these treaties for interpretation.

The principle of effectiveness in treaty interpretation provides that ‘interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses ... to redundancy or inutility.’¹³² The only reading that gives effect to both provisions, without rendering one redundant, is that article 7 in fact is not an interpretation clause. Articles 3 and 7 define separate but closely-related matters: Article 3 does not explicitly state which legal sources the Court is empowered to apply, but instead defines the nature of ‘cases and disputes’ that fall within the Court’s jurisdiction. In contrast, article 7 states explicitly which legal sources the Court ‘shall apply’ – indeed, such use of peremptory language makes it abundantly clear that article 7 is not an interpretation clause.

If the African Court Protocol is silent on interpretation, as I conclude, two possibilities remain upon which the Court may legitimately draw on international humanitarian law in discharging its mandate to apply human rights norms. First, interpretive competence can potentially be sourced externally. Second, interpretive competence may form part of the implied powers of the institution.

4.2.1 *Interpretive competence founded on external sources*

Stemmet suggested that as article 7 of the African Court Protocol empowers the African Court to apply the provisions of the African Charter, the Court is entitled to apply articles 60 and 61 of the African Charter (interpretation clause, discussed above) in determining its interpretive competence.¹³³ On the other hand, Heyns argued that articles 60 and 61 of the African Charter define only the interpretive competence of the African Commission.¹³⁴ A purely textual interpretation of the African Charter compels a conclusion that articles 60 and 61 apply only to the African Commission. However, the African Court and African Commission exist within the same treaty regime – indeed, the Court Protocol is a Protocol to the African Charter, and the Court ‘complement[s] the protective mandate of the African Commission ... conferred upon it by the African Charter’.¹³⁵ This complementary relationship is reaffirmed in article 8 of the African Court Protocol, providing for the consideration

¹³² *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) AB-1996-1 WTO Appellate Body 23.

¹³³ A Stemmet ‘A future African Court for Human and Peoples’ Rights and domestic human rights norms’ (1998) 23 *South African Yearbook of International Law* 239. Hailbronner (n 6) 353 has made substantially the same argument.

¹³⁴ Heyns (n 89) 169.

¹³⁵ Art 2 African Court Protocol.

of cases. Moreover, beyond conceptual complementarity, there exists significant mechanical integration between the Court and the Commission. For instance, the Court Protocol incorporates by reference the admissibility criteria applicable to the Commission, and provides that the Court may request the opinion of the Commission as to whether a given matter is admissible before the Court.¹³⁶ A situation in terms of which the African Court and African Commission cannot rely on the same tools in their interpretation and application of the African Charter enhances the risk for institutional fragmentation, and stands at odds with the notion of a harmonised treaty regime. As such, a teleological interpretation suggests that articles 60 and 61 indeed also apply to the Court. This raises the question of whether the African Court can rely only on articles 60 and 61 when applying the African Charter, or whether it will also be able to do so when applying other conventions within its jurisdiction.

As mentioned above, interpretation clauses by nature are constitutional, not legislative. They define part of the institutional competence of a mechanism, and do not contribute normatively to the relevant convention. The implication is that the African Commission is empowered to draw on the sources listed in articles 60 and 61, whether it is applying the African Charter or any other convention within its subject-matter jurisdiction, such as the African Women's Protocol. Yet, other mechanisms that may apply the African Charter as part of their jurisdiction, such as the ECOWAS Community Court of Justice, cannot rely on articles 60 and 61 to inform their interpretive competence.¹³⁷ Instead, such mechanisms' jurisdiction and interpretive competence are to be determined by their constitutive treaty. The conclusion that articles 60 and 61 apply also to the African Court does not change the nature of these provisions as constitutional. Therefore, they contribute to the institutional competence of the Court to rely on the listed sources, regardless of whether it is applying the African Charter or any other convention.

Starting with its first judgment on the merits, the African Court endorsed this interpretation. Relying on the African Charter's interpretation clause, the Court held that ICCPR is an 'instrument adopted by the United Nations on human and peoples' rights' and,

¹³⁶ Art 6 African Court Protocol.

¹³⁷ For the jurisdiction and competence of the ECOWAS Community Court of Justice, see Protocol A/P.1/7/91 on the Community Court of Justice, as amended by Supplementary Protocol A/SP.1/01/05 on the Community Court of Justice.

as such, the Court can 'draw inspiration' from it in its interpretation of the African Charter.¹³⁸

4.2.2 *Implied interpretive competence*

The European Convention does not contain an interpretation clause, yet the Court has maintained that it 'never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein'.¹³⁹ While the Court has often rendered judgments related to human rights violations during situations of armed conflict, for a long time it showed a reluctance to interpret international humanitarian law in a manner that would impact on how it applies European Convention rights. However, in the *Hassan* case the European Court had to determine whether the capture and subsequent detention of the applicant's brother by British forces in Iraq was contrary to article 5 of the European Convention. Article 5 provides for a closed list of exceptions to the general prohibition of the deprivation of liberty. While it was common cause that the basis for detention was security, such security detention is not included within the listed exceptions to article 5. The United Kingdom argued that that the Court should not exercise jurisdiction during the 'active hostilities phase of an international armed conflict', as the state's conduct is regulated by international humanitarian law instead of the European Convention.¹⁴⁰ The Court rejected this argument, confirming that 'the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.¹⁴¹ Ultimately, the Court found no violation of article 5 on the basis that the grounds for deprivation of liberty under article 5 should accommodate security detention as provided for in the Third and Fourth Geneva Conventions.¹⁴²

The European Court's power to interpret international humanitarian law in the absence of express authorisation is an implied power. In the *Reparations for Injuries* opinion the ICJ held that '[u]nder international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it

¹³⁸ *Mtikila v United Republic of Tanzania* (14 June 2013) App 9/2011 & 11/2011 (consolidated) para 107. For a more recent endorsement of this interpretation, see *Frank David Omary & Others v Tanzania* (28 March 2014) App 1/2012 para 73.

¹³⁹ *Demir and Baykara v Turkey* ECHR (12 November 2008) App 34503/97 para 67.

¹⁴⁰ *Hassan* (n 16) para 76.

¹⁴¹ *Hassan* para 77.

¹⁴² *Hassan* para 104.

by necessary implication as being essential to the performance of its duties'.¹⁴³

There is on-going debate as to how broadly such implied powers are to be interpreted. This issue turns on whether the powers in question are to be implied from the functions and objectives of the organisation or, more narrowly, from an express provision in the relevant treaty.¹⁴⁴ Akande submits that in order for the implied power to be deemed essential, the ICJ has generally taken the position that 'the power to be implied would enable the Organisation to function to its full capacity as expressed in its objects and purposes; in other words that the implied power would promote the efficiency of the Organisation'.¹⁴⁵ The European Court's implied powers may be inferred from the more narrow formulation, in that it is implied in the Court's power to hear individual applications in terms of article 34 of the European Convention.

If the power to have recourse to international humanitarian law is essential to the performance of the European Court's mandate as a court of human rights, the same holds true of the African Court. As with the European Court, even a narrow approach to implied powers will allow for the African Court to be guided by international humanitarian law in applying the treaties within its subject-matter jurisdiction, as these powers may be implied from articles 3 and 7 of the African Court Protocol. Thus, the Court's competence to interpret international humanitarian law, and norms belonging to other areas of international law, emanates both from articles 60 and 61 of the Charter, as well as the Court's implied powers. However, these are not alternative arguments. Instead, the Court's implied interpretive competence lends further credence to the teleological interpretation that articles 60 and 61 of the African Charter apply to the Court, as advocated above.

5 Conclusion

The purpose of this article is to explore the status of international humanitarian law with respect to the mandate of the African Court, and particularly the extent to which the Court is empowered to directly apply international humanitarian law, on the one hand,

143 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (11 April 1949) (1949) ICJ Reports 174 182.

144 J Klabbbers *An introduction to international institutional law* (2015) 56-62.

145 D Akande 'The competence of international organizations and the advisory jurisdiction of the International Court of Justice' (1998) 9 *European Journal of International Law* 437 444.

and to rely on international humanitarian law as an interpretive aid in applying human rights norms, on the other. Should all of international humanitarian law fall within the subject-matter jurisdiction of the Court, the question as to the Court's interpretive powers in relation to international humanitarian law would fall away. However, as the above analysis shows, this is not the case. While international humanitarian law is not altogether excluded from the Court's subject-matter jurisdiction, the number of international humanitarian law norms that it can potentially apply directly is very limited. Accordingly, in order for the Court to be able to properly fulfil its human rights mandate during situations of armed conflict, the need to be able to draw on international humanitarian law in the interpretation and application of human rights norms remains. To this end, the African Court indeed has the competence to do so.

International humanitarian law obligations may form part of the African Court's subject-matter jurisdiction in two circumstances: first, where international humanitarian law obligations have been incorporated in an applicable human rights treaty by reference as is, for example, the case with the Kampala Convention. Second, should the Court regard the object and purpose of specific international humanitarian law treaties as including the achievement of human rights, which is likely, and the primary rules of the relevant international humanitarian law obligations entail an individual right (which is rather uncommon). However, where international humanitarian law obligations become justiciable before the Court as a result of incorporation by reference, it is not required that the primary rules of the relevant international humanitarian law obligation entail individual rights. This is so because the relevant international humanitarian law provisions are incorporated into a human rights treaty, as though they appear as rights in that human rights treaty. The fact that the norm entails an individual right comes as a consequence of the norm forming part of a human rights treaty.

Contrary to the majority view, I have concluded that the African Court Protocol does not contain an interpretation clause. Nevertheless, the Court is empowered to rely on international humanitarian law in its interpretation and application of human rights norms. This power may be traced to two sources. First, on the basis of teleological interpretation, informed by the complimentary relationship the Court enjoys with the Commission, the African Charter's interpretation clause applies also to the Court. Second, the Court has implied powers to use international humanitarian law as an interpretive aid. Practically, the Court may be guided by the African Charter's interpretation clause in devising its interpretive strategy

under its implied powers. This would result in the Court adopting a consistent approach. However, there is a caveat. The African Court should take proper account of jurisprudential developments within the relevant treaty framework that it is applying. For example, should the Court apply ICCPR it should, to the extent possible, guard against reaching conclusions inconsistent with the relevant jurisprudence of the Human Rights Committee. By not doing so it would run the risk of enhancing institutional fragmentation, and thus negate legal certainty as to the human rights obligations of member states.

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The case law of the African Court on Human and Peoples' Rights in Libya following the Arab uprisings: Lessons learned for the consolidation and legitimation of the Court

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Summary: *This article examines the two cases brought before the African Court on Human and Peoples' Rights following the Libyan uprising in 2011: African Commission on Human and Peoples' Rights (Benghazi) v Libya and African Commission (Saif al-Islam Gaddafi) v Libya. These two cases mark three 'firsts': the first time for the African Commission to transfer a case to the African Court; the first order for provisional measures by the Court; and the first time the Court rendered a judgment by default. This study reveals that although the Court has taken significant steps in terms of its consolidation and legitimation, substantive and procedural challenges in its functioning remain. Moreover, the authors argue that the political divisions within the African Union diminished the Court's potential impact on the Libyan crisis.*

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Key words: *African Court; Libya; Arab uprising; African Union; provisional measures; default judgment; referral by Africa Commission*

1 Introduction

In 1981 the African regional human rights system was established under the auspices of the predecessor to the African Union (AU), the Organisation of African Unity (OAU), through the adoption of the African Charter on Human and Peoples' Rights (African Charter). However, the system did not include the creation of a judicial body. It took African leaders 17 years to agree on the creation of the African Court on Human and Peoples' Rights (African Court), when the AU Assembly of Heads of State and Government in 1998 adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (African Court Protocol). Since then, things initially moved slowly. The Court Protocol entered into force in 2004, its first judges were elected in 2006 and only in 2008 did the Court adopt its Rules of Procedure.

After having adopted only a few decisions, and even prior to issuing a judgment on the merits of a case, the African Court had to deal with the dramatic situation that emerged in Libya after a mass civilian uprising. This uprising – against the dictator Muammar Gaddafi – started in Tunisia, later on emerged in Egypt, and in February 2011 spread to Libya. In this context, two cases of paramount importance to the development of the African Court's jurisprudence were brought before the Court. The first is the case of *African Commission on Human and Peoples' Rights (Benghazi) v Libya*, which has to be contextualised at the very beginning of the Libyan uprising when the Gaddafi regime used disproportionate and lethal force against protesters.¹ The second case, *African Commission (Saif al-Islam Gaddafi) v Libya*, is imbedded in the chaotic situation that followed the 2011 Libyan civil war, during which a rebel militia captured and detained the second son of Gaddafi, Saif al-Islam Gaddafi.²

1 *African Commission on Human and Peoples' Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), (2011) 1 AfCLR 17; http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15_ACMHPR_v_Libya_2.pdf (accessed 27 April 2018).

2 *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures), (2013) 1 AfCLR 145; <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2018).

These two cases represent a turning point in the consolidation and legitimation of the African Court. However, some legal and political issues still represent key challenges in this process. For the purpose of this article, the notion of 'consolidation' and 'legitimation' is clarified: By consolidation, the article refers to the ability of the Court to become consistent and effective in its role of delivering judgments. The notion of legitimation or legitimacy could be defined according to different approaches. The first is the empirical or sociological approach, which inquires whether a court or institution is perceived as legitimate by relevant constituencies.³ The second is the normative approach, which analyses whether the court or institution possesses justified authority in terms of law or expertise.⁴ According to Land, '[a]lthough empirical and normative approaches to legitimacy are different ... they are complementary because normative and sociological legitimacy can be understood as different ways to measure justified authority'.⁵ For these reasons the article acknowledges both conceptions of legitimacy and legitimation in order to assess the jurisprudence of the African Court.

The article analyses the two cases taking into consideration their procedural background and the decision on the merits (part 2). In this regard, the article examines the shortfalls and successes of these cases and the way in which the African Court handled them (part 3). This part specifically considers the legal and political issues that deserve the attention of the Court. Moreover, the article provides lessons learned and recommendations for the future work of the Court (part 4). The last part presents some concluding remarks.

³ Y Shany *Assessing the effectiveness of international courts* (2014) 138.

⁴ D Bodansky 'The concept of legitimacy in international law' in R Wolfrum & V Röben (eds) *Legitimacy in international law* (2008) 313; R Wolfrum 'Legitimacy in international law from a legal perspective: Some introductory considerations' in R Wolfrum & V Röben (eds) *Legitimacy in international law* 6.

⁵ MK Land 'Justice as legitimacy in the European Court of Human Rights' in N Grossman, HG Cohen, A Follesdal & G Ulfstein *Legitimacy and international courts* (2018) 85. See also M Loth 'Courts in a quest for legitimacy: A comparative approach' in N Huls, J Bomhoff & M Adams (eds) *The legitimacy of highest courts' rulings: Judicial deliberations and beyond* (2009) 268-269.

2 *African Commission on Human and Peoples' Rights (Benghazi) v Libya*

2.1 Order for provisional measures

The mass civilian uprising that started in Tunisia⁶ and later appeared in Egypt⁷ spread to Libya in February 2011 against the dictator Muammar Mohammed Abu Minyar Gaddafi who came to power following a *coup d'état* in 1969.⁸ This civilian uprising turned into an armed conflict, with the Libyan government reacting by using lethal and disproportionate force against protesters in violation of international humanitarian and human rights law. At the end of that month a body of anti-Gaddafi forces, the National Transitional Council (NTC), was established to act as the 'political face of the revolution'.⁹ The situation escalated to such an extent that some weeks later the United Nations (UN) Security Council (UNSC) adopted Resolution 1973 (2011) authorising 'all necessary measures' to protect civilians, imposing a no-fly zone over Libya¹⁰ and legitimising the subsequent North Atlantic Treaty Organization (NATO) military intervention.¹¹ According to the analyst Bhardwaj:¹²

Gaddafi's harsh and repressive regime, territorial division of Libya into NTC and loyalist strongholds, coalition rebel forces, along with the influence of the UN, NATO intervention and the Arab League, jointly propelled Libya's conflict inexorably from peaceful protest to bloody civil war.

6 In this regard, see eg M Khan & K Mezran 'Tunisia: The last Arab Spring country' (2015) *Rafik Hariri Centre For The Middle East*, Atlantic Council 1-12.

7 See, eg, T Povey 'The Arab Spring in Egypt: Revolution and beyond' (2013) 25 *Journal of African Cultural Studies* 364-366.

8 In this regard, see eg E Oliveri 'Libya before and after Gaddafi: An international law analysis', PhD thesis, Ca' Foscari University of Venice, 2012.

9 RB St John *Libya: Continuity and change* (2015) 364.

10 UN Security Council Resolution 1973 (2011) 6498th meeting 17 March 2011, <https://www.un.org/sc/suborg/en/s/res/1973-%282011%29> (accessed 27 April 2020).

11 It is worth mentioning that five days before the adoption of Resolution 1973 (2011), the Arab league called on the UN Security Council 'to bear its responsibilities towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation'. See Decision of the Council of the League of Arab States on 12 March 2011, [http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english\(1\).pdf](http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english(1).pdf) (accessed 27 April 2020). On the role of the Arab League after the Libyan uprising, see eg R Alaaldin 'The role and impact on the Arab League' in D Henriksen & AK Larssen (ed) *Political rationale and international consequences of the war in Libya* (2016).

12 M Bhardwaj 'Development of conflict in Arab Spring Libya and Syria: From revolution to civil war' (2012) 1 *Washington University Law Review* 81.

Unlike the Arab League, which asked the UNSC to impose a no-flight zone over Libya and decided to suspend its membership, the AU played a secondary role in order to solve the Libyan crisis, largely because of the political division among AU member states. Initially, the AU Peace and Security Council of the AU (PSC) established a High-Level *Ad Hoc* Committee on Libya¹³ and proposed a road map as a solution to the crisis,¹⁴ which was rejected by both the Gaddafi government and the NTC.¹⁵ As a result of the NATO military intervention, the AU remained paralysed and, therefore, marginalised in the management of the conflict. In particular, the AU had to face the dilemma of not undermining Libya's sovereignty and supporting the Gaddafi regime – one of the main drivers of the continental organisation – or protecting the civilian population from mass atrocities as provided for in article 4(h) of the Constitutive Act of the AU.¹⁶

Even though the AU political institutions have remained paralysed, the African Commission on Human and Peoples' Rights (African Commission) and the African Court have played a significant role following the Libyan uprising. In this regard, on 24 February 2011 three non-governmental organisations (NGOs) (Human Rights Watch, the Egyptian Initiative for Personal Rights and INTERIGHTS) jointly submitted an application to the African Commission requesting the adoption of provisional measures in order to stop and prevent

13 The Committee was composed of the Heads of State and Government of Mauritania, Mali, South Africa, Uganda and Congo, alongside the AU Commission Chairperson. In this regard, see D Kuwali 'From stopping to preventing atrocities. Actualisation of article 4(h)' (2015) 1 *African Security Review* 260.

14 The roadmap consisted of a five-point plan of which objectives were 'the protection of civilians and the cessation of hostilities; the humanitarian assistance to affected populations both Libyans and foreign migrant workers, particularly those from Africa; the initiation of political dialogue between the Libyan parties in order to reach an agreement on the modalities for ending the crisis; the establishment and management of an inclusive transitional period; the adoption and implementation of political reforms necessary to meet the aspirations of the Libyan people'. See C Ekwealor & U Okeke-Uzodike 'The African Union interventions in African conflicts: Unity and leadership conundrum on Libya' (2016) 5 *Journal of African Union Studies* 69.

15 A Abass 'The African Union's response to the Libyan crisis: A plea for objectivity' (2014) 7 *African Journal of Legal Studies* 137.

16 As an example of such paralysis and political division, despite the fact that three African states – Gabon, Nigeria and South Africa – voted in favour of UNSC Resolution 1973 (2011), various AU organs later spoke out against a foreign military intervention in Libya. In this regard, according to a significant number of authors 'the AU should have participated in the implementation of the responsibility to protect the civilian population from mass atrocities, including support for the implementation of a no-fly zone ... the inaction of the AU Assembly regarding Libya illustrates the tense and potentially-contradictory relationship between what is stated in article 4(h) and political factors (*realpolitik* considerations)'. See J Perez Leon Acevedo 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union' (2016) 16 *African Human Rights Law Journal* 498.

the use of unjustified lethal force against protesters; to allow people in Libya to air their grievances through peaceful protests; and to undertake a thorough, impartial and prompt investigation in order to hold accountable those responsible for these violations, among other demands.¹⁷

However, the African Commission did not order the provisional measures requested,¹⁸ but instead transferred the case to the African Court alleging ‘serious and massive violation of human rights guaranteed under the African Charter’.¹⁹ In addition, the African Commission adopted a resolution calling on the responsibility of the AU, the PSC and the international community ‘to take all the necessary political and legal measures for the protection of the Libyan population and for the establishment of genuine democratic governance in the State Party’.²⁰

Nine days after having received such application, the African Court, for the very first time, granted an order for provisional measures taking into consideration the gravity and urgency of the matter.²¹ The order was not adopted at the request of the Commission but by the African Court *proprio motu*.²² In its decision the judicial institution

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- 17 J Oder ‘The African Court on Human and Peoples’ Rights’ order in respect of the situation in Libya: A watershed in the regional protection of human rights?’ (2011) 11 *African Human Rights Law Journal* 497. A second application was submitted to the Commission by two NGOs (the Libyan League for Human Rights and the International Federation of Human Rights) requesting to refer such application to the African Court ‘considering that the situation brought to its knowledge amounts to serious and massive violations of human rights and that Libya is a state party to the Protocol to the African Charter regarding the African Court on Human and Peoples’ Rights’; see Oder (above) 497.
- 18 The African Commission decided not to order provisional measures due to the fact that ‘the chances of such request eliciting a response from the government [were] very slim taking into consideration the situation in Libya’; Oder (n 17) 498. On the other hand, it is worth mentioning that the Libyan state ratified the Court Protocol in 2003. Nonetheless, it has not made the necessary declaration allowing NGOs and individuals direct access before the Court. For this reason, both cases regarding Libya – the only cases that have been heard to date by the Court concerning Arab African countries – were transferred by the Commission to the African Court.
- 19 *African Commission on Human and Peoples’ Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15_AcmHPR_v_Libya_2.pdf (accessed 27 April 2020).
- 20 Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya, ACHPR/RES.181(EXT.OS/IX) March 2011, <http://www.refworld.org/docid/4d8863f82.html> (accessed 27 April 2020).
- 21 Resolution (n 20) para 8. In this regard it is worth mentioning that, as noted earlier, pursuant to art 27(2) of the Court Protocol ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary’.
- 22 When submitting the application the Commission alleged ‘(1) that following the detention of an opposition lawyer, peaceful demonstrations took place on the 16th of February 2011 in the Eastern Libyan city of Benghazi; (2) that on the 19th of February 2011, there were other demonstrations in Benghazi, A1 Baida, Ajdabiya, Zayiwa and Derna, which were violently suppressed by security forces

considered whether it had jurisdiction to order such interim measures. The Court concluded that it had such jurisdiction²³ because, first, Libya had ratified the African Charter and the Court Protocol²⁴ and, second, the Commission is one of the parties entitled to submit cases to the Court without the need for the special declaration provided for in articles 5(3) and 34(6) of the Protocol.²⁵

The Court subsequently turned to consider whether there were suitable conditions – namely, ‘cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons’²⁶ – for the Court to adopt provisional measures. In this respect, the African Court, relying on the 23 February 2011 Resolution of the Peace and Security Council of the AU,²⁷ the 21 February 2011 Resolution of the Arab League,²⁸ and UN Security Council Resolution 1970 (2011),²⁹ noted that such circumstances were present in the case at issue and decided to grant an order for provisional measures against Libya.³⁰

2.2 Decision on merits

Due to the fact that the African Commission, acting as prosecutor, was not able to continue investigating the situation and collecting the necessary testimony and evidence, the African Court decided

who opened fire at random on the demonstrators killing and injuring many people; (3) that hospital sources reported that on the 20 of February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head; (4) that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks; and (5) that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly’. Taking all this into consideration the Commission concluded ‘that these actions amount to serious and widespread violations of the rights enshrined in Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter’. Resolution (n 20) para 2.

23 Order for Provisional Measures (n 19) para 19.

24 Order for Provisional Measures paras 16-17.

25 Order for Provisional Measures para 18.

26 African Court Protocol, art 27(2).

27 AU Peace and Security Council, Communiqué, Peace and Security Council, 261st meeting, Addis Ababa, Ethiopia, PSC/PR/COMM (CCLXI) 23 February 2011, <http://www.peaceau.org/uploads/psc-communication-on-the-situation-in-libya.pdf> (accessed 27 April 2020).

28 In the resolution the Arab League requested ‘an end to violence, stating that the demands of Arab people for change are legitimate’. See Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya (n 20) para 21.

29 UN Security Council Resolution 1970, 6491st meeting, 26 February 2011, http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970%20%282011%29 (accessed 27 April 2020). By such resolution the UNSC ‘decided to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court’.

30 Resolution (n 20) para 21.

to strike out the application.³¹ Notwithstanding this, as will be discussed in the next part, both the opening of the proceeding and the provisional measures ordered have been significant in terms of the Court's consolidation and legitimation.³²

3 African Commission (*Saif al-Islam Gaddafi*) v Libya

3.1 Order for provisional measures

Some weeks after the death of Muammar Gaddafi, his second son and former *de facto* Prime Minister, Saif al-Islam Gaddafi, was detained by a rebel militia based in the Libyan city of Zintan. On 2 April 2012 the African Commission received a complaint on his behalf alleging that Saif al-Islam Gaddafi had been detained in an unknown location without access to his family or to a lawyer and that he had not been brought before a court.³³ According to the complaint, these acts constituted a violation of article 6 (the right to personal liberty and protection from arbitrary arrest) and article 7 (the right to a fair trial) of the African Charter.

In January 2013 the Commission submitted the case to the African Court along with a request for provisional measures.³⁴ Similarly to the previous case, the judicial institution first considered whether it had jurisdiction to order such interim measures,³⁵ indicating that it indeed had such jurisdiction for the same reasons as stated above (Libya being a state party to the African Charter and the African Court Protocol and the competence of the African Commission to submit cases to the African Court). Likewise, the judicial institution concluded that there was 'a situation of extreme gravity and urgency,

31 *African Commission on Human and Peoples' Rights (Benghazi) v Libya* App 4/2011 15 March 2013 (Order on Merits of the Application), http://en.african-court.org/images/Cases/Decision/DECISION_-_Application_004-2011_African_Commission_v_Libya_Struck_outEngl.pdf (accessed 27 April 2020).

32 See part 5.

33 *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures) para 3, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

34 Due to the fact that the Libyan state did not comply with the provisional measures requested by the African Commission, based on Rule 118(2) of the Rules of the Commission, the Commission brought the case before the African Court and, in turn, requested the Court to adopt new provisional measures. See Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010 (Rules of the Commission) Rule 118(2), <http://www.achpr.org/instruments/rules-of-procedure-2010/> (accessed 25 April 2020).

35 In line with its case law, the Court considered that in order to adopt provisional measures, 'it need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to ensure that it has *prima facie* jurisdiction'. See Order for Provisional Measures (n 33) para 10.

as well as a risk of irreparable harm to the detainee'.³⁶ On this basis, the African Court unanimously ordered Libya:

- (1) to refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the detainee, in violation of the Charter or any other international instruments to which Libya is a party;
- (2) to allow the detainee access to a lawyer of his own choosing;
- (3) to allow the detainee visits by family members;
- (4) to refrain from taking any action that may affect the detainee's physical and mental integrity as well as his health;
- (5) to report to the Court within fifteen days from the date of receipt of this Order, on the measures taken to implement this Order.

Fatsah Ouguergouz J delivered a separate opinion in which he concurred with the African Court's decision of adopting an order for provisional measures but remarked that, on procedure, the Court seemed to have forgotten that the application should have been considered as a request by the African Commission for provisional measures. Therefore, in his view the Court did not follow the procedure that the Protocol provided for this purpose.³⁷ Moreover, according to Ouguergouz J, bearing in mind that two months had elapsed between the date of the application and the date of the Court's order, 'the Court should have therefore requested Libya to submit the observations it may have in order for the Court to ... decide on the basis of the most recent information possible on the situation for which provisional measures are sought'.³⁸

Despite an extension of 15 additional days granted by the Court, Libya failed to file any response.³⁹ It was not until July 2013 that the Court received a *note verbale* in which Libya adduced no defence but advised that an investigation had been opened in Libya against Saif al-Islam Gaddafi, and that 'a Court with jurisdiction' had authorised an extension of his period of pre-trial detention.⁴⁰ Accordingly, the African Court decided to submit to the Assembly, through

³⁶ Order for Provisional Measures (n 33) para 17.

³⁷ *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013, Separate Opinion of Fatsah Ouguergouz J on Order for Provisional Measures para 2, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

³⁸ Separate Opinion (n 37) para 5.

³⁹ *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 3 June 2016 (Judgment on Merits), (2016) 1 AfCLR 153, para 17, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

⁴⁰ As above.

the Executive Council, Libya's non-compliance with its order for provisional measures.⁴¹

In May 2014 the Court received a new *note verbale* in which Libya stated that the trial that was taking place in Libya was fair and just, and that the Libyan authorities had agreed to invite external observers in order to monitor the process. The African Court emphasised that the response in the *note verbale* did not constitute compliance with its order.⁴² Taking into account the continued inadequate responses of Libya, in March 2015 the African Commission requested the Court to deliver a judgment by default.⁴³

Events accelerated after July 2015, the month in which it was announced that the Assize Court of Tripoli had sentenced Saif al-Islam Gaddafi to death *in absentia*.⁴⁴ As a result, the Court issued a new order for provisional measures noting that Libya should 'take all necessary measures to preserve the life of Mr Gaddafi, ensure that he is given a fair trial in accordance with internationally recognised standards, arrest and prosecute those illegally holding Mr Gaddafi', as well as to submit a report to the Court on the measures taken by Libya within 15 days.⁴⁵ In the absence of an answer from the respondent, the Court decided to initiate a proceeding under Rule 55(1) of the Rules of Court, which provided the legal basis for the Court to adopt a judgment by default.

3.2 Decision on admissibility and merits

Pursuant to Rule 55(1) of the Rules of the Court, the Court must satisfy a three-limb test prior to considering the merits of the matter. It must establish (i) 'that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings'; (ii) 'that it has jurisdiction in the case'; and (iii) 'that the application is admissible and well founded in fact and in law'.⁴⁶

41 Judgment on Merits (n 39) para 18. In this regard, the Executive Council adopted a decision urging Libya 'to work with the Court and to comply with its Order'.

42 Judgment on Merits (n 39) para 28.

43 Judgment on Merits para 34.

44 Saif al-Islam was sentenced *in absentia* due to the fact that his captors 'refused to release him to the government's custody citing security issues'. See MJ Ayissi 'African Commission on Human and Peoples' Rights v Libya' (2017) 111 *American Journal of International Law* 740.

45 Judgment on Merits (n 39) para 17.

46 Rules of the African Court on Human and Peoples' Rights (Rules of Court) 55. New Rules of Procedure were adopted on 2 June 2010 in order to harmonise the Rules of the Court and the Rules of Procedure of the African Commission, <http://www.african-court.org> (accessed 27 April 2020).

With regard to the first limb, the African Court noted that both the applicant and court registry had communicated all the pleadings to the respondent and consequently that such condition had been met.⁴⁷ As far as the second limb was concerned, the judicial body addressed the issue of whether it had material, territorial, temporal and personal jurisdiction to hear the case. As far as substantive jurisdiction was concerned, the applicant alleged a violation of articles 6 and 7 of the African Charter, and argued that the Court therefore had jurisdiction.⁴⁸ Because the alleged violations took place in the territory of Libya after it had ratified the African Court Protocol and the African Charter, the requirements of territorial and temporal jurisdiction had been satisfied.⁴⁹

As for its personal jurisdiction, the Court noted that the African Commission was one of the entities entitled to submit cases to the Court as provided for in article 5(1) of the Court Protocol. With regard to the respondent, the judicial institution again recalled that Libya had ratified both the Court Protocol and the African Charter and held that, despite the detention of Saif Gaddafi by a 'revolutionary brigade', based on the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, 'the respondent is responsible for the latter's action as well as its acts of omission ... the State is indeed under the obligation to take measures to ensure, in its territory, the application of the laws guaranteed under the Charter'.⁵⁰

As far as the third limb was concerned, that of admissibility, the Court addressed the issue of exhaustion of local remedies. In this regard the Court considered that it was evident from the facts that Saif Gaddafi had been detained in an unknown location without access to a lawyer and sentenced to death *in absentia*, with the result that he could not have had access to effective, sufficient and available local remedies.⁵¹ As for the reasonable time requirement, the Court regarded as 'reasonable' the period of just over one year between

47 Judgment on Merits (n 39) paras 41-43.

48 Judgment on Merits paras 53-54.

49 Judgment on Merits paras 55-60.

50 Judgment on Merits paras 47-52. In support of its view the Court cited art 9 of the Draft Articles of the Internal Law Commission on the Responsibility of States for Internationally Wrongful Acts which provides that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.

51 Judgment on Merits (n 39) paras 66-70.

the conclusion that Libya had not complied with the provisional measures requested and the submission of the application.⁵²

After having considered the requirements of jurisdiction and admissibility, the Court turned to examine the merits of the matter. In this regard, the Court first addressed the issue of derogation of rights, noting that

whereas it is accepted under international law that, in exceptional circumstances, States Parties to a human rights instrument have the right of derogation therefrom, it is no less recognised that ... there are rights that cannot be derogated, regardless of the prevailing situation.⁵³

Among them, in the Court's view, these are the rights enshrined in articles 6 and 7 of the African Charter. Thus, the Court held that, in spite of the exceptional situation that had since 2011 prevailed in Libya, 'the Libyan State is internationally responsible for ensuring compliance with and guaranteeing such rights'.⁵⁴

As far as article 6 of the African Charter is concerned, the Court, in line with its case law, noted that 'deprivation of liberty is permitted only when it is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards'. In this context, the Court referred to article 9 of the International Covenant on Civil and Political Rights (ICCPR) and to the jurisprudence of the UN Human Rights Committee on this matter, according to which 'arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute a violation of article 9 of the Covenant as a whole'.⁵⁵ Likewise, in line with the arguments relied on by the African Commission as applicant, the Court noted that the incommunicado detention could lead to other violations such as ill-treatment and torture.⁵⁶ On the basis of the foregoing, the Court concluded that the detention of Saif al-Islam Gaddafi since November 2011 without access to a lawyer constituted a violation of his right to personal liberty, protection from arbitrary arrest and security of his person as set forth in article 6 of the African Charter.⁵⁷

52 Judgment on Merits paras 71-73. According to Rule 40(6) of the Rules of Court 'applications to the Court shall be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter'.

53 Judgment on Merits (n 39) paras 76-77. Regarding this matter, as an example, the Court referred to art 4 of the International Covenant on Civil and Political Rights.

54 Judgment on Merits (n 39) para 77.

55 Judgment on Merits para 84.

56 As above.

57 Judgment on Merits (n 39) para 85.

With regard to article 7 of the Charter, the Court stressed that the right to a fair trial was a 'fundamental human right' recognised in all human rights treaties,⁵⁸ and 'implied that every individual accused of a crime or an offence shall receive all the guarantees under the procedure and afforded the right of defence'.⁵⁹ Saif al-Islam Gaddafi was detained incommunicado in a secret location without access to either his family or to a lawyer or any form of representation, arraigned before an extraordinary court called 'the People's Tribunal' – which was declared unconstitutional by the Supreme Court of Libya – and then sentenced to death *in absentia* by the Tripoli Court of Azzize. Consequently, the Court concluded that the Libyan state had violated and continued to violate articles 6 and 7 of the African Charter, and ordered Libya 'to terminating the illegal criminal procedure instituted before the domestic courts' as well as 'to submit to the Court a report on the measures taken to guarantee the rights of Mr Gaddafi within sixty days from the date of notification of this judgment'.⁶⁰

In a separate opinion, Ouguergouz J concurred that Libya had violated articles 6 and 7 of the African Charter, but argued that, first, the Court had failed to verify that the application was well founded in fact, and that, second, it should have analysed more thoroughly some legal issues. With regard to the former, according to Ouguergouz J, in his separate opinion, the Court 'seems to have purely and simply endorsed the Applicant's submissions, and by so doing, apparently pronounced itself automatically in favour of the Applicant, which is precisely what the prescriptions of Rule 55 of the Rules of the Court intended to avoid'.⁶¹ As for the latter, in his view the Court should have placed the emphasis on the issue of derogation of rights in other international and regional human rights instruments applicable to the case, as well as on the obligations that article 1 of the African Charter imposes on those states that have ratified the treaty.⁶²

58 As an example, the Court cited art 14 of ICCPR as well as the case law of the European Court of Human Rights. Judgment on Merits (n 39) paras 89 & 95.

59 Judgment on Merits (n 39) para 89.

60 Judgment on Merits para 97.

61 Separate Opinion of Ouguergouz J on Admissibility of the Application 3 June 2016, para 28, <http://en.african-court.org/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-detals> (accessed 27 April 2020).

62 Separate Opinion (n 61) paras 3-14.

4 Lights and shadows of the Court's decisions

The two decisions under discussion are noteworthy in several respects. These cases are of particular interest since the African Commission for the first time transferred a case to the African Court, and the Court granted its first orders for provisional measures and rendered its first judgment by default. These cases also illustrate the route by which individuals and NGOs with observer status before the African Commission may submit an application to the Court – indirectly, by the Commission transferring a matter submitted to it to the Court. Since Libya has not made the special declaration under article 34(6) of the Court Protocol allowing the Court to receive applications directly from individuals and NGOs,⁶³ direct access to the Court was not a possibility. Moreover, both cases demonstrate the importance of local and international NGOs in collecting evidence and persuading the African institutions to protect human rights. In this regard, it is also worth mentioning the accommodating approach adopted by the Court allowing the Pan African Lawyers' Union (PALU) to participate as *amicus curiae* in the case of *African Commission on Human and Peoples' Rights (Benghazi) v Libya*. It is of considerable relevance because, as Viljoen points out, access to *amici curiae* 'enhances the quality of a court's judgments and serves to make the court proceedings more democratically legitimate'.⁶⁴ These elements together with additional legal and procedural issues are considered separately in the following parts.

4.1 The exceptional dynamism between the African Commission and the African Court

Both the Commission and the Court appeared notably dynamic in the cases where, as noted above, for the first time the Commission transferred a case to the Court and the Court *proprio motu* granted its first orders for provisional measures. In the same way, the effort of both institutions to encourage Libya to comply with the decisions should be noted. Regarding the issuance of provisional measures, the Court strongly relied on the evidence of human rights violations gathered by NGOs, which initially were submitted to the

63 See O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' *The ACtHPR Monitor*, August 2016, <http://www.acthprmonitor.org/in-default-african-commission-on-human-and-peoples-rights-v-libya/> (accessed 3 May 2020).

64 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 95.

Commission.⁶⁵ In particular, the senior legal adviser of the Egyptian Initiative for Personal Rights (EIPR) affirmed that '[t]his is an important development within the African human rights system, demonstrating how the African Commission and Court can cooperate in taking action against massive human rights violations'.⁶⁶ In particular, the case of the *African Commission (Saif Al-Islam Kadhafi) v Libya* exemplifies indirect access to the Court through the referral by the Commission of unimplemented provisional measures. As indicated by Viljoen, this indirect access would require two cumulative elements: the non-compliance by the respondent state; and the referral of the case by the Commission at its discretion.⁶⁷ This possibility has been explicitly contemplated in Rule 118(2) of the 2010 Rules of Procedure of the African Commission.⁶⁸ Since then, there has been only one additional decision that made use of this provision: the *African Commission (Ogiek) v Kenya* case.⁶⁹

The decision in *African Commission (Saif Al-Islam Kadhafi) v Libya* also represents the first time the Court rendered a judgment by default. In arguing in favour of the application of Rule 55 of the Rules of the Court regarding judgments by default, the decision emphasised the continuous attempts made by both the Commission and the Court to compel Libya to comply or get involved in the case. In this regard, according to Ayissi, the Court's decision reflected 'both a measured approach to the issuance of default judgments and an emphasis on the need for states to comply with their human rights obligations even in situations of exceptional political and security instability'.⁷⁰ This decision opens the door for potential judgments by default in cases where the respondent state fails to become engaged in the procedure. Taking into consideration the growing number of applications received by the African Court, the possibility of future judgments by default will also increase, although it needs to be noted that 'a case going to judgment in default does not automatically result in a decision in favour of the applicant'.⁷¹

65 See A Dolidze 'African Court on Human Rights and Peoples' Rights – Response to the situation in Libya' (2011) 15 *Insights American Society of International Law*, <https://www.asil.org/insights/volume/15/issue/20/african-court-human-and-peoples'-rights---response-situation-libya> (accessed 10 April 2020).

66 Human Rights Watch 'Libya: African Rights Court issues first ruling against a state' 30 March 2011, <https://www.hrw.org/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state> (accessed 4 May 2020).

67 Viljoen (n 64) 75.

68 See Rules of Procedure of the African Commission on Human and Peoples' Rights, approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, The Gambia, 12-26 May 2010.

69 *African Commission (Ogiek) v Kenya* App 6/2012, Order for Provisional Measures 15 March 2013.

70 Ayissi (n 44) 738.

71 O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' (2018) 18 *African Human Rights Law Journal* 774.

Nevertheless, these cases also highlight the fact that greater clarity is needed in the relationship between the African Court and the African Commission. For instance, in the *African Commission (Saif al-Islam Gaddafi) v Libya* case the Court appeared to ignore that it was the Commission that decided to issue an order for provisional measures in the first place, which was not complied with by the Libyan state⁷² and, thus, decided to submit the case to the Court. In so doing, the Court failed to follow the proceeding provided for in Rule 51 of the Rules of Court.⁷³ Furthermore, as noted by Windridge,

the current Commission-then-Court scenario also creates the seemingly confusing situation whereby the ‘Applicant’ is the Commission rather than Gaddafi ... This raises practical issues moving forward with similar transferred cases. Is the Commission ‘acting’ for the complainant? Does the Commission ‘represent’ the complainant, or do they in effect step away from litigating the case once they have transferred it?⁷⁴

Another point to consider when examining the *African Commission on Human and Peoples’ Rights (Benghazi) v Libya* decision is that the legal basis for transferring the case was not specified either by the Commission or by the Court. In this case, the legal basis appears to be Rule 118(3) of the 2010 Rules of Procedure of the African Commission. This question is of great relevance for the proceedings and should be specified in the decision, especially since the situation constitutes one of serious and massive violations of human rights.⁷⁵ The need for clarity is all the more pertinent because the four scenarios provided for in Rule 118 (in particular Rule 118(4) and its relationship with the other aspects of Rule 118) are not particularly clear and require further interpretation. In the same vein, the Court in neither case checked the veracity of the facts detailed in the Commission’s applications,⁷⁶ and did not satisfy the *jura novit curia* principle,⁷⁷ which led Ouguergouz J to hold in a separate judgment that the Court had failed to ensure that the applications were well founded in fact and in law.⁷⁸ This issue is also discussed in the following part.

72 Separate Opinion of Fatsah Ouguergouz J on Order for Provisional Measures para 2; Order for Provisional Measures (n 33) para 2, in relation with Rule 118.2 Rules of Procedure of the African Commission.

73 See Windridge (n 71).

74 Windridge (n 71).

75 Order for Provisional Measures (n 19) 2.

76 One of the negative consequences of this situation is the fact that the information on which the Court based its decisions clearly was not updated.

77 As stated by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ 27 June 1986 (Decisions on Merits) para 29, ‘the *jura novit curia* principle signifies that, to decide whether submissions are founded in law, the Court is not solely dependent on the arguments of the parties before it with respect to the applicable law’.

78 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) paras 4-6 & 16-31. .

4.2 Lack of application of Rules 45 and 46 by the Court

Another procedural aspect to be examined was the fact that the Court did not apply Rules 45 (Measures for Taking Evidence) and 46 (Witnesses, Experts and Other Persons) of the Rules of Court, especially regarding the first case, with a view to compelling the AU Assembly and the PSC to adopt a more active role in the Libyan crisis. Perez-Leon Acevedo maintains the view that the fact-finding powers of the African Commission and the Court should not be constrained by the political decisions taken by the AU Assembly.⁷⁹ In particular, he states that the African Commission only implemented limited fact-finding capacities regarding the atrocities committed in Libya in comparison to the work performed by UN mechanisms, such as the International Commission of Inquiry into Libya.⁸⁰

In this sense, the fact-finding powers of the African Court could have been reinforced if it had made use of the mechanisms provided for in Rules 45 and 46. These mechanisms allow the Court to obtain any evidence that may provide clarification of the facts of the case, including hearing the declarations of witnesses, experts or other relevant persons. Moreover, it is argued that the fact-finding powers of the African Commission and the Court would have been of paramount importance in the process of informing the AU Assembly and the PSC in the case of authorising a military intervention. Strengthening these procedural capacities could have led to increasing evidence in order to make these institutions react and engage in the Libyan crisis.

4.3 Use of additional human rights instruments by the African Court

Turning to the violations of the African Charter, the African Court adopted a comprehensive approach to the right to a fair trial, holding that such right includes the right to be promptly 'arraigned before a judicial authority';⁸¹ the right to 'be notified of the trial date and of the charges levelled against the accused';⁸² the right to 'be assisted by a lawyer of his/her own choosing';⁸³ and the right to 'communicate with his/her counsel and have adequate time and facilities to prepare the defence'.⁸⁴ However, the Court seemed to

79 Perez-Leon Acevedo (n 16) 498.

80 Perez-Leon Acevedo 495.

81 Judgment on Merits (n 39) para 91.

82 Judgment on Merits para 94.

83 Judgment on Merits para 93.

84 Judgment on Merits para 94.

forget that, according to article 3 (Jurisdiction) and article 7 (Sources of Law) of the Court Protocol, it is entitled to apply any other relevant human rights instruments ratified by Libya, not only for the purposes of interpretation of the corresponding articles of the African Charter, but also, as noted by Ouguergouz J, with the same legal force as the African Charter and its Protocols.⁸⁵

Accordingly, the Court should have carried out a more detailed analysis of the violations of articles 6 and 7 of the African Charter referring to other relevant human rights instruments. In this regard, in the *African Commission (Saif al-Islam Gaddafi) v Libya* case the Court referred to articles 9 and 14 of ICCPR, but it would also have been useful to refer, for instance, to article 2(3) (the right to an effective remedy) and article 6 (the right not to be arbitrarily deprived of one's life) of ICCPR. It could also, as interpretive guide, have drawn more from the 1988 Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment in connection with the case in question. Furthermore, the African Commission also in 2003 adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which further developed articles 5, 6, 7 and 26 of the African Charter.⁸⁶ The decision of the African Court could have been more coherent and consistent if the African Commission's Principles had been quoted by the Court bringing together international and regional human rights instruments in its argumentation.

With regard to the issue of derogation, and taking into account the situation of non-international armed conflict in Libya since 2011,⁸⁷ it is to be welcomed that, despite the lack of any article in the African Charter regarding derogation in times of public emergency, the Court referred to article 4 of ICCPR.⁸⁸ The Court only briefly

85 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) para 8.

86 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in May 2003 in Niamey, Niger.

87 In this regard, see eg I Fuente Cobo 'Libia, la guerra del General Jalifa Haftar' (2017) 70 *Instituto Español de Estudios Estratégicos* 1.

88 Art 4 of ICCPR provides that '(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. (3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated

mentioned the application of this article indicating that the right of derogation of state parties 'has inherent limits in so far as there are rights that cannot be derogated, regardless of the prevailing situation'.⁸⁹ Nevertheless, it did not further elaborate on those limits or other key issues regarding the application of this article, such as the procedural and substantive elements. This was also noted by Ayissi, who explains:⁹⁰

The Court missed an opportunity to expand on its reasoning on the issue. It could, for instance, have examined whether the procedural and substantive requirements of ICCPR Article 4 had been met in the case at hand, in light of the Human Rights Committee's General Comment No 29 (2001). It could also have explained how the non-derogability principle applies to Articles 6 and 7 of the African Charter.

On a positive note, it is worth noting that the Court referred to the jurisprudence of the European Court of Human Rights in relation to the right to be assisted by a lawyer as derived from article 6 of the European Convention on Human Rights.⁹¹ In particular, the Court mentioned the cases of *Brusco v France* and *Dayanan v Turkey*.⁹² This demonstrates the importance of the so-called 'dialogue' between international and regional courts in the interpretation of human rights provisions.⁹³

4.4 International responsibility of the Libyan state

In *African Commission (Saif al-Islam Gaddafi) v Libya* the African Court stressed the international responsibility of the Libyan state for ensuring compliance with articles 6 and 7 of the African Charter with respect to the conduct of a 'revolutionary brigade'. As argued by Windridge, 'the Court forestalled future attempts by member states to disavow actions of groups it claims are not under its control but operating on in its territory ... thereby dismissing any arguments by member states that 'we can't do anything about it'.⁹⁴ Nonetheless, since it was the first time that this issue was addressed by the Court, this was an opportunity for the Court to thoroughly examine the cases in which the state is responsible for acts committed by a person

and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

89 Judgment on Merits (n 39) para 76.

90 Ayissi (n 44) 743.

91 Judgment on Merits (n 39) para 95.

92 See European Court of Human Rights *Brusco v France*, 14 October 2010; European Court of Human Rights, *Dayanan v Turkey*, 13 October 2009.

93 See FJ Ansuategui Roig 'Human rights and judicial dialogue between America and Europe: Toward a new model of law?' (2016) 6 *The Age of Human Rights Journal* 24.

94 Windridge (n 71).

or group of persons. In particular, although the Court referred to article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, it did not examine the three conditions that must be met for conduct to be considered directly imputable to the state.⁹⁵ Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts establishes three conditions that must be met in order for conduct to be attributable to the state: First, the conduct must effectively relate to the exercise of elements of the governmental authority; second, the conduct must have been carried out in the absence or default of the official authorities; and third, the circumstances must have been such as to call for the exercise of those elements of authority.⁹⁶ These conditions were not specifically evaluated by the Court in the current case.

It is also worth mentioning that, in contrast to what the Court did, in his separate opinion Ouguergouz J highlighted the detailed analysis carried out in the *Velasquez Rodriguez v Honduras* case by the Inter-American Court of Human Rights in addressing the topic of the international responsibility of states and linking it with the due diligence principle.⁹⁷ In this case the Inter-American Court of Human Rights held: ⁹⁸

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

This means that the international responsibility of a state can be triggered not only for its own violation of international obligations but for its lack of due diligence in preventing, responding or investigating such violation committed in its territory by a private person or a group of persons. As a consequence, the African Court should have offered a more solid argumentation regarding the due diligence obligations of the Libyan state. On this particular aspect, the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights could serve as valuable interpretative materials for the African Court.

95 Judgment on Merits (n 39) para 50.

96 See art 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) adopted by the International Law Commission at its 53rd session; *Yearbook of the International Law Commission* (2001) Vol II, Part II 49.

97 Separate Opinion of Ouguergouz J on Admissibility of the Application (n 61) para 12 fn 17.

98 See *Velasquez Rodríguez v Honduras* IACHR 29 July 1988 (Judgment) para 72.

4.5 Political will of the African Union policy organs

Finally, it needs to be pointed out that the outcome of these cases has been subordinated to the political decisions of the AU policy organs and the existing divisions among its member states. As stated by Sander, 'the efficacy of any order of the Court is ultimately dependent on the political will of the African Union'.⁹⁹ In fact, there is no independent body in charge of the enforcement of the Court's orders. According to article 31 of the Court Protocol, these enforcement powers specifically rely on active engagement by the AU Executive Council.

In the aforementioned cases there were strong divisions among AU member states in relation to the decision as to how to deal with the Libyan crisis, particularly between the group led by Nigeria and that led by South Africa and Zimbabwe. According to Ekwealor and Okeke-Uzodike,

while Nigeria's position on the regime in Libya, that includes the formation of a new inclusive government which allows for the participation of the Transitional National Council (TNC), was supported by another 34 African States, South Africa and Zimbabwe were adamant that Gaddafi should remain at the helm.¹⁰⁰

Due to this lack of agreement, the AU not only failed to implement a common agenda but also to protect human rights in such a pressing situation. Consequently, these cases show that the potential positive impact of the African Court in cases of imminent human rights violations can be undermined by the political divisions within the AU.

5 Moving forward: Lessons learned and recommendations for the future work of the Court

The two cases analysed above are for several reasons considered of paramount importance for the consolidation and legitimation of the African Court. As was explained in the introduction, for the purposes of this article 'consolidation' means the consistency and effectiveness of the Court in delivering judgments. 'Legitimation' here refers to the perceived legitimacy by relevant constituencies (empirical legitimacy) and the justified authority in terms of law or

⁹⁹ B Sander 'Case summary, Application 004/2011 *African Commission on Human and Peoples' Rights v The Great Socialist People's Libyan Arab Jamahiriya*' 4 January 2012, <http://arcproject.co.uk/wp-content/uploads/2013/04/CSW-004-2011.pdf> (accessed 4 May 2018).

¹⁰⁰ See Ekwealor & Okeke-Uzodike (n 14) 76.

expertise (normative legitimacy). In terms of its consolidation, the Court acted in an effective way because, for the first time, it made use of important procedural mechanisms at its disposal in cases of extreme gravity and massive violations of human rights, namely, the issuance of provisional measures and the adoption of a judgment by default. Moreover, these cases represent the only cases that have to date been heard by the Court concerning Arab African countries.¹⁰¹

These cases have opened the door for the future use of these procedural mechanisms. Since then the Court has issued 39 additional orders for provisional measures in very different circumstances, the last being on 22 April 2020 against Côte d'Ivoire.¹⁰² The Libyan decisions have been quoted subsequently by the Court with regard to the fact that the Court does not need to justify that it has jurisdiction on the merits of the case when ordering provisional measures.¹⁰³ As for the possibility of rendering judgments by default, the Court also set a legal precedent that could be applied to similar cases where the respondent fails to appear or defend its case. In the matter concerning Saif al-Islam Gaddafi, the Court considered that notwithstanding the fact that the respondent sent two *notes verbale*, it 'consistently failed to present its defence, despite the extension of the deadline accorded'.¹⁰⁴ Therefore, *notes verbale* do not necessarily in themselves serve the purpose of demonstrating adequate state engaging in the implementation process.

In terms of the legitimization of the African Court, NGOs and international lawyers applauded the decision in *African Commission on Human and Peoples' Rights (Benghazi) v Libya* for being the first ruling against a state considering the situation of exceptional insecurity in Libya.¹⁰⁵ The Court stressed the international responsibility of the Libyan state for failing to comply with articles 6 and 7 of the African Charter. In addition, as far as its justified legal argumentation, particularly in relation to the *African Commission (Saif al-Islam Gaddafi) v Libya* case, is concerned, the decision was regarded as

101 Largely because among them only Tunisia has recently signed the declaration under art 34(6) of the African Court Protocol.

102 See the list of cases where provisional orders have been issued at <https://en.african-court.org/index.php/59-list-of-cases-with-provisional-measures/1037-list-of-cases-where-orders-for-provisional-measures-have-been-issued> (accessed 10 April 2020).

103 Eg, see *Armand Guehi v United Republic of Tanzania* 18 March 2016 3; *Dexter Eddie Johnson v Republic of Ghana* 28 September 2017 4; *Sébastien Germain Ajavon v Republic of Benin* 5 December 2018 6.

104 Judgment on Merits (n 39) para 42.

105 See International Federation for Human Rights 'The African Court on Human and Peoples' Rights seized of a case against Libya' 15 April 2011, <https://www.fidh.org/en/region/north-africa-middle-east/libya/9527-the-african-court-on-human-and-peoples-rights-seized-of-a-case-against>; see also Human Rights Watch (n 66).

'solid jurisprudence' for potential submissions by AU member states that may in extreme circumstances derogate the right to a fair trial or the right to liberty.¹⁰⁶

Nonetheless, following these decisions a number of recommendations for the better functioning of the Court are suggested, both at the procedural and the substantive level. First, the article argues that more clarity is needed in respect of the relationship between the African Court and the African Commission, especially when a case is or can potentially be transferred to the African Court. In particular, it is not clear how the four scenarios provided for in the Commission's 2010 Rules of Procedure (in Rule 118) should be applied and whether the Commission is 'acting' or 'representing' the complainant.¹⁰⁷ Moreover, the Court is required to investigate the veracity of the facts detailed in the Commission's applications and when necessary update them. Second, and in the same vein, the Court should make use of all the procedural tools at its disposal when investigating serious and massive violations of human rights, for instance, bringing into play Rules 45 and 46 of the Rules of the Court and hearing witnesses and other experts in the field.¹⁰⁸ In this way, facts will be supported with stronger and more consistent evidence.

At the substantive level of the examination of the merits of the case, it is argued that the Court should use additional UN and AU instruments in the interpretation of human rights provisions.¹⁰⁹ Although the Court considered ICCPR as one of the legal bases for the interpretation of the right to liberty and the right to a fair trial, it neither further elaborated on the 1988 Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, nor did it cite the 2003 African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Bringing together additional international human rights instruments could lead to a richer and more detailed analysis of the alleged violations. Finally, when deciding about key legal issues that have never been examined by the African Court, it is recommended that the Court explore the jurisprudence of other regional human rights courts, such as the Inter-American Court of Human Rights or the European Court of Human Rights.¹¹⁰ For example, topics such as the issue of derogation of rights or the due diligence principle for state responsibility have

¹⁰⁶ Windridge (n 71) 772.

¹⁰⁷ See part 4.1 of this article.

¹⁰⁸ See part 4.2 of this article.

¹⁰⁹ See part 4.3 of this article.

¹¹⁰ See part 4.4 of this article.

been extensively discussed by these courts.¹¹¹ In this regard, it is to be welcomed that since these two judgments the African Court indeed has included more references to the case law of these tribunals in its decisions.¹¹²

6 Concluding remarks

Libya ratified the African Charter in 1986 and the African Court Protocol in 2003.¹¹³ However, it has not made the declaration allowing individuals and NGOs to directly access the Court. Despite the lack of direct access by individuals and NGOs, the above cases reached the African Court. This was only possible through the referral of the decisions by the African Commission, establishing an alternative route to the Court. This indirect access could have relevant significance in the future due to the withdrawals of four states of their special declarations allowing direct access to the Court.¹¹⁴ Remarkably, since the *African Commission (Ogiek) v Kenya* case, this indirect access route has not again been taken. Clearly, a higher level of activity by the African Commission is required to properly assess whether this path actually proves effective.

As explained in this article, these decisions have been essential for the consolidation and legitimation of the African Court, representing the first decisions in condemning an AU member state, the first adoption of provisional measures and the first judgment by default. Nonetheless, both cases also reflect that certain areas urgently need to be improved. In particular, some procedural and legal issues should have been examined in greater detail by the Court so as to offer a more consistent and elaborate argumentation. An even more serious concern is the fact that none of the decisions adopted by the Court has been enforced by the relevant AU institutions. Therefore,

111 Regarding the derogation of rights, see J Allain 'Derogations from the European Convention of Human Rights in light of other obligations under international law' (2005) 11 *European Human Rights Law Review* 480. On the due diligence principle and state responsibility, see JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2013) 184-187.

112 Eg, see *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* 18 November 2016 paras 64, 95, 134 & 148.

113 See Ratification Table of the African Charter on Human and Peoples' Rights, <https://www.achpr.org/ratificationtable?id=49>; Ratification List of the Court's Protocol, https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 20 May 2020).

114 See T Davi & E Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African Court' EJIL:Talk! Blog of the *European Journal of International Law* 19 May 2020, <https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/?fbclid=IwAR3ZTiOoYtybjz-WJGs24dYtDFvvsqRrSOWAMYyNtPVhNciQvoAybPFQ> (accessed 20 May 2020).

the AU not only failed to implement a common agenda but also to protect human rights in such a pressing situation. The AU must leave behind the current political rhetoric and bear in mind that one of its main goals is to promote, protect and guarantee human rights under a just rule of law, as provided for in article 3 of the AU's Constitutive Act.¹¹⁵ Only under these conditions is the end to impunity ever to be achieved.

¹¹⁵ Constitutive Act of the African Union adopted on 11 July 2003 at Lomé, Togo.

Human rights enforcement in Africa: Enhancing the Pan-African Parliament's capacity to promote and protect human rights

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Summary: *To realise the promises and obligations emanating from various human rights frameworks that set regional normative standards, regional organisations have created organs and agencies with clear mandates. The Pan-African Parliament is one such organ in the context of the African Union. Indeed, article 3(2) of the Protocol establishing the Parliament lists the promotion of 'the principles of human rights and democracy in Africa' as one of its core objectives. However, the status quo clearly shows that the Parliament lacks the capacity to contribute meaningfully to the human rights agenda on the continent. Despite this deficiency, this article explores other avenues through which the organ can effectively contribute to its human rights mandate. However, the contribution questions the wisdom in adopting model laws in the absence of mechanisms to ensure the buy-in of member states as well as the adoption of these laws in national jurisdictions. Finally, the article proposes enhanced cooperation between the Parliament and various AU organs burdened with a human rights mandate to ensure that these organs 'speak the same language' and advance collective positions in furtherance of the broad AU human rights framework.*

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1 Introduction

When the Universal Declaration of Human Rights (Universal Declaration)¹ was adopted in 1948, there was no doubt that the promotion of the wide-ranging rights that it espoused was to be pursued through the United Nations (UN) and its specialised agencies. More than 70 years later, regional organisations such as the European Union (EU) and the African Union (AU) have adopted impressive human rights instruments, most of which reflect core human rights values as enunciated in the Universal Declaration. To realise the promises and obligations emanating from these human rights frameworks, these regional groupings have further created organs and agencies with clear mandates. The Pan-African Parliament (PAP) is one such organ in the context of the AU.² However, since the inauguration of its first parliamentarians in 2004, the PAP has attracted scathing criticism as scholars and commentators question its utility and relevance. Many studies on its structure and capacity indicate a consensus that the organ is weak.³ Indeed, the Parliament has been labelled a 'glorified talk-show' and a 'toothless bulldog', descriptions suggesting that it must do more to be accorded some respect as a role-player in the continent's affairs. Sadly, at the heart of the PAP's criticism is a weakness that is not of its own making, namely, its lack of legislative powers and concrete oversight over other AU organs, particularly the African Commission on Human and Peoples' Rights (African Commission).

In light of the glaring limitations in the PAP's legal framework, this contribution argues for an activist approach by the Parliament's President and its Committee on Justice and Human Rights. Accepting that the progressive evolution of the PAP is unlikely to be realised in the near future, the article explores how the organ can be made an effective tool in the protection and promotion of human rights while operating within its current legal framework. Importantly, the article questions the wisdom of adopting model laws in the absence of functional and effective mechanisms to ensure the buy-in of member

1 Adopted by the UN General Assembly on 10 December 1948.

2 Constitutive Act of the African Union adopted on 11 July 2000 in Lomé, Togo and entered into force on 26 May 2001.

3 See eg K van Walraven 'From union of tyrants to power to the people? The significance of the Pan-African Parliament for the African Union (2004) 39 *Africa Spectrum* 197; S Mpanyane 'Transformation of the Pan-African Parliament: A path to a legislative body' (2009) ISS Paper 181.

states, as well as the adoption of these laws in national jurisdictions. Finally, the contribution proposes enhanced cooperation between the Parliament and various AU organs burdened with a human rights mandate to ensure that relevant organs 'speak the same language' and advance collective positions in furtherance of the broad AU human rights framework.

2 Pan-African Parliament as a continental organ

Article 5 the Constitutive Act of the AU⁴ lists the Pan-African Parliament as one of the primary organs of the organisation.⁵ PAP has its genesis in the 1991 Treaty Establishing the African Economic Community (AEC) which was adopted in Nigeria's capital, Abuja.⁶ Also known as the Abuja Treaty, the AEC Treaty provided for the establishment of a parliament, noting that such an organ was necessary to 'ensure that the peoples of Africa are fully involved in the economic development and integration of the continent'.⁷ Article 14(2) the Abuja Treaty provided that the composition, functions, powers and organisation of the Parliament would be defined in a separate Protocol. However, it was not until March 2001 that the fifth extraordinary session of the Organisation of African Unity (OAU) Assembly finally adopted the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (AEC PAP Protocol).⁸ In a little under three years, this Protocol received the requisite ratifications and came into force in December 2003, subsequent to which the PAP's first parliamentarians were sworn in, in March 2004.

Based in Midrand, South Africa, the PAP consists of five parliamentarians from each member state, one of whom must be a female.⁹ Further, the candidates from each state are required to 'reflect the diversity of political opinions in each National Parliament or other deliberative organ'.¹⁰ Clothed with immunity, these parliamentarians vote in their personal and independent capacities.¹¹ According to Magliveras and Naldi, the Parliament gives

4 AU Constitutive Act (n 2).

5 See art 5(c) Constitutive Act.

6 The AEC Treaty, otherwise known as the Treaty of Abuja, was adopted on 3 June 1991 and entered into force on 12 May 1994.

7 Arts 7(1)(c) & 14(1) AEC Treaty (n 6).

8 For a detailed account on the background to the establishment of the PAP, see KD Magliveras & GJ Naldi 'The Pan-African Parliament of the African Union: An overview' (2003) 3 *African Human Rights Law Journal* 222. See also BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 13 *African Human Rights Law Journal* 302.

9 Art 4(2) AEC PAP Protocol (n 6).

10 Art 4(3) AEC PAP Protocol.

11 Art 6 AEC PAP Protocol.

further impetus to the desire and vision of some Africans to provide a democratic foundation to the AU.¹² In accordance with its Rules of Procedure, the organs and structures of the PAP are the Plenary, the Bureau, the Permanent Committees,¹³ the regional Caucuses and the Secretariat.

Although the stated long-term objective of the PAP is to 'evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage', the Parliament currently enjoys only consultative and advisory powers.¹⁴ This no doubt constitutes a limitation which restricts the capacity of the organ to set standards. In its 2013-2017 Strategic Plan, the PAP noted that it needs greater legislative power if it is to transform itself into a more effective and specialised organ of the AU, adding that this will provide it with the requisite institutional and political legitimacy within its mother body.¹⁵ Although all AU organs, with the exception of the Court of Justice, are subject to the oversight, investigative, consultative and advisory functions of the PAP, their actions are not overseen by the Parliament. For example, the AU Assembly has the sole mandate on budgetary issues as well as the appointment of AU officials. The PAP has bemoaned this limitation and charged that it has been restricted in its work 'to only attending AU meetings'.¹⁶ In addition to this criticism, Sesay argues that 'many African countries are not yet truly democratic and even those that profess to be so, present us with a split image as they are ruled by governments whose democratic credentials are dubious'.¹⁷ He further reasons that if individuals become parliamentarians in their home countries through flawed electoral processes, their subsequent membership of the PAP brings into question the Parliament's claim to being representative of the majority of Africans.¹⁸ In conclusion, Sesay charges that the PAP

12 Magliveras & Naldi (n 8) 233.

13 Currently there are 11 Committees, namely, the Committee on Rural Economy, Agriculture, National Resources and Environment; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Cooperation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communications, Energy, Science and Technology; the Committee on Health, Labour and Social Affairs; the Committee on Education, Culture, Tourism and Human Resources; the Committee on Gender, Family, Youth and People with Disabilities; the Committee on Justice and Human Rights; the Committee on Rules, Privileges and Discipline; and the Committee on Audit and Public Accounts.

14 Art 2(3) AEC PAP Protocol (n 6).

15 Pan-African Parliament (PAP) Strategic Plan 2014-2017 (January 2014) (PAP Strategic Plan 2014-2017) 6.

16 PAP Strategic Plan 2014-2017 (n 15) 5.

17 AY Sesay 'The African Union: Forward march or about face-turn?' (2008) 3 *Claude Ake Memorial Papers* 22.

18 Sesay (n 17) 22.

‘would not mean much to a people who, by and large, still do not have much say in the choice of those who govern them’.¹⁹

Because the AEC PAP Protocol makes provision for its review and amendment to ensure that its objectives and purposes are realised,²⁰ the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (AU PAP Protocol)²¹ was adopted in June 2014 to replace the AEC PAP Protocol. This new Protocol will come into force once it has been ratified by at least 50 per cent of AU member states.²² In addition to the objectives listed in the AEC PAP Protocol, the new Protocol envisages a PAP burdened with the duty to ‘encourage National and Regional Parliaments to ratify and integrate treaties adopted by the AU into their legal systems’.²³ More importantly, there is recognition of the importance of civil societies and community-based organisations in Africa’s integration and development.²⁴ Another significant addition is the objective to ‘invite and encourage the full participation of African diaspora as an important part of the African peoples in the building of the African Union’.²⁵ In relation to membership, the new Protocol increases the number of female parliamentarians from each member state from one to two.²⁶ Recognising the importance of cooperation and coordination, the AU PAP Protocol also defines the relationship between the Parliament and other organs of the AU.²⁷ This is in addition to working closely with national parliaments and regional parliaments, a position provided for in both Protocols.²⁸ Sadly, as of June 2020 the Protocol has been signed by only 21 states and has been ratified by 12, a far cry from the 28 it requires to enter into force.

3 Pan-African Parliament’s human rights mandate

In a paper on the possible establishment of a United States of Africa, Musila notes that ‘the protection of human rights and the promotion of democracy [are] at the core of parliaments in general

19 As above.

20 Art 25 AEC PAP Protocol (n 6).

21 Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (AU PAP Protocol).

22 Art 23 AU PAP Protocol (n 21) art 23.

23 Art 3(k) AU PAP Protocol.

24 Art 3(i) AU PAP Protocol.

25 Art 3(m) AU PAP Protocol.

26 Art 4(3) AU PAP Protocol.

27 Art 20 AU PAP Protocol.

28 Art 18 AEC PAP Protocol (n 6) and art 19 AU PAP Protocol (n 21).

and indeed the objectives of the present AU'.²⁹ This statement is relevant for two reasons. First, it suggests a functional parliament for the Union, complete with legislative powers and an oversight mandate over other organs of the AU. Second, it places a human rights mandate at the heart of such an organ. Drafters of the AEC PAP Protocol no doubt were alive to such expectations *vis-à-vis* a continental parliament. With reference to utility, the Preamble to the AEC PAP Protocol notes that the establishment of the Parliament was driven by 'a vision to provide a common platform for African peoples and their grass-roots organisations to be more involved in discussions and decision-making on the problems and challenges facing the continent'.³⁰ With reference to human rights, the eleventh preambular paragraph records member states' determination 'to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.³¹

Viljoen, an expert on African human rights law, asserts that 'the PAP has a clear human rights mandate'.³² This bold assertion no doubt is based on a simple textual reading of the Protocol establishing the Parliament. In article 3, which lists the objectives of the organ, the promotion of the principles of human rights and democracy in Africa stands out.³³ Together with the preambular paragraph referred to above, this provision confirms a clear intention by the continent's leaders at the time to have a parliament with a significant role to play in the continent's human rights agenda. Based on this provision alone, the organ's human rights mandate is unquestionable. Of relevance in article 3(2) is the reference to human rights and democracy in the same sentence. Over time, democracy has become synonymous with good human rights records, the converse being true in dictatorships and autocratic states. On this basis, one may argue, correctly so, that on any interpretation article 3(2) suggests the promotion of human rights as a means to an end, and that end is democratic governance.

The PAP is also mandated to 'encourage good governance, transparency and accountability in member states'.³⁴ This objective permeates every facet of human rights and suggests a broad, cross-cutting mandate for the Parliament. In encouraging good governance, transparency and accountability, the PAP inevitably

29 GM Musila 'United States of Africa: Positioning the Pan-African Parliament and Court in the political union debate' (2007) *ISS Paper* 142 6.

30 Preamble para 3.

31 Preamble para 11 AU PAP Protocol (n 21).

32 F Viljoen *International human rights law in Africa* (2012) 174.

33 Art 3(2) AU PAP Protocol (n 21).

34 Art 3(3) AU PAP Protocol.

has to adopt human rights standards as a measure of where and when to direct its attention. The mandate to set a human rights standard and to keep an eye on those member states that fall below the accepted threshold places the PAP in a position of potential influence on the continent. Linked to this broad mandate is the duty to 'promote peace, security and stability'.³⁵ Africa's reputation for incessant civil wars and violent conflicts is common cause. Often, at the heart of these conflicts are grievances linked to either political or socio-economic rights. The objectives listed in articles 3(2), 3(3) and 3(5), therefore, are interwoven and designed to give certainty to the PAP's mandate. Human rights, democracy, good governance, transparency, accountability, peace, security and stability all converge on a human to guarantee either her physical security or her social security. In the language of human security discourse, they address one's fears and wants.

From the provisions referred to above, the Parliament's human rights mandate is clear, at least on paper. This mandate is further clarified in the organ's Rules of Procedure. Explaining the powers of the PAP as outlined in articles 3, 11 and 18 of the AEC PAP Protocol, rule 4(1)(b) provides that the Parliament shall '[p]romote human and peoples' rights, consolidate democratic institutions and the democratic culture, good governance, transparency and the rule of law by all Organs of the Union, Regional Economic Communities and Member States'.³⁶

Although at face value the wording of this rule sounds like a repetition of what is contained in the Protocol, a closer reading reveals that there is more to it. The rule explains two perspectives, the first being the organ's mandate *vis-à-vis* member states, and the second being its mandate *vis-à-vis* other organs of the continental body. Both are important for human rights. In relation to member states, the rule does not refer to democracy but to 'democratic institutions and a culture of democracy'. This suggests a constant engagement between the Parliament and member states – including those whose human rights records are not questionable – just to ensure that the good governance debate does not fall off the agenda. In relation to other organs of the Union, the rule burdens the PAP with the mandate of promoting transparency and the rule of law, demands that no doubt contribute to the way in which these organs address human rights issues. This mandate likewise extends to regional economic communities (RECs).

35 Art 3(5) AU PAP Protocol.

36 Pan-African Parliament Rules of Procedure, as revised Rule 4(1)(b).

In addition to the provisions discussed above that expressly reference human rights, the AEC PAP Protocol also handed the Parliament a blank cheque regarding its powers and functions. Among others, the organ has powers to

examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.³⁷

That the Parliament has powers to discuss 'any matter' clears the way for the organ to be creative in executing its human rights mandate. As Viljoen notes, although there is reference to 'any matter', this competence 'is illustrated by a list of specific substantive issues that include human rights, democracy, good governance, and the rule of law'.³⁸

4 Making the most of the *status quo*: The PAP's challenges and opportunities

4.1 Challenges and limitations

The transformation of the OAU into the AU was received with widespread optimism and hope for a better continental organisation. Indeed, the OAU did not endear itself to those it claimed to represent or the broader international community. 'Union of Tyrants' was and remains one common description of the gathering of African heads of state at the time, a perception which barely was challenged. While discussing the significance of the PAP in the broad AU institutional architecture, Van Walraven notes that 'the question to be answered ... is whether the Pan- African Parliament is such a significant institutional development as it is made out to be by contemporary observers'.³⁹ Although this question betrays Van Walraven's pessimism, it also casts the spotlight on the challenges the PAP faces, as well as the weaknesses inherent in the legal framework within which it operates.

As noted above, at the heart of the criticism against the PAP is a weakness that is not of its making, namely, its lack of legislative powers. Although the drafters of the PAP's founding document were

³⁷ Art 11(1) AU PAP Protocol (n 21).

³⁸ Viljoen (n 32) 175.

³⁹ Van Walraven (n 3) 199.

aware of the need to equip the Parliament with legislative powers, this was deferred to such a time that the Assembly of Heads of State will decide to extend its competence. Writing in 2003, barely a year before the PAP's first parliamentarians were inaugurated, Magliveras and Naldi noted that the Parliament gave impetus to the desire and vision of some Africans to provide a democratic foundation to the AU.⁴⁰ However, they cautioned that the Parliament 'ought to have a significant role to play in shaping an organisation that has elements of a people's union' and to play this role effectively, it ought to be equipped with legislative powers.⁴¹ They added that legislative powers will enhance the organ's credibility with the people and 'even help to encourage and develop democratic reforms in some countries'.⁴²

The apprehension aroused by the PAP's lack of legislative powers is exacerbated by two factors. First, parliaments in Africa are viewed with suspicion. As Mpanyane notes, perceptions on their capacity to further democracy often are far from positive as they are commonly viewed as powerless, useless, ineffective, redundant or 'just talk-shops'.⁴³ This view is shared by Magliveras and Huliaras who argue that in post-colonial Africa most parliaments 'were mere appendages to the executive branches of government' and 'their role was at best that of rubber-stumping institutions'.⁴⁴ While such perceptions abound, the fear is that the AU will simply replicate the impotent model of a parliament, only this time at the continental level. Second, because of the successes of the EU Parliament, critics are appalled by the creation of a semi-useless organ when there is an example elsewhere of how such an institution can be made effective. Indeed, many studies on the PAP are quick to juxtapose the organ and the EU Parliament, with the latter being passed as a model to emulate. As Buyoya notes, the AU's organisational structure is mostly guided by the model of the European Union (EU),⁴⁵ hence when the AU decides to deviate from what has been proven to work, in the absence of sound justifications the outrage is understandable. While urging the AU to empower the PAP, Musila explains that the EU has managed

40 Magliveras & Naldi (n 8) 233.

41 As above.

42 As above.

43 Mpanyane (n 3) 1.

44 K Magliveras & A Huliaras 'Understanding success and failure in the quest for peace: The Pan-African Parliament and the amani forum' (2016) 11 *The Hague Journal of Diplomacy* 278. See also D Jancic 'Regional parliaments and African economic integration' (2019) 30 *European Journal of International Law* 227.

45 P Buyoya 'Toward a stronger African Union' (2006) 12 *The Brown Journal of World Affairs* 171.

to be what it is because as it progressed, states were willing to cede sovereignty to it and its organs.⁴⁶

In addition to the lack of legislative powers, the PAP is also criticised on the basis that it lacks a formal mandate to oversee other organs of the AU and to hold them to account. Although the Parliament can discuss its own budget as well as that of the Union, it can only make recommendations as it is powerless to direct and enforce amendments.⁴⁷ Similarly, the PAP is empowered to 'make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC ... as well as the strategies for dealing with them',⁴⁸ but these can be ignored. As Mpanyane states, 'the AU policy-making institutions are not obliged to consult with the PAP or seek its input in the decision-making processes'.⁴⁹ This impediment is a consequence of strong sentiments of national sovereignty, attitudes that hamper the AU's efforts to be perceived as a credible political entity.⁵⁰ It has been observed that since its establishment in 2004, the PAP has adopted numerous recommendations and resolutions on a variety of issues, including critical issues on the continent, and yet there is little evidence that the policy-making structures of the AU have taken the Parliament's decisions into consideration.⁵¹ However, Viljoen sees a glimmer of hope, noting that 'although PAP members only raised administrative and financial matters when the Chairperson of the AU Commission appeared at the PAP, the engagement could serve as a precedent for oversight on more substantive issues, including human rights in the future'.⁵²

4.2 Opportunities and prospects

As noted above, criticisms raised against the PAP are both necessary and justified. The inevitable comparison with the European Parliament is inescapable. During the PAP's first session Musila charged that 'there is no need to retain a PAP without utility in the AU'.⁵³ While legislative powers would be the ultimate price for the Parliament, there is also a need to focus on that which the organ can do within the current framework. This part focuses on the PAP's Justice and Human Rights Committee as well as the Office of the President *vis-*

46 Musila (n 29) 10.

47 Art 11(2) AEC PAP Protocol (n 6).

48 Art 11(4) AEC PAP Protocol.

49 Mpanyane (n 3) 4.

50 Buyoya (n 45) 172.

51 Mpanyane (n 3) 4.

52 Viljoen (n 32) 175.

53 Musila (n 29) 8.

à-vis what they contribute in furthering the Parliament's human rights mandate. The part furthermore analyses the PAP's model law mandate and how this can be used creatively to enhance the organ's effectiveness.

4.2.1 *Pan-African Parliament's Committee on Justice and Human Rights*

In its Rules of Procedure the PAP established 11 committees the functions of which correspond with those of the AU Specialised Technical Committees.⁵⁴ Among these committees is the Committee on Justice and Human Rights.⁵⁵ According to the Rules of Procedure, the Committee among other functions shall⁵⁶ –

- (a) assist Parliament in its role of harmonising and coordinating the laws of member states;
- (b) promote respect for and develop sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental rights within the Union.

Since the inauguration of the first parliamentarians in 2004, the Committee on Justice and Human Rights has deliberated and engaged in robust debates on pertinent human rights issues in Africa. Although the ultimate decisions on whether or not to adopt certain resolutions and positions are the prerogative of the Plenary, the Committee can do much to bring important human rights issues to the fore. For example, at its meeting held on 8 May 2018 at its seat in Midrand, the Chairperson of the Committee reported back to the members on the progress on the Resolution on Albinism.⁵⁷ This report was a culmination of earlier efforts in search of a permanent solution to the plight of people living with albinism across the continent. While in some parts of the world threats faced by people living with albinism are mainly medical, such is not the case in Africa. Based on myths and traditional beliefs, people living with albinism are often targeted for killings and mutilations, where their body parts are reportedly used in rituals. In her presentation to the

⁵⁴ Rule 22(1).

⁵⁵ Rule 22(1)(i). The other committees are the Committee on Rural Economy, Agriculture, Natural Resources and Environment; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Cooperation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communications, Energy, Science and Technology; the Committee on Health, Labour and Social Affairs; the Committee on Education, Culture, Tourism and Human Resources; the Committee on Gender, Family, Youth and People with Disability; and the Committee on Rules, Privileges and Discipline.

⁵⁶ Rules 26(9)(a) and (b).

⁵⁷ Minutes of the Meeting of the PAP's Committee on Justice and Human Rights held on 8 May 2018 in Midrand, South Africa 3 (on file with author).

Committee at a workshop designed to conscientise its members on the magnitude of the problem, Ikonwosa Ero, the United Nations Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, reported that since 2006 over 600 cases had been reported.⁵⁸ This process culminated in the adoption of the Resolution on Persons with Albinism in Africa on 18 May 2018.⁵⁹ This move was applauded by the University of Pretoria's Centre for Human Rights, which underscored the need to publicise the Regional Action Plan on Albinism in Africa⁶⁰ which has been endorsed by the AU Commission on Human and Peoples' Rights.

Clearly, whether or not certain human rights issues receive the Plenary's attention will depend largely on the activism of the Committee and its Chairperson. Commenting on the power to 'examine, discuss or express an opinion on any matter',⁶¹ Magliveras and Naldi argue that 'this is of enormous potential significance since, if used boldly, the Pan-African Parliament will be able to assume and exercise considerable powers'.⁶² Indeed, this blank cheque, whether it was by design or omission, is a welcome position. At its meeting on 7 August 2018, a member of Parliament from Libya bemoaned the tragic deaths witnessed as scores of people attempt to voyage across the Mediterranean into Europe. He warned that there were widespread human rights abuses by human smugglers and other illegal groups and, as such, the Committee must 'do something about it'.⁶³ In response, the Chairperson remarked that indeed it is tragic that 'Africa is emptying itself into the Mediterranean'. He went on to assure members that a request would be made to the President to undertake a fact-finding mission in Libya so as to make representations to the Parliament from an informed basis.⁶⁴ If this proposed fact-finding mission materialises and the Plenary finally debates the situation in Libya, it will serve as a good example of what an active committee can achieve. As its Chairperson noted, once findings are concluded and presentations are made to the President, the committee would have discharged its mandate and will be powerless on how the matter proceeds.⁶⁵ Sadly, close to two

58 Minutes of the Committee on Justice and Human Rights (n 57) 4.

59 PAP.4/PLN/RES/05/MAY.18.

60 See Centre for Human Rights 'Pan-African Parliament adopts a Resolution on Persons with Albinism in Africa (PAP.4/PLN/RES/05/MAY.18)' 1 June 2018, https://www.up.ac.za/en/faculty-of-law/news/post_2689958-pan-african-parliament-adopts-a-resolution-on-persons-with-albinism-in-africa-pap.4plnres05may.18 (accessed 30 August 2018).

61 Art 11(1).

62 Magliveras & Naldi (n 8) 224.

63 Author attended the Committee's sitting.

64 As above.

65 As above.

years after this sitting, the PAP has not undertaken this fact-finding mission.

The power to undertake fact-finding missions indeed is a powerful tool in terms of what the Committee can achieve. For example, during the so-called Arab Spring which engulfed a number of countries in North Africa, the Committee on Cooperation, International Relations and Conflict Resolution undertook a fact-finding mission in Libya and also went on goodwill missions to Tunisia and Egypt. Magliveras and Huliaras acknowledge these efforts but are quick to caution that, unfortunately, 'the most that they can do is to report back [and] any meaningful liaison with the citizens of the affected countries is clearly missing'.⁶⁶ Although this caution is not without reason, it must be noted that even in the absence of any concrete action, the PAP's involvement sends a message, first to the parties involved and, second, to the population or civilians affected, that what is happening has not gone unnoticed. One only needs to look at what is currently happening in Southern Cameroon to appreciate the dangers of having a situation unfold away from the scrutiny of the international community and the glare of news cameras. For more than two years, the English-speaking South's fight for independence has morphed into a full-blown armed conflict, yet very little action has come from any international organisation, particularly the AU which preaches African Solutions to African Problems.⁶⁷ In attempting to explain the organisation's lack of action in Cameroon, Hendricks and Kiven reason that perhaps the AU is hamstrung by the fact that the grievances and conflict in that country are separatist in nature.⁶⁸ They add that because Cameroon's territorial integrity is at stake, the AU has simply aligned its attitude to that of its predecessor, the OAU, on the inviolability of national borders and has characterised the conflict as an internal affair.⁶⁹

If availed with the external support it requires, the Committee on Justice and Human Rights no doubt is in a position to spearhead robust debates on human rights issues affecting the continent. Although issues of high turnover have been noted, the Secretariat

⁶⁶ Magliveras & Huliaras (n 44) 285.

⁶⁷ See *News24* 'The crisis in Southern Cameroon' 6 April 2018, <https://www.news24.com/MyNews24/the-crisis-in-southern-cameroon-20180406> (accessed 1 August 2018). See also K Betek & E Etchi 'Southern Cameroon's crisis: Granting Southern Cameroons independence one day at a time' 4 May 2018, <http://www.cameroonintelligence.com/southern-cameroons-crisis-granting-southern-cameroons-independence-one-day-at-a-time/> (accessed 1 August 2018).

⁶⁸ C Hendricks & G N Kiven 'African Union needs a more robust response to conflict in Cameroon' *The Conversation* 2 March 2020, <https://theconversation.com/african-union-needs-a-more-robust-response-to-conflict-in-cameroon-132449> (accessed 20 June 2020).

⁶⁹ Hendricks & Kiven (n 68).

has also endeavoured to keep parliamentarians informed about various aspects that have a bearing on how they discharge their mandate. For example, the Secretariat organises committee-specific workshops so as to enable parliamentarians to debate from an enlightened position.⁷⁰ These workshops are the equivalent of public consultations in national legislatures.⁷¹ Further, the Secretariat also invites relevant stakeholders to make presentations and this goes a long way in equipping members of parliament for their tasks. For example, at its sitting on 7 August 2018, the Committee on Justice and Human Rights was briefed on the African Peer Review Mechanism (APRM)⁷² where the Mechanism's objectives, operations and challenges were shared. More importantly, the presentation also outlined the role of parliamentarians in the APRM processes.⁷³ The following day the Committee sat through a presentation by Amnesty International on 'The Status of Human Rights in Africa'.⁷⁴ These efforts by the Committee and the Secretariat indicate a strong willingness to deliver on the PAP's human rights mandate. While awaiting legislative powers for the PAP as an organ, the Committee on Justice and Human Rights can – through activism by its members – manoeuvre within the limited space available and, by so doing, cast the spotlight on human rights issues of concern to the Plenary and the AU as a whole.

4.2.2 *Office of the President*

In his first session after having been sworn in as a member of the PAP, Julius Malema, leader of South Africa's radical opposition, the Economic Freedom Fighters (EFF), challenged what had been presented as the President's report.⁷⁵ He queried the presentation of what he termed 'the President's visits' as activities of the office of the President and added that through such reports, Plenary must be 'getting the State of Africa'.⁷⁶ While these remarks may seem harsh, there indeed are justifications for demanding more than merely an activities report. In the Rules of Procedure the Parliament's President is burdened with the duty to 'follow up the implementation of the

70 Interview with PAP Secretariat staff member, 8 August 2018, Midrand, South Africa.

71 As above.

72 Author attended the Committee's sitting.

73 As above. The presentation, titled 'African Peer Review Mechanism processes and the Pan-African Parliament' was made by APRM legal officer, Ms Mary Izobo.

74 Author attended the Committee's sitting.

75 See <https://www.youtube.com/watch?v=9m2T76j4w14> (accessed 30 September 2018).

76 As above.

decisions of the Bureau and Parliament'⁷⁷ as well as to 'represent Parliament in its relations with outside institutions'.⁷⁸ The wording of these duties does not prescribe how they must be exercised, thus leaving ample room for the President to manoeuvre. While acknowledging that in the absence of concrete powers the PAP risks being a useless organ, Van Walraven adds that, however, 'much depends here on the diplomatic abilities of the Parliament's President'.⁷⁹

Indeed, in the absence of explicit limitations on how the President must go about following up on the decisions of the Parliament or promoting its resolutions, much can be achieved through an 'activist' President. Writing in the context of the United Nations' Secretary-General (UNSG), Chesterman notes that the difficulty in carrying out the duties of UNSG lies in the fact that the UN Charter does not clearly define the duties of the office.⁸⁰ However, adopting the same argument, Traub adds that the positive aspect of this ambiguity in powers and functions is that 'the political space available to a Secretary-General varies according to his or her ambitions and diplomatic gifts'.⁸¹ Although the analogy between the UNSG and the PAP President is not entirely accurate, Chesterman and Traub's reasoning may be extrapolated to the Pan-African Parliament's President.

Because the President is also empowered to 'rule on the admissibility of draft resolutions and amendments thereto in consultation with the Bureau',⁸² he plays an essential role in determining what ends up before the organ's plenary. Although political considerations will always play a role in organisations of an international nature, the Parliament can also benefit from being led by an individual who is 'generous' in letting 'sensitive' resolutions onto the plenary's agenda. Beyond presiding over debates, the President also is responsible for advocacy, particularly in relation to model laws. This is discussed in detail below.

77 Rule 18(1)(e).

78 Rule 18(1)(f).

79 Van Walraven (n 3) 214.

80 S Chesterman 'Introduction: Secretary or General' in S Chesterman (ed) *Secretary or General? The UN Secretary-General in world politics* (2007) 1.

81 J Traub 'The Secretary-General's political space' in Chesterman (n 80) 186.

82 Rule 18(1)(d).

4.2.3 *Making sense of the model law mandate*

On 6 and 7 August 2018 parliamentarians participated in a workshop on 'Continental Disability Legislation and Other Policy Instruments'. This was conducted at the PAP's seat in Midrand, South Africa.⁸³ At this workshop the PAP's legal officer took parliamentarians through the organ's mandate to make model laws. That the PAP is meant to evolve 'into an institution with full legislative powers', elected by universal suffrage, is not in question. However, prior to this emancipation being achieved, it is mandated to 'work towards the harmonisation or coordination of the laws of member states'.⁸⁴ While this function no doubt would be effectively discharged by a parliament with full legislative powers, it still provides an opportunity for the PAP to contribute to Africa's human rights agenda.

Through its model law function, the Parliament can set normative standards relating to pertinent human rights issues such as the protection of political prisoners, the rights of women, the conduct of elections and police accountability. Even in the absence of legislative powers, one wonders whether there is an argument to be made that perhaps in the long term such model laws may, even in the absence of domestication, become soft law. According to the PAP's legal officer, once adopted, a model law has persuasive force.⁸⁵ This assertion, however, is not entirely correct and is based more on hope than on fact. The advocacy and promotion of model laws among member states rest on the Office of the President. Because countries have no obligations to 'pay attention' to the PAP's model laws, this is not an easy task. One does not need to look further to note that in undertaking this task, notions of sovereignty will always constitute the most significant challenge to the President. Countries with poor human rights records seldom entertain any external influences on how to manage their 'internal affairs'. Hence it will be interesting to observe how the President will navigate these murky waters.

In light of the overwhelming probability that the PAP's model laws, particularly those with serious human rights implications, will be ignored, one wonders whether there is wisdom in attempting to exercise the 'harmonising laws' mandate just yet in the current political climate. To date, the PAP has adopted two model laws, the African Union Model Law on the Protection of Cultural Property and Heritage, and the Model Law on the Medicines Registration

83 Author attended the workshop.

84 Art 11(3) AU PAP Protocol (n 21).

85 Interview with PAP Secretariat staff member, 9 August 2018, Midrand, South Africa.

and Harmonisation in Africa. While it is easy for the organ to adopt laws that are unrelated to human rights, it remains to be seen how proposals to debate and adopt purely human rights model laws will be dealt with.

5 General observations

The PAP is exactly what its architects intended it to be. That a provision was inserted clarifying that the organ will only exercise legislative powers when the Assembly so decides is the clearest indication that the *status quo* is not accidental. To underscore the fact that the Parliament will have a controlled evolution, the wording of article 2(3),⁸⁶ as Mpanyane notes, 'indicates an aim to which to aspire, rather than providing a definite objective to be achieved within a specific timeframe'.⁸⁷ On this evidence, the fate of the PAP lies in the hands of member states,⁸⁸ by design, and any changes will have to be initiated from the top, by the Assembly of Heads of State. With a hint of frustration, Van Walraven remarks that, put differently, the Parliament has been subjected to an unlimited spell of probation.⁸⁹

The frustration exhibited by Van Walraven is a common theme in a majority of publications on the PAP. However, the appropriate organ to direct such criticism of the Parliament is the AU Assembly. From the evidence, the Assembly is unwilling to cede power to other organs, or at the very least share. The relationship between the organisation's Peace and Security Council (PSC) and the Assembly is instructive in this regard. Despite the PSC's reputation as the premier organ in peace and security matters on the continent, its decisions authorising the use of force – which are an embodiment of peace and security matters – remain subject to the approval of the Assembly prior to implementation.⁹⁰ On this point, Mpanyane argues that policy organs of the AU must cede more power to the PAP to increase its autonomy.⁹¹ While this partly is true, in reality the Assembly is the only organ wielding all the power, and this is not about to change.

86 It provides that the ultimate aim of the Pan-African Parliament is to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage.

87 Mpanyane (n 3) 3.

88 Art 2(3).

89 Van Walraven (n 3) 212.

90 In December 2015 the PSC decided to send an intervention force to Burundi but this was thwarted by the Assembly.

91 Mpanyane (n 3) 1.

At the heart of how the AU Assembly behaves are yesteryear notions of sovereignty upon which most member states design their foreign policy. The AEC Treaty came into force shortly after its adoption, yet for close to 10 years the idea of a Parliament never saw the light of day. Although much has been written about the change of attitude that came with the transformation of the OAU to the AU, the same factors that hindered the immediate creation of a PAP close to three decades ago remain, and are the same factors that stand in the way of the PAP's transformation into a full legislative body. Because of these outdated notions of sovereignty, Fagbayibo even asserts that contrary to the view that the power lies with the Assembly, in reality member states simply have not empowered any organ, including the Assembly.⁹² He therefore concludes that, for this reason 'the AU remains a mere intergovernmental forum, where real decision making powers are held by member states'.⁹³

Sadly, beyond the Assembly, state-centric attitudes are also evident even at the PAP. Viljoen observes that in its operations and priorities, the Parliament has 'too often reflected interests of its members, rather than the people of Africa, whom they represent'.⁹⁴ This is a serious indictment because parliamentarians are supposed to represent 'all the peoples of Africa'.⁹⁵ Indeed, the fourth preambular paragraph to the Parliament's founding Protocol records that 'the expectation is that the Pan-African Parliament will provide a common platform for African peoples ... to become more involved in discussions and decision-making on the problems and challenges facing Africa'.⁹⁶ This criticism is linked to the observation that beyond their attitudes while in parliament, the criteria for choosing members of parliament themselves are not representative of Africans in a meaningful sense.⁹⁷ Again, the EU Parliament is used as a measure and the direct election of parliamentarians is singled out for praise. However, Viljoen cautions, correctly so, that although the EU Parliament indeed is an example to emulate, it must also be recalled that its members only became directly elected from 1979.⁹⁸ In the same vein, Mpanyane adds that the Parliament acquired all of these prerogatives 'over a long period of time and through a fair amount of struggle'.⁹⁹ While these are fair points, Magliveras and Huliaras add another dimension

92 B Fagbayibo 'The (ir)relevance of the office of the Chair of the African Union Commission: Analysing the prospects for change' (2012) 56 *Journal of African Law* 16.

93 As above.

94 Viljoen (n 32) 174.

95 Art 2(2).

96 Preamble para 4 AEC PAP Protocol (n 6). See also Magliveras & Naldi (n 8) 224.

97 Viljoen (n 32) 174.

98 As above.

99 Mpanyane (n 3) 5.

to the question of membership. They argue that in instances where a national parliament is the outcome of rigged elections or where national delegates are sent by non-democratic regimes, such members of parliament cannot be viewed as representing their countries, let alone the peoples of Africa.¹⁰⁰ They conclude that in their view, parliamentarians elected by means of fraudulent, violent or highly-undemocratic elections, or appointed following a *coup d'état*, should be excluded from the PAP.¹⁰¹ While there are merits to this argument, the AU's interpretation of the principle of sovereign integrity poses a stumbling block to such proposals being adopted.

Also worth mentioning in relation to the membership of the PAP is the composition of members of parliament from member states. While requiring that one of the five is female,¹⁰² the AEC PAP Protocol also demands that the composition reflects the diversity of political views in the said country.¹⁰³ This entails the inclusion of members of parliament from opposition benches. In the sphere of human rights, this diversity gives opposition members of parliament, who usually are victims of human rights abuses in their respective states, the opportunity to get some issues on the agenda of the PAP and, ultimately, publicising cases that risk going unnoticed.

While the PAP indeed is inadequate on its own, close cooperation with other AU organs will go a long way in enhancing its stature and increasing its influence. By banding together to speak with one voice, such organs will be in a better position to influence member states as well as the Assembly to adopt certain decisions relevant to the promotion and protection of human rights. The impact of lack of coordination is summed up by Dinkopila who states:¹⁰⁴

Unfortunately, one of the most regrettable institutional mishaps of the AU human rights system is the failure of these architects to clearly and succinctly provide for the relationship between the various AU institutions. For example, the relationship between the African Court on Human and Peoples' Rights (African Human Rights Court) and the African Commission on Human and Peoples' Rights (African Commission) remained unclear until well after 2010. This lack of attention to detail continues to characterise the AU human rights system and is likely to inhibit its growth. That is why it is not only important to put forward the PAP as a human rights actor within the AU, but also to explain how it can effectively work with other human rights institutions to promote human rights.

100 Magliveras & Huliaras (n 44) 282.

101 As above.

102 Art 4(2).

103 Art 4(3).

104 Dinokopila (n 8) 303.

Interestingly, the only cooperation provided for in the PAP's founding Protocol relates to cooperation with similar organs. Titled 'The Relationship between the Pan-African Parliament and the Parliaments of Regional Economic Communities and National Parliaments or Other Deliberative Organs', article 18 is silent on the PAP's possible cooperation with other AU organs, particularly those burdened with a human rights mandate. Worse still, the close cooperation referred to in article 18 is explained to mean convening annual consultative *fora* to discuss matters of common interest. Magliveras and Naldi explain that these meetings will be between equal partners, meaning that the PAP's ability to exert its influence will be significantly diminished.¹⁰⁵

When the PAP was inaugurated in 2004, 'the occasion was marked by optimistic speeching, in which stress was laid on issues like the implementation of NEPAD and a potential role for the Parliament in the latter's peer review mechanism'.¹⁰⁶ Unbelievably, for more than ten years thereafter, there was no formal contact between the APRM and the PAP's Committee on Justice and Human Rights until some time in 2015 when the former was invited to make presentations to the Committee.¹⁰⁷ What can be achieved through cooperation cannot be underestimated. When the APRM had no chief executive officer and was struggling with budgetary issues, it undertook a joint visit to the AU Commission by the Mechanism and the Committee on Justice and Human Rights to eventually have a chief executive officer appointed.¹⁰⁸ Prior to this appointment, the APRM at times was unable to convene its mandatory meetings.¹⁰⁹ Further, since this formal engagement began, the Committee established a sub-committee, the Pan-African Parliament Network on the African Peer Review Mechanism. Through this sub-committee, the Committee on Justice and Human Rights facilitates the tabling of APRM reports before the plenary.¹¹⁰ Based on this evidence, the PAP must do more to engage with other AU organs so as to ensure that all continental organs with a human rights mandate speak the same language. Further, this will present an opportunity to pool resources, something that the AU does not have in abundance.

Another important observation to make is that although critics and commentators are quick to point fingers at parliamentarians, these members of parliament are also frustrated by the organ's lack

105 Magliveras & Naldi (n 8) 228.

106 Van Walraven (n 3) 211.

107 Interview with Secretariat staff member, 8 August 2018.

108 Interview with Committee's clerk, 7 August 2018.

109 As above.

110 As above.

of meaningful powers. Fabricius comments that the Parliament is just a 'talk-shop discussing ... many serious African issues but in a bubble divorced from the real world'.¹¹¹ However, this statement is not entirely correct. While it indeed is correct that the PAP discusses serious issues, it is incorrect that parliamentarians do so in a bubble divorced from the real world. On his own version, Fabricius indirectly admits as much. He quotes parliamentarians from Benin, South Africa and Uganda complaining about the PAP's lack of oversight and legislative powers.¹¹² If these members of parliament indeed were discussing issues 'in a bubble', and were convinced that the Parliament's powers are sufficient, they would not brand the organ 'a waste of money' or remark that '[i]f we are not making laws, then what's the point of being here?'¹¹³ That the PAP has a sub-committee on transformation is evidence that members of parliament acknowledge their limitations and desire changes. The PAP identified six strategic objectives in its 2013-2017 Strategic Plan corresponding with its priority areas and, notably, strengthening its legislative functions stood out as an objective.¹¹⁴

6 Conclusion

The Pan-African Parliament's capacity to contribute to the continent's human rights agenda is weak. This is not a novel observation. Indeed, the organ's lack of oversight and legislative powers is almost 'fatal' to its intended function. Clearly, the PAP was deliberately created as a skeleton, with an intention to progressively add flesh as and when the AU Assembly decides to do so. However, although this may be understandable given Africa's political and financial realities, there is a danger that for a very long time the skeleton will remain just that. In light of this conclusion, there is value in exploring how the Parliament can enhance its capacity *vis-à-vis* human rights even in the absence of amendments to its legal framework. The article argued that the answers to this inquiry are two functionaries of the organ, namely, the Committee on Justice and Human Rights and the Office of the President. Armed with the power to 'examine, discuss or express an opinion on any matter', the two can, through an activist approach, venture beyond the powers expressly defined in the PAP's founding Protocol. Similarly, attempts can be made to influence human rights trajectories in member states through the 'harmonisation of

111 P Fabricius 'Does Africa really want a continental parliament?' 19 October 2017, <https://www.dailymaverick.co.za/article/2017-10-19-iss-today-does-africa-really-want-a-continental-parliament/> (accessed 30 September 2018).

112 As above.

113 As above.

114 PAP Strategic Plan 2014-2017 (n 15) 25.

laws' function. However, this avenue is weak, as the Parliament's model laws simply may be ignored without consequence. While comparisons between the PAP and the European Parliament are irresistible, criticism of the former based on what the latter has become is harsh. Considering the journey that the EU Parliament has travelled, perhaps it is too early to write off its African counterpart. Finally, the article has also demonstrated that the perception that parliamentarians operate under the illusion that the organ's legal framework is sufficient is false and must be challenged. The PAP is weak and the members of parliament know this. That the organ has a sub-committee on transformation in itself is a clear statement that parliamentarians are not content with the *status quo*.

Digital neo-colonialism: The Chinese model of internet sovereignty in Africa

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Summary: *China is making a sustained effort to become a 'cyber superpower'. An integral part of this effort is the propagation by Beijing of the notion of 'internet sovereignty' – China's supreme right to govern the internet within its borders and keep it under rigid control. Chinese companies work closely with Chinese state authorities to export technology to Africa in order to extend China's influence and promote its cyberspace governance model. This contribution argues that the rapid expansion across Africa of Chinese technology companies and their products warrants vigilance. If African governments fail to advance their own values and interests – including freedom of expression, free enterprise and the rule of law – with equal boldness, the 'China model' of digital governance by default might very well become the 'Africa model'.*

Key words: *Chinese internet censorship; data surveillance; digital authoritarianism; digital neo-colonialism; global cyber governance; internet sovereignty*

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1 Introduction

Digital technology often is lauded as liberating, favouring the striving for equal justice, democracy and human rights.¹ Liberal democracies assume that a global and open internet ‘supports free speech, and progressively spurs global interconnectivity ... Principles like “freedom”, “openness”, and “interoperability” are critical in this liberal-democratic approach.’² These assumptions prompted the New York Times columnist, Nicholas Kristof, in 2005 to write: ‘[I]t’s the Chinese leadership itself that is digging the Communist Party’s grave, by giving the Chinese people broadband.’³ However, the Chinese government has shown the ‘techno-optimists’ to be wrong; far from igniting a political transformation in China the internet is an indispensable tool advancing state censorship and surveillance.⁴ China discovered how to exploit the internet and information technology in ways that reduce – instead of enhance – freedom.

Perhaps of greater concern is the fact that the Chinese government has transferred its domestic policies on digital technology to its foreign policy.⁵ As part of President Xi Jinping’s strategy to transform China into a ‘cyber superpower’, the government and Chinese technology companies engage in a sustained effort to export the technology at the heart of the country’s information-control system to nations around the globe.⁶ This ‘China model’ of digital governance is a palatable guise for a far-reaching system of state censorship that is enhanced by cutting-edge digital technologies.⁷ Through a global infrastructure project, the Belt and Road Initiative (BRI), China

1 T Burgers & D Robinson ‘Networked authoritarianism is on the rise’ (2016) 34 *Sicherheit und Frieden* 248. In January 2010 Hillary Clinton, then United States secretary of state, delivered a landmark address on internet freedom. She argued that the spread of communications technology and free flow of information would ultimately lead to greater freedom and democracy. HR Clinton ‘Remarks on internet freedom’ 21 January 2010, <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm> (accessed 20 March 2020).

2 J Sherman & R Morgus ‘Authoritarians are exporting surveillance tech, and with it their vision for the internet’ *Council on Foreign Relations* 5 December 2018, <https://www.cfr.org/blog/authoritarians-are-exporting-surveillance-tech-and-it-their-vision-internet> (accessed 31 March 2020).

3 N Kristof ‘Death by a thousand blogs’ *The New York Times* 24 May 2005, <https://www.nytimes.com/2005/05/24/opinion/death-by-a-thousand-blogs.html> (accessed 31 March 2020).

4 A Polyakova & C Meserole ‘Policy brief: Exporting digital authoritarianism: The Russian and Chinese models’ *Brookings Institution* August 2019, <https://www.brookings.edu/research/exporting-digital-authoritarianism/> (accessed 13 March 2020).

5 Polyakova & Meserole (n 4).

6 Freedom House ‘China country report: Freedom on the net 2018’ *Freedom House* 2019, <https://freedomhouse.org/country/china/freedom-net/2019> (accessed 27 January 2020).

7 X Qiang ‘The road to digital unfreedom: President Xi’s surveillance state’ (2019) 30 *Journal of Democracy* 62.

spreads this technology which advocates its vision of a government-supervised internet across the globe including to Africa.⁸

This article opens with a brief exposition of the Chinese model of internet sovereignty; a model in terms of which the Xi regime has built a national version of the internet ‘walled off’ from the global internet and allowing complete state control over the free flow of information online. Next the focus is on demonstrating how influential the Chinese notion of ‘internet sovereignty’ has become offering an alternative version to the Western view of the internet as traversing national borders by allowing the regime to demand that domestic as well as foreign technology companies abide by its rules on censorship and advance its regime’s strategic goals. This demonstration is followed by an accounting of the extent of Chinese technological penetration in Africa, supporting the argument that the combination of a near wholesale reliance on Chinese technology infrastructure and soft loans from Chinese banks are conducive to establishing a framework in which an increasing number of African nations subscribe to the Chinese technology governance model. The conclusion expresses a warning that the rapid expansion of Chinese technology across Africa warrants vigilance and a proposition that although the nascent technology industry in Africa cannot compete with the likes of China or the United States, African nations have leverage and are able to set policy. In the sphere of digital governance these nations have started and must continue to prioritise the rule of law, transparency and accountability in the service of political discourse that is free and democratic.

Chinese technological penetration in Africa is of a nature to raise the spectre of ‘digital neo-colonialism’ – the application by China of economic and political pressure through technology in order to control and influence the actions of African nations.⁹ Chinese digital neo-colonialism in Africa takes the form of three principal elements, namely, (i) advocating the Chinese model of ‘internet sovereignty’ in African nations; (ii) exporting authoritarian surveillance technology

8 P. Mozur et al ‘Made in China, exported to the world: The surveillance state’ *The New York Times* 24 April 2019, <https://www.nytimes.com/2019/04/24/technology/ecuador-surveillance-cameras-police-government.html> (accessed 23 March 2020); L Yuan ‘Learning China’s forbidden history, so they can censor it’ *The New York Times* 2 January 2019, <https://www.nytimes.com/2019/01/02/business/china-internet-censor.html> (accessed 27 January 2020).

9 Through its deep technological penetration into Africa Chinese ‘digital neo-colonialism’ results in African nations exhibiting a relationship characterised by dependence and financial obligation towards China, functionally an imitation of the relationship under the erstwhile colonisers. This situation leads to an undue degree of political control that China is in a position to exert in order to advance its model of digital governance across the African continent.

to African states¹⁰ and (iii) deploying artificial intelligence technology and data-mining techniques across Africa.¹¹ This article is an exposition of the Chinese model of 'internet sovereignty' and its application in Africa.

2 The Chinese model of internet sovereignty and the rise of a walled internet

China has subverted the popular perception that technology will act in the role of a great democratising force¹² leading to the increase in freedom, transparency and participation.¹³ In China technology brings surveillance and control.¹⁴ The phrase 'internet sovereignty' first entered the public debate in June 2010 when China published a white paper in which it reaffirmed the primacy of its right to govern the internet within its borders and to keep it under rigid control. This white paper stated that '[w]ithin Chinese territory the internet is under the jurisdiction of Chinese sovereignty. The internet sovereignty of China should be respected and protected.'¹⁵ It declared: 'Laws and regulations clearly prohibit the spread of information that contains content subverting state power, undermining national unity [or] infringing upon national honour and interests.'¹⁶

The Chinese state has successfully built a national version of the internet – 'walled off' from the global internet – in which it holds full

10 See, eg, Polyakova & Meserole (n 4).

11 See, eg, A Gwagwa & L Garbe 'Exporting repression? China's artificial intelligence push into Africa' 17 December 2018 *Council on Foreign Relations*, <https://www.cfr.org/blog/exporting-repression-chinas-artificial-intelligence-push-africa> (accessed 23 March 2020).

12 J Sherman & R Morgus 'Authoritarians are exporting surveillance tech, and with it their vision for the internet' *Council on Foreign Relations* 5 December 2018, <https://www.cfr.org/blog/authoritarians-are-exporting-surveillance-tech-and-it-their-vision-internet> (accessed 31 March 2020).

13 JC Weiss 'Understanding and rolling back digital authoritarianism' 17 February 2020 *Texas National Security Review*, <https://warontherocks.com/2020/02/understanding-and-rolling-back-digital-authoritarianism/> (accessed 31 March 2020).

14 P Mozur 'Inside China's dystopian dreams: AI, shame, and lots of cameras' *The New York Times* 8 July 2018, <https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html> (accessed 6 February 2020); Weiss (n 13). For a brief but insightful history of China's internet controls, see JL Goldsmith & T Wu *Who controls the internet? Illusions of a borderless world* (2006) 87-104.

15 As quoted in S Woodhams 'How China exports repression to Africa' *The Diplomat* 23 February 2019, <https://thediplomat.com/2019/02/how-china-exports-repression-to-africa/> (accessed 27 January 2020). Qiang explains internet sovereignty as the 'primacy of rules made by national governments and the authority of national-level regulators over web content and providers'; Qiang (n 7) 53.

16 As quoted in M Bristow 'China defends internet censorship' *BBC News* 8 June 2010, <http://news.bbc.co.uk/2/hi/8727647.stm> (accessed 27 January 2020).

power and at will exercises control.¹⁷ A senior analyst at the Heritage Foundation, Joshua Meservey, explains: '[T]he Chinese government frame[s] it as a sovereignty issue, but what [it is] really talking about is the ability of a state to control the free flow of information online.'¹⁸

In the course of 20 twenty years the Great Firewall of China¹⁹ has become the most sophisticated, multi-layered and ominous digital apparatus of censorship and surveillance in the world.²⁰ It enables the Chinese government to render tens of thousands of websites inaccessible to Chinese users,²¹ instantly to censor politically-sensitive material²² and to employ an army of human censors estimated to be in the tens of thousands manually to search the internet and remove potentially subversive content.²³

The principal danger the Great Firewall poses, writes Griffiths, 'is that, by its very existence, it acts as daily proof to authoritarians the world over that the internet can be regulated and brought to heel'.²⁴ The Great Firewall now could 'easily become the next major Chinese export'.²⁵

The sweeping 2017 Cyber-Security Law expands online censorship and surveillance to a degree unprecedented in order to facilitate

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- 17 China's internet governance model is unique in that it nationalised its part of the global internet. Burgers (n 1) 250.
- 18 As quoted in A MacKinnon 'For Africa, Chinese-built internet is better than no internet at all' *Foreign Policy* 19 March 2019, <https://foreignpolicy.com/2019/03/19/for-africa-chinese-built-internet-is-better-than-no-internet-at-all/> (accessed 31 March 2020).
- 19 See GR Barme & S Ye 'The Great Firewall of China' *Wired* 1 June 1997, <https://www.wired.com/1997/06/china-3/> (accessed 20 March 2020).
- 20 Freedom House 'Freedom on the net 2018: The rise of digital authoritarianism' October 2018, <https://freedomhouse.org/report/freedom-net/freedom-net-2018> (accessed 2 March 2020); Woodhams (n 15); S Cook 'China's cyber superpower strategy: Implementation, internet freedom implications, and US responses' *Freedom House* 28 September 2018, <https://freedomhouse.org/article/chinas-cyber-superpower-strategy-implementation-internet-freedom-implications-and-us> (accessed 27 January 2020).
- 21 R MacKinnon 'Liberation technology: China's "networked authoritarianism"' (2011) 22 *Journal of Democracy* 32.
- 22 'The cyber-censors can suspend internet or social-media accounts if users send messages containing sensitive terms such as 'Tibetan independence' or 'Tiananmen Square incident'. Briefing 'China invents the digital totalitarian state' *The Economist* 17 December 2016, <https://www.economist.com/briefing/2016/12/17/china-invents-the-digital-totalitarian-state> (accessed 11 February 2020). Ironically, but not surprisingly, references to George Orwell's *Nineteen eighty-four* are also forbidden. Yuan (n 8).
- 23 Woodhams (n 15); Yuan (n 8); Burgers (n 1) 250.
- 24 J Griffiths *The great firewall of China: How to build and control an alternative version of the internet* (2019) as quoted in S Wade 'New book examines the great firewall of China' *China Digital Times* 19 March 2019, <https://chinadigitaltimes.net/2019/03/new-book-examines-the-great-firewall-of-china/> (accessed 26 February 2020).
- 25 As above.

state control over and access to data.²⁶ It tightened internet controls by mandating that social-media companies register users under their real names and requires that foreign companies host all data on Chinese users on the mainland ostensibly the purpose is to increase Chinese security agencies' access to records.²⁷ The legislation closes loopholes in internet controls that allowed millions of Chinese citizens to 'share breaking news, expose corruption and rights abuses, [and] debate government policies'.²⁸

Dissidents and human rights activist habitually are detained for posts on popular social-media platforms such as Weibo and WeChat. In January 2019 alone the regime of Xi Jinping closed down more than 700 websites and 9 000 mobile applications that allegedly did not comply with Beijing's dictate.²⁹

In China's one-party autocracy the independent rule of law does not exist and virtually there is no restraint on the government's authority³⁰ with the consequence that many of the constraints with regard to accessing personal data present in democratic societies³¹ are absent in China.³² The Cybersecurity Law gives the government unrestricted access to virtually all the personal information of its citizens.³³ In response to the 'drastic limits on content, pervasive obstacles to access and harsh violations of user rights', in 2018 Freedom House for the fourth year in a row bestowed on China the title labelling it the world's 'worst abuser of Internet Freedom'.³⁴

Speaking at the Nineteenth Communist Party Congress in 2017, President Xi Jinping declared it his aspiration to transform China into

26 See Cook (n 20); Qiang (n 7) 55.

27 Freedom House (n 17). The local storage of data would give the Chinese government unfettered access to search histories and other personal information that global technology companies routinely acquire. Qiang (n 7) 63.

28 Cook (n 17).

29 Polyakova & Meserole (n 4).

30 Qiang (n 7) 60. 'The Chinese Communist Party ... remains thoroughly entrenched in power, and President Xi Jinping enjoys an extraordinary degree of political control,' having eliminated term limits on the presidency in 2018. J Doubek 'China removes presidential term limits, enabling Xi Jinping to rule indefinitely' *NPR* 11 March 2018, <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely> (accessed 20 March 2020). 'In the months leading up to the 19th Communist Party Congress in October 2017, the trend of censorship and propaganda, and prosecutions increasingly focused on controlling and protecting Xi's image, coinciding with his evolution into the country's "paramount leader".' Freedom House (n 6).

31 In democracies, laws limit what companies may do with and the extent to which governments can access users' personal data. Briefing (n 22).

32 Qiang (n 7) 60.

33 As above; Briefing (n 22).

34 Freedom House (n 20).

a 'science and technology superpower'.³⁵ A month before President Jinping's speech, the Cyber Administration of China (CAC) published an article in the vanguard Communist Party journal, *Qiushi*, which was uncharacteristically forthright about the government's true aim.³⁶ The article acknowledges that controlling the internet was crucial to ensuring that 'the Party's ideas always become the strongest voice in cyberspace' and, in fact, is a means to ensure the party's political survival.³⁷

The article further notes that online propaganda should target international audiences in 200 countries and more than one billion users globally.³⁸ Most disconcertingly with reference to the future in Africa the article states that the explicit aim in 'strengthening international exchanges and cooperation in the field of information technology and cybersecurity' is 'to push China's proposition of Internet governance toward becoming an international consensus'.³⁹

Since 2010 China has advanced its notion of 'internet sovereignty' as an alternative to the dominant Western view that the internet exemplifies a 'singular, highly-interconnected web that traverses national borders'.⁴⁰

3 Chinese government's influence over domestic and foreign technology companies

Manifestly, Chinese companies play a role in the Chinese government's goal of telecommunication dominance.⁴¹ Some firms ostensibly are private enterprises apparently governed by market forces and the profit motive but they are answerable to the government and serve its strategic ends.⁴² For these companies the possibility of success or failure in China's technology landscape is dependent entirely on maintaining government support.⁴³

35 J Ding *Deciphering China's AI dream: The context, components, capabilities, and consequences of China's strategy to lead the world in AI* March 2018 7; Freedom House (n 20); Woodhams (n 15).

36 Cook (n 20).

37 As above.

38 As above.

39 As above.

40 Woodhams (n 15). President Jinping held his country's model of internet governance to be 'a new option for other countries and nations that want to speed up their development while preserving their independence'. Freedom House (n 20).

41 Freedom House (n 20).

42 As above.

43 Cook (n 20).

For example, Hikvision, the world's leading manufacturer of surveillance camera equipment, is linked closely to the Chinese government. In its 2018 annual report the company openly declared that the Chinese government is a controlling shareholder⁴⁴ and the company's Chairperson was appointed in 2018 to the National People's Congress (the rubber-stamp Parliament).⁴⁵ Similarly, a company owned by the Chinese government is the controlling shareholder in ZTE.⁴⁶

Huawei was founded by Ren Zhengfei, a former officer in the 'military technology division' of the People's Liberation Army, the armed forces of the People's Republic of China.⁴⁷ From its foundation there are continuing strong ties between Huawei's management and the Chinese security and intelligence apparatus.⁴⁸ It has been reported consistently⁴⁹ that Huawei benefits by billions of dollars in government subsidies.⁵⁰ Huawei's ownership structure appears notably opaque. A recent academic study concluded that '99% of Huawei shares are controlled by a "trade union committee", which in all likelihood is a proxy for Chinese state control of the company'.⁵¹

The Chinese Communist Party systematically places 'party cells' in technology companies to enhance its access to and control over these companies.⁵² At the same time senior executives are appointed

44 In a leaked confidential investors' prospectus the company candidly acknowledged that '[our controlling shareholder] ... is subject to the control of the People's Republic of China government ... [and] will continue to be in a position to exert significant influence over our business'. H Swart 'Video surveillance and cybersecurity (Part Two): Chinese cyber espionage is a real threat' *Daily Maverick* 26 June 2019, <https://www.dailymaverick.co.za/article/2019-06-26-video-surveillance-and-cybersecurity-part-two-chinese-cyber-espionage-is-a-real-threat/> (accessed 27 January 2020).

45 C Rollet 'In China's far west, companies cash in on surveillance program that targets Muslims' *Foreign Policy* 13 June 2018, <https://foreignpolicy.com/2018/06/13/in-chinas-far-west-companies-cash-in-on-surveillance-program-that-targets-muslims/> (accessed 18 February 2020).

46 Swart (n 44).

47 *Bloomberg Businessweek* reports that Zhengfei may have been a 'high-ranking Chinese spymaster and indeed may still be', as quoted in S Feldstein *The global expansion of AI surveillance* (2019) 15. The original report may be accessed at M Chafkin & J Brustein 'Why America is so scared of China's largest tech company' *Bloomberg Businessweek* 23 March 2018, <https://www.bloomberg.com/news/features/2018-03-22/why-america-is-so-scared-of-china-s-biggest-tech-company> (accessed 31 March 2020).

48 'Sun Yafang, for example, chairwoman of Huawei from 1999 to 2018, once worked in China's ministry of state security.' Feldstein (n 47) 15.

49 Such as a 2012 US Congressional Report from the House Intelligence Committee.

50 As referred to in Feldstein (n 47) 33.

51 C Balding & D Clarke 'Who owns Huawei?' *SSRN Scholarly Paper, Rochester, NY: Social Science Research Network* 17 April 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669 (accessed 31 March 2020).

52 'China's large privately-owned firms are becoming more like state-owned enterprises, as many in recent years have implanted in their businesses cells of the Communist Party, the Communist Youth League and even discipline inspection committee.' Z Lin 'Chinese Communist Party needs to curtail its

to head the 'party cells' in companies.⁵³ Moreover, a national security law enacted in 2015 mandates that companies acquiesce in permitting 'third-party' (that is, government) access to their networks, source codes and encryption keys.⁵⁴

Not only Chinese technology companies are anxious to please the Chinese government;⁵⁵ many of the world's largest technology companies either are forbidden from or are significantly hampered in the provision of services to Chinese internet users.⁵⁶ For example, Facebook and Twitter are blocked completely.⁵⁷ The Chinese government uses its authority to bar online services and dangles the lure of its enormous market (one billion potential users) to wrest cooperation from international technology companies, including their actively abetting its censorship and surveillance system.⁵⁸

The Chinese description of 'internet sovereignty' has gained sufficient currency that Silicon Valley firms and other commercial actors kowtow to Beijing's rules, even encouraging the censorship of information to which internet users outside of China should have access.⁵⁹ In a series of incidents during 2018 international airline, hotel and automobile companies amended the presentation of information relating to topics such as Taiwan and Tibet in an effort to appease the Chinese government.⁶⁰ Fearful of restrictions on their operations in China United States aviation companies Delta, American Airlines and United acceded to the Chinese government's demand that they include references to Taiwan as part of mainland China. The CAC shut down the Marriott hotel group's website and booking application after apparently it 'hurt the feelings of the Chinese people' by listing Taiwan, Hong Kong, Tibet and Macau separately in a customer satisfaction questionnaire.⁶¹ Automaker Mercedes Benz suffered a similar imposition after the company had featured a quote from the Dalai Lama in an advertisement on Instagram.⁶²

This trend of the increasing acceptability of a 'walled internet' that encourages China to command that multinational companies submit

presence in private business' *South China Morning Post* 25 November 2018, <https://www.scmp.com/economy/china-economy/article/2174811/chinese-communist-party-needs-curtail-its-presence-private> (accessed 31 March 2020).

53 Lin (n 52).

54 Feldstein (n 47) 15.

55 Cook (n 20).

56 As above.

57 As above.

58 As above.

59 As above.

60 As above.

61 Woodhams (n 15).

62 Freedom House (n 20).

to its mandate is epitomised by the behaviour of the international technology giant Google.⁶³ In 2010 the company departed China in protest at China's censorship apparatus. In 2017 there was an outcry among Google employees after media reports that the company's scheme had been unearthed to introduce a censored search and mobile news service specifically for the Chinese market code-named Project Dragonfly, which pairs users' accounts with their personal telephone numbers and eliminating anonymity.⁶⁴ This application evidently was developed to allow Google to return to the Chinese market having appeased the dictates of Chinese censorship, further entailed barring search results and compiling a censorship blacklist of topics such as 'free speech', 'protests', 'democracy', 'human rights' and 'religion'.⁶⁵ Moreover, Chinese security services which routinely target dissidents, activists and journalists would have unfettered access to user data that Google stored on the Chinese mainland.⁶⁶ These concessions potentially make Google complicit in human rights abuses.

After the disclosure of Google's secret Chinese search engine project some high-profile employees resigned in protest.⁶⁷ One of these is Jack Poulson, a senior Google research scientist, who in his letter of resignation stated that it was his

ethical responsibility to resign in protest of the forfeiture of our public human rights commitments ... Due to my conviction that dissent is fundamental to functioning democracies, I am forced to resign in order to avoid contributing to, or profiting from, the erosion of protection for dissidents ... I view our intent to capitulate to censorship and surveillance demands in exchange for access to the Chinese market as a forfeiture of our values.⁶⁸

More than 1 400 of Google's employees signed a petition in which they demanded that an ombudsman be appointed to assess the 'urgent moral and ethical issues' raised by the company's censorship plan.⁶⁹

In a similar vein in 2018 Apple removed more than 600 applications from its mobile store that previously enabled Chinese users to access

63 Woodhams (n 15).

64 Freedom House (n 20).

65 Qiang (n 7) 63; R Gallagher 'Google China prototype links searches to phone numbers' *The Intercept* 14 September 2018, <https://theintercept.com/2018/09/14/google-china-prototype-links-searches-to-phone-numbers/> (accessed 18 February 2020).

66 Gallagher (n 65).

67 Cook (n 20).

68 As quoted in Gallagher (n 65).

69 As quoted in Gallagher (n 65).

websites that had been blocked by the Chinese government.⁷⁰ In 2016 it was revealed that Facebook clandestinely had been developing software that could ensure that users in China would not receive certain posts in their newsfeeds, Facebook's efforts undoubtedly were geared to satisfy Beijing's desire for online censorship.⁷¹

If Facebook enters and Google re-enters the Chinese market, these actions exemplify Beijing's effective advancing of 'internet sovereignty'.⁷² The supine acquiescence of international companies in satisfying Beijing's requirements only strengthens the Xi regime's effort to recast the international rules on internet regulation.⁷³

Moreover, as both Chinese and international companies to an increasing degree mollify this authoritarian regime, the human toll their behaviour causes continues to mount.⁷⁴ For populations in the crosshairs such as activists, religious believers, and ethnic minorities the effect of their self-serving has been calamitous.⁷⁵ Censorship of controversial subject-matter (Taiwan, Tibet, Xinjiang and the 1989 Tiananmen square massacre, for example) and surveillance serve to conceal or, worse, aggravate gross violations of human rights including mass detentions, torture and extra-judicial killings.⁷⁶ On a daily basis the Chinese government withholds vital information from the public⁷⁷ and at the same time curtails the freedom of the Chinese people to discuss events in their country or the policies of the government.⁷⁸

4 Chinese technology in Africa

China is massively involved in circumstances in Africa as Chinese companies trade with and invest in African countries.⁷⁹ Some comments accuse Chinese aid of assisting in propping up totalitarian governments, of building infrastructure of poor quality, employing workers brought from China and of concentrating its 'benevolence' principally on countries with oil, minerals and other natural resources

70 Cook (n 20).

71 Qiang (n 7) 62.

72 Qiang (n 7) 63.

73 Freedom House (n 20).

74 Cook (n 20).

75 As above.

76 As above.

77 As above.

78 As above.

79 AL Dahir 'China "gifted" the African Union a headquarters building and then allegedly bugged it for state secrets' *Quartz Africa* 30 January 2018, <https://qz.com/africa/1192493/china-spied-on-african-union-headquarters-for-five-years/> (accessed 27 January 2020).

of which China has a shortage,⁸⁰ and at the same time 'saddling countries with more debt than they can ever repay'.⁸¹

China's presence in Africa grew steadily over a period of 20 years but escalated dramatically in 2013 following President Xi Jinping's unveiling of the BRI, an ambitious trillion dollar soft-power international development strategy directed at extending Beijing's influence on host countries by providing bilateral loans and building infrastructure projects.⁸² Most countries on the African continent enthusiastically embrace the BRI⁸³ with the result that China has emerged as the largest source of financing for infrastructure projects in Africa⁸⁴ and everywhere evidence of its influence is on display as African governments embrace the offer of Chinese expertise and soft loans.⁸⁵

China sponsors thousands of the next generation of African leaders, bureaucrats, students and entrepreneurs to undergo training and education in China.⁸⁶ Chinese financial support of post-graduate and post-doctoral African students is unparalleled;⁸⁷ each year China hosts tens of thousands of university undergraduate and post-graduate students from Africa and annually the Chinese government offers thousands of scholarships to African students.⁸⁸ The *Hanban* (the Chinese Language Council) has established 59 Confucius Institutes in Africa which inculcate the Chinese language and culture.⁸⁹

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- 80 Dahir (n 79). See also J Eisenman & J Kurlantzick 'China's Africa strategy' (2006) *Current History* 219-224.
- 81 However, according to supporters 'China has brought expertise on important development issues and has a much better sense than Western nations of the challenges involved in raising standards of living'. A Roussi 'China's bridge to Africa' 569 *Nature* 16 May 2019 326.
- 82 Roussi (n 81) 326. For a more detailed exposition of the geopolitical implication of the BRI, see A Chatzky & J McBride 'China's massive belt and road initiative' *Council on Foreign Relations* 28 January 2020, <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative> (accessed 23 March 2020).
- 83 Thus far 39 African countries and the African Union Commission have entered into BRI cooperation agreements, with others expected to follow suit. Roussi (n 81) 325.
- 84 China funds one in five infrastructure projects on the continent. Roussi (n 81). See also B Gill, C Huang & JS Morrison 'Assessing China's growing influence in Africa' (2007) 3 *China Security* 9; B Sautman & Y Hairong 'Friends and interests: China's distinctive links with Africa' (2007) 50 *African Studies Review* 80.
- 85 Roussi (n 81) 325; Gill et al (n 84) 6.
- 86 Dahir (n 78); Gill et al (n 84) 6.
- 87 Mohamed Hassan, president of the World Academy of Sciences and a Sudanese mathematician, as cited in Roussi (n 81) 326. Hassan continued: 'When it comes to training a new generation of African scholars, [the Chinese] are doing a marvellous job. They are doing better than any other country for Africa.' As quoted in Roussi (n 81) 326.
- 88 Eg, China hosted almost 62 000 African university and post-graduate students in 2016, and in 2015 the Chinese government offered 8 470 scholarships to African students. Roussi (n 81) 326.
- 89 Roussi (n 81) 326; Eisenman & Kurlantzick (n 80) 221.

The BRI includes a major emphasis on information technology.⁹⁰ In relation to the promotion of technology in Africa Chinese ventures are unrivalled.⁹¹ The extent of Chinese technological penetration of the African continent is encompassing;⁹² vast numbers of the population rely fundamentally on Chinese companies for their telecommunications and digital services.⁹³

China Telecom has plans to lay a 150 000 kilometre-long fibre optic network which will operate in 48 African states.⁹⁴ Transsion Holdings, a Shenzhen-based company, overtook Samsung to become the leading smart phone provider in Africa;⁹⁵ Huawei, the Chinese telecommunications giant, built 70 per cent of the 4G network and most of the 2G and 3G networks on the continent easily out-competing its European rivals.⁹⁶ The Kenyan government appointed Huawei as the principal advisor for its 'master plan' in respect of information and communication technologies.⁹⁷

The Chinese telecommunications conglomerate ZTE provides the Ethiopian government with the infrastructure that enables it to monitor and exercise surveillance over the communications of opposition activists and journalists.⁹⁸ Another Chinese company, H3C, won the contract to construct a Nigerian airport's new telecommunications network.⁹⁹ Hikvision established an office in Johannesburg¹⁰⁰ and through a local video surveillance provider

90 M Abramowitz & M Chertoff 'The global threat of China's digital authoritarianism' *The Washington Post* 1 November 2018, https://www.washingtonpost.com/opinions/the-global-threat-of-chinas-digital-authoritarianism/2018/11/01/46d6d99c-dd40-11e8-b3f0-62607289efee_story.html (accessed 26 February 2020); Freedom House (n 20).

91 Roussi (n 81) 326.

92 See D Gershgorn 'Africa is building an AI industry that doesn't look like silicon valley' *Medium* 25 September 2019, <https://onezero.medium.com/africa-is-building-an-ai-industry-that-doesnt-look-like-silicon-valley-72198eba706d> (accessed 2 March 2020).

93 A Hawkins 'Beijing's Big Brother tech needs African faces' *Foreign Policy* 24 July 2018, <https://foreignpolicy.com/2018/07/24/beijings-big-brother-tech-needs-african-faces/> (accessed 27 January 2020).

94 D Ignatius 'China has a plan to rule the world' *The Washington Post* 29 November 2017, https://www.washingtonpost.com/opinions/china-has-a-plan-to-rule-the-world/2017/11/28/214299aa-d472-11e7-a986-d0a9770d9a3e_story.html (accessed 5 March 2020).

95 Hawkins (n 93); L Chutel 'China is exporting facial recognition software to Africa, expanding its vast database' *Quartz Africa* 25 May 2018, <https://qz.com/africa/1287675/china-is-exporting-facial-recognition-to-africa-ensuring-ai-dominance-through-diversity/> (accessed 18 February 2020). Also, two of the three most popular smartphone brands are Chinese. Roussi (n 81) 326.

96 MacKinnon (n 18).

97 Abramowitz & Chertoff (n 90).

98 Hawkins (n 93); Polyakova & Meserole (n 4).

99 Freedom House (n 20).

100 Hawkins (n 93).

in 2019 rolled out 15 000 cameras throughout the Johannesburg metropolitan area.¹⁰¹

Despite the warning by the United States not to contract with Huawei because of alarm about cyber-security, the company has had great success in Africa indicating that governments consider imperative greater internet access.¹⁰² Huawei's popularity is enhanced by the inducement that its construction of 4G networks usually is funded by Chinese banks through so-called 'soft loans' offering below market rates of interest and longer repayment periods than loans from international financial institutions.¹⁰³ The fact that through its proxies the Chinese government is the only eager provider of finance for internet connectivity on the continent gifts it significant leverage over African governments.¹⁰⁴

5 The Chinese model of 'internet sovereignty' in Africa

As stated, China continues to develop and to fine-tune its internal censorship apparatus as well as exporting this model around the world. The Chinese notion of 'internet sovereignty' perhaps unsurprisingly offers an alluring prospect for many governments, including in Africa, that seek to combat the potentially-destabilising effects of a free internet and to stifle freedom of expression instead of embracing a notion of the internet that eliminates borders. To an increasing extent these African countries implement rules and erect obstacles that hinder its working in the name of national sovereignty but with the purpose of allowing governments to inspect and control their citizens' data at will.¹⁰⁵

By means of seminars and through official visits the Chinese government actively advises the media elite and government officials in countries in the path of the BRI to accept its lead in adopting internet sovereignty. According to Freedom House in 2018 'increased activity by Chinese companies and officials in Africa preceded the passage of restrictive cybercrime and media laws in Uganda and Tanzania' (China is these countries' largest trading partner).¹⁰⁶

101 Swart (n 44).

102 MacKinnon (n 18).

103 As above.

104 'There is leverage that comes with being the low-cost solution provider to a country whose political leadership might, in part, derive their popular support from being able to offer connectivity to their population.' MacKinnon (n 18).

105 Freedom House (n 20).

106 As above; Woodhams (n 15).

At an event sponsored by the government of Tanzania and the CAC of China, the Tanzanian deputy minister of communication stated:¹⁰⁷

Our Chinese friends have managed to block such media in their country and replaced them with their home-grown sites that are safe, constructive and popular. We aren't there yet, but while we are still using these platforms we should guard against their misuse.

He went on to declare that 'the government must find ways to ensure that while a person is free to say anything there are mechanisms to hold them accountable for what they say'.¹⁰⁸ The suggestion in this formulation is that internet sovereignty is compatible with the acceptance of freedom of expression but in a modified form in the limits of the law.

Woodhams points out that it is impossible not to conclude that internet sovereignty is the very 'antithesis of freedom of expression, particularly if the law strictly [proscribes] what can and cannot be said'.¹⁰⁹ As a case in point, the leader of the opposition in Tanzania, who had accused security forces of murdering dozens of herders in a violent skirmish, was arrested in October 2018. It is entirely comprehensible that internet sovereignty is available as a policy tool to silence criticism of a government whose intent is to keep a firm grip on power.¹¹⁰

Tanzania has a history of harassing critics of the government and recently introduced a statute governing internet content that relies heavily on the Chinese model.¹¹¹ In Tanzania the posting of 'false content' is prohibited; a phrase redolent of the terminology in Chinese law of a prohibition on 'making falsehoods'.¹¹² The nebulous notion of 'content that causes annoyance' is proscribed in Tanzania in an echo of China's 'destroying the order of society'.¹¹³ The Tanzanian government alleges that this law was propagated in order to crack down on 'moral decadence' similarly to the way 'decadent' material is banned from social media in China.¹¹⁴ In December 2019 Amnesty International described the introduction by the government of Nigeria of the Protection from Internet Falsehoods, Manipulation and Other Related Matters Bill as a proposal to 'stifle the space for

107 Woodhams (n 15).

108 As quoted in Woodhams (n 15).

109 Woodhams (n 15).

110 As above.

111 Hawkins (n 93).

112 As above.

113 As above.

114 Hawkins (n 93).

critics, human rights reporting and accountability in the country'.¹¹⁵ In a way that is similar to the sweeping provisions in China's Cyber-Security Law the Nigerian Bill proposes to prohibit statements online that are deemed 'likely to be prejudicial to national security' as well as 'those which may diminish public confidence' in Nigeria's government.¹¹⁶

The influence of the Chinese model of internet sovereignty is visible in Zimbabwe in the manner in which it looks to China to provide a model for managing aspects of society including social media and communications.¹¹⁷ In 2016 President Mugabe heralded China as an exemplar in social media regulation which he hoped Zimbabwe could emulate.¹¹⁸ The 2017 Cybercrime and Cyber-security Bill criminalises communicating falsehoods online in a copy of the legal rhetoric China uses to stifle dissent.¹¹⁹ Post-Mugabe the Zimbabwean government shows greater determination to have dominion over all aspects of its digital and public spaces.¹²⁰ In January 2019, after days of protests as a result of a 100 per cent increase in fuel prices, the security forces launched a crackdown in which 12 people were killed and 600 were arrested. The Zimbabwe government ordered the first countrywide internet shutdown.¹²¹ This assault on the internet is the government's latest attempt to impose its will on the citizens of Zimbabwe.¹²²

Taking their cue from China's digital governance playbook, other African governments also have ordered internet shutdowns as well as the blocking of websites and social media platforms ahead of critical democratic instances such as elections and protests. Internet shutdowns and social media bans have been reported in Chad

115 D Tegegn 'African Union's Revised Declaration on Principles of Access to Information and Freedom of Expression' 13 December 2019 *Amnesty International USA*, <https://medium.com/@amnestyusa/african-unions-revised-declaration-on-principles-of-access-to-information-and-freedom-of-2d7d636dddb2> (accessed 9 July 2020).

116 As above.

117 SN Romaniuk & T Burgers 'How China's AI technology exports are seeding surveillance societies globally' *The Diplomat* 18 October 2018, <https://thediplomat.com/2018/10/how-chinas-ai-technology-exports-are-seeding-surveillance-societies-globally/> (accessed 27 January 2020).

118 Hawkins (n 93).

119 As above.

120 'The [new] government has shown zero political will to protect rights.' Jeffrey Smith of Vanguard Africa, as quoted in R Mwareya 'Zimbabwe drifts towards online darkness' *Coda* 26 February 2019, <https://www.codastory.com/authoritarian-tech/zimbabwe-drifts-towards-online-darkness/> (accessed 31 March 2020).

121 Partial internet service was restored in February 2019, but social media applications and messaging services, such as Facebook, WhatsApp and Twitter, remained blocked for days longer. Mwareya (n 120).

122 Mwareya (n 120).

(2016), Togo (2017) and Cameroon (2018).¹²³ The *Financial Times* reports that in the first half of 2019 at least six governments in Africa shut down the internet,¹²⁴ and in the Sudan in June 2019, 'as soldiers from a government paramilitary force went on a killing spree in the capital Khartoum, the internet went dark, preventing protesters from documenting the violence on social media'.¹²⁵

Some African governments initiated a method of stifling freedom of expression through the imposition of social media taxes. In 2018 the governments of Uganda, Zambia and Benin serially announced or imposed new taxes on mobile internet users, 'leaving millions of Africans struggling to cover the costs of getting online'.¹²⁶ In Uganda the government imposed a daily tax on the use of social media platforms such as Facebook, Twitter and WhatsApp in order to curb what it described as 'idle chatter'.¹²⁷ In his 2019 report the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association stated that the social media tax in Uganda

disproportionately and negatively impacts the ability of users to gain affordable access to the Internet, and thus unduly restricts their right to freedom of expression and their rights of peaceful assembly and association – particularly so for low-income citizens, for whom purchasing 1 GB of data per month will cost nearly 40 per cent of their average monthly income.¹²⁸

In April 2018, in a blatant attempt to restrict freedom of expression online, the government of Tanzania introduced a so-called 'blogger tax' which requires Tanzanian bloggers, YouTube channel operators and independent website owners to register and pay the exorbitant sum of approximately US \$900 per year to publish content online.¹²⁹

In addition to its activities in Tanzania and Uganda, China has cemented trade partnerships with a number of other countries on

123 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association HR Council UN Doc A/HRC/41/41 (2019) 13.

124 These countries were Chad, Ethiopia, the Democratic Republic of the Congo, Eritrea and Mauritania.

125 D Pilling 'The fight to control Africa's digital revolution' *Financial Times* 20 June 2019, <https://www.ft.com/content/24b8b7b2-9272-11e9-aea1-2b1d33ac3271> (accessed 7 July 2020).

126 Only in Benin did protests result in a quick abandonment of the tax plan. Anonymous 'Taxing social media in Africa' *Internet Health Report* 2019 April 2019, <https://internethealthreport.org/2019/taxing-social-media-in-africa/> (accessed 8 July 2020).

127 Pilling (n 125).

128 Report of the Special Rapporteur (n 123) 14.

129 'Taxing social media in Africa' (n 126). The *Financial Times* opined that 'Tanzania's authorities have sought to tax bloggers out of existence'. Pilling (n 12).

the continent, including Egypt, Ethiopia, Nigeria, South Africa and Sudan.¹³⁰ Alongside the established practice of providing African governments with the knowledge and technology that enables them to control content in what they declare to be a fight against so-called 'public threats', China in an effort to deflect public criticism equips these developing economies with affordable, dependable and cutting-edge technological infrastructure.¹³¹

For example, in 2017, as part of the BRI the Chinese artificial intelligence company, Percent Corporation, developed an intelligent system for information visualisation and data analysis to assist the government of Angola in its decision-making process.¹³² This system accurately and dynamically records data about the full life cycle of birth, education, marriage and social security of every person, as well as a person's biometric information such as fingerprints and facial image.¹³³ The system's ostensible purpose is to 'manage population resources',¹³⁴ but clearly has great potential in terms of surveillance and as a tool for repression.

In many countries, in light of the costs of developing or acquiring these technologies, the Chinese offer is enticing.¹³⁵ For this reason and lured by the inducement of easy loans and investments many African countries have become almost entirely dependent on China for the provision of technology and services¹³⁶ and are susceptible to pressure to subscribe to the Chinese notion of 'internet sovereignty'. The grave danger is that as a consequence of the frail nature of democracy in these countries and their less than stellar history in defending human rights, they are open to more than economic lessons.¹³⁷

6 Conclusion

China is active in recasting the global debate on security, freedom and openness through advocating its model of 'internet sovereignty'.¹³⁸

¹³⁰ Woodhams (n 15).

¹³¹ As above.

¹³² Anonymous 'China-designed big data system aids Angola's intelligent governance' *People's Daily* 24 August 2018, <http://en.people.cn/n3/2018/0824/c90000-9493984.html> (accessed 31 March 2020).

¹³³ As above.

¹³⁴ As above.

¹³⁵ SN Romaniuk & T Burgers 'How China's AI technology exports are seeding surveillance societies globally' *The Diplomat* 18 October 2018, <https://thediplomat.com/2018/10/how-chinas-ai-technology-exports-are-seeding-surveillance-societies-globally/> (accessed 27 January 2020).

¹³⁶ Romaniuk & Burgers (n 135).

¹³⁷ As above.

¹³⁸ As above.

The rapid expansion across Africa of Chinese technology warrants vigilance on the part of democrats.¹³⁹ China's activities are conducive to creating a framework by which an increasing number of African countries follow the Chinese technology governance model.¹⁴⁰ This development raises the spectre that the Chinese attitude to state power becomes the dominant model to be followed in implementing security and surveillance in Africa.¹⁴¹

There are concerns that Africa could be 'left behind' in the global technology race and the consequent transformation of the economy,¹⁴² but a greater danger is that the developing world runs the risk of becoming passive consumers of technology developed in China or elsewhere that is designed as a fit for different cultures and circumstances.¹⁴³

Africa's nascent technology industry cannot compete globally with that of China or the United States but African countries have local leverage in setting policy. It is more important than ever in this situation that policy makers and legislators are involved in vigorously advocating improvements to the rule of law, transparency and accountability in governance and in the private sector.¹⁴⁴

In order to enjoy a political discourse that is free and democratic, telecommunications and internet legislation and regulation must be transparent, accountable and open to reform.¹⁴⁵ In the absence of fundamental guarantees the forms of dissent and opposition and the activities of reform movements face increasing and crushing opposition reinforced by the progressively more ingenious and sophisticated forms of surveillance and censorship.¹⁴⁶

Fortunately, in these circumstances there can be reliance on a well-established international human rights framework as well as access to a robust regional human rights system that is available as a bulwark against the tide of dependence on Chinese repressive systems built into technology. The African Union (AU) has taken proactive steps to develop rules and common practices on digital governance for the continent. In late 2019 the African Commission on Human and

139 See Qiang (n 7) 61.

140 Romaniuk & Burgers (n 135).

141 As above.

142 L Andersen et al 'Human rights in the age of artificial intelligence' *Access Now* November 2018, <https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf> (accessed 2 March 2020).

143 As above.

144 MacKinnon (n 21) 44.

145 As above.

146 As above.

Peoples' Rights (African Commission) published a revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration).¹⁴⁷ Principles 37 to 42 of the Declaration specifically address the rights to freedom of expression and access to information in the digital age which had not been addressed in the 2002 Declaration on the Principles of Freedom of Expression in Africa.

The Declaration reaffirms the fundamental importance of freedom of expression and access to information to individual human rights and as cornerstones of democracy and a means to ensure respect for other human rights.¹⁴⁸ Principle 37 obligates states to facilitate these rights online and to adopt laws and policies to provide universal, equitable, affordable and meaningful access to the internet without discrimination to everyone, specifically including marginalised groups and children.¹⁴⁹

Principle 38 of the Declaration speaks directly to domestic legislation that is based on the China model that restricts freedom of expression, as well as reflecting on the use of internet shutdowns and social media taxes. It prohibits states from interfering with the right of individuals to seek, receive and impart information by way of digital technologies through measures such as the removal, blocking or filtering of content unless interference is justifiable under international human rights law.¹⁵⁰ Principle 38 explicitly states that states may not engage in the disruption of access to the internet by segments of the public or an entire population.¹⁵¹ In addition, states may impose only taxes, levies and duties on internet end users that do not undermine universal, equitable, affordable and meaningful access to the internet and which are justifiable under international human rights law.¹⁵²

To discourage practices such as those favoured by the government of China to force international and domestic internet search engines and social media platforms to block certain content and otherwise

147 The Declaration was adopted by the African Commission at its 65th ordinary session held from 21 October to 10 November 2019 in Banjul, The Gambia, and replaces its 2002 Declaration of Principles on Freedom of Expression in Africa. The Declaration is a soft law instrument that interprets article 9 (right to receive information and free expression) of the African Charter on Human and Peoples' Rights Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), <https://www.achpr.org/presspublic/publication?id=80> (accessed 9 July 2020).

148 Preamble to the Declaration (n 147).

149 Principles 37(1), (3), (4) and (5) of the Declaration (n 147).

150 Principle 38(1) of the Declaration.

151 Principle 38(2) of the Declaration.

152 Principle 38(3) of the Declaration.

abide by domestic censorship laws, Principle 39 of the Declaration provides that states require that internet intermediaries enable access to all internet traffic equally without discrimination based on the type or origin of content.¹⁵³ States also shall require that internet intermediaries do not interfere with the free flow of information by blocking or giving preference to particular internet traffic.¹⁵⁴ States further may not require internet intermediaries to proactively monitor or filter content or, except under strict conditions, remove content.¹⁵⁵

Under Principle 39(6) states may not demand that internet intermediaries develop search engines and chat rooms specifically to comply with domestic censorship laws such as Google proposed to do by means of Project Dragonfly, its secret search engine for the Chinese market:

States shall ensure that the development, use and application of artificial intelligence, algorithms and other similar technologies by internet intermediaries are compatible with international human rights law and standards, and do not infringe on the rights to freedom of expression, access to information and other human rights.

In October 2019 a specialised technical committee on communication and information technologies of the AU held at Sharm El Sheikh, Egypt (2019 Sharm El Sheikh Declaration)¹⁵⁶ recognised that achieving digital transformation in Africa requires political commitment at the highest level with the intention of aligning policies and sector regulation and involving a massive scaling-up of investment and dedication of resources.¹⁵⁷ The specialised technical committee noted that the harmonisation of legal and regulatory frameworks is a prerequisite for the creation of a common digital single market, and that internet and digital infrastructure is an essential component in the development of Africa's digital ecosystem.¹⁵⁸

The geopolitical reality is that with such large sections of the continent's telecommunications infrastructure under Chinese control, African states will find it difficult to disentangle themselves from China.¹⁵⁹ If African governments fail to advance values and interests in conformity to the wishes of their people, including freedom of expression, free enterprise and the rule of law, with boldness equal

¹⁵³ Principle 39(1) of the Declaration.

¹⁵⁴ As above.

¹⁵⁵ Principles 39(2) & (4) of the Declaration.

¹⁵⁶ AU/STC-CICT-3/MIN//Decl. <https://au.int/en/decisions/2019-sharm-el-sheikh-declaration-stc-cict-3> (accessed 9 July 2020).

¹⁵⁷ Preamble to the 2019 Sharm El Sheikh Declaration (n 156).

¹⁵⁸ As above.

¹⁵⁹ MacKinnon (n 18).

to the brazen attempt to impose others, the 'China model' of digital governance by default will become the 'Africa model', largely because of inaction and complacency.¹⁶⁰

African countries are called upon to critically appraise the values, explicit and implicit, embedded in the technology they acquire from China.¹⁶¹ African governments, policy makers and technology entrepreneurs must keep in mind considerations of the kind of society they desire in contrast to the kind of society driven by the technology they acquire from China.¹⁶² Chinese investment and technological innovation should not result in the resurrection of the spectre of neo-colonial exploitation.¹⁶³ A people hoping to reap the benefit of the Fourth Industrial Revolution for the betterment of the quality of their life¹⁶⁴ creates the imperative that they play a central role in determining crucial technological issues for the continent.¹⁶⁵ Their voice must be prioritised at every step, from designing to developing to implementing technology, and – most importantly – in establishing the policy and legal framework within which these technologies operate.

160 See D Curran 'Facial recognition will soon be everywhere. Are we prepared?' *The Guardian* 27 May 2019, <https://www.theguardian.com/commentisfree/2019/may/21/facial-recognition-privacy-prepared-regulation> (accessed 6 February 2020); Freedom House (n 17).

161 See A Birhane 'The algorithmic colonization of Africa' *Real Life* 18 July 2019, <https://reallifemag.com/the-algorithmic-colonization-of-africa/> (accessed 2 March 2020).

162 As above.

163 Gershgorn (n 92).

164 Para 2 of 2019 Sharm El Sheikh Declaration (n 156).

165 Birhane (n 161).

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Using the right to health framework to tackle non-communicable diseases in the era of neo-liberalism in Uganda

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Summary: *The main objective of this article is to reflect on how the right to health framework may be used to tackle non-communicable diseases in the era of neo-liberalism in Uganda. NCDs, also known as chronic or lifestyle diseases, cause many deaths. The risk factors for NCDs include the harmful use of alcohol, physical inactivity, salt intake, tobacco use, raised blood pressure, diabetes, obesity, as well as ambient and household air pollution. The article moves beyond the recognition of these important risk factors and interrogates the contribution of neo-liberalism to the prevalence of NCDs. The article argues that neo-liberalism, which emphasises the role of market forces in dealing with socio-economic questions, significantly contributes to the NCDs challenge in Uganda. The article concludes that the right to health can and should play a critical role in tackling the challenge of NCDs in Uganda. Unless policy challenges associated with neo-liberalism are tackled, current NCD prevention, control and management efforts that focus on individual behaviour or lifestyle approaches and place the burden of responsibility on the individual may not achieve the desired results.*

Key words: *non-communicable diseases; neo-liberalism; Uganda; right to health; public health efforts; individualism*

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1 Introduction

The main objective of this article is to reflect on how the right to health framework might be used in the prevention, treatment and control of non-communicable diseases (NCDs) in the era of neo-liberalism in Uganda. As is the case in many countries, Uganda is party to human rights instruments that guarantee the right to health¹ and outline state obligations towards the realisation of the right, including the prevention and treatment of diseases. The Constitution of the Republic of Uganda further contains provisions with a bearing on the right to health.² Several public health policies and interventions are aimed at the promotion of the right.³

Globally, the recognition of health as a human right has gained traction in certain areas, for example, in the field of sexual and reproductive health, including HIV. There is an increased recognition of the role of law, including human rights, in the struggle to tackle NCDs, also known as chronic or lifestyle diseases. The World Health Organization (WHO) recognises human rights as one of the primary approaches in the prevention and control of NCDs.⁴ De Vos et al also advocate a right to health-based approach to the prevention and control of NCDs.⁵ Magnusson and Patterson advocate human rights-inspired legal and governance reforms as part of a comprehensive global response to NCDs.⁶ Ferguson et al argue that human rights can guide governments in strengthening their national laws and policies in response to NCDs.⁷ Gruskin et al observe that the contribution

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- 1 International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 ratified on 21 January 1987; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1240 UNTS 13 ratified on 22 July 1985; Convention on the Rights of the Child (CRC) 1577 UNTS 3 ratified on 16 September 1990; African Charter on Human and Peoples' Rights (African Charter) ratified on 10 May 1986; Convention on the Rights of Persons with Disabilities (CRPD) ratified on 25 September 2008; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) ratified on 22 July 2010.
 - 2 Objectives XX, IV and arts 8A, 39 & 45 of the Constitution.
 - 3 Ministry of Health *The Second National Health Policy* (2010); Ministry of Health Sector Development Plan 2015/16-2019/20 (2015).
 - 4 WHO *Global action plan for the prevention and control of non-communicable diseases 2013-2020* (2013) 12.
 - 5 P de Vos et al 'A human right to health approach for non-communicable diseases' (2013) (381) *The Lancet*, [https://www.thelancet.com/action/show/pdf?pii=S0140-6736\(13\)60274-3](https://www.thelancet.com/action/show/pdf?pii=S0140-6736(13)60274-3) (accessed 25 April 2020).
 - 6 RS Magnusson & D Patterson 'The role of law and governance reform in the global response to non-communicable diseases' (2014), <https://doi.org/10.1186/1744-8603-10-44> (accessed 26 April 2020); RS Magnusson et al 'Legal capacities required for prevention and control of non-communicable diseases' (2019) 97 *Bulletin of World Health Organization* 108-117 doi.10.2471/BLT.18.213777 (accessed 30 April 2020).
 - 7 L Ferguson et al 'Non-communicable diseases and human rights: Global synergies, gaps and opportunities', <http://dx.doi.org/10.1080/17441692.2016.1158847> (accessed 26 April 2020).

of human rights to NCD prevention and control remains nascent and there thus is a need for the infusion of human rights into NCD programme design, monitoring and evaluation.⁸

According to the WHO, NCDs kill 41 million people annually, the equivalent of 71 per cent deaths globally.⁹ Each year 15 million people in low and middle-income countries die from a NCD between the ages of 30 and 39 years.¹⁰ Cardiovascular diseases account for most NCD deaths, or 17,9 million people annually, followed by cancer (9 million), respiratory diseases (3,9 million) and diabetes (1,6 million).¹¹ The 2030 Agenda for Sustainable Development recognises NCDs as a major challenge to sustainable development.¹² Goal 3 of the Agenda aims to 'ensure healthy lives and promote well-being for all' and outlines a number of objectives relevant to the response to NCDs. Target 4 addresses the reduction of premature mortality from NCDs and the promotion of mental health and well-being. Risk factors related to NCDs include the harmful use of alcohol, physical inactivity, salt or sodium intake, tobacco use, raised blood pressure, diabetes, obesity, ambient and household air pollution.¹³ Bad food, nutrition and diet are closely linked to the increase in NCDs,¹⁴ which not only affect adults. Children and adolescents, who are targeted by food and beverage companies through advertisements, may become victims of behaviour such as tobacco use, alcohol abuse and unhealthy diets.¹⁵

In Uganda the incidence and prevalence of NCDs are increasing at an alarming rate.¹⁶ The common types of NCDs in the country, which are precipitated by the above risk factors, include diabetes, cancer, cardiovascular disease such as heart attacks and strokes as well as chronic respiratory diseases.¹⁷ The burden of NCDs is

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- 8 S Gruskin et al 'Non-communicable diseases and human rights: A promising synergy' (2014) 104 *American Journal of Public Health* 773.
- 9 WHO 'Non-communicable diseases: Key facts' (2018), <http://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases> (accessed 24 October 2018).
- 10 As above.
- 11 As above.
- 12 UN *Transforming our world: The 2030 Agenda for Sustainable Development* (2015).
- 13 As above.
- 14 C Lachat et al 'Diet and physical activity for the prevention of non-communicable diseases in low and middle-income countries: A systematic policy review' (2013) 10 *Public Library of Science and Medicine* 6.
- 15 J Proimos & JD Klein 'Non-communicable diseases in children and adolescents' (2012) 130 *Pediatrics Perspectives* 3.
- 16 Ministry of Health 'Non-communicable diseases', <http://www.health.go.ug/community-health-departments/non-communicablediseases> (accessed 24 October 2018).
- 17 As above.

increasing in both urban and rural areas.¹⁸ According to 2016 estimates, approximately 297 000 people died due to NCDs with cardiovascular disease accounting for 10 per cent of mortality; cancer 10 per cent; chronic respiratory disease 2 per cent; diabetes 2 per cent; and other NCDs 11 per cent.¹⁹ As noted above, in Uganda, alcohol abuse, tobacco use, unhealthy foods and physical inactivity contribute to the burden of NCDs.²⁰

Several commentators have argued that neoliberalism has shaped and influenced NCD policy design and implementation in many countries. Battams argues that the neoliberal paradigm ‘shapes the supply of unhealthy goods’, contributing to the burden of NCDs.²¹ She further argues that trade and development policies largely are influenced by neo-liberalism resulting in trade and economic development goals trumping health goals linked to NCDs. Lenchucha and Thow argue that in low-income countries such as Zambia, neo-liberalism conditions the policy environment in a way that promotes the use of tobacco, alcohol and other unwholesome goods.²² They have further observed that economic sectors, including trade, industry and agriculture, do not pay attention to the health consequences of their policies. Glasgow and Schrecker observe that most commentators view the challenge of NCDs as related primarily to individual choice and behaviour.²³ Yet, neo-liberalism – for example through trade liberalisation and marketing activities of transnational corporations (TNCs) – significantly contributes to the global burden of disease, including NCDs.²⁴

In Uganda public health messages target individual behaviour and prioritise the risk factors of smoking, alcohol abuse and physical inactivity. These messages are in concordance with the neoliberal paradigm, which underlines the values and virtues of the market,

18 C Kiiza Mondo et al ‘The prevalence and distribution of non-communicable diseases and their risk factors in Kasese district, Uganda’ (2013) 24 *Cardiovascular Journal of Africa* 52.

19 WHO ‘Non-communicable Diseases (NCD) Country Profile ‘Uganda’ (2018), http://www.who.int/nmh/countries/uga_en.pdf (accessed 22 October 2018).

20 Ministry of Health (n 16).

21 S Battams ‘Neo-liberalism, policy incoherence and discourse coalitions influencing non-communicable disease strategy: Comment on how neoliberalism is shaping the supply of unhealthy commodities and what this means for NCD prevention’ (2020) 9 *International Journal of Health Policy Management* 116, doi:10.1517/ijhpm.2019.95 (accessed 28 April 2020).

22 R Lenchucha & AM Thow ‘How neoliberalism is shaping the supply of unhealthy commodities and what this means for NCD prevention’ (2019) 8 *International Journal of Health Policy Management* 514.

23 S Glasgow & T Schrecker ‘The double burden of neoliberalism? Non-communicable disease policies and the global policy economy of risk’ (2015) 34 *Health and Place* 279.

24 As above.

individual liberty, choice and freedom.²⁵ As Tarryn and Cella observe, such messages assume that people have the agency to make healthy choices.²⁶ Although messages targeting individual behaviour contribute to a reduction of NCDs in Uganda, there is a need to investigate the contribution of structural and systemic factors such as neo-liberalism, which may constrain the state's capacity to prevent and control NCDs.

Against the backdrop outlined above the article argues that neo-liberalism, which emphasises the role of market forces in dealing with socio-economic questions, significantly contributes to the prevalence of NCDs in Uganda. The article further argues that some of the challenges posed by neo-liberalism are surmountable through a holistic and comprehensive application of the right to health framework. The article is divided into five parts. The first part is this introduction. In the second part I examine the right to health framework at the international, regional and national levels. I tease out the normative scope and content of the right with specific reference to interpretation by the Committee on Economic, Social and Cultural Rights (ESCR Committee).²⁷ The third part of the article examines the contribution of neo-liberalism to the NCD challenge in Uganda. I commence with an examination of neo-liberalism and proceed to illustrate how it adversely impacts on the struggle to tackle NCDs. I argue that neo-liberal policies, such as privatisation and liberalisation, significantly contribute to the NCDs trajectory in the country. The fourth part of the article explores the role that the right to health framework can and should play in tackling the NCD trajectory. In this part I argue that the right to health framework, with its emphasis on both health care and the social determinants of health, can and should play a fundamental role in tackling the risk factors related to NCDs that are exacerbated by neo-liberalism. Part 5 offers concluding remarks.

2 Right to health framework

The WHO, which defines health as a 'state of complete physical, mental and social well-being and not merely the absence of disease and infirmity', recognises the right to health as a fundamental human

25 On the market's sacrosanctity, see M Friedman *Why government is the problem: Essays in public policy* (1993).

26 P Tarryn & M Cella "We invited the disease to come to us": Neoliberal public health discourse and local understanding of non-communicable disease causation in Fiji' (2018) 28 *Critical Public Health* 560.

27 ESCR Committee General Comment 14 'The right to the highest attainable standard of health (art 12)', E/C.12/2000/4.

right.²⁸ However, this definition by the WHO has been criticised by several commentators. Evans argues that the definition should not be taken 'at face value'²⁹ and that it is better to think of health in terms of what society can do collectively 'to ensure the conditions in which people can be healthy'.³⁰ Evans also observes that health is concerned with 'the art and the science of preventing disease, promoting health, and extending life through the organised efforts of society'.³¹ Huber et al challenge the WHO's definition of health on grounds that the words 'complete state' are static and suggest the adoption of the Ottawa Charter definition of health which emphasises social and personal resources as well as physical capability.³² The Ottawa Charter defines health as 'a resource for everyday life. Health is a positive concept emphasising social and personal resources, as well as physical capacities. Therefore, health promotion is not just the responsibility of the health sector, but goes beyond healthy lifestyles to well-being'.³³

Building on the definition in the Ottawa Charter, Huber et al suggest a new concept of health in terms of the ability to adapt and to self-manage in the face of social and emotional challenges.³⁴ Jambroes et al observe that by looking at health as 'a complete state', the definition is static, does not take into account the changing patterns of morbidity, and has contributed to the medicalisation of society.³⁵ The challenge with these definitions is that they reproduce the biomedical model of disease that largely emphasises biological and behavioural factors. As Yamin has observed, health is not simply 'a question of divine or genetic fate, of random biological events, or individual behaviour',³⁶ but

a matter of justice – a product of social relations as much as biological or behavioural factors. It is the inequities in these social, and inherently

28 WHO *Constitution of the World Health Organisation* (1946).

29 T Evans 'A human right to health?' (2002) 23 *Third World Quarterly* 197.

30 Evans (n 29) 198. See also Institute of Medicine 'What is public health? An introduction', <https://www.publichealth.columbia.edu/public-health-now/news/what-public-health-introduction> (accessed 22 May 2020).

31 As above. See also D Acheson *Independent inquiry into inequalities in health* (1998) 6.

32 M Huber et al 'Health: How should we define it?' (2011) 343 *BMJ* 235.

33 WHO Ottawa Charter for Health Promotion (1986), <https://www.who.int/healthpromotion/conferences/previous/ottawa/en/> (accessed 22 May 2020).

34 Huber et al (n 32).

35 M Jambroes et al 'Implications of health as "the ability to adapt and self-manage" for public health policy: A quantitative study' (2016) 26 *European Journal of Public Health* 412.

36 AE Yamin 'Will we take suffering seriously? Reflections on what applying a human rights framework to health means and why we should care' (2008) 10 *Health and Human Rights* 45.

power relations for which the state (and sometimes other actors) can and should be held accountable from a human rights perspective.³⁷

Thus, there is a need to move beyond the above definitions, including those by the WHO, and interrogate the underlying social, economic, political and cultural factors that shape the health and well-being of individuals and populations.

The Universal Declaration of Human Rights (Universal Declaration), which 'laid a foundation for the human rights movement',³⁸ guarantees every person 'the right to a standard of living adequate for the health of himself and of his family, including food ... medical care and necessary social services'.³⁹

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees everyone the right to 'the highest attainable standard of physical and mental health'.⁴⁰ The ESCR Committee, which monitors state compliance with ICESCR, has provided an authoritative interpretation of this right⁴¹ and noted that 'good health cannot be ensured by a state'⁴² and that 'genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health'.⁴³

The ESCR Committee further interpreted the right to health 'as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health',⁴⁴ including access to safe water, food, a clean and healthy environment, relevant education and information and participation of individuals and communities in health interventions.⁴⁵ Indeed, most of the risk factors for NCDs outlined above are attributed to individual life styles, and may be tackled through education and information. However, as the ESCR Committee observed, there are 'formidable structural and other obstacles resulting from international and other factors'⁴⁶ that may inhibit the realisation of the right to health by many state parties, including Uganda. Some of these obstacles might be perpetuated by neo-liberal policies of international financial and trade institutions

37 Yamin (n 36) 46.

38 M Mutua *Human rights: A political and cultural critique* (2002) 3.

39 Art 25(1).

40 Art 12(1).

41 General Comment 14 (n 27).

42 Para 9.

43 As above.

44 Para 14.

45 As above.

46 Para 5.

such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO). In this vein, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has pointed out that the policies of these institutions compel developing countries to open up their markets for foreign direct investment in the food and beverage sectors, which has resulted in aggressive and pervasive marketing that has increased the consumption of unhealthy foods that have been associated with diet-related NCDs.⁴⁷

According to the ESCR Committee, the right to health contains a number of 'interrelated and essential elements',⁴⁸ namely, the availability, accessibility, acceptability and quality of public health facilities, goods and services.⁴⁹ The facilities, goods and services should be physically and economically accessible to everyone without discrimination. There should also be sufficient information about these facilities, goods and services, which should be respectful of medical ethics, culturally, scientifically and medically appropriate.⁵⁰ ICESCR requires state parties to take steps to ensure the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness'.⁵¹ According to the ESCR Committee this requirement includes 'the provision of equal and timely access to basic preventive, curative, rehabilitative services and health education'.⁵² Thus, in addition to preventive measures, including education, information, communication and screening procedures, which are critical in the struggle against NCDs, the state should ensure that treatment options, including palliative care, for the various NCDs are available, accessible, acceptable and of good quality. Pursuant to its obligation to fulfil human rights, the state should ensure that those who are unable, through their own means, to access treatment for NCDs, are provided with the necessary treatment.⁵³

As in the case of other human rights, the state has three types of obligations: to respect, protect and fulfil the right to health.⁵⁴ Under the obligation to respect human rights, the state should 'refrain from

47 Human Rights Council 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Unhealthy foods, non-communicable diseases and the right to health' A/HRC/26/31.

48 Para 12.

49 Paras 12(a)-(d).

50 As above.

51 Art 12(2)(d).

52 Para 17.

53 Para 37.

54 Paras 34-37.

interfering directly or indirectly with the enjoyment of the right to health'.⁵⁵ A state party violates the obligation to respect if it fails 'to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other states, international organisations and other entities, such as multinational corporations'.⁵⁶ Pursuant to their obligation to protect, states should take measures that prevent non-state or private actors from interfering with the enjoyment of the right to health.⁵⁷ The obligation to protect is violated where the state fails to take all necessary measures to safeguard persons within its jurisdiction from deleterious activities of private persons, including corporations.⁵⁸ An example of an omission is a 'failure to regulate the activities of corporations in order to prevent them from violating the right to health'.⁵⁹ The state may further violate the right to health where it fails to take measures to discourage the production, marketing and consumption of tobacco, narcotics, and other harmful substances such as unhealthy foods,⁶⁰ associated with NCDs.

Under the obligation to fulfil human rights, states should 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health'.⁶¹ The state violates the obligation to fulfil human rights where it fails to enact or adopt and implement necessary legal and policy frameworks for the realisation of the right to health. Health policy frameworks should identify appropriate right to health indicators and set benchmarks in relation to each indicator.⁶² Insufficient expenditure or the misallocation of public resources may also result in a violation of the right to health.⁶³

According to the ESCR Committee the state's obligations are to be progressively realised in accordance with available resources.⁶⁴ The ESCR Committee observes that, although ICESCR 'provides for progressive realisation'⁶⁵ and recognises 'constraints due to the limits of available resources',⁶⁶ there are obligations 'which are of immediate effect'.⁶⁷ These obligations are 'the guarantee that the

55 Para 33.

56 Para 50.

57 As above.

58 Para 51.

59 As above.

60 As above.

61 As above.

62 Paras 57 & 58.

63 Para 52.

64 Art 2(1).

65 Para 30.

66 As above.

67 As above.

right will be exercised without discrimination of any kind';⁶⁸ and 'the obligation to take steps ... towards full realisation'⁶⁹ of the right. The steps taken by the state 'must be deliberate, concrete and targeted towards full realisation of the right to health'.⁷⁰ According to the ESCR Committee, the concept of progressive realisation 'should not be interpreted as depriving states parties' obligations of all meaningful content'.⁷¹ Thus, state parties 'have a specific and continuing obligation to move as expeditiously and effectively as possible'⁷² in order to ensure the full realisation of the right to health. Retrogressive measures are not permissible unless the state justifies that it took the decision 'after the most careful consideration of all alternatives'.⁷³

The ESCR Committee has affirmed that '[s]tates parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'⁷⁴ in ICESCR. These core obligations include ensuring access to health facilities, goods and services for vulnerable and marginalised groups;⁷⁵ 'access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone'; and access to an adequate supply of safe and potable water.⁷⁶ Indeed, there is a link between nutrition and NCDs, and effective public health nutrition is required in order to curb the prevalence of the diseases.⁷⁷ These core obligations also include the provision of essential drugs.⁷⁸ The ESCR Committee lists what it calls 'obligations of comparable priority', which include taking 'measures to prevent, treat and control epidemic and endemic diseases'.⁷⁹

Although other treaties address human rights of everyone, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) specifically addresses women's human rights in the context of equality and non-discrimination.⁸⁰ State parties are enjoined to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a

68 As above.

69 As above.

70 As above.

71 Para 31.

72 As above.

73 Para 32.

74 Para 43.

75 Para 43(b).

76 Para 43(c).

77 JM Edward Joy et al 'Dietary patterns and non-communicable disease risk in Indian adults: Secondary analysis of Indian migration study data' (2017) 20 *Public Health Nutrition* 1963.

78 Para 43(d).

79 Para 44(c).

80 Art 1 CEDAW.

basis of equality of men and women, access to health services'.⁸¹ State parties are called upon to pay special attention to rural women and ensure that among other things they have access to adequate health care,⁸² including, for example, facilities for testing diabetes, blood pressure, and screening for breast and cervical cancer.

The Convention on the Rights of the Child (CRC) guarantees every child the 'enjoyment of the highest attainable standard of health and for the facilities for the treatment of illness and rehabilitation of health'.⁸³ State parties are called upon to take appropriate measures to ensure children access to both preventive and curative health services.⁸⁴

The Convention on the Rights of Persons with Disabilities (CRPD) guarantees persons with disabilities 'the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability'.⁸⁵ State parties are enjoined to 'take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health related rehabilitation'.⁸⁶

At the regional level, the African Charter on Human and Peoples' Rights (African Charter) guarantees everyone 'the right to enjoy the best attainable state of physical and mental health'.⁸⁷ State parties are obliged to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.⁸⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) obliges state parties to 'ensure that the right to health of women, including sexual and reproductive health, is respected and promoted'.⁸⁹ The treaty enjoins state parties to take appropriate measures to 'provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas'.⁹⁰ It also guarantees women the 'right to live in a healthy and sustainable environment'.⁹¹ The African Women's Protocol further

81 Art 12(1).

82 Art 14.

83 Art 24(1).

84 Arts 14(2)(a)-(f).

85 Art 25 CRPD.

86 Arts 25(a)-(b).

87 Art 16(1).

88 Art 16(2).

89 Art 14(1).

90 Art 14(2)(a).

91 Art 18(1).

calls upon state parties to 'ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels'.⁹² It enjoins state parties to 'protect and enable the development of women's indigenous systems'.⁹³ State parties are also called upon to 'provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing food',⁹⁴ and to 'establish adequate systems of supply and storage to ensure food security'.⁹⁵

The African Charter on the Rights and Welfare of the Child (African Children's Charter) guarantees every child 'the right to enjoy the best attainable state of physical, mental and spiritual health'.⁹⁶ State parties are enjoined to take measures 'to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care';⁹⁷ to 'ensure provision of adequate nutrition and safe drinking water';⁹⁸ and 'to combat disease and malnutrition'⁹⁹ among children.

The Bill of Rights in the Ugandan Constitution does not expressly provide for the right to health. However, it calls upon the state to promote the social well-being of its people and in particular to ensure that all Ugandans enjoy rights and opportunities and access, among others things, to education, health services, clean and safe water, and food security.¹⁰⁰ The state should take all practical measures 'to ensure the provision of medical services to the population'.¹⁰¹ The Constitution enjoins the state to take appropriate measures to encourage people to grow and store adequate food; to establish adequate food reserves; and to 'promote proper nutrition through mass education and other appropriate means in order to build a healthy state'.¹⁰² In addition to the right to a clean and healthy environment,¹⁰³ the Constitution obliges the state to take all possible measures to 'prevent or minimise damage and destruction resulting from pollution'.¹⁰⁴ The Constitution includes an inclusive provision that renders justiciable other rights, such as the right to health, which

92 Art 18(2)(a).

93 Art 18(2) (c).

94 Art 15(a).

95 Art 15(b).

96 Art 14(1).

97 Art 14(2)(b).

98 Art 14(2)(c).

99 Art 14(2)(d).

100 Objective XIV.

101 Objective XX.

102 Objectives XXII(a)-(c).

103 Art 39.

104 Objective XXVII(ii).

are not expressly provided for in the Bill of Rights.¹⁰⁵ In the next part I interrogate the contribution of neo-liberalism to the challenge of NCDs in the country.

3 Deciphering the contribution of neo-liberalism to non-communicable diseases

3.1 Understanding neo-liberalism

The political context, which includes neo-liberal policies, has an enormous influence on the health of the population and on poverty and inequality.¹⁰⁶ Neo-liberalism, which has significantly contributed to creating and deepening poverty and inequalities,¹⁰⁷ may be traced to the regimes of Jimmy Carter and Ronald Reagan in the United States of America (USA) at the end of the 1970s and 1980s and Margaret Thatcher of the United Kingdom (UK) in the early 1980s.¹⁰⁸ The neo-liberal paradigm advocates a reduction in the role of the state in all economic and social spheres in order to unlock the potential of market forces. It calls for the elimination of all barriers that hinder the expansion of capitalism. Neo-liberalism is manifested in the policies of international financial institutions – the World Bank and the IMF – and the WTO, the leading global trade institution. These institutions believe that neoliberal policies promote economic conditions that will spur economic development, and integrate the local and global economies.¹⁰⁹

In Uganda, as in most African countries, the World Bank and the IMF imposed structural adjustment programmes (SAPs) that emphasise liberalisation, deregulation, privatisation and the compression of state budgets, foreign direct investment, and an increased role of international aid, allegedly to lift populations out of poverty.¹¹⁰ According to these financial institutions, SAPs would

105 Art 45.

106 On the influence of politics on policy outcome, see eg V Navarro 'The importance of politics in policy' (2011) 35 *Australia and New Zealand Journal of Public Health* 313.

107 V Navarro 'Neoliberalism and its consequences: The world health situation since Almata', <http://www.vnavarro.org/wp-content/uploads/2008/07/neo-liberalism-and-its-consequences.pdf> (accessed 28 April 2020); V Navarro 'Neoliberalism as a class ideology; or the political causes of inequalities' (2007) 37 *International Journal of Health Services* 47.

108 D Harvey *A brief history of neoliberalism* (2005).

109 D Karjaner 'World Bank, the International Monetary Fund, and neoliberalism' (2015), DOI:10.1002/9781118663202.wberen414 (accessed 25 April 2020).

110 D Harvey 'Neoliberalism as creative destruction' (2007) 610 *American Academy of Political and Social Science* 21, DOI:10.1177/0002716206296780 (accessed 25 October 2020).

open and liberalise trade whereby all forms of barriers are minimised or removed. African governments, including that of Uganda, were required to adopt an export-led growth strategy that would ostensibly put the countries on the road to recovery. Privatisation was touted as the main driver of growth.¹¹¹ The World Bank and the IMF imposed on these countries market-driven policies such as the privatisation of public enterprises, including water and power utilities and other socio-economic services,¹¹² which are critical for the realisation of the right to health. Privatisation, which included the retrenchment of civil servants, led to massive job losses and higher prices of goods and services that were unaffordable for the majority of citizens. Since the imposition of SAPs, Uganda has implemented neo-liberal policies that are market-oriented and export-led and characterised by the commercialisation or privatisation of public sector functions,¹¹³ including health, water and agriculture. SAPs, which are based on the neo-liberal model of economic growth and development, have produced adverse consequences for health. They have largely been blamed for sacrificing public health and health care, especially for the rural and urban poor.¹¹⁴

3.2 Neo-liberalism, health and non-communicable diseases

If well implemented, neo-liberal policies may lead to economic growth. However, what are the implications of neo-liberalism for health? Neo-liberal policies, which stress a reliance on the market, may lead to the increased commodification of basic social services such as health care, food, water and energy, thereby making them unaffordable for the majority of the population.¹¹⁵ Neo-liberal policies adversely affect health and quality of life. Neo-liberalism, which focuses on markets for health care, ignores the fact that health moves beyond health care and encompasses social determinants of health. An emphasis on the dominance of the neo-liberal market reinforces the trend toward restricting socio-economic rights, including health. Neo-liberalism, with its emphasis on the role of the market in solving

111 For an excellent discussion of the imposition of World Bank and IMF trade and financial liberalisation policies on African countries such as Uganda, see DM Demebele 'The International Monetary Fund and World Bank in Africa: A disastrous record' (2004), <https://www.pambazuka.org/governance/international-monetary-fund-and-world-bank-africa-disastrous-record> (accessed 11 February 2020) (accessed 25 April 2020).

112 On the impact of neo-liberal policies such as privatisation, see AE Birn et al *Textbook of international health* (2009).

113 See AE Birn et al (n 112) 168.

114 AM Mukweya 'Structural adjustment and health' (1995) 311 *British Medical Journal* 71.

115 On how neoliberal policies have adversely affected socio-economic sectors including health and education, see G Martiniello (ed) *Uganda: The dynamics of neoliberal transformation* (2018).

socio-economic questions, erodes the role of the state as a guarantor of these rights and converts rights into individual responsibilities and has a deleterious impact on health. As Brezis and Wiist observe:¹¹⁶

The free market can harm health and health care. The corporate obligation to increase profits and ensure a return to shareholders affects public health. Such excesses of capitalism pose formidable challenges to social justice and public health. The recognition of the health risks entailed by corporation-controlled markets has important implications for public policy. Reforms are required to limit the power of corporations.

One of the tenets of neo-liberalism is that people should be responsible for most aspects of their health with minimal or no state intervention.¹¹⁷ Health is viewed as an individual good to be accessed through individual or family and private health providers. As Chapman observes:¹¹⁸

The neoliberal paradigm views health systems and services as commodities, that is, inputs to productivity and economic growth and sources of potential revenue, rather than as public and social goods. Neoliberal ideology also advocates for a minimal government with most social services provided by the private sector.

Although Uganda over the years has had an impressive economic growth, averaging 6 per cent, which may be attributed to neo-liberal policies implemented by the state, these policies have significantly contributed to an increase in economic and health inequalities.¹¹⁹ A study by Oxfam found that the over-liberalisation of the economy is one of the key drivers of income inequality in the country.¹²⁰ Economic growth has largely been non-inclusive and, as a result, income inequality has significantly increased since the 1990s. According to Oxfam, trends in inequality indicate that

[t]he rich have grown richer while the poor have become poorer, despite overall economic growth. The richest 10 per cent of Uganda's population enjoy over one-third (35,7 per cent) of national income, and this proportion has grown by nearly 20 per cent over the past two decades. The richest 20 per cent claim just over half of all national

116 M Brezis & WH Wiist 'Vulnerability of health to market forces' (2011) 49 *Medical Care* 232.

117 AM Viens 'Neo-liberalism, austerity and the political determinants of health' (2019) 27 *Health Care Analysis* 147.

118 AR Chapman 'Globalisation, human rights, and the social determinants of health' (2009) 23 *Bioethics* 97.

119 J Wiegate 'Fake capitalism? The dynamics of neoliberal restructuring and pseudo-development: The case of Uganda' (2010) 37 *Review of African Political Economy* 123.

120 Oxfam *Who is growing? Ending inequality in Uganda* (2017) 33.

income, this proportion having increased by almost 14 per cent over this period.¹²¹

Income inequality is manifested in poor people's inability to access socio-economic services, including health care. Some people with NCDs suffer in silence because they may not be able to afford the high cost of care. The responsibility for NCDs, especially their treatment and management, is left in the hands of individuals with little intervention by the state. Public health systems, which are accessible by the poor, are on the verge of collapse.¹²² Private health care is accessible only by particular individuals and groups who may afford the high cost of care.¹²³

Neo-liberal policies, especially privatisation and liberalisation, have promoted investment in the private health sector.¹²⁴ However, private healthcare facilities largely promote curative care, with little attention being paid to primary health care, health promotion and disease prevention. The policies also promote limited individual and community participation in design and implementation, which would have revealed the actual socio-economic challenges faced by the people in accessing health care. I have argued elsewhere that neo-liberal policies, which are devoid of grassroots participation, are antithetical to the realisation of socio-economic rights of the poor, including the right to health.¹²⁵ Focusing on medical care, in my view, without tackling the structural causes of ill-health, including the socio-economic determinants of health, may in the long run be counterproductive. The government may deliver the best medical care for the treatment of diseases, including NCDs, but if it does not tackle the underlying causes of the population's poor health status, including miserable living conditions, all interventions will be in vain. The government must tackle the social determinants of health, which in effect are the conditions in which people live and work, which affect their opportunities to lead healthy lives. As Mooney correctly observes, health care must be viewed as a social institution where key social determinants of health, such as primary health care, education, food security and public sanitation, are promoted in a holistic and integrated fashion.¹²⁶ However, health, including

121 Oxfam (n 120) 33.

122 O Kobusingye *The patient: Sacrifice, genius, and greed in Uganda's health care system* (2020).

123 As above.

124 See eg USAID *Uganda's private health sector: Opportunities for growth* (2015).

125 See eg BK Twinomugisha 'A critique of Uganda's Poverty Eradication Plan' in K Matlosa et al (eds) *The state, democracy and poverty eradication in Africa* (2008) 298.

126 G Mooney 'Neo-liberalism is bad for our health' (2012) 42 *International Journal of Health Services* 348.

health care, goes beyond bio-medical factors and encompasses social conditions in which people live and operate. Health comprises more than health-related goods and services and covers critical questions such as non-discrimination, democracy, transparency and accountability. As Yamin observes:¹²⁷

In a rights framework, health is reproduced, experienced and understood in the social, political, historical, and economic contexts in which we live. This perspective forces us to see suffering that is not the result of 'natural' biological causes but rather stems from human choices about policies, priorities, and cultural norms, about how we treat each other and what we owe each other.

The WHO has identified risk factors for NCDs which are the harmful use of alcohol, physical inactivity, salt or sodium intake, tobacco use, raised blood pressure, diabetes, obesity and air pollution.¹²⁸ What is the contribution of neo-liberalism to these factors? What is the role of the free trade or liberalisation of markets and foreign direct investment? Under the neo-liberalism banner, developed countries have used international trade regimes and the trade liberalisation strategy to encourage the export of unwholesome products to developing countries. Kuo Lin et al observe that although an increase in trade may lead to economic growth, increased trade flows in processed food are associated with a rise in the prevalence of NCDs and chronic illnesses.¹²⁹ Garcia-Dorado et al also found a link between trade liberalisation, nutrition outcomes and NCDs.¹³⁰

Relying on the WTO's philosophy of free trade, developed countries have encouraged tobacco exports by transnational conglomerates, which fuel the consumption of tobacco in developing countries such as Uganda.¹³¹ Workman reports that in 2018 global tobacco exports totalled to US \$21,2 billion, with Europe accounting for US \$12,6 billion or 59,4 per cent of the revenue from exported cigarettes.¹³² Although some African countries such as Malawi, Zimbabwe and Uganda grow tobacco, exports from Africa accounted for only

127 Yamin (n 36) 47.

128 WHO 'Non-communicable diseases', <https://www.who.int/news-room/fact-sheets/detail/noncommunicable> (accessed 11 February 2020). On how some of these risk factors play out in Uganda, see O Namusisi et al 'Risk factors for non-communicable diseases in rural Uganda: A pilot surveillance project among diabetes patients at a referral hospital clinic' (2011) 10 *Pan African Medical Journal* 47.

129 T Kuo Lin 'The effect of sugar and processed food imports on the prevalence of overweight and obesity in 172 countries' (2018) 14 *Global Health* 35.

130 SC Garcia-Dorado et al 'Economic globalisation, nutrition and health: A review of quantitative evidence' (2019) 15 *Global Health* 15.

131 ER Shaffer, JE Brenner & TP Houston 'International trade agreements: A threat to tobacco control policy' (2005) 14 *Tobacco Control* 19.

132 D Workman 'Tobacco cigarettes exports by country', www.worldstopexports.com/tobacco-cigarettes-exports-country/ (accessed 30 April 2020).

1,6 per cent.¹³³ It is even possible that some cigarettes and other tobacco products exported to developing and least developed countries may be of poor quality. For example, Deutsch reports that cigarettes sold in Africa are more toxic than those smoked in Switzerland.¹³⁴ International trade law thus has opened up developing country markets to tobacco exports from developed country markets. Cigarette smoking is promoted as part of the 'sophisticated' and 'cute' Western culture. Although the government has attempted to domesticate the WHO Framework Convention on Tobacco Control by enacting the Tobacco Control Act, 2015, the legislation has not been actively implemented.

Neo-liberalism, especially the liberalisation of trade in food, has contributed to a proliferation of fast food restaurants and outlets such as Kentucky Fried Chicken, Café Javas, Chicken Tonight and Java House, which serve potato chips, sausages, kebabs, chaps, fried eggs, chicken and all sorts of oil-filled food. Some of these foods, which are predominantly consumed in urban areas, have been linked to the emergence of NCDs.¹³⁵ These outlets also sell sugar and calorie-loaded chocolate and soft drinks of all types. In my view, the promotion of so-called 'zero sugar' sweetened soft or alcoholic drinks by food and beverage companies not only is deceptive, but a farce aimed at convincing consumers to purchase their products. Yet, the marketing of processed products contributes to negative changes in the dietary habits of the people.¹³⁶ Food and beverage industries promote consumerism through mass media and commercial marketing. In my view, these industries are largely interested in the maximisation of profits to meet the expectations of their shareholders and not necessarily the promotion of the population's health. The consumption of these foods may lead to obesity in children and young people, who are largely targeted by these companies through advertisements. Type 1 diabetes, which has been linked to fast food consumed by children, is on the increase in the country.¹³⁷

There is no doubt that nutrition is an important ingredient of good health. Good nutrition directly contributes to improved health and well-being.¹³⁸ However, neo-liberal agricultural policies, such as the Plan for Modernisation of Agriculture, which promotes the

133 As above.

134 F Deutsch 'The blazing success of Swiss cigarettes in Africa', <http://www.stories.publiceye.ch/tobacco/> (accessed 29 April 2020).

135 WHO *Globalization, diets and non-communicable diseases* (2002).

136 WHO *Fiscal policies for diet and prevention of non-communicable diseases* (2015).

137 Ministry of Health *Non-communicable Disease Risk Factor Baseline Survey Uganda* (2014) 15.

138 See eg FAO 'Pulses and the link between nutrition and health' (2016), www.fao.org/pulses-2016/news/news-detail/en/c/386990/ (accessed 29 April 2020).

commercialisation of agriculture and not self-sufficiency in food, significantly contribute to persistent malnutrition and hunger in the country.¹³⁹ These policies promote land-grabbing, which has resulted in thousands, if not millions, of people driven off their lands.¹⁴⁰ The policies also promote the use of technology in agriculture, which largely favours large-scale farmers to the detriment of small-scale farmers who are displaced from their lands.¹⁴¹ In most developing countries, including Uganda, there is an increased use of pesticides, herbicides and chemical fertilisers in commercial and small scale agriculture, allegedly to increase agricultural productivity.¹⁴² However, the use of these pesticides and fertilisers, especially when not used properly, may have deleterious consequences for the environment and human health.¹⁴³ The majority of farmers who spray the crops, whether on individual holdings or in commercial farms, do not use safety masks, gloves and other protective gear, thereby enabling access of the pesticides in the blood stream. According to Kumari et al, 'chemical fertilizers and pesticides used over a long period of time have adverse toxic effects on the production potential of the land and the ultimate consumers of the agricultural products'.¹⁴⁴ For example, in Vietnam researchers found that pesticide use in agriculture was linked to NCDs.¹⁴⁵ Researchers found that there was illegal business in pesticides with false labels, as well as the marketing of expired or poor quality products in stores, which had adverse health consequences for the population.¹⁴⁶

Uganda has enough land to provide everyone with an adequate diet but, in my view, the main challenge is the unequal distribution and use of land. Instead of encouraging the population to grow organic healthy foods on the available land, the government has overly promoted the growing of cash crops such as sugar cane, coffee, tea and cotton at the expense of food production, ignoring

139 BK Twinomugisha 'Challenges for realisation of the right to food in Uganda' (2005) *East African Journal of Peace and Human Rights* 2.

140 See NAPE *A study on land grabbing cases in Uganda* (2012).

141 Twinomugisha (n 139) 14.

142 See JS Okonya 'A cross-sectional study of pesticide use and knowledge of smallholder potato farmers in Uganda' (2015) *BioMed Research International*, <https://doi.org/10.1155/2015/759049> (accessed 2 May 2020); H Kizito 'Uganda farm families risk death by "eating" pesticides' (2013), <https://news.trust.org/item/20130220030400-mlztt> (accessed 1 May 2020).

143 N Sgarma & R Singhvi 'Effects of chemical fertilisers and pesticides on human health and environment: A review' (2017) 10 *International Journal of Agriculture, Environment and Biotechnology* 675.

144 KA Kumari et al 'Adverse effects of chemical fertilisers and pesticides on human health and environment' (2014) 3 *Journal of Chemical and Pharmaceutical Sciences* 150.

145 HV Dang et al 'Risk factors for non-communicable diseases in Vietnam: A focus on pesticides' (2017) *Frontiers in Environmental Science*, <https://doi.org/10.3389/fenvs.2017.00058> (accessed 10 January 2019).

146 As above.

the fact that people cannot eat these crops. Overly concentrating on cash crops for export rather than those that feed the country's population may be counter-productive. Indigenous food crops in Uganda, such as millet, are becoming extinct in some areas of the country, because of the drive to produce cash crops. Genetically-modified seeds, which are manufactured by Monsanto, and are promoted in developing countries to the detriment of indigenous seeds, may not be affordable to the poor.¹⁴⁷

The National Forest Authority (NFA) has also promoted the establishment of tree plantations such as eucalyptus and pine, which are owned by the rich and wealthy, including foreign investors, whose major interest may not be environmental conservation as such but profit maximisation from the sale of timber. These foreign tree species have a deleterious impact on the environment. For example, eucalyptus has been found to induce soil degradation and adversely affect biodiversity, sustainable cropping, and water conservation.¹⁴⁸ This tree species has replaced native forests and lands where communities have been growing organic foods, which have been found to be more nutritious, healthier and safer than their conventional counterparts, which have less antioxidants and more frequent pesticide residues.¹⁴⁹ Organic foods, including fruits, vegetables and grains, are more beneficial to the environment, as well as humans and animals that inhabit it.¹⁵⁰ In the next part of the article I explore the extent to which the right to health framework may be employed in efforts to tackle NCDs in the country.

4 Tackling the non-communicable disease trajectory: What role can and should the right to health framework play?

The right to health framework is so broad that this article does not claim to engage all its components in the discourse of NCDs in the era of neo-liberalism. However, I believe that a combination of key aspects of the right, namely, the use of juridical measures, community participation, and the gender perspective, might go a long way in

147 See RESET 'The privatisation of seeds', <http://en.reset.org/knowledge/privatisation-seeds> (accessed 28 April 2020).

148 W Jun Zhang 'Did eucalyptus contribute to environmental degradation? Implications from a dispute on causes of severe drought in Yunnan and Guizhou, China' (2012) 1 *Environmental Skeptics and Critics* 34.

149 A Mie et al 'Human health implications of organic food and organic agriculture: A comprehensive review' (2017) (111) *Environmental Health* 16.

150 C Micheal 'Organic fruits and vegetables: Potential health benefits and risks', <https://escholarship.org/uc/item/0c6386bt> (accessed 10 January 2019).

alleviating the NCD burden, provided that there is a strong political will on the part of government actors.

4.1 Juridical measures

4.1.1 Legislative measures

Law plays a critical role in the promotion of public health.¹⁵¹ Magnusson et al have correctly observed that law and regulation, including fiscal measures, are at the centre of national and local NCD action plans.¹⁵² At the United Nations General Assembly (UNGA), Heads of State and Government also committed themselves to '[p]romote and implement policy, legislative and regulatory measures, including fiscal measures as appropriate, aiming at minimizing the impact of the main risk factors from non-communicable diseases, and promote healthy diets and lifestyles'.¹⁵³

The obligation to fulfil the right to health further enjoins the state to take steps, including legislative measures, to prevent, treat and control epidemics such as NCDs. The obligation to protect the right to health also requires the state to take appropriate measures, including legislation, to ensure that activities of private actors, including corporations, do not compromise the enjoyment of the right.

Parliament has the overall responsibility of making laws in the country.¹⁵⁴ In order to 'promote the health of persons and reduce tobacco-related illnesses and deaths',¹⁵⁵ and 'to protect persons from the socio-economic effects of tobacco production and consumption',¹⁵⁶ Parliament enacted the Tobacco Control Act, 2015 which, among others, stresses the right to a tobacco-free environment¹⁵⁷ and imposes a comprehensive ban on tobacco

151 LO Gostin *A theory and definition of public health law* (2008); BK Twinomugisha *Fundamentals of health law in Uganda* (2015).

152 RS Magnusson et al 'Legal capacities required for prevention and control of non-communicable diseases' (2019) 97 *Bull World Health Organ* 108, doi:10.2471/BLT.18.213777 (accessed 30 April 2020).

153 Para 21, UNGA Political declaration of the third high-level meeting of the General Assembly on the prevention and control of NCDs. 'Time to deliver: Accelerating our response to address non-communicable diseases for the health and well-being of present and future generations' A/RES/73/2, 17 October 2018 https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/2 (accessed 30 April 2020).

154 Art 79(1) of the Constitution.

155 Long title to the Tobacco Control Act, 2015.

156 As above.

157 Sec 11.

advertisement, promotion and sponsorship.¹⁵⁸ The government has a duty to enforce this law and 'protect the public against the influence of and interference by commercial and other vested interests of the tobacco industry'.¹⁵⁹ Although this legislation, which seeks to fulfil Uganda's obligations as a party to the WHO Framework Convention on Tobacco Control, is progressive, there is limited enforcement of the law. There is an urgent need for government to mobilise resources for the enhanced enforcement of the law to ensure compliance.

As Magnusson et al recommend,¹⁶⁰ government should build legal capacity to draft and implement appropriate laws and litigate where necessary against corporations that may be fuelling the spread of NCDs. Government may seek support from the WHO to develop laws and regulations on health matters and NCDs, in the form of technical assistance, training and the provision of technical resources. WHO can also support government by providing *amicus* briefs in disputes over tobacco control laws.¹⁶¹ Local governments should also, pursuant to the Local Governments Act,¹⁶² enact bye-laws targeting tobacco smoking in public places. The National Management Authority (NEMA) should also actively enforce the National Environment (Control of Public Smoking in Public Places) Regulations, 2004 and the National Environment Act, 2019, so that Ugandans may enjoy their right to a clean and healthy environment.¹⁶³

Another area requiring regulation is alcohol production and consumption. Studies have found that alcohol abuse is increasing in both rural and urban areas. According to Ndugwa et al,¹⁶⁴ the level of alcohol use among adults in Uganda is high and almost 10 per cent of the adult population has an alcohol abuse-related disorder.¹⁶⁵ Uganda has one of the highest levels of alcohol consumption in the East African region with an annual per capita alcohol consumption of 9,5 litres.¹⁶⁶ Alcohol abuse has been linked to NCDs and accidents. Most of the laws on alcohol use, such as the Enguli (Manufacture and Licensing) Act,¹⁶⁷ and the Liquor Act,¹⁶⁸ were enacted in the early

158 Sec 14.

159 Sec 19(a).

160 Magnusson et al (n 152).

161 As above.

162 Cap 243.

163 Art 39 of the Constitution.

164 N Kabwama et al 'Alcohol use among adults in Uganda: Findings from the countrywide non-communicable diseases risk factors cross-sectional survey' (2016) *Global Health Action* 9; see also WHO *Global Status Report on Alcohol and Health* (2014).

165 As above.

166 As above.

167 Cap 86.

168 Cap 93.

and mid-1960s, are outdated and outmoded and need to be revised or repealed. There is a need for alcohol control legislation that explicitly states government's public health objectives for passing the legislation. The legislation should aim at regulating affordability, hours and days of trading in alcohol, alcohol marketing, setting a minimum purchase age of alcohol, and taxation measures, drawing lessons from other jurisdictions.¹⁶⁹ In this vein, Betty Namboozie who introduced a private member's Bill – the Alcohol Control Bill 2016 – should be applauded and supported. Government should also actively enforce the 2017 ban on the production of alcohol in sachets.

The food and soft drinks industries also need to be regulated. The Food and Drugs Act¹⁷⁰ is outdated and outmoded. Legislation that promotes self-sufficiency in food, the establishment of national food reserves, and proper public health nutrition is urgently required. Local governments should also develop bye-laws on effective agricultural practices, food production, storage and processing, such as occurred in the 1960s. The Food and Nutrition Bill 2009 should be urgently resuscitated and discussed in Parliament in order to address the right to food, in a holistic fashion, taking into account NCD food-related challenges. The Bill recognises the right to food as a fundamental human right and aims, among others, at providing a legal basis for implementing the Food and Nutrition Policy.¹⁷¹ The Bill creates an obligation on the government to ensure that food is available, accessible and of good quality especially for vulnerable groups, such as children, pregnant women and the elderly.¹⁷² It also enjoins the government to ensure participation of the people in the design and implementation of food-related policies.¹⁷³ Government is also enjoined to ensure the provision and maintenance of sustainable food systems.¹⁷⁴

Unregulated food advertising may also contribute to the challenge posed by NCDs. Various commentators have advocated the regulation of food advertising, especially because of its link to obesity in children.¹⁷⁵ Montana et al found that over 40 per cent

169 Liquor Act, Queensland, Australia, 1992; Alcohol Act, Norway, 1989; Alcohol Beverage Control Act, Thailand, 2008; WHO *Addressing the harmful effects of alcohol: A guide to developing effective alcohol legislation* (2011).

170 Cap 278.

171 Sec 3.

172 Sec 5.

173 As above.

174 As above.

175 See eg S Graff et al 'Government can regulate food advertising to children because cognitive research shows that its inherently misleading' (2012) *Health Affairs*, <http://doi.org/10.1377/hltaff.2011.0609> (accessed 29 April 2020); JL Harris & SK Graff 'Protecting young people from junk food advertising:

of children in Spain were either obese or overweight due to the low nutritional value of their food.¹⁷⁶ The authors call for stricter legislation targeting nutritional value food advertisements.¹⁷⁷ Indeed, some countries have developed laws aimed at regulating food advertisement. For example, in India regulations made under the Food Safety and Standards Act, 2006 regulate food business advertisements. Under the Food Safety and Standards (Advertising and Claims) Regulations, 2008, which came into force on 1 July 2019, every food business operator and marketeer is prohibited from using words such as natural, fresh, original, finest, best, authentic, genuine and real.¹⁷⁸ The regulations prohibit companies from encouraging or condoning the excessive consumption of a particular food. In South Africa, regulations made pursuant to the Foodstuffs, Cosmetics and Disinfectants Act provide maximum limits for food, including bread, breakfast cereal and porridge, processed meat, savoury snacks and potato chips.¹⁷⁹

In 2016 Chile implemented a law which was directed at children below the age of 14 years.¹⁸⁰ The law required front-package labels, restricted advertising directed at children, and banned the sale in schools of all foods and beverages containing added sugars, sodium or saturated fats that exceeded set nutrient or calorie limits.¹⁸¹ On the impact of the Chilean law, Taillie et al found that the purchase volume of targeted beverages decreased by 22,8 millilitres per capita per day or 23,7 per cent, after implementation of the law.¹⁸² Massri et al found that as a result of implementation of the law, foods

Implications of psychological research for first amendment law' (2012) 10 *American Journal of Public Health* 214, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483979/> (accessed 29 April 2020); B Reeve & R Magnusson 'Regulation of food advertising to children in six jurisdictions: A framework for analysing and improving the performance of regulatory instruments' (2018) 35 *Arizona Journal of International and Comparative Law* 72.

176 M Montana et al 'Food advertising and prevention of childhood obesity in Spain: Analysis of the nutritional value of the products and discursive strategies used in the ads most viewed by children from 2016 to 2018' (2019) 11 *Nutrients*, doi:10.3390/nu/1122873 (accessed 30 April 2020).

177 As above.

178 AMELEGALS 'India: Food safety and standards (advertising and claims) regulations – A deeper dive into compliance wef July 2019', <https://www.mondaq.com/india/healthcare/823582/food-safety-and-standards-advertising-and-claims-regulations-2018--a-deeper-dive-into-compliance-wef-july2019> (accessed 30 April 2019).

179 WHO 'Policy-Foodstuffs, Cosmetics and Disinfectants Act (54/1972): Regulations relating to the reduction of sodium in certain foodstuffs and related matters; amendment' <https://extranet.who.int/nutrition/gina/en/node/38491> (accessed 1 May 2020).

180 Law 20.606 of 2016.

181 LS Taillie et al 'An evaluation of Chile's law on food labelling and advertising on sugar-sweetened beverage purchases from 2015-2017' (2020) *Public Library of Science Medicine*, <http://doi.org/10.1371/journal.pmed.1003015> (accessed 1 May 2020).

182 As above.

exceeding cut-offs decreased from 90,4 per cent to 15 per cent in 2016.¹⁸³ Thus, Uganda needs legislation that controls or regulates the pervasive advertisement and marketing of sugar-sweetened beverages and other unhealthy food. Higher taxes should also be imposed on these food and beverages to make them less affordable.

Some of the food and beverages on the market may also be counterfeit. A recent study by the Uganda National Bureau of Standards (UNBS) found that 54 per cent of products on the Ugandan market, including food and cosmetics for women, are either counterfeit or substandard.¹⁸⁴ Parliament should debate and pass the Anti-Counterfeit Bill, 2015, after addressing concerns by civil society organisations that the proposed law may limit access to generic drugs which, because of their relative affordability, are essential in the treatment of NCDs. In order to enhance access to medicines, Parliament should also engage the government to utilise TRIPS flexibilities such as compulsory licensing and exploitation of patents by government, which were incorporated in the Industrial Property Act, 2014.¹⁸⁵

Parliament indeed can play a significant role in the promotion of the right to health by legislating against supply factors that exacerbate the NCD challenge. However, as the WHO and the United Nations Development Programme (UNDP) caution, legislators should be aware of the lobbying power of large tobacco, alcohol, food and beverages companies that are likely to thwart any efforts by Parliament to curtail their activities.¹⁸⁶ The WHO and the UNDP have outlined essential elements of legislation on tobacco control, the harmful use of alcohol, an unhealthy diet, physical inactivity and an unhealthy environment.¹⁸⁷ These include increasing taxes on tobacco, alcohol, and sugar-sweetened beverages; regulating advertising, the promotion and sponsorship of ultra-processed foods and beverages; and nutrition labelling on processed foods and beverages.¹⁸⁸ Civil society organisations (CSOs) engaged in tobacco control must hold government accountable to ensure that it resists

183 C Massri et al 'Impact of the food labelling and advertising law banning competitive food and beverages in Chilean public schools 2014-2016' (2019) 109 *American Journal of Public Health* 1294, DOI:10.2105/AJPH.2019.305159 (accessed 1 May 2020).

184 D Wandera '54% of goods on market fake – UNBS' *Daily Monitor* 1 August 2018, <http://www.monitor.co.ug> (accessed 10 May 2019).

185 Secs 58-67. On TRIPS and access to medicines, see BK Twinomugisha 'Implications of the TRIPS agreement for protection of the right of access to medicines in Uganda' (2008) 2 *Malawi Law Journal* 253.

186 WHO & UNDP *What legislators need to know* (2018).

187 WHO & UNDP (n 186) 3-4.

188 As above.

the industry and dedicate resources to the effective enforcement of the Tobacco Control Act.

Tobacco control advocates should also be aware of the fact that tobacco companies are well-resourced and are litigious. Thus, there is a need for defence lawyers – usually government lawyers or state attorneys – to anticipate the likely arguments and strategies of the tobacco industry and to adequately prepare to counter them at an early stage. In order to augment efforts by government lawyers, CSOs, engaged in tobacco control advocacy, may also apply to court to be joined as parties to the suit. A person or professional, with experience in tobacco control strategies, may also apply to court for leave to join the suit as an *amicus curiae*. CSOs should engage the media to ensure that any ‘shady’ or suspect transactions involving the tobacco industry in respect of the suit are duly investigated and exposed. CSOs should sensitise judicial officers and lawyers about the provisions of the WHO Framework Convention on Tobacco Control and the Tobacco Control Act.

4.1.2 *Constitutional rights litigation*

Using examples from India, Columbia and the United States, Magnusson et al illustrate how constitutional rights provisions may be used to challenge actions or omissions by governments and corporations, which are harmful to health.¹⁸⁹ Litigation may be used to hold the relevant industry actors to account for harm caused by their health-related products.¹⁹⁰ The Constitution confers a right on any person who claims that a fundamental right or other freedom guaranteed under the Constitution has been infringed or threatened to petition a competent court for redress, including compensation.¹⁹¹ The Human Rights Enforcement Act, 2019, permits such a person to apply to the High Court for redress.¹⁹²

Indeed, some public-spirited individuals and organisations have challenged violations of health-related rights.¹⁹³ In *Centre for Health, Human Rights and Development & Others v Attorney-General*¹⁹⁴ the petitioners argued that the non-provision of maternal health care commodities in public health facilities violated human rights such as

¹⁸⁹ Magnusson et al (n 152).

¹⁹⁰ As above.

¹⁹¹ Art 50.

¹⁹² Secs 3 & 4.

¹⁹³ See eg *Centre for Health, Human Rights and Development & Others v Attorney-General* Constitutional Petition 16 of 2011; *Centre for Health, Human Rights and Development & Others v Nakaseke District Administration*, Civil Suit 111 of 2012.

¹⁹⁴ Constitutional Petition 16 of 2011.

the rights to life and health. The Constitutional Court dismissed the petition on the ground that it raised political questions into which the Court could not inquire. However, on appeal¹⁹⁵ the Supreme Court referred the case to the Constitutional Court to be determined on its merits. It held that courts have the constitutional mandate to inquire into socio-economic human rights such as the right to health beyond the strict interpretation of the doctrines of separation of powers and political question, and that courts can adjudicate matters of social policy decided by the political branches of the state, namely, the executive and the legislature.

Activities of tobacco companies have also been challenged through litigation using the right to a clean and healthy environment. In *Asiimwe & Others v Leaf Tobacco and Commodities (U) Ltd & Another*¹⁹⁶ the applicants alleged that the activities of the first respondent, which included tobacco processing, the emission of tobacco smoke, dust and smell, violated their right to a clean and healthy environment, which is guaranteed by the Constitution.¹⁹⁷ Counsel for the respondents raised a preliminary objection that there was no cause of action since the applicants had not suffered personal injury. The Court cited the cases of *British American Tobacco Ltd v The Environmental Action Network*¹⁹⁸ and *Advocates for Development and Environment v Attorney-General*,¹⁹⁹ where the Court held that the purpose of article 50(2) of the Constitution is to enable an individual or organisation to protect the rights of others, especially the indigent and vulnerable, although they have not suffered personal injury or a violation of their rights.²⁰⁰ The Court dismissed the preliminary objection and held that the respondents had violated the applicant's right to a clean and health healthy environment.

In yet another case, that of *BAT Uganda Limited v Attorney-General and Centre for Health, Human Rights and Development*,²⁰¹ the petitioner, a tobacco company, challenged the constitutionality of several provisions of the Tobacco Control Act, 2015, including those requiring large picture health warnings, the banning of smoking in public places and workplaces, the banning of all tobacco advertising, promotion and sponsorship, and the prohibition of the

195 Constitutional Appeal 1 of 2013.

196 Miscellaneous Application 43 of 2013.

197 Art 39.

198 Miscellaneous Application 27 of 2003.

199 Miscellaneous Cause 100 of 2004.

200 For a detailed discussion of these cases, see BK Twinomugisha 'Some reflections on judicial protection of the right to a clean and healthy environment in Uganda' (2007) 3 *Law, Environment and Development Journal* 246, <http://www.lead.jurnal.org/content/07244.pdf> (accessed 1 May 2020).

201 Constitutional Petition 46 of 2016.

sale of tobacco products in specified places. The petitioner argued that these provisions, among others, violated the right to practise a lawful trade, business or occupation.²⁰² The Court held that the petitioner's rights were not absolute since they can be limited in the public interest, which includes the protection of public health.²⁰³ Owiny-Dollo DCJ held as follows:²⁰⁴

This petition, I have no doubt in my mind is part of a global strategy by the petitioner and others engaged in same or related trade to undermine legislation in order to expand the boundaries of their trade and increase their profits irrespective of the adverse health risks their products pose to human population ... The petitioner admits that its products when used in accordance with their instructions result into serious adverse effects to their users and others. They also concede that the products they manufacture and sell cause death. Legislation such as the Tobacco Control Act that seeks to protect the public from the adverse effects of the petitioner's products cannot be said to be unconstitutional.

There have also been attempts at challenging the activities of food and beverage companies. In *Centre for Food and Adequate Living v Attorney-General & Another*,²⁰⁵ which has not yet been decided, the applicants allege that the government's failure and omission to restrict the marketing, broadcasting and advertisement of unhealthy foods to children is a violation of the rights to adequate food, health and safety of the children. The applicants are asking the Court for orders, among others, banning the marketing, broadcasting and advertisement of unhealthy food to children.

4.2 Community participation in the prevention and treatment of non-communicable diseases

Participation, which is a cardinal component of the right to health, is recognised in various international, regional and national human rights instruments.²⁰⁶ Participation in the context of this discussion means that citizens have genuine ownership and control over NCD policy development processes at all stages: analysis, design, planning, implementation, monitoring and evaluation. Participation

202 Art 40(2).

203 Art 43 of the Constitution.

204 *BAT Uganda Ltd case* (n 201) 53.

205 Miscellaneous Cause 436 of 2019.

206 Art 21 Universal Declaration; art 25 ICCPR, art 8 ICESCR; arts 7, 8 & 14 CEDAW; arts 4(3), 29 & 33(3) CRPD; and art 13 African Charter. See also arts 1 and 2 of the UN Declaration on the Right to Development, adopted by the UN General Assembly Resolution 41/128 of December 1986; WHO Declaration on Alma-Ata; International Conference on Primary Health Care, Alma-Ata, USST, 6-12 September 1978; and art 38 of the Constitution.

entails active and genuine involvement of citizens in identifying their problems and designing appropriate interventions through collaboration with different stakeholders, including government and its relevant agencies. Thus, participation in the prevention, treatment and management of NCDs does not mean that citizens should depend entirely on their own resources without external support. Government should marshal, invest and direct financial, human and other resources, including seeking international assistance, for integrated preventive and curative care in the context of NCDs and in the spirit of primary health care. Building on their resilience, ingenuity and agency, citizens should be empowered with relevant public health education and information so that they may demand accountability from the state and non-state actors involved in NCD-related programmes. Genuine and active participation should promote citizens' consciousness and awareness of their human rights, including the right to health, to enable them to express their views, interests, grievances and concerns towards the state and other duty bearers.

The challenges posed by neo-liberalism in the context of NCDs are not insurmountable. Building on the philosophy informing the Alma-Ata Declaration,²⁰⁷ government should look at neo-liberal economic policies not only in terms of how they promote economic growth but how they impact on the health and welfare of the people. It should devise health policies that lead to the empowerment of the population and facilitate their active participation. However, as the experiences of China²⁰⁸ and Mexico²⁰⁹ illustrate, for a community participation approach in tackling NCDs to be effective, there should be enhanced support for education, information and communication interventions in the community. Community health centres, especially Health Centres III and IV, should be utilised in NCD detection, diagnosis, treatment and management. The government should create incentives, including transport costs and accommodation, in order to attract a greater number of qualified health professionals at all levels, including in areas that are difficult to reach. Village health teams, which are focused largely on infectious diseases and maternal-child health, might be utilised by health professionals in

207 Alma-Ata Declaration (n 206).

208 N Xiao et al 'A community-based approach to non-communicable chronic disease management within the context of advancing universal health coverage in China: Progress and challenges' (2014) 14 *BMC Public Health*, <https://doi.org/10.1186/1471-2458-14-S2-S2> (accessed 21 April 2019).

209 K Duan et al 'Implementation and clinical effectiveness of a community-based non-communicable disease treatment programme in rural Mexico: A difference-in-differences analysis' (2018) 33 *Health Policy and Planning* 707, <https://doi.org/10.1093/heapol/czy041> (accessed 18 April 2019).

community prevention and the management of NCDs.²¹⁰ There should be an increased investment in public healthcare goods and services, including essential medicines, at all health centres. This entails that government should increase its expenditure on health to the target of 15 per cent as agreed in 2001 by African Union (AU) countries in Abuja to ensure that primary health care is prioritised.²¹¹

The right to participation additionally requires that communities should be able to determine which food to produce and the farming methods and techniques. Participation implies that food sovereignty, and not necessarily the commercialisation of agriculture, should be promoted. Food sovereignty has been defined as

the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and [people's] right to determine their own food and agricultural systems. It puts the aspirations and needs of those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations.²¹²

Food sovereignty goes beyond ensuring that people have enough food to meet their physical needs.²¹³ People should be empowered to produce and enjoy healthy and culturally-appropriate food. Their local production systems should be promoted and supported. Rural women should have power over the seed and be able to pass it over from one generation to the next. Trade liberalisation of seed production, which favours transnational corporations such as Monsanto, should be revisited. Fast food may be dangerous to a person's health. Thus, local, traditional and organic food production and consumption should be prioritised, encouraged, promoted and supported. The state should, through land reform, ensure that peasants and landless people have access to land. They should be empowered to demand seeds and access to water as a public good.

4.3 A gender perspective in non-communicable disease prevention and management interventions

According to Vlassof, the concept of gender 'refers to the array of socially-constructed roles and relationships, personality traits,

210 T Ojo et al 'Exploring knowledge and attitudes toward non-communicable diseases among village health teams in Eastern Uganda: A cross-sectional study' (2017) 17 *BMC Public Health*, <https://doi.org/10.1186/s12889-017-4954-8> (accessed 23 April 2019).

211 OAU 'Abuja declaration on HIV/AIDS, tuberculosis and other related infectious diseases' OAU/SPS/ABUJA/3 (2001) para 26.

212 See Declaration of Nyeleni, Global Forum on Food Sovereignty, Mali, 2007, <https://nyeleni.org/spip.php?article290> (accessed 10 February 2020).

213 As above.

attitudes, behaviours, values, relative power and influence that society ascribes to the two sexes on a differential basis'.²¹⁴ The WHO defines gender in terms of 'the roles, behaviours, activities, attributes, and opportunities that any society considers appropriate for girls and boys, and women and men'.²¹⁵ The gender perspective is critical in analysing how public health challenges such as NCDs affect women and men in the era of neo-liberalism. The perspective is also crucial in assessing how government responds to these challenges. In fact, the ESCR Committee has urged states parties to

integrate a gender perspective in their health-related policies, planning and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.²¹⁶

Studies have found that women and men have different levels of exposure and vulnerability to NCD risk factors.²¹⁷ The WHO observes that NCDs are the leading cause of death among women globally and are responsible for two in every three deaths among women annually.²¹⁸ The role of women in the household may expose them to air pollution – an important contributing risk factor to NCDs.²¹⁹ According to the WHO, household air pollution causes NCDs, including respiratory disease and lung cancer.²²⁰ According to USAID, 'due to their domestic roles, women and girls tend to be more exposed to the smoke, dust and soot caused by cooking solid fuels'.²²¹ They are exposed to second-hand smoke, which is a known risk factor for NCDs.²²² Pregnant women may also experience a series of NCDs related to their reproductive functions, for example, an increase in blood pressure.²²³

214 C Vlassoff 'Gender difference in determinants and consequences of health and illness' (2007) *Health Population Nutrition Journal* 47.

215 WHO 'Gender', www.who.int/health-topics/gender (accessed 11 February 2020).

216 Para 20, General Comment 14.

217 See eg WHO *Women and the rapid rise of non-communicable diseases* (2020); WHO *Non-communicable diseases: A priority for women's health* (2011); Ministry of Health *Non-Communicable Disease Risk Factor Baseline Survey* (2014); WHO *Non-communicable diseases: A priority for women's health and development* (2011).

218 WHO *Global coordination mechanism on the prevention and control of NCDs* (2020), <http://who.int/global-coordination-mechanism/ncd-themes/NCD-and> (accessed 1 May 2020).

219 WHO *Household pollution and health* (2018).

220 As above.

221 USAID *Addressing the unique needs of men and women in non-communicable disease services* (2011) 2.

222 As above.

223 See eg L Hinkosa et al 'Risk factors associated with hypertensive disorders in pregnancy in Nekemte referral hospital from July 2015 to June 2017, Ethiopia:

USAID has observed that gender relations ‘affect accessibility to preventive care and treatment for NCDs’.²²⁴ The underlying ‘gender-related power inequalities have implications for NCD treatment, as women and girls may depend on their husbands or partners for health care decision-making, access and expenditures’.²²⁵ Although studies reveal that women are more likely to seek health care than men, other factors such as income poverty may inhibit their access to health care.²²⁶ Women experience fewer apparent symptoms of cardiovascular diseases than men and, consequently, are less likely to be diagnosed and treated.²²⁷ The majority of the world’s poor are women, who are least able to afford funds for NCD treatment. When a household has money available for health care, these funds may be spent on men’s health needs.²²⁸ Women may also have an unequal say in decisions pertaining to health expenditures.²²⁹ Women often are sole caregivers for those with NCDs and their care-giving and other types of informal work are unpaid or underpaid. This situation may be exacerbated by neo-liberal policies that impose charges for health care, including NCD prevention, treatment, care and support.

Thus, integrating a gender perspective in health interventions is critical since NCDs affect men and women differently. There are even gender-specific NCDs, which require specifically-designed interventions. For example, while some women suffer from cervical cancer, prostate or testicular and penile cancers are specific to men. Thus, as USAID has recommended, it is critical that data should be collected for men and women disaggregated by sex, and analysed through a gender perspective.²³⁰ Policies and other interventions based on this data should address the different NCD prevention, screening, treatment and management needs of men and women. All these policies and interventions should be guided by the right to health framework.

Case control study’ (2020) 16 *BMC Pregnancy and Child Birth* 20; A Nakimuli et al ‘The burden of maternal morbidity and mortality attributable to hypertensive disorders in pregnancy: A prospective cohort study from Uganda’ (2016) *BMC Pregnancy and Childbirth* 16.

224 As above.

225 As above.

226 Centre for Disease Control and Prevention ‘The health consequences of smoking: 50 years of progress’, <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> (accessed 10 April 2019).

227 HA de Von et al ‘Symptoms across the continuum of acute coronary syndromes: Differences between women and men’ (2008) 17 *American Journal of Critical Care* 14.

228 BK Twinomugisha ‘Protection of rural poor women’s right of access to maternal health care in Uganda: The case of Kashambya sub-county’ unpublished LLD thesis, Makerere University, 2005 102.

229 As above.

230 USAID (n 221) 3.

5 Conclusion

The main objective of the article was to reflect on how the right to health framework may be used to tackle non-communicable diseases in the era of neo-liberalism in Uganda. The state has obligations to respect, protect and fulfil the right to health. As part of its obligation to protect human rights, the state should ensure that activities by private persons, including tobacco, alcoholic, food and beverage industries, do not adversely affect the realisation of the right to health. The state should devise juridical, administrative and other appropriate measures to ensure that activities of these industries do not escalate the NCD trajectory in the country. Such measures should target unhealthy commodity industries as the major drivers of NCDs through regulation, taxation, pricing, product bans, and restrictions on advertising and sponsorship.

Current prevention, control and management efforts that frame the question of NCDs as apolitical by focusing primarily on individual behaviour or lifestyle changes are likely to fail unless structural factors that shape the NCD burden are tackled. Prevention measures through lifestyle changes are critical for the patient and health system. A person's choice and behaviour play a crucial part in explaining the outset of NCDs. However, the political, economic and social context in which the diseases are located and reproduced cannot be ignored. The role of the social determinants of health, including poverty, gender and social inequalities, the level of education, nutrition, and environmental conditions, should be recognised. The contribution of processes such as trade liberalisation and the marketing activities of transnational corporations to the burden of NCDs should also be recognised.

Under neo-liberalism, public health has been moved into the private sphere. The state must intervene and reclaim its place in the socio-economic sphere. Neoliberal policies of privatisation and liberalisation should be revisited. In the absence of social protection measures and other safety nets, there is an urgent need to treat health as a public good especially for the poor and vulnerable – those who cannot by their own means afford the high cost of NCD-related care. Heavily-subsidised universal health insurance may also be considered. The production and consumption of locally-produced organic foods should be promoted. Thus, the food sovereignty of the people should be promoted. Small-scale farmers should be supported with the necessary agricultural implements to enable them produce sufficient food for their families. The government may even consider the delicate and complex question of land redistribution to ensure

that peasants, rural women and landless people have access to and control of land for food production.

Gender relations affect accessibility to preventive care and treatment for NCDs. The underlying gender-related power relations and inequalities have implications for NCD prevention and treatment. Thus, a gender perspective should be incorporated in all health policies and other interventions since NCDs may affect men and women differently. Communities should be empowered to ensure that they may meaningfully participate in NCD related interventions.

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The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years

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Summary: *Several African countries have recently adopted fairly democratic constitutions. An emerging trend in these constitutions is the establishment of constitutional courts or constitutional councils as key institutions for human rights protection. However, the adoption of fairly democratic constitutions sometimes is not complemented by the democratisation of politics, as autocratic governments remain in place after the adoption of a new constitution. When this happens, these countries' constitutional courts become key sites of human rights protection struggles, as many turn to public interest litigation in an effort to protect human rights. Using the Constitutional Court of Zimbabwe as a case study, the article investigates the behaviour of these courts and their reliability as human rights protection institutions, when they operate under autocratic political conditions. The article makes use of the systemic level factors theory as a conceptual framework for analysing the jurisprudence of this Court. It identifies trends in the manner in which this*

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Court has handled high-level profile human rights cases that involve the interests of the ruling party or government. These trends are that in the majority of cases the Court has ignored the Constitution and delivered judgments that are meant to protect the government from certain political risks. In a few cases the Court appeared to be bold enough to enforce the Constitution, but a closer analysis of these cases reveals that the Court decided in that manner because the reconfigured political strategy of the ruling party and the internal factional contestations in the ruling party required or permitted the Court to make those decisions. The article concludes that the performance of the Constitutional Court of Zimbabwe thus far paints a gloomy picture as far as its reliability and utility as a guardian of human rights and democratic institutions under the current autocratic regime in Zimbabwe are concerned.

Key words: *Constitutional Court of Zimbabwe; systemic level factors theory; human rights protection; democratisation of politics; politically-sensitive cases; autocratic governments; public interest litigation*

1 Introduction

The past two decades have seen a number of African countries adopting fairly democratic constitutions. These countries include Zimbabwe,¹ Niger² and Senegal.³ A common feature in these constitutions is that they provide for the establishment of a constitutional court or a constitutional council with exclusive jurisdiction to adjudicate on certain key human rights matters such as presidential election petitions and disputes relating to the interpretation of the constitution, as well as the validity of legislation.⁴ In some instances,⁵ although lower courts can adjudicate on disputes relating to the interpretation of the constitution and the validity of

1 Adopted a new Constitution in 2013 which is regarded to be fairly democratic. See JA Mavedzenge & D Coltart *A constitutional law guide towards understanding Zimbabwe's fundamental socio-economic and cultural human rights* (2014) 5-22.

2 Adopted a new Constitution in 2010 which guarantees democratic principles, rights and tenets. For a more detailed assessment, see Freedom House 'Freedom in the World Report' (2020) <https://freedomhouse.org/country/niger/freedom-world/2020> (accessed 19 June 2020).

3 Adopted a new Constitution in 2001 which is regarded to be fairly democratic. See Freedom House 'Freedom in the World Report' (2020) <https://freedomhouse.org/country/senegal/freedom-world/2019> (accessed 19 June 2020).

4 See secs 166 and 167 of the Constitution of Zimbabwe of 2013; see art 120 of the Constitution of Niger of 2010; see art 92 of the Constitution of Senegal of 2001.

5 Eg, in Zimbabwe the High Court has the power to interpret the Constitution as well as to declare the invalidity of legislation. However, the Constitutional Court wields the power to make the final judgment on such matters. See sec 167(3) of the Constitution of Zimbabwe of 2013.

legislation, the constitutional court or the constitutional council is mandated to pass the final judgment on such matters.

Constitutions provide for the establishment of specialised constitutional courts or constitutional councils in order for such courts to serve as guardians of democratic institutions, constitutionalism and fundamental rights.⁶ However, the adoption of these new and fairly democratic constitutions sometimes is not complemented by the democratisation of politics. In some countries⁷ autocratic governments remain in place after the adoption of a new constitution, while in others⁸ political parties and leaders that win elections after making democratic promises and commitments renege on those promises when they come into power. When this happens, the constitutional courts become key sites of human rights protection struggles, as many people turn to public interest litigation in an effort to protect their constitutional rights from being violated by the autocratic governments. It appears that there is an expectation that, notwithstanding the autocratic political conditions, these courts should be bold and protect the rights and the constitution. It therefore is necessary to study the behaviour of these courts when handling high-profile human rights cases and to examine their reliability as human rights protection institutions when they operate under autocratic political conditions. For reasons of space limitations this article focuses on analysing the behaviour of the Constitutional Court of Zimbabwe.

Zimbabwe is a pertinent case study as the country experienced a positive constitutional change in 2013, when its citizens adopted a fairly democratic Constitution. This Constitution was meant to activate a break from the autocratic past and facilitate a transition into a democratic future. However, the constitutional change in this country was not complemented by any significant political change in the sense that the party that had governed prior to the constitutional change remained in power and continued with its autocratic style

6 Similar observations have been made by other scholars. Eg, see A Harding 'The fundamentals of constitutional courts' (2017) *International IDEA* 2. Similar views have been expressed in relation to comparative jurisdictions outside of Africa. See W Sadurski *Rights before courts: A study of constitutional courts in post-Communist states of Central and Eastern Europe* (2005) 6-7.

7 Eg, in Zimbabwe. The ZANU PF party won the elections after the adoption of the new Constitution in 2013 and it continued governing through autocratic means. See Freedom House 'Freedom in the World Report' (2020), <https://freedomhouse.org/country/zimbabwe/freedom-world/2020> (accessed 17 June 2020).

8 Eg, in Niger the current leader was democratically elected in 2011 and reelected in 2016, but appears to have reneged on his democratic commitments as government clamps down on civil liberties on the pretext of fighting terrorism. See Freedom House (n 2).

of governance. The Constitutional Court, which enjoys extensive judicial review powers, has become a key site of human rights protection struggles as individuals seek to rely on this Court to protect their constitutional rights from violation by the government. In this article I assess whether (based on its performance in the past six years) the Zimbabwean Constitutional Court has proved itself to be a reliable court that is prepared to enforce the Constitution and protect human rights, notwithstanding the autocratic political conditions under which it operates.

2 Systemic level factors theory as a conceptual framework for identifying trends in the Constitutional Court's attitude in high-profile cases

Various studies⁹ reveal that even though Zimbabwe adopted a fairly democratic Constitution in 2013, the country has remained under an autocratic regime. In countries that are governed by autocratic regimes, judiciaries may have their independence guaranteed in the constitution, but in practice the courts are hardly independent to enforce the law in cases where the interests of the ruling party and government are at stake. This has led VonDoepp and Ellett to develop the systemic level factors theory as a conceptual framework for analysing the attitude of courts when handling politically-sensitive cases in autocratic jurisdictions.¹⁰ The central thesis of this theory is that in a dictatorship there are factors within the political system that influence how courts ultimately decide in cases that are politically sensitive.¹¹ These factors have nothing to do with the law but have everything to do with the nature of political risks posed to the regime by the case.¹² The law is used only to justify a predetermined political outcome. According to VonDoepp and Ellett, where the case poses a serious risk to the regime, the court is likely to decide in favour of the ruling party in order to preserve the regime's hold on state power, even if doing so is in violation of the law. The Constitutional Court of Zimbabwe has often been accused of this.¹³ To what extent is this

9 See eg Freedom House 'The Freedom in the World 2018 Report', <https://freedomhouse.org/report/freedom-world/2018/zimbabwe> (accessed 10 June 2019). Also see Freedom House (n 7).

10 P VonDoepp & R Ellett 'Reworking strategic models of executive-judicial relations: Insights from new African democracies' (2011) 43 *Comparative Politics* 147-165.

11 VonDoepp & Ellett (n 10) 150.

12 As above.

13 M Krönke 'Bounded autonomy: What limits Zimbabweans' trust in their courts and electoral commission?' (2018) *Afro Barometer's Policy Paper* 52.

true of the Zimbabwean Constitutional Court when one examines its decisions and reasoning in politically-sensitive cases since 2013?

2.1 Political risk as a factor in the Constitutional Court's adjudication

It seems that the Court has made decisions based on political considerations, particularly to protect the ruling party from certain political risks posed by the case brought before the Court. Such considerations appear to have loomed large in the Court's reasoning when the following questions or disputes were brought before it: disputes relating to election dates; the determination of the independence of the election management body; and challenges to the legality of the military action which culminated in the resignation of President Mugabe. In the cases quoted below I demonstrate this by discussing how the Court dealt with these questions.

2.1.1 *Jealous Mawarire v Robert Mugabe*

In this case¹⁴ the Court was petitioned to declare that a general election be held no later than 30 June 2013. The background to this case was that in the previous elections held in 2008, ZANU PF had lost parliamentary majority to the opposition. The presidential election had produced an inconclusive outcome, leading to a political settlement facilitated by the Southern African Development Community (SADC) which saw the then ruling party (ZANU PF) sharing power with the opposition in a government of national unity (GNU). One of the key deliverables for the GNU was to institute electoral reforms in order to ensure that the elections to follow in 2013 would be free, fair and credible.¹⁵ However, ZANU PF continued to stall these reforms, and in 2013 it demanded that elections be held immediately, without reforms, arguably because the party was not confident of winning those elections if they were to be held in a free and fair environment to be created through the intended electoral reforms.¹⁶ The party controlled the presidency and sought

14 *Jealous Mawarire v Robert Mugabe* CZ1/13.

15 L Tatira & T Marevesa 'The Global Political Agreement (GPA) and the persistent political conflict arising there from: Is this another manifestation of the council of Jerusalem?' (2011) 3 *Journal of African Studies and Development* 188.

16 B Raftopoulos 'An overview of the GPA: National conflict, regional agony and international dilemma' in B Raftopoulos (ed) *The hard road to reform: The politics of Zimbabwe's Global Political Agreement* (2013) 20-21. Also see B Raftopoulos 'The 2013 elections in Zimbabwe: The end of an era' (2013) 39 *Journal of Southern African Studies* 971.

to use that office to set the dates for the elections.¹⁷ However, SADC became an impediment to this strategy because the regional block had resolved that it would not support elections in Zimbabwe until all the electoral reforms had been implemented.¹⁸ ZANU PF was reluctant to hold the election without SADC's endorsement. In May 2013 a citizen brought an application before the Constitutional Court, petitioning the Court to order then President Robert Mugabe to set a date for elections and that the elections be held by 29 June 2013. To some this appeared to be a ZANU PF strategy of using the Constitutional Court to set the election date.¹⁹ Whether or not this is true remains debatable but what is certain is that ZANU PF would greatly benefit politically if the Court were to grant this application. In his affidavit filed in response to the application, President Mugabe concurred with the applicant that elections should be held by 29 June 2013. The opposition parties opposed the application, arguing that the country had up to 30 October 2013 to conduct elections. This would give the country enough time to implement the electoral reforms, so argued the opposition.

The crux of the political issue here was that ZANU PF wanted elections to be held immediately (by 29 June 2013) so that there would not be time to institute the intended electoral reforms, while the opposition wanted elections to be held later, on 30 October 2013, in order to allow time for reforms to be instituted.²⁰ However, the legal question before the Court was, given that the tenure of Parliament would expire on 29 June 2013, what the deadline was for the next general election.²¹ Whether there would be enough time to implement electoral reforms depended on the Court's interpretation of the law regulating the scheduling of the next election.

The country was in transition from the former to the new Constitution. The legal answer to the above question depended

17 The then ZANU PF leader, Robert Mugabe, was the State President and he had the power to declare the date for the next general election in terms of sec 63(4) of the then Constitution of Zimbabwe of 1979.

18 See 'SADC Communiqué', <http://www.veritaszim.net/node/17> (accessed 10 June 2019). Also see Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 974.

19 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 976. Also see G Manyatera & C Hamadziripi 'Electoral law, the Constitution and democracy in Zimbabwe: A critique of Jealousy *Mbizvo Mawarire v Robert Mugabe NO & 4 Ors CCZ 1/13*' (2014) *Midlands State University Law Review* 72-83; also see D Matyszak 'New bottles – old wine: An analysis of the Constitutional Court judgement on election dates' *Research and Advocacy Unit* 18 May 2017, <http://researchandadvocacyunit.org/blog/2017/07/07/new-bottles-old-wine-analysis-constitutional-court-judgement-election-dates> (accessed 10 June 2019).

20 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 971-972.

21 *Mawarire v Mugabe NO & Others CCZ1/13* (2013) 4.

on section 58(1) of the former 1979 Constitution which stated as follows:

A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

The grammatical meaning of section 58(1) of the Constitution simply is that elections should be held within four months 'after' the dissolution of Parliament. Parliament dissolves either by proclamation of the President or by operation of law.²² Whichever way Parliament dissolves, elections should be held within four months 'after' such dissolution. In the majority judgment the Court admitted that this was the grammatical meaning of section 58(1) of the Constitution.²³ However, it rejected this as the appropriate interpretation. The Court held that the constitutional provision had to be given a purposive interpretation.²⁴ According to the Court, a grammatical meaning would allow a situation where Zimbabwe would be governed without the legislature and that would be an absurd interpretation which the framers of the Constitution could never have intended.²⁵ The Court fashioned what it termed a purposive meaning, which is that elections should be held no later than the first day after Parliament had dissolved.²⁶ As a result of this, the Court granted the application and ordered that elections be held by 31 July 2013. President Mugabe proceeded to set 31 July 2013 as the date for the elections, which was his party's preferred timeframe for the election.²⁷ When requested by the SADC to postpone elections in order to allow time for reforms to be implemented, President Mugabe argued that his hands were tied by the Court's ruling and that, therefore, elections had to be held by 31 July 2013.²⁸

The problem with this decision is not necessarily that the Court ruled in favour of the dominant party (ZANU PF) but that the decision was contrary to what the Constitution dictated. Whilst courts are permitted to disregard the grammatical meaning of the constitutional provision in order to generate a purposive interpretation, they cannot do so if the constitutional provision in question is written in simple,

22 Sec 58(1) of the Constitution of Zimbabwe 1979.

23 *Mawarire* (n 21) 10-11.

24 *Mawarire* 16-18.

25 *Mawarire* 15-16.

26 *Mawarire* 23-24.

27 As he and his party had indicated in their pleadings in court. See *Mawarire* (n 21).

28 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 976-977.

straightforward grammar which admits to only one unambiguous meaning.²⁹ Disregarding the unambiguous meaning of a legal provision is akin to usurping the legislative powers and therefore is a violation of the separation of powers. Section 58(1) of the Constitution is so grammatically clear that the framers of the Constitution could not have intended something else other than what they clearly and in simple language said. By expressly stating that elections should be held within four months after the dissolution of Parliament, the framers knew and, therefore, contemplated the possibility that the country could be governed for a certain transitional period without the legislature. Thus, section 58(1) of the Constitution was incapable of the 'purposive interpretation' which the Court attached to it. This led to Malaba DCJ (as he then was) to write a dissenting judgment in which he heavily criticised the majority judgment for essentially being a political judgment.³⁰ It therefore seems that the approach adopted by the majority judges (when interpreting the law) in this case was contrary to the Constitution, but it appears to be congruent with the political interests of the dominant party in government. If the Court had given the law its deserved grammatical meaning, it would have arrived at a decision which would have meant that Zimbabwe did not need to rush into an election. This would have compelled the country to cooperate with the SADC to implement the intended electoral reforms until 30 October 2013. This could have created political conditions which would possibly have made it difficult for ZANU PF to win the elections and retain state power.³¹ Therefore, it seems that the Court allowed the Constitution to be violated by stampeding the country into an election in order to avert a perceived political risk that was facing the ruling party (ZANU PF) at that time.

2.1.2 *Mavedzenge v Minister of Justice*

Four years later the Court took a strikingly similar approach in the case of *Justice Mavedzenge v Minister of Justice*.³² The background to this case was that Zimbabwe in 2013 had adopted a new Constitution. Through section 232(a) the Constitution establishes the Zimbabwe Electoral Commission (ZEC) as one of the 'independent commissions' and gives it an exclusive mandate to administer all elections into public office. The Constitution guarantees ZEC's independence by stating the following in section 235:

29 I Currie & J de Waal *The Bill of Rights handbook* (2013) 135.

30 See the dissenting judgment of Malaba DCJ in the case of *Mawarire* (n 21) 28-29.

31 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 971-976-977.

32 CCZ 05/18.

The independent commissions are (a) independent and are not subject to the direction or control of anyone ... (c) must exercise their functions without fear, favour or prejudice although they are accountable to Parliament for the efficient performance of their functions.

The Electoral Act,³³ which is the main legislation governing the conduct of elections, gives ZEC the power to make administrative regulations to facilitate the management of elections. To that effect, section 192(6) of this Act provides as follows:

Regulations made in terms of subsection (1) and statutory instruments made in terms of subsection (4) *shall not have effect until they have been approved by the Minister and published in the Gazette.*

Essentially this means that the ZEC can only develop draft regulations but these must be approved by the Minister before the ZEC can proclaim them as regulations governing elections. In *Mavedzenge* the applicant petitioned the Court to declare section 192(6) of the Act unconstitutional. The matter was heard on 5 July 2017, but the judgment was delivered a year later on 31 May 2018 – barely two months before the next general election. By this time the country had undergone a ‘*coup*’ which saw the then President Robert Mugabe being replaced by President Emmerson Mnangagwa. Following this ‘*coup*’ ZANU PF had split and one of the factions joined forces with the opposition. Thus, at the time the Court’s judgment was delivered, President Mnangagwa and the ruling party ZANU PF were facing their biggest opposition in an election since 1980³⁴ and they needed to do all they can to win the election.

Meanwhile, in *Mavedzenge*, the crux of the applicant’s case was that by requiring the Minister’s approval first before the election management body (ZEC) can proclaim regulations, section 192(6) of the Electoral Act prevented the ZEC from exercising its function to promulgate electoral regulations independent of direction, control or interference from the Minister. The Minister, acting on behalf of government, opposed the application and advanced two main arguments. The first was that the Minister’s powers (to approve regulations drafted by the ZEC before they can be proclaimed) were constitutionally valid because the Minister is the executive member responsible for the administration of the Electoral Act and, therefore, the Minister is the one answerable to Parliament

³³ Ch 2:13.

³⁴ N Beardsworth et al ‘Zimbabwe: The coup that never was and the election that could have been’ (2019) 118 *African Affairs* 584. Also see D Moore ‘The bar for success is low, but the stakes in Zimbabwe’s elections are high’ *News* 23 July 2019, <https://www.iol.co.za/news/opinion/the-bar-for-success-is-low-but-the-stakes-in-zimbabwes-elections-are-high-16192724> (accessed 10 June 2019).

concerning the regulations developed by the ZEC.³⁵ The Minister further argued that because the ZEC cannot account directly to Parliament, the Minister has to account to the legislature on behalf of the ZEC. When accounting to Parliament, the Minister must be able to take responsibility for the regulations. He cannot do so if he does not approve of the regulations, so argued the Minister.³⁶ Lastly, the Minister argued that the powers given to his office in terms of section 192 (6) of the Electoral Act were necessary to ensure that the process of making and promulgating regulations does not ignore 'government policy'.³⁷

The central legal question to be determined by the Court was whether the power given to the Minister 'to approve regulations' was constitutionally valid in light of the constitutional guarantee of the independence of the election management body – the ZEC.³⁸ The literal meaning of section 192(6) of the Act is that the Minister can approve or disapprove the regulations drafted by the election management body. If this grammatical interpretation was to be accepted by the Court, then section 192(6) of the Act would be deemed unconstitutional as it gives the Minister the power to interfere with the administrative functions of an independent election management body. However, the Court rejected this grammatical meaning and held that the impugned provision must be given a purposive interpretation. According to the Court, a purposive interpretation of the impugned provision implies that the Minister does not necessarily enjoy the power to veto the regulations proposed by the election management body, but he simply checks the draft regulations to ensure that they comply with the law.³⁹ On that basis the Court ruled in favour of the Minister, thereby allowing him to continue to enjoy such powers over the election management body. Further, the Court held that applicant had not provided evidence to show that the Minister had used his powers to influence the election management body to proclaim regulations that are biased in favour of the Minister's party.⁴⁰

The approach taken by the Court and its decision seem to be contrary to the Constitution. Section 192(6) of the Electoral Act is so unambiguous that it admits only one logical meaning. When a Minister

35 See para 2.4(a) of the first respondent's opposing affidavit, <https://constitutionallythinking.wordpress.com/constitutional-litigation-cases/> (accessed 10 June 2019).

36 First respondent's opposing affidavit (n 35) para 17.

37 First respondent's opposing affidavit (n 35) para 21.

38 *Mavedzenge v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 05/18 (2018) 8.

39 *Mavedzenge* (n 38) 8-9.

40 *Mavedzenge* (n 38) 8.

enjoys the power to approve something before it can happen, it simply means that he or she also has the power to disapprove it and, if he disapproves it, then that thing will not happen. The election management body will not promulgate regulations if the Minister does not approve the draft submitted to him. There seems to be no logical legal reason why the Court rejected this clear interpretation. Arguably, there was a political reason to do so. If the Court had accepted this interpretation, it would have left it with no choice but to strike down this provision and the political consequence would be such that the governing party (ZANU PF) would lose control over the electoral commission's regulation-making process. Potentially this would bring about catastrophic consequences to the ruling party, especially at this time when it was facing its biggest opposition.⁴¹ To avoid this, it seems that the Court had to invent a purposive meaning of an otherwise clear and unambiguous legal provision. Thus, it seems that the Court failed to enforce the Constitution and protect the independence of the election management body. Instead, it appears that the Court allowed the Constitution to be violated in order to allow the ruling party to maintain its control over the election management body.

2.1.3 *Liberal Democrats v President of the Republic of Zimbabwe*

This case⁴² was decided at the backdrop of a military action against the then President Robert Mugabe's government. Before the military action, the ruling party (ZANU PF) had been embroiled in a serious internal factional battle as two groups fought to succeed the then ageing President Mugabe. One faction appeared to be led by the then Vice-President Emmerson Mnangagwa, while the other faction seemingly was led by President Mugabe's wife, Grace Mugabe. President Mugabe appeared to have taken sides with the 'Grace Mugabe faction' when he expelled Vice-President Emmerson Mnangagwa from government.⁴³ President Mugabe sought to change the leadership of the military in order to neutralise the army's support for the 'Emmerson Mnangagwa faction'.⁴⁴ However, before he could do that, a *coup* was mounted against him. Between 14 and 15 November 2017 military tankers and heavily-armed soldiers were deployed in the streets of Harare and around national key points. Members of the police and central intelligence (believed to be in support of President Mugabe) were disarmed and ordered

41 Moore (n 34).

42 CCZ 7/18.

43 D Rodgers *Two weeks in November: The astonishing untold story of the operation that toppled Mugabe* (2019) 92.

44 Rodgers (n 43) 152. Also see Beardsworth et al (n 34).

to vacate the streets they were patrolling.⁴⁵ A senior military official appeared on the state radio and television station, announcing that the military had moved in to secure a deteriorating situation where the President had abdicated his constitutional duties to unelected 'criminals', referring to politicians in the 'Grace Mugabe faction'.⁴⁶ He also announced that what was happening was not a *coup* but that the military intended to arrest the 'criminals' around the President, and he promised that the situation would return to normalcy once these 'criminals' had been arrested. The military action was followed by massive public protests in Harare, calling for President Mugabe to resign. A number of senior politicians from the 'Grace Mugabe faction' were forced into exile while others were arrested and detained by the military.⁴⁷ A few days later Parliament convened to impeach President Mugabe but before this could happen, President Mugabe tendered his resignation. Mr Emmerson Mnangagwa was subsequently appointed by ZANU PF as the successor to President Mugabe and he assumed the office of State President.

A few months later a citizen joined hands with an opposition political party to challenge the constitutionality of Mr Mnangagwa's appointment as State President. The crux of the applicants' petition was that Mr Mnangagwa's appointment was necessitated by former President Mugabe's resignation which was necessitated by the unconstitutional military deployment and action against his government.⁴⁸ Applicants added that the military deployment was unconstitutional because it had not been sanctioned by the President.⁴⁹ The applicants further contended that President Mugabe was forced to resign as a result of the illegal military deployment and that, therefore, Mr Mnangagwa's appointment to replace President Mugabe was a constitutional nullity. Applicants sought, among other things, the Constitutional Court to order the establishment of a transitional government which would organise free and fair elections to pave the way for Zimbabwe's return to constitutional rule.⁵⁰

The question of whether or not the military deployment was constitutionally valid depended on one's interpretation of section 213 of the Constitution, which provides as follows:

45 Rodgers (n 43) 169-170.

46 The full speech is available at <https://www.youtube.com/watch?v=eQyV2IVqKsl> (accessed 10 June 2019).

47 Rodgers (n 43) 218-219.

48 *Liberal Democrats & Others v President of the Republic of Zimbabwe & Others* CCZ 7/18 (2018) 3.

49 *Liberal Democrats* (n 48) 6.

50 *Liberal Democrats* (n 48) 3.

- (1) Subject to this Constitution, only the President, as Commander-in-Chief of the defence forces, has power –
 - (a) to authorise the deployment of the Defence Forces; or
 - (b) has power to determine the operational use of the Defence Forces.
- (2) With the authority of the President, the Defence Forces may be deployed in Zimbabwe.

Thus, only the President can authorise the deployment of the military, and in this case he had neither deployed the soldiers nor authorised their actions. However, it has been argued that the military commanders deployed the army out of necessity, in order to restore the constitutional order that had been deposed by the unelected members of the 'Grace Mugabe faction', who allegedly had usurped executive authority.⁵¹ The doctrine of necessity is an extreme form of defence which requires those who plead it to adduce clear and credible evidence that the constitutional order had been deposed or was about to be overthrown and that, therefore, the military intervention was not only desirable but necessary.⁵² While it was clear that the 'Grace Mugabe faction' was close to the then President and enjoyed his support, those who have pleaded the doctrine of necessity have not produced any tangible evidence of unelected individuals who had usurped presidential powers. In the absence of such evidence, the doctrine of necessity cannot stand as a justification for the illegal military intervention in what was an internal party succession battle.

Thus, it seems that the impugned military deployment could not pass constitutional scrutiny when analysed through either the application of section 213 of the Constitution or the doctrine of necessity. However, the Court refrained from engaging in any interpretation of section 213 of the Constitution or the doctrine of necessity. Rather, it held that

[t]he question of the lawfulness of the military action of 14 and 15 November 2017 was determined by the High Court. In the case of *Sibanda & Anor v President of the Republic of Zimbabwe NO & Ors* HC 1082/17 [where the Court ordered that] The actions of the Defence Forces of Zimbabwe ... are constitutionally permissible and lawful in terms of section 212 of the Constitution of Zimbabwe in that (a) they arrest the first respondent's [President] abdication of constitutional function, and (b) they ensure that non-elected individuals do not

51 See the order of the High Court in *Sibanda & Another v President of the Republic of Zimbabwe NO & Others* HC 1082/17 (2017) which is also reproduced in *Liberal Democrats* (n 48) 6.

52 R Dahal 'Doctrine of necessity and its application in Nepalese constitutional law: An overview' 9 April 2012, <https://ssrn.com/abstract=2037059> (accessed 10 June 2019).

exercise executive functions which can only be exercised by elected constitutional functionaries.⁵³

Therefore, it was strange that a Constitutional Court, which is supposed to be the chief protector of the Constitution, adopted a vague order made by a subordinate court. Some may argue, as the Court did,⁵⁴ that the applicants should have appealed against the existing order that had been made by the subordinate court (the High Court). An appeal was impossible in this instance because the High Court did not deliver a full judgment with reasons, but only issued an order exonerating the military action of any constitutional invalidity. To date, there is no publicly-accessible written judgment to explain this order. Considering the constitutional importance of the question that had been placed before the judges by the applicant, the Constitutional Court ought to, at the very least, have engaged critically with both the Constitution and the High Court order and demonstrate why the military action should be deemed constitutionally valid.

Furthermore, the decision by the Court to refuse to engage with this question on account that the applicant should have appealed against the High Court order is inconsistent with the Court's own practice in previous cases, where it accepted to determine constitutional questions brought directly before it, without appealing against decisions by lower courts where similar questions would have been dealt with.⁵⁵

It seems that the decision to ignore any engagement with section 213 of the Constitution or the doctrine of necessity was made in order to justify the Court's decision to validate Mr Mnangagwa's appointment as State President. Section 213 of the Constitution is written in language that is clear and unambiguous to the extent that it renders unconstitutional any military deployment that is done outside of the President's authority. The doctrine of necessity could not be pleaded without hard evidence. Section 212 of the Constitution, on which the military sought to rely for its actions, did not give the army the power to deploy itself. It simply states that '[t]he function of the Defence Forces is to protect Zimbabwe, its people,

53 *Liberal Democrats* (n 48) 6.

54 *As above*.

55 *Eg, in In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* CCZ 13/2017 (2015) para 4 the Court stated that it accepted to determine the question whether the Prosecutor-General's independence was absolute or not even although a similar question had arisen in a case heard and determined by the High Court in two different cases. The Court acknowledged this but nevertheless proceeded to determine the question brought before it as it was in the interests of justice to do so.

its national security and interests and its territorial integrity and to uphold this Constitution'. In this case, the military failed to uphold the Constitution because it deployed itself without the authority of its commander-in-chief. All this pointed towards the illegality of the military intervention.

The constitutional validity of Mr Mnangagwa's appointment as President would logically be difficult to legally justify if the Court had found the military action preceding his appointment to be illegal. Thus, the Court seems to have made a strategic decision to avoid engaging with the Constitution in dealing with this question and in the result made a ruling in favour of the ruling party. In doing so, the Court seems to have engaged in procedural avoidance (avoiding to deal with a legal question brought before it) in order to avert a political risk to both President Mnangagwa and the entire regime's continued stay in power.

2.1.4 *S v Mwonzora*

The background to this case⁵⁶ is that a senior opposition politician, Mr Douglas Mwonzora, had been charged for insulting and undermining the authority of the President, in contravention of section 33(2)(a) of the Criminal Law Code (the insult law), which provides as follows:

Any person who publicly, unlawfully and intentionally –

- (a) makes any statement about or concerning the President or any acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may –
 - (i) engender feelings of hostility towards, or
 - (ii) cause hatred, contempt or ridicule of; the President or any acting President, whether in person or in respect of the President's Office

shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.

Mr Mwonzora had uttered the following statement at a political rally:⁵⁷

President Robert Mugabe *chikwambo uye achamhanya ... Ndawona Mugabe achigeza, tauro muchiuno, sipo muhapwa uye ndebvu hwaapepe ... Pamberi ne MDC. Pasi nechihurumende chembavha chinosunga vanhu vasina mhosva chichitora zvinhu zvavo ...*

⁵⁶ CCZ 17/2016.

⁵⁷ *S v Mwonzora* CCZ 17/2016 (2016) 2.

[literally translated to: President Robert Mugabe is a goblin and will run ... I saw Mugabe bathing, towel on waist, soap under his armpits and big beard ... Forward with MDC, down with bad government of thieves which arrest innocent people and taking away their property].

It was the state's case that by referring to the President as a goblin, Mr Mwonzora had uttered a false statement, with the knowledge that there was a real risk that the statement was false and that it could engender feelings of hostility towards the President in person or in respect of his office.⁵⁸ Mr Mwonzora was now being tried in the magistrate's court. During the trial Mr Mwonzora challenged the constitutionality of the offence of insulting the President. The presiding magistrate referred the challenge to the Constitutional Court, specifically requesting the Court to determine the constitutionality of the crime of insulting the President, in light of the fact that the Constitution guarantees the freedom of expression for every individual.⁵⁹

The Constitutional Court refused to directly adjudicate on that question. Instead, it decided that the appropriate approach is to first assess whether in this particular case Mr Mwonzora had actually committed the crime which he was alleged to have committed and, if so, then the Court could determine the constitutional question tendered before it.⁶⁰ The Court found that, based on the charge sheet, Mr Mwonzora had not committed the said offence. It reasoned as follows:⁶¹

The statement that the President was a goblin was obviously a false statement. The offence is however not committed because a person has uttered at a public place a false statement about or concerning the President. The statement must be accompanied at the time of its utterance by the knowledge of its falsity and an intention to use it to engender feelings of hostility in the audience against the President. That is not even enough for the offence to be committed. The State must prove beyond reasonable doubt that the false statement about or concerning the President was capable of deceiving the hearer into believing [that] it is true and that it was likely to arouse in the audience feelings of hostility towards the President or his office. A patently false statement to the effect that the President is a goblin was unlikely to deceive any right thinking person into believing that it is true. It was unlikely to engender in the hearer feelings of hostility towards the President ... Such a statement cannot hold up the President to ridicule.

58 *Mwonzora* (n 57) 1.

59 *As above*.

60 *Mwonzora* (n 57) 5-9.

61 *Mwonzora* 10.

Ultimately the Court stated that Mr Mwonzora had not committed the alleged crime and there was no need to determine whether or not the crime of insulting and undermining the President was constitutional.⁶²

This case was decided under conditions that made it politically sensitive. To start with, the case involved the prosecution of Mr Mwonzora – a high-ranking figure in the then biggest opposition movement. Furthermore, the case concerned the application of a law as a weapon to suppress dissenting voices that were critical of the President. During this time, the President had come under massive public scrutiny as he was very advanced in age, physically looked frail, was often forgetful and was clearly failing to cope with the demands of his office as he frequently fell asleep in public meetings.⁶³ He became a subject of public ridicule and this was embarrassing to the ruling party, ZANU PF. In response, the state made numerous arrests and prosecutions on the grounds of contravening the law against insulting the President, hoping to dissuade people from criticising the President. Between 2013 and 2017 at least 80 cases were filed in court on charges of insulting the President.⁶⁴ Given this context, it would appear that the Court made a bold decision to discharge a senior opposition leader from a frivolous criminal trial. However, a closer analysis of the judgment raises a few concerns.

The first concern relates to the approach adopted by the Court. It decided to first assess whether or not the crime had been committed before it could determine the constitutionality of the existing law creating that crime. This approach is contrary to the role of the Court and its rules of procedure. The Constitutional Court's role is to determine constitutional questions brought before it.⁶⁵ It does so if the question is constitutional in nature, if the matter is not moot, if the case has been properly placed before the Court, and if it is in the interests of justice that the question be determined at that time.⁶⁶ In this case, the question clearly was constitutional in nature and had been properly placed before the Court by way of referral by the magistrate. The constitutional question arose from an ongoing criminal trial and, therefore, it was not moot as it was a subject of a live controversy. It was in the interests of justice to

62 Mwonzora 11.

63 See S Chikwinya 'Mugabe bringing Zimbabwe into disrepute' *The Zimbabwean* 1 April 2016, <http://www.thezimbabwean.co/2016/04/mugabe-bringing-zimbabwe-into-disrepute/> (accessed 10 June 2019).

64 See Staff Writer 'Presidential insult laws must be abolished' *Daily News* 8 December 2017, <https://www.dailynews.co.zw/articles/2017/12/08/presidential-insult-laws-must-be-abolished> (accessed 12 June 2019).

65 Sec 167(1)(b) Constitution of Zimbabwe 2013.

66 See secs 167(5) & 175(4) of the Constitution of Zimbabwe 2013.

determine this question as it arose from an existing legislation. Therefore, the Court ought to have decided the question presented before it. The fact that Mr Mwonzora was charged with the crime of which the constitutionality was now being impugned provided adequate jurisdiction for the Court to directly deal with the presented constitutional question. The Court's decision did not have to depend on whether or not Mr Mwonzora was guilty, but on whether the impugned legislation could be deemed constitutionally valid in light of freedom of expression. Why did the Court choose not to determine the constitutionality of the 'insult law' regardless of whether or not Mr Mwonzora had indeed committed the crime?

The answer to this question seems to be that the Court adopted this approach in order to avoid having to determine the constitutionality of the impugned criminal law. If the Court had adopted a different approach, it would have been forced to review the constitutionality of the law against ridiculing the President, and potentially would be forced to strike it down as the impugned law is incompatible with the constitutionally-guaranteed freedom of expression. This would deprive the state of one of its most vicious weapons of muzzling dissenting voices. It therefore may be argued that, through this Court's decision, the state gave up the on-going prosecution of a senior opposition leader but retained the impugned criminal law for future use. After this judgment the state has continued to arrest, detain and charge people for violating this law.⁶⁷ Thus, in this case the Court appears to have abdicated its role of enforcing the Constitution against the interests of the ruling party to shield the President from public criticism through the continued application of an apparently unconstitutional criminal law.

3 A court ready to enforce the Constitution?

Although in the cases discussed above the Court appears to have abdicated from its role, there are instances where it seemed to demonstrate some eagerness to enforce the Constitution even against the interests of the ruling party and government. These include instances when the Court ordered the Prosecutor-General to issue a *nolle prosequi*, resulting in the private prosecution of a powerful politician in the ruling party for sexually abusing a minor.⁶⁸

67 See National Public Radio 'After Mugabe, Zimbabwe still enforces a law against insulting the President' 20 December 2018, <https://www.npr.org/2018/12/20/676055453/after-mugabe-zimbabwe-still-enforces-a-law-against-insulting-the-president> (accessed 11 June 2019).

68 *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* CCZ 13/2017 (2015).

This prosecution resulted in a conviction and a lengthy custodial sentence being imposed on the politician. Furthermore, in 2018 this Court struck down a statute that gave the police disproportionate powers to impose a blanket ban on the exercise of the constitutional right to demonstrate and freedom of assembly.⁶⁹ In light of these decisions, would it still be fair to characterise this Court as partial towards the ruling party and government?

On the face of it these decisions suggest that the Court is impartial and can be relied upon to enforce the Constitution even against the interests of the ruling party and government. However, a closer analysis of the political conditions existing at the time when these cases were decided reveals that the Court made those decisions not necessarily because it intended to impartially enforce the Constitution even against the interests of the ruling party and government. On the contrary and, as I show below, the Court made those decisions because certain powerful factions within the ruling party were supportive of those decisions or that the change of political strategy by the ruling party required or allowed the Court to make those decisions. I explain these arguments in the paragraphs below.

3.1 Internal party power dynamics as a factor in the Constitutional Court's adjudication

Autocratic regimes are hardly monolithic as they comprise, within themselves, powerful rival factions that are constantly competing for power. While the leader and the ideological inclination of the regime may not change, the internal balance of power regularly changes, resulting in different factions exercising control over the levers of state power at different episodes. This appears true of ZANU PF. Since the party took control of the state in 1980, it did not change its leader until 2017. However, the party is comprised of factions that are constantly wrestling for power and to succeed the party leader. During the period under review, the ruling party was comprised of two dominant factions that were constantly wrestling against each other for power. As mentioned above, there was a faction led by the President's wife – the 'Grace Mugabe faction' – and the other was led by the then Vice-President, known as the 'Emmerson Mnangagwa faction'.⁷⁰

69 *Democratic Assembly for Restoration and Empowerment & Others v Saunyama NO & Others* CCZ 9/18 (2018).

70 Rodgers (n 43).

Given that the party is conflated with the state,⁷¹ the internal factional battles between these two groups had a direct impact on state administration including the operations of the judiciary. In the paragraphs below I show how these internal factional power dynamics (and not necessarily the impartiality of the Court) may have influenced the Court to enforce the Constitution against the interests of the government.

3.1.1 *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*

In this case⁷² the Prosecutor-General filed an *ex parte* application in which he sought the Constitutional Court to determine whether the Prosecutor-General could be compelled through a court order to issue an order of *nolle prosequi*. The Prosecutor-General's argument was that his office enjoyed absolute independence as guaranteed by the Constitution and that, therefore, he could not be directed by the courts to issue a *nolle prosequi*. The Prosecutor-General relied on section 260 of the 2013 Constitution, which states that

[s]ubject to this Constitution, the Prosecutor-General (a) is independent and is not subject to the direction or control of anyone; and (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias.

The Court took the view that the independence of the Prosecutor-General was not absolute.⁷³ Rather, it is qualified in the sense that the Prosecutor-General must independently make prosecutorial decisions.⁷⁴ However, those decisions are subject to judicial review.

This case was shrouded by political sensitivities at different levels. The office of the Prosecutor-General is a strategic institution for the ruling party to the extent that the party has always made sure that the person who occupies that office is someone whom they can control, for two key reasons. The first is that this allows them to rely on the Prosecutor-General to persecute political dissenters by prosecuting them on frivolous criminal charges.⁷⁵ The second

71 J Shumba *Zimbabwe's predatory state: Party, military and business* (2018).

72 CCZ 13/2017.

73 *Prosecutor General of Zimbabwe* (n 68) 8.

74 Such as deciding to prosecute or refusing to do so and rejecting requests for *nolle prosequi*.

75 Eg, many opposition political leaders and civil society activists are often charged with serious crimes for purposes of arresting them. They rarely are found guilty of those crimes. See International Commission of Jurists 'Stop abuse of charges of subverting a constitutional government' 6 June 2019, <https://www.icj.org/stop-abuse-of-charges-of-subverting-a-constitutional-government-against-zimbabwe-7/> (accessed 12 June 2019).

reason is that they rely on the Prosecutor-General to protect them against being held criminally accountable for abuse of power. The Prosecutor-General does this by declining to conduct prosecutions when criminal charges are laid against those politicians. For instance, prior to this case the Prosecutor-General declined to prosecute a senior ruling party politician – Mr Munyaradzi Kereke – who had been accused of sexually abusing a minor.⁷⁶ The Prosecutor-General also denied the victim's request for a *nolle prosequi*, which meant that Mr Kereke could neither be prosecuted by the state nor privately. The victim took on review at the High Court the Prosecutor-General's decision to reject her request for a *nolle prosequi*. The High Court ordered the Prosecutor-General to grant the *nolle prosequi*, but he refused to comply with the High Court order and instead filed this *ex parte* application before the Constitutional Court.

Against this background the decision of the Constitutional Court to reject the Prosecutor-General's argument of absolute independence seems profound. This decision had personal ramifications for a senior ruling party politician (Mr Kereke) as it left him vulnerable to private prosecution. He was eventually prosecuted privately in the magistrate's court and was convicted to serve a lengthy custodial sentence.⁷⁷ Furthermore, this decision has ramifications for all the politicians from the ruling party as it left them vulnerable to future private prosecution because once the Prosecutor-General declines to prosecute, individuals now have the option to conduct private prosecutions. They can do this by applying for a *nolle prosequi* from the Prosecutor-General and if denied, they can take his decision on review. Alternatively, they can challenge his decision to decline public prosecution. Thus, the Prosecutor-General no longer is the final authority on prosecutorial decisions and, therefore, may not be able to protect the politicians in the ruling party as he had done in the past. Could this case therefore be evidence that this Court at times is prepared to enforce the Constitution even though that would jeopardise the interests or liberty of powerful politicians from the ruling party?

At the time that this case was decided ZANU PF was embroiled in a massive internal factional battle, as described above. The rival factions were using the law as a political weapon against each other. The Emmerson Mnangagwa faction appeared to have gained control over the Prosecutor-General, and was accused of using this

⁷⁶ *Prosecutor General of Zimbabwe* (n 68) 2.

⁷⁷ The details of his trial and conviction are set out in *Kereke v Maramwidze* ZWHHC 792 (2016) 1.

to prosecute political rivals from the Grace Mugabe faction.⁷⁸ In response, the Grace Mugabe faction, with the support of President Robert Mugabe, wanted the Prosecutor General replaced. Thus, at the time that this case was decided the Prosecutor-General appeared to have lost the support of the President and some powerful politicians in the ruling party. It was convenient for the President and his preferred Grace Mugabe faction for the Court to rule against the Prosecutor-General and set into motion the process of his removal. The Court's decision in this case was followed by the impeachment of the Prosecutor-General, as well as the prosecution and conviction of Mr Kereke, who was perceived to be associated with the Mnangagwa faction. Therefore, it seems that while the decision of the Court underscored certain important constitutional principles, this may only have been necessitated more by the political conditions rather than the independence of the Court or its preparedness to protect the Constitution against violations emanating from the ruling party. This is precisely because the same bench (judges) that wrote this judgment failed to uphold the Constitution in the other cases as was discussed above, even though the law was clear that the government's position was unlawful.

3.2 Change of political strategy as a factor in the Constitutional Court's adjudication

In autocratic regimes the state has a tendency of using the judiciary to rubber-stamp its decisions and policies.⁷⁹ Thus, these regimes tend to use the courts to lend legal legitimacy to policies and decisions that otherwise are illegal and unpopular. In the case of Zimbabwe it has been suggested that the courts sometimes are used, particularly by the executive, to rubber-stamp legislation and decisions that are patently unconstitutional but which assist the ruling party to maintain its political power. However, as a result of political pressure the regime sometimes is forced to change its strategy. As part of realigning its strategy, the regime may have to give up some of the laws or policies, but retain some or introduce new ones. These changes in the ruling party's political programme and strategy may either require or allow the courts to make certain decisions which *prima facie* appear progressive. Yet a closer analysis of the political conditions may show that the Court did not necessarily make those decisions because of its preparedness or independence to enforce

⁷⁸ M Tafireyika 'Sacked Tomana was in wrong ZANU PF basket' *The Daily News* 11 June 2017, <https://www.dailynews.co.zw/articles/2017/06/11/sacked-tomana-was-in-wrong-zanu-pf-basket> (accessed 12 June 2019).

⁷⁹ C Larkins 'The judiciary and delegative democracy in Argentina' (1998) 30 *Comparative Politics* 423.

the Constitution regardless of the interests of the ruling party. In the paragraphs below I demonstrate this argument.

3.2.1 *Democratic Assembly for Restoration and Empowerment v Newbert Saunyama NO*

The background to this case⁸⁰ is that the respondent, a senior police officer in charge of Harare central district, during 2017 had imposed a ban on all public demonstrations and processions for a period of two weeks.⁸¹ He was acting in terms of section 27(1) of the then Public Order and Security Act (POSA) which stated:

If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 [of POSA] will not be sufficient to prevent public disorder being occasioned by the holding of processions or public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned.

The constitutional validity of these powers was challenged at the High Court, and in its final order the High Court upheld the constitutionality of the impugned legislation. This necessitated an appeal to the Supreme Court. The Supreme Court⁸² then referred a constitutional question for determination by the Constitutional Court. The constitutional question was whether or not section 27 of POSA is constitutional to the extent that it empowers the police to impose a ban on public demonstrations in a particular district for a period not exceeding one month.

The Constitutional Court held that the impugned legislation was unconstitutional and summarised its reasoning as follows:⁸³

The ban imposed is blanket in nature and has a dragnet effect. During the currency of the ban, the rights to demonstrate and to petition peacefully are completely nullified. This includes demonstrations already planned at the time the ban is imposed and those that are yet to be planned. This also includes mass demonstrations and small demonstrations. It includes demonstrations of all sizes and for whatever purpose without discrimination. Like a blanket or a dragnet, it covers or catches them all. To the extent that the ban does not discriminate between known and yet to be planned demonstrations, the limitation in s 27 has the effect of denying the rights in advance

80 CCZ 9/18.

81 *Democratic Assembly for Restoration and Empowerment* (n 69) 1.

82 Acting in terms of sec 175(4) of the Constitution of Zimbabwe 2013.

83 *Democratic Assembly for Restoration and Empowerment* (n 69) 14-15.

and condemning all demonstrations and petitions before their purpose or nature is known. It does not leave scope for limiting each demonstration according to its circumstances and only prohibiting those that deserve to be prohibited while allowing those that do not offend against some objective criteria set by the regulating authority to proceed. The limitation in s 27 of POSA stereotypes all demonstrations during the period of the ban and condemns them as being unworthy of protection. Stereotyping is a manifestation of bias without any reasonable basis for that bias. To the extent that the limitation in s 27 stereotypes all demonstrations during the period of the ban, it loses impartiality and becomes not only unfair but irrational.

In addition to holding that the powers given to the police by the impugned legislation are irrational, the Court also held that those powers had a disproportionate negative impact on the right to freedom to demonstrate peacefully.⁸⁴ This is an important judgment as it vindicated the right to demonstrate peacefully, which is a critical right in a democracy, as explained below by the Court itself:⁸⁵

Clearly, the right to demonstrate creates space for individuals to coalesce around an issue and speak with a voice that is louder than the individual voices of the demonstrators. As is intended, demonstrations bring visibility to issues of public concern more vividly than individually communicated complaints or compliments to public authorities. Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom.

The state had always relied on the impugned law to suppress public demonstrations. Public demonstrations, especially those of massive proportions, tend to be embarrassing to dictatorial regimes as they expose a lack of legitimacy and a lack of public support for the government or its policies. They also have a chilling effect on unpopular dictatorial regimes because they can mutate into mass action which may lead to the removal of government.⁸⁶ It appears profound that the Court made this decision against the government but in favour of the Constitution, at a time when the government was under pressure from public demonstrations organised mainly by the opposition and social movements, and the state was hell-bent on suppressing these demonstrations.⁸⁷

However, it must be noted that this judgment was handed down at a time when the new government of President Mnangagwa was

84 *Democratic Assembly for Restoration and Empowerment* 14.

85 *Democratic Assembly for Restoration and Empowerment* 8.

86 As occurred during the 2011 Arab Spring revolutions in Egypt and Tunisia.

87 B Mananavire et al 'Pressure mounting as more protests line-up' *The Zimbabwe Independent* 18 January 2019, <https://www.theindependent.co.zw/2019/01/18/pressure-mounting-as-more-protests-line-up/> (accessed 12 June 2019).

vigorously pursuing a policy of re-engaging with Europe and the United States of America (USA) in its bid to attract foreign direct investment. The USA and the European Union (EU) had made it clear that they would support this policy only if the Zimbabwean government demonstrated a commitment towards strengthening democracy and respect for human rights.⁸⁸ In response the Zimbabwean government embarked on pseudo-democratic reforms while in practice it continued to be autocratic. For instance, the government decided to amend a raft of draconian legislation, including the Public Order and Security Act. It therefore may be argued that the Court's decision was consistent with this strategy where the state was prepared to give away the impugned law and develop other ways of suppressing the demonstrations. It appears that, rather than using laws to outlaw protests, the government now prefers to intimidate people from participating in protests. It does so partly by using the state security agents to harass would-be protesters and those organising the protests. This usually is done by criminally charging and placing on remand those who are leading mass mobilisation ahead of the planned demonstration.⁸⁹ Sometimes chilling threats of military intervention are issued to suppress protests.⁹⁰

4 Conclusion

A review of the Constitutional Court's decisions in the past six years reveals that in the majority of cases it appears that the Court made decisions in order to avert political risks facing the ruling party and government rather than enforcing the Constitution. Potentially this is why public trust in the Zimbabwean judiciary is very high (77 per cent) among the ruling party supporters but very low (48 per cent) among the opposition supporters.⁹¹ There are a few cases where the Court made decisions to enforce the Constitution. However, it appears that this was only possible because the internal factional contestations in the ruling party and government required or permitted the Court to make those decisions. The performance of the Zimbabwean Constitutional Court thus far paints a gloomy picture of the reliability and utility of constitutional courts as sites of human rights struggles in countries that have a fairly democratic constitution but that are governed by autocratic regimes.

88 M Dzirutwe & C Evans 'EU says ready to support Zimbabwe engage foreign lenders' *Reuters* 23 January 2019, <https://af.reuters.com/article/topNews/idAFKBN1FC1IX-OZATP> (accessed 12 June 2019).

89 See International Commission of Jurists (n 75).

90 See Staff Reporter 'Zimbabwe Army to step in' *Bulawayo24* 19 June 2019, <https://bulawayo24.com/index-id-news-sc-national-byo-164436.html> (accessed 10 July 2019).

91 Krönke (n 13).

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The protection of vulnerable witnesses during criminal trials in Malawi: Addressing resource challenges

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Summary: *It is widely acknowledged that crime victims and witnesses for a long time have not been treated fairly in most criminal justice systems. In a bid to remedy this situation, particularly with respect to vulnerable witnesses, most common law jurisdictions have introduced innovative procedural and evidential law changes, which include screening the witness from the defendant's sight; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including evidence relating to sexual history. Virtually all these measures have underpinning resource requirements. Presently Malawi does not afford adequate protection to vulnerable witnesses. The article argues that the protection of vulnerable witnesses during trial in a resource-poor nation such as Malawi lies in the hands of judges. While on the face of it Malawi's lack of resources may appear to be an obstacle to the protection of vulnerable witnesses, the system has a wealth of alternative options that may be used for their benefit. All that is needed is for judges to proactively utilise the available alternatives to the benefit of such witnesses as well as continuing training and education to reinforce their competencies in this regard.*

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Key words: *criminal justice; vulnerable witnesses; Malawi; procedural safeguards; resource restraints*

1 Introduction

Similar to many countries the Malawian criminal justice system is premised on the public prosecution model. Under this model a criminal wrong is considered an injury against society and not only against the person who has been harmed.¹ The state is a party to the action and represents society that acts against the accused person. The state plays a central role in criminal proceedings by initiating trials and overseeing the entire process. Consequently, the role of victims tends to be overlooked and their interests neglected. Victims are included only as a means to an end in the state's bid to hold the accused accountable for the crime.²

It was not until late in the twentieth century that victims began to challenge their treatment and to demand dignity, fairness and respect in the criminal justice system.³ Advocates for victims' rights and interests usually advance two arguments as to why laws protecting the rights of victims are necessary: First, even in the context of the public prosecution model a specific individual has suffered harm and that must be acknowledged; second, the criminal justice system must avoid imposing secondary harm on victims during the prosecution process.⁴ Some scholars have even advocated that criminal justice systems need a victim-participation model. Unlike a crime-control model that values the efficient prosecution of crime for the benefit of society and the due-process model, which values procedural fairness in prosecuting crime for the benefit of the defendant, a victim-participation model is one that values victims' interests.⁵ It advocates that victims should be treated with dignity, respect and fairness and even be granted 'due process-like' rights to actively participate in the prosecution of the offender.⁶

Victims have seven particular interests in criminal proceedings:⁷ an interest in receiving information concerning the case; an interest in

1 LC Bande *Criminal law in Malawi* (2017) 5; MM Giannini 'The procreative power of dignity: Dignity's evolution in the victims' rights movement' (2016) 9 *Drexel Law Review* 63.

2 As above.

3 Giannini (n 1) 64.

4 Giannini 83.

5 Giannini 84.

6 As above.

7 AN Young 'Crime victims and constitutional rights' (2005) 49 *Criminal Law Quarterly* 432-438.

recovering property and receiving compensation for harm suffered; an interest in the verdict of the court; an interest in receiving protection from the threat of further victimisation; an interest in a suitable sentence being passed by the court; an interest in the protection of their privacy; and an interest in ensuring respect for the protections afforded to them in law with regard to their cross-examination.

While all these interests are valid for victims of crime in Malawi, our focal point is the fourth, sixth and seventh interests. A victim's right to be treated with fairness and respect for their dignity and privacy is not limited to court proceedings but applies at all levels of the criminal process.⁸ Nonetheless, this article limits its scope to protection during trial.

While it is acknowledged that the interests of victims of crime should be respected, concerns predominantly involve vulnerable categories that comprise children, adult complainants of sexual offences and adults with intellectual disabilities.⁹ Internationally, the first major international instrument to underline the interests of victims in the criminal process, the Rome Statute of the International Criminal Court (ICC), emphasises the need for special measures to protect victims of sexual violence and children who are victims or witnesses.¹⁰ The article intends to focus on protective measures with respect to adult complainants of sexual offences and children. It has been indicated that a large number of Malawian women face various forms of sexual assault and that child sexual abuse remains a serious problem.¹¹ With respect to children, their lack of exposure to formal situations, coupled with their underdeveloped social, emotional, intellectual and linguistic capacities, all serve to compound their courtroom stress. As well, the vulnerability of adult complainants in sexual offence cases stems from the intimate nature of these offences and the evidence required to convict offenders.¹²

8 Giannini (n 1) 88.

9 P Bowden, T Henning & D Plater 'Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation' (2014) 37 *Melbourne University Law Review* 539 541; V Marinos et al 'Victims and witnesses with intellectual disability in the criminal justice system' (2014) 61 *Criminal Law Quarterly* 517; P Roberts & A Zuckerman *Criminal evidence* (2010) 442.

10 Art 68 (2).

11 NR Kanyongolo & B Malunga 'The treatment of consent in sexual assault law in Malawi' 2013 <http://www.theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf> (accessed 2 January 2018).

12 TA Cooper 'Sacrificing the child to convict the defendant: Secondary traumatisation of child witnesses by prosecutors, their inherent conflict of interest and the need for child witness counsel' (2011) 9 *Cardozo Public Law, Policy and Ethics Journal* 267; L Ellison *The adversarial process and the vulnerable witness* (2001) 14.

Most legal systems now acknowledge the difficulties encountered by such vulnerable witnesses and have special measures in place to protect them. There is a proliferation of research analysing the treatment of vulnerable witnesses in criminal justice systems. Research has predominantly focused on acknowledging the role of the victim of crime;¹³ the treatment of vulnerable witnesses in adversarial systems;¹⁴ procedural innovations and changes in the criminal justice system to reduce stress for such witnesses; and the extent to which such changes alleviate vulnerable witness' plight without undermining the essential precepts of a fair trial.¹⁵ The argument in this article is that in a jurisdiction with limited resources, judges bear the key responsibility for protecting vulnerable witnesses during trial. Underlying virtually all the special measures for the protection of vulnerable witnesses are resource requirements, material or human. As such, until such time as Malawi reaches the point where it can afford the requisite resources, judges bear the responsibility of coming up with creative interventions to the problems facing vulnerable witnesses. The word 'judge' is used generically in the article and includes magistrates as well as other judicial officers.

Malawi has a common law adversarial procedural system. The problems faced by vulnerable witnesses are compounded in such systems because of the combative nature of the advocacy.¹⁶ Vulnerable witnesses are considered at particular risk of being unable to present good quality evidence and so are deemed in need of special measures to enable them to testify optimally.¹⁷ In many common law jurisdictions popular measures for the protection of vulnerable witnesses usually comprise the use of screens to shield the witness from the defendant; video-recorded evidence; live television links allowing the witness to give evidence in a separate room; clearing the public gallery; the removal of legal attire (wigs and gowns); the use of intermediaries and communication aids; the prohibition of personal cross-examination of the witness by the defendant; and restrictions on the cross-examination regarding sexual history.¹⁸

13 A Keane 'Cross-examination of vulnerable witnesses: Towards a blueprint for re-professionalisation' (2012) 16 *The International Journal of Evidence and Proof* 175.

14 As above; Ellison (n 12) 2.

15 MB Bates 'A balancing act: The rights of the accused and witness protection measures' (2014) 17 *Trinity College Law Review* 143; CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251; Roberts & Zuckerman (n 9) 442.

16 E Henderson 'Bigger fish to fry: Should the reform of cross-examination be extended beyond vulnerable witnesses' (2015) 19 *The International Journal of Evidence and Proof* 83; Ellison (n 12) 2.

17 F Raitt *Evidence: Principles, policy and practice* (2013) 24.

18 L Ellison & VE Munro 'A "special" delivery: Exploring the impact of screens, live links and video recorded evidence on mock juror deliberation in rape trials'

This article intends to focus on three measures that have a bearing on the most profound problems for the Malawian vulnerable witness. These are the screening of the vulnerable witness from the defendant; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination including evidence regarding sexual history.

2 Malawian criminal justice system

Malawi is one of the world's poorest countries. Out of 189 countries on the United Nations Development Programme (UNDP) Human Development Index (HDI) in 2019, Malawi was ranked on position 172. The common law adversarial tradition is keenly adhered to, from legal regalia to procedure.¹⁹ There are virtually no jury trials, all cases being presided over by a magistrate or a judge sitting alone. Most litigants are unsophisticated, uneducated and unrepresented.²⁰ The adversarial procedures applicable in the courts are too complicated for most people who do not appreciate the importance of cross-examination, let alone know how to conduct it.²¹

The problem is compounded by the remarkably small number of lawyers available. As of 15 April 2020 the country had only 502 lawyers licensed to practice²² against a population of around 19 million people. Most lawyers are concentrated in urban areas, yet the majority of the population live in rural areas. The Legal Aid Bureau²³ was established by government to provide free legal aid to poor citizens, but normally there is an acute shortage of lawyers.²⁴ Consequently, the majority of defendants encounter the criminal justice system with no legal representation. Only in homicide cases is a defendant guaranteed legal representation at the state's expense if they cannot afford it.

(2013) 23 *Social and Legal Studies* 4; S Walklate (ed) *Handbook of victims and victimology* (2007) 292.

- 19 S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law' (2007) 5 *International Journal of Constitutional Law* 260.
- 20 W Scharf et al 'Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums' unpublished DFID Malawi Report (2002) 12. Although no recent data is available, this problem seems to persist.
- 21 Scharf et al (n 20) 13. This compels people in rural areas to prefer informal justice systems such as adjudication by chiefs. See J DeGabriele & J Handmaker 'Justice for the people: Strengthening primary justice in Malawi' (2005) 5 *African Human Rights Law Journal* 148.
- 22 According to official Malawi Law Society records. The actual figure may be slightly higher if one factors in non-practising lawyers.
- 23 Established under the Legal Aid Act of 2011.
- 24 S Kayuni 'Court fees and access to justice: Towards a policy oriented approach in Malawi' (2015) 41 *Commonwealth Law Bulletin* 29.

Given the poverty levels, justice is not considered a high priority for government. The judiciary receives 0,8 per cent of the national budget, which is far below the 3 per cent that it requires to operate optimally.²⁵ Consequently, the court infrastructure generally is in a poor state and most courts are in acute need of basic facilities such as furniture, office equipment and stationery.²⁶

3 Legal framework for the protection of vulnerable witnesses in Malawi

To begin with, the Malawian Constitution stipulates that the dignity of all persons is inviolable.²⁷ The Constitution also provides that in any judicial or other proceedings before any organ of the state, respect for human dignity shall be guaranteed. Respect for dignity is especially important for victims of crime, and in the United States of America it has been used by victims' rights movements to further their goals of protecting victims' interests and eliminating secondary victimisation.²⁸ Also important is the right to privacy guaranteed under section 21 of the Constitution as well as the right not to be subjected to inhuman or degrading treatment.²⁹ In relation to children, section 23 of the Constitution emphasises that they are entitled to equal treatment before the law and that the best interests of children shall be a primary consideration in all decisions affecting them.

The Criminal Procedure and Evidence Code (CP & EC)³⁰ is the main statute regulating criminal procedure and evidence in Malawi. Section 71A of the CP & EC is the key provision specifically dealing with the protection of vulnerable witnesses. Section 71A was introduced into the CP & EC in 2010. The Report of the Law Commission on the review of this Act states that the Commission considered favourably the introduction of a provision to deal with the protection of victims of sexual offences, particularly, victims of rape.³¹ While section 71A is to be commended, it is regrettable that it restricts itself to the protection of victims of sexual offences. There are other vulnerable witnesses outside this group, for instance, child

25 According to the *Malawi Judiciary Strategic Plan (2019-2024)*, www.judiciary.mw (accessed 28 April 2020).

26 Scharf et al (n 20) 22.

27 Sec 19 Constitution.

28 Giannini (n 1).

29 Sec 19(3) Constitution.

30 Criminal Procedure and Evidence Code Act 14 of 2010.

31 Malawi Law Commission, Report of the Law Commission on the Review the Criminal Procedure and Evidence Code, Malawi Law Commission Report 10 (Malawi Law Commission, Lilongwe 2003).

victims of physical abuse who are equally deserving of protection. Similar statutes in other countries such as Zimbabwe have broad provisions stipulating many protective measures for all categories of vulnerable witnesses.³²

Prior to the enactment of section 71A, adult complainants of sexual offences were not expressly and comprehensively protected under the law. Section 71A provides:

- (1) Where a victim of a sexual offence is to give evidence in any proceedings under this Code, the court may, of its own motion, upon application made by a party to the proceedings, or a victim of a sexual offence, make one or more of the following orders –
 - (a) that the court close while evidence is being given by the witness in the proceedings ...
 - (b) that a screen, partition or one way glass be placed to obscure the witness's view of a party to whom the evidence relates, but not so as to obstruct the view of the witness by the magistrate or the judge ...
 - (c) that the witness be accompanied by a relative or friend for the purpose of providing emotional support;
 - (d) that the evidence of the witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television.

To begin with, in providing for closed-court proceedings and screening for the said victims, this section has the potential of protecting vulnerable witnesses from the ordeal of testifying in public and facing the defendant in court. However, since the section uses the discretionary word 'may', and leaves it to the court to decide whether the outlined measures are warranted in a particular case; adult complainants of sexual offences are at the mercy of the court. This may be problematic as Malawian courts value conventional adversarial modes of giving evidence which may make such discretion unfortunate, but that remains to be seen.

In respect of paragraph (d), which mentions the transmission of evidence to a courtroom through closed-circuit television, while it is a good innovation it may not have much effect beyond paper due to a lack of technological resources to realise it. At present only a few child justice courts have closed-circuit television services. Nevertheless, it is good to have this provision which can perhaps motivate government to invest in technological resources for the courts. Lastly, it is regrettable that section 71A does not cover the improper cross-examination of sexual offence victims, including

³² Criminal Procedure and Evidence Act, Ch 9:07 of the Laws of Zimbabwe.

sexual history evidence, which is another challenge faced by vulnerable witnesses as the subsequent paragraphs will show. Also regrettable is the fact that the courts are not making frequent use of this section. In *R v Richard Mandala Chisale*³³ the High Court lamented the fact that most magistrate's courts do not appreciate the importance of putting into effect the provisions of section 71A of the CP & EC. The Court actually was of the opinion that in sexual offences involving children section 71A should be used as a matter of course.

Further to the above, sections 214(5) and 215(3) of the CP & EC are also relevant in respect of vulnerable witnesses. The former stipulates that cross-examination must relate to relevant facts, while the latter section gives the court the power to forbid any questions or inquiries which it regards as indecent or scandalous. As will be argued below, these provisions are important for restricting improper cross-examination and inquiries regarding sexual history.

In relation to children it must be noted that although the Child Care, Protection and Justice Act³⁴ is the framework law on children's matters, regarding court proceedings the Act focuses on children suspected of having committed offences, and no mention is made of children as victims or mere witnesses. For child suspects, however, the Act is to be commended for making provision for special measures to aid in their testimony. Section 145 of the Act provides that proceedings of a child justice court should be informal; official uniforms and professional robes should not be worn; and there should be regular breaks in the proceedings with necessary provisions for the child. Most importantly, section 145(d) provides that children with disabilities must be accorded assistance to meet their special needs.

4 Challenges faced by vulnerable witnesses in Malawi

In adversarial systems the significance attached to direct and public confrontation has proved a potent obstacle to improving the treatment of vulnerable witnesses.³⁵ The adversarial process assumes that evidence given in open court is made more reliable by the testing conditions operating therein, such as public scrutiny, the presence of the accused and the formality of the courtroom itself, which are

33 Criminal Review Case 7 of 2014.

34 Act 22 of 2010.

35 Keane (n 13) 175; Henderson (n 16) 83; Ellison (n 12) 83.

thought capable of exciting the conscience of a lying witness.³⁶ The vulnerable witness in Malawi is also a victim of these perceived adversarial ideals, leading to the problems discussed below.

First, section 162 of the CP & EC expressly provides that all evidence is to be taken in the presence of the accused. It is common practice for the witness, child or adult, to testify in the presence of the accused. This is problematic. There is considerable evidence to the effect that facing the defendant causes vulnerable witnesses significant anxiety and distress.³⁷ Studies reveal that women are fearful of facing the defendant and research from the United States of America indicates that many women had an intense emotional response when they encountered the defendant in a courtroom.³⁸ Facing the defendant is a visual reminder of the traumatic experience.

This problem is amplified when a child is involved. It has been noted that a face-to-face encounter with the defendant remains children's top concern and this may even cause them to give ineffective testimony.³⁹ Reliving the experience by relating the details of the abuse aggravates it. Further, for complainants in children's sexual abuse matters, a face-to-face confrontation may give the defendant a chance to intimidate the witness, thereby impairing the testimony that is given.⁴⁰ In most cases abusers have already threatened children not to reveal their ordeal when the offence was committed. 'No one should underestimate the impact of having to face one's alleged attacker when one is in the witness box.'⁴¹

Second, because defendants rarely have legal representation, virtually all vulnerable witnesses personally are cross-examined by the defendant. 'Cross-examination is widely regarded as the aspect of trial proceedings that witnesses find most difficult, even traumatic.'⁴² It is worse for vulnerable witnesses where an unrepresented defendant carries out the cross-examination himself.⁴³ Yet, this is common practice in Malawi. In this respect the court remarks as follows in *R V Milton Brown*:⁴⁴

When defendants represent themselves in criminal trials problems regularly arise. Such defendants lack that knowledge of procedure,

36 Ellison (n 12) 7.

37 Cooper (n 12) 251.

38 Ellison (n 12) 17.

39 Cooper (n 12) 251.

40 Matthias & Zaal (n 15) 297.

41 *R v Milton Brown* [1998] 2 Cr App R 364.

42 Ellison (n 12) 159.

43 Keane (n 13) 175.

44 *Milton Brown* (n 41).

evidence and substantive law; that appreciation of relevance; that ability to examine and cross-examine witnesses and present facts in an orderly and disciplined way; that detachment which should form part of the equipment of the professional lawyer. These problems exist even where the defendant is representing himself in good faith. However, the problem is magnified one hundredfold where the defendant is motivated by a desire to obstruct the proceedings or to humiliate, intimidate or abuse anyone taking part in it.

Clearly, the fact that the cross-examination of witnesses is done by the defendant personally is another major shortcoming in the Malawian criminal justice system which, unfortunately, has not been provided for by section 71A.

Third, vulnerable witnesses are subjected to inappropriate cross-examination including cross-examination of their previous sexual history: Criticism of the treatment of rape complainants during cross-examination predominantly focuses on the use of sexual history evidence and the various assaults on their private lives.⁴⁵ The use of sexual history evidence in rape trials causes distress to complainants, can affect the verdict and deters the reporting of what is already an underreported crime.⁴⁶ Improper and degrading cross-examination unnecessarily traumatises complainants and affects their ability to give evidence to the best of their ability.⁴⁷ Malawi has seen instances of accused persons, sometimes with the help of their lawyers, dealing with issues of penetration in a manner that seeks more to embarrass than to prove the particulars of the alleged offences.⁴⁸ In addition,

in Malawi the law on sexual assault and consent has historically reflected stereotypes about what constitutes consent ... in sexual offences, the prosecution has to prove absence of consent on the part of the complainant to the commission of the offence. Thus, there is an intense focus on the character and motivation of the complainant in most sexual offences. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behaviour which are not related to the circumstances of the offence.⁴⁹

45 C McGlynn 'Rape trials and sexual history evidence: Reforming the law on third party evidence' (2017) 81 *Journal of Criminal Law* 367; L Levanon 'Sexual history evidence in cases of sexual assault: A critical re-evaluation' (2012) 62 *The University of Toronto Law Journal* 609 610.

46 Ellison (n 12) 116.

47 McGlynn (n 45) 367; S Easton 'The use of sexual history in rape trials' in M Childs & L Ellison *Feminist perspectives on evidence* (2000) 41.

48 LP Chikopa 'Judicial activism and the protection of the rights of vulnerable groups in Malawi' in Southern African Litigation Centre (eds) *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* (2014) 10, <http://www.southernafricalitigationcentre.org> (accessed 2 April 2020).

49 Kanyongolo & Malunga (n 11) 3.

Thus, unregulated questioning regarding evidence of sexual history is problematic in that such evidence easily may distract the fact-finder from the real issue. Sexual history evidence is highly prejudicial when received in the context of prevailing views of women's sexuality.⁵⁰

5 Special measures for the protection of vulnerable witnesses

Most legal systems acknowledge the difficulties encountered by vulnerable witnesses and have special measures in place to protect them. At the international level the Rome Statute of the ICC was the first major international instrument to acknowledge and give effect to the interests of victims at all levels of the criminal process. The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends that measures be taken at the international, regional and national levels for the protection of victims of crime. In addition, the 2005 United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime emphasises that children who are victims and witnesses are particularly vulnerable and need special protection and support.

Special measures for the protection of vulnerable witnesses comprise the use of screens to shield the witness from the defendant; video-recorded evidence; live television links allowing witnesses to give evidence in a separate room; clearing of the public gallery; the removal of legal attire (wigs and gowns); the use of intermediaries and communication aids; the prohibition of personal cross-examination of the witness by the defendant; and restrictions on the cross-examination regarding sexual history.⁵¹ Nevertheless, the discussion in this article will be limited to the measures with the greatest bearing on the challenges faced by vulnerable witnesses in Malawi, which are screening the vulnerable witness from the defendant; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including regarding evidence relating to sexual history.

5.1 Shielding the vulnerable witness from the defendant's sight

The shielding of vulnerable witnesses from the defendant's sight is done for witnesses' protection. At common law young children and

⁵⁰ Easton (n 47) 167.

⁵¹ Ellison & Munro (n 18) 4; Walklate (n 18) 474.

rape complainants were entitled to a screen to shield them from the sight of the defendant.⁵² As noted previously, a substantial problem for vulnerable witnesses is the possibility of facing the defendant even disregarding the cross-examination. They need to be shielded from seeing the defendant and this can be done by placing a screen between them. Screening, video-recorded interviews and live television links are effective means of preventing direct contact between the witness and the defendant.⁵³ Screens only prevent a face-to-face showdown and do not prevent the defendant from hearing the witness or responding accordingly.⁵⁴ Additionally, if the defendant is represented, his lawyer is able to face the witness.

Screening mechanisms not only ease the strain of testifying for vulnerable witnesses but also aid the truth-finding process.⁵⁵ A screen can be arranged in such a way that the defendant still is able to see the witness although the witness cannot see the defendant.⁵⁶ A screen minimises the stress for child witnesses and enhances the chances of them giving effective evidence.⁵⁷ In Scotland, in addition to a live television link and a supporter, a screen is regarded as a standard special measure for the protection of vulnerable witnesses and the court is compelled to grant such measures.⁵⁸

It has been argued that in terms of protection, screens rate poorly as the witness is not protected from being in the same room as the defendant, which is stressful for many witnesses.⁵⁹ However, if being in the same room is stressful, a face-to-face encounter could be worse so screens still alleviate some stress for vulnerable witnesses. Further, although the witness is shielded from seeing the defendant in the courtroom, there is no guarantee that they will not meet while they attend the trial. Nevertheless, a face-to-face encounter at the court cannot last long and may easily be avoided. Indeed, seeing the defendant in the fixed formal setting of the courtroom is more stressful.

52 C Tapper *Cross and Tapper on evidence* (2010) 242. See also the cases of *R v Smellie* (1919) Cr App Rep 128 and *Hampson v HMA* 2003 SLT 94.

53 Ellison & Munro (n 18) 4; M Burton et al 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales' (2007) 11 *The International Journal of Evidence and Proof* 1.

54 Matthias & Zaal (n 15) 297.

55 Ellison & Munro (n 18) 4; J Doak 'Confrontation in the courtroom: Shielding vulnerable witnesses from the adversarial showdown' (2000) 5 *Journal of Civil Liberties* 307.

56 Raitt (n 17) 42.

57 Cooper (n 12) 251.

58 Raitt (n 17) 41.

59 Ellison (n 12) 41.

The claim has been made that shielding the witness from direct contact with the defendant infringes the defendant's right to challenge contrary evidence; that the right to challenge is a corollary right to a face-to-face confrontation which is violated when physical or technological barriers are interposed between an accuser and accused.⁶⁰ However, there is no authority supporting the defendant's right to be present and have opposing witnesses subjected to cross-examination which entails a physical confrontation.⁶¹ Courts have even held that the right to a fair trial does not entail a right to physical confrontation in the courtroom.⁶² As such, the defendant's right to confront witnesses against him and to a fair trial cannot be violated by placing a screening device between him and the testifying witness.⁶³

The word 'screen' here is given its literal meaning, that is, a fixed or movable partition or curtain used as a room-divider or anything used to give concealment or privacy.⁶⁴ As such, unless a video link is being used to screen the defendant from the witness's sight, this remedy generally is not costly in terms of material requirements. In some instances it suffices to re-arrange the court changing positions or moving seats around.⁶⁵

5.2 Restrictions on defendant personally cross-examining vulnerable witnesses

The second measure for the protection of vulnerable witnesses concerns the identity of the cross-examiner. As noted previously, vulnerable witnesses experience stress when subjected to cross-examination by the defendant personally. As such, it is important for these witnesses to know that they will not be improperly cross-examined by the defendant and also that they will not be cross-examined by him at all.⁶⁶ In England and Wales, following several high-profile instances of abusive cross-examination by defendants

60 Ellison 65.

61 Doak (n 55) 306.

62 *Donnelly v Ireland* (1998) 1 IR 321 (SC).

63 P Zieff 'The child victim as witness in sexual abuse cases: A comparative analysis of the law of evidence and procedure' (1991) 4 *South African Journal of Criminal Justice* 38.

64 *Oxford English dictionary* online, <http://www.oed.com> (accessed 2 January 2018).

65 *R v Smellie* (n 52) 128.

66 DJ Birch 'A better deal for vulnerable witnesses?' (2000) *Criminal Law Review* 223.

conducting their own defence, the right of a defendant to cross-examine vulnerable witnesses in person was removed by Parliament.⁶⁷

Cross-examination now mostly is conducted by a third party – a lawyer or an intermediary – in the case of children.⁶⁸ Where a prohibition on personal cross-examination applies, the accused has to arrange legal representation or the court must appoint legal representation for him.⁶⁹ However, the question arises as to why the defendant should be replaced by a lawyer when lawyers in adversarial systems have been known to abuse witnesses during cross-examination. A possible response to this can be that, first, the lawyer is not the culprit so his effect on the witness to that extent is minimised. Second, lawyers are regulated by bar regulations and codes of conduct so it should be easy to control and even punish them should they transgress their code of conduct.

Intermediaries are introduced to minimise children's trauma from a perceived aggressive advocacy culture and to make their evidence more comprehensible.⁷⁰ The role played by the intermediary varies from court advisor to a type of straightforward translator to proxy examiner, depending on the particular country and its specific driving concern.⁷¹ South Africa is one of the few countries that for many years has used intermediaries.⁷² The South African intermediary operates as a go-between translator during trial and all questions and answers must pass through them, but they are not required to have the professional qualifications expected of their English counterparts.⁷³ Other African countries, such as Namibia and Zimbabwe, also permit the appointment of an intermediary to assist a child witness in court.⁷⁴

Friedman argues that a mandatory prohibition on personal cross-examination infringes the defendant's longstanding right to challenge the evidence against him face-to-face and that preparation and the

67 Roberts & Zuckerman (n 9) 450. This was under the Youth Justice and Criminal Evidence Act 1999, secs 34-36.

68 As above.

69 Ellison (n 12) 123.

70 E Henderson 'Alternative routes: Other accusatorial jurisdictions on the slow road to best evidence' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012) 67. See also H Jackson 'Children's evidence in legal proceedings: The position in Western Australia' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012) 75.

71 Henderson (n 70) 59.

72 Matthias & Zaal (n 15) 252.

73 Henderson (n 70) 67.

74 CG Bowman & E Brundige 'Child sex abuse within the family in sub-Saharan Africa: Challenges and change in current legal and mental health responses' (2014) 47 *Cornell International Law Journal* 282.

support of complainants are preferable.⁷⁵ However, such right is not absolute, and even Friedman admits that it may be curtailed for the protection of children and the mentally-challenged. In addition, a defendant who prefers to personally question the complainant when he is in a position to utilise the services of a competent lawyer may have ulterior motives and so should be held in check. Further, involving intermediaries in the trial process does not interfere in the defendant's right to a fair trial. On the contrary, through the use of intermediaries court proceedings not only become less stressful for vulnerable witnesses but also fairer for defendants because of the better flow of more accurate communication.⁷⁶

With respect to resource requirements, an intermediary system requires a technology-enabled setting which is lacking in many regions of Africa.⁷⁷ In South Africa intermediaries are usually placed with a child in a room separate from the courtroom, but they are linked electronically by audio speakers and either closed-circuit television or a one-way mirror.⁷⁸ Even if it is possible to improvise on and minimise these technological requirements, adequate human resources are required. Often the intermediary requires professional qualifications, as is the case in England,⁷⁹ and where they do not require such qualifications they may still need training in court processes. In addition, where lawyers are required to cross-examine on behalf of defendants, this inevitably requires the availability of an adequate number of lawyers in the system.

5.3 Restrictions on improper cross-examination and sexual history evidence

Another measure for the protection of vulnerable witnesses is the restriction of improper cross-examination and evidence regarding a complainant's sexual history. At common law a defendant could attack his victim's general reputation for chastity, but even then excessively intrusive or irrelevant cross-examination relating to sexual history of a type that humiliates and degrades witnesses was not allowed.⁸⁰ Such cross-examination underpins the rationale for rules prohibiting a defendant from cross-examining the witness in person discussed above.

75 RD Friedman 'Face to face: Rediscovering the right to confront prosecution witnesses' (2004) *The International Journal of Evidence and Proof* 1.

76 Matthias & Zaal (n 15) 267.

77 Bowman & Brundige (n 74) 283.

78 Matthias & Zaal (n 15) 252.

79 Henderson (n 70) 67.

80 Raitt (n 17) 215 218; A McColgan 'Common law and the relevance of sexual history evidence' (1996) 16 *Oxford Journal of Legal Studies* 275.

Most common law jurisdictions have introduced legislation restricting sexual history evidence.⁸¹ The type and extent of restrictions vary from country to country. Restrictions on sexual history evidence are the most controversial of the special measures for vulnerable witnesses.⁸² Also referred to as the rape shield, they limit the questioning of sexual offence victims about their sexual history or bad character.⁸³ Such restrictions are meant to protect the complainant from degrading and embarrassing evidence and also to prevent the risk of prejudice against the complainant being created in the mind of the jury or judge.⁸⁴

It is admitted that restrictions on sexual history evidence to some extent curtail the rights of the defendant in order to improve those of the vulnerable witness.⁸⁵ As far as this aspect is concerned, all that can be said is that the right to fair trial is not an absolute right. Under the Malawian Constitution this right is subject to limitation.⁸⁶ Section 44(1) of the Malawian Constitution allows limitations that are prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society. The CP & EC forbids cross-examination that is irrelevant, indecent or scandalous.⁸⁷ Thus, to the extent that sexual history evidence is regarded as such, restrictions on it are prescribed by law. Reasonableness demands that laws should not be arbitrary and that the limitation must be rationally connected to its stated objectives.⁸⁸ Sexual history evidence is restricted mainly because it often is irrelevant and excluding irrelevant evidence does not constitute an injustice to the defendant.⁸⁹ Restrictions on it may therefore be said to be reasonable. The fact that limitations on sexual history are sanctioned in many countries with comparative human rights law serves to prove that such limitations are recognised by international human rights standards and are necessary in an open and democratic society.⁹⁰ Therefore, it is submitted that restrictions on sexual history evidence do not unlawfully or unjustifiably limit the accused's right to a fair trial. Any measure aimed at reducing the trauma experienced by complainants and improving the accuracy of

81 P Duff 'The Scottish "rape shield": As good as it gets?' (2011) 15 *Edinburgh Law Review* 218 219.

82 McGlynn (n 45) 369.

83 Duff (n 81) 218.

84 As above.

85 Walklate (n 18) 292.

86 D Chirwa *Human rights under the Malawian Constitution* (2011) 43.

87 Secs 214(5) & 215(3).

88 Chirwa (n 86) 48.

89 McGlynn (n 45) 370; Levanon (n 45) 611; J Temkin *Rape and the legal process* (2002) 223.

90 Chirwa (n 86) 49.

their evidence cannot be said to undermine the defendant's right to a fair trial.⁹¹

In terms of resource requirements, not much is required to restrict improper cross-examination including on sexual history evidence other than perhaps having an adequate number of lawyers to appropriately conduct cross-examination and training judges to properly implement such restrictions.

In conclusion, three observations may be made from the above discussion. First, special measures for the protection of vulnerable witnesses are a positive development. Research shows that vulnerable witnesses who had the benefit of special measures were less likely to feel anxious or distressed than those not using them and that a third would not have been willing and able to give evidence without them.⁹² Special measures have benefited from comparatively extensive empirical evaluation and have achieved considerable success.⁹³

Second, underlying the effective implementation of each special measure are resource requirements. The cost implications of special measures can be substantial. Even in cases where the basic need is a human resource such as the use of intermediaries, more resources are required through which the defendant can indirectly follow the proceedings. A lack of resources is the most critical gap compromising the effectiveness of special measures for protecting vulnerable witnesses.⁹⁴ Even in an advanced economy such as that of the United Kingdom, 'due to resource needs, including training, it took time from the introduction of the law for special measures directions to take off in England and Wales and to date, special measures are subject to availability at the relevant court centre'.⁹⁵ Scotland has also faced similar challenges.⁹⁶ Similarly, in South Africa (one of the most developed countries in Africa), although theoretically there are various special measures provided for, the vast majority of vulnerable witnesses testify in open court without any special protections because of a lack of resources.⁹⁷

91 Bowden (n 9) 539.

92 C Hoyle & L Zedner 'Victims, victimisation, and criminal justice' in M Maguire et al (eds) *The Oxford handbook of criminology* (2007) 476.

93 Roberts & Zuckerman (n 9) 462.

94 Bowman & Brundige (n 74) 284.

95 Roberts & Zuckerman (n 9) 458.

96 Raitt (n 17) 42.

97 Henderson (n 70) 69.

Finally, special measures do not necessarily impair the fundamental right to a fair trial for the defendant. The prejudicial impact of special measures for protecting vulnerable witnesses appears to have been exaggerated. These measures do not significantly erode the rights of defendants as opponents claim.⁹⁸ Additionally, balancing the interests of witnesses and of the defendant is not necessarily inimical to a robustly adversarial trial process.⁹⁹ Most importantly, findings indicate that the use of such protective measures do not put defendants at an increased risk of conviction.¹⁰⁰

To the limited extent that it is admitted that some special measures, such as the restrictions on sexual history evidence, have a bearing on the defendant's fair trial rights, it is argued that the right to fair trial is not absolute. The landmark European Court of Human Rights ruling in *Doorson v The Netherlands*¹⁰¹ states that '[t]he principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.¹⁰² As such, the defendant's right to a fair trial does not exclude the interests of witnesses, more so of vulnerable witnesses.

6 The efficacy of applying the above special measures to the Malawian criminal justice system

It has been highlighted that the treatment of vulnerable witnesses in Malawi is problematic. The challenge is the feasibility of the special measures explored above in a Malawian context. These measures were introduced to alleviate the plight of vulnerable witnesses in the various common law jurisdictions mentioned and, as already noted, have gone a long way to ease the problems faced by vulnerable witnesses. Since the challenges that motivated these innovations are the same in Malawi, such measures should be of interest to Malawi.

However, there are certain differences between Malawi and the jurisdictions discussed, prominent among which is the lack of resources. As mentioned previously, underlying virtually all these special measures are resource requirements, material or human,

98 Ellison & Munro (n 18) 21; Matthias & Zaal (n 15) 267; Bowden (n 9) 545.

99 Bowden (n 9) 545; LC Hoyano 'Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?' (2001) *Criminal Law Review* 948.

100 Ellison & Munro (n 18) 21; A Cossins 'Prosecuting child sexual assault cases: Are vulnerable witness protections enough?' (2006) 18 *Current Issues in Criminal Justice* 313.

101 *Doorson v The Netherlands* (1996) EHRR 330.

102 As above.

which Malawi does not have. What, then, does that mean for the vulnerable witness in Malawi? Subsequent paragraphs will explore the efficacy of applying the special measures mentioned above in the Malawian context. Where it may not be viable to transplant such measures into our system, alternative options will be considered.

6.1 The use of screens and partitions

Under Section 71A(1)(b) of the CP & EC the court can order that a screen, partition or one-way glass be used to obscure the witness's view of the defendant or other party to which the evidence relates. As such, there should be no obstacle to the shielding of a vulnerable witness (especially a sexual offence victim under this provision) from the defendant or any party to whom the evidence relates. Better still, with or without resources there are various options for screening. Courts can improvise and use anything to conceal the relevant parties from each other's sight, including re-arranging the court creatively. 'In the absence of access to CCTV, judges in Kenya and Zimbabwe have used handmade screens and the positioning of bookshelves to protect child witnesses from having to face the accused during their testimony.'¹⁰³ In fact, as early as in 1919 in the case of *Smellie*¹⁰⁴ the Court ordered the defendant to wait on the stairs at the side of the dock so that he could not be seen by his 11 year-old daughter while she was testifying against him. Screening is that simple and Malawian judges have no excuse for not shielding vulnerable witnesses from the defendant's sight.

In addition, since the section only covers victims of sexual offences, the common law can be useful to protect other witnesses deemed vulnerable but not covered by the section, such as child victims of physical abuse. Judges have the power at common law to shield a witness from the defendant's sight.¹⁰⁵ Most importantly, the CP & EC is premised on the principle that substantial justice should be done without undue regard for technicality,¹⁰⁶ thus the end should justify the means. In deciding whether or not to screen a witness the court can enquire as to witness's wishes, if they are old enough, or consider the witness's relationship to the defendant. The defendant's conduct may also be relevant in this regard. If he seeks by his dress, manner or questions to dominate, intimidate or humiliate a complainant

¹⁰³ Bowman & Brundige (n 74) 284.

¹⁰⁴ *R v Smellie* (n 52).

¹⁰⁵ As above.

¹⁰⁶ Sec 3 CP & EC.

or should this be reasonably apprehended, the judge should not hesitate to order the erection of a screen.¹⁰⁷

6.2 Mandatory prohibition of personal cross-examination of vulnerable witnesses by defendants

Malawi has no provision prohibiting the cross-examination of a vulnerable witness by the defendant. As noted previously, there are very few lawyers in Malawi and it is only in homicide cases that a defendant is guaranteed legal representation at the state's expense if he cannot afford it personally, which usually is the case. As such, virtually all defendants in non-homicide cases have no choice but to go through the criminal justice system without legal representation. In addition to this, the typical defendant is unsophisticated and uneducated. Most defendants are unfamiliar with the law and court procedures and do not know how to conduct cross-examination. Even though courts may endeavour to explain the procedure to litigants, trial observations have revealed that litigants have miserably failed in conducting their cases.¹⁰⁸

As noted previously, in systems where a mandatory prohibition of personal cross-examination by the defendant operates, such defendants either find or are provided with professional advocates to cross-examine witnesses on their behalf. It is clear that this cannot work in the Malawian system as there are no such advocates to do the work on the defendant's behalf. The Malawian defendant often is not unrepresented by choice. It is submitted, therefore, that in this respect, especially where adult vulnerable complainants are concerned, the defendant should still personally cross-examine the witness. The trauma occasioned by such a situation to some extent will be minimised by the erection of a screen as suggested above. It is not an ideal situation but the best that can be done in the circumstances.

What of the risk of abusive cross-examination? It has already been indicated that abusive cross-examination actually underpins the rationale for the prohibition of personal cross-examination by a defendant. A possible solution to that may be for the courts to take advantage of the opportunity presented by the fact that they explain court processes and procedures to unrepresented defendants. The courts can guide the defendant to focus on relevant matters and on how to properly conduct the cross-examination including questioning

¹⁰⁷ *Milton Brown* (n 41).

¹⁰⁸ *Scharf et al* (n 20) 14.

about sexual history evidence. If he does not comply with such instructions, the judge may intervene and secure compliance and may even stop further questioning by the defendant or take over the questioning of the complainant himself as was recommended in the case of *Milton Brown*.¹⁰⁹ Where the judge takes over the questioning he can always ask the defendant if there is anything further that he wishes the judge to ask on his behalf.

As far as children are concerned, in England and Wales, at a time when there was no provision ensuring legal representation for a defendant who could not cross-examine a key witness, in child witness cases the best practice was thought to be for the trial judge to take over the cross-examination of child witnesses.¹¹⁰ Malawian judges can borrow a leaf from this. Thus, whereas for adult witnesses the judge should only intervene if the cross-examination becomes abusive, this need not be so for children. The only challenge is that without legislative support it may not be easy for judges to just start cross-examining child witnesses on behalf of the defendant in the absence of abusive cross-examination.

As noted above, other jurisdictions use intermediaries to protect children from personal cross-examination by the defendant, even by lawyers. It was also noted that the intermediary comes in various forms, from go-between translator to child communication professionals, depending on the country. Due to resource constraints, Malawi may not be in a position to afford the fresh employment of intermediaries in whatever form. The best would be to borrow from the South African approach where the intermediary is a translator and to train all court clerks in cross-examining children in the vernacular language. With appropriate training such clerks could be used as transmission channels in cases involving very young children or children unable to testify. The lawyer or defendant could be asked to give the clerk any questions they wish to ask and the clerk can then appropriately transmit them to the child on their behalf. For older children, it is submitted that the same approach suggested for adult complainants can be followed. The judge would have to be more alert in such a case.

¹⁰⁹ *Milton Brown* (n 41) 364.

¹¹⁰ J McEwan 'In defence of vulnerable witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4 *The International Journal of Evidence and Proof* 21.

6.3 Restricting improper cross-examination and sexual history evidence

As noted above, Malawi has no specific provisions covering the improper cross-examination or sexual history evidence in respect of vulnerable witnesses. In this context the common law is useful. There is no doubt that the common law rules of cross-examination contain sufficient authority to enable judges to control improper questioning.¹¹¹ In addition, section 214(5) of the CP & EC, which stipulates that cross-examination must relate to relevant facts, appears to have codified the common law position and can also be useful in this regard. Such provisions on relevance may also be used to exclude sexual history evidence which generally is excluded for being irrelevant. Section 215(3) of the same Act goes further to state that the court may forbid any question that it considers indecent or scandalous. All these provisions may be used by the court to restrain the unnecessary and offensive cross-examination of vulnerable witnesses.

More important than the common law and the CP & EC provisions, the Malawian Constitution guarantees the right to privacy¹¹² and the right not to be subjected to any inhuman or degrading treatment.¹¹³ It provides further that 'in any judicial proceedings respect for human dignity shall be guaranteed'.¹¹⁴ It is submitted that these constitutional guarantees may be used by courts to protect vulnerable witnesses by curtailing offensive cross-examination which intrudes on the witness's privacy or otherwise is degrading. As previously indicated, this is an allowable limitation of the right to a fair trial.

A concern can be raised that, due to the nature of the adversarial system, the judge, by intervening to stop what is perceived as improper questioning, may confuse the process since he is not in control of the evidence available so as to know where a line of cross-examination might be leading.¹¹⁵ However, this may not be a significant problem in the Malawian context as the typical defendant is unrepresented and has no cross-examination techniques or structure as to suffer confusion through the judge's intervention.

Further to the above, various approaches are used in different jurisdictions in dealing with sexual history evidence: the legislated

111 Henderson (n 70) 58.

112 Republic of Malawi Constitution, 1994 sec 21.

113 Sec 19(3).

114 Sec 19(2).

115 Ellison (n 12) 109.

exceptions approach; the evidentiary purpose approach whereby the admissibility of such evidence depends on the purpose for which it is being offered; and the judicial discretion approach which simply grants to judges the broad discretion to admit or bar evidence of sexual history.¹¹⁶ The judicial discretion approach only requires a judicial determination that the proffered evidence is relevant and that its probative value is not outweighed by its prejudicial effect.¹¹⁷ Unlike the legislated exceptions approach, this approach would be good for Malawi because the former are easily implementable where lawyers are involved in the process. The typical Malawian defendant representing himself would not be able to apply legislative exceptions to his evidence, let alone know evidentiary purposes.

The other advantage is that this discretion is similar to that exercised by judges under the common law. Therefore, there would be no need for law reform which in Malawi is an inordinately long process.¹¹⁸ The important thing is that the discretion must not be exercised arbitrarily. It will be submitted below that judicial training can partially solve this. In New Zealand such a discretionary approach to sexual history evidence once operated with some success.¹¹⁹

In restricting sexual history evidence in the Malawian system, it would be important to differentiate between a represented defendant and one without legal representation. It may be easy to restrain improper questioning including on sexual history evidence by a lawyer because the code of conduct for the Malawian bar requires them to treat all witnesses with fairness and provides disciplinary measures accordingly.¹²⁰ Unrepresented defendants, on the other hand, have no similar provisions for holding them accountable, but the court can always use its common law power and the CP & EC provisions discussed above.

The greatest advantage of the Malawian system in this regard is that it rarely uses the jury system. Malawian judges are virtually sole arbiters of fact and law. Most of the concerns with prejudice that may be associated with special measures involve jury prejudice.¹²¹

116 MJ Anderson 'From chastity requirement to sexuality licence: Sexual consent and a new rape shield law' (2002) 70 *George Washington Law Review* 51; McGlynn (n 45) 367.

117 Anderson (n 116) 51.

118 Eg, the CP & EC was re-enacted in 1969 and since then remained largely unchanged until 2010 when it was wholesomely reviewed; Law Commission Report (n 31).

119 J Temkin 'Regulating sexual history evidence: The limits of discretionary legislation' (1984) 33 *International and Comparative Law Quarterly* 977.

120 Malawi Law Society Code of Ethics (2006) Ch 12 para 21.

121 Matthias & Zaal (n 15) 298; K Quinn 'Justice for vulnerable and intimidated witnesses in adversarial proceedings?' (2003) 66 *Modern Law Review* 154.

Much of the reluctance to rely on special protections or alternative procedures for vulnerable witnesses is rooted in the fear that the jury will give inappropriate weight to the evidence in question. Equally, it may be suggested that many of the tactics deployed by counsel to undermine and unsettle witnesses during cross-examination are for the jury's benefit.

Ellison goes further to say that because the presence of a jury may impact upon the nature of questioning experienced by rape complainants, the replacement of the jury by career judges may also be considered relevant as a solution.¹²² Sexual history showdowns are usually about impressing the jury who, unlike a judge, may overestimate the probative value of the evidence.¹²³

In the Malawian system, where one competent professional is the sole arbiter of fact and law, a discretionary approach to sexual history evidence should be able to work perfectly. It may of course be argued that this does not totally solve the prejudice factor as Malawian culture is conservative and patriarchal attitudes towards women and sexuality prevail. These may find their way onto the bench. The saving grace is that judges are permanently employed competent professionals who can be educated accordingly. Additionally, unlike juries who are once-off lay fact finders, judges have considerable experience of adversarial presentation and so can keep a level head and not easily be misguided by irrelevant evidence. In other words, the impact of their prejudice cannot be as bad as in the case of juries and with proper and adequate training can be properly handled.

From the above discussion, while the special measures in issue are the ideal, a copy-and-paste approach would not at present be workable in Malawi. The best starting point would be to proceed as suggested above.

It therefore is submitted that judges are the best hope for the protection of vulnerable witnesses in Malawi. Starting with screens, section 71A leaves it up to the judge to decide whether to make such an order. Regarding witnesses falling outside that provision, the power to order the erection of a screen is also in the discretion of the judge. The CP & EC and constitutional provisions as well as the common law discretion, while useful for curtailing improper cross-examination including sexual history evidence, cannot come to life if judges do not apply them to protect vulnerable witnesses in

¹²² Ellison (n 12) 153.

¹²³ As above.

court. Further, the code of conduct for lawyers does little to prevent improper cross-examination if judges do not rightly intervene.

The argument is stronger for sexual history evidence since Malawi has no specific legislative provision regulating it and, even if there was, such would need judges to appropriately implement it. The same applies to preventing unrepresented defendants from abusing witnesses during cross-examination. Judges must appreciate that that is a difficult situation for the witness and do all they can to alleviate the stress of the witness. Of course, with respect to clerks acting as intermediaries for very young children or children unable to testify, they need to be trained accordingly.

7 Moving forward: Judicial education and proactive interventions

Malawian judges bear the main responsibility of assisting vulnerable witnesses within the available resources in the ways suggested above. Unfortunately they have not been adequately proactive in practice. Most Malawian judges are driven by the need to be seen to be impartial in line with common law tradition and so play too passive a role in the proceedings.¹²⁴ Yet the English legal system, from which Malawi borrowed such culture and which often is regarded as the paradigm of the adversarial tradition, is not a perfect example of such: Even in criminal courts it allows deviations from the proper adversarial structure.¹²⁵ Malawi surely cannot afford the luxury of being a paragon of the adversarial tradition.

Reality calls for a more proactive approach on the part of judges to defend the rights of the vulnerable. It is submitted that judges' competence in this regard needs to be reinforced with continuing training and education. Inadequate training and continuing legal education for some time have been key weaknesses of the judiciary.¹²⁶ The judiciary's training programmes tend to be *ad hoc* and donor driven.¹²⁷ Consequently, critical legal issues, including the protection of vulnerable witnesses, may not be addressed or may be addressed, but insufficiently and unsystematically. In its 2019-2024 strategic plan, the judiciary acknowledges this problem and plans to establish a judicial training institute which will be a good initiative

¹²⁴ Scharf et al (n 20) 1.

¹²⁵ J McEwan *Evidence and the adversarial process: The modern law* (1998) 1.

¹²⁶ E Kanyongolo 'State of the judiciary report: Malawi 2003' (2004) IFES State of the Judiciary Report Series 24; The Malawi Judiciary Strategic Plan, 2019-2024.

¹²⁷ As above.

for reinforcing the knowledge and skills of judicial officers in this area and others.

Until this is established, the newly-established Malawi Institute of Legal Education (MILE),¹²⁸ a professional training institution set up to provide post-graduate legal training for those intending to practise law in Malawi, affords a golden opportunity for comprehensive and systematic training in this regard. MILE focuses on practical legal courses, including criminal procedure and the law of evidence. If the curriculum includes the fair treatment of victims and, in particular, the protection of vulnerable witnesses, then every professional magistrate and legal practitioner will begin work while acquainted with these areas. MILE has also been mandated to organise and conduct courses for continuing legal education purposes. This may be used to further the knowledge and skills of those who are already in the system regardless of rank. A particular advantage of the judiciary where MILE is concerned is that the judiciary has been very instrumental in establishing this institution and many judges are teaching various courses at this institution.

In addition, the High Court should also take advantage of its oversight role over magistrates by writing comprehensive judgments in this area to educate and guide magistrates on handling vulnerable witnesses, as happened in the case of *R v Richard Mandala Chisale*.¹²⁹ Such efforts can go a long way in addressing the limited understanding of some judicial officers and others of the special needs of vulnerable witnesses and how they can be protected.

To a large extent Malawian judges have not been proactive in using the available options to protect vulnerable witnesses. What guarantee is there that any training or education programme can change that? Indeed, there is no guarantee but it nevertheless is hoped that the right training can help, if not all judges, then at least some of them, to unlearn any negative attitudes whether inspired by the adversarial culture or sexual offence stereotypes and to be proactively interventionist.

8 Conclusion

This article set out to analyse the protection of vulnerable witnesses during criminal trials in the face of resource challenges. Significant challenges faced by such witnesses in the Malawian criminal

¹²⁸ Set up under sec 14 of the Legal Education and Legal Practitioners Act 2018.

¹²⁹ Criminal Review Case 7 of 2014.

justice system were highlighted as well as the negative impact of the adversarial tradition. It has been indicated that, unlike Malawi, most common law jurisdictions have introduced special measures to mitigate the plight of vulnerable witnesses, significant among which are screening the witness from the defendant's sight; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including on sexual history evidence. An assessment of these three measures indicated that they are capable of co-existing alongside the defendant's fundamental right to a fair trial.

It has further been highlighted that, with the exception of screening, underpinning all these special measures are resource requirements. While on the face of it this factor may appear to be an obstacle to the protection of vulnerable witnesses in Malawi, the discussion brought to light a wealth of options to be explored for the benefit of such witnesses. All that is needed is for judges to be proactive and actively interventionist.

If vulnerable witnesses are treated unfairly, the only interests that will be served are those of (often) guilty defendants. It therefore is in the interests of justice to protect vulnerable witnesses. Although this is not easy to do in a resource-poor nation such as Malawi, judges are in a position to make a difference.

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Rethinking the right to water in rural Limpopo

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Summary: *For decades Africa has been losing billions of dollars every year as a result of illicit financial flows. When export and import figures are tampered with this has the tendency to erode the tax base. It is common cause that in Africa a large percentage of state revenue emanates from taxation. The consequence of tax base erosion is that the government has less revenue. With less revenue, the government is increasingly unable to provide social services. The consequences for women are particularly dire as women have to end up subsidising the state in providing services, reproductive and care work. This article argues that the government has a responsibility to ensure that the maximum 'available resources' are allocated to the attainment of socio-economic rights, particularly the right to water, especially for the poorest in the country. The article is limited in scope to the province of Limpopo in South Africa. The article highlights the impact of illicit financial flows (IFFs) on women and girls living in rural communities, particularly in Limpopo. It sets out the nature and extent of IFFs in South Africa, and describes the socio-economic context*

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of Limpopo and the extent to which the right to water has not been realised in selected rural parts of Limpopo. The article further outlines the relevant legal framework and finally analyses the gendered implications of the right to water and the duty on the state.

Key words: *socio-economic rights; rights-based approach; right of access to water; illicit financial flows; rural communities; Limpopo*

1 Introduction

Illicit financial flows (IFFs) came to the forefront after the publication of the ground-breaking report of the United Nations Economic Commission for Africa.¹ Several authors have written on IFFs, largely from a social or economic perspective.² The article adds a rights-based approach to the discourse on the impact of IFFs. The issue is that IFFs negate an essential source of revenue which should be used to realise socio-economic rights. IFFs shift profits and erode the tax base, thereby undermining the development agenda of the investment host country. We argue that the government has a responsibility to ensure that the 'available resources' are allocated to the attainment of socio-economic rights, especially for the poorest in the country. We further argue that the government has a responsibility to provide access to water, which right can be realised through improved tax enforcement. The article is limited in scope to the province of Limpopo in South Africa. The argument is made that IFFs are depleting the available resources of South Africa, which resources ought to be allocated to the provision of access to water. The article further highlights the impact of IFFs on women and girls living in rural communities, particularly in the Limpopo Province.

First, the article highlights the nature and incidence of IFFs in South Africa with the aim of illustrating the potential resources that could be allocated to realising the right to water. Second, the article describes the socio-economic context of Limpopo and the extent to

1 United Nations Economic Commission for Africa (UNECA) 'Illicit Financial Flows (IFFs) Report of the High Level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development' (2014) 9.

2 See D Kar & J Spanjers *Illicit financial flows from developing countries: 2004-2013* (2015); JD Nkurunziza 'Illicit financial flows: A constraint on poverty reduction in Africa' (2012) *Association of Concerned Africa Scholars Bulletin* 87; A Cobham & P Janský *Estimating illicit financial flows: A critical guide to the data, methodologies, and findings* (2020); AA Goldsmith 'Out of Africa? Elections and capital flight revisited response' (2020) 64 *International Studies Quarterly* 248-254.

which the right to water has not been realised in selected rural parts of Limpopo. Third, the article outlines the legal framework insofar as it governs the right to water, starting with the domestic provisions, and broadening to include regional and international provisions. The article finally highlights the gendered impact of the right to water.

2 Understanding illicit financial flows

The paragraphs below seek to clarify what is meant by IFFs in order to provide clarity on how IFFs constitute 'available resources' that may be used for the progressive realisation of the right to water. IFFs are defined by the United Nations Economic Commission for Africa as

money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion including trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials.³

Another definition for IFFs proffered by the Organisation for Economic Co-operation and Development (OECD) notes that most activities that result in IFFs are criminal.⁴ This report cites as examples 'money laundering', 'corruption' and 'tax evasion'.⁵ The Global Financial Integrity (GFI) Illicit Financial Flows Report 2017 highlights two main streams as the main sources of illicit financial flows, namely, 'deliberate misinvoicing in merchandise trade ... and leakages in the balance of payments (also known as "hot money flows")'.⁶

From the definitions above, IFFs refer to a broad range of activities that ultimately result in the transfer and use of 'illegally earned, transferred or utilised money'. This article focuses on IFFs originating

3 UNECA IFF Report (n 1) 9.

4 UNECA IFF Report 15.

5 OECD Illicit financial flows from developing countries: Measuring OECD responses (2014) 15. The importance of perspectives from the OECD lies in the realisation that the majority of investments received in South Africa derive from OECD member states. In this regard see OECD 'South Africa and the OECD', <http://www.oecd.org/southafrica/south-africa-and-oecd.htm> (accessed 28 January 2020).

6 Global Financial Integrity (GFI) Illicit financial flows to and from developing countries: 2005-2014 (2017) vii; see further in A Korinek 'Hot money and serial financial crises' University of Maryland (2011) 2 Paper prepared for IMF Eleventh Jacques Polak Annual Research Conference and the IMF Economic Review, <https://www.norges-bank.no/globalassets/upload/konferanser/2011-06-09/korinek.pdf> (accessed 28 January 2020); T Lai 'Capital flows to China and the issue of hot money: An empirical investigation' 4 City University Hong Kong (2010), <https://www.rba.gov.au/publications/workshops/research/2010/pdf/lai.pdf> (accessed 28 January 2020).

from commercial tax evasion, specifically trade misinvoicing and abusive transfer pricing.

2.1 Trade misinvoicing and abusive transfer pricing

Trade misinvoicing often occurs deliberately between companies that are unrelated, whereas abusive transfer pricing occurs within groups of companies in intra-group transfer of goods and services.

2.1.1 Trade misinvoicing

Trade misinvoicing occurs when companies alter their paper trail to record profits in jurisdictions that offer low taxes, and quite often these are offshore tax-free jurisdictions. This is a critical challenge because in some instances companies operating in South Africa have shell companies hosted by corporate firms in low-tax or tax-free jurisdictions, and have a front such as having only a few employees who are junior-level staff, diverting profits from the real source to the low-tax or tax-free jurisdiction.⁷

The Global Financial Integrity Report notes that 'trade misinvoicing is the primary measurable means for shifting funds in and out of developing countries illicitly' and that 'an average of 87 per cent of illicit financial outflows were due to the fraudulent misinvoicing of trade'.⁸ Trade misinvoicing occurs when companies intentionally write incorrect amounts on invoices. Some of the reasons for this include avoidance and evasion of taxes such as customs duty when exporting or importing goods, money laundering, and profit-shifting to foreign low-tax jurisdictions.⁹

This is prejudicial to developing economies that stand to lose more when profits are shifted and re-directed outward. The taxable amount is reduced and opportunities for re-investment and job-creation are lost. Governments need tax revenue to finance the national budget and to support the provision of socio-economic rights, such as the right to water.

⁷ T Faccio 'What are tax havens?' *Mail & Guardian*, first published in *The Conversation* 7 April 2016, <https://mg.co.za/article/2016-04-07-explainer-what-are-tax-havens> (accessed 28 January 2020).

⁸ GFI (n 6) 10.

⁹ As above.

2.1.2 *Abusive transfer pricing*

The United Nations (UN) Practical Manual on Transfer Pricing for Developing Countries defines 'transfer pricing' as 'the setting of prices for transactions between associated enterprises involving the transfer of property or services'.¹⁰ With globalisation there is an increase in multinational companies, and intra-group transfers are inevitable. Transfer pricing is a normal practice which on its own is not necessarily unlawful.

However, in order to be lawful, transfer pricing must comply with both national and international law. The problem arises when multinational companies act unlawfully, and abuse loopholes in the system to syphon out money or resources under the guise of intra-group transactions with sister companies. Abusive transfer pricing involves a manipulation of prices so as to shift profits from a high-tax jurisdiction to an entity located in a low-tax jurisdiction.¹¹ The lower the income reported in the high-tax jurisdiction, the lower the tax to be paid to government. Hence shifting the profit to a low-tax jurisdiction means that the multinational corporation pays less in taxes.¹² The International Bar Association's Human Rights Institute notes that transfer pricing leads to revenue losses, perpetuates inequality, creates an unfair competitive advantage for multinational corporations, and increases the cost of tax administration.¹³ In South Africa transfer pricing is regulated primarily by the Income Tax Act. Section 31(2) of the Income Tax Act provides:

Where any goods or services are supplied or acquired in terms of an international agreement and the acquirer is a connected person in relation to the supplier; and the goods or services are acquired at a price which is either

- (i) less than the price which such goods or services might have been expected to fetch if the parties to such a transaction had been independent persons dealing at arm's length (such price being the arm's length price), or
- (ii) greater than the arm's length price.

For the purpose of this Act in relation to the acquirer or supplier, the Commissioner may in the determination of taxable income of

10 United Nations *Practical Manual on Transfer Pricing for Developing Countries Ref: ST/ESA (2017) 24*, <https://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf> (accessed 28 January 2020).

11 S Sekhar 'Transfer pricing: The case of Vodafone' (2016) 6 *International Journal of Engineering Science and Computing* 6207.

12 International Bar Association's Human Rights Institute (IBA) 'The obligation to mobilise resources: Bridging human rights, Sustainable Development Goals and economic and fiscal policies' (2017) 69.

13 IBA (n 12) 69.

either the acquirer or supplier adjust the consideration in respect of the transaction to reflect an arm's length price for the goods or services.¹⁴

In other words, the Income Tax Act makes an adjustment so that in instances where more favourable terms were provided in intra-group trade, this is adjusted for tax purposes, so that the tax is calculated on the arm's length amount. Arm's length simply means the amount that would have been paid between independent or unrelated businesses trading in the open market. This essentially means that parent and sister companies are able to trade at lower or higher prices than normal market rates, and the state will only interfere in this in relation to the collection of taxes. This in essence means that multinational corporations still enjoy numerous other benefits and may engage in anti-competitive behaviour without suffering serious consequences, thereby distorting the market.¹⁵ Nonetheless, section 31(2) of the South African Income Tax Act is in line with international tax guidelines, such as the United Nations Model Double Taxation Convention (UNMDTC), which provides for associated enterprises.¹⁶ Article 9 of the UNMDTC states in summary that tax authorities may adjust the payable tax by reviewing a company's profits if there were any transactions between that company and a related company in another country and if such transaction(s) were not concluded at arm's length.¹⁷ Trade misinvoicing and abusive transfer pricing are detrimental to the advancement of human rights as they divert resources from the state. South African tax authorities are empowered through the Tax Act to levy taxes and therefore have the power (whether the power is used or not, and regardless of the nature and extent of the exercise of this power) to adjust the tax payable by corporations taking into account transfer pricing arrangements in order to offset abusive transfer pricing.

2.2 Base erosion and profit shifting

The importance of IFFs is that they constitute taxable income that escapes the tax collector, resulting in reduced national revenue. In

¹⁴ Act 58 of 1962.

¹⁵ SB Nielsen, D Schindler & G Schjelderup 'Abusive transfer pricing and economic activity' 2, http://www.tax.mpg.de/fileadmin/user_upload/Paper_Soren_Bo_Nielsen_Dirk_Schindler_Guttorm_Schjelderup.pdf (accessed 28 January 2020).

¹⁶ United Nations Model Double Taxation Convention between Developed and Developing Countries (2017) Ref ST/ESA/PAD/SER.E/213 (UN Model Tax Convention), <https://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf> (accessed 28 January 2020).

¹⁷ As above.

other words, IFFs erode the tax base from which governments can collect taxes. This is a form of base erosion.

An argument is made that by failing to collect taxes effectively, the government is failing to meet its constitutional duty to realise socio-economic rights progressively. Governments indeed are entitled to engage strategies that enhance the growth of economies through foreign direct investment and the ploughing back of profits. This in no way includes the avoidance of tax by individuals and companies. Tax avoidance and evasion through trade misinvoicing and abusive transfer pricing are classified as IFFs and therefore are an impediment to government's collection of its due revenue towards the fulfilment of its obligation to provide water as a right to even the poorest of its people. The state must fully utilise international law to regulate tax issues. Article 21(5) of the African Charter on Human and Peoples' Rights (African Charter) provides that '[s]tate parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.¹⁸

Section 214 of the South African Constitution requires a law to be enacted to ensure the equitable allocation of resources among the three spheres of government (national, provincial and local). This law is the Division of Revenue Act, which annually allocates an equitable share to provinces and municipalities based on a specific calculation determined in the Act. The allocation of resources in terms of the Act should take into account 'the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them'. A reduced tax base means that the government has fewer resources to allocate. The Limpopo 2019/2020 budget allocates ZAR3,6 billion to public works, roads and infrastructure. This includes infrastructure for water,¹⁹ to enable the minimum access to water stipulated in the National Water Standard Regulations.²⁰ ZAR3,6 billion amounts to over

18 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

19 R Tooley 'Limpopo Provincial Budget Speech 2019/2020', <https://www.gov.za/speeches/mec-rob-tooley-limpopo-prov-budget-speech-201920-6-mar-2019-0000> (accessed 28 January 2020) which is an improvement on the 2016/2017 budget, infographic, <https://reviewonline.co.za/199065/infographic-r61-4-billion-budget-limpopo/> (accessed 28 January 2020).

20 Regulations Relating to Compulsory National Standards and Measures to Conserve Water, Government Gazette 22355, Notice R509 of 2001 (8 June 2001) published in terms of sec 9 of the Water Services Act 108 of 1997 (National Water Standards Regulations); para 23; *Mazibuko & Others v City of Johannesburg & Others* (CCT 39/09) [2009] ZACC 28.

US \$0,2 billion on the current exchange rate of US \$1 to ZAR14,6.²¹ When one considers the huge amounts of revenue lost as profits are illicitly shifted to low-tax jurisdictions, and under-invoicing in export trade, it is clear that US \$0,2 billion is miniscule.

The extractives sector of South Africa is particularly vulnerable to IFFs in the form of abusive transfer pricing, and trade mispricing in evasion of tax. This is a cause for concern as the mining sector ought to contribute significantly towards South Africa's national revenue. These resources could then be allocated equitably to provinces and municipalities because the levying of customs duties and income tax falls within the mandate of national government, to the exclusion of provincial and local government in accordance with sections 228 and 229 of the Constitution.

There is significant mining activity near the villages selected for this article, which is explained further in part 3 below. Of the selected rural communities in Limpopo, there is coal mining in Phalaborwa in Mopani and Vhembe, and chromite, asbestos and platinum group metals in Sekhukhune.²² Considering that Limpopo contributes 25 per cent of the national mineral production, and produces platinum, one of the most valuable minerals, it is imperative to consider the contribution of this sector to the realisation of the right to water in the province. It is noted that

[f]or South Africa, cumulative underinvoicing over the period 2000-2014 is reported in the UNCTAD study (in 2014 constant US dollars) for silver and platinum to have amounted to USD 24 billion, iron ore to USD 600 million, and gold to USD 78.2 billion. In total, underinvoicing for South Africa over the nearly 15 year period is stated by the UNCTAD study to have amounted to USD 102.8 billion (2014 US dollars).²³

21 Bloomberg 'Spot exchange rate', <https://www.bloomberg.com/quote/USDZAR:CUR> (accessed 28 January 2020).

22 M Mothetha, Z Nkuna & V Mema 'The challenges of rural water supply: A case study of rural areas in Limpopo Province' Council for Scientific and Industrial Research, http://researchspace.csir.co.za/dspace/bitstream/handle/10204/7593/Mothetha_2013.pdf;jsessionid=763AE7BEB08FA51EA8D83AED3F1041AB?sequence=1 (accessed 28 January 2020); Mopani District Municipality 'Mopani', <https://municipalities.co.za/featured/mopani.pdf> (accessed 28 January 2020); Department of Rural Development and Land Reform South Africa District Rural Development Plan Sekhukhune District Municipality Limpopo Province 56, http://www.ruraldevelopment.gov.za/phocadownload/SPLUMB/Dev_Plans2017/Limpopo/sekhukhune%20drdp.pdf (accessed 28 January 2020).

23 Open Society Initiative for South Africa (OSISA), Third World Network Africa (TWN), Tax Justice Network Africa (TJNA), Action Aid International (AAI), Christian Aid (CA) (2009) 'Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development', <https://www.oxfam.de/system/files/20150602-mb-money-talks-africa-g7-summit-en.pdf> (accessed 29 January 2020).

UNCTAD reports that Africa loses US \$100 billion a year to corporate tax avoidance schemes.²⁴ This exceeds the total amount of development assistance provided in 2009 under the OECD Development Assistance Committee.²⁵ OSISA et al note that

[i]n 2012, more than R300bn (US\$29.1bn) or close to 10 per cent of GDP left South Africa in the form of illicit financial flows. Among the worst offenders were the countries' mining giants who used a variety of dubious accounting practices to sidestep paying taxes. This has led to the South African treasury losing out on US \$359m a year.²⁶

South Africa loses US \$7,4 billion per year due to trade misinvoicing alone.²⁷ This is a significant amount of money, especially taking into account the state of access to socio-economic rights in South Africa.²⁸ When government fails to collect taxes, particularly by failing to adjust the accounts of associated companies in order to tax the arm's length trade figures as provided for in section 32(1) of the Income Tax Act, it reduces the state's tax base. Shrinking the tax base means that the government will receive less revenue and that ultimately the government will have less revenue to use to fulfil its numerous obligations, including providing for access to socio-economic rights. It is common cause that large multinational corporations generally have higher incomes through profits, and are more likely to evade tax than domestic companies, and wealthy individuals are more likely to evade tax than poor individuals.²⁹ This is because of the access that large multinational corporations and wealthy individuals have to expert legal and tax advisors, aggressive tax planning, global presence, and high incomes that are attractive and eligible for banking in tax havens.³⁰ This results in an exponential erosion of the tax base.³¹

The South African Revenue Authority introduced the Special Voluntary Disclosure Programme (SVDP) between October 2016 and August 2017 pursuant to the release of the Panama papers

24 OSISA, TWNA, TJNA et al 'Breaking the Curse' (n 23) 5.

25 R Balakrishnan et al *Maximum available resources and human rights* (2011) 13.

26 Oxfam Media Briefing (n 23) 5.

27 G Nicholson 'Illicit financial flows: Trade misinvoicing costs South Africa \$7.4bn in tax a year', <https://www.dailymaverick.co.za/article/2018-11-19-trade-misinvoicing-costs-south-africa-7-4bn-in-tax-a-year/> (accessed 28 January 2020).

28 OSISA Third World Network Africa, Tax Justice Network Africa, Action Aid International, Christian Aid (2009) 'Breaking the curse: How transparent taxation and fair taxes can turn Africa's mineral wealth into development', <http://documents.twnafrica.org/breaking-the-curse-march2009.pdf> (accessed 28 January 2020).

29 African Monitor 'Report 1: State of illicit financial flows in South Africa: A scoping exercise' 10 (African Monitor Report), <http://www.africanmonitor.org/wp-content/uploads/2017/04/IFF-Report-1.pdf> (accessed 28 January 2020).

30 As above.

31 As above.

and obtained R1 billion from approximately 2 000 tax payers.³² This is a gain that must be acknowledged, and more must be done to continue to boost the collection of taxes from multinational corporations. However, the amount collected under the SVDP is miniscule in comparison to amounts lost to IFFs. More must be done to secure the available resources in order to progressively realise women's rights to water in rural areas such as Limpopo.³³

2.3 Domestic tax burden

When the tax base is eroded, the state will have to find alternative sources to plug the gap in the national treasury in order to support the national budget. In an effort to plug the gaps left by enlarged spending such as free education,³⁴ the state tends to place the burden on the shoulders of its citizens. For example, the budgeted ZAR57 billion for free tertiary education conceded after three years of student protests under the Fees Must Fall movement requires the government to find a revenue source for this expenditure.³⁵ In such cases the state inevitably increases the burden on citizens, especially on poorer households.

The burden on citizens manifests itself as increased personal taxes such as value added tax (VAT) and income tax as seen in the 2018 Budget Speech in which VAT was increased. An increase of VAT by 1 per cent from 14 to 15 per cent is significant. Some may argue that globally VAT of 15 per cent remains relatively low, but that generalisation does not lighten the plight of the poor. This increase in VAT disproportionately affects the poorest households and the

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- 32 ANA Reporter 'SARS collects R1 billion from special voluntary disclosure programme' Business Report 12 October 2017, <https://www.iol.co.za/business-report/companies/sars-collects-r1-billion-from-special-voluntary-disclosure-programme-11555305> (accessed 28 January 2020). One thousand seven hundred South Africans were listed in the Panama Papers as holding shell companies in tax havens, where profits can easily be re-directed away from the stiff tax requirements of South Africa; M Ferreira '1700 South Africans named in Panama Papers', <https://www.iol.co.za/business-report/companies/1-700-south-africans-named-in-panama-papers-2026164> (accessed 28 January 2020).
- 33 Regulations relating to Compulsory National Standards and Measures to Conserve Water, Government Gazette 22355, Notice R509 of 2001 (8 June 2001) published in terms of sec 9 of the Water Services Act 108 of 1997 (Water Standards Regulations); *Mazibuko* (n 20) para 23.
- 34 Free education means available, accessible, free and compulsory primary education. For a more detailed discussion, see L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *PER/PELJ* 97.
- 35 M Gigaba, Minister of Finance, National Budget Speech of South Africa 2018 10, <http://www.treasury.gov.za/documents/national%20budget/2018/speech/speech.pdf> (accessed 28 January 2020).

missing middle.³⁶ It means that poorer households lose more buying power relative to wealthy households.³⁷ Additionally, the increase of 52 cents per litre of fuel, being 22 cents per litre fuel levy and 30 cents per litre Road Accident Fund levy, which the Minister at the time suggested ‘will not affect the poor’, increases production costs for companies, and filters through to consumers through increased prices of goods and services.³⁸

The IBA³⁹ notes the impact of resource diversion and foregone tax revenues in limiting the available resources for human rights fulfilment, including the right to water and highlighted the importance of the domestic state revenue for the realisation of Goal 16.4 of the United Nations Sustainable Development Goals (SDGs). The report notes that states have an obligation to mobilise resources and devote the maximum available resources towards the realisation of human rights.⁴⁰ In order to fully devote the maximum available resources to human rights, states have a duty not only to generate resources, but also to prevent the diversion of resources.⁴¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) has urged states ‘to “take rigorous measures” to combat illicit financial flows, tax evasion and fraud “with a view to raising national revenues and increasing reliance on domestic resources”’.⁴²

The Special Rapporteur on Extreme Poverty notes that

tax abuse is not a victimless practice; it limits resources that could be spent on reducing poverty and realising human rights, and perpetuates vast income inequality ... a state that does not take strong measures to tackle tax abuse cannot be said to be devoting the maximum available resources to the realisation of economic, social and cultural rights. Moreover, high levels of tax abuse undermine the principles of equality and non-discrimination.⁴³

36 Department of Higher Education Ministerial Task Team ‘Training Report: To develop a support and funding model for poor and “missing middle” students’ 7, http://www.dhet.gov.za/SiteAssets/Gazettes/MTT_Report.pdf (accessed 28 January 2020). The Minister of Finance effectively increases the definition of the ‘missing middle’ to include families whose combined annual income falls below R35 000; see National Budget Speech (n 35) 14.

37 National Budget Speech (n 35) 10; Balakrishnan et al (n 25).

38 Gigaba National Budget Speech (n 35) 11; J Cronje ‘Fuel and Road Accident Fund levies go up’ *Fin24* 21 February 2018, <https://www.fin24.com/Budget/fuel-and-road-accident-fund-levies-going-up-20180221> (accessed 28 January 2020).

39 IBA (n 12).

40 IBA (n 12) 10.

41 IBA (n 12) 67.

42 As above.

43 IBA (n 12) 68.

Article 24 of General Comment 24 of the Committee on Economic, Social and Cultural Rights (ESCR Committee) notes that when countries reduce corporate taxes in order to attract investors, this encourages a race to the bottom, which limits all states' ability to mobilise domestic resources and undermines their ability to fulfil their human rights obligations.

It has been argued that although the Working Group on Business and Human Rights acknowledges that all corporations have an obligation to respect human rights, the Independent Expert on Equitable International Order has noted that the Working Group's Guiding Principles on Business and Human Rights make no provision relating to the obligation of businesses to pay their 'fair share' of taxes, nor does it mention tax evasion, tax fraud or tax havens.⁴⁴

Regarding financial secrecy legislation, tax havens and low-tax jurisdictions, the Special Rapporteur on Extreme Poverty noted that tax havens facilitate large-scale tax abuse and illicit conduct, divert state revenue and worsen inequalities because 'most tax havens are located in – or under the jurisdiction of – wealthy countries'.⁴⁵

The following part of the article describes the extent and nature of access to water in Limpopo Province.

3 Access to water in Limpopo

Limpopo is selected as it is one of the two poorest provinces in South Africa (the other being the Eastern Cape).⁴⁶ It is argued that rural women in Limpopo face harsh economic conditions as they live in one of the poorest provinces, and constitute one of the most vulnerable groups affected by intersectional inequalities of poverty, gender and race.⁴⁷ Limpopo is home to many people who belong to the so-called 'second economy'. The second economy is

a metaphor implying that part of the economy is cutting-edge and globalised, and part is marginalised and underdeveloped. Obviously, these two economies don't occupy distinct geographic spaces, but are interconnected in many ways. About two thirds of the population is to be found in the first economy, as employers, workers, professionals and others. The development of the second economy has to be

44 IBA 72.

45 United Nations 'Report of the Special Rapporteur on Poverty, Magdalena Sepúlveda Carmona' (2014) UN Doc A/HRC/26/28 para 61.

46 Statistics South Africa 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' 34, <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 28 January 2020).

47 As above.

carried almost exclusively by the democratic state. The level of underdevelopment of this economy and the small size of its market makes it an unattractive target for the industrial economy.⁴⁸

As of 2016 Limpopo had 11,5 per cent multi-dimensionally poor households.⁴⁹ Inequality of access to water within the Limpopo Province is also an issue. Unlike the good fortunes of those living in Capricorn and Waterberg, who mostly have access to piped water (80,5 and 75,4 per cent respectively), only 53,2 per cent of citizens living in Mopani, Vhembe and Greater Sekhukhune have access to piped water.⁵⁰ Research conducted by the Council for Scientific and Industrial Research highlights a lack of access to water in Magona and Govhu villages, and the Vondo Cluster.⁵¹ These challenges are representative of a provincial dilemma. The main challenges noted by Mothetha et al are the lack of capacity and skills at municipalities, poor operation and maintenance of infrastructure, illegal connections and political interference.⁵²

The lack of capacity and skills at municipalities has contributed to residents going without access to potable water for long periods of time, ranging from two weeks to more than two years in some areas.⁵³ In this case, the community members will either buy water from those who have boreholes or, if they cannot afford it, resort to unprotected water sources such as rivers, wells and springs.⁵⁴ A similar challenge is experienced in Vhembe district where it is alleged that poor maintenance of water infrastructure and the incompetence of public officials appointed to manage water in the region are impacting the right to water negatively.⁵⁵ The reasons provided for this are that there is an information gap between communities and municipalities, and that case operators are not always available to attend to the maintenance and operation of water infrastructure.⁵⁶

48 V Gumede 'Poverty and the "second economy" in South Africa: An attempt to clarify applicable concepts and quantify the extent of relevant challenges' DPRU Working Paper 8/133, [https://www.vusigumede.com/content/academic%20papers/Poverty%20and%20Second%20Economy%20in%20SA%20DPRU%20WP%2008-133\].pdf](https://www.vusigumede.com/content/academic%20papers/Poverty%20and%20Second%20Economy%20in%20SA%20DPRU%20WP%2008-133].pdf) (accessed 28 January 2020).

49 Statistics South Africa (n 46).

50 Limpopo Provincial Government 'Budget Statement 2016/2017' 29, http://www.limtreasury.gov.za/lim_admin_trea/pages/sites/treasury_lim/documents/budget_statement/Overview%20of%20Provincial%20Revenue%20and%20Expenditure%20201617.pdf (accessed 28 January 2020).

51 Vondo Cluster includes Matondoni, Maranzhe and Murangoni.

52 See generally Mothetha et al (n 22).

53 As above.

54 As above.

55 LL Netshipale 'Water services delivery in Mukondeni Village in Limpopo Province, South Africa' unpublished thesis, University of Limpopo, 2016 5.

56 See generally Mothetha et al (n 22).

Since most areas do not have domestic water piping, the most common infrastructure used are street taps, boreholes, reservoirs and reticulation pipes. However, there are several leaking or broken pipes and taps owing to damage, theft, and lack of maintenance or refurbishment. Illegal water connections, together with leakages in water pipes, have over time caused a reduction in both water pressure and borehole water output. Moreover, the unequal distribution of water has caused villagers whose villages do not have water infrastructure to interfere with the infrastructure of those villages that do have water infrastructure. The argument put forward by the municipalities is that they sometimes receive a budget that does not allow them to cover the entire village, and that is why they provide access to one side of a village and not to the other. This is an issue of national resources, and possibly political interference and corruption. There clearly is a need for resources so that when resources are available, they can be allocated to capacity building for municipalities, and investment in water infrastructure so that the rural communities in Limpopo can access potable water.

The following part examines the right to water to highlight the domestic commitments undertaken by South Africa in terms of protecting, promoting and fulfilling the right to water and to show the particular link between women and their right to water.

4 Right to water

This article questions whether the South African government is meeting its mandate to use 'available resources' so that rural women in Limpopo can have access to water as envisaged in section 27 of the South African Constitution. In order to properly answer this question, one must examine the legal rules governing the right of access to water. The following part of the article explores the legal principles pertaining to the state's responsibilities in relation to the realisation of the right to water under domestic, regional and international law.

4.1 Domestic provisions under the Constitution

Section 27(1)(b) of the South African Constitution explicitly guarantees the right of access to water.⁵⁷ The right to access water is also set out in section 3(1) of the Water Services Act which provides that '[e]veryone has a right of access to basic water supply and basic

⁵⁷ African Charter on Human and People's Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

sanitation'.⁵⁸ This right is not absolute, as it is subject to section 27(2) of the Constitution which stipulates that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.⁵⁹ O'Regan J in paragraph 1 of her judgment in the *Mazibuko* case starts by highlighting that '[w]ater is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die'.⁶⁰

The right to water is entrenched in the Constitution, and where individuals consider the state to have failed to respect, promote and fulfil the Bill of Rights as mandated by section 7(2) of the South African Constitution, they have recourse to judicial review.⁶¹ The courts have considered claims relating to socio-economic rights, particularly the right to housing, health care and water, and selected cases will be noted below. This article is limited to an analysis of the concept of 'available resources'. Chenwi provides an analysis on progressive realisation.⁶² The cases below touched on the issue of available resources, but not definitively.

The Constitutional Court confirmed in the *Grootboom* case that South Africa is bound to use its available resources in the progressive realisation of socio-economic rights. It states in the relevant part that 'both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'.⁶³ The *Soobramoney* case considered the provincial budget as the 'available resources'.⁶⁴ Although the Court in the *Treatment Action Campaign (TAC)* case found that the government would not incur significant additional costs if it were required to provide anti-retroviral drugs, it did not in detail elucidate on the determination of what constitutes 'available resources'.⁶⁵ It took into account that

58 Act 108 of 1997.

59 The Constitution of the Republic of South Africa, 1996; L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance' (2013) *De Jure* 742 743 .

60 *Mazibuko* (n 20).

61 South African Constitution; Chenwi (n 59).

62 Chenwi (n 59) 743.

63 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 46. This case dealt with the right to housing wherein *Grootboom* was facing eviction; Chenwi (n 59) 743; S Liebenberg 'The interpretation of socio-economic rights' in M Chaskalson et al (eds) *Constitutional law of South Africa Original Service* (2003) 44.

64 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) paras 24 & 29; Liebenberg (n 63) 45.

65 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) (TAC) para 71.

the Nevirapine HIV medication in question would be provided free of charge for five years, and the hospitals administering the medication already had facilities for HIV testing and counselling, and concluded that the government would not incur significant costs.⁶⁶

Although *Mazibuko* dealt specifically with the right to water, it did not fully address the question as to what constitutes available resources. Instead, the approach adopted in this case was to question the sufficiency of the amount of water provided for free, and to question the installation of pre-paid metres in Phiri, Soweto, in Gauteng Province.⁶⁷ The Court referred to section 27 of the Constitution, sections 1 and 3 of the Water Services Act, and Regulation 3 of the National Water Standards Regulations, being delegated legislation in terms of the Water Services Act, which provide for:⁶⁸

a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

- (i) at a minimum flow rate of not less than 10 litres per minute;
- (ii) within 200 metres of a household; and
- (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

The Constitutional Court in *Mazibuko* overturned the decision of the Supreme Court of Appeal, and rejected the use of a minimum core, relying on its reasoning and rulings in the cases of *Grootboom* and *TAC* cases. The Constitutional Court in *Mazibuko* concluded that section 27 of the Constitution does not grant a right to immediately claim sufficient water but, rather, that it places an obligation on the state ‘to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources’.⁶⁹ However, the *Mazibuko* case does not clearly state a position on the available resources. How does one determine the available resources? Does the phrase ‘available resources’ refer to the national budget alone, or other sources? Authors often narrowly interpret Limburg Principle 26 where it refers to ‘its available resources’ as ‘both the resources within a state and those available from the international community through international co-operation and assistance’.⁷⁰ However, this is not a *numerus clausus* as it is open to interpretation. Balakrishnan et al propose that there are

66 *TAC* (n 65) paras 32, 49 & 71; Liebenberg (n 63) 45-46.

67 *Mazibuko* (n 20).

68 National Water Standards Regulations; *Mazibuko* (n 20) para 23.

69 *Mazibuko* (n 20) para 57; *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15.

70 Para 26 Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights UN Doc E/CN4/1987/17, Annex.

other available resources, including monetary policy, state revenue, financial sector policy and deficit financing.⁷¹ They note further that '[t]ax avoidance and evasion lead to substantial loss of revenue for governments'.⁷² McLaren similarly argues:⁷³

[T]here is a growing consensus that resource generation for human rights fulfilment needs to look beyond the budget itself and evaluate fiscal and economic policies according to human rights principles ... [and that this] requires an assessment of the reasonableness and progressive nature of fiscal and tax policies and the broader macro-economic context within which budget decisions are made. The obligation to use the maximum available resources to fulfil SERs means that government must do everything possible to mobilise resources that can be directed to socio-economic programmes.

This article is in agreement and makes an argument that speaks to available resources in trade and investment, which are currently undermined, unaccounted for and untapped. These are resources lost to IFFs. It is further argued that, when potential revenue is removed from the treasury through IFFs, and it is redirected for the benefit of multinational corporations or foreign jurisdictions, it affects the rights of poor people to access basic socio-economic rights and, particularly, the rights of the women in rural Limpopo to access potable water.

The following part of the article examines the right to water in the context of regional human rights law applicable in South Africa in order to determine South Africa's regional commitments towards advancing the right of access to water.

4.2 Regional provisions

Sections 231(2) and 231(4) of the South African Constitution provide that as a general rule, international law will only become binding in South Africa when it has been ratified through a process of parliamentary approval, and has been translated into domestic law.⁷⁴

The African Charter appears to have left out the right to water completely, save for the broad provision in article 22(1) which

71 Balakrishnan et al (n 25) 4.

72 Balakrishnan et al 13.

73 D McLaren 'Within its available resources: Socio-economic rights and the national budget' Policy Brief 2016/01 *Studies in Poverty and Inequality Institute* 3, <http://www.spil.org.za/wp-content/uploads/2016/02/SPII-Policy-Brief-2016-1.pdf> (accessed 28 January 2020).

74 Constitution of the Republic of South Africa, 1996; Chenwi (n 59) 743.

entitles all people to economic, social and cultural development. One may argue that access to water facilitates 'social development' through good health, food preparation, personal hygiene and read in the right to water into article 22(1). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) adds more context. Article 2(1)(b) of the African Women's Protocol states:⁷⁵

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.

This may be interpreted to include customary practices but, more importantly, modern practices that hinder access to the life-giving natural resource – water, such as water pollution, and denial of access to water. However, the African Charter and the African Women's Protocol do not sufficiently address the issue of water. This means that South African law offers better protection than that of the African Charter insofar as the right to water is concerned.

More importantly, the African Commission on Human and Peoples' Rights (African Commission) recently adopted Guidelines on the Right to Water which explain the obligation on states to mobilise resources for the advancement of the right to water in Africa. Article 4 states in summary:⁷⁶

- 4.1 The State shall mobilise available resources in order to respect, protect, promote and fulfil the right to water.
- 4.2 'Available resources' encompass both financial and non-financial resources, including technical and human resources, state resources and international assistance and cooperation.
- 4.3 When a state claims that it has failed to realise the right to water, due to whatever reason including economic constraints or adjustments, it shall show that it has allocated all available resources towards the realisation of human rights, including the right to water.

This provision places a duty on states not only to use their available resources, but to 'mobilise resources', both domestic and international. However, domestic resource mobilisation eliminates the reliance of

⁷⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

⁷⁶ African Commission on Human and Peoples' Rights, Draft Guidelines on the Right to Water, https://www.achpr.org/public/Document/file/English/achpr_draft_guidelines_on_the_right_to_water_in_africa_eng.pdf (accessed 11 May 2020).

states on external aid, which is unpredictable and unsustainable. Furthermore, article 4.3 requires some level of accountability from states should they fail to realise the right to water, to show that they have allocated all available resources. However, the challenge is that there currently is no measure to determine whether all available resources have been allocated, which will make this provision difficult to implement.

Moreover, article 21 of the AU Guidelines requires states to empower women to participate on an equal basis with men, paying particular attention to ensuring access to water for rural women. Further, the Guidelines call on states to ‘take action to reduce the disproportionate burden and amount of time women bear in water collection’.

Finally, the Southern African Development Community (SADC), of which South Africa is party, has a Regional Water Policy which requires member states to ‘prioritise the allocation, access and utilisation of water resources for basic human needs over any other allocation, access and utilisation’.⁷⁷ This is a clearer provision, which rightfully sets access to water as a priority. However, this is merely a policy document and has no binding effect on South Africa.

Although the African Charter does not directly address the right to water, its recent Draft Guidelines on the Right to Water provide guidance on state responsibilities especially with regard to realising the right to water. Similarly, the SADC Water Policy requires states to prioritise the allocation, access and utilisation of water resources. It may be concluded that regional instruments of the AU require states to go beyond simply using their available resources for the realisation of human rights, but require them to go beyond that and actually mobilise resources for this purpose.

4.3 International provisions

South Africa has ratified ICESCR.⁷⁸ The right to water is incorporated into articles 11 and 12 of ICESCR which speak to the right to ‘an adequate standard of living ... including adequate food, clothing

⁷⁷ Policy Statement 2.2.2 Southern African Development Community Regional Water Policy (2005), http://www.sadc.int/files/1913/5292/8376/Regional_Water_Policy.pdf (accessed 28 January 2020).

⁷⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27, South Africa signed in 1994, and ratified in 2015, <http://indicators.ohchr.org/> (accessed 28 January 2020).

and housing’, and ‘the enjoyment of the highest attainable standard of physical and mental health’.⁷⁹ The right to water is incorporated as water is central to attaining good health. General Comment 15 of the ESCR Committee confirms the centrality of water in the attainment of an adequate standard of living, and highest attainable standard of health by re-enforcing the fact that water is pivotal to the production of food, hygiene, health, livelihoods, and cultural life.⁸⁰

However, similar to the South African Constitution, the right to water is not absolute due to the limitation found in article 2(1) of ICESCR which requires state parties to take steps using the maximum available resources to progressively realise socio-economic rights. This is similar to the provision in the South African Constitution, except that ICESCR refers to ‘maximum available resources’ whereas the South African Constitution refers to ‘its available resources’.

State parties have three main obligations which are to respect, protect and fulfil the rights in ICESCR. The duty to respect means that state parties must ‘refrain from interfering directly or indirectly with the enjoyment of the right to water’.⁸¹ To protect means that state parties must ‘prevent third parties from interfering in any way with the enjoyment of the right to water’.⁸² Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority’ and this interference includes pollution.⁸³ To fulfil means to facilitate access by taking ‘positive measures to assist individuals and communities to enjoy the right’, especially in rural areas, to promote through awareness education, and provision when individuals or communities cannot realise the right on their own such as by adopting strategies to ensure ‘sufficient and safe water for present and future generations’.⁸⁴

The Limburg Principles provide guidance in the implementation of ICESCR. The explanation provided for the phrase ‘to the maximum of its available resources’⁸⁵ is that ‘state parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’, and the phrase ‘its available resources’ consists of ‘both the resources within a state and those

⁷⁹ As above.

⁸⁰ ESCR Committee General Comment 15: The Right to Water (arts 11 & 12 of the Covenant) para 6, adopted at the 29th Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (contained in Document E/C.12/2002/11) Office of the High Commissioner for Human Rights.

⁸¹ ESCR Committee General Comment 15 (n 80) para 21.

⁸² ESCR Committee General Comment 15 para 23.

⁸³ As above.

⁸⁴ ESCR Committee General Comment 15 (n 80) paras 25 & 27.

⁸⁵ Para 25 Limburg Principles (n 70).

available from the international community through international co-operation and assistance'.⁸⁶

Although the ESCR Committee's General Comment clearly addresses the right to water, the Universal Declaration of Human Rights (Universal Declaration), as the ICESCR, does not specifically speak to the right of access to water. However, the Universal Declaration does stipulate in article 25 that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security'.⁸⁷ Therefore, the Universal Declaration is in alignment with ICESCR and similar interpretations may be used for incorporating the right to water into article 25.

The right to water must be considered especially insofar as it relates to women as it has significant implications for women. South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995. Article 3 of CEDAW states:⁸⁸

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, *for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

Furthermore, South Africa is not listed as a signatory to the Joint Declaration on Trade and Women's Economic Empowerment on the 11th WTO Ministerial Conference (Buenos Aires Declaration). It is a member of the World Trade Organisation (WTO) and section 39 of the Constitution provides that when interpreting law, the courts may be guided by international and foreign law. Although this Declaration is contested, parts of the Preamble provide good guidance in relation

⁸⁶ Para 26 Limburg Principles.

⁸⁷ Universal Declaration of Human Rights, 1948 adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

⁸⁸ Convention on the Elimination of All Forms of Discrimination Against Women adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with art 27(1) United Nations Treaty Series, vol 1249 13 (our emphasis).

to women's economic participation.⁸⁹ The Preamble of the Buenos Aires Declaration provides in the relevant part:⁹⁰

Acknowledging that international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development.

Although ICESCR does not specifically address the right to water, the right to water is inherent in other rights such the right to the enjoyment of the highest attainable standard of physical and mental health protected in ICESCR. In addition, General Comment 15 provides guidance and confirms the centrality of water in attaining an adequate standard of living. The international, regional and domestic instruments do not provide for an immediately enforceable right, but allow for the progressive realisation of the right to water to progressively realise socio-economic rights. This is similar to the provision in the South African Constitution, except that ICESCR refers to 'maximum available resources' whereas the South African Constitution refers to 'its available resources'. The ICESCR standard is for states to take steps using the 'maximum available resources', whereas the African Charter requires states to use 'available resources', but its Guidelines on Water require states to use 'all available resources', while the South African Constitution requires the use of its 'available resources'.

The following part analyses the interactions of women and water. Rural communities are mostly patriarchal in the distribution of work, with women taking the task of ensuring that water, food and health care are provided. A lack of access to water denies women access to economic opportunities because of the time spent fetching water from distant sources, as well as time spent caring for the sick who may contract water-borne diseases.

89 The Buenos Aires Declaration raised discontent as women's organisations urged states not to sign it as it 'fails to address the adverse impact of WTO rules and instead appears to be designed to mask the failures of the WTO and its role in deepening inequality and exploitation'; <https://www.world-psi.org/en/womens-rights-organizations-call-governments-reject-wto-declaration-womens-economic-empowerment> (accessed 12 May 2020).

90 Preamble Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017.

5 Women and water

When the right to water is undermined, women and children suffer the most. As noted in General Comment 15 and the *Mazibuko* case discussed above, 'water is life'. Women are entitled to exercise and enjoy human rights on the same basis as men, and yet societal and cultural norms impose a greater burden on women and children to access water. Traditional set-ups see women performing more tasks that require water, such as cooking, cleaning, washing clothes, bathing children and sick relatives, and gardening.

When the government fails to provide sufficient water as envisaged in the National Water Standard Regulations, within 200 metres, as is the case in parts of rural Limpopo, this places a burden on women who have to walk long distances to fetch water, which reduces their economically-productive hours each day.⁹¹ The absence of access to water coupled with inadequate sanitation pose substantial health risks for rural communities, and is a breeding ground for cholera and diarrhoea. Women need water for their personal hygiene, including during menstruation, childbirth, and caring for infants, such as cleaning and sterilising materials to be used for new-born babies and toddlers. Access to water is a gateway to the achievement of numerous other rights, and to the reduction of infant mortality rates in rural Limpopo. Recent research also shows that women and children presently are at risk of musculoskeletal disorders and related disabilities as a result of carrying containers of water.⁹²

Furthermore, women have one to four fewer hours per day to participate in market activities (or income generation) in comparison to men.⁹³ This means that great economic potential is lost and socio-economic gains are compromised. The lack of access to water forces women (and girls) to walk longer distances especially during droughts, and they spend additional time fetching water, which time could have been used to attend work or school, and to study in order to successfully compete. Relying on the upper estimate, women lose four hours every day, for 365 days each year. This amounts to 1 460 hours of economically-productive time re-allocated to provide a service which is the responsibility of the state. A denial of access to water deprives rural women of the chance to improve their economic status, because if they do not succeed at school, societal pressure

91 Water Standards Regulations; *Mazibuko* (n 20) para 23.

92 JL Geere, PR Hunter & P Jagals 'Domestic water carrying and its implications for health: A review and mixed methods pilot study in Limpopo Province' (2010) 9 *South African Environmental Health* 52.

93 World Bank Report: Gender Equality and Development (2012) 80.

forces them to marry early and bear children. This deprives women of their rights under article 3 of CEDAW to participate in economic, social and cultural life on an equal footing with men.

A study of 175 countries by Gadikou found that for each additional year of education for women at reproductive age, child mortality was reduced by 9,5 per cent.⁹⁴ The impact of access to potable water and free time would provide opportunities for women at reproductive ages to access education, and could potentially reduce the child mortality rate in Limpopo. A study was conducted in the Pietersburg Mankweng Hospital in Limpopo which found that diarrhoea was the second leading cause of death in infants and children. Diarrhoea accounted for 12,9 per cent in neonatal deaths and 34 per cent of deaths of children aged one to four years. Diarrhoea is so closely connected to the need for access to potable water and adequate sanitation, which in essence means that these deaths could have been avoided.⁹⁵ Additionally, because the majority of rural women in Limpopo do not have access to piped water within 200 metres of their homes, they resort to unprotected water sources such as rivers, dams and springs, and these alternative water sources are sometimes compromised.⁹⁶ Without access to water, the state deprives women of the right to have the highest attainable standard of physical and mental health guaranteed under article 2 of ICESCR.

Multinational corporations in the extractives and manufacturing sectors pose health risks by polluting water sources, especially where villages are situated downstream.⁹⁷ The pollution of water resulting from mining activities is causing land degradation and food insecurity for communities that live and grow crops in those areas, for example through nitrate pollution and acid water.⁹⁸ This exposes women, children and livestock to chemical ingestion which may have serious health impacts. The state must fully monitor the conduct of investors and maximise on the established international customary law principle 'polluter must pay' to ensure that companies that pollute natural resources bear the cost of such pollution, to correct improper

94 E Gakidou et al 'Increased educational attainment and its effect on child mortality in 175 countries between 1970 and 2009: A systematic analysis' (2010) 376 *The Lancet* 969.

95 ST Ntuli, N Malangu & M Alberts 'Causes of deaths in children under-five years old at a tertiary hospital in Limpopo Province of South Africa' (2013) *Global Journal of Health Science* 97.

96 See generally Mothetha et al (n 22).

97 C Bosman 'The hidden dragon: Nitrate pollution from open-pit mines: A case study from the Limpopo Province, South Africa', https://www.imwa.info/docs/imwa_2009/IMWA2009_Bosman.pdf (accessed 28 January 2020).

98 See generally Bosman (n 97).

cost allocation.⁹⁹ The state cannot simply turn a blind eye as this would be in contravention of article 2(1) of ICESCR and paragraph 23 of General Comment 15 of the ESCR Committee.

Finally, the state is obliged under ICESCR to protect the right to water, including 'to prevent third parties from interfering in any way with the enjoyment of the right to water'.¹⁰⁰ Customary law and patriarchal land rights tend to reduce the realisation of the right to water. The fact that women often do not have ownership of land also means that they may be denied access to natural resources from the land, including water. It is the state's duty to prevent customary practices that interfere with the enjoyment of the right to water.

In the *Bhe* case the Court simultaneously heard the matters of *Bhe & Others v The Magistrate, Khayelitsha & Others* and *Charlotte Shibi v Mantabeni Freddy Sithole & Others*. Both matters dealt with inheritance under customary law which followed the male primogeniture rule that excludes women from inheritance by granting succession to the oldest male child.¹⁰¹ In the first case, the applicant had been in a relationship with Mr Bhe (the deceased) and had two children by him although they were not married. The applicant lived with Mr Bhe and their youngest daughter on land acquired by the deceased in a temporary informal shelter built by the deceased. They had bought building materials, but had not yet started to build their house. Upon the death of the deceased the magistrate's court appointed the deceased's father, who lived in the Eastern Cape, as sole heir in terms of section 23 of the Black Administration Act.¹⁰² The deceased's father made it clear that he intended to sell the property on which the applicant lived in order to defray the costs of the funeral.¹⁰³ This would have left the applicant and her two children homeless.

In the second case, Ms Shibi's brother died unmarried, with no children or parents to inherit his estate. The magistrate appointed two male cousins as his heirs, overlooking his sister on the basis that customary law of succession is based on the male primogeniture rule.

99 See further OECD Polluter pays principle: OECD analyses and recommendations 1992, Paros Ref OCDE/GD(92) 81, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En) (accessed 28 January 2020); SA Joseph 'The polluter pays principle and land remediation: A comparison of the United Kingdom and Australian approaches' (2014) 1 *Australian Journal of Environmental Law* 25.

100 Para 23 ESCR Committee General Comment 15 (n 80).

101 *Bhe & Others v Khayelitsha Magistrate & Others* (CCT 49/03) [2004] ZACC 17 paras 174 & 176.

102 Act 38 of 1927.

103 *Bhe* (n 101) para 17.

The Constitutional Court held that section 23 of the Black Administration Act¹⁰⁴ was unconstitutional and declared it invalid. The Court also found that 'the rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property'. While this case deals with the inheritance of property, in this instance land that formed part of the deceased estate, land rights are intricately linked with ownership and the use of water resources on the land surface and below the surface. The owner of the land thus has the option to install a borehole or well, subject to compliance with provisions regulating water use as set out in the Water Services Act.¹⁰⁵ Additionally, as land owners women would have the right to be consulted in their own capacity should government or private actors wish to limit their land rights, for example through mining activity, whereas if those rights are passed on to a male heir, they would have very limited say. Although the *Bhe* case serves as a good starting point in the area of succession of land shifting from a patrimonial system to a system of equality for surviving children, more is to be done to address the living law which often does not match the letter of the law.¹⁰⁶

6 Conclusion and recommendations

When the maximum available resources are diverted or tampered with through trade mispricing and aggressive transfer pricing, this reduces state revenue and ultimately undermines the rights of women to access essential social services, such as access to safe drinking water. IFFs are one of the untapped available resources that can facilitate the realisation of the right to water. Therefore, until the government actively pursues and curbs IFFs, it is not fulfilling its constitutional mandate to use its available resources for the realisation of the right to water.

As it stands, rural women in Limpopo are subsidising both the state and multinational corporations and they are deprived of their right to water, economic participation, human dignity, and their right to be equal before the law, and not to be discriminated against. Curbing IFFs through deepening and widening the tax base in a progressive tax system, and fully utilising the remedies allowed in the Income Tax Act to collect revenues on the arm's length amount, will increase the

104 Act 38 of 1927.

105 Act 108 of 1997.

106 *Bhe* (n 101).

available resources for allocation to water infrastructure. By doing this, the government would reduce the burden on rural women in Limpopo, and enable them to have more time to participate in economic, educational, professional or cultural activities, or rest as they are entitled to do under the Universal Declaration.

The paragraphs below note recommendations, including selected actions in the OECD Action Plan on Base Erosion and Profit Shifting which can assist South Africa to reduce IFFs and boost its available resources.¹⁰⁷

First, the state must prioritise transparency and disclosure of multinationals' structures and transactions. Action 12 requires the mandatory disclosure of aggressive tax-planning arrangements. This Action presupposes a willingness and transparency of multinational corporations and technical capacity of the state to monitor compliance, neither of which is guaranteed. However, if mandatory disclosure is imposed in conjunction with mandatory tax information sharing between governments, this could seal some of the cracks through which IFFs are currently flowing out.

Second, the government should support global efforts to develop a multilateral instrument and to amend its existing bilateral tax agreements to plug loopholes and legal gaps, in line with Action 15. However, a multilateral instrument is more useful as a long-term rather than short-term solution as it will require global efforts before it can realise meaningful results, and it may take time to gain the support of the international community to develop such an instrument.

Third, in line with Actions 8-10 and 13, the state must reconsider its approach to transfer pricing and, where necessary, develop new rules or amend existing rules to address current challenges. Rules pertaining to the movement of intangibles, risk and capital must be revised to ensure that profits are allocated appropriately, and are not shifted illicitly. Action 5 notes the need for domestic tax rules to address the 'multiple layers of legal entities' which form the supporting structure for investments, and intra-group transfers through conduits. The state should draw lessons from companies that presented themselves for voluntary disclosure and identify loopholes that have been used, as well as to project potential IFFs, in order to plug these gaps, and protect the available resources.

¹⁰⁷ OECD Action Plan on Base Erosion and Profit Shifting (2013) OECD Publishing, <http://dx.doi.org/10.1787/9789264202719-en> (accessed 28 January 2020).

Finally, the state should monitor the realisation of the right to water through gender-disaggregated data, and it should streamline gender budgeting in line with its commitments under the African Women's Protocol, in order to better address gender-specific issues. The state should critically review and evaluate the progression of the realisation of the right to water in Limpopo, and ensure that it urgently allocates sufficient resources for citizens to access the minimum legal amount of six kilolitres of safe drinking water per person per month in Limpopo's rural areas. The state should reinforce the value of women's participation in economically-productive sectors such as trade and investment, and the state must ensure that it prevents resource diversion in order to direct its maximum available resources towards the realisation of the right to water for women in rural Limpopo.

Does the right to dignity extend equally to refugees in South Africa?

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Summary: *Refugee law scholars have lauded the human rights approach as the most appropriate for addressing issues faced by refugees. The inclusion of human rights in both the 1951 Refugee Convention and the Global Compact for Refugees is evidence thereof. However, even though many countries have enacted domestic refugee legislation, refugee experiences still suggest a gap between this human rights legislation in theory and in practice. For many refugees the human rights approach does not provide effective protection, as it neither ensures physical security nor protects refugees' dignity. In South Africa this is further exacerbated by the lack of administrative and judicial consistency. This article explores the connection between refugeehood and dignity by considering dignity principles established by four key philosophers – Hannah Arendt, Immanuel Kant, Jeremy Waldron and Henk Botha. Although all three philosophers emphasise the importance of human dignity and warn of the lack of dignity associated with statelessness, refugees often are still denied this right. The article explores the ways in which dignity is denied to refugees by considering a human rights approach, the lived experiences of refugees in South Africa, and the approach of the South African courts. By analysing refugeehood through these lenses, it becomes clear that current approaches are inadequate to fully support refugees. Despite ample legislation and an urban policy, refugees in South Africa remain outsiders and as such, their dignity often is denied.*

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Key words: *human rights approach; right to dignity; refugee experiences in South Africa; local integration; urban policy*

1 Introduction

Refugee law scholars have historically lauded a human rights-based approach as the most appropriate for addressing issues faced by refugees. The inclusion of human rights in the 1951 UN Refugee Convention Relating to the Status of Refugees¹ is evidence hereof.² The ethos of the Global Compact for Refugees³ also is based on a range of human rights principles and conventions adopted by host states. The constitutions of several countries⁴ include and safeguard human rights. The South African Refugee Act 130 of 1998 is a reflection thereof.

However, refugees' experiences tell a different story. Regrettably, refugees in South Africa live in poverty, are frustrated, and cannot realise their full potential due to inadequate systems of protection and support. Their refugee status deprives them of opportunities and subjects them to constant fear of harassment and exploitation. For instance, Somali and Congolese refugees and asylum-seekers have for a number of years repeatedly been the targets of xenophobia in South Africa.⁵ These experiences prove that for many refugees the human rights approach does not provide effective protection, since it neither guarantees physical security nor protects refugees' dignity.

Human rights and, in particular, the right to dignity which underpins all human rights, commonly are understood as inalienable and so fundamental that persons are entitled to the right simply due to their humanity. The Supreme Court of South Africa has endorsed this approach, acknowledging the fact that the right to dignity is

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- 1 UN Convention Relating to the Status of Refugees, 189 UNTS 150 (1951 Refugee Convention).
 - 2 Some human rights included in the 1951 Refugee Convention include the right to non-discrimination (art 3); the right to religion (art 4); the right to association (art 15); and the right of access to courts (art 16).
 - 3 United Nations Global Compact for Refugees 17 December 2018, A/RES/73/151, <https://undocs.org/en/A/RES/73/151> (accessed 24 February 2020).
 - 4 The South African, Canadian and Indian Constitutions are three examples.
 - 5 LB Landau et al 'Xenophobia in South Africa and problems related to it' (2005) Forced Migration Working Paper Series 13, https://s3.amazonaws.com/academia.edu.documents/28806095/13_xenophobia.pdf?response-content-disposition=inline%3B%20filename%3DXenophobia_in_South_Africa_and_problems.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20200311%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20200311T103320Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=f6765efcb390ecc4d7af6244e2ed0e3f4a955e7ba614478054d2a1077a037908 (accessed 10 March 2020).

so fundamental that it can be used to limit state sovereignty.⁶ However, the South African Constitutional Court has also undercut this approach by limiting its application in certain instances.⁷ Thus, while refugees have undoubtedly benefited from the human rights approach through international human rights laws and the incorporation of human rights in the constitutions of states, the human rights approach ultimately struggles to adequately protect refugees.⁸

This article highlights how the right to dignity cannot be a morally-inclusive right for all when, in actuality, many refugees often are denied this right.⁹ The article evaluates current legal instruments in support of a human rights-based approach in South Africa before examining South Africa's current practices. This analysis examines three approaches to dignity. First, it considers the philosophical approach of three key philosophers – Hannah Arendt, Immanuel Kant and Jeremy Waldron – regarding dignity as a human right to demonstrate that citizenship better protects the fundamental right to dignity.¹⁰ These philosophical ideals are then utilised to demonstrate how the fundamental right to dignity is impaired in the case of refugees in South Africa. Second, the article considers the human rights approach internationally and in South Africa. Despite the claims of the human rights approach to the contrary, refugees' right to dignity often is denied because they are not members of a political community.¹¹ Third, the article will explore the human rights approach to dignity by analysing refugees' experiences. Analysing a human rights-based approach to refugee issues from refugees' point of view will provide examples of how their lived experiences demonstrate how dignity is impaired and violated simply because they are not citizens. Finally, the article analyses the way in which the South African courts have linked citizenship to the right to dignity and, therefore, have struggled to fully protect this right for refugees.

6 See *Minister of Home Affairs & Others v Watchenuka* 2004 (4) SA 326 (SCA).

7 See *Khosa & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).

8 JC Hathaway & M Foster *The law of refugee status* (2014); F Khan & T Schreier *Refugee law in South Africa* (2014) 233; H Botha 'The rights to foreigners: Dignity, citizenship and the rights to have rights' (2013) 130 *South African Law Journal* 837.

9 H Arendt *The origins of totalitarianism* (1968) 296.

10 J de Waal & I Currie *The Bill of Rights handbook* (2001) 231. The philosophical approach of Immanuel Kant has been chosen as he is regarded as the father of the modern concept of human dignity. According to Kant, human dignity recognises the intrinsic worth of the person, being the source of a person's innate rights to freedom and to physical integrity, from which a number of rights flow. In South Africa it is regarded as a foundational right.

11 As above.

2 Four key philosophers on the link between dignity and citizenship

Recently, former United Nations High Commissioner for Refugees (UNHCR) deputy representative, Thomas Aleinikoff, asserted that because refugees are *de facto* stateless persons they are unable to access the full range of human rights.¹² Arendt originally made this point in her book by stating that '[t]he fact of not having a nationality or not enjoying in practice the protection of a state places stateless persons, *de jure* or *de facto*, in a position of inferiority, incompatible with the respect of human rights'.¹³ Although pessimistic, Arendt's point draws an important connection between citizenship and dignity, namely, that citizens have an attachment to a state or political community and, through this attachment, are able to access their human rights. Therefore, Arendt believes that without an attachment to a state or political community, human rights often are unrealised.¹⁴ Thus, while stateless persons live in a 'legal limbo' between their country of origin and their host country, their human rights often are violated or endangered.

On the other hand, Immanuel Kant states that the right to dignity vests in every human being irrespective of their status or rank.¹⁵ He also asserts that a person cannot be stripped of their dignity; instead, Kant writes that 'no human being can be without a dignity because he at least has the dignity of a citizen'.¹⁶ Therefore, Kant argues that the dignity of a citizen is the one dignity to which every human being is entitled.¹⁷ However, what about individuals who do not have the dignity of a citizen? Refugees are *de facto* stateless and do not have citizenship. Consequently, refugees are deprived of the 'dignity in citizenship' that Kant describes.

Finally, American legal philosopher Jeremy Waldron argues that citizenship grants the bearer a certain dignity. This point is evident from the fact that citizens are granted particular rights and privileges,

12 T Aleinikoff & S Poellot 'The responsibility to solve: The international community and protracted refugee situations' (2014) 56 *Virginia Journal of International Law* 207.

13 Arendt (n 9) 295. 'The conception of human rights ... broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human.'

14 As above.

15 I Kant *The metaphysics of morals* trans M Gregor (1996) 104.

16 As above.

17 As above.

and citizenship generally is regarded as a positive status.¹⁸ However, Waldron also argues that the right to dignity can extend equally to everyone since status differences – such as slavery and nobility – largely have been abandoned in modern society. The lack of status differences has developed the concept of the universality of human rights. Waldron clarifies that all people have ‘legal citizenship’ and, therefore, that all people have dignity. To Waldron, ‘legal citizenship’ encompasses equal access to rights, regardless of nationality. Ideally, Waldron believes that all people should have ‘legal citizenship’.

Although Waldron argues that status differences have been abandoned, legal statuses continue to exist. For example, some legal statuses in modern society include the citizen, the refugee and the permanent resident. Although Waldron suggests the positive effects of a single status system, we do not yet live in a single status society.¹⁹ Waldron acknowledges that there are two types of statuses: conditional and sortal.²⁰ Conditional statuses are the conditions in which individuals find themselves; these conditions may not be permanent, such as in the case of minors. Sortal statuses, on the other hand, are based on the idea that there are different types of persons.²¹ Some examples of sortal statuses include slaves or the victims of racist policies during apartheid. Using this framework, refugee status initially appears to be a conditional status, since the conditions in a refugee’s country of origin caused the refugee to flee and, therefore, created the refugee status as such. However, refugee status may also be considered sortal, since refugees are unable to exit their status due to a lack of solutions. If refugeehood is a sortal status, this status believes that refugees are a ‘different kind of person’. In reality, the treatment of refugees, particularly long-term refugees, and their exclusion from a national or political community will always make them the ‘other’. This permanent condition (conditional status) of refugeehood thus negatively impacts their right to dignity.

South African legal scholar Botha states that in countries where one finds refugees or other immigrants, citizenship often works as an *us versus them* concept, marking a contrast between a privileged class and a less privileged class.²² Even when most constitutional and human rights are accorded to non-citizens, Botha finds that these class and status distinctions remain.²³ However, it cannot

18 J Waldron ‘Citizenship and dignity’ (2013) Public Law and Legal Theory Research Paper Series 1-24.

19 As above.

20 Waldron (n 18) 242.

21 As above.

22 Botha (n 8).

23 As above.

be said that the dignity of the citizen merges with human dignity because the dignity of the citizen remains relational and specific.²⁴ This is reinforced by the fact that citizenship connotes the quality of the relationship between a state and those subject to its power.²⁵ Therefore, if everyone has a state that is responsible for him or her, it may be a way of realising human dignity for everyone.

Although Arendt, Kant, Waldron and Botha adopt different approaches to fully realising human dignity, all four consider the relationship between dignity and citizenship and touch on the ways in which dignity can be denied to those who are especially vulnerable – non-citizens and non-residents. These philosophers acknowledge that the right to dignity is an important human right while simultaneously noting that the right often is violated or unrealised when an individual does not belong to a state. Do refugees' experiences express the same sentiment?

3 International and South African human rights approaches

3.1 International human rights-based approach

The UN Refugee Convention protects the rights of refugees in international law. This treaty stems from article 14 of the Universal Declaration of Human Rights (Universal Declaration) which states that all persons have the right to seek and *enjoy* asylum.²⁶ In Africa, the UN Refugee Convention has been supplemented by the 1969 OAU Refugee Convention Relating to the Status of Refugees²⁷ (1969 OAU Refugee Convention). South Africa has ratified both treaties. Additionally, South Africa has ratified various international human rights treaties²⁸ recognising several rights that may be used to protect refugees.

24 Waldron (n 18).

25 Waldron (n 18).

26 UN General Assembly Universal Declaration of Human Rights 10 December 1948, art 14, <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 24 February 2020).

27 Organisation of African Unity Convention governing the Specific Aspects of Refugee Problems in Africa 10 September 1969, <https://treaties.un.org/doc/Publication/UNTS/Volume%201001/v1001.pdf> (accessed 27 June 2016).

28 UN General Assembly International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series Vol 999 171, <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 24 February 2020) (ICCPR); UN General Assembly International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series Vol 993 3, <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 24 February 2020) (ICESCR); UN Convention on the Reduction of Statelessness, 30 August 1961,

In fact, it is not possible to interpret or apply the UN Refugee Convention in isolation. Article 5, a key provision that provides guidelines to the analysis and interpretation of the Convention, provides that '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a contracting state to refugees apart from this Convention'.²⁹ This provision should require governments to respect all refugee rights recognised in this treaty as well as other international human rights treaties. Furthermore, the 1969 Vienna Convention on the Law of Treaties (Vienna Convention)³⁰ clarified that provisions of international treaties must be interpreted based on the ordinary meaning of the words, in the context of the whole treaty and the treaty's purpose, and in the juridical context of subsequent agreements concluded by state parties.³¹ In light of the UNHCR's Executive Committee's Conclusion 8,³² it therefore is perfectly rational to adopt a human rights approach when applying the UN Refugee Convention.³³ The UNHCR Executive Committee stated that the duty to protect refugees goes beyond respecting the norms of refugee law and includes the obligation 'to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection'.³⁴ This view is understandable given that treaties such as the International Covenant on Civil and Political Rights (ICCPR) extend their protection to 'everyone' or to 'all persons'. For example, article 2 of ICCPR obligates each state party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind'.³⁵ Furthermore, the Human Rights Committee, which monitors the implementation of ICCPR, has held that rights in ICCPR 'must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers

United Nations, Treaty Series Vol 989 175, <https://www.refworld.org/docid/3ae6b39620.html> (accessed 24 February 2020).

29 Art 5 UN Refugee Convention (n 1).

30 UN Vienna Convention on the Law of Treaties 1155 UNTS 331 (Vienna Convention).

31 T Clark & F Crepeau 'Mainstreaming refugee rights: The 1951 Refugee Convention and international human rights law' (1999) 17 *Netherlands Quarterly of Human Rights* 389.

32 UNHCR Executive Committee Conclusion 81 'International Protection of Refugees' (1997) (General Conclusion 81).

33 V Chetail 'Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law' in R Rubio-Marin (ed) *Human rights and immigration* (2014) 63.

34 General Conclusion 81 (n 32).

35 ICCPR guarantees all rights to everyone under its jurisdiction, except for rights such as vote and public office which are reserved for citizens. See also BC Nirmal 'Refugees and human rights' (2001) ISIL Yearbook of International Humanitarian and Refugee Law <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/6.html> (accessed 19 July 2017).

and refugees.³⁶ The UNHCR holds firmly that human rights should be extended to refugees particularly since, by definition, refugees were denied human rights in their country of origin. Ensuring that refugees are not discriminated against and have access to human rights is crucial to their overall protection.

However, the degree to which refugees are able to enjoy their rights depends on how well they are integrated into the host society. The International Covenant on Economic, Social and Cultural Rights (ICESCR) demonstrates that nationality or citizenship is important to the full enjoyment of human rights³⁷ by allowing individual states to determine how socio-economic rights are granted to non-citizens.³⁸ There thus is no obligation to grant refugees the same socio-economic rights as those granted to nationals.³⁹

3.2 South African human rights-based approach

Post-apartheid South Africa began to move away from the policy of exclusion towards one of inclusion based on its new constitutional values.⁴⁰ South Africa not only ratified the international refugee law instruments, but also enacted refugee-specific legislation including the Refugee Act 130 of 1998. These constitutional developments and ratifications significantly altered the basis of South African refugee law and policy. In 1997 a Green Paper on migration⁴¹ categorically stated that while South Africa, as a sovereign nation, had the right to decide who enters its territory, it would exercise this right in a manner that reflected the country's commitment to human rights:

As a sovereign state, South Africa reserves the right to determine who will be allowed entry into the country and under what

36 UN Human Rights Committee General Comment 31: The nature of the legal obligations of the states parties to the Covenant' (1 May 2004); see also A Kesby *The right to have rights, citizenship, humanity and international law* (2012) 100; V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014).

37 F Marouf & D Anker 'Socio-economic rights and refugee status: Deepening the dialogue between human rights and refugee law' (2009) 103 *American Journal of International Law* 784.

38 Art 2(3) ICESCR (n 28); see JC Hathaway *The rights of refugees under international law* (2005) 122 229.

39 Art 2(2) ICESCR (n 28).

40 In South Africa the interim Constitution of 1993 and the final Constitution of 1996 explicitly stated these principles of inclusion. Eg, the Preamble of the final Constitution states: 'We the people of South Africa ... [b]elieve that South Africa belongs to all who live in it, united in our diversity' and, therefore, that the adoption of the Constitution is intended to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.

41 Draft Green Paper on International Migration GN 849 in GG 18033 (30 May 1997).

conditions. The design and implementation of immigration policy must, however, be faithful to the new Constitution and Bill of Rights. It must also be consistent with South Africa's commitment to upholding universal human rights, administrative justice and certain basic rights for all the people who are affected by the South African state.⁴²

The Refugees Act offers a generous range of rights and entitlements to refugees. It expressly states that all rights in the Bill of Rights of the South African Constitution apply to refugees. South Africa thus has moved away from the *ad hoc* approach used during apartheid which allowed abuse by the executive and administrative officials⁴³ and excluded black refugees. During the apartheid era the South African government utilised the doctrine of sovereignty to regard citizenship as a prerogative of the state, such that the state could choose without censure to whom it granted refugee status and citizenship. This right now has to be counterbalanced by the country's commitment to human rights.

Both the international and South African human rights approaches are intended to adequately protect refugees. However, by comparing the human rights approach with both the lived experiences of refugees and recent South African court decisions, it becomes clear that this approach in actuality is insufficient to properly safeguard the dignity of refugees.

4 Urban refugee policies

4.1 International urban refugee policy

The article does not consider the question of whether refugees who live in refugee camps are living lives of dignity in the host state. In fact, the article agrees with the commonly-held sentiment that confinement in a refugee camp is the antithesis of the human rights approach.⁴⁴ The article considers the situation of refugees who are protected by the UN Refugee Convention where no reservation has been signed and where refugees live among the local population.

42 As above.

43 J Crush & W Pindleton 'Regionalising xenophobia? Attitudes to immigrants and refugees in SADC' (2004) *Southern African Migration Policy Series*.

44 E Holzer 'What happens to law in a refugee camp?' (2013) 47 *Law and Society Review* 837; JSTOR, www.jstor.org/stable/43670361 (accessed 18 March 2020).

The UN Refugee Convention recognises a wide range of rights that ought to be sufficient for the safety and protection of refugees and to allow refugees to live meaningful lives in the host state. However, the UNHCR nevertheless introduced the concept of an urban policy for refugees⁴⁵ when it realised that the rights on paper were insufficient for the meaningful integration of refugees in urban areas.⁴⁶ The urban policy allows refugees to enjoy a range of rights and encourages refugee integration in local communities.⁴⁷ The policy is viewed as a counterweight to the confinement of refugees in camps and considers urban areas and cities to be legitimate places for refugees to enjoy their rights.⁴⁸ The urban policy, therefore, sets out to 'expand the protection space' for refugees.⁴⁹

The UNHCR, by means of its urban policy, encourages host governments to accede to and respect international refugee law and human rights instruments and to adopt and implement appropriate domestic legislation which will allow for meaningful integration.⁵⁰ The policy also strives to ensure that refugees have access to justice systems, are treated as equals before the law, and are not subjected to any form of discrimination by law enforcement agencies and other state representatives.⁵¹ Most importantly, the urban policy recommends that host governments play a major role in the integration of refugees; they are expected to provide reception facilities, undertake the registration of refugees, and ensure that refugees are documented.⁵² Not only must the host government determine the status of refugees, but it must also reach out to the refugee community and foster constructive relations between refugees and citizens.⁵³ Furthermore, the government should ensure the security of refugees and promote livelihoods and self-reliance;⁵⁴

45 UNHCR 'UNHCR policy on refugee protection and solutions in urban areas' September 2009, <https://www.unhcr.org/protection/hcdialogue%20/4ab356ab6/unhcr-policy-refugee-protection-solutions-urban-areas.html> (accessed 25 July 2016).

46 L Landau 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) 19 *Journal of Refugee Studies* 3; see also J Crisp et al *Surviving in the city: A review of UNHCR's operation for Iraqi refugees in urban areas of Jordan, Lebanon and Syria* (2009); S Bailey 'Is legal status enough? Legal status and livelihood obstacles for urban refugees' unpublished PhD thesis, The Fletcher School, 2004.

47 O Naoko & J Crisp 'Evaluation of the implementation of UNHCR's policy on refugees in urban areas' (2001) EPAU Evaluation Reports.

48 As above.

49 As above.

50 UNHCR Urban Policy (n 44) para 25.

51 As above.

52 UNHCR Urban Policy (n 44) para 27.

53 UNHCR Urban Policy para 40.

54 UNHCR Urban Policy para 101.

ensure access to healthcare, education and other services; and allow for the freedom of movement of refugees.⁵⁵

4.2 South Africa's urban refugee policy

South Africa has distinguished itself as one of a few African countries to allow refugees to self-settle in urban areas.⁵⁶ South Africa's refugee legislation makes provision for all necessary elements for successful local integration, and the UNHCR's urban policy is inherent in South African legislation.

However, the founding director of the African Centre for Migration and Society at the University of the Witwatersrand, Loren Landau, claims that South Africa is struggling to fairly implement its progressive refugee laws.⁵⁷ Landau argues that it lacks the institutional prerequisites for translating refugees' legal rights into true entitlements. Landau has argued that South Africa's urban policy requires more than the mechanical application and extension of rights to urban refugees. Instead, the South African government must play a greater role in the integration of refugees. Even though the Bill of Rights has a direct bearing on all persons present in South Africa and it is expected that the values of the Constitution will assist the refugee in meaningfully integrating into South African society, the refugee experiences discussed below paint a different picture.

5 Lived experiences of refugees

5.1 Lack of policy

Although South African refugee legislation provides local integration, there is no comprehensive policy to facilitate the legal, social and economic integration of refugees. It could be argued that there is no need for a separate policy on socio-economic integration as it is implicit in the numerous rights offered by the Refugees Act and the South African Constitution. However, as Landau has shown, a mere formal guarantee of rights is insufficient for refugees to become fully integrated or to enjoy their rights in practice. Indeed, the lived experiences of refugees prove that such an assumption is incorrect.⁵⁸

55 UNHCR Urban Policy para 110.

56 Landau (n 45) 308.

57 As above.

58 D Mavhinga 'Xenophobic violence erupts in South Africa' Human Rights Watch 24 February 2017, <https://www.hrw.org/news/2017/02/24/xenophobic-violence-erupts-south-africa> (accessed 25 February 2020).

The Preamble to the Immigration Act states that ‘civil society should be educated on the rights of foreigners and refugees in South Africa’⁵⁹ and that xenophobia should be ‘prevented and countered’.⁶⁰ However, the government has taken inadequate steps to ensure that these goals are achieved. South Africa thus far has been reactive in this regard, for example, by establishing an anti-xenophobia desk and xenophobia task team after the fact.⁶¹ South Africa cannot have adequate safeguards and policies in place if the only existing policies to prevent and counter xenophobia have been established after the harm has been realised.

Even though South Africa’s adoption of a non-encampment policy means that refugees live among the local population, their presence has not been explained fully to the South African public. Government officials as well as the South African public need more information about refugees and how to engage them in all sectors of society, including schools, labour markets, health care and the justice system. The need for policies to explain the rights of refugees and their presence among the local population is essential to help create a welcoming society.⁶² It is evident that many South Africans are unaware of the extent of the socio-economic rights afforded to refugees.⁶³ For example, refugees regularly note that prospective employers are unaware of their rights.⁶⁴ They also speak of exploitation in the workplace and their inability to integrate economically, even though they have the right to seek employment.⁶⁵ The South African government needs to do more to demonstrate to South Africans that welcoming refugees is an international obligation and a duty that stems from belonging to common humanity.

5.2 ‘Cumbersome bureaucracy’

Some of the greatest obstacles to the enjoyment of rights by refugees include delays in processing asylum applications and

59 Immigration Act 13 of 2002.

60 As above.

61 Government of South Africa ‘National action plan to combat racism, racial discrimination, xenophobia and related intolerance 2016-2021’ 2015, <http://www.gov.za/sites/www.gov.za/files/NAP-Draft-2015-12-14.pdf> (accessed 17 March 2018).

62 UNHCR (n 45).

63 I Palmary ‘Refugees, safety and xenophobia in South African cities: The role of local government research report’ (2002) The Centre for the Study of Violence and Reconciliation, <http://www.csvr.org.za/docs/foreigners/refugeessafetyand.pdf> (accessed 2 June 2016).

64 D Dass, K Ramjathan-Keogh & F Khan ‘The socio-economic rights of refugees and asylum seekers in South Africa’ in F Khan & T Schreier (eds) *Refugee law in South Africa* (2014) 220.

65 As above.

procedural problems related to refugee recognition. Refugee law scholar Hathaway has argued that 'South Africa has developed a multi-layered, bureaucratically cumbersome system for refugee assessment'.⁶⁶ This system presents numerous problems for refugees to obtain recognition documentation and, hence, to access the rights promised by the Constitution and Refugees Act.

From the very beginning much is required of the vulnerable and often traumatised refugee arriving in South Africa. The individual applications must be made in person, and the new applicants are required to complete a nine-page application form in English.⁶⁷ Many refugees fail to complete these forms without the help of interpreters who are in short supply.⁶⁸ As a result, refugees often are unable to submit a comprehensive claim with the refugee reception officer at this initial encounter.⁶⁹ Furthermore, refugees encounter inexperienced refugee status determination officers⁷⁰ who often espouse incorrect interpretations of the law⁷¹ and focus on irrelevant information.⁷² A combination of these factors is responsible for the large number of Department of Home Affairs (DHA) rejections of status in the first instance.⁷³ Of the 60 642 asylum applications processed in 2015, only 2 499 persons were granted refugee status.⁷⁴ This was the case even though a large number of refugees who sought asylum were from Somalia, the Eastern Democratic Republic of the Congo (DRC) and Eritrea, countries that remain involved in a conflict.⁷⁵ The DHA maintained that all the rejected asylum seekers were economic migrants.⁷⁶

Decisions by the DHA can only be overturned on appeal or review by the Refugee Appeal Board and the Standing Committee established by the Refugees Act. The next step in seeking a remedy

66 Hathaway (n 8).

67 Refugee Act Regulations GN R366 GG 21075 (6 April 2000) BI-1590 form.

68 R Amit 'Protection and pragmatism: Addressing administrative failures in South Africa's refugee status determination decisions' (2010) Forced Migration Studies Programme Report: Johannesburg.

69 As above.

70 As above.

71 As above.

72 As above.

73 Asylum Statistics: Department Home Affairs briefing; Immigration Amendment Bill 2016 deliberations. In the 2015 calendar year 2 499 applications were approved in terms of sec 24(3)(a) of the Refugees Act, these persons thus being recognised as genuine refugees. However, 14 093 applications were rejected as unfounded in terms of the same section, and there were also rejections in terms of sec 24(3)(b) numbering 64 abusive, 10 908 fraudulent or 33 078 manifestly unfounded applications.

74 As above.

75 As above.

76 As above.

is through a long and expensive review process in the High Court.⁷⁷ Highly prejudicial is the fact that refugees remain on these temporary asylum permits while they await the lengthy adjudication process. In its 2016 parliamentary briefing, the DHA noted that a total of 1 082 669 asylum applications in its backlog had been rejected over a period of ten years by the refugee status determination officers and still needed to be assessed by the Standing Committee of Refugee Affairs and the Refugee Appeal Board.⁷⁸ In addition, all the other services – such as birth registration, the renewal of documentation, the replacement of lost or expired documents, and the joining of families – require direct engagement with the DHA.

Thus, the bureaucratic system of the Refugees Act negatively affects refugees' lives. Refugees find it physically and emotionally draining to queue all day and sometimes all night long to access services.⁷⁹ These documents must be renewed in person at the office of initial application. Not only is this request costly, but it also severely affects the daily lives of asylum seekers. School-going children are forced to miss at least four days of school per year; their parents struggle to find employment as employers are reluctant to hire people whose legal status in South Africa is of limited duration. The psychological and emotional impact of the uncertainty of their status cannot be overstated.⁸⁰

Several studies have revealed that the DHA has been unable to fairly implement the Refugees Act and to abide by its regulations.⁸¹ Most detrimental among these failures is the DHA's inability to abide by the timelines set in the regulations for the adjudication of refugee status. Even though the Regulations Act regulations set a time period of 180 days for the entire adjudication process, the DHA seldom complies with this timeline.⁸² For instance, the study conducted by Amit demonstrated that in some cases the DHA took ten years to complete the refugee determination process instead of the required six months.⁸³

77 C Hoexter *Administrative law in South Africa* (2012) (lower courts in South Africa have no jurisdiction to hear judicial review applications).

78 Asylum Statistics (n 73).

79 L de la Hunt 'Tracking changes' (2000) 7.

80 G Mathonsi et al 'It's not just xenophobia: Factors that lead to violent attacks on foreigners in South Africa and the role of the government' (2011) *African Centre for the Constructive Resolution of Disputes*; Amit (n 46).

81 R Amit 'Queue here for corruption: Measuring irregularities in South Africa's asylum system' (2015) *A Report by Lawyers for Human Rights*.

82 Regulation 3(1) Refugee Act Regulations (n 65).

83 As above; *Tafira & Others v Ngozwane & Others* 2006 Case 12960/06.

5.3 Xenophobia

Xenophobia proves that refugees are failing to integrate into South African society. Official government responses to the xenophobic attacks on refugees in South Africa in 2015 were puzzling, to say the least. First, the government denied that there was a crisis and then blamed criminal elements and the victims themselves.⁸⁴ Nevertheless, the South African⁸⁵ perpetrators of the xenophobic violence clarified that the impetus for violence in actuality was xenophobic.⁸⁶ Rather than random acts of criminality or spontaneous protests as the government had suggested, these acts were violence targeted at refugee-owned small businesses.

The government's failure to implement the Refugees Act has been described as institutionalised xenophobia,⁸⁷ and it has been said that there is a lack of political will to assist refugees.⁸⁸ Refugees indicate that at every level of interaction with the DHA, they are treated poorly by officials who often make arbitrary and unlawful decisions in the face of clear policy and legislation.⁸⁹ DHA officials often arbitrarily deny refugees access to the asylum system, refuse extensions of permits, are generally slow and inefficient,⁹⁰ and act maliciously and with impunity against foreigners. This behaviour is designed to keep the foreigner out ('gatekeeping') rather than to welcome them by creating a fair and transparent process.

Furthermore, refugees have noted barriers to health care, which for many has led to a psychological fear of the public health care system. A 2011 South African Migration Policy study found that xenophobia by medical personnel existed and manifested itself in various ways,⁹¹ such as the requirement that refugee patients produce documentation and proof of residence status before being given treatment. The study further noted a refusal by healthcare professionals to communicate in English or to allow translators as well as repeated instances of xenophobic insults and verbal abuse by professionals. The study also noted that non-South African patients were required to wait until all South African patients had been assisted. Refugees have also reported negative experiences with police

84 'Soweto: Violence escalates between locals and foreigners' *Mail and Guardian* 22 January 2015, <http://mg.co.za/article/2015-01-22-two-dead-foreigner-owned-shop-burnt-in-soweto> (accessed 19 June 2018).

85 As above.

86 As above.

87 As above.

88 Landau (n 45).

89 Case on file with author.

90 Case on file with author.

91 Crush & Pindleton (n 43).

including brutal attacks by officials⁹² and police indifference while third parties vandalise foreign-owned shops.⁹³ These experiences prove that simply guaranteeing rights on paper does not guarantee the enjoyment of these rights in practice. Despite having been resident in South Africa for a protracted period of time, refugees are considered 'other' because of their refugee status.

University of Witwatersrand Law School Professor Jonathan Klaaren argues that the issue of xenophobia may be used to explore the 'development of themes of citizenship' in South Africa.⁹⁴ According to Klaaren, one view sees violence as the 'natural result of apartheid deprivations and its refusal to share the spoils with respect to those from outside the borders'. The second view is more 'empirically informed' and sees xenophobic violence as a constitutive struggle over the current meaning of South African citizenship.⁹⁵ It raises the question of whether citizenship is viewed as exclusive membership in a community – that is, membership in a political republic or membership in a cultural bloc – or whether it is conceived of as 'constitutional citizenship' – that is, that lawful residence entitles one to the universal human rights culture.⁹⁶

As long as refugees are regarded as 'other', they will remain prone to xenophobia, they will struggle to integrate, and they will continue to face prejudice and marginalisation. Hence the question remains as to whether membership to a national or political community is a prerequisite to the effective protection of human rights.

5.4 Linking dignity to respect and safety

Even though states appear to be committed to follow a human rights approach, according to well-known refugee scholar Haddad, states' perception of refugeehood inevitably differs from refugees' perception.⁹⁷ While states are preoccupied with issues of obligation and management, refugees view their status by considering their safety and dignity.⁹⁸ Refugeehood triggers a number of rights, regardless of the social context of the refugee. Refugees thus assess whether the rights afforded to them allow them a sense of safety

92 Case on file with author.

93 *Said v Others v Minister of Safety and Security* EC13/08 (unreported).

94 J Klaaren 'Constitutional citizenship in South Africa' (2010) 8 *International Journal of Constitutional Law* 94.

95 As above.

96 As above.

97 E Haddad 'Who is (not) a refugee?' European University Institute EUI Working Paper SPS 2004/6, <http://cadmus.eui.eu/bitstream/id/1769/sps2004-06> (accessed 19 July 2018).

98 Haddad (n 97) 18.

and belonging and whether they feel respected as human beings. It is apparent from the current refugee situation throughout the world that refugees are failing to access these rights and to integrate into their host communities, even though the protection by the UN Refugee Convention confirms the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination.⁹⁹ Ultimately, refugee protection has become a contest between the universality of human rights and the sovereignty of nations.¹⁰⁰ This contest has a detrimental effect on the lives and livelihoods of refugees and relegates refugees permanently to the status of second-class citizens.¹⁰¹

There is a growing school of thought that emotions can be used to establish the extent to which a person's dignity has been violated.¹⁰² University of Oxford Professor of Public Law and Legal Theory, Tarunabh Khaitan, holds this view and describes the concept of dignity in human rights law as an expressive norm.¹⁰³ Khaitan argues that 'whether an act disrespects someone's dignity depends on the meanings that act expresses'.¹⁰⁴ Does the legislation demean, degrade, or humiliate the person under its authority? The right to dignity takes seriously the expression of disrespect, insult or humiliation. The emotions expressed or articulated by the person are one way of establishing whether the person feels disrespected, insulted or humiliated by the act. Dignity involves worth and respect, and the right to dignity, in part, is whether this worth is recognised by the state.¹⁰⁵ Thus, if the victim feels insulted, humiliated or disrespected by the laws, the adjudicator can assess whether the law protects the dignity of the person. Furthermore, Kidd-White states that one can expect emotions such as indignation, empathy and pity to draw out the content of human dignity. Many of these are painful emotions that respond to evidence of human rights abuse.¹⁰⁶ Emotions, therefore, can help judges understand what the legal concept of human dignity was supposed to protect.

One way for the plight of refugees to be realised is if an avenue can be found for them to demonstrate the negative effect of refugee

99 UN Refugee Convention (n 1) Preamble.

100 *Watchenuka* (n 6); see also Amnesty International 'Global refugee statistics' 13 August 2012, <http://www.amnesty.org.au/refugees/comments/29462/> (accessed 19 June 2017).

101 Botha (n 8).

102 E Kidd-White 'Till the human voices wake us: The role of emotions in the adjudication of dignity claims' (2014) 3 *Journal of Law, Religion, and State* 201.

103 T Khaitan 'Dignity as an expressive norm: Neither vacuous nor panacea' (2012) 32 *Oxford Journal of Legal Studies* 1.

104 As above.

105 As above.

106 Kidd-White (n 102).

status on their dignity. The extent to which refugees in South Africa 'feel insulted, humiliated and not respected by the laws'¹⁰⁷ is yet to be clearly established. Still, the brief discussion below demonstrates that refugees are unable to live meaningful lives in South Africa and integrate fully into South African society.

5.5 Right of access to documents

In South Africa the refugee document entitles the holder to a variety of rights and benefits. Most importantly, it entitles the holder to sojourn legally in the country. However, refugees struggle to access these documents and, when they have obtained these documents, the documents themselves serve to alienate them even further.

A refugee's struggle to access documents in South Africa can be demonstrated through the cases undertaken against the Department of Home Affairs – the government department that is responsible for the issuance of these documents. In one of the first cases dealing with the right to documentation, the Court explained the significance of the right to documentation appropriately by stating:¹⁰⁸

Until an asylum seeker obtains an asylum-seeker permit in terms of s 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, is subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person.

In addition to the difficulties associated with accessing documentation, identity documents themselves are markedly different from those issued to South African citizens or permanent residents.¹⁰⁹ The purpose of this differentiation may be that the government can impose order on society: The government can plan for the benefit of the holders or the identification of refugees to distinguish between who is the holder of rights and who is not.¹¹⁰ On the other hand, it may serve as a form of control so that the government can deport asylum seekers whenever it deems it necessary to do so.

¹⁰⁷ Khaitan (n 103).

¹⁰⁸ UNHCR Urban Policy (n 44); *Kiliko & Others v Minister of Home Affairs & Others* 2009 Case 2739/2005.

¹⁰⁹ Refugees Act 130 of 1998 sec 22 (temporary asylum document); sec 24 (refugee status document); sec 27 (travel and identity document), sec 23 (immigration document).

¹¹⁰ R Amit & N Krigler 'Making migrants "il-legible": The policies and practices of documentation in post-apartheid South Africa' (2014) *Kronos* 269.

The various forms of documentation lend themselves to administrative practices that often lead to the exclusion of refugees from benefits. The specific document that refugees receive, for example, has restricted access to the two rights most necessary for the refugee to become self-reliant, namely, the right to work and the right to education. The refugee status permit is issued in terms of section 24(3)(a) of the Refugees Act¹¹¹ without regard for the refugee's right to work.¹¹² Refugees struggle to access employment because refugee status documents usually are valid for a limited period, mostly two years for recognised refugees and three months for asylum seekers.¹¹³ This limited duration negatively impacts a refugee's right to work because it prejudices refugees and asylum seekers from permanent employment. Even when the refugee documents are accepted by employers, various issues arise, such as access to banking¹¹⁴ and access to unemployment insurance.¹¹⁵

Similarly, the refugee documentation impacts refugees' education. The short duration of refugee and asylum seeker status makes it difficult to obtain admission or continue their studies at universities.¹¹⁶ This shows that refugee documentation itself negatively impacts the social and economic integration of refugees. Despite the fact that all children have the constitutional right to basic education, the education of refugee children is also threatened. Refugee children who fail to obtain or renew documentation are at risk of arrest. In 2017, for example, a Gauteng school issued a letter to all parents of foreign children stating: 'If any foreign child arrives here on Monday we will phone the police to come and collect your child, and you can collect your child at the police station. These are direct instructions from the Department of Home Affairs.'¹¹⁷ Documentation and the registration of refugees may be an important component of local integration. However, until refugees are able to secure enabling documents, local integration will continue to be unachievable.

111 Sec 24(3)(a) Refugees Act (n 109).

112 Residence permits issued generally indicate the right to work attached to it.

113 De la Hunt (n 79).

114 *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited* SGNC 34220/2010 (unreported).

115 Khan & Schreier (n 8) 233.

116 R Browne 'The right to education for refugees and asylum seekers in South Africa' unpublished LLM thesis, University of Cape Town, 2013 39.

117 N Goba 'Outrage over school letter threatening to bar pupils with foreign parents' *Times Live* 2 February 2017.

6 Approach of the courts

The United States Supreme Court has described the right of citizenship as 'the right to have rights'.¹¹⁸ In *Trop v Dulles* the US Supreme Court held that the loss of citizenship was a cruel and unusual punishment and nothing less than an offence to the 'dignity of man'.¹¹⁹ The US Supreme Court helped answer the question of the relation between 'dignity in citizenship' and the 'abstract human dignity' that underpins human rights. It referred to the likely hardships of denationalisation and concluded that taking away citizenship is 'the total destruction of the individuals' status in an organised society'.¹²⁰ The Court found that the dignity of man was offended by being made stateless.¹²¹

6.1 By limiting the sovereignty of the state

The *Watchenuka* case¹²² is considered seminal with regard to the interpretation of the right to dignity of non-citizens in South Africa. In this case the Supreme Court of Appeal boldly stated that 'human dignity has no nationality' and that the right to dignity may be used to prevent the 'humiliation and degradation' of any person even if it limits the sovereignty of the state.¹²³

In this case Mrs Watchenuka and her disabled son fled Zimbabwe and sought asylum in South Africa. Without social assistance from the government, Mrs Watchenuka soon found herself destitute due to her temporary asylum seeker status and her inability to access employment. Faced with the decision whether to grant asylum seekers the right to work and study, the Supreme Court of Appeal recognised the power of the state to differentiate between citizens and non-citizens and to decide whom to admit and on what terms. The Court thus recognised the foundational nature of the right to dignity and used it to limit the right to sovereignty. It demonstrated that the right to dignity can challenge notions of sovereignty to protect non-nationals from 'humiliation and degradation'.¹²⁴ The Court found that a person who exercises his or her right to apply for asylum in South Africa and is destitute 'will have no alternative but to turn to crime, or to begging or foraging'. In such cases, the Court

118 *Trop v Dulles* 356 US 86 (1958).

119 As above.

120 As above.

121 As above.

122 *Watchenuka* (n 6).

123 As above.

124 As above.

held, 'the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely inhibit the realisation of the potential for self-fulfilment'.¹²⁵

The Supreme Court of Appeal also noted that the applicants, as asylum seekers, were easily identified as immigrants on the 'lowest rungs of the immigration ladder'¹²⁶ and should be afforded the right to dignity. The Court therefore declared that

human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And whilst that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights.¹²⁷

Despite its bold statements, the Court did not uphold asylum seekers' general right to work and, instead, left this question to the adjudicating body, the Standing Committee of Refugee Affairs. The Standing Committee would grant asylum seekers the right to work on a case-by-case basis. Overall, this judgment affirmed a non-citizen's right to be free from humiliation and degradation and effectively severed human dignity from nationality.¹²⁸

6.2 By drawing similarities with citizens

In *Khosa*¹²⁹ the Constitutional Court drew similarities between citizens and non-citizens. The applicants, Mozambican citizens who had lived in South Africa since 1980 and had acquired permanent residence status, were destitute and would have qualified for social assistance grants had they been citizens. The applicants applied for social assistance under the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, but their applications were rejected based on their permanent residence status. They thus challenged the decision, arguing that it infringed upon their constitutional right to not be discriminated against unfairly as well as their right to social assistance.¹³⁰

125 As above.

126 As above.

127 As above.

128 Botha (n 8).

129 *Khosa* (n 7).

130 The Constitution of the Republic of South Africa, 1996. Sec 27(1) of the Constitution provides that everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

In addressing the question of whether it was reasonable to exclude non-citizens from social assistance,¹³¹ the Court identified the following four factors as relevant: the purpose served by the social security assistance; the impact of the exclusion; the relevance of the citizenship requirement; and the impact on other intersecting constitutional rights – in this case, equality.¹³² The Court concluded that the purpose of social assistance was not only to ensure the availability of the basic necessities for everyone but also to respect the values of human dignity, equality, and freedom.¹³³ Regarding access to social grants, the Court held that differentiating on the basis of citizenship ‘must not be arbitrary or irrational or mark a naked preference’.¹³⁴

In opposition, the state submitted that permanent residents could apply for naturalisation and then become eligible for social grants and that, therefore, permanent residents should wait before applying for social assistance. The Court considered this and found that naturalisation was not guaranteed upon application. The Court also considered the financial burden on the state but held that the state had not provided sufficient evidence to justify the claim that it could not afford to extend social grants to eligible permanent residents. In the end, the Court decided this case from an unfair discrimination perspective. Employing the proportionality analysis, it concluded that the impact of exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations on which the state relied. This judgment is in line with *Watchenuka*.

However, the Court in *Khosa* was careful in limiting the extension of social grants to those ‘who like citizens have made South Africa their home’.¹³⁵ The level of attachment to the host state was crucial in the Court’s determination to extend social assistance to permanent residents.¹³⁶ According to the Court, since permanent residents had demonstrated their ties to South Africa, they were eligible for social grants. This judgment is problematic as it lays emphasis on the similarities between permanent residents and citizens, namely, their immigration status, instead of considering their eligibility for social security based on their shared human dignity. The right of access to social assistance is recognised both under the South

131 As above.

132 *Khosa* (n 7) para 49.

133 As above.

134 As above.

135 As above.

136 As above.

African Constitution and ICESCR.¹³⁷ Although states at times have used 'progressive realisation' to justify the exclusion of permanent residents and refugees, *Khosa* did not consider progressive realisation as the determining factor. Instead, this case was decided based on the ties permanent residents had to South Africa. Indeed, the majority judgment simply assumed that temporary residents did not have meaningful ties of allegiance or commitment to their country of residence.¹³⁸ In a way, this case suggests that refugees, asylum seekers and undocumented migrants are not eligible for social grants. The applicants for permanent residence may have been successful in this case, but the Court has demonstrated that non-citizens can be excluded even if the right is extended to everyone in the Constitution.¹³⁹ The Social Assistance Act has since been amended, and the benefits thereof have been extended to permanent residents and refugees.¹⁴⁰

Therefore, it is not enough to conclude that all the obstacles can be overcome by non-nationals with the use of the universal rights to dignity and equality for the full recognition of their humanity. Even though the Constitution guarantees most of the rights recognised in the Bill of Rights to 'everyone' or every child and the noble statements by the Constitutional Court about human dignity and equality, the South African courts have not consistently upheld these provisions in concrete cases concerning refugees.

7 Conclusion

Although key philosophers agree that dignity is a fundamental human right, the citizenship status of refugees often imposes limits upon this right. When comparing the philosophical principles of Arendt, Kant and Waldron to a human rights-based approach, the lived experiences of refugees in South Africa, and the responses of the courts, one finds that the current policies and safeguards in place do not adequately protect refugees. While many countries, including South Africa, have constitutions that include human rights- and promising domestic refugee legislation, these legislative norms often

137 ICESCR (n 28). South Africa signed ICESCR in 1994 and ratified the document in 2015. Given that the socio-economic rights in the South African Constitution were modelled on those of ICESCR, comments and analysis of the rights in ICESCR are valuable to South African courts; see De Waal & Currie (n 11).

138 L Williams 'Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis' (2005) 21 *South African Journal on Human Rights* 436.

139 *Khosa* (n 7).

140 Lawyers for Human Rights 'Social relief is made available for vulnerable refugees' *Lawyers for Human Rights* 2012, <http://www.lhr.org.za/news/2012/social-relief-made-available-vulnerable-refugees> (accessed 12 April 2017).

do not translate into concrete protection. The universality of the right to dignity is questionable when one explores the experiences of refugees themselves and the various administrative and practical stumbling blocks that they encounter in South Africa. Dignity often is linked to ideas around citizenship and, for those who do not belong to a particular political community, this dignity often is elusive. While South Africa has a generous legal framework and a noteworthy urban policy, refugees in South Africa remain outsiders and, as a consequence, often are denied their fundamental right to dignity.

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Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Masjid*

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Summary: *This article assesses the extent to which the South African Constitutional Court's seminal findings in *Governing Body of the Juma Masjid Primary School v Essa NO* have bolstered the lower courts to give tangible content to the right to basic education. It is contended that the particular facts of *Juma Masjid*, which required the Constitutional Court to rule on the negative obligations of section 29(1)(a) of the Constitution, actually played a significant role in the Court's unequivocal pronouncement that the right is unqualified. The Court's ruling on the nature of section 29(1)(a) seems to have emboldened lower courts to adopt a substantive interpretation of the right. The article traces the lower courts' judgments over a period of almost a decade and explores in detail how the right to basic education has been 'filled out' incrementally by these courts. The connection between the incremental approach and a conceptualisation of transformation that is cognisant of the changing context of our society is also explored in the article. It is argued that a case-by-case approach to litigating potential violations of the right to basic education ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in)justice in our society.*

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Key words: *right to basic education; socio-economic rights; normative content; negative obligations; unqualified right; incremental approach; transformation; evolving right*

1 Introduction

The Constitutional Court (Court) has consistently refused to give normative content to socio-economic rights under the South African Constitution.¹ However, its confirmation of the unqualified nature of the right to basic education in *Governing Body of the Juma Masjid Primary School v Essa NO (Juma Masjid)*,² one of the most seminal judgments in education law jurisprudence, seemingly has emboldened lower courts to provide substantive content to section 29(1)(a) of the Constitution.

The particular facts of the judgment required the Court to rule on the negative obligations of the right to basic education. Taking into account that the Court has been more generous in its interpretation of negative obligation cases as opposed to cases where it was tasked to rule on the positive obligations of socio-economic rights, I argue that the facts of *Juma Masjid* actually represented the proverbial ‘blessing in disguise’. Not being confronted with making a ruling on the positive duties of the right to basic education, the Constitutional Court unequivocally pronounced that the right is unqualified and that it can only be limited in terms of the Constitution’s general limitation clause.

Post-*Juma Masjid* the lower courts³ have given concrete content to the right to basic education, consistently referencing the Court’s seminal finding in *Juma Masjid* as a basis for their decisions to provide substance to the right. I trace the extent to which section 29(1)(a) has been developed by these courts over a period of approximately eight years.

1 The Constitution of the Republic of South Africa, 1996. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2013 (6) SA 249 (CC).

2 2011 (8) BCLR 761 (CC). The case was appealed to the Constitutional Court in 2010 from the KwaZulu-Natal High Court (Pietermaritzburg) which sanctioned the eviction of a public school, operated on private property owned by the Juma Masjid Trust. The application to prevent the eviction was unsuccessful as the Constitutional Court ultimately granted the eviction order. See paras 63-64 for an explanation of the Constitutional Court’s finding that the eviction order sought by the Juma Masjid Trust was reasonable.

3 ‘Lower courts’ in this article is a reference to the courts below the Constitutional Court, namely, the High Courts and the Supreme Court of Appeal.

The article also examines the link between the incremental ‘filling out’ of the right to basic education and a particular conceptualisation of transformation that takes account of the ever-changing context of our society. The incremental approach ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in) justice in our society.

The article is divided into four parts. In part 2 I focus first on the significance of the unqualified nature of the right to basic education; second, I examine how the Constitutional Court’s ruling on the negative obligations of the right in *Juma Musjid* led to a more generous interpretation of section 29(1)(a) of the Constitution; third, I chronologically trace the judgments of lower courts to provide an account of how the right to basic education incrementally has been ‘filled out’. In part 3 I explore the link between the incremental approach and transformation. Part 4 provides the conclusion.

2 Right to basic education

Section 29(1) of the Constitution provides:

Everyone has the right –

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Although *Juma Musjid* was not brought before the Court with the intention of gaining clarity on what the absence of textual qualifiers in section 29(1)(a) means, the Constitutional Court in this judgment held that the right to basic education is distinguishable from other socio-economic rights in the Constitution.⁴ Writing for a unanimous Court, Nkabinde J held as follows:⁵

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education ‘progressively available and accessible’.

⁴ *Juma Musjid* (n 2) para 37.

⁵ As above.

Whereas the rights to housing, health, food, water, social security and further education are qualified to the extent that their realisation is subject to the internal limitations of 'progressive realisation', 'reasonable legislative measures', and/or 'available state resources', the Court held that the right to basic education is an immediately realisable right as it does not contain any of the qualifiers mentioned above.⁶

The Constitutional Court has adopted an approach of reasonableness in respect of qualified socio-economic rights in the Constitution. The reasonableness approach rejects a substantive interrogation of the right, and merely determines whether the state has acted reasonably in giving effect to the particular right.⁷ The Constitutional Court provided an extensive explanation of the reasonableness approach in the seminal case of *Grootboom*⁸ which dealt with the right of access to housing in terms of section 26 of the Constitution.⁹ The Court rejected a substantive inquiry by refusing to interpret section 26(1) as giving rise to a minimum core content.¹⁰ According to the Court, section 26(1) read in conjunction with section 26(2) merely imposes a positive obligation on the state 'to adopt and implement a reasonable policy, within its available resources' to ensure the progressive implementation of the right.¹¹ The Constitutional Court has since applied the reasonableness approach to the other qualified socio-economic rights in the Constitution.¹² The effect of the latter approach on individual rights bearers has been described as follows:¹³

6 As above. Sec 26(1) of the Constitution provides that '[e]veryone has the right to have access to adequate housing'. Sec 26(2) states: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' Sec 27(1) of the Constitution provides that '[e]veryone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Sec 27(2) provides: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' Sec 29(1)(b) states that '[e]veryone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible'.

7 S Wilson & J Dugard 'Constitutional jurisprudence: The first and second waves' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 38.

8 *Grootboom* (n 1).

9 As above. See also Wilson & Dugard (n 7) 39-40.

10 *Grootboom* (n 1) paras 34-36.

11 *Grootboom* paras 39-46.

12 See, eg, *Treatment Action Campaign v Minister of Health* (No 2) 2002 (5) SA 721 (CC).

13 C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 562.

The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources. In simple terms, the fact that a person is homeless, has insufficient food or water, has limited access to health care or social security is not sufficient to establish a limitation of her ss 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.

When juxtaposing the Constitutional Court's interpretation of section 29(1)(a) in *Juma Masjid* with its approach of reasonableness the importance of Nkabinde J's pronouncement in the latter judgment is underscored. The right to basic education secures a right to an actual public good, namely, 'basic education', and not merely to an entitlement that the state performs reasonably in their adoption and implementation of the goods related to the right.¹⁴

2.1 Enforcing the negative obligations of section 29(1)(a) in *Juma Masjid*: 'Blessing in disguise?'

The central issue in *Juma Masjid* revolved around a private owner's right to evict a public school from its property and therefore concerned the enforcement of a negative obligation in terms of section 8(2) of the Constitution.¹⁵ The eviction order granted by the Court resulted in the affected learners being placed in other schools 'which meant the expense to the state of placing them in those schools was negligible'.¹⁶ The Court therefore was not tasked with ruling on the positive dimensions of the right which would have carried a much higher 'price tag' for the state.¹⁷ In such a case the Court would be cognisant of the possibility that the state would be unable to immediately comply with a court order that incurs significant costs.¹⁸ As Skelton speculates, the Court then would probably circumscribe the right more tightly, as the authority of the Court is brought into question and the anticipated recipients are left with no benefit if the court order is not complied with.¹⁹

14 McConnachie & Mconnachie (n 13) 564.

15 *Juma Masjid* (n 2) para 1. Sec 8(2) of the Constitution provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

16 A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *Southern African Public Law* 397.

17 Skelton (n 16) 396.

18 Skelton 397. See also E Berger 'The right to education under the South African Constitution' (2003) 103 *Columbia Law Review* 614.

19 Skelton (n 16) 397.

Skelton's analysis confirms the view that the Constitutional Court is more cautious in its interpretive approach of the positive obligations stemming from socio-economic rights.²⁰ Brand brings up separation of power concerns as he points out that courts operate under the perception that 'enforcing negative duties require of them less interference in the sphere of power of the political branches than the enforcement of positive duties would'.²¹ The enforcement of a positive obligation, unlike the enforcement of a negative obligation, is perceived as interfering in the executive or legislature's decisions on budgetary allocations.²² This, coupled with 'institutional considerations sourced in the [Constitutional] Court's understanding of its own role, legitimacy and competencies',²³ time and again have resulted in the Court's refusal to provide normative content to socio-economic rights.²⁴ Therefore, it is suggested that the Court may have decided *Juma Masjid* differently, had it been confronted with a different set of facts which would have forced it to rule on the positive obligations of the right to basic education.

In hindsight, the fact that the Court was asked to rule on the negative obligations of section 29(1)(a) may have turned out to be the proverbial 'blessing in disguise'. To be clear: Since the Court was not tasked with ruling on the positive obligations of the right (and all the concerns that accompany it, as noted above) it was more inclined to provide a 'generous' interpretation of the unqualified nature of

20 Wilson & Dugard (n 7) 42.

21 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 11. See also *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* para 78: 'The objectors argued ... that socio-economic rights are not justiciable ... because of the budgetary issues their enforcement may raise. The fact that socio-economic rights will ... inevitably give rise to such implications does not seem ... to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'

22 Brand (n 21) 11.

23 S Liebenberg 'Social rights and transformation in South Africa: Three frames' (2015) 31 *South African Journal on Human Rights* 454.

24 Liebenberg (n 23) 453-454. Wilson & Dugard compare the Constitutional Court's interpretive approach in positive obligations cases with those judgments in which negative obligations have been ruled upon. In *Jaftha* the 'Court considered whether the attachment and sale in execution of residential property without judicial oversight constituted a violation of the right of access to adequate housing'. The Court held that the lack of judicial oversight violated the right of access to adequate housing in terms of sec 26(1) of the Constitution and that the limitation was not justifiable in terms of the limitation clause. In coming to this conclusion, the Court relied directly on the international law concept of the minimum core content of a right to conclude that security of tenure was part and parcel of sec 26(1). In *Grootboom*, a case which concerned the positive enforcement of sec 26, the Court refused to interpret sec 26(1) as containing a minimum core content. The juxtaposition of these two cases clearly illustrates a more generous approach to interpretation when the Court is dealing with the negative duties emanating from socio-economic rights. See Wilson & Dugard (n 7) 41-42; *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC) paras 25-34; *Grootboom* (n 1) paras 26-33.

the right, which of course it did. This, in turn, led to the lower courts using the Court's pronouncements on the immediate realisation of the right as a basis to provide concrete content to section 29(1)(a).

2.2 An incremental approach to 'fill out' section 29(1)(a): A chronology of cases (2010-2018)

As noted above, the *Juma Masjid* Court held that the absence of qualifiers in the textual formulation of the right to basic education means that section 29(1)(a) is immediately realisable, not subject to the availability of state resources and that the right may only be limited in terms of the Constitution's general limitation clause.²⁵ Furthermore, the Constitutional Court confirmed that the state bears the primary onus of providing a basic education.²⁶ However, what is the exact content of the state's duties in respect of section 29(1)(a)? The latter question was not before the Court. However, Nkabinde J provided some broad parameters in understanding the content of the right to basic education. First, she held that access 'is a necessary condition for the achievement of this right'²⁷ and that the state has a duty to ensure the availability of schools.²⁸ Whereas the *Juma Masjid* judgment provided some broad principles in guiding the content of the right to basic education, the High Courts and the Supreme Court of Appeal have been more specific in providing exact content to the right, albeit on an incremental basis. As stated by Skelton, the latter courts 'have begun to spell out, in case after case, what makes up the right to education'.²⁹ According to Veriava, the High Courts and the

25 *Juma Masjid* (n 2) para 37.

26 The Court found that the state incurred a positive obligation in terms of secs 7(2) and 8(1) of the Constitution to provide a basic education. Sec 7(2) of the Constitution provides: 'The state must respect, protect, promote and fulfill the rights in the Bill of Rights.' Sec 8(1) states: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' The Court held that the primary obligation to provide a basic education rests on the state, and that the Trust's duty was merely 'secondary'. According to the Court, private entities such as the *Juma Masjid* Trust incur mere 'negative obligations not to impair learners' right to a basic education [in terms of sec 8(2) of the Constitution]'. *Juma Masjid* (n 2) paras 45-62. In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) the Constitutional Court held that '[the right to basic education in terms of sec 32 of the interim Constitution] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education'.

27 The Court held that 'access to school [is] an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution'. *Juma Masjid* (n 2) para 43.

28 Secs 7(2) and 8(1) of the Constitution read with sec 12 of the Schools Act impose a duty on the state 'to provide public schools for the education of learners'. *Juma Masjid* (n 2) para 45.

29 A Skelton 'Strategic litigation impacts: Equal access to quality education' Report commissioned by the Open Society Justice Initiative: Open Society Foundations Education Support Programme (2017) 66.

Supreme Court of Appeal have been engaged in developing a 'rich jurisprudence' based on the principles established in *Juma Masjid*.³⁰

2.2.1 'Mud schools' case

The so-called 'Mud schools' case was one of the first noteworthy cases to focus on school infrastructure.³¹ This case, launched in 2010 by the Legal Resources Centre (LRC) on behalf of the Centre for Child Law and several schools in the Eastern Cape, resulted in a settlement agreement with the state which eventually developed into the Accelerated Schools Infrastructure Development Initiative (ASIDI).³² The objectives of ASIDI are to eradicate the 'Basic Safety Norms backlog in schools without water, sanitation and electricity and to replace those schools constructed from inappropriate material (mud, planks, asbestos) to contribute towards levels of optimum learning and teaching'.³³ Since a settlement was reached in this case, the Court could not explicitly find that infrastructure constitutes an element of the right to basic education. However, in my view the government's commitment to providing appropriate infrastructure in schools as per the terms of the programme indicates an admission on their part that school infrastructure is a key element of the content of section 29(1)(a). Furthermore, by stating that appropriate infrastructure will contribute to 'levels of optimum learning and teaching' in terms of ASIDI, the state recognises that there is a link between resources and the provision of quality education.

The meaning of 'quality education' is not defined in the Constitution or the South African Schools Act, and at an international law level 'quality' also is not clearly circumscribed in any human rights instrument. The former Special Rapporteur on the Right to Education, Kishore Singh, has developed a holistic approach to understanding quality, titled 'Normative action for quality education'.³⁴ Singh contends that the quality of education should not only be assessed in terms of the acquisition of 'knowledge, skills and competencies', but by a range of barometers. The holistic framework for quality education is summarised as follows: (i) a minimum level

30 F Veriava 'The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education' LLD thesis, University of Pretoria, 2018 14.

31 Skelton (n 29) 52.

32 Skelton 52-53.

33 <https://www.education.gov.za/Programmes/ASIDI.aspx> (accessed 28 February 2019).

34 K Singh 'Normative action for quality education' (2012) 5, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf (accessed 28 February 2019).

of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified teaching force; and (iv) a school that is open to the participation of all, particularly students, their parents and the community.³⁵

Singh's normative framework seemingly is backed by South African state policy. In terms of 'Action Plan to 2019: Towards the realisation of schooling 2030' a wide range of objectives have to be realised by 2030 in order to fulfil the vision of a 'post-apartheid schooling system'.³⁶ At the heart of this vision is the creation of an education system that provides 'quality schooling' to all young South Africans.³⁷ The Action Plan enumerates several elements that must be in place to achieve quality schooling, including competent teachers, learning and teaching materials 'in abundance' and of 'high quality' and school buildings and facilities that are 'spacious, functional, safe and well-maintained'.³⁸ The state therefore acknowledges Singh's holistic approach that quality not only is to be understood in terms of an academic outcome achieved by learners, but encompasses an environment that is conducive of adequate teaching and learning. The violation of quality education was alluded to in some of the cases discussed below.

2.2.2 Centre for Child Law & Others v Minister of Basic Education & Others

In *Centre for Child Law v Minister of Basic Education*³⁹ the Court held that teaching and non-teaching staff are core components of the right to basic education.⁴⁰ Plasket J, in particular, focused on the damaging impact of a deficient non-educator staff on learners as well as teachers.⁴¹ He reasoned as follows:⁴²

If the administration and support functions of a school ... cannot perform properly because of staff shortages, not only does this have a knock-on effect on the right to basic education but it also has the potential to threaten other fundamental rights. Where hostels are understaffed, for instance, or security is lacking, the rights to dignity and to security of the person, as well as children's rights in terms of s 28

35 As above.

36 National Department of Basic Education (NDBE) 'Action Plan to 2019: Towards the realisation of schooling 2030' (2015).

37 NDBE (n 36) 9 (my emphasis).

38 NDBE 9-10. See generally Skelton (n 29).

39 2012 (4) All SA 35 (ECG).

40 *Centre for Child Law* (n 39) paras 33-34.

41 *Centre for Child Law* paras 16-21.

42 *Centre for Child Law* para 21.

of the Constitution, may be implicated. When administrative capacity in a complex institution like a school is non-existent, administration either breaks down or has to be performed by teachers who have to deviate from their core functions to perform tasks that they are not trained or expected to perform.

This *dictum* confirms the approach by the Constitutional Court that socio-economic rights are not to be construed in isolation, but in relation to other rights.⁴³ All rights in the Bill of Rights are interconnected.⁴⁴ Therefore, a denial of certain core elements of section 29(1)(a), such as teachers and non-teaching staff, not only constitutes a violation of the right to basic education, but detrimentally impacts other rights, such as the right to dignity. Furthermore, Plasket J inadvertently alluded to the infringement of the right to quality education by highlighting the undue burden that is placed on teachers when there is a shortage of support staff at a particular school. Being compelled to carry the workload of non-teaching staff may force educators to cut classes and to be inadequately prepared for their lessons. This in turn leads to a low morale among educators and a downturn in the quality of education provided to learners.

2.2.3 *Madzodzo & Others v Minister of Basic Education & Others*

Quality was implicated In *Mazdodzo v Minister of Basic Education (Mazdodzo)*⁴⁵ in which the Mthatha High Court pronounced on the failure of the Eastern Cape Education Department to provide school furniture (in the form of desks and chairs) to destitute public schools in the province.⁴⁶ The Court described in detail the harmful effect that a scarcity or complete lack of furniture has on learners and teachers. The Court emphasised that learners are either 'forced to sit on the floor', 'compelled to stand throughout lessons with no writing service' or be 'squashed into desks like animals'.⁴⁷ This results in a multitude of problems. Learners become entangled in fights over the limited furniture available, which in turn leads to a struggle on the

43 In *Grootboom* (n 1) paras 22-23 the Constitutional Court explained the interrelated nature of rights in the Bill of Rights: '[R]ights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.'

44 As above.

45 2014 (2) All SA 339 (ECM).

46 *Mazdodzo* (n 45) para 1.

47 *Mazdodzo* para 20.

part of the teacher to maintain discipline in class. Furthermore, due to the limited writing space, teachers are not able to provide learners with writing exercises. The deplorable physical environment, 'not at all conducive to teaching and learning', inevitably results in learners not being able to concentrate on the work before them.⁴⁸ It therefore comes as no surprise that Goosen J described this poor state of affairs as an impairment of the dignity of the affected learners.⁴⁹ The Court subsequently found that an absence of desks and chairs 'profoundly undermines the right of access to basic education'.⁵⁰ Similar to the case of *Centre for Child Law v Minister of Basic Education*, the Court affirmed the interrelated nature of the rights in the Bill of Rights by considering the impact of a lack of appropriate furniture on the dignity of the learners.⁵¹ Goosen J further alluded to an assault on the quality of education, brought on by the deplorable physical environment in which the learners were educated. Finally, the Court interpreted the provision of school furniture as part of the state's obligation to provide 'educational resources' which include 'schools, classrooms, teachers, teaching materials and appropriate facilities for learners'.⁵²

Madzodzo therefore is significant to the extent that the Court went further than merely declaring that the state is liable to provide desks and chairs to learners. The Court expanded the content of the right by interpreting section 29(1)(a) as a right to school infrastructure and the various educational resources referred to above. Furthermore, *Madzodzo* interpreted the right to basic education as an entitlement to a physical environment that takes account of a learner's right to dignity.

2.2.4 'Textbook judgments'

Next, textbooks as a core component of section 29(1)(a) became the main issue of a trio of judgments. In the first of these judgments, *Section 27 v Minister of Education (Textbook 1 judgment)*,⁵³ the North Gauteng High Court considered the question of whether the state's failure to provide textbooks to public schools in the Limpopo province signified an infringement of the rights to basic education, equality and dignity.⁵⁴ In the end the Court did not

48 As above.

49 As above.

50 As above.

51 As above.

52 As above.

53 Case 24565/12, 4 October 2012.

54 *Textbook 1 judgment* (n 53) para 21. This particular case was instituted by sec 27 as a direct result of the so-called 'Limpopo textbook crisis'. The root of this

make any pronouncements on the rights to equality and dignity. However, it zoomed in on the question of whether the right to basic education includes an obligation on the state to provide textbooks. Kollapen J answered in the affirmative by having recourse to a range of state policy statements and documents. For example, the Court emphasised former President Zuma's declaration in the 2011 State of the Nation Address that '[t]he Administration must ensure that every child has a textbook on time'.⁵⁵ Furthermore, the Court referred to the Limpopo Education Department's Annual Performance Plan for 2011-2012 which indicates as one of its objectives '[t]o ensure that every learner has access to a minimum set of textbooks and workbooks required according to National Policy'.⁵⁶ Finally, Kollapen J highlighted the Limpopo Education Department's Curriculum Strategy which essentially states that effective teaching and learning are impossible without 'learning support materials'.⁵⁷ The Court reasoned that the government has taken 'an unambiguous stance ... that textbooks are an essential and vital component in delivering quality learning and teaching'.⁵⁸ Drawing on the above, Kollapen came to the following conclusion:⁵⁹

[T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.

The *Textbook 1* judgment not only is valuable because of its contribution to developing the content of the right to basic education.

crisis was found in the government's decision to implement a new curriculum, called Curriculum and Assessment Policy Statements (CAPS) in 2012. As a result of the change, new textbooks were required to implement the curriculum. The Department of Basic Education made the decision to introduce CAPS on a grade-by-grade basis: grades 1 to 3 and 10 in 2012; grades 4 to 6 and 11 in 2013; and grades 7 to 9 and 12 in 2014. Due to resource constraints the DBE decided to prioritise the procurement of textbooks for the grades in which CAPS would be implemented in 2012. The Department subsequently ran out of funds which resulted in some schools not receiving textbooks. Limpopo was particularly affected by the non-delivery of textbooks due to 'the general fraud, maladministration, corruption and incompetence in the provincial government'. In January 2012 the national executive exercised its sec 100 constitutional mandate to intervene in the Limpopo government by taking over the obligations of the province. See F Veriava 'The Limpopo textbook litigation: A case study into the possibilities of a transformative constitutionalism' (2016) 32 *South African Journal on Human Rights* 321-323.

55 *Textbook 1* judgment (n 53) para 23.1.

56 *Textbook 1* judgment para 23.2.

57 *Textbook 1* judgment para 23.3. The Department of Basic Education categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). See NDBE 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 3.

58 *Textbook 1* judgment (n 53) para 23.3.

59 *Textbook 1* judgment para 25.

The judgment also provides clear guidance as to when the judiciary is willing to give content to socio-economic rights. Kollapen J consulted a range of policies to reach the conclusion that the right to basic education includes the right to textbooks. Wilson and Dugard argue that the courts are disposed to providing content to socio-economic rights when it requires 'the state to take steps provided for in, or consistent with, its own policy, or when expanding on the content given to the right by applicable legislation'.⁶⁰ In other words, the courts are more likely to give concrete content to socio-economic rights where legislation or policy giving effect to the applicable right already exists.⁶¹ As will be discussed later in this article, the Supreme Court of Appeal adopted a similar approach as Kollapen J in relying on state policy to give content to section 29(1)(a).

Subsequent to the order in the *Textbook 1* judgment, the state failed to effect complete delivery of textbooks to all the affected schools in Limpopo. As a result, two more settlement agreements in terms of which the state undertook to deliver the textbooks by specified dates were reached.⁶² When the state failed to comply with the latter time frames, another case in the continuous textbook litigation saga was instituted, namely, *Basic Education for All v Minister of Basic Education (Textbook 2 judgment)*.⁶³

60 Wilson & Dugard (n 7) 59.

61 Brand explains why the courts are more inclined to define the content of socio-economic rights where legislation giving effect to the right already exists: 'Statutory entitlements are likely to be more detailed and concrete in nature than the vaguely and generally phrased constitutional rights forming their background, and are consequently more direct in the access to resources that they enable people to leverage. In addition, courts are likely to enforce statutory entitlements more robustly than they would constitutional rights, because they are enforcing a right, duty or commitment defined by the legislature itself, rather than a broadly phrased constitutional right to which they have to give content. As such they are not to the same extent confronted with the concerns of separation of powers, institutional legitimacy and technical competence that have so directly shaped and limited their constitutional socio-economic rights jurisprudence.' Brand (n 21) 14.

62 K Paterson 'Constitutional adjudication on the right to basic education: Are we asking the state to do the impossible?' (2018) 34 *South African Journal on Human Rights* 113-114.

63 Case 23949/14 (5 May 2014). Kollapen J's initial order required the state to deliver textbooks for grades R, 1, 2, 3 and 10 by no later than 15 June 2012. The failure by the state to meet the latter deadline resulted in a settlement agreement that extended the deadline with two weeks to 27 June 2012. The settlement also included an undertaking by the state to agree to an independent audit and to a 'catch-up' plan for 'at least Grade 10 learners'. The settlement also required monthly reports to be served, detailing progress on the plan. When the state still did not meet the 27 June 2012 deadline, the case was again placed by the initial applicants before Kollapen J. On 4 October 2012 a fresh order was issued by the North Gauteng High Court, requiring completion of delivery by 12 October 2012. According to BEFA, although textbook delivery improved in 2013, it remained incomplete. The NDBE, on the other hand, admitted that although 'there were shortfalls in deliveries in 2013 ... these were rectified'. However, by January 2014 Section 27 informed the NDBE of a number of 'textbook shortages' in Limpopo. Several schools also indicated that they 'had

At the time when the application was launched, the National Department of Basic Education (NDBE) had made significant strides in delivering textbooks to schools in Limpopo.⁶⁴ On the state's version, it had already delivered approximately 97 per cent of textbooks in the province at the time litigation was instituted.⁶⁵ The NDBE therefore argued that their failure to provide textbooks to the remaining schools did not amount to a violation of section 29(1)(a) because most of the textbooks had been delivered when litigation had commenced.⁶⁶ Thus, the Court was faced with the question of whether a violation of the right to basic education had occurred in respect of the minority of learners who had not received their quota of textbooks.⁶⁷

Tuchten J confirmed the finding in *Textbook 1* that textbooks are an essential component of the right to basic education.⁶⁸ He rejected the state's argument that delivering textbooks to the majority of schools in the Limpopo province meant that they had complied with their section 29(1)(a) obligations. The Court held as follows:⁶⁹

The delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right. Section 29(1)(a) confers the right to a basic education to *everyone*. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the enquiry that all the other learners had been given their books.

The NDBE subsequently appealed the *Textbook 2* judgment to the Supreme Court of Appeal and argued, inter alia, that the requirement of a 100 per cent delivery record is a 'standard of perfection' that they were not able to meet.⁷⁰ In other words, they 'insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook'.⁷¹ The Supreme Court of

not received their full quotas of books in 2012 and 2013'. By 20 March 2014, two months into the new school year, in a formal letter to the Minister of Basic Education Section 27 detailed a growing number of schools in the province without textbooks. The letter also indicated that Section 27 would institute an urgent application if learner support materials, including textbooks, were not delivered to the affected schools by 7 April 2014. The lack of a 'substantive response' to the letter by the NDBE resulted in a new application being launched by BEFA and 29 school governing bodies in Limpopo on 27 March 2014. This application resulted in the judgment delivered by Tuchten J on 5 May 2014. See Veriava (n 54) 321-343; *Textbook 2* judgment (above) paras 2-31.

64 *Textbook 2* judgment (n 63) para 44.

65 As above.

66 As above.

67 As above.

68 *Textbook 2* judgment (n 63) para 51.

69 *Textbook 2* judgment para 52.

70 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) para 33 (*Textbook 3* judgment).

71 *Textbook 3* judgment (n 70) para 41 (my emphasis).

Appeal per Navsa JA rejected this argument and made the following pronouncement in the *Textbook 3* judgment:⁷²

[T]he DBE did not only set itself a 'lofty' ideal but ... its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. *The content of the s 29(1)(a) right is also determined in the DBE's 'Action Plan to 2014 – Towards the Realisation of Schooling in 2025'*.⁷³ That certainly is what it achieved in pursuit of its own policy in respect of the other eight provinces and on its version of events for almost 98 per cent of learners in Limpopo.

Navsa JA clearly endorsed Kollapen J's interpretive approach by deriving the content of section 29(1)(a) from policy statements. The Court also went further than merely confirming the now uncontroversial stance that the right to basic education includes a right to a textbook.⁷⁴ The Court proceeded to launch an inquiry into the learners' right to equality by applying the constitutionally-mandated 'Harksen test'.⁷⁵ This test involves a two-stage inquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution⁷⁶ and has been framed by the Constitutional Court as follows:⁷⁷

Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

According to Albertyn and Fredman, 'dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry

⁷² *Textbook 3* judgment (n 70) para 42.

⁷³ The '2014 Action Plan' referred to here by the Court has been replaced by a new policy titled 'Action Plan to 2019: Towards the Realisation of Schooling 2030'.

⁷⁴ *Textbook 3* judgment (n 70) para 41.

⁷⁵ The 'Harksen test' was established in *Harksen v Lane* 1998 (1) SA 300 (CC).

⁷⁶ Sec 9(3) provides: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

⁷⁷ *Harksen v Lane* (n 75) para 54.

under] section 9(3)'.⁷⁸ For example, in *President of the Republic of South Africa v Hugo*⁷⁹ the Constitutional Court held:⁸⁰

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal dignity* and respect regardless of their membership of particular groups.

Applying Harksen to the facts of the Textbook 3 judgment, the Supreme Court of Appeal held first that differentiation occurred between those learners who had received textbooks (the approximately 97 per cent of learners in Limpopo as well as those in the rest of the country) and the roughly 3 per cent who did not receive textbooks.⁸¹ The Court found that this differentiation amounted to discrimination.⁸² A finding of unfair discrimination was justified as follows by Navsa JA:⁸³

Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the *indignity* of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.

Navsa JA, therefore, clearly considered the dignity of the affected learners as the benchmark for his finding of unfair discrimination. Moreover, by employing an equality analysis, the Supreme Court of Appeal underscored the fact that equal access to education is a vital component of section 29(1)(a). Important to note, also, is that the Supreme Court of Appeal did not explicitly base its finding of unfair discrimination on a listed ground in section 9(3), or on a comparable ground. However, as I will argue below, the Court did so implicitly.

First, Navsa JA argued that 'the approximately three per cent of the learners who did not receive textbooks were treated differentially ... were being discriminated against [and that there] is no justification for such discrimination' without ever mentioning the distinguishing ground(s) for differentiation.⁸⁴ However, at the

78 C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Judge Langa's judgments' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 435.

79 1997 (4) SA 1 (CC).

80 *Hugo* (n 79) para 41 (my emphasis).

81 *Textbook 3* judgment (n 70) para 48.

82 As above.

83 *Textbook 3* judgment (n 70) para 49 (my emphasis).

84 *Textbook 3* judgment para 48.

beginning of the judgment the Court noted that 'it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners.⁸⁵ Furthermore, it is indisputable that the affected learners were all from no-fee schools which are predominantly historically black schools.⁸⁶ White learners in the public education system were therefore never affected by the textbook crisis. An argument can therefore be made that the state's failure to deliver textbooks to those affected schools, amounted to unfair discrimination against black learners on the basis of race.

Navsa JA, also implicitly made a ruling of unfair discrimination on the comparable ground of socio-economic status. Subsequent to his finding of unfair discrimination, he stated that '[w]e must guard against failing those who are most vulnerable. In this case we are dealing with the rural *poor* and with children. They are deserving of constitutional protection.'⁸⁷ He also acknowledged that all the affected learners were from '*poor communities*'.⁸⁸ As established above, the children affected by the textbook crisis were all located in no-fee schools. Schools are allocated no-fee status based on the median household earnings, unemployment percentage and the standard of education of the community in which the school is located.⁸⁹ According to Paterson, '[i]t is therefore presumed that parents [or guardians] in these communities cannot afford to purchase textbooks. If the state does not provide textbooks, the learners must learn without them.'⁹⁰ The socio-economic status of these learners therefore differentiates them from those learners in fee-charging schools whose parents or guardians are assumed to be able to afford textbooks. Thus, although the Supreme Court of Appeal did not explicitly refer to socio-economic status as a differentiating ground on which it based its finding of unfair discrimination, the Court's emphasis on the poor and vulnerable as deserving of constitutional protection implies that unfair discrimination on the basis of socio-economic status indeed was implied.

In sum, *Textbook 3* is a significant judgment in the courts' approach to the interpretation of the right to basic education and the broader constitutional imperative of transformation. To start, the Supreme Court of Appeal confirmed that section 29(1)(a) entitles every learner in the public school domain to be provided with all the required

85 *Textbook 3* judgment para 3 (my emphasis).

86 As above.

87 *Textbook 3* judgment para 50 (my emphasis).

88 *Textbook 3* judgment para 3 (my emphasis).

89 Paterson (n 62) 113.

90 As above.

textbooks for a specific grade.⁹¹ According to Kamga the Supreme Court of Appeal ruling underscores the importance of textbooks as integral to the availability of section 29(1)(a).⁹² In Stein's view, the judgment clarifies that the state is in violation of the right to basic education if it fails to comply with its obligation to provide textbooks to learners in public schooling.⁹³ For Veriava, Textbook 3 reinforces the High Courts' notion that education provisioning is immediately realisable.⁹⁴ She also contends that the decision of the Supreme Court of Appeal to interpret textbooks as an integral element of the right to basic education confirms the Court's substantive approach to the interpretation of section 29(1)(a).⁹⁵ Furthermore, the Supreme Court of Appeal found that equal access to textbooks (and impliedly to education as a whole) is a clear component of the right to basic education. Kamga argues that the Court has clearly shown that the provision of textbooks is 'extrinsically' connected to the achievement of the rights to equality and dignity.⁹⁶ Lastly, the Supreme Court of Appeal affirmed the pattern of disadvantage disproportionately skewed towards black, impoverished learners in the public school domain and delivered a judgment aimed at addressing this historical inequality.⁹⁷ In this regard, the Court implicitly found that the state's failure to provide textbooks to the affected learners amounted to unfair discrimination on the basis of race and socio-economic status.⁹⁸

2.2.5 Tripartite Steering Committee v Minister of Basic Education

The judiciary's 'filling out' of the content of the right to basic education continued in *Tripartite Steering Committee v Minister of Basic Education (Tripartite Steering)*.⁹⁹ The Court was tasked with the question whether scholar transport, at state expense, should be provided to indigent learners who live a particular distance from school.¹⁰⁰ First, the Court highlighted the perils associated with the

91 *Textbook 3* judgment (n 70) para 53.

92 S Kamga 'The right to a basic education' in T Boezaart (ed) *Child law in South Africa* (2017) 528.

93 N Stein 'Textbooks' in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 270.

94 Veriava (n 54) 331.

95 As above.

96 Kamga (n 92) 528.

97 At para 48 of *Textbook 3* judgment (n 70) Navsa JA writes: 'The State is prohibited from unfairly discriminating against any person whether on listed grounds or not. SASA and NEPA envisage equality of opportunity for learners. SASA's preamble recognises that historically, our education system was based on racial inequality and segregation and *those past injustices have to be remedied*' (my emphasis).

98 *Textbook 3* judgment (n 70) para 49.

99 2015 (5) SA107 (ECG).

100 *Tripartite Steering* (n 99) para 2.

long distances that learners have to walk to and from school every day. At paragraph 14 of the judgment Plasket J states:

[A] great burden, both physical and psychological, is placed on scholars who are required to walk long distances to school. They are often required to wake extremely early, and only get home late, especially if they engage in extramural activities at school, with the result that less time than would be desirable is available for study, homework and leisure. That, in turn, has a knock-on effect on performance at school, attendance at school, particularly during periods of bad weather, and it increases the dropout rate.

The Court evaluated the interrelated nature of the right to basic education by claiming that ‘the fundamental right to freedom and security of the person, including the right to be “free from all forms of violence from either public or private sources” loom large in our shockingly violent, and often predatory, society’.¹⁰¹ The Court subsequently emphasised the positive obligation on the state to fulfil basic education before relying on the reasoning in *Juma Musjid* that access to school is an essential component of the right to basic education.¹⁰² The Court also had recourse to other judgments wherein the content of the right to basic education has been defined. In particular, Plasket J referred to *Textbook 1* which held that ‘the right to basic education, in order to be meaningful, includes such issues as infrastructure, *learner transport*, security at schools, nutrition and such related matters’.¹⁰³ Plasket J agreed with the latter judgment and came to the following conclusion:¹⁰⁴

The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and *transport to and from school at State expense in appropriate cases*. Put differently, in instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education ... [T]he reality of the situation is that if the provincial government does not provide scholar transport ‘many thousands of scholars would simply not be able to attend school’.

¹⁰¹ *Tripartite Steering* para 13.

¹⁰² *Tripartite Steering* paras 15-16; *Juma Musjid* (n 2) paras 43-46.

¹⁰³ *Tripartite Steering* (n 99) para 17.

¹⁰⁴ *Tripartite Steering* paras 18-19.

2.2.6 Equal Education & Another v Minister of Basic Education & Others

One of the most recent judgments dealing with the courts' incremental approach to define section 29(1)(a) is *Equal Education & Another v Minister of Basic Education & Others*.¹⁰⁵ Equal Education (the applicant) disputed the validity of various provisions of the Norms and Standards for School Infrastructure, promulgated in 2013.¹⁰⁶ These regulations indicate various standards related to infrastructure that must be in place at public schools and stipulate deadlines as to when the state must provide schools with the required infrastructure.¹⁰⁷ In order to make sense of the judgment, it is imperative to discuss the history related to the promulgation of the Norms and Standards for School Infrastructure.

Historical context of the Norms and Standards for School Infrastructure

In 2007 Parliament amended the South African Schools Act by introducing section 5A into the Act.¹⁰⁸ In terms of this section 'the Minister may ... by regulation prescribe minimum uniform norms and standards for school infrastructure'.¹⁰⁹ At the same time, Parliament inserted section 58C into the Act 'which imposes mechanisms to ensure that the provinces comply with the norms required under Section 5A by requiring MECs to annually report to the Minister on provincial progress'.¹¹⁰ By 2011 the Minister still had not prescribed the regulations as envisioned by section 5A.¹¹¹ At that point in time, the Minister argued that she had a discretion to promulgate the regulations and therefore was under no obligation to do so.¹¹² In response to the Minister's recalcitrance, Equal Education embarked on a campaign of 'sustained activism' to force the Minister to publish the desired regulations.¹¹³ After unsuccessful attempts to persuade the

¹⁰⁵ (2018) ZAECBHC 6.

¹⁰⁶ South African Schools Act 84 of 1996 'Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure' (29 November 2013). See *Equal Education* (n 105) paras 35-45.

¹⁰⁷ *Equal Education* (n 105) paras 35-45.

¹⁰⁸ As amended by sec 5 of Education Laws Amendment Act 31 of 2007.

¹⁰⁹ Sec 5A Schools Act.

¹¹⁰ As amended by sec 11 of the Education Laws Amendment Act 31 of 2007. See also <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

¹¹¹ *Equal Education* (n 105) para 41.

¹¹² As above.

¹¹³ L Draga 'Infrastructure and equipment' in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 239. The Equal Education website reports: 'EE members have marched and picketed, petitioned, written countless letters to the Minister, gone door-to-door in communities to garner support for the campaign and have even gone so far as to spend nights fasting

Minister otherwise, Equal Education launched court proceedings in 2012, compelling the Minister to publish the Norms and Standards.¹¹⁴ The latter application launched a protracted journey of court orders and settlements before the Minister finally on 29 November 2013 promulgated the Norms and Standards.¹¹⁵ The publication of these regulations is significant because ‘these legally-binding standards set a standard for provincial education departments to work towards, and against which to be held accountable’.¹¹⁶ Although Equal Education has rightly celebrated the promulgation of the Norms and Standards in 2013, it has consistently expressed its reservations in respect of certain regulations that form the basis of their dispute in the 2018 judgment, *Equal Education & Another v Minister of Basic Education & Others*. The disputed regulations are discussed below.

Arguments before the Bhisho High Court

The first disputed regulation stated that ‘the implementation of the norms and standards ... is subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure’.¹¹⁷ *Equal Education* argued that this regulation subjected the implementation of the Norms and Standards to the co-operation and resources of other government agencies and, therefore, in effect provided the Minister with a mechanism to escape her obligation to provide school infrastructure.¹¹⁸ It was further contended by the applicant that the regulation compromises the right to basic education because section 29(1)(a) includes the obligation to provide infrastructure at schools.¹¹⁹ In response the Minister claimed that although, on the face of it, section 29(1)(a) is not subject to internal qualifiers, it is important to understand that the right can be limited by enabling legislation such as the Norms and Standards for Infrastructure.¹²⁰ The Minister’s

and sleeping outside of Parliament. EE lobbied Parliament and politicians, and on Human Rights Day in March 2011, it led 20 000 learners and supporters in a march to Parliament to demand that the Minister and the DBE keep their promise and adopt Minimum Norms and Standards that will lay down the blueprint for ensuring that all learners in South Africa, regardless of race or wealth, are able to learn in schools with adequate infrastructure.’ See <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

114 As above.

115 *Equal Education* (n 105) para 43.

116 <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

117 *Equal Education* (n 105) para 59.

118 *Equal Education* para 61.

119 *Equal Education* para 67.

120 *Equal Education* para 68. Sec 36(1) of the Constitution provides that any right in the Bill of Rights may be limited in terms of a law of general application. See P de Vos & W Freedman (eds) *South African constitutional law in context* (2014)

argument from this point on became perplexing and incongruous: She contended that the abovementioned enabling legislation points to the fact that the right to basic education, as other rights in the Bill of Rights, is subject to progressive realisation.¹²¹ To justify the latter claim the Minister invoked the Constitutional Court's dictum in the *Ermelo* judgment where Moseneke J held that the determination of language policy (in terms of section 29(2) of the Constitution) must be understood 'within the broader constitutional scheme to make education progressively available and accessible to everyone'.¹²² Subsequent to constructing the argument that section 29(1)(a) is a qualified right, the Minister changed course and admitted that the right to basic education indeed is unqualified and therefore not subject to progressive realisation.¹²³ However, despite the latter admission, she proposed that in this particular case, the Court make an exception by adopting an approach that allows the state to realise the 'positive dimension of the right', which includes the provision of school infrastructure, progressively.¹²⁴ Her insistence on this exception stemmed from the argument that she 'simply does not have unlimited resources' and is dependent on the Department of Finance and the Treasury to provide the necessary finances to discharge the obligations related to school infrastructure.¹²⁵ To this end, the Minister's excuse that the state financially is unable to comply with its obligations to provide school infrastructure seemed to echo the South African government's decision to enter a reservation in respect of article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁶

362; *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR (CC) para 47.

121 *Equal Education* (n 105) para 68.

122 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 61.

123 *Equal Education* (n 105) para 72.

124 As above.

125 *Equal Education* (n 105) para 115.

126 Art 13(2)(a) of ICESCR obliges state parties to make primary education free and compulsory. Art 14 of ICESCR requires state parties to work out a detailed plan to realise primary education within a reasonable time. At the time of ratifying ICESCR in 2015, the South African government entered a reservation in respect of arts 13(2)(a) and 14 of the Covenant. In this regard, the qualification provides that '[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources.' Whereas the ratification of ICESCR was broadly welcomed in the country, disappointment was expressed at South Africa's decision to enter a declaration in respect of art 13(2)(a), especially in light of the decision of the Constitutional Court in *Juma Masjid* that the right to basic education is immediately realisable and not subject to the availability of state resources. Veriava interprets the South African government's decision to enter the reservation as an obvious attempt to construe sec 29(1)(a) as a progressively realisable right and to reduce the duties it has incurred in terms of the right to basic education. The civil society organisation, Section 27, views the reservation as a clear violation of the South

Equal Education also challenged Regulation 4(3)(a) which expressed that schools completely constructed from materials such as ‘wood, metal, asbestos and mud’ require ‘prioritisation’.¹²⁷ The applicant questioned whether the latter regulation implied that schools built partially from these materials were to be excluded from the Department’s list of prioritisation. A similar argument was made in respect of Regulation 4(3)(b) which provided that schools with no access to electricity, water and sanitary services must receive ‘prioritisation’.¹²⁸ Again, did the regulation imply that schools with limited access to power, water or sanitation would not be prioritised? In response to the applicant’s concerns, the Minister contended that she has the discretion to publish the regulations in the form that she chooses and that, therefore, she can prioritise certain schools over others.¹²⁹ In her view, this preference is dependent on ‘budgetary constraints’.¹³⁰ Furthermore, she claimed that the provision of water, sanitation and electricity falls ‘outside her scope of services’.¹³¹

Judgment by Mzizi AJ

Mzizi AJ held that infrastructure is crucial in the provision of basic education.¹³² The Court rebuffed the Minister’s contention that the implementation of the Norms and Standards can be subject to budgetary constraints and to the co-operation of other state entities.¹³³ Mzizi AJ correctly pointed out that the latter claim contradicts the immediate nature of the right to basic education.¹³⁴ Furthermore, the Court held that the Minister’s argument that she was thwarted to earmark resources for infrastructure should have been justified in terms of section 36 or section 172(1)(a) of the Constitution.¹³⁵ In this regard, Mzizi AJ relied on the Constitutional Court’s ruling that the right to basic education can only be restricted in terms of the limitation clause set out in section 36 of the Constitution.¹³⁶ Mzizi AJ did not explain how section 172(1)(a) of the Constitution could be applied in this particular case. However, it is possible that the

African Constitution. See Veriava (n 30) 70-71; <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (accessed 15 April 2020).

127 *Equal Education* (n 105) para 118.

128 *Equal Education* para 136.

129 *Equal Education* para 132.

130 As above. Various role players are involved in the budget process as it pertains to the sphere of public basic education. See, eg, D McLaren ‘Funding basic education’ in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 37.

131 *Equal Education* (n 105) para 140.

132 *Equal Education* para 170.

133 *Equal Education* paras 180-185.

134 *Equal Education* para 185.

135 *Equal Education* para 185.

136 *Juma Musjid* (n 2) para 37.

Court mistakenly referred to section 172(1)(a). In my view, section 172(1)(b) is the more appropriate section as it provides that '[w]hen deciding a constitutional matter within its power ... a court may make any order that is just and equitable'. To that end, the Minister could then have argued that an order requiring her to comply with the obligations of section 29(1)(a) in full would not have been 'just and equitable'.¹³⁷ Furthermore, the Court rebuffed the Minister's contention that it was within her discretion to decide which schools are prioritised, and held that schools that are partially built from inappropriate materials presented the same dangers as schools built entirely from such materials.¹³⁸ The Court held as follows:¹³⁹

The crude and naked facts staring [at] us, are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is [a] fate that also stares the educators and other caregivers in the schools in the face.

The Court subsequently amended Regulation 4(3)(a) to the effect that it now prioritises the replacement of all classrooms built entirely or substantially from mud, wood, asbestos or metal through reading in the desired changes to the Norms and Standards.¹⁴⁰ A similar remedy was effected in respect of Regulation 4(3)(b) which now requires that 'all schools that do not have access to any form of power supply, water supply or sanitation' must be provided such access.¹⁴¹ Additionally, the judgment upheld the constitutional value of accountability by declaring the Regulations unconstitutional to the extent that they did not provide for the plans and reports specifying government's progress in implementing the Norms and Standards. The Court directed the Minister to amend the Regulations so as to provide for an accountability mechanism in this regard.¹⁴²

In conclusion, it is important to emphasise the significance of this judgment with regard to the development of the particular content of section 29(1)(a). The Court's proclamation that infrastructure is essential for the delivery of basic education¹⁴³ confirms that infrastructure is a core component of the right to basic education.

137 The *amicus curiae* in this case, Basic Education for All (BEFA), argued that 'to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable.' See *Equal Education* (n 105) para 89.

138 *Equal Education* (n 105) paras 180-193.

139 *Equal Education* para 194.

140 *Equal Education* para 209.

141 As above (my emphasis).

142 *Equal Education* (n 105) para 209.

143 *Equal Education* para 170.

Veriava argues that '[this] judgment further develops the evolving jurisprudence in respect of the right to basic education by its explicit acknowledgment of school infrastructure as an important component of the right'.¹⁴⁴ Furthermore, by ordering an amendment of the Regulations as explained above, the right to basic education now applies to a wider range of learners who otherwise would not have benefited had the Regulations not been revised. In this manner, section 29(1)(a) has been expanded.

3 Incremental approach and transformation

In the seminal case of *Ermelo* Moseneke DCJ (as he then was) refers to the historical and social context of the public education system:¹⁴⁵

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. *Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception.* While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.

In response to the disparity created by the former regime's severe marginalisation of former black schools as opposed to the preferential treatment of former white schools,¹⁴⁶ the Constitutional Court states that '[i]n an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular'.¹⁴⁷ The

144 F Veriava 'A Bhisno High Court ruling gives effect to government's obligations to provide public school infrastructure. At last, we have an effective road map for improving school infrastructure in South Africa's under-resourced schools', <https://www.dailymaverick.co.za/article/2018-07-27-bhisno-court-judgment-makes-infrastructure-part-of-the-right-to-basic-education/> (accessed 22 May 2020). See also L Arendse 'The South African Constitution's empty promise of "radical transformation": Unequal access to quality education for black and/or poor learners in the public basic education system' (2019) 23 *Law, Democracy and Development* 115-117.

145 *Hoërskool Ermelo* (n 122) para 45 (my emphasis).

146 The Constitutional Court writes at para 46 of *Hoërskool Ermelo* (n 122): 'It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.'

147 *Hoërskool Ermelo* (n 122) para 47.

Court then refers to a 'cluster of warranties' that are aimed at bringing about this transformation, including the right to basic education.¹⁴⁸

The Constitution does not provide a particular blueprint for transformation.¹⁴⁹ In other words, it does not provide a 'comprehensive model for a transformed society [and by implication a transformed education system], nor [does it articulate] the detailed processes for achieving this'.¹⁵⁰ However, Liebenberg denotes that the Constitution does present 'a set of institutions, rights and values for guiding and constraining the processes of social change'.¹⁵¹ To that end, the courts have a specific, albeit limited, role to play in honouring the transformative aspirations of the Constitution.¹⁵² This the judiciary does, *inter alia*, through the interpretation and enforcement of the Bill of Rights in general, and socio-economic rights in particular, which are regarded as conduits for facilitating social change in South Africa.¹⁵³

Veriava and Skelton indicate that various civil city organisations have instituted a range of cases seemingly spurred on by the principle established in *Juma Musjid*, namely, that the right to basic education

148 As above. By referring to the social and historical context of education as well as the cluster of rights that are aimed at transforming the education system, the Court is employing a contextual approach to interpretation. This approach has been adopted by the Court when interpreting the rights in the Bill of Rights. This approach requires a consideration of the text (first leg of test) as well as the social and historical context of the right (second leg of test). The second leg requires that 'rights must be interpreted with a historically conscious transformative vision in mind'. In practical terms, this means that the interpretation of the right to basic education 'must be geared towards redressing this historical disparity [in the education system caused by the discriminatory education policies of the apartheid and colonial regimes]'. See F Veriava & F Coomans 'The right to education' in Brand (n 21) 60-61; *Grootboom* (n 1) paras 22-25.

149 S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 29.

150 As above. See also K Moyo 'The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence' in N Bohler-Muller et al (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 78-79.

151 Liebenberg (n 149) 29.

152 Wilson & Dugard (n 7) 35. Liebenberg writes that the judiciary is 'not the institution directly responsible for making policy or advocating for social change. Nevertheless, they have a significant role to play in inducing and supporting the kind of fundamental transformative changes envisaged by the Constitution. They are constitutionally mandated to determine whether social policies and programmes are consistent with the Bill of Rights, and to provide "appropriate relief" when infringements are found [in terms of section 38 read with section 172 of the Constitution]'. See Liebenberg (n 23) 447-448.

153 Moyo (n 150) 81. According to Brand, '[a]part from requiring their implementation, the Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights operate reactively. They are translated into concrete legal entitlements that can be enforced against the state and society by the poor and otherwise marginalised to ensure that appropriate attention is given to their plight.' See Brand (n 21) 3.

is immediately realisable and therefore is directly enforceable.¹⁵⁴ Moreover, these organisations have argued in each separate case that a particular component such as infrastructure or furniture is indispensable to the realisation of section 29(1)(a), thus calling for a substantive understanding of the right to basic education.¹⁵⁵ As explained in detail above, these cases have resulted in the courts ordering the state to provide tangible outcomes (for example in the form of textbooks or school furniture) to disadvantaged learners. By adopting a substantive approach to section 29(1)(a), the High courts and Supreme Court of Appeal have steered in the opposite direction of the Constitutional Court which has remained steadfast in a 'normative emptiness' approach of socio-economic rights.¹⁵⁶ The latter approach has been vehemently criticised by academic commentators as having an anti-transformative impact on the implementation of socio-economic rights.¹⁵⁷

Although the substantive approach has undoubtedly been welcomed, it is not without criticism. First, it has been contended that while court orders set out the specific section 29(1)(a) entitlement(s) to be realised, the state often does not meet these requirements within the stipulated timeframes.¹⁵⁸ This means that civil society organisations have to repeatedly engage the court to ensure that the state complies with its obligations in respect of the right to basic education.¹⁵⁹ Furthermore, Veriava argues that despite the substantive approach of the courts to section 29(1)(a), there is no objective test laid down by the courts to determine all the entitlements that would constitute the content of the right to basic education.¹⁶⁰ In this regard, she specifically refers to the *Textbook 3* judgment noted above.¹⁶¹ Although the Supreme Court of Appeal in this case endorsed a substantive approach to the adjudication of the right to basic education, it did not develop a test which could objectively establish which elements constitute the right to basic education.¹⁶² The Supreme Court of Appeal suggested that it is within the discretion of government to define all the essential elements

154 F Veriava & A Skelton 'The right to basic education: A comparative study of the United States, India and Brazil' (2019) 35 *South African Journal on Human Rights* 3.

155 As above.

156 Veriava (n 54) 332.

157 See eg Dugard & Wilson (n 7) 37-42; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484.

158 Veriava & Skelton (n 154) 4.

159 As above.

160 Veriava (n 54) 336.

161 As above.

162 Veriava (n 54) 336-337.

of the right through its policy frameworks.¹⁶³ In response to the Supreme Court of Appeal's stance and commenting on the courts' failure to develop an objective test, Veriava notes the following:¹⁶⁴

[T]he absence of an objective test could impact on future education provisioning cases, particularly where there is a lack of clarity from the government as to its policy and provisioning. Indeed, by making government policy the sole determinant of the content of the right, government will be disincentivised from providing policy certainty in respect of education provisioning.

Liebenberg takes an opposing view to Veriava by arguing that the normative content of socio-economic rights should never reach a stage of completion, but 'space' should be allowed for rights to evolve so as to respond to 'changing contexts and forms of injustice'.¹⁶⁵ Moreover, in *Doctors for Life* the Constitutional Court explained that rights will degenerate if they remain fixed.¹⁶⁶ The Court further held that the meaning of rights should change to keep abreast with the continual shifts in the notion of justice and the evolving circumstances of society.¹⁶⁷

I agree with Liebenberg that the content of socio-economic rights should not have an 'end point'. It should be developed continuously, particularly in an intolerant society such as South Africa with a history of marginalisation of people based on, *inter alia*, race, sex and gender. Although it is acknowledged that the absence of an objective test is very cumbersome for civil strategic litigators because they have to keep going back to the court to order the implementation of a specific component of section 29(1)(a), the latter strategy enables the courts to continuously expand on the content of the right. Such an approach ensures that a space always is left open to contest potential violations of the right to basic education (and other rights) in respect of groups that in future may need to have their rights litigated and enforced. Thus, it is submitted that the right to basic education should not remain static, but must be developed constantly so as to

163 As above.

164 Veriava (n 54) 337.

165 Liebenberg (n 149) xix.

166 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 97.

167 As above. As an example of the Constitutional Court's observation in *Doctors for Life* and Liebenberg's argument, in the last few years, 'non-binary identity has been slowly seeping into societal consciousness'. In this regard, a person who adopts the label of 'gender non-binary' does not identify as male or female and thus does not conform to any gender stereotype. The 'coming out' of non-binary individuals is quite novel in society and these persons as a group tend to be discriminated against. See <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> (accessed 23 January 2020); A Vijlbrief et al 'Transcending the gender binary: Gender non-binary young adults in Amsterdam' (2020) 17 *Journal of LGBT Youth* 89-90.

ensure that greater numbers of learners continue to benefit from the ambit of the right. Such an approach also is in keeping with Langa's view on the notion of transformation:¹⁶⁸

[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.

4 Conclusion

This article focused on the progressive role of the High Courts and Supreme Court of Appeal in giving concrete content to section 29(1) (a). The substantive interpretive approach adopted by these courts seemingly has been influenced by the Constitutional Court's seminal ruling in *Juma Musjid* on the unqualified nature of the right to basic education. I contend that the particular facts of the *Juma Musjid* matter, which required the Court to rule on the negative obligations of the right, were tantamount to a proverbial 'blessing in disguise'.

The Constitutional Court's approach in cases concerning the negative obligations of socio-economic rights mostly has been generous as opposed to their approach in positive obligation cases. This is due to the fact that courts view negative obligation cases as less of a threat to their institutional integrity and capacity as well as a way to not interfere unduly in the domain of the other branches of the state. As a result, in *Juma Musjid* the Court ruled liberally that the right to basic education is immediately realisable and not subjected to other internal qualifiers such as budgetary constraints and 'reasonable and legislative measures'. The ruling in the latter judgment seems to have emboldened the lower courts to give direct content to the right to basic education. This content includes the following: adequate school infrastructure; teaching and non-teaching staff; appropriate school furniture; teaching materials such as textbooks; transport to and from school at state expense (in appropriate cases); a school environment that promotes the dignity of learners; and equal access to education.

¹⁶⁸ P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 354.

The article further explored the link between the incremental approach and a conceptualisation of transformation that takes account of the ever-changing context of our society. The incremental approach entails that a case-by-case approach is adopted to litigate potential violations of the right to basic education. This ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in)justice in our society. Such an approach is in keeping with the idea that change always is constant in a society that will always be defined by transformation.

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Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights

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Summary: *The right to freedom of expression is guaranteed under international law and in the constitutions of most countries. The content of this right has developed and recently has come to be thought of as including the internet as a medium of communication, and the question is raised whether access to the internet is protected under the current set of normative principles. The right to freedom of expression is fully protected under the African Charter on Human and Peoples' Rights, to which Ethiopia is a party. The Ethiopian government restricts freedom of expression on the internet and has adopted extraneous limiting measures. Most of these measures are incompatible with the African Charter. Restrictions to freedom of expression on the internet include internet shutdowns, hate speech and disinformation regulation, repressive laws, and internet censorship. These limitations may (in)directly muzzle freedom of expression in Ethiopia.*

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The writer argues that illegitimate limitations of the right fall short of the quadruple tests of limitation measures, both under the African Charter and the Ethiopian Constitution. As a result, these limitations violate individuals' freedom of expression on the internet. Finally, the article suggests that the Ethiopian government should draw guidance from the African Commission's 2019 Declaration on Freedom of Expression and Access to Information containing rules on limitation measures imposed on freedom of expression on the internet.

Key words: *freedom of expression on the internet; internet shutdown; internet censorship; hate speech; legality; African Charter; Ethiopia*

1 Introduction

Freedom of expression is one of the cornerstones of any free and democratic society.¹ It is a long-standing and fundamental human right that is an indispensable condition for the full development of the individual. It enhances access to information, pluralism,² and is key to the realisation of other human rights.³ The role of channelling free expression traditionally was performed by the print media and broadcasters, but online media through the internet⁴ are increasingly transforming our lives and are giving a voice to millions of people in Africa. The internet provides a mechanism for amplifying the exercise of free speech in many African countries, and in some cases it has enabled Africans to replace despotic and dictatorial rulers. For

1 UN Human Rights Committee (HRC) General Comment 34, art 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 para 2. See E Barendt *Freedom of Speech* (2007) 1821. See also J Magee *Freedom of expression* (2002).

2 Media Legal Defence Initiative (MLDI) Mapping Digital Rights and Online Freedom of Expression in East, West and Southern Africa (2018) 10-14, https://10years.mediadefence.org/wp-content/uploads/2019/07/Mapping-digital-rights-litigation_Media-Defence_Final.pdf (accessed 11 March 2020), See also D McGoldrick 'The limits of freedom of expression on Facebook and social networking sites: A UK perspective' (2013) 13 *Human Rights Law Review* 125 151.

3 See J Cannataci et al 'Privacy, free expression and transparency and redefining their new boundaries in the Internet ecosystem' UNESCO Internet Study (2016).

4 A Puddephatt *Freedom of expression and the internet* (2016) 17.

example, social media played a role in popular revolutions in Egypt,⁵ Ethiopia,⁶ Sudan⁷ and Tunisia.⁸

Under international law, freedom of expression embraces⁹ the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media, including the internet.¹⁰

The African Charter on Human and Peoples' Rights (African Charter) guarantees freedom of expression¹¹ subject to 'claw-back clauses'.¹² The 2002 African Declaration on Principles of Freedom of Expression in Africa stressed the importance of free speech as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.¹³ However, the Declaration places little emphasis on the right as exercised on the internet and did not clearly address the digital aspect.¹⁴ The revised and updated version of the Declaration, adopted in 2019, extends the scope of protection of freedom of expression to online media.¹⁵ In 2012 the then Special Rapporteur on Freedom of Expression and Access to Information, Pansy Tlakula, identified key challenges to freedom of expression in Africa, including a lack of political will to implement the recommendations of the Special Rapporteur; limitations of the African Charter and the Declaration; a lack of political will by state parties to enact laws on freedom of expression; a lack of real and

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- 5 See K Clarke & K Kocak 'Launching revolution: Social media and the Egyptian uprising's first movers' (2018) 50 *British Journal of Political Science* 1.
 - 6 A Bitew 'Social media and the simmering Ethiopian revolution' ECDAP 3 September 2016, <https://ecadforum.com/2016/09/03/social-media-and-the-simmering-ethiopian-revolution-alem-bitew/> (accessed 6 May 2020).
 - 7 N Taha 'Sudan's social media deemed major player in Bashir's ouster' *VOA News* 18 April 2019, <https://www.voanews.com/a/sudan-s-social-media-deemed-major-player-in-bashir-s-ouster-/4882059.html> (accessed 6 May 2020).
 - 8 A Dhillon 'Social media and revolution: The importance of the internet in Tunisia's uprising' Independent Study Project (ISP) Collection (2014) 1.
 - 9 D Voorhoof 'The right to freedom of expression and information under the European human rights system: Towards a more transparent democratic society' EUI Working Paper RSCAS 2014/12 (2014) 1.
 - 10 Art 19(2) International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A of 16 December 1966 (ICCPR). See also J Rowbottom 'To rant, vent and converse: Protecting low level digital speech' (2012) 71 *Cambridge Law Journal* 355.
 - 11 Art 9 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 June 1981.
 - 12 Art 9(2) African Charter.
 - 13 The African Commission on Human and Peoples' Rights, ACHPR/Res 62 (XXXII) 02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) meeting at its 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002, Preamble para I.
 - 14 Para X Preamble African Declaration (n 13).
 - 15 Principle 5 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Lawrence Mute, Special Rapporteur on Freedom of Expression and Access to Information in Africa (2019 African Declaration on Expression and Information).

effective democratic institutions; the weakness of the rule of law and human rights; low levels of education; and poverty.¹⁶ However, the findings of the Special Rapporteur overlooked a few restrictions imposed on freedom of expression on the internet, such as the internet shutdowns in Guinea, Ethiopia and Egypt.

The jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) regarding freedom of expression on the internet is still in the making, with the exception of a handful of communications on free press,¹⁷ on the issue of what constitutes 'expression through any form of communication',¹⁸ and the right to publish an article on the internet.¹⁹ Although much work remains to be done, there are developments in the form of soft law²⁰ in Africa aimed at enhancing freedom of expression on the internet. For instance, the African Commission's Resolution on Freedom of Information and Expression on the Internet urges African states to respect the right to freedom of expression on the internet by taking legislative and other measures.²¹

Freedom of expression on the internet is guaranteed under the Federal Constitution of Ethiopia as the Constitution allows expression of ideas using any media.²² The Constitution also stipulates restrictions on the right, such as legal limitations to protect the well-being of the youth; the honour and reputation of individuals; any propaganda for war; and the public expression of

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- 16 Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented by Adv Pansy Tlakula, 52nd ordinary session of the African Commission on Human and Peoples' Right, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire, paras 22-23.
- 17 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 107.
- 18 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan Communication* 379/09, para 114.
- 19 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe Communication* 294/04 paras 3, 110-112.
- 20 See African Commission on Human and Peoples' Rights Model Law on Access to Information for Africa, April 2013. See also African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and Joint Declaration on Freedom of Expression and responses to conflict situations, adopted in Riga, 4 May 2015, art 4(C), 'Filtering of content on the internet, using communications "kill switches" (ie shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.'
- 21 Art 1 African Commission on Human and Peoples' Rights Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res 362(LIX) 2016, meeting at its 59th ordinary session, Banjul, The Gambia, 21 October to 4 November 2016.
- 22 Art 29 Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, Federal Negarit Gazeta (Ethiopian Constitution).

opinion intended to injure human dignity.²³ Under international law, limitations on the freedom of expression on the internet should fulfil at least four requirements, namely, the restriction should be prescribed by law, must achieve a legitimate aim, must be necessary in a democratic society, and must be proportionate to the aim sought to be achieved.²⁴ However, the Ethiopian government has restricted freedom of expression on the internet and adopted extraneous limitations, most of them incompatible with the Constitution and the African Charter. Restrictions made on freedom of expression on the internet in the Ethiopian context include internet shutdowns, hate speech or disinformation regulations, draconian national laws such as the Computer Crime Proclamation adopted in 2016 and the Hate Speech and Disinformation Proclamation of 2020, and internet censorship. These limitations have the potential to affect freedom of expression on the internet.

This article starts by mapping the conundrum regarding (il) legitimate limits to freedom of expression on the internet through the lens of the African Charter. It is argued that illegitimate limitations of the right fall short of the four requirements that limitation measures must meet under the African Charter. As a result they violate individuals' freedom of expression on the internet. Part 2 of the article discusses the development of the internet in Ethiopia, and emerging concerns pertaining thereto. Part 3 explores the local context by highlighting the practical limitations unfolding in Ethiopia. These include internet shutdowns, hate speech and disinformation regulation, repressive laws, and internet censorship. In part 4, the normative content of freedom of expression on the internet under the African Charter is presented with specific reference to the obligations of the Ethiopian government under the African Charter, on the one hand, and of non-state actors, on the other. Part 5 discusses the tests used to define limitations of freedom of expression on the internet. As part of assessing these limitations four tests are examined, such as legality, legitimacy, necessity and proportionality. The article concludes by making recommendations based on its findings.

2 Development of the internet in Ethiopia

The internet was introduced to Ethiopia only two decades ago. Ethiopia had telephone services since 1894, but the internet was only introduced in 1997, and broadband internet was not widely

²³ Art 29(6) Ethiopian Constitution.

²⁴ General Comment 34 (n1) paras 22-36.

available.²⁵ According to data from the Ethiopian Ministry of Communication and Information Technology, the first 4 000 kilometres of fibre optic backbone were laid in Addis Ababa in 2005.²⁶

Ethiopia is among the countries that have the lowest level of internet penetration and use. Statistics show that the number of internet users in Ethiopia remains low compared to the total number of population.²⁷ There is disagreement about the exact number of Ethiopians with access to the internet, but estimates typically range from 18 to 23 million. For example, in the year 2018 the International Telecommunication Union (ITU) recorded that out of 110 135 635 people living in Ethiopia, 18,62 million people were internet users, constituting 17,1 per cent of the total population.²⁸ The state-owned Ethio-Telecom recently released new figures in its annual report and, according to the report, as of December 2019 there were 22,74 million internet subscribers in Ethiopia,²⁹ constituting 20,65 per cent of the total population. In the past few years Ethiopia experienced steady growth in internet penetration from 0,02 per cent in 2000³⁰ to 22,74 per cent in 2019. That is, it is estimated that 23 million people currently are using the internet. Although Ethiopia still lags behind the rest of the world in internet penetration, it is rapidly bridging that gap. For instance, in 2019 the number of internet users in Egypt was around 48,7 per cent, roughly double that of Ethiopia.³¹

The Ethiopian ICT policy adopted in 2009 underlines the need for enhanced innovation including internet access. The country's Second Growth and Transformation Plan/GTP II (2016-2020) aims to serve as a springboard for realising the national vision of becoming a low middle-income country by 2025, through 'sustaining rapid, broad-based and inclusive economic growth, which accelerates economic

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- 25 KM Yilma & HH Abraha 'The internet and regulatory responses in Ethiopia: Telecoms, cybercrimes, privacy, e-commerce, and the new media' (2015) 9 *Mizan Law Review* 109.
- 26 Ethiopian Ministry of Communication and Information Technology (2014) 1 *Communication and Information Technology Statistical Bulletin* 6.
- 27 See HH Abraha 'Examining approaches to internet regulation in Ethiopia' (2017) 26 *Information and Communications Technology Law* 293.
- 28 See International Telecommunications Union (ITU) 'Internet users by country', <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 12 March 2020).
- 29 K-Bekele 'Ethio-Telecom expresses concern on liberalization process' *The Reporter* 18 January 2020, <https://www.thereporterethiopia.com/article/ethio-telecom-expresses-concern-liberalization-process>(accessed 22 January 2020).
- 30 International Telecommunications Union (ITU) 'Percentage of individuals using the internet, Ethiopia', <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 22 January 2020).
- 31 Internet World Stats (IWS) <https://www.Internetworldstats.com/africa.htm#eg> (accessed 12 March 2020).

transformation and the journey towards the country's renaissance'.³² In GTP II the strategic directions for digital infrastructure are to

accelerate information and communication technology, human development, ensure the legal framework and security, use ICT for government administration, upgrade government electronics services, internalise ICT knowledge among the general public, use ICT for industrial and private sector development and ICT research and development.³³

Practically, the internet and mobile technology have played a decisive role in transforming the lives of millions in Ethiopia through innovation, tech startups and creativity since private companies have been introduced to alternative digital services in banking and other sectors.³⁴ For instance, using mobile phones, the M-birr service offers financial transactions. By using M-birr customers can deposit, withdraw and transfer cash, as well as settle bills, and pay for goods and services.³⁵ Similarly, the HelloCash service enables existing and potential customers of financial institutions to carry out transactions.³⁶ One of the unique features of the HelloCash mobile money service is the shared infrastructure feature, allowing multiple banks and Micro Finance Institutions to serve one another's customers. In the agricultural sector, the Ethiopian Commodity Exchange (ECX) launched a gateway for direct online trading of agricultural products among farmers.³⁷ In the transport sector, the Ride, also known as the 'Ethiopian version of Uber', simplified the lives of many Ethiopians who use private taxi transportation.³⁸

In the context of these policies, Ethiopia launched ambitious projects through the Woredanet and Schoolnet systems.³⁹ However, the Ethiopian government uses the Woredanet and Schoolnet projects to advance political ends and narrative control.⁴⁰ Put simply, Woredanet stands for 'network of district (woreda) administrations'

32 Ethiopia: Second Growth and Transformation Plan (GTP II: 2016-2020), <https://en.unesco.org/creativity/policy-monitoring-platform/second-growth-transformation-plan> (accessed 22 January 2020).

33 As above.

34 Collaboration on International ICT Policy for East and Southern Africa (CIPESA) and Small Media, Ethiopia: Universal Periodic Review (UPR) Session 33 Digital Rights Advocacy Briefing Document (2019) 8-9, https://cipesa.org/?wpfb_dl=292 (accessed 20 January 2020).

35 As above.

36 As above.

37 As above.

38 RIDE to Re-launch Internet Based Taxi Hailing Service in Addis Ababa, 2Merkato.Com, <https://www.2merkato.com/news/alerts/4783-ride-to-re-launch-Internet-based-taxi-hailing-service-in-addis-ababa> (accessed 22 January 2020).

39 See I Gagliardone "'A country in order": Technopolitics, nation building, and the development of ICT in Ethiopia' (2014) 10 *Information Technologies and International Development* 3.

40 As above.

and employs the same protocol upon which the internet is based, but rather than allowing individuals to independently seek information and express their opinions, it enables ministers and cadres in Addis Ababa to video-conference with the regional and district offices and instruct them on what they should be doing and how.⁴¹ Gagliardone argues that

the Schoolnet uses a similar architecture to broadcast pre-recorded classes on a variety of subjects, from mathematics to civics, to all secondary schools in the country while also offering political education to school teachers and other government officials.⁴²

I would argue that the Woredanet and Schoolnet programmes are used as tools for narrative control and governmental information channels.

In relation to freedom of expression on the internet, emerging concerns in Ethiopia include a lack of internet access; internet shutdowns; hate speech and disinformation regulation; draconian national laws such as the 2016 Computer Crimes Proclamation; and internet censorship.

3 Major concerns regarding freedom of expression on the internet in Ethiopia

This part of the article identifies a plethora of practical limitation measures in Ethiopia, which potentially may be considered illegitimate limitations on the right to freedom of expression under the African Charter. These are internet shutdowns, hate speech and disinformation regulation, draconian national laws and internet censorship.

3.1 Internet shutdowns

Internet shutdowns are a menace which curtail freedom of expression on the internet. Technically, it is 'a deliberate disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information'.⁴³ Shutdowns are

41 I Gagliardone & F Golooba-Mutebi 'The evolution of the internet in Ethiopia and Rwanda: Towards a "developmental" model?' (2016) 5 *Stability: International Journal of Security and Development* 1 6.

42 As above.

43 This definition was developed at RightsCon Brussels in 2016 in collaboration with a diverse set of stakeholders including technologists, policy makers, activists,

also called 'blackouts' or 'kill switches'.⁴⁴ Thus, internet shutdowns involve measures to intentionally prevent or disrupt access to or dissemination of online information in violation of human rights law.⁴⁵ The 2019 African Declaration on Expression and Information clearly prohibits any disruption of access to the internet.⁴⁶ This makes the African human rights system very progressive in terms of having norms in place which prohibit internet shutdowns.

Successive prime ministers in Ethiopia have used internet shutdowns as a tool to muzzle freedom of expression.⁴⁷ Although the regime of the current Prime Minister, Abiy Ahmed, is praised for advancing human rights in Ethiopia, in respect of freedom of speech, the regime has continued in the habit of repressing dissent both offline⁴⁸ and online.⁴⁹ Under the rule of the previous Prime Minister, Hailemariam, particularly between 2016 and 2018, the internet was shut down more than three times under the broader 'economic development narrative', to control cheating during examinations, for national security, and to quell civil disobedience. Similar reasons have been given by the government under Abiy for shutting down the internet, including the need to control palace strikes by the defence forces,⁵⁰ and managing security in Wollega province.⁵¹

Internet shutdowns have also had an immense economic impact. Under Hailemariam, a month-long internet shutdown in Ethiopia

and others, <https://www.accessnow.org/no-Internet-shutdowns-lets-keepit-on/> (accessed 13 March 2020).

- 44 B Wagner 'Understanding internet shutdowns: A case study from Pakistan' (2018) 12 *International Journal of Communication* 3918.
- 45 'The promotion, protection and enjoyment of human rights on the internet: Resolution/adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/13 para 10.
- 46 Principle 38(2) (n 15).
- 47 See YE Ayalew 'The internet shutdown muzzle(s) freedom of expression in Ethiopia: Competing narratives' (2019) 28 *Information and Communications Technology Law* 208.
- 48 Amnesty International 'Ethiopia: Stop harassing Eskinder Nega for his opinions' 7 June 2019, https://www.amnesty.org/en/latest/news/2019/06/ethiopia-stop-harassing-eskinder-nega-for-his-opinions/?utm_source=twitter&utm_medium=quote&utm_term=VGhpcyBoYXN&utm_campaign=social (accessed 24 January 2020).
- 49 B Taye 'Old habits die hard: Ethiopia blocks internet in the eastern part of the country, again!' 7 August 2018, <https://www.accessnow.org/ethiopia-blocks-Internet-in-eastern-part-of-country-again/> (accessed 24 January 2020).
- 50 YE Ayalew 'A tale of two prime ministers? Internet shutdowns gagging free speech in Ethiopia' *OxHRH Blog*, July 2019, <http://ohrh.law.ox.ac.uk/a-tale-of-two-prime-ministers-Internet-shutdowns-gagging-free-speech-in-ethiopia/> (accessed 23 January 2020).
- 51 See L Bader 'Millions of Ethiopians can't get COVID-19 news' Human Rights Watch Report, 20 March 2020, <https://www.hrw.org/news/2020/03/20/millions-ethiopians-cant-get-covid-19-news> (accessed 14 May 2020). See also YE Ayalew 'How internet shutdowns have affected the lives of millions of Ethiopians' *The Conversation* 3 April 2020, <https://theconversation.com/how-Internet-shutdowns-have-affected-the-lives-of-millions-of-ethiopians-134054> (accessed 14 May 2020).

in 2016 cost US \$8 million according to a Brookings⁵² estimation, while under Abiy a blackout for almost half a month in 2019 cost the country US \$66,87 million, as estimated by NetBlocks.⁵³ In a digital world people are highly dependent on the internet for social services, including access to information, blogging services, daily messaging, and accessing health services. Thus, when the state or internet service providers block or otherwise disrupt the internet, it unequivocally affects free speech, as any form of internet shutdown results in a failure to access information, and may also stifle other socio-economic rights such as the right to health.⁵⁴ During the blackout week in Ethiopia, there was no access to email communication or social media. During the shutdown Ethiopians had no sources other than mainstream media to access or verify information.⁵⁵

In light of article 9 of the African Charter, and the accepted norms of international human rights law, shutdowns ordered covertly or without an obvious legal basis violate the requirement of legality as explained below. Shutdowns ordered pursuant to vaguely-formulated laws and regulations also fail to satisfy the legality requirement.⁵⁶ For example, in 2016 Ethiopia passed a State of Emergency Directive which allows the government to block mobile services and internet access without a court order on the basis of a state of exception.⁵⁷

3.2 Hate speech and disinformation regulation

The Ethiopian Attorney-General has developed a law to prevent hate speech and disinformation in Ethiopia: the Hate Speech and Disinformation Suppression Proclamation (Hate Speech

52 DM West 'Internet shutdowns cost countries \$2,4 billion last year, Brookings Institution' 6 October 2016, <https://www.brookings.edu/research/Internet-shutdowns-cost-countries-2-4-billion-last-year/> (accessed 24 January 2020).

53 The NetBlocks Cost of Shutdown Tool, <https://netblocks.org/cost/> (accessed 24 January 2020).

54 YE Ayalew 'Questioning Ethiopia's internet shutdown measures through the lens of the right to health' Global Health Law Groningen Blog 28 June 2019, <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/questioning-ethiopia-internet-shutdown-measures-through-the-lens-of-the-right-to-health-28-06-2019> (accessed 24 January 2020).

55 As above.

56 Para 12 Report of the Special Rapporteur to the General Assembly on the Contemporary Challenges to Freedom of Expression, David Kaye, A/71/373 (2016), https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373 (accessed 15 March 2020).

57 Art 4(2) Ethiopian Proclamation 1/2016 – State of Emergency Proclamation for the Maintenance of Public Peace and Security, Addis Ababa, 25 October 2016. 'When the Emergency Command Post believes that it is necessary for the observance of the constitutional order and for the maintenance of peace and security of the public and citizens, it may: cause the closure or termination of any means of communication.'

Proclamation). As the Deputy Attorney-General remarked at a parliamentary discussion,

the aim of the law is to punish those perpetrators who make dangerous statements. In the past few years, we have learned tragic violence's, ethnic and religious based attacks, deaths, and civilian displacements in different parts of the country. As such, the aim is to quell all these odds and to ensure rule of law.⁵⁸

The Hate Speech Proclamation has a restrictive Preamble. The first paragraph sets out that the aim of the Proclamation is 'to prevent and suppress ... the deliberate dissemination of hate speech and disinformation'.⁵⁹ This law generally targets offensive and hate speech, thus there should be maximum safeguards and restraints not to police speech. Indeed, there is no 'heckler's veto under international human rights law',⁶⁰ which would 'mandate the stifling of speakers when those who are offended choose to show their displeasure through harmful acts'.⁶¹ In the Ethiopian context where ethnicity is a defining political ideology and party organising factor, the heckler's veto could easily be applied to stand up with those offended or harmed ethnic groups. As such, the language of the Preamble should have been drafted in a human rights-friendly manner.

The Proclamation⁶² defines hate speech as 'speech that deliberately promotes hatred, discrimination or attack against a person or an identifiable group, based on ethnicity, religion, race, gender or disability'.⁶³ This definition is quite nebulous and overbroad, and may be regarded as illegal under international human rights law. However, the Proclamation aims to be specific by giving definitions for vague terms such as 'discrimination' and 'attack', although it fails to define what constitutes 'hatred'.⁶⁴ Laws should be clear, precise and unambiguous. Freedom of expression may be limited by laws that are clear and precise according to the UN Human Rights

58 YE Eneyew 'Muting sectarianism or muzzling speech?' *Ethiopia Insight* 31 January 2020, <https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-or-muzzling-speech/> (accessed 13 March 2020).

59 Para I Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2020, Federal Negarit Gazette 26th Year, Addis Ababa, 23 March 2020 (Hate Speech Proclamation).

60 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, the regulation of online 'hate speech', 74th session, Agenda item 70(b), A/74/486 (9 October 2019) 7, https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf (accessed 23 January 2020).

61 EM Aswad 'To ban or not to ban blasphemous videos' (2013) 44 *Georgetown Journal of International Law* 1322.

62 Art 2(2) Hate Speech Proclamation (n 59).

63 As above.

64 See YE Ayalew Working Paper on the Draft Hate Speech Law in Ethiopia, Network for Digital Rights in Ethiopia (NDRE) (13 January 2020, unpublished).

Committee General Comment 34.⁶⁵ In this regard, the Proclamation should have drawn inspiration from the Camden Principles⁶⁶ and Facebook⁶⁷ to define these vague terms. Thus, such overbroad formulations could create interpretive ambiguities, and clearly violate the legality thresholds under article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) and article 29(5) of the Ethiopian Constitution.

The Proclamation incorporates the intent requirement through the term ‘deliberately’⁶⁸ in its definition. Specifically, the law uses the term ‘promotes’ instead of ‘advocates’. The term ‘promote’ sets out neither the intent requirement nor the intention to encourage hatred, discrimination or attack towards the target group. The term ‘incitement’ refers to statements about ethnic, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁶⁹ Incitement, although subject to judicial application, embraces causation and contexts.

Most importantly, the Proclamation does not draw inspiration from the most widely-accepted norm under international human rights law to draft hate speech laws, the Rabat Plan of Action.⁷⁰ The Rabat Plan of Action contains six factors to determine whether or not speech could be regarded as hate speech. These include context, the status of the speaker, intent, content, audience, and the likelihood of effectively inciting harm.⁷¹

Furthermore, the law punishes the dissemination of hate speech.⁷² During the drafting stage it was unclear from its provisions whether the term ‘disseminating of hate speech’ included mere sharing and distribution of hateful content. How could the public prosecutor indict all the followers that disseminate hate speech once it goes viral? In a country where ‘echo-chambers’ are common, it would be very

65 General Comment 34 para 25.

66 Article 19 *The Camden Principles on Freedom of Expression and Equality* (2009). Eg, Principle 12(1) defines ‘hatred’ as ‘the intense and irrational emotions of opprobrium, enmity and detestation towards the target group’.

67 Facebook Community Standards ‘Hate speech’, https://www.facebook.com/communitystandards/hate_speech (accessed 24 January 2020). ‘Attack’ means ‘a violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation’.

68 As above.

69 As above.

70 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, United Nations Office of the High Commissioner for Human Rights A/HRC/22/17/Add.4, 11 January 2013.

71 Para 29 Rabat Plan of Action (n 70).

72 Art 4 Hate Speech Proclamation (n 59).

difficult to fully enforce this kind of stipulation. This issue casts doubt on the practicality of the law. Even when the law was approved, the definition of 'dissemination' remained problematic. It is defined as 'spread or share a speech on any means for many persons, but it does not include like or tag on social media'.⁷³ A literal reading of this provision implies that any person who 'shares' any content on social media is deemed to be a disseminator of disinformation and will be liable. While the drafters narrowed the scope of 'disseminating', the provision remains subjective and lacks specificity. It would have been preferable to use the term 'advocacy' rather than 'disseminating' under article 4, since the latter falls short of demonstrating intent.

In the disinformation part the law gave a broad and subjective definition to the term 'disinformation' as 'speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict'.⁷⁴ How does one know whether a given statement is false? Who determines that a statement is false? During parliamentary deliberations the Deputy Attorney-General stated that one knows a statement is false through evidence. Therefore, it is for the courts to determine this.⁷⁵ Second, the disinformation definition lacks precision as it fails to define what constitutes 'knew or should reasonably have known the falsity of the information'. Yet, article 29 of the Constitution does not limit freedom of expression to 'truthful' information, but rather applies to 'information and ideas of all kinds'.

3.3 Draconian national laws

Repressive laws and the courts may be used to muzzle political dissenters, bloggers, journalists and others. Through the prosecutorial apparatus the Ethiopian government has been using oppressive legislation to neutralise real or perceived foes from the political landscape, effectively taking over the democratic public sphere.⁷⁶

When a law puts an absolute proscription on conduct it grants authorities a wide margin of appreciation to restrict expression while providing limited guidance to individuals about the demarcation

⁷³ Art 2(7) Hate Speech Proclamation..

⁷⁴ Art 2(3) Hate Speech Proclamation.

⁷⁵ YE Ayalew 'Is Ethiopia's first fake news case in line with human rights norms?' *Ethiopia Insight* 1 May 2020, <https://www.ethiopia-insight.com/2020/05/01/is-ethiopias-first-fake-news-case-in-line-with-human-rights-norms/> (accessed 14 May 2020).

⁷⁶ A Awol & t Beza 'Spectacles of illegality: mapping Ethiopia's show trials' (2015) 13 *African Identities* 284.

between lawful and unlawful behaviour.⁷⁷ For instance, the Ethiopian Computer Crime Proclamation 958/2016 punishes with imprisonment the dissemination of any type of writing or video online that is likely to cause violence.⁷⁸ Here the law did not specify the *modus operandi* and what content would be likely to cause violence.

The Hate Speech Proclamation presents a second example. Under the cloak of countering hate speech and disinformation the Ethiopian government has been engaged in stifling individual freedom by using vague formulations in this Proclamation. The UN Special Rapporteur expressed concerns about the ambiguous formulation of Ethiopia's hate speech and disinformation law which was recently presented to Parliament, stating that it goes far beyond the scope of article 20(2) and the limitations on restrictions required by article 19(3) of ICCPR.⁷⁹ This is because the definition is nebulous and overbroad and not based on international human rights law. According to the UN Human Rights Committee, laws should be clear, precise and unambiguous in what they stipulate. Freedom of expression may only be limited by laws that are clear and precise.

The Hate Speech Proclamation also has a strict criminal provision which includes both imprisonment and excessive fines. It states that if the offence of hate speech or disinformation was committed through a social media account with more than 5 000 followers, the person responsible for the act shall be punished with simple imprisonment not exceeding three years, and/or a fine not exceeding 100 000 Birr (US \$3 000).⁸⁰ This is an instance where journalists and activists could be targeted for having 5 000 followers. It is bizarre to see the 5 000 followers standard as a threshold, a move that seems to be novel and arbitrary. The question may be posed as to whether this formulation is based on Facebook's friendship limit or comparative experience. Unlike in Egypt, where the law obliges personal social media accounts with 5 000 followers to come under

77 UN Special Rapporteur (n 56) para 13.

78 Art 14 Computer Crime Proclamation 958/2016, Federal Negarit Gazette, Addis Ababa, 22nd Year 83.

79 United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression, David Kaye, Visit to Ethiopia, 2-9 December 2019, End of Mission Statement, <https://www.ohchr.org/EN/NewsEvents/Pages/> (accessed 24 January 2020).

80 Art 7(4) Hate Speech Proclamation (n 59). There also is an apparent contradiction between the Amharic and the English versions: The former uses of 'and', meaning both imprisonment and fine, may be imposed together, while the latter uses 'or', meaning the court may order imprisonment or a fine, but not both. In interpretation issues, Amharic is binding and prevails in the event of ambiguity on the basis of Federal Negarit Gazette Establishment Law (art 2(4) Federal Negarit Gazeta Establishment Proclamation, 1st Year 3, Addis Ababa, 22 August 1995).

media regulations,⁸¹ the 5 000 standard in Ethiopia is stricter and an aggravating ground for a charge rather than a starting point. Moreover, the fine is excessive compared to the fines for crimes such as female genital mutilation (FGM), in respect of which a fine of 500 Birr is set. For committing hate speech, an individual receives a fine of 50 000 Birr. The magnitude is 100 times higher than that for other ordinary crimes. Also, given the modest income of many social media writers, this law could lead to self-censoring of free speech on the internet and could force some to reduce their followers to avoid punishment. The Proclamation would have a chilling effect on freedom of expression on the internet.

A third example is the Anti-terrorism Proclamation 652/2009⁸² under which many human rights defenders and activists were targeted. For instance, in case of *Prosecutor v Yonatan TR*⁸³ the Ethiopian Federal High Court convicted the accused, the former spokesperson of the Blue Party, for a Facebook post as encouragement of terrorism under article 6 of the Proclamation without defining what constitutes 'encouragement of terrorism'. Using such repressive laws, the authorities enjoy unlimited discretion to police free speech in Ethiopia. This again clearly signals how draconian laws gag freedom of expression on the internet.

3.4 Internet censorship

Internet censorship is a growing threat to the free speech rights of bloggers, journalists and individuals online. It refers to the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or on the basis of their perceived connection to content deemed inappropriate or unlawful.⁸⁴

In 2018, Ethiopia unblocked hundreds of websites⁸⁵ as part of political reforms under a new government. However, merely a year later there was a resurgence of internet censorship in the country. On 22 June 2019, following a high-profile assassination in the

81 See Egypt: Law on the Organisation of Press, Media and the Supreme Council of Media 2018.

82 Anti-Terrorism Proclamation 652/2009, Federal Negarit Gazeta 15th Year 57 (Anti-Terrorism Proclamation) has now been amended by Proclamation 1176/2020.

83 *Public Prosecutor v Yonathan Tesfaye*, Federal High Court of Ethiopia, Lideta District (Judgment) F/P/P 414/08, May 2016 (on file with author).

84 Article 19 'Freedom of expression unfiltered: How blocking and filtering affect free speech' Policy Brief December 2016 7.

85 B Taye et al 'Ethiopia: Verifying the unblocking of websites' 29 June 2018, <https://ooni.org/post/ethiopia-unblocking/> (accessed 24 January 2020).

Amhara region and Addis Ababa, access to WhatsApp and Facebook was completely blocked. The blocking of the website of African Arguments, a pan-African platform covering investigative stories, followed a few weeks later.⁸⁶

Technically, according to the Open Net Initiative (ONI), there are four approaches to internet censorship:⁸⁷ first, technical blocking, including IP blocking, DNS tampering, and URL blocking using a proxy; second, the removal of search results. These are acts by companies that provide internet search services through cooperation with governments to omit illegal or undesirable websites from search results. In the third place, when takedown measures are effected,⁸⁸ for example where regulators have direct access to and legal jurisdiction over web content hosts, the simplest strategy is to demand the removal of websites with inappropriate or illegal content. Lastly, through induced self-censorship, users could be restricted from posting online because of fear of arrest or intimidation. In Ethiopia, IP and URL blocking and self-censorship are common. As a result of these measures, bloggers' and individuals' free speech have been stifled.

In the same vein, the UN Special Rapporteur expressed concerns over states' filtering measures with the assistance of the private sector.⁸⁹ The Joint Declaration on Freedom of Expression and the Internet forbids content-filtering systems which are imposed by a government or commercial service providers, and which are not end-user controlled. They are considered as a form of prior censorship and are not justifiable as a restriction on freedom of expression.⁹⁰

The first recorded case of internet censorship in sub-Saharan Africa occurred in Zambia in 1996. The ONI observed the presence of technical internet filtering in four sub-Saharan African countries in

86 M Xynou et al 'Resurgence of internet censorship in Ethiopia: Blocking of WhatsApp, Facebook, and African arguments' 14 August 2019, <https://ooni.org/post/resurgence-Internet-censorship-ethiopia-2019/> (accessed 24 January 2020).

87 Open Net Initiative 'Overview of internet censorship', <https://opennet.net/about-filtering> (accessed 27 May 2019).

88 *Delfi AS v Estonia*, ECHR Application 64569/09 2013, para 155.

89 Report of the Special Rapporteur to the Human Rights Council on Freedom of Expression, States and the Private Sector in the Digital Age, David Kaye, A/HRC/32/38 (2016) para 46. See also Principle 38(1) of the 2019 African Declaration (n 15): 'States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.'

90 Joint Declaration on Freedom of Expression and responses to conflict situations (n 20).

2008 to 2009, namely, Ethiopia, Nigeria, Uganda and Zimbabwe. Despite government attempts, of these four countries only Ethiopia was found to be filtering the internet. Until June 2018 Ethiopia's filtering regime targeted independent media, blogs and political reform and human rights sites. However, though the filtering is inconsistent in that many prominent sites that are critical of the Ethiopian government remain inaccessible, while some blocked sites seem harmless.⁹¹

4 Normative content of freedom of expression on the internet under the African Charter

Freedom of expression is a fundamental right protected under the African Charter.⁹² Drawing on the findings of the African Commission, it should be understood as a basic right, vital to an individual's personal development, political consciousness, and to participation in the conduct of the public affairs in a country.⁹³ Under the African Charter, this right encompasses the right to receive information and to express one's opinion. Article 9 of the African Charter provides as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

Based on the above provisions, it may be concluded that the African Charter clearly spells out that individuals have the right to freedom of expression. Thus, it includes the right of access to information and of disseminating information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.⁹⁴ Importantly, the phrase 'to express and disseminate' under the African Charter embraces numerous means and forms of expression.⁹⁵

A comparison between the African Charter and other regional human rights documents reveals that the Charter does not have

91 R Heacock 'Internet filtering in sub-Saharan Africa, Open Network Initiative' (2012) 6.

92 Arts 4-14 African Charter

93 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 36.

94 Art 1 African Commission Resolution (n 21).

95 See generally R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019).

the specificity and clarity⁹⁶ found in other instruments,⁹⁷ such as the Universal Declaration of Human Rights (Universaal Declaration),⁹⁸ which includes the reference to 'any media', ICCPR,⁹⁹ the European Convention of Human Rights (European Convention)¹⁰⁰ and the American Convention on Human Rights.¹⁰¹ However, the African Charter's failure to mention any specific media forms could be a positive factor since it could be interpreted to embrace any medium, including the internet. First, the African Charter has a flexibility clause which allows the African Commission to draw inspiration from international law on freedom of expression which can extend the right to the use of any medium.¹⁰² Also, in the case of *Media Rights Agenda v Nigeria*¹⁰³ the African Commission provided relevant guidance on how article 9(2) should be interpreted. Besides, the 2019 African Declaration on Expression and Information clearly provides that the right to freedom of expression has to be protected both offline and online.¹⁰⁴ Hence, freedom of expression as formulated under the African Charter denotes conveying thoughts in whatever means to reach the wider public. This again applies to the internet.

Using a 'holistic approach' of treaty interpretation, where a provision is interpreted in its entirety blending many factors together, as enunciated under the Vienna Convention of the Law of Treaties,¹⁰⁵ article 9(2) of the African Charter may be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Charter in its context and in light of its object and purpose. Although the contextual meaning of the phrase 'to

96 For extensive discussion, see WE Adjei 'The protection of freedom of expression in Africa: Problems of application and interpretation of article 9 of The African Charter on Human and Peoples' Rights' unpublished PhD thesis, University of Aberdeen, 2012 237.

97 K Olaniyan 'Civil and political rights in the African Charter: Articles 8–14' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986–2006* (2008) 220.

98 Art 19 Universal Declaration of Human Rights 10 December 1948, 217 A (III).

99 Art 19(2) ICCPR.

100 Art 10 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5.

101 Art 13 American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969.

102 Art 60 African Charter.

103 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 66: 'According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.'

104 Principle 5 (n 15).

105 Art 31(1) Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol 1155 331.

express and disseminate opinions' does not imply anything about the nature of the medium, the phrase ordinarily implies stating ideas or venting one's thoughts using any media. The object and purpose or teleological interpretation of the phrase, as an instrument for the protection of individual human beings, require that the Charter's provisions be interpreted and applied so as to make its rights practical and effective. In addition, any interpretation of the rights under article 9(2) of the Charter is aimed at maintaining and promoting the ideals and values of a democratic society.¹⁰⁶ Similarly, the African Charter must be interpreted holistically and all clauses must reinforce each other to enable an individual to live a dignified life and enjoying the ideals of democracy.¹⁰⁷ Accordingly, freedom of expression on the internet should be guaranteed to enable individuals to express their views online.¹⁰⁸ Alternatively, if the interpretation of the above phrase is limited to traditional mediums, such as print or broadcasting, still using an evolutive method of interpretation, namely, that the African Charter as a living instrument must be interpreted in light of present-day contexts,¹⁰⁹ I would argue that article 9(2) includes any modern mediums, including the internet.

The last hallmark of the normative content of the right is the so-called 'claw-back clause'¹¹⁰ which entitles states to restrict the granted rights to the extent permitted by domestic law.¹¹¹ The caveat 'within the law' refers to the fact that the right could be restricted by the application of law. However, the question remains as to what 'within the law' refers to. The phrase 'within the law' is a claw-back clause under the African Charter which restricts the enjoyment of the right.¹¹² In this regard, the African Commission¹¹³ has interpreted

106 *Soering v The United Kingdom* 1/1989/161/217 ECtHR, 7 July 1989, paras 87-88.

107 *Lawyers of Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 37.

108 See D Cucereanu *Aspects of regulating freedom of expression on the internet* (2008) 137.

109 *Tyrer v The United Kingdom* 5856/72 ECtHR 15 March 1978 para 31; *Marckx v Belgium* Application 6833/74, ECtHR 13 June 1979 para 41.

110 Higgins has defined claw-back clauses as those clauses that in normal circumstances permit the breach of an obligation for a specified number of public reasons. See R Higgins 'Derogations under human rights treaties' (1976/77) 48 *British Yearbook of International Law* 281.

111 See R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 691; GJ Naldi 'Limitation of rights under the African Charter on Human and Peoples' Rights: The contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 110; and S Singh 'The impact of clawback clauses on human and peoples' rights in Africa' (2009) 18 *African Security Studies* 100.

112 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679 688.

113 See *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 112. The African Commission notes that the meaning of the phrase 'within the law' in art 9(2) must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the

this clause contained in article 9(2) to mean that any restriction on freedom of expression has to be ‘provided by law’¹¹⁴ and must also conform to international human rights norms and standards relating to freedom of expression and should not jeopardise the right itself.¹¹⁵

Therefore, the normative content of freedom of expression on the internet embraces free speech online using a cornucopia of means and modes of expression in a similar manner to offline mediums. However, since the right is not absolute, it could be limited by law¹¹⁶ that serves legitimate purposes and is necessary in a democratic society.¹¹⁷

Ethiopia ratified the African Charter on 15 June 1998.¹¹⁸ The obligation of the Ethiopian government under the African Charter is to respect, protect and fulfil all rights, including freedom of expression,¹¹⁹ both offline and online, as required by article 9(2) of the African Charter. It may be recalled that the UN Human Rights Council adopted a landmark resolution in 2012 affirming ‘the same rights that people have offline must also be protected online’.¹²⁰

According to a tripartite assessment of a state party’s obligations under international human rights law,¹²¹ freedom of expression imposes three obligations on states, namely, the respect, protect and fulfil obligations. The state’s obligation to respect implies a negative duty by which all branches of government (executive, legislative and judicial) must refrain from violating the right. For example, a state is duty bound to refrain from shutting down the internet

concept of ‘within the law’ employed in the African Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

- 114 *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) paras 59-60.
- 115 *Constitutional Rights Project* (n 93) paras 39-40. ‘According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one’s opinions guaranteed at the international level; this would make the protection of the right to express one’s opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.’
- 116 Art 9(2) African Charter
- 117 Art 1(2) African Commission Resolution (n 21).
- 118 List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights, https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 23 January 2020).
- 119 R Murray *Human rights in Africa: From the OAU to the African Union* (2008) 90.
- 120 OHCHR Report of the Special Rapporteur to the Human Rights Council on the Promotion, Protection and Enjoyment of Human Rights on the Internet, 29 June 2012, UN Doc A/HRC/20/L.13 para 1, http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_20_L13.doc (accessed 23 January 2020).
- 121 UN Special Rapporteur for the Right to Food, *The Right to Adequate food as a Human Right: Final Report* submitted by Asbjorn Eide, UN Doc E/CN.4Sub.2/1987/23 (1987) paras 67-69.

or cracking down websites aimed at stifling free expression. The obligation to protect obliges state parties to the African Charter to guard rights holders from the actions of non-state actors. In other words, the obligation also requires state parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of free expression to the extent that these Charter rights are amenable to application between private entities.¹²² For instance, internet providers could be private entities, and at some point they might block or withdraw services to the online community. In this instance it is the state's obligation to protect the rights of individuals from arbitrary interference with access to the internet. Besides, freedom of expression on the internet also includes the obligation to fulfil, which imposes an obligation on the authorities to take positive measures to promote through arranging mechanisms to open access of the internet and installing telecommunication facilities. Hence, as a party to the African Charter Ethiopia has the duty to respect, protect and fulfil freedom of expression on the internet in light of legitimate limitations under article 27.

Turning to non-state actors operating in Ethiopia, they are under an obligation to respect freedom of expression on the internet on the basis of the UN Guiding Principles on Business and Human Rights.¹²³ For example, companies should work to moderate content and remove contents before hate speech or disinformation goes viral. The Ethiopian Hate Speech Proclamation contains provisions regarding the responsibility of social networks.¹²⁴ It obliges them to remove illegal content from their platforms less than 24 hours from receiving notification. This makes Ethiopia one of few sub-Saharan African countries to legislate content moderation regulation where the law obliges social networks to remove hate speech or illegal content less than 24 hours from notification.¹²⁵

122 UN Human Rights Committee (HRC) General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 8.

123 UN 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, A/HRC/8/5_7 April 2008, <http://www.undocs.org/A/HRC/8/5> (accessed 23 January 2020).

124 Art 8(2) Hate Speech Proclamation (n 59).

125 Art 3(2) Germany Act to Improve Enforcement of the Law in Social Networks, (Netzdurchsetzungsgesetz, NetzDG), 1 October 2017. Art 3(2) 'removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint'; <https://germanlawarchive.iuscomp.org/?p=1245> (accessed 23 January 2020). Note that while the final version used the term 'swiftly', the approved version of the Ethiopian Hate Speech Proclamation used the '24 hours' standard.

Freedom of expression as a human right creates a vertical obligation on state parties to a treaty. In other words, states have a primary duty to observe human rights. However, this does not mean that non-state actors such as private companies are not required to be responsive to human rights commitments.¹²⁶ Non-state actors have horizontal obligations even though they are not parties to a treaty. Based on the African Commission definition, non-state actors refer to individuals, organisations, institutions and other bodies acting outside the state and its organs.¹²⁷ The Universal Declaration emphasises groups broadly, including private actors, to observe human rights.¹²⁸ The involvement of non-state actors in a society is rapidly increasing, and at the same time their engagement has caused human rights abuses. As such, to bestow on non-state actors the responsibility for protecting human rights, the UN Human Right Council has endorsed the John Ruggie Principles¹²⁹ on the applicability of human rights to businesses. While conducting their activities, business entities have a duty to respect human rights, to protect the rights holders from harm and to provide a remedy for human right abuses.¹³⁰

As far as the internet is concerned, non-state actors generally refers to bodies such as the internet intermediaries,¹³¹ or internet service providers, search engines, blogging services, online community and social media platforms,¹³² private contractors or corporate entities. So far, the human rights regime provides a soft law mechanism to make them responsible. Since the UN Guiding Principles provide the responsibility of businesses to respect human rights, non-state actors directly involved in the internet domain should set out minimum standards for corporate human rights accountability through a clear commitment to respect human rights; conduct due diligence that meaningfully 'identify, prevent, mitigate and account for' actual and potential human rights impacts throughout the company's operations, and provide for or cooperate in the remediation of adverse human rights impacts.¹³³

126 General Comment 31 (n 122) para 8.

127 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 136.

128 Art 30 Universal Declaration.

129 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (Geneva, United Nations, 2011) 4.

130 As above.

131 TF Cotter 'Some observations on the law and economics of intermediaries' (2005) 1 *Michigan State Law Review* 67.

132 R MacKinnon et al 'Fostering freedom online: The role of internet intermediaries' UNESCO Series on Internet Freedom Report (2014, Paris: UNESCO) 11.

133 UN Guiding Principles (n 124) Principles 16-24.

5 Assessing the limitations to freedom of expression on the internet under the African Charter

While it is clear from the above part that Ethiopia has an obligation under the African Charter to ‘respect, protect, and fulfil’ freedom of expression, including online, under international human rights law, there are also several ways in which the Ethiopian government is legally allowed to restrict such freedoms. I now analyse four requirements that human rights limitations need to fulfill to allow the Ethiopian government’s various orders to restrict internet access lawfully under international human rights law. These are legality, legitimacy, necessity and proportionality.¹³⁴

5.1 Legality

Legality refers to the fact that limitations imposed on freedom of expression should be provided by law. The Ethiopian Constitution underscores the legality requirement in article 29. This means that the right can be limited only through laws that are guided by the principle that freedom of expression cannot be limited based on a subjective appreciation of the content or effect of the point of view expressed.¹³⁵

The African Charter has spelled out the legality requirement in article 9(2). Accordingly, one can express his or her views ‘within the law’. According to Human Rights Committee General Comment 34, the underlying tenet of the legality requirement is that the restrictions have to be clearly provided for by law. Thus, law may include laws of parliamentary privilege and laws of contempt of court.¹³⁶ Since the restriction on freedom of expression may constitute a serious curtailment of the rights *per se*, it is not compatible with legitimate limitations for the restriction to be enshrined in traditional, religious or other such customary law because the law has to be made by pertinent law makers and courts. The law has to be formulated with sufficient precision so as to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.

For example, internet shutdown measures ordered pursuant to vaguely-formulated laws and regulations fail to satisfy the legality requirement. For instance, in 2016 Ethiopia passed a State of Emergency Directive which allows the government to block mobile

¹³⁴ Note that the discussion under this part is partly adapted from Ayalew (n 47).

¹³⁵ Art 29(6) Ethiopian Constitution.

¹³⁶ General Comment 34 (n 1) para 24.

services and internet access without a court order on the basis of a state of emergency. In particular, article 4(2) of the Directive provides:

When the Emergency Command Post believes that it is necessary for the observance of the constitutional order and for the maintenance of peace and security of the public and citizens, it may cause the closure or termination of any means of communication.

The African Court on Human and Peoples' Rights (African Court) has elaborated on the legality test in its ruling in the *Konaté* case where it stated that restrictions on freedom of expression were indeed provided by law as they were part of the penal and information codes of Burkina Faso.¹³⁷ The Court added that the Burkinabe Penal and Information Codes were drafted with sufficient clarity to enable an individual to adapt with the Rules and to enable those in charge of applying them to determine which forms of expression are legitimately restricted and which are unduly restricted.¹³⁸ However, in the separate opinion released by four dissenting judges the laws were found to be too broad and problematic and in conflict with article 9 of the African Charter.¹³⁹

In the same vein, the African Commission has communicated that although in the African Charter the grounds of limitation to freedom of expression are not expressly provided for as in the other international and regional human rights treaties, the phrase 'within the law' in article 9(2) provides 'a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation'.¹⁴⁰ The phrase 'within the law' must be interpreted with reference to international norms which can provide grounds of limitation on freedom of expression.¹⁴¹

In addition to the accessibility and clarity requirement, the law has to provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.¹⁴² Furthermore, the legality requirement asks that laws apply equally to everyone, and that the

137 *Lohé Issa Konaté v Burkina Faso* ACTHPR, Application 4/2013, Judgment, 5 December 2014, para 130.

138 As above.

139 *Lohé Issa Konaté v Burkina Faso* ACTHPR, Application 4/2013, Separate Opinion, Elsie Thompson, Sophia Akuffo, Bernard Ngoepe and Duncan Tambala JJ 2014, paras 4-5.

140 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 188.

141 *Malawi Africa Association & Others v Mauritania* (2000) AHRLR 194 (ACHPR 2000) para 102.

142 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, (Article 19, London, ISBN 1 870798 89 9, November 1996) Principle 1.1(b).

penalty for contravention may not be corporal punishment.¹⁴³ Thus, on the basis of the legality test, the second State of Emergency Directive adopted in February 2018 does not pass this test.

5.2 Legitimacy

The legitimacy test refers to the requirement that measures have to be in conformity with laws and be acceptable to the general public interest. The Ethiopian Constitution provides a few grounds by which freedom of expression can be legally limited.¹⁴⁴ These include limitations imposed to protect the well-being of the youth, the honour and reputation of individuals, prohibition of propaganda for war and public expression of opinion intended to injure human dignity.¹⁴⁵

While delineating freedom of expression under article 9, the African Charter does not explicitly list the limitation grounds, the Charter in article 27(2) mentioned the 'rights of others', 'collective security', 'morality' and 'common interest' as possible grounds justifying limitation.¹⁴⁶ In other words, whenever any restrictions are imposed on freedom of expression online, due regard should be had to these factors.

The first legitimacy caveat is 'the rights of others'.¹⁴⁷ This could for example mean any restriction on freedom of expression in order to protect the right to vote or the right to privacy.

The second potential limiting ground is related to 'collective security',¹⁴⁸ which resembles national security under ICCPR. Thus, freedom of expression should be limited for genuine purposes, such as to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to the violent overthrowing of the government. However, national security cannot be invoked to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its institutions, to entrench a particular ideology, or to suppress industrial unrest.

143 General Comment 34 (n 1) para 26.

144 Art 29(6) Ethiopian Constitution.

145 As above.

146 Art 27 African Charter.

147 As above.

148 As above.

The third caveat is related to 'morality',¹⁴⁹ that is, freedom of expression online can be legitimately limited to protect morality. The African Charter does not define the term 'morality'. According to the UN Human Rights Committee jurisprudence, 'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'.¹⁵⁰

The last potential restriction ground is 'common interest'. Although the African Charter did not define the term, it may refer to mutual societal needs and community demands.¹⁵¹ In other words, common interest may refer to collective aspirations and mutual social destiny. In this respect, without defining what constitutes collective security, morality and common interest, the African Commission¹⁵² and, more recently, the African Court,¹⁵³ have used article 27(2) in particular to incorporate the rules and principles employed in other regional and international systems into the African Charter.¹⁵⁴

5.3 Necessity

Necessity is the third gauge by which to judge the legality of any restrictions placed on freedom of expression online. This means that the right to freedom of expression can be limited if it is necessary in order to protect a legitimate objective, such as the rights or reputations of others, national security, public order, public health or morals. In this regard, unlike ICCPR, the Ethiopian Constitution and the African Charter failed to incorporate the necessity test. However, the 2019 African Declaration on Expression and Information provides a useful guidance as to the necessity requirement by requiring that the limitation has to originate from a pressing and substantial need that is relevant; and has to have a direct and immediate connection

¹⁴⁹ As above.

¹⁵⁰ UN Human Rights Committee (HRC), ICCPR Committee General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993 CCPR/C/21/Rev.1/Add.4 para 8.

¹⁵¹ See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339.

¹⁵² *Konaté v Burkina Faso* (n 137) para 134.

¹⁵³ *Constitutional Rights Project v Nigeria* (n 93) para 41. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in art 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

¹⁵⁴ Murray (n 95) 583.

to the expression and disclosure of information.¹⁵⁵ Whenever a limitation is deemed 'necessary', this implies that the limitation is based on one of the grounds justifying limitations being recognised by the relevant provisions of the treaty, and responds to a pressing public or social need.¹⁵⁶ As such, any assessment as to the necessity of a limitation must be made on objective considerations, and on a case-by-case basis.¹⁵⁷

In the *Konaté* case the African Court held that 'if a restriction is to be deemed acceptable, it is insufficient for it to be provided for by the law and to be written precisely; it must also be absolutely necessary for the advantages which are to be obtained'.¹⁵⁸ However, such necessity measures may not thwart the very purpose of the right.¹⁵⁹ Even more importantly, a limitation may never have as a consequence that the right itself becomes illusory. Thus, the Court's holding showed that limitations to be imposed on necessity grounds should meet the pressing social need and may not nullify the very purpose of the right.¹⁶⁰

Hate speech regulation in Ethiopia invariably fails to meet the standard of necessity. The 'necessity' inquiry requires that the claimant should show that the hate speech law would achieve its stated purpose. As can be seen from the examples discussed during the course of the article, these laws often achieve the opposite effect. Some governments argue that it is important to tackle hate speech and offensive statements. Yet these measures fall short of the necessity test since hate speech is an emotive concept,¹⁶¹ and regulating emotions through law is very complex.

Given that Ethiopia is organised on the basis of an ethnically-centred political system, hate speech laws could easily be used to silence opposition ethnic parties and individuals' free speech. In a democratic society, hate speech ideally should not be deterred through the use of the law but through robust political discussion. As US Supreme Court Judge Brandies famously observed in the case

155 Principle 9(4)(a-b) (n 15).

156 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4, Principle 10.

157 As above.

158 *Konaté v Burkina Faso* (n 138) para 132.

159 As above.

160 As above.

161 AF Sellars 'Defining hate speech' 8 December 2016 *Harvard University Berkman Klein Center Research Publication* 2016-20 14.

of *Whitney v California*, 'the remedy to be applied is more speech, not enforced silence'.¹⁶²

The Ethiopian government's stated justification for having hate laws in place is that such laws curb the violence that may result from hate speech. However, it could be argued that it is not the hate speech *per se* that creates violence, but rather the ethnicity-based political system or age-old repression. As such, promoting free speech is a more pressing social need than policing speech using hate speech regulations. Thus, by using the necessity test states can measure whether or not the likelihood and action to be taken constitute a pressing social need. What constitutes a pressing need may be determined by the court. Yet the word 'pressing' refers to 'requiring quick or immediate action or attention'.¹⁶³ As such, a pressing social need may refer to social actions that demand quick intervention and urgency.¹⁶⁴

5.4 Proportionality

By applying the proportionality test, states can restrict freedom of expression online if the restriction is believed to be proportional to the right being protected. This means that states have to demonstrate that the tools chosen to achieve legitimate objectives are proportionate so as to protect the rights or reputations of others, national security, public order, public health or morals. While this test allows for some restrictions of internet access, it does not give states exorbitant leverage to muzzle the rights holder. However, unlike the 2019 African Declaration,¹⁶⁵ the Ethiopian Constitution and the African Charter failed to incorporate the proportionality test.

Restrictions must be commensurate with the objective sought. In the case of *Zimbabwe Lawyers for Human Rights*, following the publication of *The Daily News* by Associated Newspapers of Zimbabwe (ANZ) on 25 October 2003, the police moved back into the ANZ offices, stopped their work and prevented all further publication. The complainants argued that the closure of the newspaper was causing

¹⁶² See the case of *Whitney v California* US Supreme Court 274 US 357, 372 16 May 1927; concurring opinion of Brandeis J finds that hate speech and fake news can be deterred through more speech. 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence;' <https://globalfreedomofexpression.columbia.edu/cases/whitney-v-california-brandeis-j-concurring/> (accessed 25 April 2020).

¹⁶³ See *Oxford online dictionary*, <https://en.oxforddictionaries.com/definition/pressing> (accessed 23 January 2020).

¹⁶⁴ As above.

¹⁶⁵ Principle 9(4)(b) - (c) (n 15).

irreparable harm to the freedom of expression as delineated in the African Charter.¹⁶⁶ The Commission stated:¹⁶⁷

The principle of proportionality seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole. In determining whether an action is proportionate, the Commission will have to answer the following questions: (1) Was there sufficient reasons supporting the action? (2) Was there a less restrictive alternative? (3) Was the decision-making process procedurally fair? (4) Were there any safeguards against abuse? and (5) Does the action destroy the very essence of the Charter rights in issue?

When one combines these criteria, the closure of a newspaper amounts to a disproportionate measure and violates the right to freedom of expression as it is clear that the action of the state to stop the complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons.¹⁶⁸

The UN Human Rights Committee elaborated what measures satisfy the test of proportionality in its General Comment 27 as follows:¹⁶⁹

They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected ... has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.

Similarly, the principle of proportionality must take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed on freedom of expression by ICCPR is particularly high in the context of public debate in a democratic society concerning figures in the public and political domain.¹⁷⁰ In the *Konaté* judgment the Court held that freedom of expression in a

¹⁶⁶ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 1-12.

¹⁶⁷ *Zimbabwe Lawyers for Human Rights* (n 166) para 176.

¹⁶⁸ *Zimbabwe Lawyers for Human Rights* (n 166) para 178. The Commission reiterated that in a civilised and democratic society, respect for the rule of law is an obligation not only for the citizens but also for the state and its agents. If the state considered the complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them.

¹⁶⁹ UN Human Rights Committee (HRC), CCPR General Comment 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 paras 14-15.

¹⁷⁰ *Bodrozic v Serbia and Montenegro*, UN HRC Communication 1180/2003, views adopted on 31 October 2005, para 7.2.

democratic society must be subjected to a lesser degree of interference when it occurs within the context of public debate relating to public figures.¹⁷¹ Public figures therefore should necessarily endure a high degree of criticism than private citizens in order to prevent the stifling of public debate.¹⁷²

Therefore, internet shutdowns do not satisfy the test of proportionality, even though their duration and geographical scope may vary. Affected users are cut off from emergency services and health information, mobile banking, e-commerce, transportation, school classes, voting and election monitoring, reporting on major crises and human rights investigations. Most importantly, blanket shutdown measures are disproportionate to the legitimate aim to be sought as they are imposed on a wholesale basis. In the Ethiopian context, shutdown measures in connection with the security forces strike are said to be proportional as the closure was concentrated in Addis Ababa and did not extend to other parts of the country, whereas the shutdown action in connection with the second state of emergency and high-profile assassinations did not fulfil the proportionality test since it was neither geographically-limited nor time-specific.

6 Conclusion

Freedom of expression on the internet embraces freedom to seek, receive and impart information using an online medium. Ethiopia is a party to the African Charter and recognises freedom of expression subject to claw-back clauses. This article navigated major concerns arising in connection with freedom of expression on the internet in Ethiopia. These include internet shutdowns, hate speech and disinformation regulation, draconian national laws, and internet censorship. The article examined the normative contents of freedom of expression on the internet under the African Charter, and the extent of its protection. Ethiopia has an obligation under the African Charter to respect, protect and fulfil freedom of expression, both offline and online. This is also reinforced by the UN Human Right Council's landmark resolution in 2012 affirming that 'the same rights that people have offline must also be protected online'.

The article examined two forms of limitation on freedom of expression on the internet. The first is legitimate restriction, bringing together various legitimate limitations to be imposed on freedom

¹⁷¹ *Konaté v Burkina Faso* (n 138) para 155.

¹⁷² *Media Rights Agenda* (n 103) para 74.

of expression on the internet provided they meet four yardsticks: legality (prescribed by law); protecting a legitimate objective (legitimacy); necessity; and proportionality. The legality test obliges the government to make limitations on freedom of expression on the internet by enacting laws that are consistent with international human rights law. The Ethiopian government should furthermore employ utilitarian grounds, such as public morality, public order, and national security to fulfil the legitimacy requirement. The necessity test should be applied as it commands the government to take necessary measures aimed at achieving the above utilitarian grounds, whereas the proportionality requirement guides the government to take comparable and fair measures while limiting the right.

The second form is illegitimate limitation, comprising those measures imposed contrary to international human rights law. For instance, the Ethiopian government has muzzled freedom of expression on the internet using blanket internet shutdowns, unfettered hate speech provisions and disinformation regulation, draconian national laws and internet censorship.

To tackle these challenges, the Ethiopian government needs to take effective legislative, policy, administrative and judicial measures, and should draw inspiration from the African Commission's 2019 African Declaration on Expression and Information by observing the rules pertaining to limitations to freedom of expression on the internet. As the UN Human Rights Council Resolution 32/13 in 2016 unequivocally condemned measures to intentionally prevent or disrupt the internet in violation of international human rights law, the Ethiopian government should be cognisant of it, and take concrete legislative measures aimed at redressing internet shutdowns. When shutdowns are imposed, they should be transparent, legal, necessary and proportional in a democratic society. The government should amend or repeal all repressive laws aimed at stifling or otherwise targeting individuals' free expression on the internet in Ethiopia, such as hate speech and disinformation laws, and the Computer Crimes Proclamation. Also, when internet service providers practise content-filtering and censorship of the internet, they should explain, justify and clarify this to their users. Finally, social media companies should work to remove hate speech content and disinformation on their platforms less than 24 hours after receiving notification of it being posted.

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Book review

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

Pretoria University Law Press (2020) 277 pages

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From a multidisciplinary perspective, *Exploring the link between poverty and human rights in Africa* assembles an impressive group of leading scholars, in their own right, on human rights, sociology and development studies. At the core of this edited volume is the probe into how the African continent has fared in navigating a complex interface between poverty alleviation, on one side of the spectrum and the advancement of human rights, on the other. The volume appreciates the intersectionality of its *raison d'être*, namely, poverty, an albatross to many Africans, with many dimensions and causes. The obvious good about this appreciation is that it harnesses the objectivity and realism of the conclusions and solutions presented in this collection.

A common characteristic of many edited volumes is the lack of a coherent thesis or framework that binds all the disparate chapters together into one integrated whole. This, however, is not the case with *Exploring the link between poverty and human rights in Africa*. A visible strength of this volume is that it has been presented along

thematic lines. It captures various interrelated aspects that go hand in hand with poverty. These include (in)equality; food (in)security; the inclusivity of vulnerable groups (disabled persons and women); access to justice; state accountability; structural inefficiencies; power dynamics; governments' interventions or lack thereof; and environmental considerations. Throughout these themes, the volume uncovers the truths and speaks to the prevailing realities, opportunities, challenges and even threats to a shared dream of a more equitable society that is free from poverty.

The volume is edited by two prominent scholars, Ebenezer Durojaye and Gladys Mirugi-Mukundi, both of whom have written widely on seminal issues around human rights, socio-economic rights, sexual and reproductive health and rights, gender and constitutionalism, social justice and inclusive societies, the rule of law and corruption. The exceptional novelty demonstrated in this collection evidences their careful and competent editorship, for which they ought to be commended. I congratulate them for curating this comprehensive blueprint of scholarship to serve as a launch pad for future studies on the question of human rights and poverty.

Structurally, the book features 12 chapters, each comprising approximately 15 to 30 pages. The editors of the collection begin with the framing chapter, titled 'General introduction to poverty and human rights in Africa'. They start by giving a broader understanding of the nature of poverty, what causes it and the various forms through which it manifests itself. They then proceed to conceptualise poverty as a human right concern and establish the link between the two in this regard. One also learns about the significance of this volume in the framing chapter. The editors succinctly explain the contemporary relevance of the book and its positioning in relation to other closely-related scholarly works.¹ It ends by outlining various sections and chapters of the book.

In chapter 2, 'Integrating a human rights approach to food security in national plans and budgets: The South African National Development Plan', May takes us through the link between the national development plans, budgetary patterns and poverty reduction in South Africa. He argues that proper planning through policy formulation and research capacity are critical to the realisation of access to food. Using the South African experience, May points

¹ Such as A Focu, G Mwabu & E Thorbecke *Poverty in Africa: Analytical and policy perspective* (2009); S Jones & N Nelson *Urban poverty in Africa: From understanding to alleviation* (1999) and S Liebenberg & G Quinot *Law and poverty perspectives from South Africa and beyond* (2011).

out that the national development plan has urged improvements in household food and nutrition. Even so, however, he is of the view that for such a plan to succeed, it requires more specific detail and must be grounded in human rights norms. May's main argument appears to be that human rights principles should be incorporated into the budgetary and planning programmes in South Africa in order to realise food security. In trying to guide as to how exactly this is to be achieved, he identifies some rights-based approaches to planning for food security to include food security diagnostics, macro- and micro-economic policies, the appropriate sequencing of policy and multi-year budgeting strategies.

In chapter 3, 'Is South Africa winning the war on poverty and inequality? What do the available statistics tell us?' by Sekyere, Gordon, Pienaar and Bohler-Muller, we learn more about three primary dimensions of social inequality in South Africa. These are income inequality; poverty and human development; and access to services. The authors ascertain whether or not the implementation of a diverse set of policy initiatives since the demise of apartheid in 1994 actually has reduced social inequality. They find that the inequality gaps have widened and remain a threat to social and economic development in South Africa. They proceed to identify the main drivers of income inequality in the country as including race, gender and geographical location. In trying to meet the aspirations of this edited volume, the authors then examine the link between human development and poverty in the country. They observe that there has been mixed progress with regard to indicators on human development in the country and argue that 'as poverty is a reflection of multiple forms of deprivation in an individual's life, it is important to explore multidimensional subjective poverty measures'.² In conclusion the authors recommend that a holistic approach to measuring inequality with a stronger focus on subjective multi-dimensional indicators might be the way forward towards addressing inequality gaps in South Africa.

In the most interesting chapter 4, 'Who really "state-captured" South Africa? Revealing silences in poverty, inequality and structurally-corrupt capitalism', Bond helps us to understand what in recent times has been a buzzword in South Africa, namely, 'state capture'. The author gives thoughtful insights on the impact of 'state capture' on poverty. He explore the debates around poverty and inequality, on the one hand, and rife economic corruption, on the other. In a

2 E Sekyere et al 'Is South Africa winning the war on poverty and inequality? What do the available statistics tell us?' in E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020) 43.

very interesting analysis, he examines how neo-liberal policies have contributed, in one way or another, to the poverty trajectory in South Africa. With much emphasis, Bond offers a cautionary perspective that unless the root causes of these miseries and their interlinkages are adequately addressed, the simple narratives such as that

[a]partheid was a tragedy the legacy of which can be addressed by deracialising capitalism; inequality must be addressed through a more sensible economic policy, a generous social policy and a growing middle class to ensure stability; the way forward is to restore macro-economic discipline, maintain conservative fiscal policy, tackle state and especially parastatal corruption, and rebuild the credit ratings agencies³

will merely remain narratives. At one point the author unpacks in more detail what he calls 'the fight between hostile brothers',⁴ namely, the 'Zuptas' and 'white monopoly capital'. He concludes by offering a very different interpretation of the above 'simple narratives'.

In chapter 5, 'Poverty, women and the human right to water for growing food', Mbanjo-Mweso grapples with the question of whether the human right to water for growing food can be included in the normative content of the human right to water. She examines the relevance of the right to water for poverty reduction, with a particular focus on women. Her main argument is that a lack of access to water undermines not only productivity, but also economic growth, thereby deepening and perpetuating the inequalities featuring in the current patterns of globalisation that side-line and trap vulnerable households below the poverty line. She points out that access to water for production could be a solution to addressing poverty among women and other vulnerable groups. In consolidating her argument and bringing it home, she contends that states should take more drastic measures to ensure that women have access to water for food production and other usages.

Oluduro explores 'The link between environmental pollution and poverty in Africa' in chapter 6. He examines the meaning of environmental pollution and the causal relationship between poverty and environmental degradation, and traverses several ways in which environmental pollution exacerbates poverty. He proceeds to examine the legal framework aimed at addressing environmental pollution and how this may be of assistance in poverty reduction in

3 P Bond 'Who really "state-captured" South Africa? Revealing silences in poverty, inequality and structurally-corrupt capitalism' in Durojaye & Mirugi-Mukundi (n 2) 62.

4 Bond (n 3) 76.

the region. The author concludes by urging African governments to take collective action to protect the environment in order to reduce poverty, which continues to damage the environment and puts the people at risk.

In chapter 7, 'Alleviating poverty through retirement reforms', Malherbe is very succinct and goes straight to the point in making a strong case for reform in pension laws. She demonstrates how retirement reforms may be utilised as a mechanism to address poverty of not only elderly persons, but also of other members of their households. In so doing, she identifies the current shortfalls in the provision of social security to older persons. She goes on to argue that this potential poverty reduction mechanism can only succeed if retirement reforms are placed at the top of the list for social security reforms that are based on the realisation of the right to social security. In conclusion, she notes that attempts at retirement reforms must place the emphasis on principles of human rights and must strive towards universal access to social security.

In chapter 8, 'Disability, poverty and human rights in Africa: Opportunities for poverty reduction from the UN Convention on the Rights of Persons with Disabilities', Chilemba establishes the nexus between disability and poverty. He observes that in many societies, including those in Africa, the poverty rates among persons with disabilities are strongly felt compared to the rates among other members of the constituency. He further notes that persons with disabilities face several discriminatory practices in society, which result in a lack of access to social services and thus perpetuate poverty. The author then considers how the Convention on the Rights of Persons with Disabilities may be utilised as a useful tool for addressing poverty among persons with disabilities in Africa. He analyses disability-related legal frameworks for realising the rights to equality, employment, education and social security in some African countries. He concludes by identifying weaknesses in some of the examined pieces of legislation meant to address poverty among persons with disabilities and provides some suggestions for the way forward.

At the centre of Ntlama's chapter 9, 'The co-existence of gender inequality and poverty in Southern Africa' is the feminisation of poverty in Southern Africa. The author provides an overview of the efforts undertaken by the Southern African Development Community (SADC) governments through the adoption of the Protocol on Gender and Development to address the link between gender inequality and poverty across the sub-region. She pushes an agenda for the adoption of a human rights-oriented approach in the pursuit of large-scale

legal reforms, and argues that such is a necessary foundation for the advancement of gender equality and the elimination of poverty as envisaged in the Protocol. The author lays bare the factors that hinder the achievement of equality and also attempts to define the concept of gender equality and how it interfaces with poverty. She proceeds with a discussion on the importance of this Protocol. She concludes by observing that although legal reforms are important, they can only be effective if combined with other measures and strategies to address gender inequality in society.

In chapter 10, 'The potential of the African human rights system in addressing poverty', Nkrumah examines the potential of the African human rights system in realising access to justice for disadvantaged groups and how this potentially can reduce poverty in the region. He argues that the inclusion of socio-economic rights and the recent Declaration on Employment and Poverty Alleviation in Africa provide the impetus to addressing poverty in the region. The author particularly singles out the African Charter on Human and Peoples' Rights (African Charter) as one of the celebrated regional human rights instruments that guarantees both civil and political rights, as well as socio-economic rights, as enforceable rights. According to Nkrumah, this ensures that the 'substantive norms provide formal avenues for the quasi-judicial and judicial ambits of the regional human rights architecture to adjudicate on, and enforce socio-economic rights and freedom from poverty'.⁵ He concludes by noting that through collaboration and harmonisation of the mandates of the monitoring bodies, the African Union human rights system provides the strongest framework for addressing poverty.

In chapter 11, 'Realising access to justice for the poor: Lessons from working with rural communities', Balogun problematises the lack of access to justice for impoverished and marginalised communities. She makes known the key factors that present hurdles to access to justice for disadvantaged groups and how this exacerbates poverty. She further notes that in any society access to justice and resources is an essential element in addressing inequality and poverty. Balogun proceeds by offering an instructive perspective that African governments should embark on reforms that will ensure access to justice for vulnerable and marginalised groups in rural communities, with a view to addressing poverty. She uses the example of a non-governmental organisation by the name of Centre for Community Justice and Development as a case to illustrate the importance of

5 B Nkrumah 'The potential of the African human rights system in addressing poverty' in Durojaye & Mirugi-Mukundi (n 2) 217.

addressing poverty through the realisation of access to justice for people in rural communities.

Adams's chapter 12, 'The role of the South African Human Rights Commission (SAHRC) in ensuring state accountability to address poverty' concludes the volume. The author discusses the role of national human rights institutions in facilitating access to justice for disadvantaged groups in society. Using the SAHRC as a case study, she argues that the SAHRC has played an important role in ensuring that the government adheres to its constitutional obligations to protect and promote the rights of disadvantaged members of society in South Africa. She further explores the link between poverty and human rights and what it means in the South African context. She advances from there by highlighting the role of the SAHRC in addressing poverty and ensuring accountability on the part of the government to protect marginalised and vulnerable groups against it. She concludes by noting that despite the promising role of the SAHRC in addressing poverty in the country, the Commission is confronted by several operational and structural challenges that have hampered its effectiveness in this regard.

To this end, my overall impression of the book is that it is rich in content, inspiring in vision and empowering of the targeted readership. It clarifies comprehensively a conceptual gap in the notion of poverty as a human right violation. It also presents a detailed summary of the most notable attempts and efforts levelled at poverty alleviation from an international, regional and national perspective. However, an interesting discussion one seems to have missed in this volume surrounds the validity and utility of the distinction between 'poverty' and 'extreme poverty' as an emerging conceptual dichotomy. Such distinction, in my view, is largely arbitrary and does not solve the problem but exacerbates it. I am diametrically opposed to this reductionist approach of conceptualising poverty. Poverty should be poverty. It is against the basic formulations of the universally-accepted human rights norms and standards to attempt to classify impoverishment into certain degrees with the aim of forging an excuse by governments to escape their constitutional obligations of protecting the poor and vulnerable against the wrath of poverty.

The book also lacks the general conclusion chapter that offers a critical synthesis of key observations and major 'take-aways' from individual chapters. One purpose this concluding chapter would have served is to bring into one accent the strides of new knowledge each chapter contributes to the central topic. That the African region continues with a struggle for poverty alleviation is made clear in

the volume. That those mostly affected in this regard are poor and marginalised groups is also evident. However, whether there is the moral clarity and political will to act on the knowledge available to reduce poverty and inequalities across African societies remains to be seen.

Be that as it may, besides the highlighted shortfalls, the book and its content remain of top-notch quality. It best marks a deep appreciation of inequalities and poverty as experienced in Africa more than any other previous work. It challenges the reader to reflect on and think more broadly about the current general status of human rights observance by African states insofar as poverty alleviation is concerned.

In conclusion, the book is useful and is recommended to all government officials responsible for poverty alleviation, human rights and socio-economic rights scholars, students and every person interested in understanding the outlook of the human rights system in Africa and how thus far it has navigated the issue of poverty.

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Review: Special issue in *Journal of African Law: The African Charter on Democracy, Elections and Governance at 10*

Nandi N Makubalo

The *Journal of African Law* has been in existence for over 60 years and has built a reputation as the authoritative academic source on legal issues pertaining to the African continent. It therefore is appropriate that it has chosen to dedicate a special issue on the implementation of arguably one of the most important international legal instruments in Africa: 'The African Charter on Democracy, Elections and Governance at 10' (published as *Journal of African Law*, Volume 63, Supplement S1). A phenomenon that makes the special issue rich and diverse is that African democracy, elections and governance are dissected and discussed from different viewpoints. An additional significant feature of the special issue is that it is available in open access, making it accessible to a broad audience. The special issue presents an accessible resource even for readers with little prior knowledge of the subject.

The focus of this special issue – the African Charter on Democracy, Elections and Governance (African Governance Charter) – has had a significant normative and institutional impact since its adoption on 30 January 2007. It therefore is both apt and timely that a comprehensive assessment of the Charter is made just over a decade after its inception.

In the introduction to the special issue the guest editors, Micha Wiebusch, Chika Charles Aniekwe, Lutz Oette and Stef Vandeginste, first present a brief overview of the chronology of the Democracy

Charter as well as its impact to date. They also make reference to some of the other outputs that stem from the collaborative efforts that were instrumental to the realisation of this special issue. This includes admirable examples of how encouraging dialogue with practitioners – a perennial struggle in the academic world – has been a central objective. The main content of the special issue is split into six articles all considering different aspects of the African Democracy Charter, including its contextuality, instrumentality and impact.

The first substantive article, 'The African Charter on Democracy, Elections and Governance: Past, present and future', authored by the guest editors, begins by placing the Democracy Charter in its historical context, succinctly allowing the reader to orient themselves with the subject from the outset. It proceeds to consider the present and future dimensions of the Charter. It is helpful that they delve into various factors, including the legal context and the actor dynamics, which shape the present and future implementation of the instrument. Unfortunately, the socio-political context has not received the same degree of focus and thoroughness.

The subsequent article on 'The African Charter on Democracy, Elections and Governance as a justiciable instrument' by Justice Ben Kioko and Vice-President of the African Court on Human and Peoples' Rights (African Court) considers the involvement of individuals and non-governmental organisations (NGOs) in enforcing the African Democracy Charter in African courts. Justice Kioko develops his argument by expounding the case of *APDH v Côte d'Ivoire*.

'The African Charter on Democracy, Elections and Governance as a human rights instrument' by Professor Gérard Niyungeko, a former judge and president of the African Court, clarifies what a human rights instrument is. He further investigates the elements in the Democracy Charter that clearly relate to human rights and what the approach to the issue is of the African Court. The article is useful in the sense that there is a thorough breakdown of the instrumentality of the African Democracy Charter as a human rights instrument and of its provisions on issues of human rights. The only weakness is that it is not critical enough of the African Court's lack of opinion on the direct link to human rights issues of the Democracy Charter.

'Towards a right to resist gross undemocratic practices in Africa' by Professor Pacifique Manirakiza, former commissioner of the African Commission on Human and Peoples' Rights (African Commission), enquires as to whether the African Democracy Charter enshrines the right to resist gross undemocratic government changes. The chapter clearly distinguishes between the right to resist in international law

and the right to resist in African law. It reinforces the distinctiveness of the African context and further discusses the issues that have led to the increased number of uprisings in the last decade with a focus on the upholding of democracy.

The article 'The status and legitimacy of popular uprisings in the AU norms on democracy and constitutional governance' was written by Commissioner and Chairperson Solomon Dersso of the African Commission. The article stresses the availability of legal criteria to legitimise changes of government that resulted from uprisings. Criteria suggested by the author that may confer constitutional legitimacy on uprisings include the extent to which uprisings are a measure of last resort, the popularity of protestors and the peacefulness of the protests. Of significance is that the practicality of the criteria is tested on the Egyptian uprising of 2013, making the article thought-provoking and practical.

'Presidential term limits and the African Union' is a collaboration by Micha Wiebusch and Christina Murray, a Senior Adviser of the Standby Team of Mediation Advisers in the United Nations (UN) Department of Political Affairs. This article discusses the manipulation and unconstitutional changes of presidential term limits, a conundrum that is almost comparable to the spreading of an infectious disease in Africa. In light of the current political arena in Africa, this article undeniably is important and relevant. Readers can appreciate an in-depth history and analysis of the manipulation of term limits, as well as the solution-centred approach adopted by Wiebusch and Murray.

'The African Charter on Democracy, Elections and Governance at 10' offers a succinct introduction to and analysis of the African Democracy Charter, making it clear to the reader how the Charter was established, why it was established and its objectives. It highlights the present status of the instrument and predicts the future implementation and predicted challenges and successes going forward. The fact that the contributors represent leading experts in the field has ensured that the content is well informed, thought out and precise.

A general criticism would be that on occasion the later chapters fall foul of repeating previously-made arguments and on these, albeit rare, occasions it becomes more obvious that the special issue is comprised of a series of collective works as opposed to being a single piece. The special issue also fails to explicitly discuss other important aspects of the African Democracy Charter framework, such as poverty alleviation set in article 33 of the Charter and the fight against diseases such as Ebola, malaria and HIV set in

article 27. Given the gravity and scale of these issues, this comes across as a rather striking omission.

Overall the special issue will benefit policy makers and practitioners of African governance and politics, African law makers and advocates and scholars in the fields of international relations, politics, governance and law. An additional set of people who might benefit are those who have a more general interest in staying abreast with African development and governance. One of its many endearing features is the fact that the content of the special issue specifically aims to feed into and influence local, national and regional politics, law and governance systems.

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- Women's Rights Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Law 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*
- *African Human Rights Yearbook*

AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:
idemeyer1@gmail.com

All communications should be sent to the same address.

Books for review should be sent to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission must indicate that it has not already been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- Manuscripts will not be considered if the English is below standard. In case of doubt about the correct use of the English language, authors are advised to have their text checked by a native English speaker before submission.
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- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors need to provide their ORCID identifier. ORCID provides a persistent digital identifier that distinguishes them from every other researcher and, through integration in key research workflows such as manuscript and grant submission, supports automated linkages between them and their professional activities ensuring that their work is recognised. If authors do not have such an ID, they can register at the website <https://orcid.org/register>.
- Authors should supply a summary of their contributions (setting out the main *findings* of the article) of between 250 and 300 words, and at least four keywords.

- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.
- The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:
 - 1
 - 2
 - 3.1
 - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or <http://www.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for additional aspects of house style.

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2019

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 28 June 2020)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14*	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03*	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	54	46	49	30	42	34

* Additional declaration under article 34(6)

Ratifications after 31 December 2019 are indicated in bold