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Editorial

In 2020 we marked 20 years since the *Journal* first appeared in 2001 and, with its twenty-first volume, it has blossomed into full adulthood. This issue appears as the African human rights system, similarly, marks its evolution into greater maturity. In 2021 Africa celebrates 40 years since the adoption (on 27 June 1981) of the (Banjul) African Charter on Human and Peoples' Rights, and 35 years since its entry into force (on 21 October 1986). The second issue of the *Journal*, to appear in December 2021, will in major part be devoted to scholarship on the evolution, growth and contemporary relevance of the African Charter.

We noted in the previous issue that up to the end of 2020, a total of 517 contributions had been published, at an average rate of around 13 contributions per issue. This issue contains 24 contributions, significantly more than the average over the first 20 years. This increase now appears to be a trend, with 20 contributions in the last issue of 2020, and 24 contributions in the current issue. Compared to most comparable journals, this is a significant number. Three factors drive the publication of such a significant number of contributions. The first is the large and ever-increasing number of submissions we receive, indicating the need for a journal of this kind to be an outlet for scholarship by African scholars and on African-focused human rights topics. The second factor is our ambition to provide opportunities to emerging scholars, and to 'walk the extra mile' to bring a submission into a publishable format. The third is the dedication of our editorial team, in particular Ms Isabeau de Meyer, the *Journal*'s publication manager, which facilitates the processing of this large number of manuscripts.

A further sign of the maturation of the African regional human rights system appears from the evolution of the self-standing treaty body architecture devoted to the rights of children in Africa. Last year noted the 30-year milestone since the adoption (on 11 July 1990) of the African Charter on the Rights and Welfare of the Child (African Children's Charter). The *Journal* devoted part of its last issue of 2020

to the first of a two-part special focus section on children. This issue contains the second part of the special focus section, comprising an editorial by Dr Nkatha Murungi and six articles, bringing to ten the total number of articles appearing in the two special sections.

The articles in this issue of the *Journal* cover a broad range of thematic concerns, but all grapple with aspects of particular relevance to Africa and Africans.

The first four articles deal with aspects of the African human rights system, which remains one of the areas in respect of which the *Journal* invites and publishes numerous scholarly contributions. While the second two articles concern aspects dealt with explicitly in the African Charter (or its Women's Rights Protocol), the first (by Kariseb) examines the functioning of the African Commission's special procedure mechanisms. These special mechanisms are not explicitly provided for in the African Charter, and their establishment is an example of the progressive interpretation of its mandate by the African Commission on Human and Peoples' Rights (African Commission). Of the 42 state parties to the African Women's Protocol, only 17 have submitted a report under article 26 of the Protocol. Johnson's article identifies obstacles experienced by state parties in reporting to the African Commission. The inclusion of justiciable socio-economic rights is one of the most notable features of the African Charter. Amin interrogates the suitability of a 'teleological approach' to their interpretation. Mujuzi discusses the right to return to one's country, as provided for under article 12(2) of the African Charter.

The next three articles deal with issues of broader continental relevance. Atabongawung ponders the implication of a legally-binding instrument on business and human rights for the right to development in Africa. It should be recalled that the right to development has been made justiciable in the African Charter. Ntlama-Makhanya and Lubisi-Bizani explore the implications and relevance of the African Union's Agenda 2063 for women's access to justice. Against the background of the COVID-19 pandemic, Makwaiba contemplates how best the balance is struck between the individual's fundamental human rights and the protection of the public.

The sub-regional dimension remains of great relevance in Africa. Even as the movement towards regional integration accelerates, it is clear that effectively functioning regional economic communities form the building blocks for greater regionalism. As much as African sub-regional arrangements have come about as pivots for economic

development, they also play important roles in peace and security. Gichana makes a case for a greater institutional and normative role for sub-regional organisations in respect of coercive measures against states, under the mantle of the 'responsibility to protect'.

The *Journal* then turns to country-focused analyses. The countries covered are Kenya (with contributions by Igbayiloye and Bradlow; Bwire, Akech and Meroka-Mutua; and Koske and Milej); Nigeria (with articles by Eyongndi and Adebimpe); South Africa (with a contribution by Lasseko-Phooko and Mahomed); Tanzania (with Kaniki contributing an article); and Zimbabwe (with an article by Kasuso and Madebwe).

As is customary, the issue contains a section in which recent developments are discussed. Chamberlain and Khunou explore the far-reaching impact of a recent decision of the High Court of South Africa sitting in Pietermaritzburg, KwaZulu-Natal (*Mshengu v uMsunduzi Local Municipality*), on the realisation of the right of access to water for people living on farms. Kondo, Masike, Chihera and Mbonderi look at judicial decisions on Zimbabwe's constitutional socio-economic rights, culminating in the 2018 Supreme Court decision in *City of Harare v Mushoriwa*.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001, especially as anonymous reviewers. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Lukman Abdulrauf; Akinola Akintayo; Jay Aronson; Evelyne Asaala; David Bilchitz; Yonas Birmeta; Amanda Boniface; Ashwanee Budoo-Scholz; Martie Bradley; Lilian Chenwi; Solomon Dersso; Ebenezer Durojaye; Zozo Dyani-Mhango; Charles Fombad; Ilze Grobbelaar-Du Plessis; Charlemaine Husselmann; Ademola Jegede; Ade Johnson; Anton Kok; Admark Moyo; Gideon Muchiri; Mona Kareithi; Selemani Kinyunyu; Reina-Marie Loader; Bronwen Manby; Stuart Maslen; Justice Mavedzenge; Michelle Maziwisa; Ngcimezile Mbano-Mweso; Yolandi Meyer; Bonita Meyersfeld; Jamil Mujuzi; George Mukundi; Susan Mutambasere; Tarisai Mutangi; Satang Nabaneh; Zahara Nampewo; Carol Ngang; Chinedu Nwagu; Enyinna Nwauche; Tom Nyanduga; Anita Nyanjong; Benson Olugbuo; Richard Oppong; Thomas Probert; Annika Rudman; Ayo Sogunro; Lee Stone; Marko Scicevic; Ben Twinomugisha; Diya Uberoi; Annette van der Merwe; and Melissa Ziswa.

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Editorial: Continuation of the Special Focus to mark 30 years since the adoption of the African Children's Charter

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1 Background to the Special Focus

This special focus on the rights of children under the African Charter on the Rights and Welfare of the Child (African Children's Charter) is the second instalment of dedicated articles to mark 30 years since the adoption of the African Children's Charter in 1990. Along with articles published in the first edition of the Special Focus in the second issue of the *African Human Rights Law Journal* in 2020, the articles in this issue highlight the pertinent contributions of the Charter to key child rights developments and shaping of the child rights discourse in the African region.

The contribution of this Special Focus ought to be viewed in a wider context. The African continent has changed significantly over the course of the past three decades. These changes include significant political, economic, legal-normative and developmental milestones. These developments have implications for the context within which children's rights are implemented in the region. There certainly is a wider acceptance of human rights and democratic norms and standards, a growing demand for accountability of duty bearers for the respect and fulfilment of rights at both the regional and national levels, and an acceptance of the shared fate and responsibility of African countries to ensure mutual progress in the protection of rights

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in light of deeply integrated interests. These developments provide a backdrop for the assessment of the evolution of the protection of children's rights and welfare in the African region.

At the time of its adoption, and following hot on the heels of the adoption of the United Nations Convention on the Rights of the Child (CRC), the African Children's Charter was part of a bold shift in the child rights discourse at the global and regional levels. As the first regional treaty of its kind, the Children's Charter became the foundation stone for the evolution of a continental child rights discourse. It is difficult to attribute the significant developments related to child rights and welfare on the continent purely to the adoption of the Charter. Nevertheless, with a purposive review of the measures evoked by the African Children's Charter through a range of direct means and processes, such as normative articulation, direct engagements with key stakeholders and jurisprudence, it is possible to decipher the impact of the African Children's Charter on the status of child rights in the region.

During the course of 2020 a number of activities were undertaken, and initiatives launched across the continent to mark the 30-year milestone of the adoption of the African Children's Charter. The nature of these initiatives included research outputs and dialogue forums convened by or targeting a range of stakeholders, including the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), state parties to the African Children's Charter, civil society organisations, and children. The majority of these forums adopted a stock-taking approach on progress made in achieving the commitments under the Charter, with an emphasis on the gaps between the promise of the Charter and the lived realities of children in Africa. These reflections were relevant and timely. They also pointed to the need to anticipate new frontiers for the protection of children's rights, and the potential of the Charter as the principal normative source on these rights in the region, to adequately respond to emerging issues.

There is no doubt that the African Children's Charter has fostered the growth of a vibrant community of practice on children's rights and welfare in Africa, the hallmarks of which can be seen in, among others, the wide acceptance of normative instruments and standards on a number of child rights issues; a fledging jurisprudence from regional, sub-regional and national judicial and quasi-judicial forums; and the proliferation of organisations working to promote and protect children's rights at different levels. The African Children's Charter has also inspired a diverse and growing body of research on various aspects of children's rights across the continent; and the

increasing academic and literary engagement with the contents of the Charter. The articles in this Special Focus add to this burgeoning academic discourse on the rights of children in Africa.

As with the first edition, the articles in the current Special Focus emanate from a call for papers titled 'Symposium on the 30th anniversary of the adoption of the African Children's Charter: Visualising the African child in 2050', which was planned for July 2020. Although the symposium was ultimately called off because of COVID-19-related restrictions on movement and gatherings, research contributions were nevertheless received, resulting in a total of ten articles published in two batches.

2 Contents of the Special Focus

The current edition of the Special Focus contains six articles, covering a range of pertinent issues in the African Children's Charter. These include the right to education; protection from violence and abuse in the form of corporal punishment; addressing children's rights in the context of health emergencies such as the ongoing COVID-19 pandemic; climate change and children's rights; the protection of children's rights to privacy in a digital context; and an interrogation of the potential and impact of the Children's Charter in shaping and transforming the overall child rights discourse in the region. These issues span the spectrum of traditional child rights domains, as in the case of the rights to education and the elimination of corporal punishment, to the more contemporary and emerging issues affecting children, such as the evolving digital context of rights and its impact on the privacy rights of children, the growing recognition of the nexus between climate change and children's rights, particularly through the prism of intergenerational justice, as well as concerns emanating from the ongoing COVID-19 pandemic. While the first five articles are largely focused on a specific right or theme, the sixth article engages the overall context within which children's rights are implemented, beyond the direct normative stipulations of the African Children's Charter.

Khoza recalls the importance of the right to education as a 'gateway right' to the realisation of other rights of the child. She notes the linkages that have been made between education and development, albeit often from an economic as opposed to a rights point of view. She argues that the realisation of the right to education has been shown to play a positive role in the realisation of developmental goals, both for children, as individuals, and for communities as a whole. The article relies on the theories advanced by Sen and Nussbaum on

the concept of development, in terms of which development ought to be understood as consisting of far more than the measure of the gross national product (GNP). The article reviews the realisation of the right to education in Africa, as guaranteed in article 11(3) of the African Children's Charter, noting the opportunities that have been missed to ensure optimum education outcomes for children in the implementation of the article. The article, therefore, proposes the use of the freedoms and capabilities approaches proposed by the Sen and Nussbaum theories of development as a guide to the implementation of the right to education, so as to ensure better outcomes for children.

Fambasayi and Addaney explore the manner in which climate governance at the African regional level protects and promotes children's rights, taking into account the principle of intergenerational equity. They note that, while the concept of intergenerational equity is entrenched in the global and African regional framework on climate change, CRC and the African Children's Charter do not explicitly mention the concept. However, CRC and the African Children's Charter oblige states to take into consideration the views of children and protect their best interests in climate governance (to ensure intergenerational equity) and in achieving a sustainable future. Using doctrinal research methods, the article examines the regional legal and institutional responses to the cascading impacts of climate change and how they impact on children's rights to a sustainable future. They analyse the provisions of the African Children's Charter that have the potential to enhance the utility of the principle of intergenerational equity in the context of climate governance in Africa, and conclude that the principle of intergenerational equity, in theory, could be used as a tool for the protection and promotion of the rights and interests of children from the impact of climate change.

Nanima evaluates the role of the African Children's Committee in the protection of children's rights in the context of the COVID-19 pandemic. He argues that Africa has gained traction in recognising the rights of the child with an emphasis on his or her holistic environments. He notes that the Children's Committee can harness this traction gained in the response to the pandemic to improve the position of the child and achieve long-term aspirations under the Charter. The article evaluates the role of the Committee against the backdrop of three general environments that affect a child: a peaceful environment informed by adequately functional institutions that aid the implementation of all laws that improve the position of the child; an environment punctuated by emergencies such as armed

conflict, public health emergencies or humanitarian situations; and an environment where a child who has moved from humanitarian situations seeks solace, including internally-displaced persons, refugees and asylum seekers. Following the evaluation of the effects of the pandemic on the child, the article proposes a model that the African Children's Committee may in future adopt to respond to emergency situations affecting children.

Vohito traces the progress made towards the prohibition and elimination of corporal punishment of children in all settings in Africa, as influenced by the African Children's Charter. She notes that corporal punishment is the most common form of violence against children worldwide, including in Africa, and that it violates children's rights to respect for their human dignity and physical integrity. This is despite the recognition of every child's right to be protected from violence and ill-treatment as articulated in the African Children's Charter, and the fact that the African Children's Committee and other human rights bodies consistently examine states on their progress towards prohibiting and eliminating the practice. The article highlights some of the challenges experienced in the efforts to achieve the total elimination of corporal punishment in Africa in terms of the legal and social barriers to the success of the campaign, and the role of the African Children's Committee in this regard.

Singh and Power address the growing phenomenon of children's interaction with digital technology in Africa and its implications for the protection of their rights. They note that Africa is increasingly welcoming and participating in the technological revolution that is occurring the world over through a rise in access to the internet and other digital technologies. This reality means that children can engage, communicate, share, learn and develop in previously unimaginable ways, with fundamental changes to the way in which children exercise and realise their rights as a result of technology. The article argues that the safety and empowerment of children in their interaction with technology, whether on or off-line, and the respect, promotion, and protection of their privacy depends on the engagement of a variety of stakeholders. Drawing on recent international developments around children's rights in a digital environment, the article reflects on the roles of such key stakeholders in advancing the privacy rights of children. The article underscores the need for collaborative commitments from public and private decision makers, and parents, care givers and guardians and, importantly, that children are part of the solution to guarantee the protection of children's privacy in a digital context.

Chibwana reflects on key imperatives required for the child rights discourse to proactively address emerging challenges and changing child rights contexts on the African continent. Using positional reflexivity as the methodology, the article identifies six transformative promptings that engender a shift in the child rights discourse, and which ought to be considered seriously for the discourse to be more responsive to the protection as well as well-being of children on the African continent. These issues are a shift from child rights alterity to trans-disciplinarily; the strengthening of the promotional aspects of child rights; attention to the nexus between exponential urbanisation on the African continent and the fulfilment of children's rights; the rise of the information communication technology and implications on child rights; responsiveness to cross-border violations of children's rights, and the financing of children's rights using domestic resource mobilisation. Attention to these issues, he argues, would enhance the prospect of the attainment of the commitments under the African Children's Charter, and the longer term vision of children's rights in Africa.

3 Conclusion

Collectively, the articles featured in both issues of the *Journal* underscore the valuable contribution that the African Children's Charter has made towards the transformation of the child rights discourse in the African region, paving new paths for the development of child rights, challenging dominant narratives on the continent's progress towards an Africa fit for children, and propositioning new frontiers for the development of the child rights discourse into the future. As the last of the Special Focus editions marking the 30 years of the adoption of the African Children's Charter, this Special Focus strikes a balance between celebrating progress achieved so far, and highlighting the challenges for the protection of children's rights in the region over the next 30 years of the implementation of the Children's Charter.

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The Sen-Nussbaum diagram of article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the relationship between access to education and development

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Summary: *The right to education is an infinitely important right, the benefits of which are boundless. In the case of children, this position is even more emphasised. The right to education has been described as a 'gateway right', which leads to the realisation of a plethora of other rights. Although often done from an economics point of view, many authors have also written about the nexus between education and development. The realisation of the right to education, thus, has been shown to play a positive role in the realisation of developmental goals, both for children, as individuals, and for communities, as a whole. Regarding development, the works of Sen and Nussbaum have helped us to understand development in a marked way, which considers more than the gross national product. These authors, notably, introduced us to the language of 'unfreedoms' and 'capabilities'. With its focus on the rights of the African child, this article begins by tracing some of the notable*

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developments that have occurred since the adoption of the African Charter on the Rights and Welfare of the Child. Thereafter, the article focuses specifically on the realisation of the child's right to education in Africa, as guaranteed in article 11(3) of the African Children's Charter, through the lens of the theories of Sen and Nussbaum.

Key words: *children's rights; right to education; development in Africa; Sen and Nussbaum, African Children's Charter*

1 Introduction

This article proposes a 'Sen-Nussbaum diagram' of article 11(3) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) which, it argues, could contribute to the creation of 'an Africa fit for children'[1] as it focuses on the capabilities with which access to education should equip children. These capabilities are twice beneficial. First, they benefit the individual child who, through education, can develop personally. Second, they benefit the country, because the education of the individual, in most cases, allows that individual to contribute positively, in a number of ways, to the development of the nation. It is further argued that as an added benefit, the individual development of each country will result in the collective development of the African continent. Tomaševski has correctly stated that the government of each country is responsible for the realisation of the right to education of its children.[2] What is stressed here is that the collective development of our continent depends on each government realising this right for all its children.

According to a report by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) published in 2018, Africa is behind in terms of providing education,[3] and that the backlog may be attributed to a number of factors.[4] Most common among

1 This wording is borrowed directly from African Children's Committee *African Agenda for Children 2040: Fostering an Africa fit for children* (Agenda 2040) (2016).

2 K Tomaševski 'Human rights obligations: Making education available, accessible, acceptable and adaptable' (2003) 3 *Right to Education Primers* 8.

3 See discussion at n 2.

4 UNESCO often reports on these issues. As of 2018, it reported that more than 50% of the world's population of out-of-school children are in sub-Saharan Africa; furthermore, sub-Saharan Africa has the highest number of out-of-school children at the primary, lower secondary, and upper secondary levels. Lastly, in terms of proficiency and actual learning, Africa has the lowest percentages of children achieving minimum proficiency at every level. See UNESCO Institute for Statistics 'New methodology shows that 258 million children, adolescents and youth are out of school' Fact Sheet 56 (September 2019) UIS/2019/ED/FS/56

countries are low retention rates; high drop-out rates; bad quality of education;[5] and barriers to access to education, such as child marriage.[6] Additionally, data consistently shows that the enrolment rates, even when they are relatively low, are always higher than the completion rates.[7] Thus, instead of focusing only or mainly on access, countries need to strengthen their efforts to retain learners in school and decrease drop-out rates. In this regard, they must first realise that 'access' to education is an element of, not tantamount to, the 'right' to education. In other words, providing access to education is not, and has never been, sufficient. Children must be able to access an education of good quality, at a safe and well-equipped institution. Tomaševski, adds that a positive approach to fulfilling a child's rights to access quality education should be futuristic.[8] At the end of each grade, and at the end of the schooling career, the child must be in a more enriched position, and be a step closer to reaching their full potential. In other words, education must equip each child with the capabilities needed in order to live a full life, which the child has reason to value. It is proposed that ensuring this will yield positive results for the development of African countries and, eventually, hopefully, the African continent as a whole.

This article proposes that the right to education should be viewed through the lens of the Sen-Nussbaum diagram, which would have state parties offering access to an education that equips children with the necessary capabilities. To this end, the article begins by giving a synopsis of the efforts employed and what opportunities have been missed in relation to the realisation of the right to education for children on the continent. Thereafter, the article offers an account of the past and current *status quo* of the right to education, before it moves to considering some efforts that can be employed in the future. Subsequently the developmental theories of 'freedoms' and 'capabilities', as developed by Sen and Nussbaum, are discussed, so as to introduce the reader to these theories before the diagram is drawn. Finally, the article draws the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter by applying the theory of capabilities to the right to education, and showing the benefits of approaching this right in this manner.

7; UNESCO 'Inclusion and education: All means all' *Global Education Monitoring Report 2020* (2020) 204 212.

5 UNESCO Institute for Statistics (n 4) 15.

6 UNESCO 'Inclusion and education' (n 4) 51.

7 See eg UNESCO (n 4) 212-213.

8 Tomaševski has written about 'rights "through" education'. See Tomaševski (n 2) 12. The right achieved through the realisation of the right to education on which this article focuses is the right to development.

2 Thirty years of impact: A synopsis of the developments in the region since the adoption of the African Children's Charter

The 30-year anniversary of the adoption of the African Children's Charter presents a unique opportunity to reflect on past achievements as well as to forecast what can still be achieved, through the implementation of the Children's Charter. This part, then, offers a synopsis of the strides made in terms of children's rights to education since the adoption of the African Children's Charter.[9]

The African Charter on Human and Peoples' Rights (African Charter) does not consider children's rights, except 'as an afterthought in article 18(3)'.[10] It does, however, protect the right to education, which Viljoen describes as the right most 'likely to be more beneficial to children than other members of society'.[11] The lack of protection of children's rights and, more specifically, the bare protection of their right to education, then, necessitated the elaborate protection of the right to education that is found in the African Children's Charter.[12]

The need to adopt a region-specific instrument on the rights of the child 'cannot be overemphasised',[13] and the African Children's Charter is the culmination of the need to develop such a treaty.[14] The contents of the African Children's Charter were informed both by what is contained in the Convention on the Rights of the Child (CRC), as well as what is left out.[15] Regarding the right to education,

9 Of the 50 states that have ratified the African Children's Charter, four have entered reservations. See https://www.acerwc.africa/ratifications/table/ (accessed 22 June 2021). Only Sudan's reservation is in relation to the right to education. Sudan entered reservations on arts 10, 11(6) and 21(2). See https://www.acerwc.africa/reservations/ (accessed 22 June 2021). Art 11(6) affords children who become pregnant the right to return and complete their schooling.

10 F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 204-205.

11 Viljoen (n 10) 205.

12 The Convention on the Rights of the Child (CRC) has a total of 14 protection points for the right to education; the African Charter on the Rights and Welfare of the Child (African Children's Charter) has 18.

13 MG Nyarko & HM Ekefre 'Recent advances in children's rights in the African human rights system: A review of the African Committee on the Rights and Welfare of the Child in the *Talibés* case' (2016) 15 *Law and Practice of International Courts and Tribunals* 386.

14 E Durojaye & E Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the *Nubian Children* communication' (2012) 12 *African Human Rights Law Journal* 565.

15 BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 128.

while CRC contains two articles dealing with the right to education,[16] the African Children's Charter consolidates all aspects under one article.[17] While a number of the provisions in both treaties overlap, the African Children's Charter has six provisions that are not included in CRC.[18] Two important provisions for increased access to and inclusion in education are those pertaining to state parties taking measures in relation to female, gifted and disadvantaged children,[19] and also allowing learners who fall pregnant to return and continue with their education when they are ready.[20] Especially given that child marriage, pregnancy and poverty are barriers precluding children from accessing education in Africa, these protections are important for African children.

Another important aspect of the African Children's Charter is the best interests of the child principle. The African Children's Charter states that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.[21] Boshoff lists this particular provision as one of the 'bedrocks' of the African Children's Charter.[22] This means that, even when dealing with the right of the African child to education, all stakeholders must act in a way which is in the best interests of the child. It is argued here that by applying the Sen-Nussbaum diagram to the realisation of article 11(3), the best interests of the child will be protected. This is because it argues for the realisation of an education in which access is granted immediately but the benefits of that education for the child are lifelong.

Because of the African Children's Charter, the continent has certainly come a long way in terms of protecting children and their rights. However, there is still a long way to go, and many more lives to reach.[23] Unfortunately, in terms of the right to education, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) seems not to have made as many strides as it has in other areas.[24] This is particularly unfortunate given how Africa

16 Arts 28 & 29 CRC.
17 Art 1 African Children's Charter.
18 Arts 11(2)(c), (e), (f), (h), 11(3)(e), 11(6) African Children's Charter.
19 Art 11(3)(e) African Children's Charter.
20 Art 11(6) African Children's Charter.
21 Art 4(1) African Children's Charter.
22 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 32.
23 Mezmur (n 15) 147-148.
24 Eg, the African Children's Committee has published six General Comments, none of which deal (exclusively and extensively) with the right to education. However, it is worth noting that the Committee in General Comment 5 has written that '[t]he purpose of this General Comment is not to undertake an exploration of the expansive nature of the state obligation to provide for the right of the child to education, as enshrined in Article 11 of the Charter (which could form the

and, in particular, sub-Saharan Africa, continuously performs poorly in terms of enrolment, progression and quality.[25] Nevertheless, it would be incorrect to claim that the African Children's Committee has done absolutely nothing for the right to education. In a selection of the communications that it has heard, the Committee has spent some time contemplating the right to education.[26] However, the extensive consideration within communication decisions begs the question as to when, if ever, the Committee would have dealt with the issues related to the right to education, or whether these selected communications had not reached it.[27]

Thus, this 30-year anniversary presents a special opportunity for the African Children's Committee to (re)consider focusing some of its future efforts, perhaps by way of conducting studies or drafting a General Comment, towards the African child's right to education. The African Children's Committee has also admitted that it has not '[undertaken] an exploration of the expansive nature of state obligations to provide for the right of the child to education, as enshrined in article 11 of the Charter (which could form the basis of a self-standing General Comment)'.[28]

To this end, the next part of the article will discuss the right to education, particularly in the context of the African Children's Charter and the lived reality of the African child. Thus, a more

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basis of a self-standing General Comment)'. See African Committee of Experts on the Rights and Welfare of the Child 'General Comment No 5 on "State party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection"' (2018) 27. The African Children's Committee has undertaken three continental studies, and published 14 statements/Communiqués, none of which dealt (exclusively) with the right to education.

25 UNESCO (n 4).

26 The African Children's Committee has received 16 communications in total, 11 of which were decided on merits. Of those 11, five unpack the right to education. These are Communication 11/2005, *Michelo Hansungule & Others v Government of Uganda*; Communication 2/2009, *Institute for Human Rights and Development in Africa and Open Justice Initiative (on behalf of Children of Nubian Descent in Kenya v Government of Kenya*; Communication 3/Com/001/2012, *Centre for Human rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal*; Communication 55/Com/001/2015, *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v Government of the Republic of Sudan (Sudanese Child)*; and Communication 7/Com/003/2015, *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Government of the Republic of Mauritania* (*Said and Yarg Ould Salem*).

27 For a detailed discussion on what the African Children's Committee has said on the right to education, within the received communications, the communications mentioned above may be consulted. To date, the Committee has not yet released a right to education-specific document, such as a General Comment, statement or study.

28 African Children's Committee 'General Comment No 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (article 1) and Systems Strengthening for Child Protection' (2018) 27.

detailed discussion of the Committee's contribution to the realisation of the right to education for the African child will be offered below.

3 Right of the African child to an education: The past, the present and the future of article 11(3) of the African Children's Charter

This part begins with an outline of the right before it moves to unpacking some of the wording of article 11(3). Thereafter, the part discusses the 'past and the present' of the realisation of the right, through the use of data to highlight the past and the current *status quo*. Finally, the part discusses some tools and considerations that can be used in the 'future'.

The right to education is the Mitochondrial Eve of human rights.[29] This is because it is a 'multiplier' right,[30] the realisation of which results in the enhanced enjoyment of all other rights.[31] This right also enjoys protection in a number of instruments, and is 'firmly rooted in an array of international conventions and treaties',[32] the African Children's Charter included.[33] It is an independent right,[34] which has been characterised as both a civil and political right as well as, and more commonly, a socio-economic right.[35] It also is a gateway right,[36] through which economic, social, and political benefits accrue to an individual,[37] as well as 'an indispensable means of realising other human rights'.[38] Onuora-Oguno holds that the right to education is important for both (individual) human development, as well as the development of Africa.[39] To this end, the article argues that the

29 The term 'Mitochondrial Eve', also called the 'Eve Gene', refers to 'the most historically recent female from which humans can trace their ancestry … it is used "only to refer to the most recent female genetic ancestor of a species"'. In other words, the Mitochondrial Even is one female to whom we (current) humans trace their ancestry. See EKF Chan et al 'Human origins in a Southern African palaeo-wetland and first migrations' (2021) 592 Nature 185-188. See also S Adamson 'The Eve Gene' 10 August 2020, https://shadesofnoir.org.uk/the-eve-gene/ (accessed 22 June 2021).
30 Tomaševski (n 2) 10.
31 As above.
32 SJ Klees & N Thapliyal 'The right to education: The work of Katarina Tomasevski' (2007) 51 *Comparative Education Review* 500.
33 Art 11 African Children's Charter; Boshoff (n 22) 35.
34 ESCR Committee General Comment 13: The Right to Education (Art 13) E/C.12/1999/10 (8 December 1999) para 1.
35 Tomaševski (n 2) 8.
36 L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *Potchefstroom Electronic Law Journal* 101.
37 C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development* 163.
38 ESCR Committee (n 34) para 1.
39 AC Onuora-Oguno *Development and the right to education* (2019) vii.

realisation of the right to education for the African child is an integral part of, and positive means for, the development of Africa.

The African Children's Charter protects the right of every child to education,[40] and reflects the obligations relating to the protection of the right to education. Thus:[41]

> States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
> (a) provide free and compulsory basic education;
> (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
> (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
> (d) take measures to encourage regular attendance at schools and the reduction of dropout rates;
> (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

The first aspect that stands out from this provision is the language used. The African Children's Charter refers to 'basic education',[42] as opposed to 'primary education', as CRC does.[43] In this regard, Murungi notes that the meaning of the term 'basic education' is 'not agreed upon amongst stakeholders'.[44] This indeed is true as the term has been defined in different ways.[45] For example, Murungi makes reference to the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs (Jomtein Declaration),[46] citing it as the 'origins' of the term 'basic education'.[47] Coomans posits that 'basic education' refers to the content of education.[48] However, Woolman and Fleisch, on the one hand, have defined basic education with reference to a period of schooling and, on the other hand, defined it with reference to a standard of schooling.[49]

40 Art 11(1) African Children's Charter.
41 Art 11(3) African Children's Charter.
42 Art 11(3)(a) African Children's Charter.
43 Art 28(1)(a) CRC.
44 LM Murungi 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 *Potchefstroom Electronic Law Journal* 3160.
45 C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 565-566.
46 UNESCO *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (Jomtein Declaration) (1990).
47 Murungi (n 44) 3161.
48 F Coomans 'In search if the core content of the right to education' in A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 226; Murungi (n 44) 3161.
49 S Woolman & B Fleisch *Constitution in the classroom: Law and education in South Africa 1994-2004* (2009) 127.

Primary education also is not universally defined, but it is often equated to basic education.[50] One of the explanations for this can be found in the positions held in the Jomtein Declaration as well as the account given by Ssenyonjo.[51] The Jomtein Declaration defines basic education in relation to primary education by stating that 'the main delivery system for the basic education of children … is primary schooling'.[52] Similarly, Ssenyonjo posits that primary education, which UNESCO has defined as 'the first four to seven years, usually six, after pre-primary school (ISCED 1)',[53] 'focuses on imparting basic learning skills, including literacy and numeracy'.[54] When considering the debate on the differences between basic and primary education in light of Ssenyonjo's position, the conflation is understood. Moreover, the fact that the African Children's Charter refers to basic, secondary and higher education[55] can be used to reasonably deduce that the drafters intended to speak of the primary level of schooling when they wrote the contents of article 11(3)(a). A possible further argument is that, by specifically referring to compulsory and free basic education, the African Children's Charter sets a higher standard in terms of the *quality* of the primary education to which children are entitled, as the provision can be interpreted as referring to both a period and standard of schooling.

The past and present state of affairs in relation to the realisation of the right to education for children in Africa is disappointing.[56] Consistently, Africa performs worse than the other regions in terms of educating its children. In fact, the UNESCO Institute for Statistics has written that 'of all regions, sub-Saharan Africa has the highest rates of education exclusion'.[57] At all levels of schooling there are millions of children of school-going age who are out of school. In 2016 sub-Saharan Africa accounted for more than half of the global total of out-of-school children,[58] which remains the current *status quo*.[59] Currently, about one-fifth (approximately 19 per cent)

50 Murungi (n 44) 3161.
51 UNESCO (n 46) 6, art 5; M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 377.
52 UNESCO (n 46) 6, art 5.
53 UNESCO Institute for Statistics 'International Standard Classification of Education (ISCED)' (2011) 17 21.
54 Ssenyonjo (n 51) 377; Murungi (n 44) 3161.
55 Arts 11(3)(a)-(c) African Children's Charter.
56 For information on the past situation, see eg UNESCO Institute for Statistics and Education for All Global Monitoring Report 'A growing number of children and adolescents are out of school as aid fails to meet the mark' Policy Paper 22/Fact Sheet 31 (July 2015). The discussion of the current situation is reflected in n 42.
57 UNESCO Institute for Statistics 'Education in Africa' https://uis.unesco.org/en/topic/africa/education-africa (accessed 23 June 2020).
58 UNESCO Institute for Statistics 'Leaving no one behind: How far on the way to universal primary and secondary education' Policy Paper 27/ Fact Sheet 37 (2016) 3.
59 UNESCO (n 4) 7.

of children between the ages of six and 11 years, more than one-third (approximately 37 per cent) of children between the ages of 12 and 14 years and more than two-thirds (approximately 68 per cent) of children between the ages of 15 and 17 are out of school in Africa.[60] It is also estimated that approximately nine million girls and six million boys who are currently out of school in Africa will never attend school.[61]

As mentioned above, the African Children's Committee, on its own admission, has not dealt in detail with the right to education for the child.[62] In General Comment 5, however, the Committee at least mentions that legislation enunciating the right of the child to an education is an important part of state parties' implementation obligation.[63] The Committee notes that legislation is an important foundation of the obligation to provide free and compulsory basic education, whereby 'free' also means 'free of collateral charges'.[64] It is also important for state parties to legislate on learner pregnancy, expulsion, corporal punishment at schools and the accreditation and functioning of private learning institutions.[65]

What is most interesting in its General Comment 5 is that the African Children's Committee reiterates the absence of the qualifiers of 'progressive realisation' and 'to the maximum extent of available resources' in article 1 of the Charter, which the Committee writes was intentional.[66] The Committee goes further to say that, while it is aware of and notes the 'fiscal realities' in Africa, the Charter standards were 'set intentionally – they do not allow state parties to claim that they do not have any resources for the implementation of social and economic goods for the fulfilment of children's rights'.[67] Therefore, it urges all countries, whatever their fiscal realities, to spend at least 9 per cent of their gross domestic product (GDP) on education.[68]

The African Children's Committee also noted that the best interests of the child must be considered in the education setting,[69] and that

60 UNESCO Institute for Statistics (n 57); UNESCO Institute for Statistics (n 4) 7.
61 UNESCO Institute for Statistics (n 57).
62 It is worth noting, however, that the 2014 theme for the Day of the African Child was 'A child-friendly, free and compulsory education for all children in Africa'. See https://www.acerwc.africa/day-of-the-africa-child-dac. https://www.acerwc.africa/Latest%20News/eulogy-to-dr-azza-el-ashmawy/ (accessed 21 June 2021).
63 African Children's Committee (n 28) 28.
64 As above.
65 African Children's Committee (n 28) 28-29.
66 African Children's Committee 6.
67 African Children's Committee 6-7.
68 African Children's Committee 7.
69 African Children's Committee 12.

states must remove barriers to education, through providing free, quality pre-primary and primary education.[70] These two particular considerations have also come through in the Committee's decisions on the five communications that deal with the right to education. In the *Ugandan Children* decision the Committee held that the drafters of the African Children's Charter, 'being fully aware of the important role of education for creating an Africa fit for children, have crafted a very comprehensive and detailed provision on the right to education'.[71] This is a direct reference to the *African Agenda for Children 2040: Fostering an Africa fit for children* (Agenda 2040).[72] In the *Nubian* decision the Committee highlighted that article 11(3)(a) 'necessitate[s] the provision of schools, qualified teachers, equipment and the well-recognised corollaries of the fulfilment of this right'.[73] Thus, it emphasised the importance of education provisioning. In the *Talibés*, *Sudan* and *Said Ould Salem and Yarg Ould Salem* communications[74] the Children's Committee endorses the 4-A scheme of the right to education, which is later discussed in more detail. Furthermore, in the *Sudan* communication the Committee also condemns the violation of the right to higher education.[75] In the *Said and Yarg Ould Salem* communication the Committee also highlighted that a deprivation or exclusion from education is tantamount to discrimination against the child.[76]

Progressive decisions in communications notwithstanding, the current *status quo* remains concerning, especially because Africa has the youngest and fastest-growing demographic in the world.[77] As the school-going population grows, so the demand for education grows with it.[78] That is why the right to education in the context of Africa requires urgent attention. Having the highest out-of-school rates[79] means that there is much potential we are neither building nor tapping into. Both the high numbers of out-of-school children in Africa, as well as their consistency, present a cause for concern which must be prioritised moving forward.

70 African Children's Committee 41.
71 Ugandan Children (n 26) para 63.
72 African Children's Committee.
73 *Nubian Children* (n 26) para 63.
74 *Talibés, Sudanese Child and Said and Yarg Ould Salem* communications (n 26).
75 *Sudanese Child* (n 26) paras 98-99.
76 *Said and Yarg Ould Salem* (n 26) para 74.
77 UNICEF *Generation 2030 Africa 2.0: Prioritising investments in children to reap the demographic dividend* (2017) 6.
78 UNESCO Institute for Statistics (n 57).
79 UNESCO Institute for Statistics (n 4) 7.

As stated earlier, the right to education is both an individual right as well as a gateway right.[80] To this end, Tomaševski's immortal words are echoed here:[81]

> The importance of the right to education reaches far beyond itself. Many individual rights are beyond the grasp of those who have been deprived of education, especially rights associated with employment and social security. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.

Onuora-Oguno describes the right to education as 'one of the most important rights of our lifetime',[82] and echoes the sentiments of Tomaševski and the Committee on Economic, Social and Cultural Rights (ESCR Committee), that the realisation of the right to education is important for the realisation of other rights.[83] Tomaševski correctly notes that 'governments are individually obligated to secure human rights for their own population'.[84] Furthermore, because of the collective nature of the right and its benefits, each government also plays an important role in ensuring that education is a public good, and schooling is a public service.[85] The African Children's Committee echoes the same sentiments as it has stated that education is 'a public good, the quality of which should be assured'.[86] In addition to these considerations, the African Children's Charter also serves the continent through offering a protection of the right to education which 'provides most of the elements which are needed in respect of the children's right to education',[87] including some considerations directed at the girl child.[88]

When realising the right to education, state parties should adhere to the 4-A scheme, which was developed by Tomaševski,[89] adopted by the ESCR Committee,[90] and endorsed by the African Children's Committee.[91] In terms of the 4-A scheme, education must be

80 ESCR Committee (n 34).
81 Tomaševski (n 2) 10.
82 Onuora-Oguno (n 39) vii.
83 As above.
84 Tomaševski (n 2) 8.
85 Tomaševski 9 15.
86 African Children's Committee (n 1) 32.
87 Boshoff (n 22) 35.
88 African Children's Charter art 11(3)(e); Boshoff (n 22) 35.
89 See UN Economic and Social Council 'Preliminary report of the Special Rapporteur on the right to education, Ms Katarina Tomasevski, submitted in accordance with Commission on Human Rights Resolution 1998/33' E/CN.4/1999/49 (13 January 1999) paras 50-74; see also, generally, Tomaševski (n 2).
90 ESCR Committee (n 34) paras 6(a)-(d).
91 The African Children's Committee has endorsed Tomaševski's 4-A scheme in the following communications (n 26): *Talibés* para 46; *Sudanese Child* para 96; *Said*

available, accessible, acceptable and adaptable.[92] Tomaševski further explains that the elements of availability and accessibility refer to 'rights to education' while acceptability and adaptability refer to 'rights in education'.[93] Furthermore, in terms of making education available, the government must establish or allow others to establish institutions of learning. In terms of access, at least primary school must be made free and compulsory. The element of acceptability refers to the quality of the education which governments make available and accessible. Finally, in terms of adaptability, governments must ensure that the established schools offer quality education that is able to adapt to the (changing) needs of children.[94]

The continent is facing issues regarding all four elements of the 4-A scheme.[95] However, if embraced as an aid, the 4-A scheme can assist state parties in guiding their policies. One of the most important facts which the 4-A scheme reiterates is that 'access' to education is not tantamount to, but a component of, the 'right' to education. Therefore, whereas access to education is created, through the establishment of education institutions and the removal of barriers to access to education, it remains a means, not an end. Access to education is a vessel that must be filled with content that is of a good quality. Thus, state parties also have an obligation to improve the quality of education. Access alone, even if it becomes universal, is insufficient. The African Children's Committee is not blind to this fact. In Agenda 2040, for example, the Committee admits that, while the primary enrolment rates have improved, primary and secondary completion rates have not.[96] Improvement to enrolment rates notwithstanding, access to education and, more especially, completion of the education cycles remain major challenges in Africa.[97] Furthermore, the quality of education in Africa currently is not good enough to meet the demands of the labour markets.[98]

It is encouraging that the African Children's Committee dedicated an aspiration to the right to education in Agenda 2040.[99] Through this aspiration, the Committee envisages an Africa in which every child receives an education.[100] By 2040, the Committee hopes that

and Yarg Ould Salem para 74.
92 UN Economic and Social Council (n 89) para 50; ESCR Committee (n 34) 5 13.
93 Tomaševski (n 2) 12.
94 Tomaševski (n 2) 14-15.
95 Onuora-Oguno (n 39) 2-3.
96 African Children's Committee (n 1) 3.
97 Onuora-Oguno (n 39) 2.
98 African Children's Committee (n 1) 31; Onuora-Oguno (n 39) 3.
99 African Children's Committee (n 1) Aspiration 6.
100 As above.

'every child starts and completes free, quality, primary and secondary education that leads to relevant and effective learning outcomes'.[101]

In addition to the rights to education and in education, there are also rights 'through' education. Tomaševski mentions the ending of child marriage, child labour and child soldiering.[102] The African Children's Committee mentions that 'education is central to enhancing a child's full potential. The lack of education is a life sentence of poverty and exclusion.'[103] The Committee has thus highlighted that, through the realisation of the right to education, children can be freed from the cycle of poverty. This particular point of freedom from poverty will be further developed in the subsequent part. It should also be mentioned that, whereas the Committee has been criticised for not taking a gender-sensitive approach to their interpretation of the rights in the African Children's Charter,[104] it is encouraging that they have paid attention to the unbalanced struggles to access education between girls and boys. To this end, the Committee in Aspiration 6 also writes that, going forward, boys and girls should have equal opportunities and access to primary and secondary education.[105]

The right to education is the Mitochondrial Eve of human rights and is particularly phenomenal because of its multiple dual statuses. It is both a civil and political right as well as a socio-economic right, an individual as well as collective right, and an independent as well as a gateway right.[106] Although there is a plethora of rights that can be realised through the realisation of the right to education, this article focuses only on (the capabilities aspect of) the right to development. The following part will discuss the topic of development, before delving into a discussion of the nexus between the education of the African child and development in Africa.

101 African Children's Committee (n 1) 32.
102 Tomaševski (n 2) 12.
103 African Children's Committee (n 1) 31.
104 Durojaye & Foley (n 14) 576; Nyarko & Ekefre (n 13) 392.
105 African Children's Committee (n 1) 32.
106 UNESCO et al 'SDG4 – Education 2030: Framework for Action' in Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4 (ED-2016/WS/28) (December 2015) para 10.

4 'WWSAND'; what would Sen and Nussbaum do: Development of African children and the continent through the lens of freedoms and capabilities

The theme of development is on the lips of most, if not all, supra-national and national law and policy bodies. There are a number of goals that have been formulated, so as to ensure (sustainable) development in the future.[107] This part of the article focuses on the idea of development, as developed by Sen and Nussbaum.[108] Their 'capabilities' theories are discussed in detail here so that, in the following part, the nexus between education and development can further be discussed, through the formulation of the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter.

Sen and Nussbaum have argued that deprivations, which manifest as poverty and inequality, indicate conceptual, ethical, scientific, technical and, most importantly, political failures.[109] According to Sen and Nussbaum, 'the concept of development is inherently value laden in that it yields criteria for what counts as good social change, "beneficial alteration", and, most fundamentally, "the achievement of a better life" for human beings'.[110]

This concept of development is centred around the concept of capabilities.[111] Importantly, both Sen and Nussbaum have stated from the beginning that the capabilities approach goes hand in hand with rights.[112] For Sen, rights are the central goals of public policy[113] and, for Nussbaum, rights play a prominent role in the account of which capabilities are most important.[114] Nussbaum notes that the language of rights raises a number of questions, such as who the bearers are; who must provide for them; and whether they are individual or collective.[115] For Nussbaum, the language of rights, therefore, 'is not especially informative, despite its uplifting

107 See African Union Commission Agenda 2063; African Children's Committee (n 1).
108 It should be borne in the mind that, while development is a broad field, as mentioned in the introduction, the focus of this article is on the works of Sen and Nussbaum on the developmental theory of 'capabilities'.
109 DA Crocker 'Functioning and capability: The foundations of Sen's and Nussbaum's development ethic' (1992) 20 *Political Theory* 584.
110 Crocker (n 109) 585.
111 MC Nussbaum 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 275.
112 Nussbaum (n 111) 275 277.
113 A Sen 'Rights and capabilities' in T Honderich (ed) *Morality and objectivity: A tribute to JL Mackie* (1985) 130.
114 Nussbaum (n 111) 277.
115 Nussbaum (n 111) 273-275.

character, unless its users link their references to rights to a theory that answers at least some of these questions'.[116] This is why this article argues that the child rights and capabilities approaches can be seen as complementing each other and, with specific regard to the right to education, this complementarity manifests as the proposed 'Sen-Nussbaum diagram of article 11(3)'.

Sen and Nusbaum also note that there are other approaches to measure development, such as the gross national product (GNP) per capita approach and the utility approach.[117] Nussbaum describes the GNP per capita approach as 'crude', as it may give a country a high score for development, even though there are high rates of inequality; therefore, it does not consider each person.[118] Furthermore, it provides no information about the elements of human life that are important for measuring its quality, such as educational opportunities.[119] The Benthamite utility approach also presents problems as it measures the quality of life in terms of the satisfaction of desire and preference, but in doing so regards the social total as an aggregate. Therefore, this approach accepts a situation whereby the social total is high, but some individuals still suffer; thus, it is also linear and does not consider the multiple factors on the quality of life,[120] including access to education.

Arguably, the most notable footprint left by Sen can be found in the Human Development Report of 1990 of the United Nations Development Programme (UNDP),[121] much of which was influenced by Sen.[122] This particular report for the first time defined 'national development' in relation to 'human development', 'which in turn is conceived in relation to the formation, expansion, and use of "human capabilities"'.[123] In 1993 the UNDP further used Sen's work in order to develop the 'human development index' which uses the concept of capabilities to assess people's quality of life within a nation.[124]

116 B Williams 'The standard of living: Interests and capabilities' in G Hawthorn (ed) *The standard of living* (1987) 94 100; Nussbaum (n 111) 275. It is worth noting here that other authors have also discussed (the language of) human rights outside of the legal discipline. Eg, Waltz has written that human rights can be analysed as a philosophical or legal concept. See S Waltz 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly* 438.

117 Crocker (n 109) 585-586; Nussbaum (n 111) 280-281.

118 Nussbaum (n 111) 280.

119 Nussbaum 280-281.

120 Nussbaum (n 111 above) 281.

121 United Nations Development Programme (UNDP) *Human development report* (1990).

122 Crocker (n 109) 587.

123 UNDP (n 121) 10; Crocker (n 109) 587.

124 UNDP *Human development report* (1993) 10. Nussbaum has argued that the consideration of capabilities within the 1993 Report was clearly influenced by Sen. See Nussbaum (n 111) 275.

With regard to Sen's writings, the focus of this article is on his *magnum opus, Development as freedom*.[125] In the opening line of this work Sen describes development as 'a process of expanding the real freedoms that people enjoy'.[126] He posits that the GNP of any country can contribute to the freedom of its people; however, freedom is also influenced by socio-economic and civil and political arrangements, such as the provision of education facilities.[127] He further writes that 'development requires the removal of major sources of unfreedom' such as poverty.[128]

According to Sen, 'freedom' involves the processes that allow freedom of action and decision as well as the opportunities that people have; 'unfreedom', then, can arise from inadequate processes or opportunities.[129] The creation of opportunities, for example, the provision of public education and public health, contributes to the economic development of a country.[130]

Sen holds that many people around the world suffer from a variety of unfreedoms.[131] Particularly in Africa, the unfreedom of poverty is of great concern. Recalling that, 'the lack of education is a life sentence to poverty',[132] realising the right to education for the African child directly and positively impacts the development of that child, as well as that child's role in the development of their country. Whereas poverty is an unfreedom, and unfreedoms stand in the way of development,[133] education is a socio-economic arrangement that will result in the growth of a country's development. In particular, the improvement of the quality of basic education directly improves quality of life and increases the ability to earn an income.[134]

Sen also uses the idea of freedom as a portal to the theory of capabilities. Greater freedom enhances the capability of someone to help themselves as well as influence the world.[135] He posits that basic freedoms, such as education, are the 'building blocks for the expansion of capabilities'.[136] As unfreedoms, poverty and inequality

125 A Sen *Development as freedom* (1999).
126 Sen (n 125) 3.
127 As above.
128 As above; A Sen 'Development as freedom' in JT Roberts et al (eds) *The globalisation and development reader: Perspectives on development and global change* (2014) 526.
129 Sen (n 125) 3; Sen (n 128) 527.
130 Sen (n 128) 533.
131 Sen (n 128) 526.
132 African Children's Committee (n 1) 31.
133 Sen (n 128) 526.
134 Sen 539.
135 Sen 528.
136 Sen 527.

negate the capability of a person to live a meaningful life.[137] Education, however, as a socio-economic arrangement, can free children from the unfreedoms of poverty and inequality.

Although their ideas on what Crocker terms 'an innovative and promising "capabilities ethic"' converge, and have often been viewed as one,[138] some differences in their constructions are notable.[139] Most notably, Nussbaum argues that Sen approaches capabilities in a very general sense,[140] while she produced 'an explicit account of the most central capabilities that should be the goal of public policy'.[141] This account will later be discussed in greater detail.

Nussbaum's work is particularly important for the way in which it developed Sen's formulation of the capabilities approach to development. Nussbaum's developments of the theory of capabilities 'rely heavily on the notions of human dignity and agency'.[142] Furthermore, Nussbaum is also interested in the parts of the theory that Sen left out, namely, what levels of provision should be seen to in order to ensure that rights, such as the rights to education and health, are realised.[143] Therefore, for Nussbaum, governments have a duty to create opportunities through which people can pursue a life of dignity, which can be achieved through the provision of at least the threshold of a number of listed capabilities.[144] Nussbaum also holds explicitly that human rights and capabilities are very closely linked.[145] Furthermore, as stated above,[146] for Nussbaum the language of rights must answer some questions, pertaining to who bears them, who has the obligation to provide for them, and what the provision should achieve. For Nussbaum, it is the language of capabilities and human functioning that can provide answers to these questions.[147] Therefore, in relation to the right to education, the right can only be said to have been realised if the provision has given the right holder the capabilities to live a life which they have reason to value.

137 Sen (n 125) 74; S van der Berg 'The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions' (2015) 31 *South African Journal on Human Rights* 330.
138 Nussbaum (n 111) 275.
139 Crocker (n 109) 585.
140 Nussbaum (n 111) 277 285.
141 Nussbaum 277.
142 Van der Berg (n 137) 333.
143 MC Nussbaum 'Capabilities and fundamental entitlements: Sen and social justice' (2003) 9 *Feminist Economics* 35.
144 MC Nussbaum *Creating capabilities* (2011) 70; Van der Berg (n 137) 333.
145 See generally Nussbaum (n 111) 273-300; MC Nussbaum *Women and human development: The capabilities approach* (2000) 1-29; Nussbaum (n 143) 35-37.
146 Nussbaum (n 111) 273-275, 277.
147 Nussbaum (n 111) 275.

Nussbaum lists ten 'central human capabilities'.[148] She also admits that the list she has curated is not the final list of capabilities, but is open-ended and has changed and can be changed over time.[149] Of particular importance to the conversation in this article is the fourth item titled 'Senses, imagination, thought'.[150] Nussbaum defines this central capability as the ability to 'use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training'.[151]

This is a recognition by Nussbaum that the right to education is one of the most essential rights to be realised, in order to create and foster capabilities such as economic independence, freedom from poverty, and development of self and country. Furthermore, as Nussbaum admits, while her list is neither exhaustive nor immune to change, it is argued here that the right to education should feature on any list of central human capabilities, because it is so salient. Also, importantly, the capabilities approach is a compelling way to view the subject of the realisation of fundamental rights.[152] This approach looks beyond the first step of creating access to a right because, in terms of this approach, rights can only be said to have been realised where they have placed the subject 'in a position of capability to function in that area'.[153] Therefore, through this approach, stakeholders have to provide an education of such quality that it will equip the child immediately and in future, ever enhancing the child's capabilities.

5 The Sen-Nussbaum diagram of article 11(3): Linking the right to education to the theory of capabilities for children in Africa

For both Sen and Nussbaum, development ought to be defined in relation to 'what humans can and should be able to do'.[154] In other words, development should be viewed as the enhancement of certain human functionings as well as the expansion of their

148 These central human capabilities are life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. For the full discussion on this list of capabilities, refer to Nussbaum (n 111) 287-288; Nussbaum (n 143) 41-42.
149 Nussbaum (n 111) 277; Nussbaum (n 143) 41-42.
150 Nussbaum (n 143) 41.
151 As above.
152 Nussbaum (n 143) 37.
153 As above.
154 Crocker (n 109) 586.

capabilities.[155] This makes for a good point of reflection because, is this not what the right to education aims to achieve?[156] Through a quality education, unfreedoms such as inequality are stripped away. Where the playing field is levelled, and children have equal access to equal education, the opportunities borne from the education are also equal. Furthermore, where the quality of the education made accessible is such that it positively contributes to the child's development, it will build on what the child can and should be able to do, thus expanding the child's capabilities. Therefore, the realisation of the right to education for all children is a doorway to the development for all of Africa.

In applying this approach to development to the right to education as encapsulated in article 11(3) of the African Children's Charter, we have to look at both what the Charter is doing, as well as what it should and can do in the future. Granted, the Charter only applies to children; however, the right to education is one of those rights that can be realised in childhood, but the benefits can be seen until death. Therefore, countries have to look at the right of the child to receive an education, through the lens of creating and fostering capabilities. In creating 'an Africa fit for children', (sustainable) development must be a prominent consideration.

Accordingly, the education system must grow children's capabilities now, so that in the future they can be placed in a position to also positively contribute to the development of their countries, and Africa as a whole.[157] Referencing the current *status quo*, Onuora-Oguno explains that Africa's underdevelopment is due to the lack of access to education.[158] Similarly, the African Children's Committee has also stated that the education of children in Africa is a key component of Africa's development agenda.[159] So too, in *Agenda 2063: The Africa we want* (Agenda 2063) the African Union Commission states that the Africa we want is 'an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children'.[160] Agenda 2040 adds that the

155 As above.
156 UNESCO et al recently wrote that the 'evidence of education's unmatched power to improve lives … continues to accumulate'. See UNESCO et al (n 106) para 8.
157 The bidirectional relationship between education and development, in the context of human rights, is discussed extensively in TN Khoza 'The end justifies the means: Realising the right to education for the girl child as a means to achieving economic growth and empowerment in Africa' in MN Amutabi (ed) *Africa's new deal* (2019) and is beyond the scope of this article.
158 Onuora-Oguno (n 39) 1.
159 African Children's Committee (n 1) 31.
160 African Union Commission *Agenda 2063: The Africa we want* (Agenda 2063) (2015) 7.

education of children must be directed towards the promotion of sustainable development, through education on sustainable development, human rights and equality.[161] As a result, the setting of realising the right to education for children in Africa, in order to develop Africa, is further emphasised.

Education has an important role to play in securing development.[162] Furthermore, the denial of the right to education translates to the denial of the capability to fully enjoy the other rights that would enable an individual to develop to their full potential as well as participate meaningfully in society.[163] In other words, education is central for the enhancement of an individual's capacity and development, as well as the development of society.[164] As a result of this, education should also be able to adapt to the ever-changing needs of children and society, so that it can meaningfully impact the development of the individual and the collective.[165]

It should be borne in the mind once again that the right to education is more than merely access to education. The right needs to place children in a position whereby they have the capabilities to work on their personal development and also contribute to the development of their countries, and continent. In other words, children are entitled to an education the quality of which is such that it equips children with the necessary tools for working life and to live a life they have reason to value. Consequently, the education must be complete and comprehensive.[166]

Importantly, if education is to be used as an agent for development,[167] it must be guaranteed for all children, not a chosen or privileged few.[168] Against this backdrop, it is difficult to imagine an Africa where not all of its children are educated as being 'fit for children'. The Sen-Nussbaum diagram of article 11(3) injects the theory of capabilities into the conversation about the right to education for children in Africa. It does this by directing governments to 'think from the start about what obstacles there are to full and

161 African Children's Committee (n 1) 34.
162 Onuora-Oguno (n 39) 2.
163 F Veriava & F Coomans 'The right to education' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 60; Onuora-Oguno (n 39) 5.
164 Onuora-Oguno (n 39) 12.
165 As above.
166 Onuora-Oguno (n 39) 56.
167 Former South African President Thabo Mbeki stated that 'nowhere in the world has sustained development been attained without a well-functioning system of education' in his opening speech at the Conference on Education for African Renaissance in the Twenty-first Century, Johannesburg, South Africa (6 December 1999).
168 Onuora-Oguno (n 39) 56.

effective empowerment of all its [children], and to devise measures that address these obstacles'.[169] This approach to the realisation of the right may assist state parties to reconsider the quality of their education systems and to ensure that it is able to expand capabilities and develop countries.

6 Conclusion

If we are to view the education of children in Africa as a right that opens doors when realised, and shuts doors when denied, then we can begin to fully understand its significance and impact. Particularly in the context of development, the right to education is important on two levels. First, education is a driver of personal development as well as collective development. Where one receives an education, that education can be put to use, for example, in the labour market which will in turn grow the economy and so contribute to the development of the country and, eventually, the continent. Second, where development is viewed as freedom from unfreedoms such as poverty and capabilities and created through drivers such as education, children can use education as a vehicle through which they can live meaningful lives that they have reason to value. Where rights are realised, and their content is ultimately transposed into the realm of capabilities, the personal capacity for development, as well as subsequent development, of an individual child inevitably contributes to the overall development of the country. This is why, looking into the next 30 years and beyond, all stakeholders need to zone in on the provisions of article 11(3) and strengthen efforts to ensure that the children of Africa are able to access an education that is of good quality. The efforts to create a more educated youth must start immediately, as it is already later than we think. At all times, when considering the provision of the right to education, always in light of the best interests of the child, the capabilities that are fostered by that education must be considered. States are thus encouraged to apply the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter.

169 Nussbaum (n 143) 39.

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Cascading impacts of climate change and the rights of children in Africa: A reflection on the principle of intergenerational equity

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Summary: *This article explores the manner in which climate action at the African regional level protects and promotes children's rights with considerations being had to the principle of intergenerational equity. It establishes that while the concept of intergenerational equity is entrenched in the international and African regional climate change framework for the protection of children, neither the Convention on*

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the Rights of the Child nor the African Children's Charter mentions the concept. However, CRC and the African Children's Charter oblige states to take into consideration the views of children and protect their best interests in climate action (to ensure intergenerational equity) and in achieving a sustainable future. Using a doctrinal research method, the article examines the regional legal and institutional responses to the cascading impacts of climate change and how they safeguard children's rights to a sustainable future. It proceeds to critically analyse child rights-responsive provisions in the African Children's Charter that could potentially enhance the utility of the principle of intergenerational equity in the context of climate action in Africa. The article argues that the principle of intergenerational equity could, in theory, be used as a useful tool for the protection and promotion of the rights and interests of children from climate change impacts.

Key words: *children's rights; climate change; climate justice; future generations; intergenerational equity*

1 Introduction

Climate change is predicted to pose significant harm to the integrity of a wide array of ecosystems as it alters hydrological, coastal, marine, forest and agricultural systems, replacing these with 'new assemblies'.[1] A complicated series of impacts will trigger a cascade of direct and indirect, primary and secondary stresses on ecosystems on an unprecedented scale.[2] However, it is understood that these changes would be more intense in developing countries.[3] Already, many of these developing countries are fraught with several socio-economic problems and huge populations that continue to grow as they struggle to comply with the modest targets set out in the Sustainable Development Goals (SDGs).[4] While there is universal agreement that states must invest in and promote climate change adaptation and mitigation actions, this is not explicitly on the agenda of many of these developing nations that are hamstrung by the lack

1 JB Ruhl 'Climate change and the Endangered Species Act: Building bridges to the no-analog future' (2008) 88 *Boston University Law Review* 11.

2 UNFCCC *Climate change: Impacts, vulnerabilities and adaptation in developing countries* (2007) 5, http://unfccc.int/resource/docs/publications/impacts.pdf (accessed 15 July 2020).

3 As above.

4 *Transforming our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 (2015). While definite progress is being achieved on many fronts in reducing poverty, close to a billion people will still be living on an income that is less than US $1,25 per day. See, generally, UN *The Sustainable Development Goals report 2019* (United Nations 2019).

of appropriate technology, capacity and, more importantly, financial resources.[5] More significantly, the existing development plans and policies will be rendered redundant unless states reconfigure them taking into account the need for sustainable and climate-smart development, which incorporates both mitigation and adaptation needs. A failure to address the cascading impacts of climate change will effectively irrefutably undermine the rights of vulnerable populations, especially children in developing regions such as Africa.

An estimated 30 per cent of the world's population are below the age of 18 years,[6] representing some 2,2 billion children, who will take over a threatened planet facing rising ecological ruin with climate change being a major concern.[7] The adverse impacts of climate change disproportionately affect vulnerable groups, in particular children, causing a short and long-term and, potentially, irreparable impact. With a 95 per cent confidence rate, the Intergovernmental Panel on Climate Change (IPCC) attributes climate change to human activity.[8] The children of the present generation inherited an environment strikingly different from that of the previous generations. For instance, it is estimated that, because of climate change, by 2030 almost 125 million children in Africa will be subjected to water scarcity, malnutrition, and displacement.[9]

Thus, there is an urgent need to address the causes and impacts of climate change to safeguard human rights, in particular the rights of children, such as the right to life, the right to health and the right to survival and development. In turn, this will ensure the protection of the rights and interests of children in the current and future generations, and the promotion of the principle of intergenerational equity. The principle of intergenerational equity under international and African regional law stipulates the obligations of states towards future generations in the utilisation and exploitation of the environment

5 TG Puthucherril 'International law on climate change adaptation: Has the time come for a new protocol?' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 44.

6 A child is defined as any person under the age of 18 years. See article 2 of the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter).

7 United Nations Department of Economic and Social Affairs (UNDESA), Population Division (2019) World Population Prospects 2019, https://population.un.org/wpp/DataQuery/ (accessed 21 November 2020).

8 IPCC *Climate change 2013: The physical science basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013).

9 J Guillemot & J Burgess 'Children's rights at risk' in UNICEF *The challenges of climate change: Children on the front-line* (2014) 47; GC Nelson et al *Climate change: Impact on agriculture and costs of adaptation* (2009) 1 6; IPCC *Climate change 2014: Impacts, adaptation and vulnerability: Regional aspects* 1203.

and natural resources.[10] The principle is premised on the concept of sustainable development which dictates that 'we hold the natural environment of our planet in common with other species, other people, and with past, present and future generations'.[11] Despite the lack of an explicit mention of the principle in the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter), in general, the adoption of Africa's Agenda for Children 2040 (Agenda 2040) shows a forward-thinking approach on how the Charter must be interpreted and implemented going forward.

From a doctrinal standpoint, this article analyses relevant provisions of the African Children's Charter to assemble substantive child rights norms and principles that could potentially enhance the utility of the principle of intergenerational equity in the context of regional action on climate change. The article argues that the principle of intergenerational equity, in theory, can act as a tool for the protection and promotion of children's rights and interests in the present and future generations from climate change impacts. This contribution is divided into four parts, of which the introduction is the first. The second part discusses, giving context, in general, to climate change, children and the intergenerational right to a sustainable future under regional and international law in Africa. Part 3 explores climate action, children's rights and the applicable African regional law, with a view to establishing how the rights and interests of children could be mainstreamed into responses to climate change at the African Union (AU) level. The last part concludes the article.

2 Climate change, children and the intergenerational right to a sustainable future in Africa

Climate change unquestionably is the most serious challenge facing the world today, with its effects expected to impact present and future generations.[12] The earth has already warmed by 1˚C above pre-industrial levels, and current scientific evidence suggests that, at the business-as-usual rate of emission, warming will reach 1,5˚C by 2050. The impacts of this warming include new extreme climatic events, loss of health and functioning of major ecosystems, and other biophysical changes that have adverse effects on human

10 See the discussion in part 2 below.
11 EB Weiss 'In fairness to our children: International law and intergenerational equity' (1994) 1-2 *Childhood* 22.
12 K Davies, GM Tabucanon & P Box 'Children, climate change, and the intergenerational right to a viable future' in N Ansell et al (eds) *Geographies of global issues: Change and threat, geographies of children and young people* (2016) 401 402.

health, livelihoods, food security, water supply, human security and economic growth; with some of these impacts already manifesting.[13] Davies and others anticipate that without any drastic mitigatory action, children with their whole lives ahead of them, and unborn generations, will bear the burden of the long-term consequences of climate change.[14] This part focuses on children as they naturally link the present and future generations and, thus, are the contiguous link to the unborn generations.[15] It is argued that the incorporation of children's rights, preferences, and interests in climate law and policy partly addresses the criticisms raised against the concept of intergenerational equity in climate action. More importantly, it argues for a better elucidation of the duty of care and a broader legal acceptance by states of the necessity to protect the global climate for children in the present and future generations' rights to a sustainable future.

While the causes of climate change are global, the impacts are felt by vulnerable communities and groups, including children.[16] The Committee on the Rights of the Child (CRC Committee) proclaims that climate change is one of the biggest threats to the operationalisation and enjoyment of children's rights,[17] and the interests of future generations. Climate change significantly undermines the enjoyment of children's rights, such as the rights to life, human dignity, health, an adequate standard of living, access to clean water, and access to education. For instance, climate change severely compromises the fulfilment of the rights to life, and survival and development,[18] which are fundamental norms of children's rights.[19] The right to life

13 LF Schipper 'Maladaptation: When adaptation to climate change goes very wrong' (2020) *One Earth* 409; CV Rong, D Song & A Scheidel 'Maladaptation and development as usual? Investigating climate change mitigation and adaptation projects in Cambodia' (2019) 19 *Climate Policy* 47.

14 Davies et al (n 12).

15 As above.

16 K Arts 'Children's rights and climate change' in C Fenton-Glynn *Children's rights and sustainable development: Interpreting the UNCRC for future generations* (2019) 216-220. See also C Bakker 'Children's rights challenged by climate change: Is a reconceptualisation required?' in F Lenzerini & AF Vrdoljak *International law for common goods: Normative perspective on human rights, culture and nature* (2014) 361; E Boshoff 'The best interests of the child and climate change adaptation in sub-Saharan Africa' in M Addaney, MG Nyarko & E Boshoff *Governance, human rights, and political transformation in Africa* (2019) 359-361.

17 See CRC Committee General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health (art 24) CRC/C/GC/15 (2013) paras 5 & 50.

18 Art 5 African Children's Charter; art 6(1) CRC.

19 See Human Rights Council 'Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health' A/HRC/32/23 (2016) para 8. See, in general, the Report of the Special Rapporteur on Human Rights and the Environment on Safe Climate A/74/161 (2019) paras 28-29.

as enshrined in international law[20] is regarded as a prerequisite for the enjoyment of all other rights.[21] As the Human Rights Council clearly articulates,

> climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life … implementation of the obligation to respect and ensure the right to life … depends, *inter alia*, on measures taken by states parties to preserve the environment and protect it against harm, pollution and climate change.[22]

Children are disproportionately affected as they are among the most vulnerable groups negatively impacted by climate change as a result of their age, fewer economic resources, less mobility, extra care needs and a dependence largely on adults.[23] Furthermore, child-related health conditions caused by atmospheric pollution, such as asthma and other respiratory tract infections, and extreme climatic events are projected to be intensified as a result of rising global temperatures and heat waves, consequently threatening children's rights to health.[24] Children are susceptible to extremely high temperatures and heat waves, which may result in increased child mortality and consequently undermining the right to life, survival and development.[25] Scientifically, when the body's ability to self-regulate its own temperatures is diminished, and if ambient temperatures are too high, it leads to child deaths.[26]

Climate change also disrupts children's rights to enjoy the highest standard of health[27] – an essential right to the exercise

20 See art 6(1) of the 1966 International Covenant on Civil and Political Rights; art 4 of the 1981 African Charter on Human and Peoples' Rights (African Charter).

21 See Human Rights Council General Comment 36 on art 6 of the International Covenant on Civil and Political Rights, on the right to life CCPR/C/GC/36 (2018) para 2.

22 General Comment 36 (n 21) para 62.

23 P Mitchell & C Borchard 'Mainstreaming children's vulnerabilities and capacities into community-based adaptation to enhance impact' (2014) 6 *Climate and Development* 372–381. See also S Cutter 'Social science perspectives on hazards and vulnerability science' in T Beer (ed) *Geophysical hazards: Minimizing risk, maximizing awareness* (2010); N Watts et al 'Health and climate change: Policy responses to protect public health' (2015) 386 *The Lancet* 1861.

24 M Franchini & PM Mannucci 'Impact on human health of climate changes' (2015) 26 *European Journal of Internal Medicine* 1–5.

25 AS Larr & M Neidell 'Pollution and climate change' (2016) 26 *The Future of Children* 93 95.

26 J Graff Zivin & J Shrader 'Temperature extremes, health, and human capital' (2016) 26 *The Future of Children* 31 32-34. Similarly, the developmental interests of the unborn foetus are interfered with when pregnant women are affected by heat waves, air pollution and climate change. See Larr & Neidell (n 25) 95.

27 Art 14(1) African Children's Charter; art 24(1) CRC. See J Tobin 'Childrens' rights to health' in U Kilkelly & T Liefaard (eds) *International human rights of children* (2019) 277.

of other rights.[28] Watts and others classify climate change as one of the principal health-related global threats in the twenty-first century.[29] This means that climate change is one of the leading contemporary threats to the enjoyment of the right to health, both directly and indirectly. In developing countries and regions such as Africa, for instance, climate change is projected to exacerbate the top five causes of death for children under five (acute respiratory illness, diarrhoea, malaria, malnutrition and neonatal deaths).[30] Furthermore, there is a prediction of an estimated 8 per cent increase in diarrhoeal disease for every 1°C temperature rise, and up to a 28 per cent increase in malaria exposure in Africa this century.[31] The World Health Organisation (WHO) observes that a 'third of the global burden of disease is caused by environmental factors with children under five years of age bearing more than 40 per cent of that burden, even though they represent only 10 per cent of the world's population'.[32] In the developing countries, the burden of climate-related diseases already falls predominately on children, thereby severely undermining their rights to life, survival and development.[33] Indirectly, climate-related disasters may destroy health infrastructure and decrease the capacity of health systems to cope,[34] thereby diminishing the capacity of governments to achieve and sustain optimal development for all children.

In addition, climate change will potentially intensify pressure on education systems and interrupt access to education for children across Africa.[35] For instance, the United Nations Children's Fund (UNICEF) notes that approximately 13,5 million children across Africa are uprooted as a result of climate change, among other things, and

28 ESCR Committee General Comment 14 on the right to the highest attainable standard of health (art 12) E/C.12/2000/4 (2000) paras 1-2.

29 Watts et al (n 23) 1861-1867; N Watts et al 'Health and climate change: Shaping the health of nations for centuries to come' (2018) 392 *Lancet* 2479 2482.

30 K Kiang, S Graham & B Farrant 'Climate change, child health and the role of the paediatric profession in under-resourced settings' (2013) 18 *Tropical Medicine and International Health* 1053.

31 As above.

32 F Perera 'Children suffer most from climate change and burning of fossil fuels' in UNICEF (n 12) 16.

33 A McMichael et al 'Global climate change' in M Ezzati et al (eds) *Comparative quantification of health risks: Global and regional burden of disease attribution to selected major risk factors* (2004) 1606; AV Sanson & SEL Burke 'Climate change and children: An issue of intergenerational justice' in N Balvin & DJ Christie (eds) *Children and peace* (2020) 343.

34 WHO 'Climate change and human health – Information and public health advice: Heat and health' (2018) 2; WHO 'Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s' (2014) 2; R Hanna & P Olivia 'Implications of climate change for children in developing countries' (2016) 26 *The Future of Children* 115 117.

35 See Save the Children *Legacy of disasters: The impact of climate change on children* (2007) 2. See also J Lawler *Children's vulnerability to climate change and disaster impacts in East Asia and the Pacific* (2011) 1.

they lack access to educational opportunities.[36] The proportion and aggregate of children impacted at regional, national and local levels vary, depending on the availability of data. Kenya, for example, recorded that in 2018 climate-related disasters affected over 145 000 children and more than 700 schools were closed.[37] Approaches to protect, support and assist children are undermined by, among other things, a lack of adequate climate financing, corruption in, and poor governance by, national governments and institutions.[38] It can be gleaned from the discussion that climate change potentially undermines the best interests of the child, the rights to life, survival and development, health, and the right of access to education, sanitation and other basic services. These establish a legitimate need to integrate the best interests and welfare of children, inclusive of developmental interests, and protect their rights in the context of climate action.

The recent climate-induced droughts, extreme weather and water scarcity in South Africa, locust invasion in Eastern Africa and climate-induced floods in Ghana and Nigeria have negative effects on agriculture and food security, thereby impacting the life, growth and well-being of children.[39] UNICEF explains that due to the impacts of climate change on water security, agriculture and migration, among other factors, there is a likelihood of increased poverty, inadequate access to nutrition and health services, and an economic crisis that will affect children's rights and access to basic services.[40] The impacts of high temperatures and disrupted rain patterns are projected to disrupt sustainable development and have long-term impacts that will severely affect children, and also impact on future generations.[41]

Climate change effects such as droughts can adversely impact on agricultural production and food quality and thus exacerbate the likelihood of hunger, particularly in the poorest and most vulnerable

36 UNICEF '13,5 million children now uprooted in Africa – including those displaced by conflict, poverty and climate change' (UNICEF, 2019), https://www.unicef.org.uk/press-releases/13-5-million-children-now-uprooted-in-africa-including-those-displaced-by-conflict-poverty-and-climate-change/ (accessed 15 July 2020).

37 Kenya National Climate Change Action Plan: 2018-2022 (2018) 2. See also Kenya National Adaptation Plan: 2015-2030 (Goverment of Kenya 2016) 29.

38 KL Ebi 'Childhood health risks of climate change' in UNICEF (n 9) 23.

39 R Hanna-Andrea, S Wijesekerab & F Ward 'The impact of the environment on South Africa's child and adolescent health: An overlooked health risk' in M Shung-King et al *Child and adolescent health: Leave no one behind* (2019) 171. See also UNICEF *Mitigating the effects of climate change on water access and quality in Nigeria* (2020), https://www.unicef.org/nigeria/stories/mitigating-effects-climate-change-water-access-and-quality-nigeria (accessed 16 July 2020).

40 UNICEF 'Exploring the impact of climate change on children in South Africa' (2011) 21-34.

41 UNICEF (n 40) 24.

regions across the African continent.[42] For instance, the United Nations Development Programm (UNDP) estimates that approximately 122 million additional people could potentially become extremely poor as a result of higher food prices caused by the adverse consequences of climate change.[43] According to the International Labour Organisation (ILO), children born during droughts in Ethiopia, Kenya and Niger are more prone to malnutrition due to the negative impacts of climate change.[44] In relation to the rights to health, and the survival and development of children, climate change is projected to cause an additional 250 000 deaths annually through heat stress, malnutrition, malaria and diarrhoea between 2030 and 2050.[45] Several millions of people, including children, could be exposed to deadly heat by 2050 as well as a shift and possible expansion of the geographic range for disease vectors such as mosquito species that transmit malaria or dengue fever.[46] According to the United Nations Development Programme (UNDP) malaria vectorial capacity has increased by 27,6 per cent in the highlands of sub-Saharan Africa since the 1950 baseline as a result of climate change.[47] All these climate-induced events undermine children's enjoyment of the right to life, survival and development. For instance, the suffering and devastation inflicted by cyclone Idai and Kenneth in 2019 in Malawi, Mozambique and Zimbabwe, killing some 1 303[48] people, including children, are evidence of the negative impacts of climate change on the rights to health, life, survival and development of children as they are one of the most vulnerable groups to natural disasters and humanitarian emergencies. It is safe to assume that climate change-related threats to children's rights must be alleviated through the effective integration of children's needs and welfare in climate action.

Assessing the impacts of climate change on children's rights and intergenerational equity, broadly, and children's rights to a viable future, in particular, depends on how the violation of human rights norms are conceptualised. The 1987 Brundtland Report, 'Our

42 OHCHR Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61) (15 January 2009).
43 United Nations Development Programme (UNDP) (2019) Human Development Report 2019: Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century (2019) 195, http://hdr.undp.org/sites/default/files/hdr2019.pdf (accessed 16 July 2020).
44 International Labour Organisation (ILO) (2018) Digital labour platforms and the future of work: Towards decent work in the online world' International Labour Office, Geneva.
45 UNDP (n 43) 181.
46 As above.
47 UNDP (n 43) 182.
48 UN Office for the Coordination of Humanitarian Affairs, Cyclones Idai and Kenneth, https://www.unocha.org/southern-and-eastern-africa-rosea/cyclones-idai-and-kenneth (accessed 16 July 2020).

Common Future' was the first to conceptualise intergenerational equity in the definition of sustainable development as development which 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[49] The Report proclaims that the present generation was loaned environmental wealth from future generations with no intention of repayment – thus the present generation 'acts as we do because we can get away with it'.[50] At a theoretical level, sustainable development emphasises the necessity to integrate environmental matters into current development planning and economic policy making while observing that the fundamentally disconnected models of environmental sustainability and economic growth complement and are not opposed to one another in order to provide for the needs of present and future generations.[51] Conceptually, the right to a healthy environment, particularly for present children, and the right of future generations to a viable future is linked to sustainable development.

More notable references to the principle of intergenerational equity were enunciated at the 1992 UN Earth Summit.[52] For instance, all three documents produced during the Earth Summit referred to the right to intergenerational equity.[53] Although they constitute soft law, the documents nonetheless set forth important principles of international climate action. As underscored earlier, the negative impacts of a changing climate undermine children's rights to life, health, survival and development and without effective climate action by states, their developmental needs will not be met. While children's intergenerational rights to a viable future and intergeneration equity are mentioned in various international instruments, these references are generally incantatory rather than a binding rule. Notable exceptions are the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biodiversity (CBD) produced during the 1992 Earth Summit. For instance, article 3(1) of the UNFCCC provides that 'the Parties should protect the climate system for the benefit of present and future generations of humankind'.

Without contestation, both present and future generations include children and that current climate action will impact future

49 See generally World Commission on Environment and Development *Our common future* (1987) 43.
50 As above.
51 D French 'Sustainable development and the instinctive imperative of justice in the global order' in D French (ed) *Global justice and sustainable development* (2010) 5.
52 For more information on the 1992 UN Conference on Environment and Development (Earth Summit), see F Taib *Malaysia and UNCED* (1997).
53 See generally Rio Declaration, Agenda 21 and Forest Principles.

generations, including those under 18 years, either negatively or positively. Simply, climate change has consequences now and in the future. For instance, there is consensus that at the current rate of carbon emissions, warming will hit 1,5˚C degrees some time in the next 30 years with dangerous consequences on human health and livelihoods, including food security and water supply.[54] This will indicatively affect children in that generation disproportionately due to their increased vulnerability to extreme climate and weather events. At the very least, these fundamental references signal a potential of breaking innovative ground in recognition of children's rights to a viable future beyond preambular mentions. The incorporation of intergenerational equity and children's rights to a viable future in climate action, therefore, enhances the attainment of sustainable and inclusive socio-economic growth, builds resilience, and promotes the rights and welfare of children in the present and future generations.[55]

Consequently, there is general recognition that enhanced climate action should consider the fundamental rights and the best interests of children in the present life, and the interests of future generations. This implies that the protection of the global environment and natural resources – 'our common patrimony' – should predictably factor in the welfare and developmental needs of children and that of future generations.[56] The principle sums up the notion that the choices of today will have a profound impact on future generations, representing the inter-temporal aspect of sustainable development.[57] It is also rooted in a compact between the present and future generations under which the present generation is obliged through a 'fiduciary duty' founded on 'planetary trust', to pass on the environment and natural resources that they received from previous generations in a way that is not of poorer quality than what they inherited.[58] This arguably implies that the actions and decisions of the current population (adults and children included) should consider the rights and best interests of children and that the present generation also as a whole should consider the collective impact of their actions on future generations.

Consequently, the environment and natural resources to be bequeathed to children by adults of the present generation and this

54 Schipper (n 13) 409.
55 As above.
56 EB Weiss *In fairness to future generations: International law, common patrimony, and intergenerational equity* (1989) 23.
57 As above.
58 EB Weiss 'The planetary trust: Conservation and intergenerational equity' (1983) 11 *Ecology Law Quarterly* 495 499.

generation as a collective (adults and children) to future generations should not be compromised in nature and/or quality to the extent that limits the ability of these generations to benefit from such resources for their own development including the enjoyment of their rights, including the rights to life, a healthy environment, food, water and recreation; constituting a viable future.[59] Conceptually, the principle of inter-generational equity requires 'conservation of options', 'conservation of quality' and 'conservation of access' in demanding the development and implementation of specific duties concerning the needs of present and future generations.[60] The implication is that states must redesign development paths to undertake obligatory mitigation and adaptation measures in ensuring that development comports to climatic changes over longer time scales. The current generation thus has the legal obligation to design and adopt the legal and institutional mechanisms for the protection of the environmental rights and interests of children and through them as the extension of the needs of children in future generations.[61]

Despite the relevance of and emerging consensus on the concept of intergenerational equity and the right to a viable future in climate action, one of the common criticisms is that the rights for future generations should not be recognised since it is impossible to ascertain what their preferences will be.[62] Proponents argue that mechanisms such as voting and protests exist for the current generation to manifest their human rights. Nonetheless, there are no avenues for articulating the needs and interests of future generations.[63] This contention, conversely, disregards the elementary natural and physiological needs of humans. Based on the above discussion, it is safe to rightly predict that future generations will not want forest fires, water scarcity, inundation, food insecurity and pandemics.[64] Despite children not being a static group that consume, for example, energy, they generally consume less and do not contribute to climate change decision making that have implications on addressing carbon emissions, as already argued. At its core, climate change is an issue of equity, both within and across generations.[65] It can therefore be argued that children within and across generations are and will be the least responsible for climate change, but will be left

59 Weiss (n 58) 505.
60 As above.
61 As above.
62 J Gaba 'Environmental ethics and our moral relationship to future generations: Future rights and present virtue' (1999) 24 *Columbia Journal of Environmental Law* 260.
63 As above.
64 Sanson & Burke (n 33) 343.
65 R Garthwaite & P Mitchell 'Inequality, climate change and children's development' in UNICEF (n 9) 101-104.

to bear the brunt of its impacts as a future with increasingly extreme climate change effects poses challenges to sustainable development and the human rights of children, including their rights to life, health (a healthy environment), survival and human development (physiological needs).

3 Regional climate action and children's rights in Africa from an intergenerational perspective

The ability of states to develop and implement human rights-based approaches to drive responses to climate action is reliant on the normative content of the relevant children's rights obligations that are binding on the state in question.[66] However, states' children's rights obligations in the context of climate action are not yet well understood, and thus an analysis of substantive and procedural human rights norms, as expressed in relevant treaties and spelt out in human rights jurisprudence, is useful in generating a conceptual legal link with children's rights and climate action. In particular, the adoption of the African Children's Charter and its ensuing level of recognition conclusively transformed the foundation on, and the manner in which, AU organs and member states view and deal with children.[67] In its Preamble, the African Children's Charter notes with concern that 'the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, and natural disasters'.[68] It further recognises that 'the child, due to the needs of his/her physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security'.[69] As argued earlier, the negative impacts of climate change, such as intense and frequent floods, drought, heat waves, famine, the outbreak of diseases, cyclones and forced displacement, undermine the enjoyment of children's rights to health, survival and development, and nutrition. This underscores the significance of this recognition and notice as the recitals are useful interpretative tools for understanding the substantive provisions applicable to children's

66 See M Addaney 'Climate change adaptation, African Union law and the realisation of human rights' in WL Filho et al (eds) *African handbook on climate change adaptation* (2021) (forthcoming).
67 See BD Mezmur 'No second chance for first impressions: The first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62.
68 Preamble to the African Children's Charter para 3.
69 Preamble to the African Children's Charter para 5.

rights and welfare in the context of regional and national climate action.

The African Children's Charter substantively provides in article 4 that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.[70] This implies that in undertaking climate action at all levels across space and time, the best interests of children must be duly considered, appropriately integrated and consistently applied.[71] The best interests of the child principle is unanimously acknowledged as a core foundational principle, without adherence to which the implementation of the rights of children will be severely compromised.[72] Importantly, the best interests principle occupies a revered status in international and regional children's rights law,[73] comprising a substantive right, a fundamental interpretative legal principle and a rule of procedure.[74] In essence, the best interests stand as a substantive right to be considered in all climate decisions and actions, and an indispensable interpretative legal principle in how decision makers construe and implement climate responses and strategies.

Furthermore, article 5 of the African Children's Charter enshrines the right to survival and development of children, articulating that 'every child has an inherent right to life',[75] and consequently obliges state parties to 'ensure to the maximum extent possible, the survival, protection and development of the child'.[76] Concerning the right to health, article 14 provides that:

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70 Art 4 African Children's Charter.

71 See CRC Committee General Comment 14 on The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) CRC/C/GC/14 (2013) para 14(a).

72 N Cantwell 'The concept of the best interests of the child: What does it add to children's rights?' in M Sormunen (ed) *The best interests of the child: A dialogue between theory and practice* (2016) 18 20.

73 L Lundy & B Bryne 'The four general principles of the United Nations Convention on the Rights of the Child: The potential value of the approach in other areas of human rights law' in E Brems, E Desmet & W Vandenhole (eds) *Children's rights law in the global human rights landscape: Isolation, inspiration, integration?* (2017) 52 57. See also Cantwell (n 72) 21.

74 See CRC General Comment 14 para 6, which underscores best interests as a three-tiered concept, namely, 'a substantive right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child … a fundamental interpretative legal principle ensuring that the interpretation which most effectively serves the child's best interests should be chosen whenever a legal provision is open to more than one interpretation … and a rule of procedure in that the decision process in any matter concerning a child must include an evaluation of the possibility of any negative or positive impact of the decision on the child'.

75 Art 5(1) African Children's Charter.

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

(1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
(2) State parties to the Charter shall pursue the full implementation of this right and in particular shall take measures

(a) to reduce infant and child mortality rate;
…
(c) to ensure the provision of adequate nutrition and safe drinking water;
(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology.

These provisions are fundamental in the context of the regional action on climate change as extreme climatic and weather events have severe consequences on the physical, mental and spiritual health of children. At the policy level, Agenda 2040 also includes aspirations that are essential for child-responsive climate action, including aspiration 4 (that every child survives and has a healthy childhood); aspiration 5 (that every child grows up well-nourished and with access to the basic necessities of life); aspiration 9 (that every child is free from the impact of disasters or emergency situations); and aspiration 10 (that African children's views matter).[77] The overarching nature of the consequences of climate change on children makes the above binding and non-binding mechanisms pivotal in enhancing climate action to safeguard the rights and welfare of children, including the right to a viable future.

Cognisant of the impacts of climate change and the fact that the continent is more vulnerable and bears the brunt of climate change as compared to other geographic localisms,[78] the AU has placed climate change high on the continental policy agenda. Thus, this part also explores whether the efforts made towards an integrated continental approach to climate action in Africa consider the rights and interests of children and the interests of future generations. It does this by discussing the regional framework governing climate change action and evaluates its adequacy in protecting the rights and interests of children. The AU conceptualises climate [change] governance as

77 See Africa's Agenda for Children 2040 Fostering an Africa Fit for Children (Agenda 2040), https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf (accessed 16 July 2020).
78 *Agenda 2063: The Africa We Want* (African Union 2015) aspiration 1, para 16. See also IPCC *Climate Change 2014: Impacts, adaptation and vulnerability – Regional aspects* (2014) 1205; P Collier, G Conway & T Venables 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337; W Scholtz & D Pallangyo 'Climate change and the African Union' in T-L Humbly et al *Climate change law and governance in South Africa* (2016) 5.1-5.3.

> the exercise of power and authority by formal institutions of governments with a view to minimise the impacts of climate change on communities, ecosystems, and the wider environment in general. It entails development of legislation, policies, institutional and management frameworks, at continental, regional and national levels. Further, it is to deal with the governance of sectoral, cross-sectoral and regional issues; and the harmonisation across sectors and levels of governance. Climate [change] governance … should also deal with matters of compliance and mutual accountability on global, regional and national levels.[79]

Simply put, climate governance is the synergistic interaction between state institutions and non-state actors on how to manage climate change adaptation, mitigation, resilience and financing. Climate governance, thus, constitutes, among other things, the adoption of robust legal and policy frameworks; strong, accountable institutions; the availability of financial resources and incentives; and commitment from (political) leadership.[80] The AU urges African states to strategically improve their climate governance capabilities within their 'supreme, broad and overarching mandates' towards the realisation of continental development.[81] As a result, African governments have committed to participating in global, regional and sub-regional efforts for governing climate action, and to 'speak with one voice and unity of purpose in advancing its position and interests on climate change'.[82]

The regional cooperation on climate change has resulted in sparse arrangements and regulations, especially when the challenges in the governance of climate action at the AU level are considered.[83] In Africa, the challenges of governing climate action are exacerbated by the lack of a regional self-standing legal and institutional framework on climate change.[84] Consequently, there is no continental climate governance framework established in terms of law; only a fragmented set-up at institutional and policy levels. A regional climate change regulatory framework, as Jegede

79 See African Ministerial Conference on the Environment (2014) Draft African Union Strategy on Climate Change, AMCEN-15-REF-11 27, http://www.un.org/en/africa/osaa/pdf/au/cap_draft_auclimatestrategy_2015.pdf (accessed 27 July 2020).

80 J Bellali et al *Multi-level climate govenance in Kenya: Activating mechanisms for climate action* (2018) 21.

81 AMCEN (n 79) 27.

82 Agenda 2063 (n 71) aspiration 1, para 17.

83 See AU Climate Strategy 5. At the UN level, climate legal and policy framework constitute the UNFCCC; the Kyoto Protocol; the Cancun Agreements, 2010; and the Paris Agreement, 2015.

84 Scholtz & Pallangyo (n 78) 5.1-5.21. See AO Jegede *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (2016) 238. See also the Draft Strategy; the AU Resolution on Climate Change and Human Rights in Africa (2016).

notes, has the potential to drive regional solutions, standard setting and oversight in the protection of vulnerable groups,[85] including children. Over the past three decades, the AU has adopted several policy documents and established institutions and initiatives to build and strengthen regional cooperation, and to ensure the protection of human rights through robust and comprehensive environmental governance, for the benefit of present and future generations.[86] Some of the key policy documents are the Nairobi Declaration on the African Process for Combating Climate Change and the Draft AU Strategy on Climate Change (Draft Strategy). While these policies do not directly focus on children, they could be broadly interpreted in a way that respects, promotes and protects the rights and interests of children from the negative impacts of climate change. For instance, the Draft Strategy offers strategic direction to member states and provides a framework for integrated and coordinated mechanisms to address the challenges and capitalise on the opportunities associated with climate change in Africa. Importantly, it aims to improve 'the livelihoods of the African people',[87] including children, and also to particularly improve the environment wherein children live. The Draft Strategy also prioritises the implementation of climate action to achieve sustainable development, for the benefit of the most vulnerable groups, including children.[88]

At the institutional level, some of the regional bodies mandated to undertake climate action and/or promote and protect the rights of African peoples against imminent and future threats, such as climate change, includes the Committee of African Heads of State and Government on Climate Change (CAHOSCC),[89] and the African Ministerial Conference on the Environment (AMCEN), and also initiatives such as the Climate for Development in Africa (ClimDev-Africa) Programme.[90] The CAHOSCC and the AMCEN are high-level political organs established by the AU to adopt a common position in climate negotiations at the global level, especially in the Conference of Parties (COPs) under the Paris Agreement.[91] The mandate of these bodies is broad, which includes the protection of the interests of all African peoples, in general. It is crucial to note

85 Jegede (n 84) 215-217.
86 AU Resolution on Climate Change and Human Rights in Africa (2016).
87 AMCEN (n 79) 16.
88 As above.
89 Decision on the African Common Position on Climate Change including the Modalities of the Representation of Africa to the World Summit on Climate Change (Assembly/AU/Dec 257(XIII) Rev 1).
90 For a detailed discussion, see Jegede (n 76) 239-250.
91 See W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 10-13.

that the mandate takes account of the interests of vulnerable groups, including children, although there is no evidence that the rights and interests of children are adequately considered and protected. While it may be argued that the recognition of and sensitivity to vulnerable groups create the impression that the interests and rights of children are also protected; this is not the case in all circumstances as children's special interests are often overlooked in the governance processes, including in climate action. As Van Bueren notes, the mere fact that international law and policy are capable of being applied to children does not guarantee that it incorporates a coherent child-centred approach to ensure the respect and protection of the basic dignity of children.[92]

An indispensable aspect of regional climate action more broadly is the participation of all concerned citizens. While the rights of children to participate in matters concerning them is a fundamental right and core principle of children's rights,[93] children have few opportunities to express their views on climate change and environmental decision making at the regional and national level in Africa.[94] In many instances, decisions on issues such as responding to regional environmental and climate change threats are made by politicians, governments, and subject experts who are usually adults, without consulting children.[95] The lack of meaningful opportunities for child participation in climate action may be attributed to, among other things, societal attitudes that devalue children's voices; social and cultural norms that view children as incapable of contributing sound views; a lack of access to environmental information and knowledge; a lack of sufficient financial resources and budgetary support for travel to attend AU meetings; and, in some instances, practical and legal barriers that recognise the participation of adults only.[96] Children can be heard directly through peaceful protests, strikes,[97] and formally participating in proceedings, or indirectly through a representative.[98] Recently, there has been emerging

92 G van Bueren *International law on the rights of the child* (1998) 19.
93 Arts 4(2) & 7 African Children's Charter. See art 12 of CRC.
94 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 23 30.
95 H Clark et al 'A future for the world's children?' A WHO-UNICEF-Lancet Commission (2020) 607.
96 L Forde et al *The right of children to participate in public decision-making processes* (2020) 8-9.
97 See BBC 'Climate change: COP25 recognises that children are leading climate change activism' BBC Newsroom 2019, https://www.bbc.co.uk/newsround/50714878 (accessed 30 June 2020); Global Climate Strike 'Global climate strike: 20-27 September 2019', https://globalclimatestrike.net/ (accessed 30 June 2020); School Strike4Climate 'Students striking from school for a safe climate future' (2019), https://www.schoolstrike4climate.com/ (accessed 30 June 2020).
98 See art 12 of CRC.

platforms for children to participate in global climate action. For instance, initiatives such as the Intergovernmental Declaration on Children, Youth and Climate Action,[99] and the UN Joint Framework Initiative on Children, Youth and Climate Change enable children and the youth to informally take part in Conference of Parties (COP) meetings, and intergovernmental negotiations.[100] However, given the politics, high-level technical procedures of participating in COPs, and the high costs associated with attending the negotiations,[101] the formal participation of children may be challenging.[102] Without evidence of how the views of children are taken into account by the AU mechanisms, child participation in high-level panels remains a facade and rhetoric at best.[103]

Furthermore, judicial and administrative bodies could be used as governance organs to ensure that the bests interests and the views of children are incorporated in climate action at the regional and national levels. Also, judicial and administrative processes can be used to advance the rights and interests of children to hold governments accountable. An example is the case of *Mbabazi & Others v The Attorney General and National Environmental Management Authority* (*Mbabazi*),[104] where four children filed a suit in the High Court of Uganda against their government. The children indicated that they were acting on their behalf and on behalf of (born and unborn) children of Uganda.[105] They alleged that since 1994 the government of Uganda had taken no robust climate governance measures and processes,[106] resulting in the deaths and injury of children and the destruction of schools due to climate-induced disasters.[107] In their prayer to the Court, they sought, among other things, an order directing the government to 'implement measures that will reduce the impact of climate change; conduct an updated carbon footprint and develop a climate change mitigation plan [following] the best available science; and undertake measures to protect the plaintiffs

99 UNICEF 'COP 25: Young climate activists call for urgent action on the climate crisis at UNICEF-OHCHR event' (UNICEF 2019), https://www.unicef.org/press-releases/cop-25-young-climate-activists-call-urgent-action-climate-crisis-unicef-ohchr-event (accessed 30 June 2020); E Nelson 'Launch of the Intergovernmental Declaration on Children, Youth, and Climate Action' (*Texas Impact*, 2019) https://texasimpact.org/2019/12/launch-of-the-intergovernmental-declaration-on-children-youth-and-climate-action/ (accessed 30 June 2020).
100 ED Gibbons 'Climate change, children's rights, and the pursuit of intergenerational climate justice' (2014) 16 *Health and Human Rights Journal* 19, 23.
101 Gibbons (n 100) 24.
102 See also Arts (n 16) 232-233.
103 Gibbons (n 100) 23-24.
104 *Mbabazi & Others v The Attorney-General and National Environmental Management Authority* Civil Suit 283 of 2012 (High Court of Uganda, Kampala).
105 *Mbabazi* (n 104) para 5.
106 *Mbabazi* paras 6(a)-(i).
107 *Mbabazi* paras 11(a)-(e).

(children) and the children of Uganda from the effects of climate change'.[108]

Although the pleadings were criticised as shallow, abstract and lacking compelling scientific evidence,[109] the case is a reflection of the state of climate action in Africa because there is lack of momentum and collaboration, in general.[110] Kotzé and Du Plessis attribute the vagueness of the pleadings and prayer to 'a lack of information on or knowledge of climate change law, policy and science on the part of the plaintiffs [children], as well as insufficient legal support in assisting to frame the issues, the claims and remedies, and to base these on sound legal argument'.[111] That said, the observation affirms an urgent need on the continent to ensure access to (adequate) climate change information and to remedy when their rights are undermined by the impacts of climate change or violated by responses to same by states. Access to information is a prerequisite for meaningful participation. While the matter remains *sub judice*, the case is a strong example of how children can, and must, participate in climate governance to hold states to account. Also, child rights experts in African states could use this case as an example to take up and file environmental and climate-related challenges for the benefit of present children and future generations.

In addition, the rights of children and their interests in climate action could potentially be advanced through the work of human rights-monitoring bodies such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the CRC Committee. For the first time, the CRC Committee received a climate-related communication filed by children in *Sacchi & Others v Argentina, Brazil, France, Germany and Turkey* (*Sacchi*).[112] The communication remains *sub judice* until a decision on admissibility and the merits has been made. In this complaint, 16 children from different parts of the world allege that their governments have failed

108 As above.

109 LJ Kotzé & AA du Plessis 'Putting Africa on the stand: A bird's eye view of climate change litigation on the continent' (2020) *Journal of Environmental Law and Litigation* 28.

110 See the examples of climate litigation involving children in *Urgenda Foundation v Kingdom of the Netherlands* [2015] HAZA C/09/, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (accessed 20 July 2020); and *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200324_docket-18-36082_opposition.pdf (accessed 20 July 2020).

111 Kotze & Du Plessis (n 109) 30.

112 *Sacchi & 15 Others v Argentina, Brazil, France, Germany and Turkey* (CRC Committee) filed 23 September 2019.

to take action against climate change.[113] Three of the claimants are from African states, namely, South Africa, Nigeria and Tunisia. It is not clear why the three children opted instead to use the CRC Committee and not the African Children's Committee. Given the global momentum on the active participation of children within global governance structures and the complementarities existing between international and regional regimes, the use of the CRC Committee is strategic in that the decision will have a global rather than a regional impact.

With the support of scientific data, the 16 children claim that climate change is substantially undermining the enjoyment of their rights,[114] and it will also cause intergenerational harm.[115] The complainants consequently argue that by the failure of states to reduce emissions in line with their international obligations, they are deliberately promoting excessive emissions, and neglecting to use available means of international cooperation to mitigate climate change. They further contend that acts and omissions by states are directly and foreseeably causing harm to children and violating their fundamental rights such as the rights to life, health, survival and development. More importantly, the complainants allege that states are creating and perpetuating systemic intergenerational discrimination by a clear disregard of the best interests of children in climate action.[116] Brazil, France and Germany filed objections to the admissibility of the complaint, claiming that the CRC Committee has no jurisdiction; the petitioners have not exhausted domestic (internal) remedies; and the communication is manifestly unsubstantiated.[117]

Despite the apparent weaknesses in the claims, the communication is ground-breaking in two respects. First, it escalates the climate change debate to a global forum where children take up the stand – an exercise of their participation rights. Second, it presents the CRC Committee with an opportunity to articulate how climate change intersects with children's rights. The decision and recommendations of the CRC Committee will potentially influence legal and institutional responses in relation to climate change obligations and children's rights in climate action at the regional and national levels. Thus, the direct involvement of children in challenging states' climate change

113 *Sacchi* (n 112) paras 34-49.
114 *Sacchi* paras 23-29, 87-95.
115 *Sacchi* paras 193-195, 303-308.
116 The best interests of the child entrenched in terms of art 4(1) African Children's Charter and art 3(1) CRC.
117 See Petitioners' Reply to the Admissibility Objections of Brazil, France, and Germany para 11, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200504_Not-available_reply.pdf (accessed 20 July 2020).

responses at the international, regional and national levels presents a unique opportunity for the treaty-monitoring bodies and judicial bodies to shape the trajectory of children's rights in climate action in the next three decades.

While the African Children's Committee has not dealt with a climate change-specific communication or devoted a General Comment to climate change and environmental protection; it has the potential to contribute to strengthening the protection of children from the negative impacts of climate change. Every year, the African Childen's Committee organises the Day of the African Child, an event that has generated significant interest from states, non-governmental organisations (NGOs), children's rights practitioners and children themselves.[118] Devoting a Day of the African Child to a focus on climate change and environmental protection could effectively generate momentum on issues around climate action and children's rights. Thus, from the discussion it is clear that climate change and children's rights, especially to a viable future, are conceptually and legally linked and, thus, in the next decades, without the adoption of effective regional legal and institutional frameworks, the negative impacts of climate change will undermine the rights and welfare of children in Africa.

4 Conclusion

This article attempts to make a case for the incorporation of children's rights and the principle of intergenerational equity into regional climate action in Africa. It begins by demonstrating how the negative impacts of climate change undermine children's rights, and explored the concept of intergenerational equity in the context of climate action. The discussion reveals that although there are emerging standards and notions on the concept, its integration into existing climate action in Africa is weak. It consequently becomes obvious that the ethical argument behind an intergenerational approach to climate action may be persuasive, but this is not reflected in terms of legal and institutional development in the AU. In order to remedy this deficit, legislative development and policy making at the regional and national levels should fully reflect the need to invest in long-term solutions that ensure and take into account the full interests and rights of children in present and future generations. Furthermore, strict adherence to the African Children's Charter could require that national governments and regional human rights bodies in Africa

118 J Sloth-Nielsen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (eds) *Child law in South Africa* (2017) 441.

should ensure the fair representation of children and that child-specific rights and interests are given due consideration in climate action.

In addition, the African Children's Committee could also increase its attention to climate change and environmental protection in its Concluding Observations and resolutions, thereby shaping the future of children's rights for the next 30 years, in the face of the climate crisis.[119] Similarly, a thematic area or Special Rapporteur on issues explicitly relating to climate change and environmental rights could add momentum and weight to mainstreaming children's rights and welfare in climate action. At the moment, through both their action and inaction on climate change, state parties to the African Children's Charter have failed to meet their obligation to make decisions in the best interests of the child.[120] States' reporting on climate change and children's rights could, therefore, be included under existing reporting commitments by governments that have ratified the African Children's Charter.

119 Eg, in its Concluding Observations to Angola, the African Committee mentioned climate change without indicating how the country should improve the protection of children from climate change. See Concluding Observations and Recommendations of the African Committee on the Initial Report of the Republic of Angola on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child para 17, https://acerwc.africa/wp-content/uploads/2019/07/Angola_CO_Initial_Report.pdf (accessed 20 July 2020).

120 Art 3.1 UNFCCC.

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Evaluating the role of the African Committee of Experts on the Rights and Welfare of the Child in the COVID-19 era: Visualising the African child in 2050

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Summary: *Africa has gained much traction in recognising the rights of the child with an emphasis on his or her holistic environments. Three general environments that affect a child are identified: first, a peaceful environment informed by adequately functional institutions that aid the implementation of all laws that improve the position of the child; second, an environment punctuated by emergencies such as armed conflict, public health emergencies or humanitarian situations. The third environment is where a child who has moved from humanitarian situations seeks solace. This may include internally-displaced persons and refugees/asylum seekers. This article evaluates the role of the African Committee of Experts on the Rights and Welfare of the Child as the only regional human rights body that monitors the promotion and protection of the rights of children. The evaluation covers the third environment in the context of the COVID-19 era. It is argued that the current traction by the Committee after the outbreak of the pandemic can be used to improve the position of the child towards the 2050 aspirations. An evaluation of the effects of the pandemic on the child is*

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done followed by a visualisation of the child in 2050. An analysis of the normative, institutional and jurisprudential framework of the Committee in the Covid-19 era follows. A juxtaposition of the use of Agenda 2040 to realise the 2050 visualised child is done. This informs a proposed model that the Committee may adopt, followed by a conclusion and recommendations.

Key words: *African Children's Committee; African Children's Charter; Agenda 2040; jurisprudence; normative; COVID-19*

1 Introduction

The success of any human rights system at the domestic, regional or international level requires an adequate development of the normative, institutional and jurisprudential frameworks.[1] While the normative framework informs the laws in use, the institutional framework relates to the expertise of the human resources that apply the theoretical principles to the practical challenges. Consequently, the jurisprudential framework is developed by the institutionalised structure as it engages the normative provisions in the human rights instrument. It follows that the jurisprudential framework then organically develops over time. The evaluation of these three aspects is critical to taking stock of a human rights system on any thematic issues that are within its mandate. This aids the evaluation of its successes, challenges and insights on the way forward.

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) was established under the African Charter on the Rights and Welfare of the Child (African Children's Charter).[2] As will be shown shortly, this article discusses the institutional structure, the normative structure in light of the value addition that the Children's Charter presents and the evolving jurisprudence of the African Children's Committee; all in the context of the COVID-19 pandemic.[3] The article also directs the conversation to the child who has moved from areas of armed conflict to relatively peaceful areas due to internal displacement or as a refugee or asylum seeker.[4] From this point forward, an evaluation of the argument and the sub-claims underscored in the abstract follows.

1 B Thomas 'The normative and institutional evolution of the international human rights' (1997) 19 *Human Rights Quarterly* 703 723.
2 African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990), art 42.
3 See part 4 below.
4 The qualification of this child is made in part 2 below.

2 Revisiting the COVID-19 pandemic and its effect on children

Before the outbreak of COVID-19, the world had witnessed various pandemics and epidemics leading to loss of life.[5] Persons with low social and economic status remain greatly affected, due to living conditions that make it hard to use public health interventions or utilise various healthcare options.[6] Children who are refugees or internally displaced are grossly affected by pandemics due to poverty, overcrowding, exposure to the virus, and limits in the use of hand hygiene.[7]

The world was gripped with COVID-19 that spread from Wuhan, China in December 2019 to over 219 countries. As of 17 November 2020, there were 54 771 888 confirmed cases of COVID-19, including 1 324 249 deaths.[8] Various countries adopted restrictions to curb the spread of the virus, ranging from the declaration of periods of emergency to periods of disaster to curfews, among others.[9] Most countries adopted public health interventions to mitigate the spread of the virus, which included non-pharmaceutical measures such as restrictions on the movement of people; non-attendance of school by children; and limited access to health care, among others.[10] The public was advised to practise social distancing of at least one and a half metres; use masks; wash hands for at least 20 seconds; use sanitisers; clean surfaces as frequently as possible; and practise self-isolation.[11]

These public health interventions add to existing problems that present various challenges that affect children's enjoyment of their

5 Eg, over 500 million people, a third of the world's population, were affected by Spanish flu and between 50 and 100 million people died. See J Edwin *Epidemic influenza. A survey* (1927) Chicago: American Medical Association; FW Hampton 'Statistics of influenza morbidity: With special reference to certain factors in case incidence and case fatality' (1920) *Public Health Reports* (1896-1970) 584. See also J Niall & J Mueller 'Updating the accounts: Global mortality of the 1918-1920 Spanish influenza pandemic' (2002) *Bulletin of the History of Medicine* 105.

6 SE Mamelund '1918 pandemic morbidity: The first wave hits the poor, the second wave hits the rich' (2018) 12 *Influenza and Other Respiratory Viruses* 311.

7 B Galobardes et al 'Indicators of socio-economic position (part 1)' (2006) 60 *Journal of Epidemiology and Community Health* 7.

8 WHO Coronavirus Disease (COVID-19) Dashboard, https://covid19.who.int/ (accessed 18 November 2020).

9 Eg, on 15 March 2020 South Africa declared a national state of disaster under sec 27 of the Disaster Management Act 57 of 2002. Uganda declared a notification of the disease and engaged measures to mitigate its spread under sec 11 of the Public Health Act.

10 Coronavirus disease (COVID-19) advice for the public, https://bit.ly/2Yya34I (accessed 18 November 2020).

11 As above.

rights. These include armed conflict;[12] civil wars;[13] terrorism;[14] increased displacement; droughts; and food insecurity.[15] These challenges affect the enjoyment of other rights such as the rights to food,[16] education,[17] health[18] and access to justice for children who are victims or are in conflict with the law. The enjoyment of the right to food for children has been affected by limited access to food. The United Nations High Commissioner for Refugees reported that millions of refugees, especially children across Africa who relied on regular aid to meet their food needs, were bound to suffer shortages due to COVID-19.[19] These problems have continued to escalate due to the lack of available measures to deal with malnutrition at national levels. It is important to look at the various challenges that children faced in the context of their environments. For instance, statistics showed that 52,4 per cent of children in refugee camps present high levels of anaemia, acute malnutrition and stunted growth.[20] These challenges existed before the onslaught of the pandemic. In countries with peaceful environments the lack of access to justice

12 Statistics show that one out of every four children are in areas of armed conflict, and sixout of the 10 most dangerous countries to raise a child are in Africa. See Save The Children 'War on children' (2018) 15, https://bit.ly/31tQ1tp (accessed 19 October 2020).

13 These have greatly affected children, with the result that they cannot attend school. Increased attacks on schools that used to be safe havens have continued. The continued and growing insecurity in the Sahel region has forced nearly 2 000 schools in Burkina Faso, Mali and Niger to close down, and the continued use of schools for military purposes has disrupted education in the case of more than 400 000 children across the three countries and left 10 050 teachers unable to work or displaced by the violence. UNICEF 'School closures in the Sahel double in the last two years due to growing insecurity', https://uni.cf/3fjEh2v (accessed 20 November 2020).

14 Crisis Group, https://bit.ly/3pPgJr5 (accessed 20 November 2020).

15 According to OCHA, in Mali the number of internally displaced people has more than doubled over the past year to reach around 100 000. Burkina Faso faces unprecedented displacement with more than 100 000 people uprooted in 2019 alone. In Niger's Tillaberi and Tahoua regions, violence has forced more than 70 000 people from their homes. Sahel Humanitarian Crisis (2019), https://bit.ly/2IYtT3L (accessed 20 November 2020).

16 Food and Agricultural Organisation of the United Nations 'The right to adequate food in emergency programmes' (2014), www.fao.org/3/a-i4184e.pdf (accessed 20 June 2020). For a domestic perspective, see B Nkrumah 'Opening Pandora's box: A legal analysis of the right to food in South Africa' (2019) 52 *De Jure Law Journal* 47.

17 Eg, in the Sahel region a UNICEF report in February 2019 indicates that the closure of schools has doubled due to insecurity. See report, UNICEF (2014) 'School closures in the Sahel double in the last two years due to growing insecurity – UNICEF', https://uni.cf/2Z9ma7G (accessed 20 November 2020).

18 The World Health Organisation states that globally over 2 billion people in more than 40 countries face high health risks from crisis conditions. See A Musani et al 'The challenges of securing health in humanitarian crises', https://bit.ly/3g0u6yX (accessed 20 November 2020).

19 'UNHCR and WFP warn refugees in Africa that face hunger and malnutrition as COVID-19 worsens food shortages', https://bit.ly/2Kiq36k (accessed 20 November 2020).

20 Y Jemal, J Haidar & WK Makau 'The magnitude and determinants of anaemia among refugee preschool children from the Kebribeyah refugee camp, Somali region, Ethiopia' (2017) 30 *South African Journal of Clinical Nutrition* 1.

affected children. While one may argue that this is a less dire situation than malnutrition, the failure for a child victim to have a remedy, or the violation of his or her rights as a child in conflict with the law, the traumatic effect on the child has repercussions that affect his or her holistic development.[21] For instance, in South Africa the enactment of the COVID-19 regulations under the Disaster Management Act restricted the enjoyment of parental care towards children whose parents or caregivers were neither staying together nor had parental plans in place.[22] The challenge lay in the discrimination occasioned to these children due to the application of the regulations.

The use of social distancing among vulnerable children such as refugees or internally-displaced persons remains a challenge, especially where they are in populated camps.[23] Crowded settlements cannot adequately use the recommended social distancing of at least one and a half metres. This only leads to more health hazards that may not mitigate the spread of the pandemic.[24] This is exacerbated by the restrictions on movement that impact the provision of child-related health initiatives such as immunisation and the supply of essential vaccines and medicines.[25] The disruption in childhood immunisation for COVID-19 in Africa is due to its reliance on functioning health facilities and stable communities that were subjected to public health interventions.[26] The other challenge has been instances where the integration of the displaced persons or refugees with the host communities has overstretched the existing health services.[27]

The requirement to use masks and sanitisers and cleaning surfaces as frequently as possible is based on the assumption that one can afford to buy the resources to do this, especially in the absence of palliative care.[28] While the option of washing hands with water

21 T Liefaard 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *The International Journal of Children's Rights* 195.

22 For a detailed analysis of this law and how the Court approached it to protect the child, see RD Nanima 'From regulations to courts: An evaluation of the inclusive and exclusive criteria on children with co-caregivers in the era of COVID-19' (2020) 21 *Economic and Social Rights Review* 10-14.

23 W Williams 'COVID-19 and Africa's displacement crisis' (2020), https://bit.ly/3et1Ggu (accessed 20 November 2020).

24 A Wells 'Keeping displaced communities safe and healthy as COVID-19 pandemic takes hold' (2020), https://bit.ly/2Ba0XST(accessed 20 November 2020).

25 In Ghana, immunisation came to a standstill due to the restrictions on movement of the population. See R Nelson 'COVID-19 disrupts vaccine delivery' (2020) 20 *The Lancet Infectious Diseases* 546.

26 AA Adamu et al 'COVID-19 and routine childhood immunisation in Africa: Leveraging systems thinking and implementation science to improve immunisation system performance' (2020) 98 *International Journal of Infectious Diseases* 161-165.

27 Williams (n 23).

28 'Coronavirus disease (COVID-19) advice for the public', https://bit.ly/2Yya34I (accessed 20 November 2020).

and soap for 20 seconds seems manageable, statistics show that in sub-Saharan Africa 40 per cent of a population of 780 million people do not have access to clean water.[29] Concerning sanitation, research indicates that while North Africa has 90 per cent coverage of sanitation, sub-Saharan Africa stands at 30 per cent.[30] This limits the efficacy of mitigation efforts during public health emergencies such as COVID-19.

3 Visualising the child in 2050

The African Union (AU) adopted Agenda 2063 to transform Africa into a global powerhouse of the future, to spur economic growth and to improve the standard of living holistically for all persons in Africa.[31] Agenda 2063 is informed by seven broad aspirations.[32] The sixth aspiration calls for 'an Africa whose development is people driven, relying on the potential offered by African people, especially its women and youth, and caring for children'.[33]

This informed the adoption of Agenda 2040 by the African Children's Committee in 2016, to cater for the progressive improvement of the child in the wider framework of Agenda 2063.[34] The Children's Committee is entrusted by the AU to realise Aspiration 6 of Agenda 2063 by engaging children and the youth.[35] Agenda 2040 is a 25-year programme that calls for a long-term and strategic progress in implementing children's rights in Africa. It provides a child-based focus for the AU's Agenda 2063, which highlights children's rights and welfare concerns in paragraph 53.

Agenda 2063 is guided by ten aspirations that include the provision of an effective continental framework for advancing children's rights,[36] and the existence of an effective child-friendly national legislative, policy and institutional framework in all member

29 United Nations Department of Economic and Social Affairs 'International Decade for Action "Water for life" 2005-2015' (2015), https://bit.ly/2HI5QMd (accessed 20 November 2020).
30 As above.
31 African Union (2020), https://bit.ly/2AXoiXs (accessed 20 November 2020).
32 Goals and Priority Areas of Agenda 2063, https://au.int/en/agenda2063/goals (accessed 20 November 2020).
33 Aspiration 6 at Goals and Priority Areas of Agenda 2063 (n 32).
34 Agenda 2040 elaborates para 53 of Agenda 2063, to realise the intent of establishing long-term strategies to lead to the sustenance and protection of children's rights in Africa within a period of 25 years from 2015 to 2040. See details at Agenda 2040, https://www.acerwc.africa/agenda-2040/ (accessed 20 November 2020).
35 Aspiration 6, Goal 15, https://au.int/en/agenda2063/goals (accessed 20 November 2020).
36 Agenda 2040 (n 34) Aspiration 1.

states.[37] In addition, Agenda 2040 calls for the registration of every child's birth and other vital statistics;[38] the survival of the child who also has a healthy childhood;[39] and the growth of a well-nourished child with access to necessities in life.[40] It is expected that every child benefits fully from quality education,[41] and is protected against violence, exploitation, neglect and abuse.[42] The benefits have to extend to a child-sensitive criminal justice system,[43] freedom from the impact of armed conflicts and other disasters or emergencies,[44] and the minor's participation in matters that concern him or her.[45] It is crucial to relate these aspirations with the child affected by a public emergency such as COVID-19.

Before visualising the child in 2050 as a product of the implementation of Agenda 2040, it is prudent to contextualise the child now in the context of the COVID-19 era. This is against the background that the pandemic has had a profound impact on children, with the poorest and most vulnerable being the hardest hit.[46] Consider a hypothetical situation where we have child A, who stays in a peaceful community, goes to school, and has access to health care and stays with caregivers.[47] Consider another child B, who is in an area with emergencies such as armed conflict, famine and drought, and he or she is conditioned to live in this environment. A good example is a child affected by armed conflict.[48] Consider the third child C, who has moved from areas of emergency to other areas that seem safe.[49] This includes a child who is internally displaced, a refugee or asylum seeker.[50] It should be noted that all these children (A, B and C) are entitled to the promotion and protection of their rights in all their environments. While Child A

37 Agenda 2040 Aspiration 2.
38 Agenda 2040 Aspiration 3.
39 Agenda 2040 Aspiration 4.
40 Agenda 2040 Aspiration 5.
41 Agenda 2040 Aspiration 6.
42 Agenda 2040 Aspiration 7.
43 Agenda 2040 Aspiration 8.
44 Agenda 2040 Aspiration 9.
45 Agenda 2040 Aspiration 10.
46 OECD 'Combating COVID-19's effect on children', https://bit.ly/3nKPDQ3 (accessed 20 November 2020).
47 State parties usually emphasise the protection of this child as a citizen on the basis of the social contract between the child and the state.
48 Workshop Report on Children Affected by Armed Conflict and other situations of violence, Geneva, 14-16 March 2011, https://bit.ly/2VRKSZN (accessed 20 June 2020); J Maxted 'Children and armed conflict in Africa' (2003) 9 *Social Identities* 72.
49 JM Shultz et al 'Internally displaced "victims of armed conflict" in Colombia: The trajectory and trauma signature of forced migration' (2014) 16 *Current Psychiatry Reports* 475; A Özerdem & T Jacoby 'Conflict induced internal displacement' (2007) *Human Rights in Turkey* 159.
50 RD Nanima 'The enjoyment of the right to health beyond areas of armed conflict: An evaluation of Kenya's practice and jurisprudence on refugee children' in M Amutabi (ed) *Africa's new deal* (2019) 257.

is better placed to benefit because of the relative peace he or she enjoys in the community, the same cannot be said about child B or C (visualised child). This category is hit hardest with the compromised enjoyment of their rights and the possible failure to adequately use possible interventions. Furthermore, this child, who lacked or had limited access to essential services such as health care, schools, online shopping before the COVID-19 pandemic, is bound to continue suffering significantly.[51]

Available statistics emphasise the conversation on the visualised child as far as they form the bulk of the 13 million child refugees, one million child-asylum seekers and 17 million internally-displaced children.[52] Moreover, more than 3 700 000 children live in refugee camps or collective centres.[53] These numbers show the extent of the effect of armed conflict on these children – thus the need to conduct this study. An evaluation of all the aspirations concerning the visualised child cannot be done extensively. A look at a few aspirations that speak to the former are hinted on below.

By 2050 the visualised child's rights are expected to be adequately protected at the African region and the states' level in existing legislative, policy and institutional frameworks.[54] The outbreak of the pandemic reiterates the need to include the protection of children in the states' disaster management and responses,[55] and protection against all forms of violence, exploitation, neglect and abuse.[56] Furthermore, this child should be able to access the uninterrupted registration of his or her birth and other vital statistics even during periods of emergency[57] and have access to necessities in life.[58] The envisioned child is expected to benefit from quality education even in situations of public emergency.[59] This brings to the fore the

51 United Nations High Commissioner for Refugees 'Global trends: Forced displacement' (2018) Geneva.
52 D You et al 'Migrant and displaced children in the age of COVID-19: How the pandemic is impacting them and what can we do to help' (2020) 10 *Migration Policy Practice* 33.
53 United Nations High Commissioner for Refugees, Global Trends: Forced displacement (2018) Geneva.
54 Agenda 2040 (n 34) Aspiration 1.
55 Eg, research in 2018 showed that while Kenya had very progressive policies concerning the education and health of children, they did not deal with refugees. See Nanima (n 28) 257. In South Africa, although the policies on child security extend to refugee or migrant children, the practice is different. See Child Support Grant, https://bit.ly/3pNTOwk (accessed 20 November 2020). See also L Golden 'Do "vast numbers" of refugee and migrant children rely on SA social services?' (2018), https://bit.ly/3g6mV86 (accessed 26 June 2020).
56 Agenda 2040 (n 34) Aspiration 7 should be engaged by 2050 to reflect this position.
57 Agenda 2040 Aspiration 3 should be engaged by 2050 to reflect this position.
58 Agenda 2040 Aspiration 5 should be engaged by 2050 to reflect this position.
59 Agenda 2040 Aspiration 6 should be engaged by 2050 to reflect this position.

rhetoric of the provision of online education during the pandemic and the questions of access to data, internet connections, and online education materials for all children, including refugees, migrants or internally-displaced persons.

Other benefits that this child needs include a child-sensitive criminal justice system, which caters for both children as victims of human rights abuses and those in conflict with the law. [60] This calls for improved access to both civil and criminal justice. A case in point is Uganda that has been trying to use its Judicature (Audio-Visual) Rules to have online courts.[61] This would be instructive in ensuring that access to physical involvements at courts cannot be used. Access to justice need not be limited to the children who are citizens, but even those who are migrants, refugees or of other similar status.[62] Besides, the participation of the child in matters that concern him or her in public health emergencies should be adequately engaged by 2050.[63] This includes the use of virtual tools as a form of communication, advocacy, and information at a time such as this. It is argued that on some of these platforms involving children, the voice of the child has not come out strongly. It is proposed that child participation is key to the realisation of the position of the visualised child.

4 Normative, institutional, and jurisprudential framework of the African Children's Committee in the COVID-19 era

The normative provisions of the African Children's Charter provide added value to the protection of the child. First, it adopts the straight 18-year definition of the child without qualification.[64] This is in contrast to the position in the Convention on the Rights of the Child (CRC) which qualifies a child to be 18 years old or the national age that provides for the attainment of maturity at an earlier age.[65] The Children's Charter as such offers better protection because of the straight 18 position.[66] Second, the Charter creates sufficient protection to the child affected by armed conflict, tension and strife.

60 Agenda 2040 Aspiration 8 should be engaged by 2050 to reflect this position.
61 See RD Nanima 'A right to a fair trial in Uganda's judicature (visual-audio link) rules: Embracing the challenges in the era of COVID-19' (2020) 46 *Commonwealth Law Bulletin* 351.
62 As above.
63 Agenda 2040 (n 34) Aspiration 10 should be engaged by 2050 to reflect this position.
64 Art 2 African Children's Charter.
65 Convention on the Rights of the Child, 1577 UNTS 3 art 1.
66 BD Mezmur 'Happy 18th birthday to the African Children's Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 125.

To this end, its article 22 deviates from the silence of CRC on the protection of the child in armed conflict, tension and strife.[67] Also, the limited position of the Optional Protocol to CRC on the non-recruitment of children in armed groups is amplified by the African Children's Charter which provides for the protection for all children affected by armed conflict and not those that are recruited as child soldiers.[68] Furthermore, the wording in the Children's Charter shows a deliberate effort to apply both humanitarian and human rights law to protect the child in situations of conflict.[69]

Other additional points of added value in the African Children's Charter include the provision of better protective standards for children because of the recognition of the peculiar challenges faced by the African child in the spheres of socio-economic, developmental, cultural and traditional circumstances.[70] Other challenges include natural disasters, armed conflicts, exploitation and hunger.[71] Furthermore, the deliberate prohibition of child marriage in the Children's Charter[72] contrasts the position of CRC and the jurisprudence in the General Comment on ending child marriages which allows children below the age of 18 to marry because of evolved capacities.[73]

The African Children's Charter then provides for the African Children's Committee to promote and protect these rights through the collection and documentation of information, the organisation of meetings and recommendations to governments.[74] Its mandate extends to the formulation of principles and rules to protect the rights and welfare of children in Africa, [75] cooperation with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child.[76] The Children's Committee also monitors the implementation of the Children's Charter through various avenues such as the consideration of communications, state party reporting, investigative visits and the use of recommendations in Concluding Observations.[77] It should be noted that following the apogee of the COVID-19 pandemic, most of these obligations have been

67 Art 22 African Children's Charter.
68 As above.
69 As above.
70 Fourth preambular para African Children's Charter.
71 As above.
72 Mezmur (n 66) 125.
73 Para 20 General Comment on Marriages.
74 Art 45(a)(i) African Children's Charter.
75 Art 45(ii) African Children's Charter.
76 Art 45(iii) African Children's Charter.
77 Arts 43, 44 & 45 African Children's Charter.

suspended, affecting the usual execution of its mandate. The African Children's Committee's use of online methods through virtual sessions and meetings has been a critical engagement of its Rules of Procedure.[78]

The institutional structure of the African Children's Committee is informed by the African Children's Charter. Thus:[79]

> (1) The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
> (2) The members of the Committee shall serve in their personal capacity.
> (3) The Committee shall not include more than one national of the same state.

As such, this shows that these qualities should speak to the calibre of members of the Children's Committee. From a procedural perspective, the Committee cannot have more than two members from a state party, [80] and their tenure is tagged to a maximum of two terms in office.[81] This ensures an ascertainable term of office that is not mired by perpetuity. However, this has been tested in the era of COVID-19 as elections that were poised for July 2019 could not be held due to the restrictions on movement to curb the spread of the pandemic.[82] Besides, the Committee adopts its own procedure in the execution of its mandate. For matters to do with quorum and execution of this mandate, the Committee is guided by the Revised Communication Guidelines, the Revised Rules of Procedure and the Revised Implementation Hearing Guidelines.[83] It is argued that the continued engagement of some members of the Committee whose term was due to expire in July 2020 was to ensure that problems such as the lack of quorum would be avoided.[84]

78 For details, see http://acerwc.africa/ (accessed 18 November 2020).
79 Arts 31(1)-(3) African Children's Charter.
80 Art 35 African Children's Charter.
81 Art 37 African Children's Charter.
82 A look at the bureau details of the current experts indicates that the term of six experts was due to expire in July 2020. This seems to have been extended until a convenient session of the Executive Council is convened to conduct the elections. See the Committee Experts, https://bit.ly/3nyxeWn (accessed 18 November 2020).
83 Revised Guidelines for the Consideration of Communications, https://bit.ly/3xVcihI (accessed 25 July 2021). See also Revised Rules of Procedure of the African Children's Committee, Communications, https://bit.ly/3h36CeF (accessed 25 July 2021).
84 This potentially dangerous predicament was evidently avoided through the successful convening of the virtual 35th and 36th session of the African Children's Committee. See https://www.acerwc.africa/ (accessed 18 November 2020).

In the development of its jurisprudence, the African Children's Committee is mandated to draw inspiration from the international law on human rights, particularly from the provisions of the Universal Declaration of Human Rights (Universal Declaration), CRC and other instruments adopted by the UN and by African countries in the field of human rights, and from African values and traditions.[85] This is an indication that the African Children's Charter allows its Children's Committee to apply other pieces of international law to protect the child, such as the Refugee Convention and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which may speak to children who are either refugees or internally-displaced persons whose rights may be in danger of an actual or possible violation.

Besides, the African Children's Charter calls for a child rights-based approach which engages four principles that have to be used in dealing with matters affecting a child. First, this approach engages the best interests principle as the yardstick for measuring all actions, laws and policies of a state affecting children. The best interests of the child are 'the' primary consideration by which to measure all actions, laws and policies that affect children.[86] Further, in determining who must apply the 'best interests' principle, the phrase 'in all actions' (concerning the child) as used in the Children's Charter provides significant guidance. This principle has been referred to in all the General Comments adopted by the African Children's Committee.[87] To this end, it would be good to see the development of jurisprudence on the best interests of the child at a time such as this.

Second, the principle of non-discrimination asserts states' obligation to protect children from any form of discrimination and to take positive action to promote their rights without exception.[88] The third principle is the need to uphold the right to life, survival and development of the child. It is proposed that this term is interpreted broadly to include physical, mental, emotional, cognitive, social and cultural development of the child.[89] This is an indication that the literal definition of the right to life is not sufficient on its own – thus calling for a broad approach that speaks to other aspects that would

85 Art 46 African Children's Charter.
86 In contrast with the Convention on the Rights of the Child which states that the best interests of the child are 'a' primary consideration. The article 'a' in CRC shows that in determining on issues that consist of the child's interests, the best interest principle may not be the only principle to be consulted.
87 Some of the notable examples include the General Comment on Article 22; children in situations of conflict, paras 24-30; and General Comment 1 (Article 30 of the Charter) on 'Children of incarcerated and imprisoned parents and primary caregivers' 2013, paras 22-24. All General Comments are available at www.acerwc.africa/general-comments (accessed 23 October 2020).
88 Art 3 African Children's Charter.
89 Art 5 African Children's Charter generally.

affect the child's development.[90] Fourth, the child-based approach requires that children are heard and their views considered in any matters affecting them.[91] This extends to according due weight to the considerations of children whose capacities have evolved.[92] Other activities of the African Children's Committee continue to develop its jurisprudence. In its concept note for the commemoration of the day of the African Child 2019,[93] the Committee gives insights on emergencies that affect children. It states that humanitarian crises may be natural disasters, such as earthquakes, tsunamis, floods and health epidemics.[94] As such, this broad understanding of humanitarian crises also calls for humanitarian action by states that may not be experiencing (armed) conflicts but other disasters or emergencies that require humanitarian action.[95]

As the African Children's Committee celebrates its thirtieth anniversary in 2020, it has developed much traction concerning the child affected by armed conflict. Much can be said about its activities between 2016 and 2020. First, it has undertaken studies concerning the plight of the child affected by armed conflict. In the Continental Study on the Children Affected by Armed Conflict, the Children's Committee identified the changing roles of the child as far as girls were increasingly recruited into armed groups, and used as suicide bombers in some areas controlled by armed groups.[96] Another study on mapping children on the move identified various factors that lead children to migrate in Africa.[97] These two studies, however, did not contextualise the possibility of a pandemic of the magnitude of COVID-19.

Second, the Children's Committee has remained resilient in making strategic appointments such as senior child protection officers,[98]

90 See General Comment on Article 6 of the Charter: Right to birth registration, name and nationality, para 16.
91 General Comment on Article 6 of the Charter: Right to birth registration, name and nationality, paras 21-22.
92 Art 7 African Children's Charter. See also General Comment 12 of the Convention of the Right of the Child on Child Participation. See also General Coment on Article 22, paras 31 & and 41.
93 Concept Note of the Commemoration of the Day of the African Child, https://bit.ly/2UKW6Oj (accessed 19 November 2020).
94 Concept Note (n 93) para 6. World Vision International (US) 'What is a humanitarian disaster?' http://www.wvi.org/disaster-management/what-humanitarian-disaster (accessed 20 November 2020).
95 World Vision International (n 94).
96 Study on the impact of armed conflict on children, https://bit.ly/3nKZup4 (accessed 20 November 2020).
97 Mapping Children on the Move within Africa – ACERWC, https://bit.ly/3nJEPkY (accessed 19 November 2020).
98 See Appointments made in 2019, https://www.acerwc.africa/the-secretariat/ (accessed 19 November 2020).

Special Rapporteurs on children affected by armed conflict,[99] and consultants to engage the issues affecting children in situations of armed conflict.[100] This culminated into the adoption of a General Comment on Article 22 of the Charter on children in situations of conflict during the 35th virtual session of the Committee during the COVID-19 pandemic.[101] The challenge is that the General Comment does not sufficiently delineate armed conflict, tension and strife, leaving the matter to the Committee to develop these definitions. The current occurrence of the pandemic offers a good time to introspect on children affected within and out of conflict situations.[102]

Third, the African Children's Committee continues to hand down key principles in the promotion and protection of the rights of the child. In recent decisions, the Committee has used the principle of due diligence to advise state parties on ensuring the realisation of the rights of the child under the African Children's Charter.[103] In principle, the Children's Committee advised that due diligence of the state is evaluated based on the result of measures used to address the violations of the rights of the child.[104] The adoption of crucial principles came to the fore outside the realm of individual communications when the Committee issued a Guiding Note on the protection of children during COVID-19. It called on state parties to tailor responses to suit the special vulnerabilities of the concerned group of children such as refugees and those who are internally displaced in light of the variations of the impact of the pandemic on them.[105] It should be noted, however, that this evaluation has to be informed by the dictates of Agenda 2040 in light of what has been done as of 2020. [106]

99 See https://www.acerwc.africa/special-rapporeurs/ (accessed 19 November 2020).

100 See appointment of consultant to draft the General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child, in the Report of the 32nd session of the African Children's Committee, item 5, paras 32-37, https://bit.ly/36PG635 (accessed 19 November 2020).

101 See Final Communiqué of the Committee on the 35th session, http://acerwc.africa/ (accessed 19 November 2020).

102 The reluctance to develop definitions is pointed to in the General Comment paras 18 and 21.

103 See *Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon* Communication 6/Com/002/2015, paras 46-57; *MRGI & Another v Mauritania* Communication 7/Com/003/2015 paras 47-58 on the use of due diligence and the best interests principle.

104 *MRGI* (n 103) paras 47-58; *Institute for Human Rights and Development in Africa* (n 103) paras 46-57.

105 Guiding Note on Children's Rights during COVID-19, 8 April 2020, para vii, https://bit.ly/3nR1X1h (accessed 19 November 2020).

106 Art 42(a)(ii) African Children's Charter.

5 An evaluation of Agenda 2040 as a working model to 2050

The evaluation of Agenda 2040 as a tool towards the realisation of the 2050 visualised child uses five key aspects that are drawn from the Aspirations of Agenda 2040. These include the adoption of laws, policies and institutions; the use of states' disaster management and responses; and the registration of births and other statistics. Other aspects include ensuring that children benefit from quality education; the existence of a child-sensitive criminal justice system; and the use of the African Children's Committee's normative mandate to push for the realisation of the rights of the child towards the visualised position in 2050.

5.1 Adoption of laws, policies and institutions

The African Children's Committee has indeed done quite a lot in offering direction to state parties on the adoption of adequate laws, policies and institutions to protect the child. It has called for the improvement of the lives of vulnerable children such as refugees, children with disabilities and other related cases.[107] This has extended to the reiteration that states provide for the enjoyment of rights of these vulnerable children in areas of access to health care, access to justice, the provision of education facilities and the enjoyment of the right to water and sanitation.[108] The Committee has continued to remind states to reinforce their commitment to protecting children through the harmonisation of national laws with provisions of the African Children's Charter.[109] Several states have since 2016 adopted child-friendly national legislative, policy and institutional frameworks.[110] However, some state parties still have non-child-

107 Concluding Observations on the Republic of Cameroon's Report on the status of implementation of the African Charter on the Rights and Welfare of the Child, para 26, https://bit.ly/38edLUB (accessed 20 November 2020).

108 As above.

109 Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the People's Democratic Republic of Algeria Report on the status of Implementation of the African Charter on the Rights and Welfare of the Child the African Charter on the Rights and Welfare of the Child, para 5, https://bit.ly/2YKf0I0 (accessed 20 November 2020).

110 See Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child on the initial report of the Republic of Angola on the status of the implementation of the African Charter on the Rights and Welfare of the Child, paras 3-4, https://www.acerwc.africa/reporting-table/ (accessed 20 November 2020); Concluding Observations on Algeria (n 109).

friendly legislative, policy and institutional frameworks[111] that are exacerbated by reservations to the African Children's Charter.[112]

Based on the foregoing paragraph, one may argue that the emphasis of the Children's Committee in the gains above is not expressly aligned to public health emergencies. This is because the recommendations that are usually proposed by the Committee to state parties are informed by the circumstances in individual states. These include the provision of the right to education, access to health care, the protection of vulnerable children such as refugees and children with disabilities or children in conflict with the law.[113] It should be noted that these rights are interdependent where the enjoyment of one may inform the enjoyment of others, such as the enjoyment of the right to health care as a precursor to the enjoyment of the right to dignity, education and life. A look at the follow-up missions to some states has shown increased traction towards the promotion and protection of the rights of the child.[114] As indicated earlier, the specific aspects of reforms such as access to the provision of health care, education, water and sanitation that speak to public health interventions remain lacking. As such, this points to the Children's Committee's engagement of underlying challenges in national laws, policies and institutions to protect the child which, once engaged, would greatly inform the public health interventions.

5.2 States' disaster management and responses

In addition, the African Children's Committee has urged that children in public health emergencies are included in states' disaster management and responses.[115] It adopts a wide definition of disaster to include natural, man-made disasters and public health emergencies.[116] What is instructive is the call to states to protect the child against human rights violations such as violence, exploitation,

111 See Concluding Observations and Recommendations on Angola (n 110) paras 3-4.
112 See Reservations to the Charter (2020), https://www.acerwc.africa/reservations/ (accessed 20 November 2020).
113 Concluding Observations on Angola (n 110) paras 3-4; Concluding Observations Algeria (n 109) para 4.
114 Reports from follow-up visits by the African Children's Committee Secretariat, https://www.acerwc.africa/follow-up-missions/ (accessed 5 May 2020).
115 Africa's Agenda 2040 for Children, Fostering an Africa Fit for Children 8, https://bit.ly/31lEhKd (accessed 27 June 2020). Eg, research in 2018 showed that while Kenya had very progressive policies concerning the education and health of children, they did not deal with refugees. Child Support Grant, https://www.sassa.gov.za/Pages/Child-Support-Grant.aspx (accessed 20 November 2020). See also Golden (n 55).
116 Concept Note (n 99) para 6.

neglect and abuse that the children in question face during public health emergencies.[117]

It is argued that the African Children's Committee has engaged an approach that addresses the underlying challenges that face a child. Aspiration 9 of Agenda 2040 looks towards having every child free from the impact of armed conflicts and other disasters or emergencies.[118] It is true that the Aspiration refers to the word 'emergency' only in the heading of the aspiration,[119] and calls for the use of academic/curriculum development measures, legislative, policy and other measures to stop the effects of conflict.[120] The use of the due diligence principle can be used by the Children's Committee to turn these measures into obligations of result. This would be a call on states to show how they have inculcated the protection of children in their responses to public health emergencies.

5.3 Registration of births and other vital statistics

The African Children's Committee has developed jurisprudence on the need for birth registration of all children and other vital statistics. It continues to call on state parties to improve the operationalisation of their birth registration bureaus to be accessible at no cost.[121] The challenge remains in the continued provision of these services following the outbreak of a pandemic.

In its recent Guiding Note on Children and COVID-19, one may argue that the Children's Committee does not reiterate the need to ensure the continued registration of births and other vital statistics.[122] It is argued, however, that it uses a health safety perspective to remind state parties to ensure that women have access to safe birth, ante-natal and post-natal care.[123] It may be inferred that following safe delivery, births continue to be registered. This would be instructive as it enables the state to allocate resources to cater for children based on these statistics.

117 Aspiration 7 of Agenda 2040 should be engaged by 2050 to reflect this position.
118 Agenda 2040 (n 24) Aspiration 9.
119 As above.
120 As above.
121 Concluding Observations on Cameroon (n 107) para 15.
122 Guiding Note (n 105).
123 As above.

5.4 Benefit from quality education

The African Children's Committee has reiterated the need to ensure that all children benefit from quality education even in situations of public emergencies.[124] Besides, it points out the disadvantages that the closure of schools presents to learners.[125] These include the interruption of classes, and the compromise of the right to adequate food where school feeding programmes or free and subsidised school meals are unavailable.[126] In addition, the Children's Committee has reiterated the vulnerability that children face when out of school such as susceptibility to abuse, exposure to harmful practices such as female genital mutilation and child marriages.[127] The Children's Committee has called on states to create online platforms to facilitate tailored learning activities at home for children and the provision of resources to be used by teachers and caregivers to facilitate continued learning. However, the provision of online education during emergencies raises other issues such as the availability of devices for accessing the internet, data, and the availability of online education materials for all children, regardless of their status. It is argued that the enjoyment of a right by selected children to the exclusion of others on account of their status may raise questions of discrimination.

5.5 A child-sensitive criminal justice system

Agenda 2040 requires that a child benefits from a child-sensitive criminal justice system, which caters for children as victims of human rights abuses and as perpetrators.[128] This calls for improved access to both civil and criminal justice. Jurisprudence from the African Children's Committee underscores the adoption of a General Comment on children of incarcerated and imprisoned parents and primary caregivers.[129] It is appreciated that the General Comment advises state parties to refrain from incarcerating mothers with their children.[130] However, matters of incarceration during a period of a public emergency are not provided for. This potentially dangerous predicament is solved by the Committee's general use of a child-based approach that inculcates the use of the four principles of the

124 Concluding Observations on Cameroon (n 107) para 26.
125 Guiding Note (n 105).
126 As above.
127 As above.
128 Agenda 2040 (n 24) Aspiration 8.
129 General Comment on Article 30 (n 87).
130 General Comment on Article 30 (n 129) paras 6, 8 & 10.

best interests of the child, the right to survival and development, non-discrimination and the participation of a child.[131]

Some countries have adopted the use of online courts. A case in point is Uganda which adopted the Judicature (Audio-Visual) Rules to enable the use of online courts.[132] A look at the objectives shows that these rules may be used to reduce the delays and costs associated with hearing cases from vulnerable witnesses such as children.[133] This would be instructive in ensuring access to justice where physical involvements at courts cannot be used. In practice, the courts have been hesitant to deal with children during the outbreak of the pandemic. For instance, in Ethiopia and Uganda the national lockdown led to the suspension of court sittings, placing child offenders in a very precarious position.[134] It is believed that the existence of traction that expressly deals with health pandemics at a time such as this would be instructive.

5.6 Use of the African Children's Committee's mandate

The Children's Committee's mandate includes the consideration of state reports, and communications through the individual communications procedure, the use of follow-up visits to establish states' compliance with its recommendations.[135]

State parties are obliged to submit reports for consideration by the Children's Committee.[136] Subsequently, they may advise on the modes of improvement of the rights of the child in the given state.[137] Some of the requirements should be towards requiring states to

131 These four concepts have been greatly engaged by the Committee. See Part 2 of the General Comment on Article 30 (n 87). See also General Comment 5 On 'State Party Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection, acerwc.africa/generalcomments/ (accessed 20 November 2020).

132 Nanima (n 61) 351.

133 'CJ launches court audio-video link technology', https://bit.ly/2xjlDWW (accessed 11 April 2020). See also M Nabatanzi 'UNICEF supports installation of audio-visual technology at Ugandan courts for witness protection: Protecting the rights of child witnesses', https://uni.cf/3b5NS9X (accessed 20 November 2020).

134 Effectively, various NGOs that deal with children stated that there were court sessions for child victims of crime and those in conflict with the law. See Plan International 'Under siege: Impact of COVID-19 on girls in Africa' (2020) 11, https://bit.ly/3ffeIzw (accessed 20 November 2020).

135 See discussion under part 4 above on the mandate of the Committee.

136 Art 43 African Children's Charter.

137 J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 *African Human Rights Law Journal* 538; J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 340.

report on steps taken to ensure the promotion and protection of the visualised child through practical explanations on non-discriminatory and inclusive approaches that speak to the enjoyment of their rights.[138] A good example that may inform the conversation is where the Committee required South Africa to use appropriate measures to ensure that asylum-seeking, migrant and refugee children are not discriminated against based on unnecessary barriers to assessing various services such as basic education.[139]

As far as the communications procedure is concerned, although the current statistics show that the Children's Committee has handed down 10 decisions, this is in stark contrast to the over 300 decisions of the African Commission on Human and Peoples' Rights (African Commission).[140] The reiteration of key principles such as the use of due diligence on realising the visualised child is instructive.[141] This principle requires that the state's initiative to promote and protect the rights of the child as assessed by result will lead to the engagement of measures that offer better protection, especially during public emergencies.[142]

6 A working model towards 2050

The foregoing analysis shows that to a great extent the normative, institutional and jurisprudential framework of the African Children's Committee has attempted to engage the protection of the child in the wake of the various challenges that the COVID-19 pandemic has presented. This is partly because Africa has not in a long time been affected by a pandemic of this magnitude. This calls for the need to re-evaluate approaches concerning public health emergencies. In a 2016 research, Durojaye and Oluduro used an interesting principle to evaluate the African Commission's jurisprudence on the rights of women.[143] They argued that the development of the jurisprudence on women requires asking the right women question other than the

138 Concluding Recommendations by the African Children's Committee on the Kenyan first Periodic Report on the Status of implementation of the African Charter on the Rights and Welfare of the Child, para 43, https://bit.ly/3ouIRyY (accessed 18 November 2020).

139 The African Children's Committee's Concluding Observations on South Africa's initial State Report para 22, https://bit.ly/3otwvHo (accessed 23 October 2020).

140 IHRDA Case law analyser, http://caselaw.ihrda.org/ (accessed 18 November 2020).

141 See *Institute for Human Rights and Development in Africa* (n 103); MRGI (n 103) on the use of due diligence and the best interests principle.

142 *MRGI* (n 103) paras 47-58; *Institute for Human Rights and Development in Africa* (n 103) paras 46-57.

143 E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 315.

right question.[144] This requires placing a woman at the centre of every decision and question the initiatives that ought to improve the person of the African woman. In this context, the right child question has to be addressed to the right child affected by COVID-19 to inform approaches going forward.

In the context of Agenda 2040, this would entail placing the child at the centre of the probe and asking the relevant questions as follows: What are the best interests of a child as an internally-displaced person or as a refugee in the context of COVID-19? How do national laws speak to this child? What is the protection accorded to the child in the disaster management initiatives of the state? What has been the status of registration of births and vitals at a time such as this? How can all children benefit from quality education without discrimination based on their status? How can states learn from the Committee's use of due diligence and adopt good practices to ensure the promotion of the rights of the child? These questions will greatly improve the realisation of the protection of the visualised child.

7 Conclusion and recommendations

The outbreak of the COVID-19 pandemic has shown that vulnerable children are the worst hit, whereby the pandemic and the measures to mitigate its spread still leaves child rights violations. An evaluation of the first five-year implementation plan shows the visualised child and many positive developments by the African Children's Committee during this period. This is not in disregard of the various challenges that the pandemic has placed on the normative framework of the African Children's Charter and the consequential institutional and jurisprudential position of the Children's Committee. This notwithstanding, going forward presents opportunities to work towards the protection of the visualised child through adequate laws, policies and institutions to protect him or her in public health emergencies at both national and international levels. The deliberate continuation of the registration of birth and vital information of children can be harnessed. The enjoyment of other critical rights such as the right to health care and quality education has to be engaged even during emergencies. An accessible child-sensitive criminal justice system also imports to ensure the protection of both the child victim and one in conflict with the law. A child rights-based approach has to be at the centre of all these interventions.

144 As above.

Following the COVID-19 pandemic, the normative framework of the African Children's Committee may be interpreted to include matters of public health emergencies as far as human rights violations occur during public emergencies. The point of departure is in the pointers evident in the current jurisprudence. Further engagement of states towards the development of legislation, policies and institutional frameworks that protect children in public health emergencies should be on the Children's Committee's checklist. The low registration of births and vital information during the COVID-19 era should be a learning curve towards the use of easier and more practical modes of registration where physical registration procedures cannot be used. The right to education should include the dissemination of information to children to enable them to participate in various environments through questioning in classes and other platforms in society. The use of state reporting and the communications procedure should be embraced to enable the Committee to highlight good practices and advise concerning areas of improvement.

The African Children's Committee should undertake an empirical study to tackle the effect of COVID-19 on children emphasised in this study. This will improve approaches by various stakeholders in the promotion and protection of the right of children in Africa. This will be instructive in informing methods of dealing with public health emergencies in future.

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The African Children's Charter and ending corporal punishment of children in Africa: A work in progress

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Summary: *Corporal punishment is the most common form of violence against children worldwide, including in Africa. Corporal punishment violates children's rights to respect for their human dignity and physical integrity. The African Charter on the Rights and Welfare of the Child provides for every child's right to be protected from violence and ill-treatment. The African Committee of Experts on the Rights and Welfare of the Child and other human rights bodies consistently examine states on their progress towards prohibiting and eliminating corporal punishment. In the context of the thirtieth anniversary of the African Children's Charter, this article aims to examine the progress made towards the prohibition and elimination of corporal punishment of children in all settings, in Africa. It highlights the challenges and shortcomings in implementing this campaign in Africa. The role of the African Children's Committee in promoting and protecting the human rights imperative to prohibit corporal punishment of children is also examined, especially as regards the legal barriers to end the corporal punishment of children in Africa.*

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Key words: *African Children's Charter; children's rights; corporal punishment; Agenda 2040*

1 Introduction

Every human being in the world has the rights to respect for human dignity and physical integrity and to equal protection under the law, regardless of gender, age, ethnicity, socio-economic circumstances, ability or disability, religion, or any other status. Corporal punishment violates children's rights to respect for their human dignity and physical integrity, as well as their rights to health, development, education and freedom from torture and other cruel, inhuman or degrading treatment or punishment.[1]

Corporal punishment is the most common form of violence against children worldwide, including in Africa. Prohibiting its use raises the status of children in society who would be equally protected under the law on assault – whoever the perpetrator and whether or not the assault is inflicted as 'discipline' or punishment. Prohibiting corporal punishment can also have a positive effect in reducing other forms of violence against children. The UN Committee on the Rights of the Child (CRC Committee) defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. [2] According to the Committee, these include hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement – a whip, stick, belt, shoe or wooden spoon. However, it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).[3] According to the CRC Committee, corporal punishment is invariably degrading.[4] In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention on the Rights of the Child (CRC). These include, for example, punishment that belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child. The

1 Global Partnership to End Violence Against Children *Prohibiting all corporal punishment of children: Laying the foundations for non-violent childhoods* (2021) 3.
2 UN Committee on the Rights of the Child (CRC Committee) General Comment 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19, 28, paras 2 & and 37, *inter alia*).
3 CRC Committee (n 2) para 11.
4 As above.

CRC Committee has raised the issue of corporal punishment in other General Comments that it issued, including General Comment 1 on 'The aims of education' (2001);[5] 10 on 'Children's rights in juvenile justice' (2007);[6] 13 on 'The right of the child to freedom from all forms of violence' (2011);[7] 20 on 'The implementation of the rights of the child during adolescence' (2016);[8] 21 on 'Children in street situations' (2017);[9] and 24 on 'Children's rights in the child justice system' (2019).[10] Prohibiting corporal punishment therefore aims to ensure that children are equally protected under the law on assault, regardless of who the perpetrator is and whether or not the assault is inflicted as 'discipline' or punishment.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for every child's right to be protected from violence and ill-treatment. The Charter requires states to ensure that discipline by parents and at school respects the child's human dignity.[11] The Children's Charter further calls on states to ensure that children are protected from all forms of torture and inhuman or degrading treatment by parents and others caring for the child[12] and that in the administration of juvenile justice, children in detention shall not be subjected to torture or inhuman or degrading treatment or punishment.[13]

As of June 2021, ten African states[14] have prohibited corporal punishment of children in all settings.[15] The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and other human rights bodies have made it very clear that all corporal punishment of children must be prohibited and eliminated, including within the family.[16] The African Children's Committee increasingly examines states on their progress towards

5 CRC Committee General Comment 1 (2001): The aims of education (art 29(1)).
6 CRC Committee General Comment 10 (2007): Children's rights in juvenilejustice.
7 CRC Committee General Comment 13 (2011): The right of the child to freedom from all forms of violence.
8 CRC Committee General Comment 20 (2016) on the implementation of the rights of the child during adolescence.
9 CRC Committee General Comment 21 (2017) on children in street situations.
10 CRC Committee General Comment 24 (2019) on children's rights in the child justice system.
11 Arts 11 & 20 African Children's Charter.
12 Art 16.
13 Art 17.
14 Benin; Cabo Verde; Congo; Guinea; Kenya; Seychelles; South Sudan; South Africa; Togo; Tunisia. Tunisia has not ratified the African Children's Charter.
15 https://endcorporalpunishment.org/africa/ (accessed 1 June 2021).
16 African Committee of Experts on the Rights and Welfare of the Child General Comment 5 (2018) on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection.

prohibiting and eliminating corporal punishment and has made recommendations to prohibit and eliminate it in state parties.[17]

In the context of the thirtieth anniversary of the African Children's Charter, this article aims to examine the progress made towards the prohibition and elimination of corporal punishment of children in all settings, in Africa. It highlights the challenges and shortcomings in implementing this campaign in Africa. The role of the African Children's Charter in promoting and protecting the human rights imperative to prohibit corporal punishment of children is emphasised. Recommendations will therefore be made on the ways of overcoming the legal and socio-cultural barriers to end corporal punishment in Africa. The ultimate goal is to call on state parties to fully implement the African Children's Charter by effectively protecting children's best interests, including safeguarding their dignity and their physical and mental integrity.

2 The human rights imperative to prohibit corporal punishment

Corporal punishment is the most common form of violence against children in all regions, including in Africa. Where adults are legally protected from all assaults, the legality of corporal punishment denies children their right to equal protection under the law and clearly discriminates against them. The legal and social acceptance of this form of violence against children is highly indicative of children's marginal and often secondary status in societies where children are not seen as individual rights holders.

The obligation to prohibit all forms of corporal punishment against children falls directly under articles 19, 28(2) and 37 of CRC. Article 19:

> (1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

17 https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/ (accessed 1 June 2021).

Article 28(2):

> States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

Article 37:

> States Parties shall ensure that:
>
> (a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

Article 4 of CRC emphasises that its implementation necessitates legislative as well as non-legislative measures: 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.'

Articles 2, 3, 6 and 12 are regarded as the four general principles underlying implementation of CRC, providing respectively for non-discrimination, the best interests of the child, the child's right to life, survival and development, and respect for the views of the child.

Since the very beginning of its work in examining state parties' reports on the implementation of CRC, the CRC Committee has raised the issue of corporal punishment of children with governments and recommended it be prohibited, including in the home.[18] By March 2020[19] the CRC Committee had made 486 Observations/recommendations on the issue of ending corporal punishment to 194 states. Recommendations are consistently to prohibit corporal punishment in all settings, including the home, and to support this with relevant measures of implementation. Once states have achieved prohibition, the Committee continues to monitor its implementation and enforcement. Many other UN and regional human rights treaty-monitoring bodies have confirmed that governments must prohibit all corporal punishment of children.[20] The issue is regularly raised under the Universal Periodic Review (UPR) process where states are examined by all United Nations (UN) member states on their overall human rights record. To date, many African states have expressed

18 https://endcorporalpunishment.org/introduction/ (accessed 1 June 2021).
19 https://endcorporalpunishment.org/human-rights-law/crc/ (accessed 1 June 2021).
20 Eg CRC Committee; UN Committee Against Torture; UN Committee on theElimination of Discrimination Against Women; African Committee on the Rights and Welfare of the Child.

their commitment to law reform by accepting recommendations made under the UPR. It should also be noted that ending violence against children constitutes a global target in the development agenda. Under the Sustainable Development Goals (SDGs), all states have committed to ending all violence against children by 2030 (Target 16.2).[21] The prohibition of all forms corporal punishment is a critical step towards the achievement of Target 16.2 and other SDG targets, including those related to health and well-being,[22] and quality education.[23] The INSPIRE strategies[24] developed by the World Health Organisation and other agencies to support governments in achieving Target 16.2 recognises the prohibition of corporal punishment as key to ending violence against children and to reduce violence in society in the long term.

At the regional level, the obligation to prohibit corporal punishment against children is regulated by the African Children's Charter. The Charter makes provision for corporal punishment inflicted to children in schools, in the home and penal institutions.[25] For instance, in articles 11, 16 and 20 the Children's Charter calls on states to ensure that discipline by parents and at school respects the child's human dignity. Article 11(5) provides:

> States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

Article 20:

> (1) Parents, or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty
>
> ...
>
> (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

Article16(1) of the African Children's Charter requires state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman

21 United Nations 'Transforming our world: The 2030 Agenda for Sustainable Development' A/RES/70/1.
22 SDG Target 3.5.
23 SDG Target 4(a).
24 World Health Organisation *INSPIRE: Seven strategies to end violence against children* (2016) 24.
25 As of June 2020, the Charter has been ratified or acceded to by 50 AU member states. See https://www.acerwc.africa/ratifications-table/ (accessed 1 June 2021).

or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of [parent(s), legal guardian(s) or any other person who has the care of the child].

Furthermore, as regards children in penal institutions, article 17(2)(a) of the Children's Charter requires state parties to particularly ensure that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment.

The implementation of the African Children's Charter is monitored by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In 2016 the African Children's Committee adopted Africa's Agenda for Children 2040: Fostering an Africa fit for children.[26] The Agenda is composed of 10 Aspirations that aim to 'restore the dignity of the African child' by ensuring the effective implementation of the African Children's Charter. Relevant to ending corporal punishment of children in Africa is Aspiration 7 which aims to 'ensure every child is protected against violence, exploitation, neglect and abuse'. Agenda 2040 therefore aspires that by 2040 no child should be subjected to corporal punishment.[27] Key benchmarks have been set as regards ending corporal punishment of children in Africa. By 2020 states should have prohibited corporal punishment as a form of discipline or punishment in schools, institutions and in the criminal justice system. Furthermore, by 2020 national partners should have initiated and engaged in national dialogue to discuss the feasibility of abolishing and eradicating corporal punishment from the private setting of the home. From all indications the benchmarks set for 2020 will not be met. With this missed key millstone, questions could be raised about the likelihood of achieving the ultimate milestones of 2040 which aim to eliminate corporal punishment of children. It will therefore be important to verify whether the African Children's Committee will adopt a revised strategy to achieve its initial targets, including those concerning the corporal punishment of children.

Another regional instrument which includes an obligation to prohibit and eliminate corporal punishment of children in all settings is the African Charter on Human and Peoples' Rights (African Charter).[28] The African Charter requires states that have ratified this

26 African Children's Committee *Africa's Agenda for Children 2040: Fostering an Africa fit for children* (2016) 11.
27 African Children's Committee (n 26) 39.
28 African Charter on Human and Peoples' Rights 1981.

Charter to ensure equal protection of the law (article 3); respect for personal integrity (article 4); respect for human dignity (article 5); and protection from torture and cruel, inhuman or degrading punishment and treatment (article 5) for all people. It should be noted that the African Commission on Human and Peoples' Rights (African Commission) which monitors the implementation of the African Charter has specifically stated that the use of corporal punishment by state parties was in violation of the African Charter. In 2000 the African Commission received a complaint[29] concerning the sentencing of eight students to 25 to 40 lashes in Sudan, under the country's criminal law. The African Commission concluded that the Sudanese legislation permitting flogging violated article 5 of the African Charter, and requested the government of Sudan to amend the criminal law in question, abolish the penalty of lashes, and compensate the victims. The African Commission clearly stated that '[t]here is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.'[30] The African Commission's decision is evidence that according to African human rights standards, the infliction of corporal punishment constitutes a human rights violation and for this reason, African states are required to take legislative measures to prohibit this practice. Sudan has since prohibited 'whipping by way of discipline' and flogging as a sentence for crime.[31]

3 State of corporal punishment of children in Africa

3.1 Prevalence

An overwhelming body of research associates corporal punishment with a variety of negative health and behavioural outcomes, including poorer mental health, cognitive development and educational outcomes, increased aggression and antisocial behaviour.[32] It can damage family relationships and, far from teaching children to

29 *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).
30 *Doebbler* (n 29) para 42.
31 The Miscellaneous Amendments Law 2020 repeals whipping and replaces it with community service. It also amends arts 25, 68, 69, 80, 81, 125, 148(2), 151, 155, 156 and 174 of the Criminal Code 1991 to repeal flogging as disciplinary measure.
32 ET Gershoff 'Report on physical punishment in the United States: What research tells us about its effects on children' (2008) *Center for Effective Discipline* 30; see also ET Gershoff & A Grogan-Kaylor 'Spanking and child outcomes: Old controversies and new meta-analyses' (2016) 30 *Journal of Family Psychology* 453.

behave well, it teaches them that violence is an acceptable way to resolve conflict. In the school setting, corporal punishment is often associated with the reason why children drop out of school, or record poor school performances,[33] making them more vulnerable to other forms of exploitation.[34]

A survey conducted by the United Nations Children's Fund (UNICEF) in sub-Saharan Africa revealed that 82 per cent of children aged between one and 14 years of age have reported experiencing violent discipline in the month preceding the survey, between 2012 and 2019.[35] This represented 83 per cent in the West and Central African sub-region.[36] A Multiple Indicator Cluster Survey in 2017/8 by Ghana Statistical Service found that almost all children (94 per cent) aged one to 14 years experienced some form of violent 'discipline' (physical punishment and/or psychological aggression) at home; 17 per cent experience severe physical punishment (hitting or slapping a child on the face, head or ears, and hitting or beating a child hard and repeatedly) and 78 per cent other physical punishments.[37] In the school setting, a Human Rights Watch study[38] conducted in 2017 revealed routine, widespread and sometimes brutal use of corporal punishment in schools in Tanzania. Almost all adolescents and students interviewed were subjected to corporal punishment at some point of their school experience. Teachers reportedly hit students irrespective of their gender or disability. Senior school officials or teachers reported caning students and not following government regulations on the infliction of corporal punishment in schools. Similarly, in Malawi, in a study of 104 childcare institutions (orphanages, special needs centres, church homes, transit care centres and reformatory centres) which involved interviews with staff in the institutions and focus group discussions with children, documented the use of corporal punishment, including children being whipped, forced to kneel and forced to do hard work.[39]

33 MJ Ogando Portela & K Pells 'Corporal punishment in schools: Longitudinal evidence from Ethiopia, India, Peru and Vietnam' (2015) *Innocenti Discussion Paper* 2.
34 UNICEF, Plan West Africa et al *Too often in silence: A report on school based violence in West and Central Africa* (2010) 10.
35 https://data.unicef.org/topic/child-protection/violence/violent-discipline/ (accessed 1 June 2021).
36 As above.
37 Ghana Statistical Service *Multiple Indicator Cluster Survey (MICS 2017/18)* (2018) *Survey Findings Report*.
38 Human Rights Watch *I had a dream to finish school: Barriers to secondary education in Tanzania* (2017) 8.
39 UNICEF Malawi & Ministry of Gender, Children and Community Development *All children count: A baseline study of children in institutional care in Malawi* (2011) 2.

The consistent positions of human rights treaty bodies reflect the seriousness with which the prohibition of corporal punishment of children is viewed under international human rights law. It also underlines the high priority that should be given to achieving law reform. There is much work to be done in Africa, but all indications are that progress is accelerating. Many African states have achieved prohibition in settings outside the home, including 28 states in schools, 50 as a sentence of the courts, and 32 in penal institutions.[40]

3.2 Legality and need for law reform to prohibit corporal punishment

The prohibition of corporal punishment is fundamental to child protection. The experience of states that have achieved effective prohibition shows that legal protection supports change in attitudes and behaviour.[41] Law reform provides clarity to children, parents, teachers, social services and law enforcement that no violence against a child is acceptable. Because corporal punishment has been almost universally accepted in all regions as a disciplinary measure in child rearing, it still is not generally perceived as harmful, abusive or even violent.[42] It is even frequently argued that it is a good and necessary element of child rearing – 'in the child's best interests'. For this reason, legislation that prohibits 'violence' or 'inhuman or degrading treatment', or which protects 'physical integrity' or 'human dignity', is not readily interpreted as prohibiting all corporal punishment but can be seen as prohibiting only that which reaches a certain level of severity. For instance, in Malawi section 80 of the Child Care, Protection and Justice Act 2010 states that 'no person shall subject a child to a social or customary practice that is harmful to the health or general development of the child' but this is not interpreted as prohibiting all corporal punishment in child rearing. Consequently, in its Concluding Observations on Malawi's initial report,[43] the African Children's Committee urged the state party to 'review relevant laws and expressly prohibit corporal punishment in all settings and create awareness in schools, among parents, community, traditional and cultural leaders, and among personnel of the justice system on the negative impacts of corporal punishment on the wellbeing of children'.

40 See https://endcorporalpunishment.org/africa/ (accessed 1 June 2021).
41 TA Trifan et al 'Have authoritarian parenting practices and roles changed in the last 50 years?' (2014) 76 *Journal of Marriage and Family* 744.
42 Global Initiative to End All Corporal Punishment of Children *Ending corporal punishment of children: A short guide to effective law reform* (2019) 8.
43 Concluding Observations on initial report, para 21.

In many countries the right of parents, teachers and others to use 'reasonable' punishment (chastisement, correction or similar) exists in case law, and in some this is confirmed in legislation.[44] This constitutes a legal defence, so the law on assault does not apply to 'disciplinary' assaults on children by parents and others. In other words, the law provides a defence to parents when the corporal punishment is considered 'reasonable'. For instance, in Botswana article 61 of the Children's Act 2009 prohibits only 'unreasonable' correction of a child by parents, thereby allowing 'reasonable' correction; sections 27 and section 61 expressly state that the legal provisions protecting a child's dignity and prohibiting cruel treatment do not preclude the use of corporal punishment. Equally, in Ethiopia article 576 of the Criminal Code 2005 recognises the power of parents and others with parental responsibilities to take 'a disciplinary measure that does not contravene the law, for the purpose of proper upbringing' and article 258 of the Revised Family Code 2000 states that 'the guardian may take the necessary disciplinary measures for the purpose of ensuring the upbringing of the minor'. In other countries (for instance, Côte d'Ivoire, Niger, Gabon) there is no confirmation in law of a 'right' of parents to administer punishment, but legal provisions against violence and abuse are not interpreted as prohibiting all corporal punishment in child rearing. The law therefore needs to be amended to explicitly prohibit all corporal punishment and other cruel or degrading forms of punishment, in the home and all other settings where adults exercise parental authority over children. It should be added that a 'silent' repeal of provisions that allowed corporal punishment does not amount to prohibition as it does not necessarily send a clear message that corporal punishment is unlawful. Because corporal punishment has traditionally been so widely socially accepted, the law must be absolutely clear in order to avert misinterpretation, especially in case of litigation. For instance, in Rwanda Law 32/2016 of 28/08/2016 Governing Persons and Family passed in August 2016 repealed the Civil Code 1988, which previously recognised a 'right of correction' to parents under its article 347. The new Law does not mention the 'right of correction' but it does not explicitly repeal it and does not explicitly prohibit corporal punishment. Consequently, prohibition is still to be achieved in the home, alternative care settings and day care facilities.

Corporal punishment may be specifically provided for in national constitutions. In Eswatini, section 29(2) of the Constitution, 2005 states that 'a child shall not be subjected to abuse or torture or other

44 Global Initiative to End All Corporal Punishment of Children (n 42) 7.

cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction'. A constitutional reform will therefore need to be carried out and a law explicitly prohibiting corporal punishment in all settings should be enacted. Alternatively, a high-level court could rule that corporal punishment is in violation of section 29(2) of the 2005 Constitution and declare it unconstitutional. The process of law reform to prohibit corporal punishment, in accordance with international and regional human rights instruments, might be compounded in states with a plural legal system where corporal punishment may be lawful under customary and/or religious laws. In Nigeria, for example, the legal system is composed of a mix of Islamic law, English common law and customary/native law. Section 221 of the 2003 Child Rights Act prohibits corporal punishment as a sentence for crime. However, the Child Rights Act is in force only in the federal capital territory of Abuja and in states that have explicitly enacted it. Consequently, judicial corporal punishment is prohibited only in the federal capital territory and in some selected states. As regards corporal punishment in the home, section 295 of the Criminal Code (in the southern states),[45] section 55 of the Penal Code (in the northern states)[46] and the Shari'a penal codes in the northern states confirm the right of parents to use force to 'correct' their children. In sum, due to the uneven protection of children's rights across the country, it appears that the process of prohibition of corporal punishment will be disparate and inconsistent, mainly depending on individual states' political willingness to enforce this fundamental children's human rights.

It should be noted that in some states governments have issued policies, guidance or circulars advising against the use of corporal punishment. Such frameworks are positive and may discourage the use of corporal punishment in practice. However, on their own they do not amount to prohibition. For instance, in Rwanda the National Integrated Child Rights Policy, adopted by the Ministry of Gender and Family Promotion in 2011 and intended as a guide for legislation, states that 'physical abuse, including torture and cruelty against children and corporal punishment of children is prohibited in all settings' and defines all settings as including 'homes, communities, schools, all centres and institutions that have children, prisons and detention centres, etc'. In the same vein, in Ghana a letter from the Ghana Education Service dated January 2019 declared that all forms of corporal punishment are banned in public and private schools

45 Criminal Code Act Laws of the Federation of Nigeria 1990.
46 Penal Code CAP 345 Laws of the Federation of Nigeria 1990.

and instructed all pre-tertiary schools to adopt a 'positive discipline toolkit'. However, both section 13(2) of the Children's Act 1998 and section 41 of the Criminal Offences Act 1960 allow for 'justifiable correction' of children in Ghana. Corporal punishment, therefore, remains lawful in schools in Ghana. Overall, although these are positive steps, prohibition will be achieved only if legislation is properly enforced. It is important to note that the prohibition of corporal punishment can also be achieved through case law.

In some states high-level judgments have declared corporal punishment unconstitutional, struck down legislation authorising its use and/or called on the government to enact prohibition in some or all settings. For example, in 1999 the Zambian High Court[47] heard an appeal against a sentence of ten strokes of the cane handed down by the magistrate's court. The Court set aside the sentence of corporal punishment against the appellant. It further found that the sections providing for the use of corporal punishment as a sentence were in direct conflict with article 15 of the Zambian Constitution, declared them unconstitutional and ordered that they should be repealed from the Penal Code. The judgment was later confirmed in legislation to prohibit judicial corporal punishment. The Criminal Procedure Code (Amendment) Act 2003 and the Penal Code (Amendment) Act 2003 repealed articles 14 and 330 and articles 24(c), 27, 36(c), 39 and 40(1) of the Criminal Procedure Code 1934 and the Penal Code 1931 which authorised and regulated flogging.

3.3 Role of the African Children's Committee in ending corporal punishment

During its 12th session in November 2008 the African Children's Committee held a special session on the issue of prohibition of corporal punishment, and its harmful and often permanent effects on children.[48] This session enabled the Committee and representatives from civil society organisations to openly discuss the need to encourage state parties to commit themselves to legal reform for the explicit prohibition of corporal punishment. The African Children's Committee has increasingly examined state parties to the African Children's Charter on their progress towards prohibiting corporal punishment and has recommended its prohibition in all settings, including the home. As of July 2019 the Children's Committee had published 26 recommendations/Observations on corporal

47 *Banda v The People* (2002) AHRLR 260 (ZaHC 1999).
48 Twelfth Meeting of the African Children's Committee, 3-8 November 2008, Addis Ababa, Ethiopia.

punishment to 25 states.[49] It should be noted that the Committee has equally issued recommendations to state parties regarding the implementation of prohibiting laws. Following its examination of Kenya's initial report in 2014, the Committee stated:[50]

> The Committee notes with appreciation the prohibition of corporal punishment under the Constitution, but recommends that it be implemented. The Committee encourages the State Party to raise awareness and give training on a continuous basis on alternative disciplinary measures.

Similarly, in 2019, to Benin the African Children's Committee stated:[51]

> Despite the legal prohibition, corporal punishment remains high in the State Party, particularly in the family and school settings. The Committee recommends that the State Party undertakes trainings and sensitisations to families, teachers, and law enforcement officials on prohibition of corporal punishment and on positive disciplining mechanisms. The Committee also encourages the State Party to prosecute teachers and law enforcement officials who inflict abuse while treating and disciplining children. Additionally, the Committee recommends that the State Party empowers children through education about their right to be free from any form of abuse and procedures for reporting corporal punishment and abuse when they occur.

In 2018 the African Children's Committee adopted General Comment 5 on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection'.[52] With General Comment 5 the Committee emphasised the need for prohibiting all forms of corporal punishment of children. The Committee highlighted that state parties must adopt legislation which prohibits all corporal punishment of children in all settings including the home (paragraph 5.3.1), also including in schools (paragraph 5.3.3) and in penal institutions and as a sentence for a crime (paragraph 5.3.2), as well as putting in place implementation measures (paragraph 5.3.1). The Committee expanded on its interpretation of article 1, stating that the perpetuation of harmful cultural practices cannot be defended on the basis of custom, tradition, religion or culture and must be eliminated (paragraph 7.1). All states, regardless of their governance systems and including federal states, have an obligation to recognise and implement the rights in the African Children's Charter (paragraph

49 https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/ (accessed 1 June 2021).
50 Concluding Observations on initial report (December 2014) para 23.
51 Concluding Observations on initial report (September 2019) para 23.
52 African Children's Committee (n 16).

5.2). Any retrogressive measures diluting or cutting back on rights already enjoyed are against international law (paragraph 3.10).

Under article 44 of the Children's Charter, the African Children's Committee can receive communications relating to any matter covered by the Charter, from any person, group or non-governmental organisation (NGO) recognised by the African Union (AU) or one of its member states, or by the UN. The African Children's Committee first dealt with the issue of corporal punishment of children in a 2014 decision.[53] In this case the Children's Committee found that the beating of *talibés*[54] by *marabouts*[55] amounted to corporal punishment and violated their rights under article 16; Senegal was found in violation of the African Children's Charter as it had not adequately protected *talibés* children from all forms of violence (paragraphs 65, 67 and 68).

The African Children's Committee expanded on this in 2017,[56] stating that it '[was] of the view that all forms of corporal punishment should be abolished, either in the home or any other setting'. By failing to protect the complainants from the physical and mental abuse to which they had been subjected during their enslavement, Mauritania was found to have 'violated its obligation to protect under article 16 of the Charter' (paragraph 88).

It should be pointed out that the African Children's Committee's decisions are not binding since the African Children's Charter does not provide for sanctions against non-compliant states. Nevertheless, as regards the above-mentioned complaints, the concerned states were required to report to the African Children's Committee within 180 days from receipt of the decisions, on all measures taken to implement the Committee's recommendations. Most importantly, the African Children's Committee's recommendations and decisions are evidence of its unequivocal support to the campaign for the eradication of corporal punishment of children in Africa. In its General Comment 5 the African Children's Committee clearly established a link between state parties' obligations under the African Children's Charter and the need to adopt legislations that prohibit all corporal punishment of children in all settings. The African Children's

53 Decision of 14 April 2014 on Communication 3/Com/001/2012 *Centre for Human Rights and la Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal.*
54 Boys studying the Quran at a *madrasa*.
55 Muslim religious leaders and teachers.
56 Decision 3/2017 of 15 December 2017 on Communication 7/Com/003/2015 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania.*

Committee consequently clarifies the provisions of article 16(1) of the Children's Charter which requires states to protect children from 'all forms of torture, inhuman or degrading treatment'. Indeed, the African Children's Committee expands its interpretation of 'protection from inhuman and degrading treatment' to the obligation to protect children from corporal punishment in all settings.

3.4 African Children's Charter and national frameworks prohibiting corporal punishment

The influence of the African Children's Charter in achieving the prohibition of corporal punishment is evidenced by existing national frameworks across the continent. National legislations prohibiting corporal punishment in some or all settings have specifically made reference to the African Charter. For instance, in Namibia the Child Care and Protection Act 2015, which came into force in January 2019, specifically states that the Act intends to give effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Child Care and Protection Act 2015[57] does not explicitly prohibit all forms of corporal punishment inflicted by parents, however light. Nevertheless, as regards alternative care settings and day care, section 228(3) of the Act states:

> A person may not administer corporal punishment to a child at any residential child care facility, place of care, shelter, early childhood development centre, a school, whether a state or private school or to a child in foster care, prison, police cell or any other form of alternative care resulting from a court order.

In the same vein in Côte d'Ivoire, in 2009 the Minister of Education signed a ministerial order[58] advising against the administration of corporal punishment by teachers in public or private schools. In its Preamble the ministerial order makes explicit reference to CRC and the African Children's Charter. The ministerial order is yet to be confirmed by legislation. This implies that corporal punishment is not formally prohibited in schools. Be that as it may, it is important to note that the African Children's Charter serves as reference in official government instruments that aim to ban the use of the corporal punishment of children.

57 Namibia Child Care and Protection Act 2015.
58 *Arrêté N° 0075 /MEN/DELC du 28 septembre 2009 portant interdiction des punitions physiques et humiliantes à l'endroit des enfants en milieu scolaire.*

Finally, in Sierra Leone corporal punishment is unlawful as a sentence for crime under the Child Rights Act 2007,[59] which repeals the Corporal Punishment Act 1960. The Child Rights Act 2007 explicitly states that its aims to provide for the promotion of the rights of the child compatible with CRC and the African Children's Charter. The Child Rights Act 2007 therefore recognises the role of the African Children's Charter in protecting children from violence as it repeals existing legislation allowing the use of corporal punishment.

3.5 African Children's Charter and high-level court judgments ruling against the use of corporal punishment in case law

The African Children's Charter has also been invoked in case law that ruled against the use of corporal punishment in some or all settings. In Zimbabwe, in the case of *The State v C (a Juvenile)*[60] in 2014, the Harare High Court condemned the use of judicial corporal punishment of children by referring to the African Children's Charter. The judgment by the Harare High Court stated that judicial corporal punishment violated the provisions of the new 2013 Constitution[61] prohibiting physical or psychological torture and cruel, inhuman or degrading treatment or punishment. The judgment followed a review by the Harare High Court of a case dealt with by the magistrate's court in which a 14 year-old boy was convicted for rape and sentenced to judicial corporal punishment under section 353(1) of the Criminal Procedure and Evidence Act. In this judgment Muremba J declared that corporal punishment as a criminal sanction for juveniles was no longer lawful because the new Constitution 2013 placed no limitation on protection from inhuman treatment and, unlike the previous Constitution, made no explicit provision for 'moderate corporal punishment'. The Court further invoked the international human rights instruments ratified by Zimbabwe that have guaranteed the right to freedom from torture, inhuman and degrading punishment, including CRC and the African Children's Charter. In this regard it noted:

> This elaboration of the children's rights in conformity with the regional and international conventions that Zimbabwe has ratified demonstrates that the new Constitution does not allow for the imposition of corporal punishment anymore. Clearly s 353 (1) of the Criminal Procedure and Evidence Act [Cap 9:07] is now a law which is inconsistent or *ultra vires* the Constitution.

59 Sierra Leone Child Rights Act 2007.
60 *The State v C (a Juvenile)* HH 718-14 / CRB R 87/14.
61 Constitution of Zimbabwe, 2013.

The Constitutional Court of Zimbabwe gave out a ruling[62] in 2019 which confirmed the 2014 High Court ruling, finding judicial corporal punishment of juveniles to be unconstitutional and striking down article 353 of the Criminal Procedure and Evidence Act. Once again, international and regional human rights instruments ratified by Zimbabwe were invoked to justify the court decision. In constructing its reasoning, the Court found:

> The primary focus on the rehabilitation of the juvenile offender is also present in Article 17(3) of the African Charter on the Rights and Welfare of the Child (the ACRWC), according to which 'the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation'.

Concerning the best interests of the child, the Court held:

> The first fundamental principle is one contained in the provisions of Article 3.1 of the CRC. It is to the effect that in all actions concerning children, the best interests of the child shall be a primary consideration. Section 81(2) of the Constitution also provides that 'a child's best interests are paramount in every matter concerning the child. See also Article 4(1) of the ACRWC.

As a result, the Court struck down section 353 of the Criminal Procedure and Evidence Act as unconstitutional. The prohibition was extended to apply to sentences of corporal punishment which had already been imposed but were awaiting execution. It should be pointed out that through this case, the Constitutional Court had the opportunity to declare corporal punishment unconstitutional in all settings. Especially, considering the unlimited interpretation of section 53 of the Constitution. However, the Court chose to limit its interpretation to judicial corporal punishment. This constitutes a missed opportunity for Zimbabwe to achieve full prohibition of corporal punishment of children. As of June 2020, a 2017 High Court decision[63] which ruled that corporal punishment of children in homes and in schools was unconstitutional has not yet been ruled upon by the Constitutional Court. This case represents another opportunity for the Zimbabwean Constitutional Court to invoke the African Children's Charter and declare corporal punishment of children unconstitutional.

In South Africa, High Court judges have also invoked the African Children's Charter and its mechanism – The African Children's

62 *The State v Willard Chokuramba* CCZ 10/19 Constitutional Application CCZ 29/15.

63 *Pfungwa & Another v Headmistress Belvedere Junior Primary School & Others* (HHT48-17 HC 6029/16) [2017] ZW HHC 148.

Committee's recommendations – to rule against the use of corporal punishment of children in the home. In 2017, in the case of *YG v The State*,[64] the Gauteng High Court declared the common law defence of 'reasonable chastisement' unconstitutional, particularly in light of sections 9, 10, 12 and 28 of the 1996 Constitution. The case was brought by a father who was found guilty of common assault against his son and who appealed the decision, referring to his right of 'reasonable chastisement'. The South African common law then recognised a defence to the charge of assault for parents who use force to discipline their children, provided this falls within the bounds of 'moderate or reasonable chastisement'. The Court stated that the parental 'right' to exercise 'moderate or reasonable' chastisement, as recognised in common law, ignores children's constitutionally-guaranteed rights to be protected from all forms of violence from public or private sources and to respect to their bodily and psychological integrity (section 12), to respect for their dignity (section 10), to equal protection under the law (section 9), and to be protected from maltreatment, neglect, abuse or degradation (section 28). In its arguments the Court made extensive reference to both CRC and General Comment 8 and their impacts on the national framework for the protection of children in South Africa. Crucially, the Court explicitly referred to the African Children's Committee's recommendation of 2014 which called on South Africa to ban corporal punishment in the home and to promote and provide information and training on positive discipline. The Court highlighted that the Committee had urged South Africa to 'harmonise its current national laws which permit parents to reasonably chastise their children'. The Constitutional Court confirmed this ruling in 2019,[65] finding the defence to be unconstitutional. This has effectively prohibited all corporal punishment of children in South Africa, which is yet to be confirmed in legislation.

4 Challenges

It has become evident that for the past 30 years, the African Children's Charter and its monitoring body – the African Children's Committee – are essential in the protection and promotion of children's rights in Africa. Using various mechanisms (general conclusions, General Comments, statements, and so forth) the African Children's Committee has repeatedly reminded state parties of their obligations to prohibit and eliminate all forms of corporal

64 *YG v The State* High Court of Gauteng Local Division Case A263/2016.
65 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* Constitutional Court ZACC34.

punishment children. However, in order to ensure that no child is subjected to corporal punishment by 2040, more efforts will need to be made. The prohibition of corporal punishment in the home still needs to be achieved in 45 African states. Some states are openly opposed to prohibition and/or have clearly expressed support for the use of corporal punishment of children. For instance, during the first cycle of the Universal Periodic Review (session 3) of Botswana in 2008 the government rejected recommendations to prohibit all corporal punishment, stating:[66]

> The Government … has no plans to eliminate corporal punishment, contending that itis a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame ofthe Customary Courts Act, the Penal Code and the Education Act.

During the second cycle review which took place in 2013 (session 15) the government of Botswana stated its commitment to comply with its treaty obligations regarding 'cultural sensitivities that have a bearing on existing legislation' and in this regard would 'undertake educational awareness campaigns, including on corporal punishment; however, to date there is public support for the retention of corporal punishment'.[67] The government rejected recommendations to prohibit corporal punishment. Responding to one of the recommendations, it stated:

> Botswana does not accept the recommendation. Public consultations have so far confirmed that Batswana still prefer the retention of corporal punishment. However, Government is committed to undertake educational awareness campaign before it can consider prohibition of corporal punishment of children in all settings.

The third cycle examination of Botswana took place in 2018 (session 29). Although consultations held with civil society during the drafting of the national report highlighted corporal punishment as 'being of paramount importance to CSOs',[68] the national report very parsimoniously addressed the legality of corporal punishment. The government 'noted' (did not support) recommendations to prohibit corporal punishment of children in all settings, including in the home. The government of Botswana clarified that '"noted" recommendations are those Botswana has taken some steps in but not fully implemented the recommendations or is unable to implement the recommendation within this reporting period'.[69]

66 17 March 2009, A/HRC/10/69/Add.1, Report of the working group: Addendum.
67 22 March 2013, A/HRC/23/7, Report of the working group, para 92.
68 6 November 2017, A/HRC/WG.6/29/BWA/1, National report, para 7.
69 2 May 2018, A/HRC/38/8/Add.1, Report of the working group: Addendum.

Botswana has ratified the African Children's Charter since 2001. It has not submitted its initial report to the African Children's Committee.

Achieving law reform to explicitly prohibit corporal punishment in all settings remains a significant challenge in Africa. Many state parties to the African Children's Charter enact laws pertaining to children without including the explicit prohibition of corporal punishment. These missed opportunities undeniably constitute setbacks to the advancement of children's rights in Africa. An example of a missed opportunity is the Central African Republic (CAR) that ratified the African Children's Charter in 2016. This followed an advocacy mission to CAR for the ratification of the Charter by the African Children's Committee in 2014. In June 2020 the President promulgated the first Child Protection Code of the country.[70] Although the new Child Protection Code explicitly refers to both CRC and the African Children's Charter, it fails to prohibit corporal punishment of children in all settings. Article 3 defines children's ill treatment as any severe or disproportionate punishment or abuse committed against a child or any other deprivation directed against a child causing or likely to cause physical, psychological or economic harm or suffering. It therefore excludes all forms of corporal punishment, however light. In the same vein, article 44 provides that parents must administer family discipline in a way that ensures that the child is treated with humanity. This provision cannot be interpreted as prohibiting all forms of corporal punishment, however light.

Likewise, Gabon enacted its first Children's Code in 2019. Article 83 of the Children's Code 2019 prohibits any form of physical or psychological violence against the child. Given the traditional legal and social acceptance of corporal punishment, this provision cannot be interpreted as prohibiting corporal punishment, however light. Moreover, article 84 of the Children's Code 2019 contains a list of prohibited forms of violence against children but corporal punishment is not included. This is despite the fact that the African Children's Committee had made recommendations concerning the need to ban corporal punishment in the country. In 2015, in its Concluding Observations to Gabon,[71] the Committee stated:

> It is noted that violence and abuse against children is predominant within the family. Therefore, the Committee recommends the State Party to ban corporal punishment in all settings. Moreover, the Committee recommends the State Party to put in place a child friendly

70 Loi No 20.016 portant Code de Protection de l'Enfant en République centrafricaine.
71 Concluding Observations on initial report (November 2015) para 26.

> and accessible reporting and rehabilitation mechanism for child victims.

The fact that the Gabonese Children's Code did not prohibit all forms of corporal punishment of children is evidence of the limits of the African Children's Committee's recommendations to state parties. It irrefutably establishes the need for further advocacy to address deep-rooted and harmful practices and beliefs, including corporal punishment of children.

Another shortcoming on the part of state parties in ending corporal punishment of children is evidenced in Sierra Leone. As mentioned above, the Child Rights Act 2007 specifically refers to the African Children's Charter and prohibits judicial corporal punishment. However, the Act equally confirms the concept of 'reasonable' and 'justifiable' correction, stating in article 33(2):

> No correction of a child is justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child and no correction is justifiable if the child by reason of tender age or otherwise is incapable of understanding the purpose of the correction.

Consequently, corporal punishment is lawful in the home, alternative care settings, day care and schools. In 2017 the African Children's Committee issued recommendations[72] to Sierra Leone regarding corporal punishment. The Committee stated:

> The Committee notes with appreciation the various legislative measures taken to protect children from abuse and torture. However, sources of the Committee indicate that various forms of violence, including physical, physiological and sexual abuse, are still being perpetrated against children. In particular, the Committee was informed that corporal punishment is prevalent within the home and school settings. During the Constructive dialogue with the State Party, the Committee has also observed that the Child Rights Act tolerates reasonable punishment being perpetrated against children; the Committee recommends the State Party to repeal the relevant clause in the Act with a view to completely prohibit corporal punishment in all settings.

This dichotomy suggests that if the ratification of the African Children's Charter and other human rights instruments is an important step, the harmonisation of domestic frameworks with these instruments remains crucial for ensuring the best interests of the child.

It is also important to highlight cases of state parties that have had prohibiting draft laws in preparation for several years but have

72 Concluding Observations on initial report (December 2017) para 20.

not taken the necessary steps to enact these laws, despite the African Children's Committee's recommendations. In Comoros, the government reported to the African Children's Committee in May 2017 that the new Criminal Code had been adopted in 2014 and that it prohibits all corporal punishment. In its Concluding Observations[73] the Committee recommended that the government repeal provisions of the Criminal Code that authorise corporal punishment of children in the home and school. It called on the government to prohibit all forms of corporal punishment and impose sanctions on the perpetrators. However, as of January 2021 the Criminal Code has not yet been promulgated by the President and, therefore, is not in force.

Another significant challenge is for state parties to engage in constitutional reform when their constitutions make provision for corporal punishment of children. As mentioned above, section 29(2) of the Constitution 2005 of Eswatini provides for 'lawful' and 'moderate chastisement for the purpose of correction'. In its Concluding Observations on the initial report of Eswatini, the African Children's Committee recommended that the state party amend the Constitution to prohibit corporal punishment in all settings. Considering the typical procedure of constitutional reforms, achieving full prohibition of corporal punishment in Eswatini is likely to become a complex process.

5 Recommendations and conclusion

The process of transforming society's behaviour in child rearing and education, and its view of children, takes time. If states are to achieve substantial reductions in the prevalence of violent punishment of children by 2040 (Agenda 2040) they must urgently reform national legislation and work to make prohibition of all forms of corporal punishment of children a reality now. The Agenda 2040 requires states to prohibit corporal punishment as a form of discipline or punishment in schools, institutions and in the criminal justice system by 2020. This target has not been met. As of June 2021 only 28 African states have prohibited corporal punishment in public and private schools. Accelerated efforts are therefore recommended to fulfil this fundamental human rights obligation.

Civil society organisations can play a critical role – at national and regional levels – in advocating law reform to prohibit corporal

73 Concluding Observations on initial report (July 2017) para 18.

punishment of children. For instance, at regional level, the CSO Forum on the African Charter on the Rights and Welfare of the Child, which brings together civil society organisations from across Africa and child rights experts, represents a conducive platform for sharing experiences on national and sub-regional strategies to end the corporal punishment of children. The CSO Forum aims to strengthen the work of the African Children's Committee in carrying out its mandate. Placing a focus on the prohibition and elimination of corporal punishment high on the CSO Forum agenda would undoubtedly strengthen the campaign across Africa.

A crucial option to consider for promoting the campaign to end corporal punishment in Africa is to encourage taking legal action invoking human rights instruments, including the African Children's Charter. As previously seen in the cases of *The State v C* (*a Juvenile*) and *YG v The State*, respectively in Zimbabwe and South Africa, High Court judges take into account human rights instruments ratified by the country to strike down legal defence for corporal punishment of children. In case domestic remedies have failed, the African Children's Charter communication mechanism represents a remarkable tool to continue to exert pressure on national governments. Civil society organisations can provide the Children's Committee with additional information relevant to the admissibility and determination of the communication. As mentioned above, to date the Committee has addressed the issue of corporal punishment of children through the communication mechanism on two occasions.[74] Moreover, the Committee monitors the implementation of the outcomes of its decision. This constitutes further pressure on state parties to achieve law reform.

Even though the ultimate goal of the campaign is to achieve the prohibition of corporal punishment in all settings, including in the home, the African Children's Committee should encourage states to prohibit in some selected settings as the opportunity arises. For instance, as the theme of the 2020 Day of the African Child revolved around child-friendly justice systems, the prohibition of corporal punishment both in penal institutions and as a sentence for crimes could be promoted. As of June 2020 nearly half of the African states have still not prohibited corporal punishment of children in penal institutions, while five states are yet to prohibit corporal punishment

74 Decision of 14 April 2014 on Communication 3/Com/001/2012 *Centre for Human Rights and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal* and Decision 3/2017 of 15 December 2017 on Communication 7/Com/003/2015 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v the Republic of Mauritania*.

being handed down as a sentence for a crime committed by children under state, traditional and/or religious law.

The prohibition of all corporal punishment of children can also play a preventive and educational role. Reforming national legislation to achieve prohibition in all settings therefore is a milestone achievement. It sends a clear message to adults and children that corporal punishment is no longer acceptable and that the law protects children from all assault as it does for adults. Once prohibition is in place, states and societies must ensure its effective implementation in the best interests of the child in order to achieve an end to corporal punishment. In order to ensure that children are no subjected to corporal punishment by 2040, this will require society-wide measures to raise awareness and understanding of the law, aimed at changing social norms and attitudes around violence in child rearing. A concerted effort between the African Children's Committee, state parties and civil society, therefore, is recommended.

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Understanding the privacy rights of the African child in the digital era

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Summary: *Africa is increasingly welcoming and participating in the technological revolution that is occurring the world over. A significant rise in access to the internet and other digital technologies means that children can engage, communicate, share, learn and develop in previously unimaginable ways. Technology, to a large extent, has fundamentally changed the way in which children exercise and realise their rights. This article argues that in order for children to be safe and empowered both on and off-line – and have their privacy respected, protected and promoted – a variety of stakeholders need to come to the table. Drawing on recent international developments around children's rights in a digital environment, this article reflects on the various roles of key stakeholders in advancing the privacy rights of children. The article submits that the advancement of children's privacy rights in Africa is indeed achievable and attainable, provided there are collaborative*

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commitments from public and private decision makers and parents, caregivers and guardians and, importantly, that children are part of the solution. As we look to the future of the right to privacy in Africa, the article concludes with a selection of recommendations on the right to privacy going forward.

Key words: *children's right to privacy; technological advancements; digital spaces; multi-sectoral approach; children's participation*

1 Introduction

The digital era has fundamentally changed the way in which children exercise and realise their rights. A significant rise in access to the internet and other digital technologies means that children are able to engage, communicate, share, learn, and develop in previously unimaginable ways. This has led to unprecedented opportunities, as well as unprecedented challenges.[1] Across Africa, access to the internet is rapidly increasing, with millions of individuals joining online spaces.[2] While inequality in internet access and connectivity remains rife, it is estimated that approximately 40 per cent of children in Africa can access the internet in some form.[3] Indeed, as set out by the African Union (AU) Agenda for Children 2040, Fostering an Africa fit for children, states are called upon to provide universal access to affordable information and communication technology devices, content and connectivity, and to integrate these into teaching and curricula.[4] As more children become more connected, an urgent need arises to ensure that all children are able to safely access and enjoy the many benefits and opportunities of the online world. The United Nations (UN) Committee on the Rights of the Child (CRC Committee) has affirmed this position in its most recent General Comment 25, noting that '[c]hildren's rights shall be respected, protected and fulfilled in the digital environment'.[5]

1 UNICEF *Review of progress in the advancement of child rights in Africa: Reflecting on the past and future challenges andopportunities* (2020) 10.
2 See History of the African Declaration on Internet Rights and Freedoms, https://africaninternetrights.org/en/about (accessed 15 February 2021).
3 S Livingston et al 'One in three: Internet governance and children's rights' UNICEF Innocent Discussion Paper 2016-01(2016) and UNICEF *Children in a digital world* (2017) 46.
4 African Union *Africa's Agenda for Children 2040: Fostering an Africa fit for children* (2016) 14.
5 CRC Committee General Comment 25: Children's rights in relation to the digital environment CRC/C/GC25 (2021).

Children's privacy rights are no different, and apply equally on and off-line.[6] Online, a child's privacy can be compromised by the processing of personal data, online surveillance, the building and maintaining of records of children's entire digital existence, the use of biometrics and pre-existing risks such as online stalking and harassment, and exposure to unwanted inappropriate content.[7] The UN Human Rights Council (UNHRC) has noted that the violations and abuses of the right to privacy in the digital age may affect all individuals, but that such violations may have a particular effect on children.[8] It bears highlighting at the outset that the right to privacy of children is firmly safeguarded in article 10 of the African Charter on the Rights and Welfare of the Child (African Children's Charter),[9] as well as article 16 of the Convention on the Rights of the Child (CRC).[10]

The right to privacy is a fundamental right that is both important as a right itself, and as an enabler of an array of other fundamental rights, ranging from access to information, freedom of expression, freedom of association, and freedom of thought, conscience and religion, to public participation, dignity, equality and non-discrimination. The full realisation of the privacy rights of children, both on and off-line, cannot be gainsaid. Importantly, it facilitates the child's ability to fully self-actualise and self-identify in a manner of their own choosing, without undue intrusion or influences that may wish to steer their path in a particular social or cultural direction. The South African Constitutional Court has held that 'the right to privacy is even more pressing when dealing with children' as it is central to a child's self-identity which is still forming, emphasising that the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy.[11]

Given the importance of children's privacy rights, as well as the mounting challenges of children's privacy in our digitally-transforming society, this article argues that a collaborative, multi-stakeholder approach is necessary to enable the safety of children online and ensure that their right to privacy is respected, protected

6 UNICEF *Children's rights and the internet: From guidelines to practice* (2016) 12.
7 For a further discussion on these risks, see M Viola de Azevedo Cunha 'Child privacy in the age of web 2.0 and 3.0: Challenges and opportunities for policy' UNICEF Innocent Discussion Paper 2017-3 (2017) 6. See also UNICEF (n 1) 91. See further Council of Europe Policy guidance on empowering, protecting and supporting children in the digital environment (2018) 14.
8 UNHRC 'The right to privacy in the digital age' A/HRC/34/L.7/Rev.1 (2017).
9 African Charter on the Rights and Welfare of the Child (1990).
10 Convention on the Rights of the Child (1989).
11 *Centre for Child Law and Others v Media 24 Limited & Others* 2020 (3) BCLR 245 (CC) para 49.

and promoted. Accordingly, as we navigate the various roles and responsibilities within the ecosystem of children's online engagement and participation, the need for nuanced understandings of the right to privacy is more necessary than ever.[12] This article begins by exploring the regional and global evolution of children's privacy rights. Following this discussion, this article turns to examine the roles of the state, non-state actors, and parents, guardians and care givers in advancing children's privacy rights online. Furthermore, this article considers the role of children, taking into consideration their evolving capacities, participation and engagement to safeguard their rights online while enjoying the innumerable opportunities facilitated through access to the internet.

2 Evolution of children's privacy rights

2.1 Development of the right to privacy for children

In general terms, the right to privacy under international law finds its origin in the Universal Declaration of Human Rights (Universal Declaration)[13] and the International Covenant on Civil and Political Rights (ICCPR).[14] While the African Charter on Human and Peoples' Rights[15] (African Charter) does not expressly contain a right to privacy,[16] the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (African Commission Declaration of Principles), adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2019, recognises the importance of the right to privacy, both as a self-standing right and an enabler of the rights to freedom of expression and access to information.[17] The right to privacy is complex and wide-ranging, comprising protections against the arbitrary or unlawful interference with the right to privacy, family, home or correspondence, the confidentiality of communications, the protection of personal information, and protections against communication surveillance.[18]

12 UNHRC 'Report of the United Nations High Commissioner for Human Rights' A/HRC/39/29 (2018) 1.
13 Universal Declaration of Human Rights (1948).
14 International Covenant on Civil and Political Rights (1966) art 17.
15 African Charter on Human and Peoples' Rights (1981).
16 For a detailed discussion on reading the right to privacy into the African Charter on Human and Peoples' Rights see, A Singh & T Power 'The privacy awakening: The urgent need to harmonise the right to privacy in Africa' (2019) 3 *African Human Rights Yearbook* 202.
17 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Principle 40.
18 See United Nations Human Rights Committee 'General Comment 16 on Article 17 of the International Covenant on Civil andPolitical Rights' HRI/Gen/1/Rev.1 (1994) (General Comment 16).

Both the African Commission and the UN Human Rights Committee have recognised that the same rights that people enjoy off-line apply equally on-line, including the right to privacy.[19]

The development of the right to privacy in the context of children's rights, as evinced through CRC and the African Children's Charter, to a large extent drew on ICCPR. In this regard, article 16 of CRC provides:

> (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> (2) The child has the right to the protection of the law against such interference or attacks.

The African Children's Charter has nuanced the right to privacy in a manner that does not find similar reference in CRC. Article 10 of the African Children's Charter protects the right to privacy as follows:

> No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

Notably, there are two key distinctions between the right to privacy as contained in CRC and the African Children's Charter. The first relates to the exclusion in the African Children's Charter of the word 'unlawful' in respect of attacks. Gose argues that this likely was an editing error, noting that protection against lawful attacks is a highly-improbable interpretation.[20] Both article 16 of CRC and article 17 of ICCPR protect against 'unlawful' attacks and, for present purposes, this textual distinction is of limited relevance. The second and more noteworthy difference between the two instruments relates to the inclusion of parental and guardian power in the African Children's Charter, namely, the inclusion that 'parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children'. In order to understand this inclusion, a brief reflection on the drafting processes of the respective instruments is necessary.

19 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); United Nations Human Rights Council 'Resolution on thePromotion, Protection and Enjoyment of Human Rights on the Internet' A/HRC/32/L.20 (2016) para 1.

20 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 79.

CRC, often recognised as the seminal instrument on the rights of the child, is not without flaws. Critics of the drafting process highlight the lack of diversity and inclusion, and the 'particularly Western' perspective of CRC.[21] This was in part due to the tensions between the global East and West at the time, an initial lack of civil society representation, and an underrepresentation of African states.[22] During the ten-year drafting process of CRC only four states from North Africa participated, with no representations from sub-Saharan Africa.[23] Despite most African states ratifying CRC, it has been observed that many African states felt that CRC insufficiently reflected African concerns and cultural contexts.[24] This resulted in certain factors that were unique to the African context being excluded from the drafting process, including considerations of socio-economic circumstances, culture, tradition and development.[25]

For example, Ekundayo's insights suggest that the perception of children as rightsholders is difficult to realise in African societies as 'the attitude of domination over children by adult[s] has continued to determine the destiny of children especially children in Africa'.[26] The role of parents in guiding and directing children in the exercise of their right to freedom of thought, conscience and religion in article 9 reinforces the role of parents and care givers. Article 31 arguably is a further manifestation of the relationship between children and adults, in that it requires children to respect their parents, superiors and elders at all times, and preserve and strengthen African cultural values.[27]

There are differing views on whether the duty to respect parents and guardians could easily be relied upon to limit children's rights to freedom of expression, privacy, and participation in decision making, or whether it is analogous with positive African traditions.[28] Cognisant of these diverging views, the African Committee of

21 O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underlines and repeats the Convention on the Rights of the Child (CRC)'s provisions?: Examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 143 147 and J Oestreich 'UNICEF and the implementation of the Convention on the Rights of the Child' (1998) 4 *Global Governance* 184.
22 Ekundayo (n 21).
23 J Adu-Gyamfi & F Keating 'Convergence and divergence between the UN Convention on the Rights of the Children and the African Charter on the Rights and Welfare of the Child' (2013) 3 *Sacha Journal of Human Rights* 50.
24 As above. See further T Kaime 'The foundations of rights in the African Charter on the Rights and Welfare of the Child: A historical and philosophical account' (2009) 3 *African Journal of Legal Studies* 131.
25 Preamble to the African Children's Charter.
26 Ekundayo (n 21) 144-145.
27 J Sloth-Nielsen 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159.
28 Ekundayo (n 21) 155.

Experts on the Rights and Welfare of the Child (African Children's Committee) published a General Comment on article 31 of the Children's Committee, explaining that there is a need to strike a balance between the authority exerted by adults over children and the corresponding responsibility of children to be respectful and mindful of such authority.[29] Notably, the General Comment goes further to state that the '[r]ights of the child including freedom of expression, participation, and development, among others, shall not be compromised or violated by reference to "respect for adults"'.[30] Therefore, while it is likely that the perception as captured by Ekundayo could explain why article 10 is more prescriptive on the supervisory role of parents and caregivers, it is necessary to bear in mind that children's rights should not be compromised or violated because of this.

Against the backdrop of these drafting nuances, it is also important to consider the significance of the inclusion of article 10 in the African Children's Charter, given that this is not provided for in the African Charter. It is by now well-established that the African Charter sets the standard for recognised and enforceable human rights in the region, establishing the rights, duties and freedoms to which every individual is entitled.[31] It therefore is perhaps unusual that African Children's Charter departed from the prescripts of the overarching framework of the African Charter on this particular point, but what is even more curious is that this distinction has not attracted much academic debate, nor has it led to commentary from the relative regional bodies. While the official position on this is unclear, it is possible that the drafters of the African Children's Charter, whilst electing to develop a uniquely African framework on the rights of the child, sought to specifically distinguish the African framework from CRC in relation to privacy. The discussion above on the African perspectives of children as rights holders lends support to this argument, highlighting that despite the African Charter not explicitly including privacy rights, the traditional and cultural underpinnings of familial roles require specific understandings of privacy.

2.2 Contemporary notions of children's privacy rights

Understanding the above contextual nuance is necessary as we work to bring children's privacy to life in the digital era. As noted in General

29 African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on 'the responsibilities of the child' (2017).
30 As above.
31 Art 1 African Charter.

Comment 16, '[a]s all persons live in society, the protection of privacy is necessarily relative'.[32] The right to privacy has been described as existing across a continuum, whereby the expectation of privacy is considered reasonable in the inner sanctum of a person or the truly personal realm, but the reasonableness of the expectation gradually erodes in the context of communal relations and activities.[33] In this regard, the more a person inter-relates with the world, the more the right to privacy becomes attenuated.[34] This raises important and complex questions regarding where the right to privacy online for children falls on the continuum. As noted by the United Nations Children's Fund (UNICEF), both children and adults face greater risks of intrusion into their rights to privacy when online: States may follow children's digital footsteps; private sector actors may collect and monetise children's data, and parents or guardians may publish children's information and images.[35] UNICEF further explains the complexities of the particular contexts in which the privacy rights of the child arise, stating:[36]

> Children's right to privacy is multifaceted, and the physical, communications, informational and decisional aspects of children's privacy are all relevant in the digital world. Children's physical privacy is affected by technologies that track, monitor and broadcast children's live images, behaviour or locations. Children's communications privacy is threatened where their posts, chats, messages or calls are intercepted by governments or other actors, and children's informational privacy can be put at risk when children's personal data are collected, stored or processed. Children's decisional privacy may be affected by measures that restrict access to beneficial information, inhibiting children's ability to make independent decisions in line with their developing capacities.

Moreover, General Comment 25 on CRC explains the right to privacy in relation to the digital environment as follows:[37]

> Privacy is vital for children's agency, dignity and safety, and for the exercise of their rights. Threats to children's privacy may arise from their own activities in the digital environment, as well as from the activities of others, for example by parents' sharing online the photos or other information of their children, or by caregivers, other family members, peers, educators or strangers. Threats to children's privacy may also arise from data collection and processing by public institutions, businesses and other organizations; as well as from criminal activities such as hacking and identity theft.

32 General Comment 16 (n 18) para 7.
33 *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) paras 67 & 75.
34 As above.
35 UNICEF *Children's online privacy and freedom of expression* (2018) 4.
36 As above.
37 General Comment 25 (n 5).

The above passages capture the specific privacy-related concerns that may be prevalent while children are online. These passages equally demonstrate the need to find an appropriate balance between protecting children's privacy rights and guarding against undue limitations on their ability to express themselves and access information. As more children in Africa begin, or continue, their online journeys, it is necessary to ensure that emerging threats and challenges do not unjustifiably restrict the exercise of their rights.

3 Working collectively to protect children's privacy rights

The African Children's Charter makes it clear that the promotion and protection of the rights and welfare of the child also imply the performance of duties on the part of everyone.[38] Meaningfully realising the right to privacy requires both a negative duty – not to infringe the right to privacy – and a positive duty – to take proactive measures to give effect to the right to privacy. It is only through a confluence of both these negative and positive measures that the right to privacy can be realised in theory and practice. In this part we explore the role of the state, parents and guardians, non-state actors, and children themselves in respect of the privacy rights of the child. As we explore these roles, we further unpack the various dimensions of children's privacy rights online.

Before turning to these roles and how they relate to children's privacy, it is important to note that the realisation of these roles and duties must be informed by the four general principles underpinning children's rights, including the best interests of the child, the right to life, survival and development, the right to non-discrimination and the right to be heard.[39] General Comment 25 similarly encourages these four principles to be used as a lens through which children's rights in relation to the digital environment can be understood.[40] In sum, General Comment 25 records that (i) the best interests of the child is a dynamic concept that has special importance in relation to the digital environment; (ii) it is necessary to take into account emerging risks children face in diverse contexts as well as the effects of digital technologies on children's development; (iii) children should have equal and effective access to the digital environment in ways that

38 Preamble to the African Children's Charter.
39 CRC Committee General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child CRC/GC/2003/527 (2003). See further Council of Europe *Guidelines to respect, protect and fulfil the rightsof the child in the digital environment* (2018) 12-13.
40 General Comment 25 (n 5).

are meaningful for them, and should not face discrimination online; and (iv) the use of digital technologies should enhance children's rights to be heard in matters that affect them and help to realise their participation at local, national and international levels.[41]

3.1 Role of the state

Article 1(1) of the African Children's Charter requires states to recognise the rights, freedoms and duties contained in the Charter, and undertake the necessary steps, in accordance with their constitutional processes and the provisions of the Children's Charter, to adopt such legislative or other measures as may be necessary to give effect to the African Children's Charter. As noted by the African Children's Committee in General Comment 5:[42]

> States Parties must see their duty as fulfilling applicable legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children. The clear meaning of 'shall recognise' as contained in Article 1(1) is peremptory.

The duty on states to recognise the rights, freedoms and duties contained in the African Children's Charter implies a level of formal recognition of the rights, be it in law or through a constitutional provision.[43] This must be recognised without distinction of any kind.[44] Furthermore, as explained by the African Children's Committee, providing for judicially enforceable children's rights carries with it the imperative to ensure that children have access to the judicial system, if needs be without parental assistance, to enable them to enforce their rights.[45]

In General Comment 16 the UNHRC gives content to the duties of states in respect of the right to privacy. Notably, public authorities should only be able to call for such information relating to one's private life where such knowledge is essential in the interests of society.[46] It is clear that states themselves are under a duty not to engage in interferences inconsistent with the right to privacy, and to provide the legislative framework to prohibit such acts by natural or legal persons.[47]

41 General Comment 25 paras 9-19.
42 African Children's Committee General Comment 5 on State Party Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) (General Comment 5) 7.
43 As above.
44 Art 3 African Children's Charter.
45 General Comment 5 (n 42) 18.
46 General Comment 16 (n 18) para 7.
47 General Comment 16 para 9.

With regard to the duty to respect the right to privacy of the child, states must not take any measures that unjustifiably intrude on the right. As explained by UNICEF, children's privacy is more likely to be respected in a digital environment where children can privately and securely access information online; where children's communications and personal data are sufficiently protected from unauthorised access or intrusion; where children's privacy is considered in the design of websites, platforms, products, services and applications designed for, targeted at or used by children, and children enjoy protection from online profiling.[48] The duty rests firmly on states to create an appropriate enabling environment where children are able to exercise and realise their privacy rights, both on and off-line.

Several key considerations bear highlighting. The first relates to the surveillance of children, particularly their communications.[49] In this regard, any state that undertakes mass or bulk surveillance activities will invariably infringe the privacy rights of children caught in the surveillance net, as such mass surveillance is inherently indiscriminate and disproportionate.[50] Children are also placed at risk in circumstances of targeted surveillance, whereby a child may be subjected to surveillance themselves or may have their communications intercepted when communicating with a parent or other adult who has been placed under surveillance. General Comment 25 states that

> [a]ny surveillance of children together with any associated automated processing of personal data, shall respect the child's right to privacy and shall not be conducted routinely, indiscriminately, or without the

48 UNICEF (n 35) 8.

49 In general terms, there are two common types of surveillance: mass surveillance, or passive or indirect surveillance, whichrelies on systems or technologies that collect, analyse, and/or generate data on indefinite or large numbers of people. Targeted surveillance differs in that it amounts to surveillance directed at particular individuals and can involve the use of specific powers by authorised public agencies. See Privacy International *Mass surveillance and House of Lords overview of surveillance and data collection* (2009).

50 See, eg, principle 41(1) of the African Commission Declaration of Principles, which provides that '[s]tates shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person's communications'. See further *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services ; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* 2021 (3) SA 246 (CC) in which the South African Constitutional Court remarked in a footnote that '[a] ny arbitrary or unlawful interception of children's communications is at odds with South Africa's international law obligations under Article 16(1) of the Convention on the Rights of the Child, 20 November 1989, which provides that "[n]o child shall be subjected to arbitrary or unlawful interference with his or privacy, family, home or correspondence" and Article 10 of the African Charter on the Rights and Welfare of the Child, 1 July 1990, which provides that "[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence"'.

> child's knowledge, or in the case of very young children their parent or caregiver, and where possible the right to object to such surveillance.[51]

In our view, the duty to respect the privacy rights of children requires states to include express child-sensitive provisions and safeguards in any law that impedes the privacy rights of children.[52] For instance, in the context of surveillance, this might require states to include a provision in the law that expressly requires disclosure to an independent judicial authority if a child is to be placed under surveillance or there is a reasonable likelihood that the communications of a child will be subjected to surveillance. This should also include taking appropriate measures to protect children from intrusions into their privacy from other actors, such as private sector actors, who may seek to impermissibly benefit from the vulnerabilities of children.

The second consideration relates to the need to create an enabling environment for the exercise of the right to privacy, particularly through the enactment of data protection frameworks that include child-sensitive provisions for the processing of personal information of children. As noted in the General Data Protection Regulation (GDPR) of the European Union (EU), children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences, safeguards and rights in relation to the processing of personal information.[53] Across Africa there are just over 30 states that have adopted data protection laws, although not all provide explicit protections for children.[54] Notably, the African Union Convention on Cyber Security and Personal Data Protection is silent on the processing of personal information of children.[55] Regionally, the Economic Community of West African States (ECOWAS) appears to be the only sub-regional body with a binding regional data protection regime,[56] whereby the ECOWAS

51 General Comment 25 (n 5) para 67.

52 This aligns with the approach adopted in General Comment 25 para 72 which requires states to take 'legislative and other measures to ensure that children's privacy is respected and protected by all organisations and in all environments that process their data. Such legislation should include strong safeguards, independent oversight and access to remedy.'

53 Recital 38 to the General Data Protection Regulation (2016).

54 For a mapping of data protection laws in Africa, see https://dataprotection.africa/ (accessed 14 July 2020). See also GGreenleaf & B Cottier '2020 ends a decade of 62 new data privacy laws' (2020) 163 *Privacy Laws and Business International Report* 24-26.

55 African Union Convention on Cyber Security and Personal Data Protection (2014).

56 See T Illori 'Data protection in Africa and the COVID-19 pandemic: Old problems, new challenges and multistakeholder solutions' (2020) *African Declaration on Internet Rights and Freedoms* 4. See also G Greenleaf & B Cottier 'Comparing African data privacy laws: International, African and regional commitments' (2020) *University of New South Wales Law Research Series*.

Supplementary Act on Personal Data Protection aims to ensure that all member states establish a legal framework of protection for privacy of data relating to the collection, processing, transmission, storage and use of personal data without prejudice to the general interest of the state.[57] However, this Act also contains no detailed guidance for states on the processing of personal information relating to children.

Some domestic frameworks provide more express protection for children, such as the Data Protection Act, 2012 of Ghana and the Protection of Personal Information Act, 2013 of South Africa, both of which prohibit the processing of personal information of children unless one of the exceptions, such as the consent of the parent or guardian, can be established.[58] The Data Protection Act, 2019 of Kenya provides that children's personal data cannot be processed unless consent is given by the child's parent or guardian, and the processing is in such a manner that protects and advances the rights and best interests of the child.[59] It further requires a data controller or data processor to incorporate appropriate mechanisms for age verification and consent in order to process the personal data of a child.[60] Most recently, the Cyber Security and Data Protection Bill, 2019 of Zimbabwe provides that the personal information of a child may not be processed unless a competent person consents to the processing of such data. It provides further that where the data subject is a child, their rights pursuant to this law may be exercised by their parents or care givers.[61]

As explained by the Council of Europe:[62]

> Where states take measures to decide upon an age at which children are considered to be capable of consenting to the processing of personal data, their rights, views, best interests and evolving capacities must be taken into consideration. This should be monitored and evaluated while taking into account children's actual understanding of data collection practices and technological developments. When children are below that age and parental consent is required, states

57 Supplementary Act A/SA.1/01/01 on Personal Data Protection (2010).
58 Sec 37 of the Data Protection Act prohibits the processing of the personal information of a child who is under parental control unless the processing is necessary or the parent or guardian of the child consents. Section 32 of the Protection of Personal Information Act contains additional exceptions, including whether the information has been deliberately made public by the child with the consent of a parent or guardian.
59 Sec 33(1) Data Protection Act 24 of 2019.
60 Sec 33(2) Data Protection Act 24 of 2019.
61 Secs 12 and 26 of the Cyber Security and Data Protection Bill. The Bill does not define competent person.
62 Council of Europe *Comments submitted by the Secretariat of the Council of Europe on the UN Committee on the Rights of the Child's draft General Comment on children's rights in relation to the digital environment* (2020) 16.

should require that reasonable efforts are made to verify that consent is given by the parent or legal representative of the child.

It bears reference that in 2020 the United Kingdom Information Commissioner's Office announced the coming into force of the Children's Code (also known as the Age-Appropriate Design Code).[63] The Children's Code is a data protection code of practice for online services, such as applications, online games, websites and social media platforms that are likely to be accessed by children. Specifically, it addresses how to design data protection safeguards into online services to ensure that they are appropriate for use by – and meet the development needs of – children.[64] A similar code or framework does not appear to exist in Africa, although Zimbabwe,[65] Zambia,[66] Ghana[67] and South Africa[68] appear to be moving in the right direction with their efforts to develop strategies or amend laws to incorporate children's online safety.

The third consideration relates to the facilitation by states of appropriate privacyprotecting technologies used by children. This includes, for instance, the use of encryption to enable children to communicate in a secure manner, and safeguards the integrity and confidentiality of their communications. States should encourage the development, use and adoption of such technologies, as they not only complement the right to privacy but also facilitate the rights to freedom of expression, participation, assembly and association, among others. In this regard, children should be able to use technology freely and confidently without disproportionate monitoring by governments or other parties, unnecessarily strict moderation or policing of user-generated content, or unwarranted limitations on anonymity.[69]

Lastly, we are of the view that states have a positive duty to ensure that children have access to digital literacy skills. In order for children

63 United Kingdom Information Commissioner's Office *Age-appropriate design: A code of practice for online services* (2020).
64 As above. The Children's Code sets out 15 standards that are cumulative and interlinked, including the best interests of the child, data protection impact assessments, age-appropriate application, parental controls, and profiling.
65 Postal and Telecommunication Regulatory Authority of Zimbabwe (POTRAZ) Child Online Projection Guidelines for Children (2015).
66 See NNW 'Zambia commits to protect children from online abuse through National Child Online Protection Policy' News from non-aligned world' 13 October 2020.
67 UNICEF *Child online protection* (2018).
68 The South African Portfolio Committee on Social Development is working on the Children's Amendment Bill [B18 – 2020] which aims to amend the Children's Act, 2005 so as to, among other things, provide for children's right to privacy and protection of information.
69 UNICEF (n 35) 9.

to be safe online and enjoy meaningful engagement in the digital world, they need a set of necessary skills to assist them to make informed decisions about how they exercise their rights online. These skills encompass a range of competencies including navigating and exploring new spaces; being cognisant of risks and harms; finding, evaluating and managing information online; interacting, sharing and collaborating online; developing and creating content; safely using protection features; navigating threats and challenges online; and knowing how to solve problems and be creative.[70] UNESCO views digital literacy, along with digital safety and resilience digital participation and agency, digital emotional intelligence, and digital creativity and innovation as key in any child-centred approach towards digital citizenship.[71] Providing children with digital literacy skills allows them to make informed choices regarding the personal information they share, it advances their understanding of the importance of privacy and avoiding risk, all while exercising their right to freedom of expression online. States should incorporate digital literacy training at an early stage in the school curriculum, with various opportunities provided to upskill as children mature and advance. Ensuring that children are informed 'allows a child to develop an appreciation of the many opportunities of the online world'.[72] States further need to take steps to ensure the digital literacy of educators, parents and guardians and caregivers.[73]

3.2 Role of parents, guardians and care givers

It is undeniable that children, in accordance with their age and maturity, require assistance to understand and engage with the use of online platforms.[74] For instance, children are not asked to provide informed consent for the collection and processing of their personal information where they do not possess the capacity to do so.[75] Parents or guardians play a more active role in deciding the scope and nature of the information and content that younger children can share and consume, but should do so while also considering the views and opinions of the children themselves.[76]

70 See UNICEF *Children in a digital world* (2017) 128, and UNICEF *Children's online privacy and freedom of expression* (2018) and Media Monitoring Africa *Children's rights online: Towards a digital rights charter* (2020). See also N Law et al *A global framework of reference on digital literacy skills for indicator* 4.4.2 (2018).
71 See UNESCO *Digital kids Asia-Pacific: Insights into children's digital citizenship* (2019).
72 Media Monitoring Africa (n 70) 19.
73 General Comment 25 (n 5) para 89.
74 UNICEF (n 35) 10.
75 As above.
76 As above.

As mentioned, this is recognised by the internal limitation clause contained in article 10 of the African Children's Charter, which provides that the right to privacy may be limited by a parent or guardian exercising reasonable supervision of the conduct of their children. The ambit of reasonable supervision is not defined in article 10, leaving the definition open. Sillah and Chibanda express concern that 'this gives parents and guardians the leeway to possibly completely circumvent the right to privacy under the guise of "reasonable supervision"'.[77] In our view, however, this could not have been the intention of the drafters. Furthermore, any restriction on a right may not erode the right to such an extent that the right itself becomes illusory.[78] Rather, in our view, this limitation should be read with article 20 of the African Children's Charter regarding parental responsibilities, which imposes a duty on parents and guardians to ensure that the best interests of the child are their basic concern at all times; to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and to ensure that domestic discipline is administered with humanity and in a manner consistent with the dignity of the child.[79]

Parents and guardians should understand their responsibility as being one that promotes an environment conducive to the right to privacy of the child. In this regard, parents and guardians should be cautious about themselves violating the privacy rights of the child, through for instance sharing content about children on public platforms. While this may be well-intentioned, parents or guardians may make such disclosures without appropriately considering the privacy policies of the websites that they are using or the effect that such sharing may have on their child's well-being. The concern here is twofold: First, there is the possibility of the disclosure being unwanted or harmful to the child, resulting in, for instance, bullying, harassment or embarrassment; and, second, this information can be used by third parties, such as digital marketers, to profile the child in an impermissible manner. As explained by Steinberg:[80]

> Children have an interest in privacy. Yet parents' rights to control the upbringing of their children and parents' rights to free speech may trump this interest. When parents share information about their children online, they do so without their children's consent. These parents act

77 RM Sillah & TW Chibanda 'Assessing The African Charter on the Rights and Welfare of the Child (ACRWC) as a blueprint towards the attainment of children's rights in Africa' (2013) 11 IOSR *Journal of Humanities and Social Sciences* 53.

78 Communication 140/94-141/94-145/95, *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

79 Art 20(1) African Children's Charter.

80 SB Steinberg 'Sharenting: Children's privacy in the age of social media' (2017) 66 *Emory Law Journal* 839.

> as both gatekeepers of their children's personal information and as narrators of their children's personal stories. This dual role of parents in their children's online identity gives children little protection as their online identity evolves. A conflict of interests exists as children might one day resent the disclosures made years earlier by their parents.

Another way in which parents or guardians may infringe the right to privacy of the child is by unduly monitoring the child's online behaviour. As with states, parents and guardians should consider whether the ambit of the reasonable supervision being exercised pursues a legitimate aim and is necessary and proportionate. In this regard, considerations to take into account might include whether there is a pressing and substantial need that is relevant and sufficient; whether it is the least restrictive means to achieve the considered aims; and whether the benefit of pursuing that aim outweighs the harm that may arise from the privacy infringement.

In determining what constitutes reasonable supervision, regard must be had to the age, maturity and level of understanding of the child. There are certain online services, platforms and applications in which children should be able to engage at an appropriate stage of their development without scrutiny from parents or guardians, who may inhibit the lawful content that the child may seek and share. For instance, under article 8 of the GDPR the age of consent for a child in relation to information society services is set at 16 years. This practically means that where the child is below the age of 16 years, the processing of personal information will only be lawful if consent is given or authorised by the holder of parental responsibility over the child.[81] However, the GDPR also stipulates that member states may provide by law for an age lower than 16 years, provided that such lower age is not below 13 years.[82] In the United Kingdom, for example, children aged 13 or older can provide their own consent for online services.[83] In practice, however, the decision on who can consent – whether it is the child or the holder of parental responsibility – and at what point often is unclear; of particular concern, this may have the consequence of denying services to children and keeping children away from the internet until they have attained a certain age.[84] In our view, this is not a reasonable exercise of supervision by parents or guardians, and would unduly encroach on the privacy rights of the child in their engagement with online activities.

81 Art 8(1).
82 As above. See, also *Better Internet For Kids* Status quo *regarding the child's article 8 GDPR age of consent for dataprocessing across the EU* (2019).
83 Information Commissioner's Officer *Children and the GDPR* (2018).
84 Multi-stakeholder Expert Group To Support the Application of Regulation (EU) 2016/679 *Contribution from the multi-stakeholder expert group to the stock-taking exercise of June 2019 on one year of GDPR application* (2019).

The role of parents and guardians in the protection of children's privacy rights online, and particularly in the African context, can be complicated by a lack of digital literacy skills. Recognising this, General Comment 25 notes that there is a need for states to support parents and caregivers by providing them with opportunities to gain digital literacy skills and learn how 'technology can support the rights of children and to recognise a child victim of online harm and respond appropriately.'[85] It therefore is necessary to ensure that those responsible for children, and those that seek to protect children, are empowered to and capable of doing so. As discussed above, and as highlighted in General Comment 25, digital literacy for parents, guardians and care givers is imperative for the advancement of children's safety online – an important component of their privacy rights.

3.3 Role of the private sector

Unlike the obligations and duties placed on member states, parents and guardians, the African Children's Charter does not explicitly engage with the obligations of non-state actors and the advancement of children's rights. In the context of children's rights online this is concerning given that the digital world is predominately driven by private sector actors.[86] However, there has been some subsequent acknowledgment of the application of the African Children's Charter to private sector actors. According to the African Children's Committee in General Comment 5, it is recognised that private sector actors are also duty bearers involved in the implementation of children's rights and that the principle of the best interests of the child applies to both state and private sector actors.[87] Further to this, General Comment 5 emphasises the obligations on state parties to ensure that private sector actors do not adversely impact the rights of children.[88] Although these are necessary acknowledgments, more concrete responses are needed to ensure that children's privacy rights, both on and off-line, are not infringed by private sector actors.

Online platforms and social media companies wield significant power over how various rights are advanced or limited online.[89] Unfortunately, existing laws, both regionally and globally, do not

85 General Comment 25 (n 5).
86 UNHRC (n 8).
87 General Comment 5 (n 42) 4 & 11.
88 General Comment 5 45-47.
89 See eg in the context of the rights to freedom of peaceful assembly and of association *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (2019).

adequately safeguard children's privacy online, and there appears to be a lack of coherent guidelines on the duties and obligations of the private sector.[90] Children's data privacy is of particular concern, with private sector actors having the capabilities and scope to erode children's privacy rights. For example, ubiquitous technologies and the growing global reliance on data and related infrastructure lead to an array of privacy risks, including the misuse and abuse of personal data, commercial exploitation, profiling, fraudulent attacks on dignity, damage to reputation and discrimination.[91] Children also risk being exposed to inappropriate content and have little or ill-informed knowledge on the implications of their digital footprint.[92]

The approaches to collecting, using and processing children's data are becoming increasingly prolific, with private sector actors being able to gather extensive amounts of data on children, causing commercial data collection to be considered the highest-ranking privacy concern.[93] UNICEF has recently submitted that data processing itself is a concrete concern for children's rights, noting concerns of how personal data can impact the safety and well-being of a child, their development and opportunities and can have adverse social effects.[94]

Private sector actors, including online platforms, social media companies and marketers, often employ invasive tactics to collect information about children, taking advantage of the developing capacities of children and their ability to understand data privacy, the long-term consequences of sharing personal data, and the nuances of consenting to data collection.[95] The user-generated content and interactive nature of social media and other online platforms present a paradox between the voluntary sharing of personal information which can in many ways promote children's freedom of expression, their ability to disseminate information, associate and participate, but can equally threaten their privacy rights.[96] Accordingly, there is a need to strike the appropriate balance between online protection and the empowerment of children. Private sector actors are central

90 Viola de Azevedo Cunha (n 7) 11.
91 M Macenaite & E Kosta 'Consent for processing children's personal data in the EU: Following in US footsteps?' (2017) 26 *Information and Communications Technology Law* 146.
92 UNICEF *Guideline for Industry on Child Online Protection* (2015) 6 (Guidelines for Industry).
93 S Livingtone, M Stoilove & R Nandagiri *Children's data and privacy online: Growing up in a digital age* (2018) 14.
94 Submission from UNICEF to the CRC Committee on the General Comment on children's rights in relation to the digital environment (2019).
95 Livingtone et al (n 93) 15. See also UNICEF (n 35).
96 As above. See further Guidelines for Industry (n 92).

to this balance and appropriate guidance is needed to assist them in navigating these competing interests.

While data protection frameworks are not without criticism – for example, its potential to limit children's online activities and hamper their access to opportunities and ability to participate, with parental consent being too inclusive and overprotective – it is necessary to recognise that the provisions of data protection frameworks can safeguard the privacy rights of children, and can serve to address the infringements presently committed by private sector actors. However, although data protection is an important means of limiting infringements by private sector actors, there is limited regional guidance directed towards private sector actors and how they can give effect to the African Children's Charter. Regionally, Africa is falling short of ensuring that the privacy rights of children, specifically their data privacy, are upheld. It is also of concern that there is limited guidance to private sector actors to ensure that they advance – and not infringe – children's privacy rights.

In response to these emerging challenges and the undeniable power of the private sector, there has been a steady incline in the introduction of duties and obligations on the private sector to respect human rights, including the rights of children. UNICEF and the International Telecommunication Union (ITU) developed Guidelines for Industry on Child Online Protection to provide advice on how different actors in the private sector can promote the safety of children who use the internet and the devices that can connect to it.[97] These guidelines reinforce existing principles, such as the United Nations Guiding Principles on Business and Human Rights and the Children's Rights and Business Principles.[98]

The African Children's Committee, in the context of CRC, has recognised the 'transnational nature of the digital environment' which 'necessitates strong international and regional cooperation to ensure that states, businesses and other actors effectively respect, protect and fulfil children's rights in relation to the digital environment'.[99] Along with this recognition, General Comment 25 calls on states to[100]

97 ITU and UNICEF *Guidelines for industry on child online protection* (2020).
98 UNHCR *Guiding Principles on Business and Human Rights* (2011) and CRC Committee General comment 16 (2013) on State obligations regarding the impact of the business sector on children's rights.
99 General Comment 25 (n 5).
100 General Comment 25 para 39.

> require businesses that impact on children's rights in relation to the digital environment to establish and implement regulatory frameworks, industry codes and terms of services that adhere to the highest standards of ethics, privacy and safety into the design, engineering, development, operation, distribution and marketing of their technological products and services. States should also require businesses to maintain high standards of transparency and accountability, and encourage them to take measures to innovate in the best interests of children.

General Comment 25 further addresses issues pertaining to commercial advertising and marketing, noting that targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics should be prohibited.[101] These are important recognitions that can go a long way in advancing children's privacy rights online.

3.4 Role of children

Last, and by no means least, children have a role to play in the protection of their privacy while enjoying the online world. Both internationally and regionally, the concept of children's participation has evoked some controversy. Many viewed the inclusion of the concept of children's participation in CRC[102] as a 'radical and profound challenge to traditional attitudes'.[103] Fortunately, there are concerted efforts to ensure that children can meaningfully participate in decisions that affect them.[104] General Comment 25 is a key example of this – the Committee conducted consultations with children from around the world who shared their experiences, their opinions and their hopes for a safer and more inclusive internet.

The African Children's Charter provides a different route for children's participation. Article 31 of the Children's Charter provides for the responsibilities of children. Article 31 may 'lead to challenges in understanding and appreciating the extent to which children can exercise responsibilities while at the same time enjoy the rights guaranteed by the Charter',[105] and has caused critics to view it as a 'licence for harmful practices which violate children's rights'.[106] Owing to some of the misconceptions, the African Children's Committee published a General Comment giving meaning and scope to the

101 General Comment 25 para 42.
102 Art 12 CRC.
103 Art 12 CRC.
104 CRC Committee General Comment 12 The right of the child to be heard CRC/C/GC/12 (2009).
105 General Comment on art 31 (n 29).
106 Sloth-Nielsen (n 37).

interpretation and understanding of the responsibilities of the child. The Committee explains:[107]

> The responsibilities of the child as contained in Article 31 of the African Children's Charter present an indication of the value placed on children's role as active participants and contributors to the greater good of society, right from childhood. It is recognition of children and young people as citizens who have contributions to make to society in the here and now, and not only in the future.

We endorse this position and align with a purposive interpretation of article 31, which reveals that children should be required to play a role at 'family, community, national and continental levels, in accordance with their age and maturity as they grow up, as part and parcel of their heritage, empowerment and developing citizenship'.[108] We therefore support the 'inclusion of the voices and experiences of young people in the decisions made about safety and security online and promote their safety, privacy, and access to information'.[109] A child's online journey is undoubtedly advanced when children are informed, equipped and afforded the opportunity to engage with decisions, systems and processes that affect them.

Aligned with the position of the African Children's Charter, children's participation is not limited to their involvement in decisions, but is equally about how they participate in their communities and societies. Principles of respect, dignity and equality should inform how children participate and engage online. In 2020 a group of children in South Africa worked on a Digital Rights Charter which seeks to reflect key elements of an ideal and achievable digital world for children, which is accessible, safe and empowering, and which advances the development of children in line with their rights and interests. Notably, the children felt that kindness, integrity and inclusivity should inform how they participate online. The Digital Rights Charter reflects the following in relation to the role of children online:

- Children should be treated – and treat each other – with dignity and respect. All persons should work towards fostering the best interests of children, including by encouraging, uplifting and empowering children.
- Children must be afforded the opportunity to meaningfully participate in decisions that affect them, and must, where reasonably possible, be included in discussions around internet governance

107 General Comment on art 31 (n 29).
108 Sloth-Nielsen (n 37).
109 Feminist Principles of the Internet (2014).

and the development of child-centred programmes, platforms and spaces.

Engaging with children about their privacy rights, incorporating their views and working with them to ensure that they equally respect the privacy of others online are integral components to the full realisation of children's privacy rights online.

4 Conclusion and recommendations: The future of the right to privacy of the child

As noted by UNICEF, childhood is a continuous and rapid period of development, and no single approach can fully guide efforts to realise the right to privacy of the child.[110] Information shared on the internet has the potential to exist long after the value of the disclosure remains, and therefore disclosures made during childhood have the potential to last for a lifetime.[111] It has been noted that

> [t]he fact that children's data can now be collected from the moment of their birth, the sheer volume of digital information that is generated during the first 18 years of life, and the multiple and advancing technological means for processing children's data all raise serious questions about how children's right to privacy can best be preserved and protected.[112]

As we look to the future of the right to privacy of the child in Africa, we propose eight recommendations to be considered to guide the actions of relevant stakeholders.

First, multi-stakeholder cooperation is essential for appropriately safeguarding the privacy rights of the child. This requires cooperation from states, regulators, non-state actors, national human rights institutions, educators and civil society. Most importantly, this requires input from children themselves to understand the digital future in which they want to participate. The right to privacy now is so intertwined with the realisation of a range of other rights, and finds application in such a vast array of online spaces, that it cannot be considered or dealt with in isolation.

Second, states should adopt and implement child-sensitive legal frameworks that provide appropriate protections for the privacy rights of the child. In some instances this might require the reform of existing laws, such as surveillance laws that are typically applied

110 UNICEF (n 35) 10.
111 Steinberg (n 80) 846.
112 UNICEF (n 35) 4.

in a relative blunt manner that infringes the right to privacy of all affected persons, children included. In other instances this might require the development of new laws, such as data protection laws, that include appropriate provisions for the processing of personal information relating to children to ensure that such personal information is processed in a manner that is fair, lawful, transparent and compatible with the purpose for which it was collected. Such legal frameworks must be nuanced to address the evolving maturities and capabilities of a child through the duration of childhood and address the potential harms that children may suffer to minimise the risks of being online. States must take responsibility for ensuring that other stakeholders meet their obligations in terms of such laws. States must equally ensure that appropriate implementation, compliance and enforcement mechanisms are in place in order to avoid any unjustifiable limitations on the rights of children.

Third, digital literacy must be seen as a key imperative from an early age. For present purposes, we emphasise the importance of digital literacy for children, to enable them to make informed decisions about their online engagement and privacy rights. It is only through such digital literacy that children can be truly empowered to realise the right to privacy in their personal capacities, and to understand the consequences that this may have for them, both now and in the future. More broadly, however, it is also important to ensure that there is appropriate digital literacy for parents, guardians and educators, to enable them to assist children to exercise their privacy and other online rights in a manner consistent with their best interests. Coupled with digital literacy for children, states must provide appropriate support and guidance for parents, guardians, care givers and educators.

Fourth, the development of privacy-protecting technologies, as well as online platforms and services, should be encouraged and promoted. These should be developed in a child-friendly manner that considers the ways in which such technologies will be used by children. By creating an enabling environment for the development of such technologies, children will be able to engage in online platforms in a safe and secure manner and will be able to do so without their privacy rights being infringed.

Fifth, children must be able to seek redress where their privacy rights have been infringed or their reputations have been damaged. As noted by UNICEF:[113]

113 UNICEF (n 35) 9.

> Children's reputations are increasingly shaped by the growing quantities of information available about them online. This not only influences children's interpersonal relationships but may also have an impact on their ability to access services and employment as they enter adulthood.

Children should be able to easily request that their personal information is corrected or deleted, especially where such information has been collected or published without their consent, and seek the removal of content that they believe to be damaging to their reputation.[114] Furthermore, children should be able to seek appropriate remedies against any stakeholder that has infringed their privacy rights, be it the state or a private sector actor, and be enabled to receive effective redress in this regard. To this end, data protection authorities should establish units or departments that are available to assist children seeking redress.

Sixth, parents and guardians should be considered and deliberative in their approaches to the exercise of reasonable supervision over the right to privacy, and avoid unduly restricting the right. The guidance provided in the General Comment on article 31 of the African Children's Charter can be applied to children's rights in a digital environment, and may assist parents and guardians in ensuring that the '[r]ights of the child including freedom of expression, participation, and development, among others, shall not be compromised or violated by reference to "respect for adults"'.[115] Furthermore, clarity should be provided on the age of consent for children when accessing online platforms, and the roles and responsibilities of parents and guardians when exercising such consent on behalf of the child. Parents and guardians should also be cautious about the role that they can play in indirectly infringing the privacy rights of children, such as through online disclosures or the undue monitoring of online content. Parents and guardians should, to the extent possible, and with support from the state, engage in digital literacy opportunities in order to provide meaningful and appropriate support to their children.

Seventh, private sector actors should adopt child-centric policies that are compliant with the African Children's Charter and other international law guidance on the right to privacy. Such policies should be accessible and transparent,[116] and cover (i) processes

114 As above.
115 As above.
116 Submission from the EU Kids Online Network to the UN Committee on the Rights of the Child on the General Comment on children's rights in relation to the digital environment (2019).

relating to data collection, retention and preservation; (ii) appropriate online advertising to children; and (iii) ownership of user-generated content and the removal thereof.[117] Private sector actors should be required to adapt and implement advanced default privacy settings for the collection, processing, storage, sale and publishing of personal data of children, including location-based information and browsing habits.[118] Moreover, in line with General Comment 16 of the CRC Committee, it is important for there to be child rights impact assessments conducted in order to consider the privacy impact on all children affected by the activities of a particular business or sector.

Finally, it is apparent to us that there is much need for further debate and discussion on how the privacy rights of children will be developed in Africa in the coming decades. In this regard, we therefore call on the African Children's Committee to develop a General Comment on the rights of children in the digital era, with specific reference to the right to privacy of the child in Africa, including the roles and responsibilities of the state, parents, guardians and private sector actors. General Comment 25 provides a useful point of departure. However, as evident in the drafting of the African Children's Charter it is necessary to ensure that African realities and realistic solutions are captured. The proposed General Comment by the African Children's Committee would therefore be more nuanced, taking into consideration the specificity of the relevant provisions of the African Children's Charter, the unique context in Africa, and the need for appropriate accountability from the full range of stakeholders. In doing so, the African Children's Committee has a key opportunity to develop the laws, practices and policies of stakeholders operating in the digital environment, and fundamentally change the way in which the right to privacy of the child is realised in Africa.

In conclusion, while today's young people will be the first to settle into adulthood under this new landscape, future generations will follow in their path.[119] The answer, however, is not to unduly restrict children's access to online services. This risks jeopardising a range of children's rights, including the rights to freedom of expression, access to information, education, association and assembly. The right to privacy is vital for a child's development, including developmental areas of autonomy, identity, intimacy, responsibility, trust, resilience, critical thinking and sexual exploration.[120] As such, a carefully considered and balanced approach needs to be developed

117 Guidelines for Industry (n 92)
118 As above.
119 Steinberg (n 80) 846.
120 Livingtone et al (n 93) 17.

that balances the range of competing rights and interests, and which treats the best interests of the child as the paramount consideration.

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Towards a transformative child rights discourse in Africa: A reflexive study

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Summary: *It has been 30 years since the adoption of the African Charter on the Rights and Welfare of the Child. This article takes the opportunity to reflect on where the child rights discourse is going to allow for proactivity in addressing emerging challenges and changing child rights context on the African continent. Using positional reflexivity as the methodology, I identify what I call six transformative promptings which are engendering a shift to the child rights discourse. I argue that for the discourse to be more erudite in ensuring the protection as well as well-being for children on the African continent, these six issues must be seriously considered. The first issue is a shift from child rights alterity to trans-disciplinarity. The second issue involves the evolution of the child rights promotional obligation. The third issue is on the nexus between exponential urbanisation on the African continent and fulfilment of children's rights. The fourth issue is on the rise of the nebulous information communication technology. The fifth issue is on addressing cross border child rights violations and lastly the small matter of financing child rights using domestic resource mobilisation.*

Key words: *positional reflexivity; children's rights; African Children's Charter*

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1 Introduction

This article provides a prognostic perspective of the child rights discourse in Africa, in the context of reflecting on 30 years since the adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter).[1] I argue that the celebration of 30 years since the adoption of the African Children's Charter should present an opportunity to reflect on where the child rights discourse is going, to allow for proactivity in addressing the emerging challenges and changing context on the African continent. Using positional reflexivity as the methodology, I identify six issues that have to be considered going forward so that the child rights discourse can be more efficacious and more erudite in providing protection as well as well-being for children on the continent of Africa to realise their fullest potential. From a theoretical point of view, the article can be characterised as a realist social ontology, providing a dialectical view of the relationship between the African child rights discourse and emerging trends on the continent of Africa and globally. I use the axiomatic deductive approach in selecting the six issues, which I argue have a potentially transformative effect on the child rights discourse. Are these six issues exhaustive? By no means; there could be more. It is, however, my axiological perspective based on my experience that these six are in the article. The first issue I identify is on shifting the child rights discourse from alterity to being transdisciplinary. I argue that one of the major lessons from the last 30 years is the symbiotic connections that exist between the realisation of children's rights and other aspects which previously seemed not to concern children's rights. Some of these include the nature of governance within a jurisdiction, corruption and climate change.

The second issue relates to the evolving nature of the child rights promotional discourse. I submit that in the last 30 years, the promotion of children's rights has been a key issue for both state parties as well as civil societies. This promotional course has yielded phenomenal results where we are nearing the universal ratification of the African Children's Charter on the African continent. In some countries children's rights have been embedded within national constitutions and some have even gone further to include children's rights in the education curriculum. Beyond the success achieved

1 CRC was adopted in 1989 while the African Children's Charter was adopted in 1990. The African Children's Charter, however, became effective in 1999 when it had received 15 ratifications. As at October 2019, CRC had been ratified by 193 countries, except the United States of America. The African Charter has 50 ratifications,with Somalia, Democratic Republic of the Congo, Tunisia, Morocco and the Saharawi Arab Democratic Republic still to ratify the instrument.

in the last 30 years, the question is, so what? Where does the promotional obligation of children's rights go from there? The third aspect which I interrogate is the growing urbanisation on the African continent. I raise some concerns that urbanisation may be missing some fundamental aspects of children's rights, such as the right to play. I also note that municipal authorities have become more important to the child rights discourse than before.

The issue of information communication technology (ICT) is a double-edged sword in the child rights discourse. On the one hand, ICT is a huge opportunity for less expensive high impact programming for children. On the other hand, there is still limited ICT governance on the continent which is creating many grey areas on which perpetrators of violations of children's rights are capitalising. Going forward, this issue must be at the centre of the child rights discourse to ensure that as Africa embraces technology, risks associated with it are mitigated. Another transformative prompting in the child rights discourse is the more pronounced phenomenon of free movement of people, inspired by the spirit of integration of Agenda 2063 of the African Union (AU). I raise a trepidation that whilst the promotion of free movement of people is a welcome initiative towards a cohesive Africa, it also comes with opportunities for increased cross-border child rights violations. This brings regional economic communities and other regional mechanisms into the child rights discourse equation. The last issue I raise concerns funding for children's rights on the continent. I observe that with the rise of populism in most of the 'donor countries', some of the state parties on the African continent that have been heavily relying on international aid for their social services programmes have to seriously consider domestic resource mobilisation. In attending to these issues, I use positional reflexivity methodology, which is enunciated in the next part.

2 Reflexivity

Reflexivity has been embraced in social science as a methodology that appreciates the power relations existing in the value chain of knowledge generation.[2] I considered the probity of using positional reflexivity in this article primarily because of my experience within the child rights sector working with national, regional and global organisations, as well as governments on different child rights issues. Macbeth terms this 'positional reflexivity', which involves 'a disciplined view and articulation of one's analytically situated self,

2 SN Mauthner & A Doucet 'Reflexive accounts and accounts of reflexivity in qualitative data analysis' (2003) 37 *Sociology* 413.

or how the subjectivity of the researcher enters into the process of knowledge production.[3] Positional reflectivity entails also the use of experiential accounts. Though these are considered as anecdotal evidence in the positivist epistemology,[4] they present an important source of knowledge for reflecting on existing theories and facts which need to correspond to the lived realities of marginalised people's accounts.[5] In view of this, I was alive to the caution by Code when he noted:

> Experience must therefore be reflexively positioned within the broader social contexts in which they occur, so as to avoid the dilemma of experiential knowledge standing in for a claim to authority. That is, we must be careful not to replace 'the old tyranny of authoritarian expertise', one that discounts people's lived experiences, with 'a new tyranny of "experientialism" that claims for first-person experiential utterances an immunity from challenge, interpretation, or debate'.[6]

In putting my arguments together for this article, I was conscious of the fact that 'experiential accounts must be understood as particular interpretations; to accept experiential accounts as exempt from critical analysis runs the risk of romanticising "knowledge on the margins"'.[7] This means that there has to be at least some corroboration of the observations I will be making, something I considered seriously. My consideration of this methodology is an acknowledgment that as a social researcher, I am integrated into the child rights world which I am studying and writing about. As Denzin points out, 'representation … is always self-presentation … the Other's presence is directly connected to the writer's self-presence in the text'.[8] I am coming from the viewpoint that there is increased awareness that 'how knowledge is acquired, organised, and interpreted is relevant to what the claims are'.[9] Further, I recognise that the production of knowledge is a social activity, which is culturally, socially and historically embedded, thus resulting in 'situated knowledges'.[10] Whilst most methods continue to be presented as a series of neutral,

3 D Macbeth 'On reflexivity in qualitative research: Two readings, and a third' (2001) 7 *Qualitative Inquiry* 35.
4 LB Code 'How do we know? Questions of method in feminist practice' 13-44 in S Burt & LB Code (eds) *Changing methods: Feminists transforming practice* (1995) 13.
5 PH Collins *Black feminist thought: Knowledge, consciousness, and the politics of empowerment* (1990).
6 Code (n 4).
7 D Haraway 'Situated knowledges: The science question in feminism and the privilege of partial perspective' (1988) 14 *Feminist Studies* 575.
8 NK Denzin & YS Lincoln 'Introduction: The discipline and practice of qualitative research' in NK Denzin (ed) *Handbook of qualitative research* (2000) 1.
9 DL Altheide & JM Johnson 'Criteria for assessing interpretive validity in qualitative research' in NK Denzin & YS Lincoln (eds) *Handbook of qualitative research* (1994).
10 Haraway (n 7).

mechanical and decontextualised procedures that are applied to the data and that take place in a social vacuum, reflexivity helps in situating me as a subjective researcher carrying out a child rights analysis as a visible variable in the knowledge generation, appreciating the interpersonal, social and institutional contexts.[11] This article therefore carries my epistemological, ontological and theoretical assumptions around the transformative promptings that I perceive to be occurring in the child rights discourse.

Using reflexive methodology offers me a means of critically exploring the various social forces and discursive practices that have shaped my own involvement in the child rights discourse.[12] Using my own experience and observations for research purposes provides me with a unique opportunity to reflect on the evolution of the child rights discourse in the last 30 years of the existence of the African Children's Charter. As such, the article is a consolidation of my reflections, experiences and observations over the 15 years I have been working in the child rights sector as they pertain to the future of the child rights discourse.

3 Unpacking 'child rights discourse'

'Discourse' has been described as 'social practice which constitutes situations, objects of knowledge, and the social identities of and relationships between people and groups of people'.[13] In consonance with the foregoing definition, Lemke defines 'discourse' as the concrete realisation of abstract forms of knowledge.[14] This definition shares similarities with one provided by Van Dijk in his socio-cognitive theory where he defined 'discourse' as a form of knowledge.[15] In view of these definitions, I define a child rights discourse as a form of knowledge premised on codified rights of children enshrined in the African Children's Charter. This instrument has a dual role of first providing a normative underpinning of children's rights and, second, informing the efficacy of social practice that find their expression through programmes and intervention for and with children. The idea of 'transformative promptings' presupposes that there is a tacit

11 M Alvesson & K Sköldberg *Reflexive methodology: New vistas for qualitative research* (2000).
12 E Ellis et al 'Autoethnography: An overview' (2011) *Historical Social Research/ Historische Sozialforschung* 273.
13 N Fairclough & R Wodak 'Critical discourse analysis' (1997) 2 *Discourse Studies: A Multidisciplinary Introduction* 357.
14 JL Lemke 'Intertextuality and text semantics' (1995) 50 *Advances in Discourse Processes* 85.
15 TA van Dijk *Prejudice in discourse: An analysis of ethnic prejudice in cognition and conversation* (1984).

metamorphosis happening globally, and on the continent of Africa, which will take dialectical analysis to realise. The subsequent parts suggest six 'transformative promptings' (they are not in any order of importance) that are imposing themselves as challenges in shaping current thinking, policy and planning in the child rights discourse.

3.1 Transformative prompting 1: From alterity to transdisciplinarity

It has become more apparent that addressing child rights issues from the grassroots up to the global levels has to take a transdisciplinary approach. Previously, there were tendencies of focusing on children's issues in isolation, without providing strong linkages to other sectors. I have seen programme designs shifting from child support to family strengthening. Cash transfer programmes have moved from giving a child grant to a particular child, to addressing household economy. It is the realisation that beyond specific symptomatic vulnerabilities easily quantifiable at surface level, there are a plethora of issues that make the child vulnerable. For example, in the Lake Chad basin the effects of climate change have disrupted communities' livelihoods making these communities easy targets for recruitment into terrorism by groups such as Boko Haram.[16] The susceptibility of communities in the Lake Chad basin is intricately linked to flourishing terrorism in the same region.[17] This example is a microcosm of the nature in which the child rights discourse has transformed. One cannot attend to the vulnerabilities of children in the Lake Chad basin without addressing the root of why terrorism is flourishing in the region. Some of these reasons include climate change, inequality and bad governance that leaves a vacuum for terrorist groups to flourish. It is easy to respond to symptomatic vulnerabilities without reflecting on the underlying issues. Addressing underlying issues requires transdisciplinary lenses.

Child rights alterity makes children's issues as outside issues that have to get onto the agenda. This is incorrect. Children's issues are at the centre of any development initiative, including inter alia building a dam, constructing a stadium and mineral exploration. Being able to include children's issues in any feasibility study should be the natural thing to do. The child rights discourse should therefore be articulated in such a way that other stakeholders who may not necessarily be working on child rights *per se* will be able to see the

16 S Oyewole 'Boko Haram: Insurgency and the war against terrorism in the Lake Chad region' (2015) 39 *Strategic Analysis* 428.

17 AL Enobi *Terrorism financing: The socio-economic and political implications of Boko Haram insurgency in Lake Chad basin* (2016).

connections between what they are doing and the impact that intervention will have on a child in a village somewhere. The issue of taxation is another example. When a government is not able to broaden its fiscal space by coming up with innovative ways of taxing the informal sector, for example, this directly affects the quality of service that child will get in education, health and other basic social services which the state is supposed to provide for the child. Going forward, it is imperative to be able to locate child rights in the broader development discourse, instead of pushing it as a specific interest group issue. This approach will make people in the national treasury, in trade, in information and technology to be alive to the connections that exist with child rights.

If there is a distinction of children as an interested group pushing for policies and programmes to be child friendly, that approach does not become transformational since it will be located in alterity. Countries that are the most child friendly using different indices, did not start with the pursuit of a specific interest group. Instead, they sought the transformation that was inclusive. As such, the minimalist child-friendly budget discourse naturally neglects some pertinent aspects such as investment in productivity. A critical analysis of increase of investment in productivity has sustainable benefits for children. Meanwhile, the minimalist child-friendly budget initiatives focus mainly on allocations to education, health and social protection. These indeed are important elements for development in any society. They are, however, incomplete if questions are not asked about where the resources for those sectors come from.

Polanyi's seminal work gives guidance that the economic should not be autonomous but, rather, be subordinated to the social and the politics.[18] This thinking should anchor child rights work. Polanyi's argument further enunciates that the subordination of the economy to social relations makes it possible to have sustainable economies that serve, at the centre, the interests of humanity broadly and children. Chang corroborates this argument by Polanyi when he notes that the 'economic is inseparably linked to the social'.[19] This means that instead of articulating a corpus of 'child friendliness', the discourse should aim to be transformational by emphasising the human capital opportunity that lies in children. Child friendliness is not transformational by itself. It does not challenge the structural aspects that make children vulnerable. Instead, friendliness provides caution

18 K Polanyi & RM MacIver *The great transformation* (1944) 2.
19 HJ Chang 'The role of social policy in economic development: Some theoretical reflections and lessons from East Asia' (2004) *Social Policy in a Development Context* 246.

to ensure that children are not negatively affected, disregarding the inequalities and inequities that could be entrenched against children within societies.

The transformational discourse for child rights should further challenge the neo-liberal thinking that for a long time has been predominant, arguing that 'economic growth is a precursor to social development'.[20] This school of thought argues that economic growth leads to social development. This ideological thinking, however, is contrary to documented experiences where significant growth did not really translate to a reduction in poverty, inequality and unemployment.[21] The argument results in child rights residualism which finds expression in social assistance programmes that are not transformational and not embedding child rights into the mainstream political and economic priorities. The child rights sector needs to fight residualism and peripherism by demonstrating the inextricable link between social and economic policies, further arguing that there should be an emphasis on human development, as a conduit for economic development.

The discourse should further tackle inequality and wealth distribution. It is true that what the normative frameworks provide can give dignity to a child. However, it is a fact that access does not guarantee quality. Countries such as Namibia and South Africa have been the most unequal in the world.[22] What this means is that indeed all children will be accessing basic social services but there will be a huge gulf on the quality of the services for children in the same country. For one child, access will be getting an education under a tree, while for another child the classroom will be air-conditioned, with electricity, running clean water and with an iPad.[23] This is the reality of inequality on the continent at present. The child rights discourse should go beyond lobbying for access to basic social services to addressing inequality that persists in the process.

20 B Udegbe 'Social policy and the challenge of development in Nigeria and Ghana: The cases of education and labour market policies' (2007) *Social Policy in Sub-Saharan African Context* 148.

21 See R Titmuss *Social policy* (1974); G Myrdal 'International inequality and foreign aid in retrospect' in G Meier & D Seers (eds) *Pioneers in development* (1984); A Sen *Development as freedom* (1999); JO Adesina 'Beyond the social protection paradigm: Social policy in Africa's development' (2011) 32 *Canadian Journal of Development Studies/Revue canadienne d'études du développement* 454; T Mkandawire 'Globalisation, equity and social development' (2002) 6 *African Sociological Review* 115.

22 A Shimeles & T Nabassaga 'Why is inequality high in Africa?' (2018) 27 *Journal of African Economies* 108.

23 N Spaull 'Poverty and privilege: Primary school inequality in South Africa' (2013) 33 *International Journal of Educational Development* 436.

3.2 Transformative prompting 2: The evolving promotional discourse

Significant efforts in the last 30 years of the African Children's Charter have been expended on promoting the ratification and domestication of this instrument. The scope of promotional obligation includes 'information and education functions, a quasi-legislative function, an institutional co-operation function, and a function in the examination of state reports'.[24] The examination of state party reports and the quasi-legislative functions take the bulk of the promotional mandate of human rights treaty bodies. The former aspect is outside the scope of the article.

In the last 30 years, one of the staggering successes in the child rights sector is recognition of both the Convention on the Rights of the Child (CRC) and the African Children's Charter as key human rights instruments. For both instruments, there is near universal ratification on the continent. As far as the African Children's Charter is concerned, at the time of the writing of this article only five countries had not ratified it. After universal ratification, the discussions of stakeholders and member states alike should move from ratification.[25] The next frontier is ensuring that member states domesticate the provisions of these instruments into their national laws. Already, some of the countries have developed Children's Acts that are anchored on the African Children's Charter. Table 1 shows that several countries in Southern Africa came up with wholesale Children's Acts after the African Children's Charter came into effect. Although some of the laws still need to be reviewed on some of the provisions, it can be unequivocally said that the situation was not the same before the existence of the African Children's Charter.

Table 1: Selected countries' Children's Acts and year of promulgation

Country	Law	Year
Angola	Children's Act	2012
Botswana	Children's Act	2009

24 SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 191.

25 Five countries are yet to ratify the African Children's Charter. These countries are Tunisia, South Sudan, Morocco and Saharawi Arab Democratic Republic.

Lesotho	Children's Protection and Welfare Act	2011
Malawi	Child Care, Protection and Justice Act	2010
Mozambique	Children's Act	2008
Namibia	Child Care and Protection Act	2015
South Africa	Children's Act	2005
Swaziland	Children's Protection and Welfare Act	2012
Tanzania	Child Act in Tanzania & Children's Act in Zanzibar	2009 & 2011 respectively
Zambia	Child Care and Protection Act	2005
Zimbabwe	Children's Act	2002 & 2013 constitution

Source: Compiled by author

For countries with monist legal regimes such as Namibia, Côte d'Ivoire, Kenya and Mozambique, the conversation will start from a different point. There are some countries on the continent that are yet to develop specific wholesale laws on children. The promotional conversation in these countries would need to place urgency on the issue, especially for countries with dualist legal regimes. There will be a need also to lobby countries that entered reservations on certain provisions of the African Children's Charter to revoke these reservations. On the African Children's Charter, four countries entered reservations. Botswana entered a reservation on article 2, on the definition of a child. Egypt entered four reservations: first on article 24 on adoption; second on article 30 on children of imprisoned mothers; third on article 44 on communication; and, lastly, on article 45(1) on investigation. Mauritania entered a reservation on article 9 on religion. Sudan entered reservations on article 10 on privacy; article 11(6) on education of pregnant girls; and article 21(2) on child marriages. The drive to make state parties revoke their reservations remains frontier to be conquered.

However, for the countries that have wholly domesticated the provisions of the African Children's Charter, the promotional conversation needs to graduate to discussing costing of the laws. Lesotho is a good example of a country which, soon after coming up with the Children's Protection and Welfare Act of 2011, went ahead to cost the implementation of the law. Costing the law helps in answering the question of how much is enough. This conversation is important because in the previous 30 years of programming on

the continent, in terms of budgeting for children, the focus was on ensuring that children's issues get allocations. The conversation mostly ended at comparing the allocation of sectors that directly impact children, such as education, health and social protection with other sectors such as defence. This conversation has been indigent of depth. The question always would arise as to enquire about how much is enough. There was no scientific way of getting to that. The usable benchmarks that helped this approach were the Dakar Declaration on Education[26] and the Abuja Declaration on Health.[27] The lifespan of these benchmarks expired, though their spirit thrives on. Beyond universal benchmarking, however, there should be an erudite way that is context specific, to decide on how much is enough. Certainly, the answers will be different for each country depending on several factors such as inequality and general conditions prevailing in the country. Therefore, costing a child rights law will make the advocacy initiative more nuanced in a way that can be understood by some colleagues who may not be child rights inclined. It means that the child rights discourse needs to engage in actuarial processes of costing laws to be empirical in advocacy.

The promotional discourse also needs to broaden its scope to focus on institutions that deliver for children's rights, the resourcing of these institutions as well as their decentralisation for ease of accessibility to *all* children. It is not good enough to have a good constitution that provides for the rights of children. It is also not good enough to have a child rights law on paper with no concrete plan of action or strategy to have the rights enshrined therein to see the light of day for all children within the country. Having national action plans that operationalise provisions of constitutions and laws that are financed by the country's public funds is a *sine qua non* to the implementation of the provisions in the laws. Operationalisation of given provisions would extend to ensuring that institutions that are meant to deliver on children's rights, first, move from the paper to actual existence. Second, they should be manned by competent personnel who are adequately trained and paid to meet the needs of children. Third, they should be decentralised to be accessible to all children of the country. The CRC General Comment 5 on General Measures of Implementation as well as the African Children's Charter General Comment on Child Protection and Systems Strengthening provide clear guidance on what the state parties need to prioritise in

26 The Dakar Framework for Action: Education for All of 2000 prescribed that 20% of the national budget be allocated to basic education.

27 The Abuja Declaration of 2001. Member states of the African Union pledged to increase their health budget by at least 15% of the state's annual budget.

this institutionalisation dispensation of the promotional discourse of child rights.

Linked to ensuring that there are strong institutions that deliver for children is the aspect of addressing inequality. Africa had a growth rate of 3,5 per cent in 2018 and 4,1 per cent in 2019.[28] To a greater extent, the growth is not translating to development outcomes as mentioned earlier. One way of addressing inequality is for the child rights sector to invest in informatics. The sector should influence national censuses to ensure that these capture child rights data that shows distribution of inequality. In Zimbabwe, the child rights sector was able to influence the census of 2012 to collect data on birth registration. Having reliable and valid data to back the promotional initiatives strengthens the case for child rights work.

3.3 Transformational prompting 3: Nexus between urbanising Africa and children's rights

Africa is the least urbanised continent in the world. In 2010 it was estimated that only about 36 per cent of the continent was 'urban'.[29] The continent, however, is in overdrive to urbanise at the rate of 3,5 per cent per year over the last two decades, which is expected to continue up to 2050.[30] Table 2 provides the trajectory of population growth on the African continent since 1950. By 2015, 40,4 per cent of the population was living in urban areas.[31] It is projected that by 2050, 55,9 per cent of the population will be living in urban areas. In 2015, Southern Africa had the largest population in urban areas with 61,6 per cent.[32]

Table 2: Urbanisation rate in various regions of Africa

REGIONS	1950	1980	2000	2015	2050
Africa	14.0	26.7	34.5	40.4	55.9
Eastern Africa	5.6	14.5	20.6	25.6	43.6
Middle Africa	14.0	27.5	36.8	44	60.8

28 African Development Bank 'African Economic Outlook 2019: Macro-economic performance and prospects' (2019).
29 R Jha & S Udas-Mankikar *India's urban challenges: Recommendations for the new government* (2019-2024) (2019).
30 As above.
31 M Awumbila et al 'Social networks, migration trajectories and livelihood strategies of migrant domestic and construction workers in Accra, Ghana' (2017) 52 *Journal of Asian and African Studies* 982.
32 As above.

Northern Africa	26.0	41.3	48.4	51.6	63.3
Southern Africa	37.7	44.7	53.8	61.6	74.3
Western Africa	8.4	23.6	34.7	45.1	62.7

Source: Awumbila and Teye (2014)

The challenge coming with accelerated urbanisation is that African countries have not developed mechanisms of harnessing on the internal migration trends. As a result, there is an emerging trend on the African continent of poor basic social services resulting in slums, pollution, more traffic congestion and poor living conditions broadly. It means that the cities are indeed growing but the quality of life in these cities is poor. These conditions are not ideal for any child to have a quality childhood. One conspicuous anomaly is the absence of recreational facilities for children. Article 31 of CRC and article 12(1) and (2) of the African Children's Charter provide:

> States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

As African cities are expanding, there seems to be oblivion to the aforementioned obligation for children. There are hardly recreational facilities that are in areas where the cities are expanding. Priority is given to residential and economic ventures. Left with no conducive space to play, you find children playing their games along the tarmac roads which comes with safety risks of different kinds. The Child Friendly Cities Initiative by the United Nations Education Fund (UNICEF) is a commendable programme that was hatched out of the need to give guidance to city planners. The purpose of the UNICEF initiative is to ensure that city governments consistently make decisions in the best interests of children, and that cities are places where children's rights to a healthy, caring, protective, educative, stimulating, non-discriminating, inclusive, culturally-rich environment are addressed.[33] I concur with Riggio's assertions:

> A child friendly city can no longer run sectoral programmes, services and interventions independently. As the Convention addresses the child as a whole, with an indivisible body of legal provisions, a child friendly city has to deal with the child holistically, ensuring that all

33 E Riggio 'Child friendly cities: Good governance in the best interests of the child' (2002) 14 *Environment and Urbanisation* 45.

> sectors converge to provide an integrated response to the indivisible demands of children. A child friendly city is not achieved through adopting one more ad hoc project or multiplying interventions haphazardly. On the contrary, foundations are laid by assessing needs and existing responses in order to gear up systems to respond to children from all perspectives. Once such mechanisms are in place, the whole system gives consideration to children in all city actions, overcoming a tendency to create a 'ghetto' for children, as for the elderly, the disabled, women and other 'minorities'.

The growing populations in African cities result in municipal authorities managing hefty financial resources in rates and taxes. It means that beyond dealing with national governments, the child rights discourse should prioritise working with municipal authorities. Some of the municipal authorities manage schools and health facilities. It means that if they embed child rights within their work, they will be able to ensure quality services for children. It is relatively easier to influence municipal authorities to prioritise certain projects such as internet connectivity in the cities, than to do it at national level.

3.4 Transformational prompting 4: The rise of the nebulous ICT on the continent

Mobile phone penetration is increasing at an exponential rate on the African continent. By the end of 2018 there were 456 million mobile subscribers in sub-Saharan Africa.[34] This was an increase of 20 million subscribers in one year, representing a subscriber penetration rate of 44 per cent. For internet connectivity, there are around 239 million people who have access, representing some 23 per cent of the population.[35] The number of smartphone connections in the region reached 302 million in 2018; this is projected to rise to nearly 700 million by 2025, an adoption rate of 66 per cent.[36] With this exponential increase in phone penetration and internet connectivity on the continent, the virtual world has become, and even increasingly so, an opportunity for individuals to share information and knowledge as well as to interact with other people.[37] Children are not being left behind in this development. Going into the future, they will increasingly constitute most of the

34 GSM Association 'The mobile economy sub-Saharan Africa-2019', https://www.gsmaintelligence.com/research/?file=36b5ca079193fa82332d09063d3595b5&download (accessed 18 March 2020).
35 As above.
36 As above.
37 G Sartor & CM Viola de Azevedo 'The Italian Google-case: Privacy, freedom of speech and responsibility of providers for user-generated contents' (2010) 18 *International Journal of Law and Information Technology* 356.

internet users on the African continent. This exposure will come with certain benefits, as well as hazards for children.

The major benefits that are coming with access to the internet on the African continent include ready access to information which may enhance the learning experience for children. Cellphone penetration will also make child protection programmes, such as child helplines, to be robust in their coverage and less expensive for collection of child protection data in real time. With mobile money on the continent, cellphone penetration will increase accessibility for children to programmes such as cash transfers and remittances, which will reduce administration costs for the senders. Also, improved cell phone penetration enhances information dissemination on pertinent issues such as cholera prevention, immunisation and participation in key processes. As a result, instead of printing flyers and billboards to advertise, a simple text message or whatsapp message can do rounds to educate the public on identified issues.

One remarkable example of harnessing technology for a cause in recent history is the story of Greta Thunberg, a Swedish climate change activist. Driven by a record heat wave in Northern Europe and forest fires that ravaged swathes of Swedish land up to the Arctic, the 16 year-old started a strike where she was skipping school every Friday to protest climate change under the Twitter hashtag #FridaysforFuture demonstrations.[38] Due to online mobilisation, on 20 September 2019 over 150 countries in more than 4 000 locations took to the streets demonstrating against climate change.[39] Tens of thousands of students participated in these demonstrations because of the reach of social media. The availability of new and easy-to-use technological tools therefore opens new opportunities for children, their development and how they can express themselves and engage in civic debates.[40]

With increased online presence in Africa come risks for children as well. These risks include radicalisation by terrorist groups such as Boko Haram and Al Shabaab. It explains why most terrorist activities on the African continent have been carried out by young people. Due to the underlying challenges that children and young people face, they have become targets of terrorist groups. To reach out to

38 T Tahir 'Eco WARRIOR Who is Greta Thunberg? Teenage climate change activist who's inspired worldwidestrikes' *The Sun Newspaper* (2019), https://www.thesun.co.uk/news/8918369/who-is-greta-thunberg-meet-the-teenage-climate-activist-from-sweden/ (accessed 8 April 2020).

39 As above.

40 SZ Omar et al 'Children internet usage: Opportunities for self-development' (2014) 155 *Procedia-Social and Behavioral Sciences* 75.

young people for recruitment, terrorist groups primarily use social media. Groups such as Boko Haram, the Lord's Resistance Army, Al-Qaeda branches, and the Islamic State use Twitter in a similar fashion.[41] The other risks to which children are susceptible include sexual exploitation, cyber-bullying, online stalking, identity theft, and exposure to unwanted or inappropriate advertising content.[42] What exacerbates these risks is the ease of accessibility of platforms for individuals to participate virtually through expression of views on issues, posting news, disseminating scientific and literary works, sharing photos and videos, or even developing open-access computer systems.[43]

Despite all these emerging risks to child protection, existing child rights instruments do not provide sufficient safeguards for children online.[44] Also, member states on the African continent are relatively slow in addressing these issues. The AU is yet to develop a mechanism for protecting children from the risks that come from virtual presence. Meanwhile, the European Union came up with the General Data Protection Regulation (GDPR) which obliges companies handling the personal data of EU citizens, regardless of where the company is located, to obtain clear and unequivocal consent for the processing of data. It also includes hefty fines for non-observance.[45] This is the next frontier on child protection in Africa.

What exacerbates the situation is the fact that parental control on the issue is limited on the African continent. This is primarily due to the fact that the parents and guardians are generally not acquainted with the new technologies that children easily comprehend and utilise. As a result, they are not able to provide general safeguards that the children may need. In consonance with this finding, a 2016 World Health Organisation (WHO) report on online food advertisements aimed at children concluded that parents were unaware of both the profiling techniques used to target children and the related risks.[46]

41 N Jones et al 'The Islamist cyberpropaganda threat and its counter-terrorism policy implications' (2015) *Cybersecurity Policies and Strategies for Cyberwarfare Prevention* 341.

42 W Shin & H Kang 'Adolescents' privacy concerns and information disclosure online: The role of parents and the internet' (2016) 54 *Computers in Human Behaviour* 114.

43 Sartor & Viola de Azevedo (n 37).

44 Organisation for Economic Co-operation and Development, Recommendation of the Council on the Protection of Children Online (2011) 155, OECD (accessed 9 April 2020).

45 The Digital Watch Observatory 'Cambridge Analytica explained: The facts, implications, and open questions', https://dig.watch/trends/cambridge-analytica (accessed 9 April 2020).

46 World Health Organisation 'Tackling food marketing to children in a digital world: Trans-disciplinary perspectives' (2016) WHO Regional Office for Europe, Copenhagen, www.euro.who.int/__data/assets/pdf_file/0017/322226/

This is contrary to article 20(1)(a) of the African Children's Charter on parental responsibilities, which states:[47]

> Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and *shall have the duty to ensure that the best interests of the child are their basic concern at all times*.

Due to the parents' limited exposure, they are not able to ensure the best interests of the child as it relates to internet access and the risks that accompany it. The child rights discourse therefore needs to be proactive in ensuring that internet service providers, as duty bearers to the realisation of child rights, provide safeguards for children. Also, the protection of children from online risks needs to include the other persons that are responsible for the child. Interventions should not isolate the child. Instead, there should be an inclusion of the entire ecosystem which has a role in ensuring comprehensive protection of children from risks associated with their online presence. This includes deliberate engagement with policy makers, law enforcement agencies, social workers, teachers, parents and the private sector to systematically protect children.[48]

3.5 Transformational prompting 5: Addressing cross-border child rights violations

As Africa pursues integration, inspired by the AU's Agenda 2063, epitomised by the African Continental Free Trade Agreement (AfCFTA), the integration brings with it emerging trends in the child rights discourse that may not be adequately covered in existing normative frameworks. Regional integration means that the borders become more open, thereby increasing the movement of people from one country to the other. It is anticipated that AfCFTA will bring together all 55 member states of the AU covering a market of more than 1,2 billion people, including a growing middle class, and a combined gross domestic product (GDP) of more than US $3,4 trillion.[49] In terms of numbers of participating countries, the AfCFTA will be the world's largest free trade area since the formation of the World Trade Organisation (WTO). Estimates from the Economic Commission for Africa (UNECA) suggest that the AfCFTA

Tackling-food-marketingchildren-digital-world-trans-disciplinary-perspectives-en.pdf?ua=1 (accessed 9 October 2019).

47 My emphasis.

48 United Nations Children's Fund 'Child safety online: Global challenges and strategies' (2011) UNICEF Innocenti Research Centre.

49 Tralac *African Continental Free Trade Area (AfCFTA) legal texts and policy documents* (2019), https://www.tralac.org/resources/by-region/cfta.html (accessed 11 April 2020).

has the potential both to boost intra-African trade by 52,3 per cent by eliminating import duties, and to double this trade if non-tariff barriers are also reduced.[50]

This brilliant opportunity on the continent will bring with it new transnational dynamics for child rights. It means that the risk of child trafficking, for example, will be increased. If laws among the countries do not speak to each other, child rights violations may go unpunished due to the legislative loopholes in the countries. To combat this, member states at regional level would need closer collaboration in dealing with such cross-border child rights violations. Addressing cross-border child rights violations would require deliberate, systematic and focused actions. This development naturally means that regional economic communities and other regional mechanisms must play a key role in protecting children's rights. It means that they must come up with either protocols or policies that would ensure harmony among the member states in addressing cross-border child rights violations. The Economic Community of West African States (ECOWAS) came up with a Strategic Response and Mobilisation Framework for Child Protection Systems and ECOWAS Child Policy of 2009 which compliments CRC as well as the African Children's Charter.[51] In 2016 the East African Community (EAC) promulgated a child rights policy, of which the purpose, *inter alia*, is to 'establish and strengthen existing inter-country partnerships on the promotion of child rights, child protection and child well-being'. With leadership from the Child Rights Network for Southern Africa (CRNSA), child rights civil society in Southern Africa are lobbying the Southern African Development Community (SADC) to develop a SADC Protocol for Children.[52] The regional economic communities are realising their role as duty bearers for the protection and fulfillment of rights. It is imperative for the child rights sector to deliberately engage with these duty bearers for the protection of rights in the various regions.

3.6 Transformational prompting 6: Alternative funding for child rights on the continent

In recent history, Overseas Development Assistance to Africa has been gradually decreasing. One of the key reasons for this trend is

50 As above.
51 L Amusan 'Child rights in ECOWAS: A continuation of the United Nations and African Union's positions on child rights?' (2018) 1 *Journal of African Union Studies* 49.
52 M Chibwana 'Sustainability of transnational African child rights civil society' (forthcoming).

that there has been an emergence of populism politics in Europe.[53] Since the dawn of the twenty-first century, parties led by far-right leaders have grown in popularity, gaining legislative seats, reaching ministerial office, and holding the balance of power. In Switzerland there have been notable gains for the Swiss People's Party, the Austrian Freedom Party in Austria, Greece's Golden Dawn, and the Danish People's Party.[54] Sweden, one of the countries considered to have a stable political order, saw the gaining ground of the Sweden Democrats, a political party considered by some scholars as neo-fascist.[55] The party had 5,7 per cent of the national vote in 2010. Its tally increased to 12,9 per cent in 2014 and in 2018, it scooped 17,7 per cent of the national vote.[56] In France, Marine Le Pen's Front Nationale has been gaining traction, taking seats from both the centre left and centre right. In Italy, Matteo Salvini's Northern League has been gaining traction.[57] Eastern Europe has not been spared by this wave of populism. The success of the neo-fascist Jobbik Party in Hungary pushed the ruling Fidesz Party even further to the right; leading them to build a wall against the wave of migrants flooding across.[58]

The rise of far-right movements can best be epitomised by the British electorate's vote to exit the European Union (EU).[59] These nationalistic ideologies promote isolationism from the world. As a result, the amount of funding that has been coming to Africa has significantly been reduced since these countries under far-right leadership would want to focus internally.

53 The most important common denominator is their exclusionist, ethno-nationalist notion of citizenship, reflected in the slogan 'own people first'. This nativist stance means that states should be inhabited exclusively by members of the native group (the nation) and that non-native elements (persons and ideas) threaten homogeneous nation-states.

54 RF Inglehart & P Norris *Trump, Brexit, and the rise of populism: Economic have-nots and cultural backlash* (2016).

55 As above.

56 As above.

57 P Wilkin 'The rise of 'illiberal' democracy: The Orbánization of Hungarian political culture' (2018) 1 *Journal of World-Systems Research* 5.

58 As above.

59 On 24 June 2016 Britain undertook a vote on whether to stay or leave the EU; 51,9% of British voters cast their ballot in favour of leaving the EU. On 23 June 2016 United Kingdom citizens who were not residing abroad for more than 15 years, as well as Commonwealth residents in the UK, were called to express their stance in a referendum about the future of the UK in the EU. The question of the ballot was stated as follows: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' Voters could choose between two options: 'Remain a member of the European Union' or 'Leave the European Union'. The referendum, albeit 'consultative', was considered politically binding for Parliament and the cabinet. The referendum had a pretty high turnout, 72,2%, and the leave option prevailed by almost 4 percentage points (51,9% versus 48,1%).

In view of the foregoing, the African countries that were depending on donor funding for their developmental projects must seriously explore domestic resource mobilisation (DRM). DRM has been defined as comprising of fiscal revenue mobilisation (that is, tax and non-tax revenue mobilisation), but also strengthening the domestic financial sector in developing countries by encouraging the orderly development of capital markets, sound banking systems and increasing financial inclusion.[60] This definition is in consonance to the one given by Culpeper who notes that domestic resource mobilisation is the generation of savings from domestic resources and their allocation to socially-productive investments. The idea of strengthening capacity to mobilise resources domestically is gaining currency. This is coming in the wake of some governments having leakages within their systems resulting in them not benefiting as much, compared to the potential they have in increasing their fiscal spaces.

The major aspect on DRM is strengthening of the countries' tax systems so that the citizenry and corporates may contribute to the development of their countries.[61] There have been leakages in countries on the African continent of which multinational corporations have taken advantage. Such leakages come in the form of tax holidays, where countries do not benefit from multinational corporations in the spirit of promoting investment. Meanwhile, the companies maximise production during these tax holidays at the expense of the respective countries. There is another leakage in the collection of taxes primarily because some of the economies in Africa are driven by the informal sector. Consequently, there have not been robust mechanisms to collect tax from the informal sector into the treasury. Another leakage that compromises governments' fiscal space is corruption. Due to the corruption levels and weak institutions to combat same, most governments on the African continent do not rank favourably on the Ibrahim Index of African Governance[62] and the Corruption Perceptions Index of Transparency International.[63]

60 A Bhushan et al *Financing the post-2015 development agenda: Domestic revenue mobilisation in Africa* (2013).

61 E Aryeetey 'The global financial crisis and domestic resource mobilisation in Africa' (2009) *Organization for Economic Co-operation and Development*.

62 The Ibrahim Index of African Governance (IIAG) is a tool that measures and monitors governance performance in African countries. The Mo Ibrahim Foundation defines governance as the provision of the political, social and economic public goods and services that every citizen has the right to expect from their state, and that a state has the responsibility to deliver to its citizens.

63 The Corruption Perceptions Index (CPI) is an index published annually by Transparency International since 1995 which ranks countries 'by their perceived levels of public sector corruption, as determined by expert assessments and opinion surveys'.

Limited fiscal space for any government means that few resources will be available to address child rights concerns.

As overseas development assistance dwindles, there is an opportunity for African philanthropy to assume the role of supplementing governments' efforts in providing public goods for its citizens. This is coming in the wake of Africa having the fastest-growing number of High-Net-Worth Individuals (HNWI) in the world. The number of African HNWIs has increased by 145 per cent over the past 14 years, compared with a worldwide HNWI growth of 73 per cent over the same period.[64] The wealth of African HNWIs has increased by even higher proportions. Africans with assets of more than US $30 million will double by 2025.[65] While philanthropy provided some US $30 million in the implementation of the Millennium Development Goals, the Foundation Centre forecasts that philanthropy is likely to contribute US $364 billion of the US $3,5 trillion that is needed for the realisation of the Sustainable Development Goals.[66] As such, many governments on the continent of Africa are recognising the role that philanthropy plays, as can be epitomised by Liberia's establishment of a Liberia Philanthropy Secretariat in 2009. The AU launched the African Union Foundation in 2015 to mobilise voluntary contributions in support of Agenda 2063. As can be deciphered from these examples, philanthropy is increasingly becoming a viable option that can contribute significantly to financing children's rights.

4 Conclusion

Since the African Children's Charter came into force some 30 years ago, there is no doubt that much progress has been made to protect the rights of children. The child rights discourse has gradually transformed. Therefore, there needs to be proactiveness in addressing the emerging issues arising from the new normal. I have contended that going forward, the discourse needs to be more erudite so that transformation can be achieved. I have argued against child rights alterity which expresses itself in the creation of a sector of this particular interest group, with the exclusion of other pertinent sectors either by omission or by commission. The child rights discourse must be located within the broader developmental agenda, not as an appendage. As such, efforts should be made to

64 B Moyo 'How to make societies thrive: The role of African philanthropy' (2016) *Claiming Agency* 17.
65 As above.
66 As above.

clearly demonstrate the centrality of fulfilling children's rights in the pursuit of a country's development goals.

I have noted that the discourse must be transformational, addressing inequality in the universal access to quality basic social services. To address this aspect, the child rights discourse should invest in valid and reliable informatics that expose the inequalities. Further, the discourse should be institutionally oriented, interrogating the various institutions that are meant to provide for children's rights. How resourced are they to provide quality services? How decentralised are they to be reachable for all the children who need them? How robust and conceptually grounded are their agendas in addressing child rights issues?

I have observed that information and communication technology access is improving on the African continent. This comes with it some positives and well as some risks for children. The child rights discourse, therefore, must be strategically placed to be able to harness the positives while finding proactive ways of mitigating the risks that come with ICT. Overall, the continent has not been responsive to the accelerated dynamism existing in the ICT world. Most countries on the African continent have not developed internet governance protocols that protect the citizenry. Wheels are turning slowly in that regard, something which the child rights discourse must take up and infuse some urgency into.

As regional integration gains momentum, inspired by the AU's Agenda 2063, I raise caution that what will come with this noble initiative is a sequel of cross-border child rights violations. This will need regional economic communities to establish systematic mechanisms for responding to these child rights violations. Some of the regional economic communities have taken initiative in this regard, with ECOWAS leading the way. The child rights discourse, therefore, needs to place a premium on the role of regional economic communities in the realisation of children's rights on the continent of Africa.

The last issue I raise to conjure a paradigm shift is the rise of far-right politics in Europe. This dynamic has resulted in governments having politics that focus on internal issues, with less interest on financing overseas development assistance. The dwindling donor funding from Western countries presents an opportunity for African countries to explore domestic resource mobilisation to fully finance their own development initiatives. At present, some of the social development projects in African member states are heavily reliant on Western funding, which is not sustainable. As such, the child

rights discourse should be at the forefront of lobbying member states to explore innovative ways of mobilising domestic resources. This will increase the fiscal space for adequate provision of quality basic social services. It also means that the focus must be placed on available resource governance and accountability to deal with leakages through, *inter alia*, corruption and illicit financial flows that subsequently handicap member states' capacities to provide for their people.

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Understanding the nature, scope and standard operating procedures of the African Commission's special procedure mechanisms

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Summary: *Special procedure mechanisms form an important aspect of the human rights architecture of the African Commission. Although introduced gradually, these mechanisms have grown in both size and scope. This article considers the overall nature, scope and standard operating procedures of the African Commission's special procedure mechanisms in light of development and evolution by reference to its composition; selection and appointment of mandate holders, code of conduct of mandate holders (that is, independence and conflict of interest), working modalities, immunities and privileges and procedure. It also identifies and analyses possible areas of reform in this system.*

Key words: *African Union; African Commission; human rights; special procedure mechanisms; standard operating procedures*

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1 Introduction

With the creation of its first special procedure mechanism in 1994 – the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions – one may argue that the African Commission on Human and Peoples' Rights (African Commission) marked the beginning of an alternate route of human rights protection and promotion in the African regional human rights system. The Commission has since expanded its special procedure mechanisms and used these as a subsidiary means in fulfilment of its article 45 functions. Although the African Commission had other means of human rights protection and promotion, such as its communications and state reporting procedures, shortcomings existed within these procedures.[1] Its special procedure mechanisms seemed well positioned to fill some of these gaps and, thus, may be viewed as complementing and reinforcing the existing procedures of the African Commission. It did so to a greater extent; so much so that now it is a legitimate and accepted apparatus of the African regional human rights architecture.

While there has been wide acceptance of the African Commission's special procedure mechanisms; its standard operating procedures and nature remains relatively unknown. This is understandable. Despite existing differences, the intertwined nature of the African Commission with its special procedure mechanisms often gives the impression that they are one and the same. When compared to the special procedures of the United Nations (UN) Human Rights Council (HRC), the African Commission's special procedure mechanisms have not reached a level of systemisation and autonomy, contributing heavily to misconceptions, misinterpretations and misunderstandings of these mechanisms, especially when taken as a whole. Accordingly, this article examines the generic question of what the nature and overall scope of the African Commission's special procedure mechanisms are within its human rights architecture. In considering this broad question, the focus is on the special procedure mechanisms of the African Commission as a whole and not on specific mechanisms.

The question of the nature, scope and standard operating procedures of the African Commission is important. First, an understanding of the nature of these special mechanisms is a prerequisite for engaging and accessing these mechanisms. It is only when one understands how a system or mechanism works that one can fully engage, explore and access it. Moreover, such an

1 F Viljoen *International human rights law in Africa* (2012) 369.

understanding may also be important as it gives us an insight into the 'extra-conventional' nature and thus 'special character' of these mechanisms and how they affect both state and non-state actors in the international human rights system.

Moreover, a theoretical grounding of the African Commission's special procedure mechanisms may also be imperative because, as Domínguez-Redondo once suggested, 'many of the challenges faced by human rights bodies, including [special procedure mechanisms] remain linked to the misalliance between their conception in origin and their organic growth'.[2] Second, although the special procedure mechanisms of the African Commission hold great potential for human rights advancement, direct engagement by individuals, other than that by non-governmental organisations (NGOs), remains relatively limited. A lack of understanding and education on the system generally contributes to this limitation. Lastly, those concerned and working within the international human rights framework, especially those uninitiated and unfamiliar with the African regional human rights system, often assume that the African Commission's special procedure mechanisms work and function in the same way as those of the global system. However, this is far from the truth. True, there are similarities between these systems but the variances are even more. To begin with, the geo-politics between these systems are relatively different. Each are informed by their own needs and conditions. It therefore is important that the nuances that exist between these systems be set out.

Using a desk-top method and relying on a theoretical approach, this article considers the standard operating procedures of the African Commission's special procedure mechanisms. Accordingly, in addition to this introduction the article briefly examines in the second part the geo-political determinants that contributed to the creation of the special procedure mechanisms of the African Commission; its legal basis, functions and complementary role in the Commission's operations. In the third part I consider the general nature and scope of the Commission's special procedure mechanisms by reference to its (i) composition; (ii) selection and appointment of mandate holders; (iii) code of conduct of mandate holders (that is, independence and conflict of interest); (iv) working modalities; (v) immunities and privileges; and (vi) (constructive dialogue) procedure. The fourth part concludes the article.

2 E Domínguez-Redondo 'The history of the special procedures: A "learning-by-doing" approach to human rights implementation' in N Aoife, R Freedman & T Murphy (eds) *United Nations special procedures* (2017) 16.

2 Creation and evolution of the special procedure mechanisms of the African Commission

The establishment of the first special procedure mechanism of the African Commission took place in 1994. Since then, additional mechanisms have been created, some altered and others merged over the years. The determinants – political, legal, or otherwise – leading to the creation of the African Commission's special mechanisms are not always a straightforward matter. In fact, the initial reasons for the creation of the Commission's special mechanisms are not known. The Commission never pronounced itself on this matter, leaving those interested in its work in suspense. This has provoked speculation among scholars, with some attributing the failures of the African Commission's state reporting procedure as a focal point that led to the creation of the Commission's special mechanisms.[3] Others have suggested that it was a means aimed at cementing the credibility and legitimacy of the then embryonic and still fledging African Commission.[4] Pressure from NGOs, especially regarding the lack of action on the political challenges on the continent, particularly the genocide in Rwanda, may well have been another reason for the creation of the African Commission's special mechanisms.[5]

The African Commission's special procedure mechanisms are prisoners to their political history. This is because, as Heyns once argued, human rights, generally, and, by extension, its mechanisms, processes and institutions, developed as a response to specific historical circumstances and should be understood primarily not as the pursuit of abstract notions of justice, but rather as a reaction to concrete experiences of justice.[6] It started in an *ad hoc* fashion and expanded and developed over time. For the most part, the establishment of the Commission's special procedure mechanisms was necessitated by political and social circumstances on the African continent. Certainly, the first special mechanism was triggered by the Rwandan genocide. As the foremost human rights organ of the African Union (AU), the African Commission was expected to respond to and be seen as doing something about this and other delicate human rights situations on the African continent. Although

3 Viljoen (n 1) 369.
4 J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 248.
5 The overt reality was that a considerable number of non-governmental organisations have repeatedly been attending the Commission's sessions, and have been pressurising the Commission to be more choral on the human rights developments at the domestic level.
6 C Heyns 'A struggle approach to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 15-16.

this political situation served as a determinant for the birth of the African Commission's first special mechanism, time and again, each of the subsequent mechanisms created was based on some sort of 'political' human rights situation on the continent. In a sense, then, the African Commission's special mechanisms are a reaction to prevailing human rights situations, which first and foremost are not adequately covered or addressed by existing procedures and machinery of the Commission. Henceforth, the special mechanisms of the African Commission play a complementary role, aimed at filling the gaps left by the primary apparatuses and procedures used by the African Commission.

With the diversity of the arguments on the motivations behind the special mechanisms of the African Commission, one may argue that it was rather the geo-political context within which the Commission at the time found itself that gave rise to the steady emergence of its special mechanisms. Such an argument may be cogent when one has regard to the creation of the African Commission's first thematic special mechanism on extrajudicial, summary or arbitrary executions created in 1994 which was largely birthed out of the political developments of the time. Historically, the political unrest in Southern Africa, particularly apartheid in South Africa (and, to a lesser extent South-West Africa (now Namibia)) and the systematic killings of Tutsi and Pygmy Batwa in Rwanda, were typical developments to which the African Commission could not respond through its existing working methods. However, this was not the only political reality. In fact, since the inception of the Organisation of African Unity (OAU) in 1963, civilian unrest marked the continent from almost all corners. This was even to a greater extent corroborated by colonialism that was still prevalent on the continent. A notable development worth mentioning that left an imprint on the state of human rights protection on the continent were the erratic atrocities of the Amin regime in Uganda (1971-1979) which was marked by political repression, ethnic cleansing and the general commission of crimes against humanity. Events of this nature not only shed light on the dire state of human rights on the continent but equally placed pressure on the stakeholders of the OAU to act on atrocious human rights situations without delay. Accordingly, institutions such as the African Commission were left with not much option but to explore means and more 'flexible' methods to address some of these challenges. 'Flexibility' in this regard boiled down to more speedy and unconventional approaches and techniques of responding to human rights situations.

Although not introduced immediately, the special mechanisms of the African Commission gave meaning to the much sought 'flexible' responses of human rights protection. Given the political realities of the time stated above, it also is not surprising that predominantly there was no active state resistance to the creation of special procedure mechanisms of the African Commission. At least, no state has expressly questioned the legitimacy of the special mechanisms of the African Commission, which is reflective of the wide acceptance of these mechanisms by AU member states. The relative acceptance by member states and the African Commission itself of these mechanisms is understandable, given the fact that many states viewed the existing working mechanisms of the African Commission, particularly the communication procedures of the Commission, as confrontational, and an intrusive invasion of state sovereignty. It should also be borne in mind that in as much as there may have been several explanations for the creation of special mechanisms under the African Commission's work, each individual mechanism was triggered by its own context and motives, requiring a certain level of appreciation for each on its own merits.

Much of the uncertainty around the establishment of the African Commission's special procedure mechanisms stems from the fact that, at least at the time of the creation of the first special procedure mechanism, it had no explicit legal basis in the primary legal instruments of the AU. However, through a purposive reading of the African Charter on Human and Peoples' Rights (African Charter), the formation of the Commission's special procedure mechanism can be traced to article 45(1) of the African Charter. Article 45(1) deals with the mandate of the African Commission to promote and protect human and peoples' rights.

The overt linking of article 45(1) to the African Commission's special mechanisms may be an overstretched reading of the African Charter, one that may not truly reflect and accurately captivate the legal basis of these mechanisms. Instead, it is in article 46 of the African Charter that a legal basis should be sought which provides that '[t]he Commission may resort to *any appropriate method of investigation*; it may hear from the Secretary-General of the Organization of African Unity [now Chairperson of the African Union] or any other person capable of enlightening it'.[7] As recourse, it is to Rule 25 (and Rule 23 of the old Rules of Procedure and Rule 28 of the 1988 Rules of Procedure) of the 2020 Rules of Procedure of the African Commission

7 See generally Viljoen (n 1) 370, who argues that arts 45(1)(a), 46 and 66 of the African Charter can be a possible legal basis of these mechanisms.

that the legal basis should be attributed. Rule 25 explicitly 'creates subsidiary mechanisms' but mentions very little as to the nature and scope of these mechanisms. Rather, the technical aspects of these special mechanisms are detailed in the recently-concluded Standard Operating Procedures on the Special Mechanisms of the African Commission.[8]

Although the Commission should be acknowledged for its innovation in creating the special mechanisms of the African regional human rights system,[9] the lack of explicit provision of these mechanisms in the legal framework of the African Commission at the time of their institutionalisation signals the weak efficacy of the system. It raises questions as to its legitimacy, role, and impact as a human rights response mechanism of the African regional human rights system. The swift yet fluid manner in which these mechanisms were created is a clear indication that they were almost never intended and/or anticipated as part of the African Commission's working methods by the drafters of the African Charter.

Even with the recent formalisation through the adoption of the Rules of Procedure of the African Commission, it became clearer through practice that these mechanisms were created not with the intention of serving as independent mechanisms for human rights response in the African human rights system, but rather as complementary apparatuses aimed at providing support to the African Commission. It may therefore be compelling to argue that their creation in principle is one of innovation triggered by legal-political necessity as opposed to substance. However, one may can counter this argument and suggest that historically these mechanisms were always part and parcel of the African Commission since its formation. This counter-argument finds corroboration if one has due regard to the African Commission's first Rules of Procedure adopted in 1988. Chapter VI of these 'old' Rules permitted the establishment of subsidiary bodies.

Although not of a neat legal basis, but rather creatures of innovation, it is undoubtedly clear that special mechanisms are now an entrenched part of the African Commission's human rights architecture. So far the African Commission has initiated 15 special

8 Adopted during the 27th extraordinary session of the African Commission, held from 19 February to 4 March 2020 in Banjul, The Gambia, https://www.achpr.org/public/Document/file/English/SOP%20on%20the%20Special%20Mechanisms%20of%20the%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights_ENG.pdf (accessed 22 May 2020).

9 Harrington (n 4) 248.

mechanisms,[10] starting with those with a focus on civil and political rights and, of recent, those oriented around socio-economic rights. Each of these special procedure mechanisms is initiated with a specific mandate informed primarily by its thematic focus and resolution establishing it. However, collectively the roles and responsibilities of mechanisms are standardised. In terms of clause two of the Standard Operating Procedure (SOP) the Commission's special procedure mechanisms generic roles and responsibilities include –

(1) seeking, receiving, examining and taking action on information related to their mandate area;
(2) cooperating and engaging with state parties, national human rights institutions, relevant intergovernmental organisations, international and regional mechanisms, and civil society organisations;
(3) setting standards and developing strategies for the better promotion and protection of human and peoples' rights; and
(4) submitting reports at each ordinary session of the African Commission.

In fulfilling the above stated overall mandate, the special procedure mechanisms primarily complement the African Commission in the discharge of its article 45 function. In this complementary role, the special procedure mechanisms of the African Commission play an important role in filling the actual and potential gaps left by the African Commission in its state reporting and communications procedures.[11] This is because of its malleable nature, hence the adage 'special' in special mechanisms. For example, without adequate follow-up, state party reports or individual communications made to the African Commission may be overlooked or soon forgotten. Special Rapporteurs or working groups often undertake this follow-up role during country visits to states. Special mechanisms also give 'life' to the work of the African Commission by engaging directly with victims of human rights violations through field visits and

10 These are the Special Rapporteur on Prisons and Conditions of Detention (1996); the Special Rapporteur on the Rights of Women (1998); the Working Group on Indigenous Populations and Communities in Africa (2000); the Special Rapporteur on Freedom of Expression and Access to Information (2004); the Special Rapporteur on the Situation of Human Rights Defenders (2004); the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (2004); the Working Group on Economic, Social and Cultural rights (2004); the Working Group on specific issues related to the work of the African Commission (2004); the Committee for the Prevention of Torture in Africa (2004); the Working Group on the Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa (2005); the Working Group on Rights of Older Persons and People with Disabilities (2007); the Working Group on Extractive Industries and Human Rights Violations in Africa (2009); the Advisory Committee on Budgetary and Staff Matters (2009); and the Committee on the Protection of the Rights of People Living with HIV and those at risk, vulnerable to and affected by HIV (2010).

11 Viljoen (n 1) 369.

those NGOs that may not enjoy observer status with the African Commission or have the resources to always engage with the African Commission because of its remote location. As rightly suggested by Long and Muntingh:[12]

> The special mechanisms procedure is particularly popular with NGOs because it has proved to be an effective way [and arguably the only way] for NGOs to ensure that a particular issue that they are promoting has a sustained profile within the activities of the African Commission.

With the article 34(6) declaration in place, which requires states to accept the competence of the African Court on Human and Peoples' Rights (African Court) to receive cases under article 5(3) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights, most states have excluded individual accountability, thus limiting access to the African Court.[13] The special procedure mechanisms can be a contributing factor to meet the shortcomings brought about by this limitation, in addition to the communications procedure of the African Commission, and the subsequent option of the African Commission to refer cases to the African Court.[14]

A common feature of all the special procedure mechanisms of the African Commission is the guidance sought from international law. Thus, in the discharge of their duties all special procedure mechanisms of the African Commission 'draw inspiration' from (public) international law, whether hard or soft, concerning human and peoples' rights.[15] As a basis, such inspiration shall be primarily centred on the provisions of various African instruments on human and peoples' rights, beginning with the Charter of the Organisation of African Unity (now replaced by the AU Constitutive Act). Such reliance on African instruments, however, does not exclude the possibility of reliance on instruments beyond the AU as well as those

12 D Long & L Muntingh 'The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The potential for synergy or inertia?' (2010) 7 *International Journal on Human Rights* 109.

13 A Tsunga & S Ebobrah 'Withdrawal of states from the African Court a blow to access to justice in the region' (2020) *International Commission of Jurists Reports* 1-2, https://www.icj.org/wp-content/uploads/2020/05/Ivory-Coast-Statement-Advocacy-ENG-2020.pdf (accessed 1 November 2020); See also F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63.

14 This could be achieved if the various special procedure mechanisms can institute *amicus* briefs on behalf of complainants or the African Commission. This is something worth exploring by the special procedure mechanisms mandate holders of the African Commission.

15 Art 60 African Charter.

'adopted by African countries in the fields of human and peoples' rights'.[16]

More in tune with article 38(1) of the Statute of the International Court of Justice, article 61 of the African Charter further provides that the African 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 peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'.

Although worded and directed to the African Commission as a whole, these provisions in principle are attributable to all the mechanisms, institutions and processes of the African human rights system, including the African Commission's special procedure mechanisms.

While generally informed by international (human rights) law, in principle mandate holders of the various special procedure mechanisms also have the privilege of relying on any relevant sources of law in the discharge of the mechanisms mandate. This unrestricted use of information allows mandate holders of the various special procedure mechanisms to ensure that whatever allegations they raise remain substantiated with authority.

3 Nature and scope of the African Commission's special procedure mechanisms

3.1 Composition

The special procedure mechanisms in the African Commission take one of three forms, differentiated predominantly only by composition and mandate, namely, (i) Special Rapporteurs; (ii) working groups; and (iii) committees. The difference between these mechanisms is not neatly demarcated. However, in practice there appears to be definite differences between them, distinctions suggestive of some sort of hierarchy. Hoene, in the context of the UN special procedures, argued that the different references to and labels of these mechanisms indicate 'an unstated hierarchy commensurate with the gravity of

16 As above.

the situation'.[17] The same argument may be extended to the special procedure mechanisms of the African Commission. In practice, one notices that the thematic mechanisms that are either technical in nature or require specialised expertise often resort under the banner of 'working groups'. Matters internal to the African Commission or its special mechanisms are often classified as 'committees'.

Special rapporteurship is held by individual mandate holders who are also commissioners. In contrast, the composition of working groups and committees consists of commissioners and external experts. Such composition usually is comprised of a maximum of eight members, three of whom must be commissioners.[18] One of the commissioners who form part of a working group or committee chairs such a mechanism.

Ironically, the African Commission's special procedure mechanisms consist only of thematic mechanisms, but in practice each commissioner is allocated several countries as respondents for human rights protection and promotion, including monitoring. Country-specific mechanisms, therefore, are not unique to the special procedure mechanisms of the African Commission but rather an overall and 'internal' arrangement of the African Commission as a whole. The reluctance to robustly embark on a system of country-specific mechanisms within the system of special procedure mechanisms, apart from country-specific responsibilities allocated to commissioners, may be attributed to a lack of resources and the overall attention already given to geographical situations, particularly in cases of peace and security, by the AU.

In the calls for application to memberships concerning special procedure mechanisms, and since the adoption of the SOP, due consideration is increasingly given to gender, linguistics and geographical representation in the composition of special procedure mechanisms. So, too, consideration is given to appropriate representation of different legal systems.

3.2 Appointment of mandate holders

As a logical part of any process of appointment, the African Commission has not neglected to appoint persons it deems most appropriate to hold a rapporteurship, or membership in its

17 O Hoene 'Special procedures of the new Human Rights Council: A need for strategic positioning' (2007) 4 *Essex Human Rights Review* 92.
18 Clause 3.6 of the Standard Operating Procedures (SOP).

working groups or committees. In terms of clause 8 of the SOP, the appointment of members of the working groups and committees of the special mechanisms of the African Commission shall be through a published call for applications,[19] with the requirement that prospective applicants possess proven skills and experience in the thematic area of a special mechanism.[20] No similar provision is made for the appointment of Special Rapporteurs, leaving their appointment entirely to the subjective judgment of the African Commission.[21] Mandate holders are appointed for a period of two years, which may be renewed twice.[22] It is also reserved for nationals of a state party to the African Charter,[23] who possess proven skills and experience in the thematic area of a special procedure mechanism.[24]

The selection procedure of mandate holders arguably is a major area of weakness of the African Commission's special procedure mechanisms. This is because it is primarily an internal process of the African Commission, exclusive of any input from any of the external stakeholders of the African regional human rights system. Moreover, there are no clear criteria set both in terms of the Rules of Procedure and SOP for the allocation of a mechanism to a commissioner.[25] However, a reasonable presumption would be that the individual interest of commissioners and, possibly, their professional background, experience, expertise and availability inform the Commission's allocation of mandates to mandate holders.[26]

19 Clause 8 SOP.

20 Clause 10 SOP. If one may make reference to one of its most recent calls for nominations relating to the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, it is clear that the Commission's appointment of such experts is based on related experience, expertise and record of publication in a given field or area of focus, advocacy and written skills, ability to commit time and language requirements. See, eg, the call for applications for the nomination of expert members to serve on the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, https://www.achpr.org/news/viewdetail?id=132 (accessed 16 December 2019).

21 However, a reasonable argument may be advanced that these are also the criteria guiding the nomination and eventual appointment of Special Rapporteurs of the African Commission.

22 Clause 4.13 SOP.

23 Clause 3.11 SOP.

24 Clause 3.10 SOP.

25 In contrast, the Manual of Standard Operating Procedures of the Human Rights Council's special procedures clearly sets out criteria of consideration when appointing mandate holders. See generally clause 9 of the Manual of Operations of the Special Procedures of the Human Rights Council (2008) 6-7.

26 One may here refer to the appointment of Commissioner Hatem Ben Salem, the African Commission's first Special Rapporteur on Extrajudicial Executions, as a case in point. The failures of the Commission's first special mechanism raised concerns about both the methods of appointment and calibre of candidates appointed to special mechanisms. See, generally, Harrington (n 4) 253-254.

Over the years, and through practice, the African Commission has reserved 'special rapporteurship' exclusively to sitting members of the African Commission, while its working groups have been opened to include independent experts from outside the African Commission, though again under the stewardship of a sitting commissioner. Consequently, all Special Rapporteurs have been sitting commissioners of the African Commission. This is uncommon in the UN's special procedures system and therefore a distinguishing feature from its mother system. Whether the African Commission should keep to its current 'hybrid' arrangement is a complex matter. One may advance arguments on both sides of the spectrum.

On the one hand, the thinking could be that the current arrangement is an acceptable trend that should not summarily be dismissed, though it has severe consequences on the effective functioning of the African Commission's special mechanisms. This is because the special procedure mechanisms of the African Commission are subsidiary to the African Commission as a whole and, therefore, would need to be under its close oversight. Therefore, outsourcing independent external experts would derail from the subsidiary nature of the special mechanisms and as such detach it from its 'mother body', contrary to the intention and the manner in which the system was engineered. A material shortcoming of this stream of thinking is that it lends to the reality of conflation between the dual role of commissioners as 'members of the African Commission', on the one hand, and as 'special mechanism mandate holders', on the other.

The dual role of commissioner and special rapporteurship can be extremely challenging and, if not safeguarded, can lead to the neglect of the mandate that commissioners hold as Special Rapporteurs. To give an example, at some point one of the former Special Rapporteurs on the Rights of Women in Africa had three roles. At the 42nd ordinary session of the African Commission, Commissioner Soyata Maiga was not only appointed as the Special Rapporteur but also given the role to serve as member of the Working Group on Indigenous Populations/Communities, as well as the country rapporteurs for Central African Republic, Niger, Guinea, Libya and Gabon.[27] While the multi-concurrent appointment of Commissioner Maiga, in light of this example, may be seen as evidence of her demonstrated ability and professional track record, which other commissioners with concurrent mandates certainly have, the concern

27 Final Communiqué of the 42nd ordinary session of the African Commission on Human and Peoples' Rights (28 November 2007), Brazzaville, Republic of Congo, https://www.achpr.org/public/Document/file/English/achpr42_fincom_2007_eng.pdf (accessed 12 May 2020).

one can advance is that with an overburdened workload some of her roles will undoubtedly have to suffer. Whether such overburdening had an effect on the mechanisms of the Special Rapporteur cannot fully be comprehended but the possibility of such a reality looms large and can certainly not be denied. The same can be said of other commissioners who serve multiple mandates. Cognisant of the challenges of having multiple mandates , the Human Rights Council in its standard operating procedures has adopted the 'principle of non-accumulation of human rights functions at a time' to safeguard the work of its special procedures.[28] This is something worth simulating in the African Commission's special procedure mechanisms system.

The counter-argument to be made is that even the strongest mandate stands and falls with the choice of an individual mandate holder. A total surrender or outsourcing of the Special Rapporteur on the Rights of Women in Africa and, by extension, the other mechanisms of the African Commission, would be ideal. In fact, this recommendation finds resonance when one has regard to the trends and practices that have marked the African Commission's special mechanisms for close to three decades. Much of the African Commission's special mechanisms' failures and successes have been dependent on the personalities that hold these mandates. Others have used the moral command that comes with these mandates to put pressure on states in addition to the Commission's state reporting procedures. They have been proactive and have sought funding and capacity support to drive their mandates in light of the chronic financial circumstances permeating the AU system generally and have produced resounding reports and findings that contribute modestly to norm setting and human rights promotion on the continent.[29] Others have been extremely passive, contributing in part to the discontinuation or reframing of some mandates.[30] In such rare but persistent instances the ultimate consequence has been the weakening of the systemisation aspirations of the African Commission's special mechanisms.

The outsourcing of these mechanisms is a reachable possibility if only the African Commission would admit to its current state of work overload and seek solace by sharing some of its heavy loads with

28 See clause 9 of the Manual of Standard Operating Procedures of the Human Rights Council's Special Procedures (2008) 6.

29 See, eg, the appraisal made by E Durojaye 'The Special Rapporteur on the Rights of Women in Africa 2007-2015' (2018) 16 *Gender and Behaviour* 10700.

30 See, generally, Harrington (n 4) 267, who argues that the attempt by the Commission to designate Special Rapporteurs in order to circumvent the constraints of the institution as a whole can only meet with success where the chosen individual has greater willingness than the Commission to devote energy to the task and to risk states' displeasure.

experts with the necessary experience, expertise and charisma to drive some of its mandates. The unease of the African Commission to expand its special mechanisms to external parties is to some extent understandable and should not be completely dismissed. The African Commission is established in terms of article 30 of the African Charter. Its members, who serve as commissioners for a period of six years, subject to eligibility for re-election,[31] are directly 'elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by states parties'.[32] Whether commissioners elected by, and accountable to, a political organ have the power to outsource its duties to external parties is highly contestable. It could possibly amount to an *ultra vires* act. Even more potent is the fact that such outsourcing could be interpreted and seen as the African Commission's abdication of responsibility, let alone undermining its own members' competence.

On the other hand, the UN system, which supposedly is a model of the African Commission's special mechanisms, has always been open to engaging external experts. In fact, right from the onset of its first special mechanism in 1967, the UN has outsourced its mechanisms to external experts, bearing in mind the 'principle of non-accumulation of human rights functions at all times'.[33] The same approach can be adopted by the African Commission. In the past, the African Commission has contemplated outsourcing the Special Rapporteur on the Rights of Women in Africa to external stakeholders. The African Commission had designated Commissioners EVO Dankwa and Vera VD Duarte-Martins to oversee the Special Rapporteur on the Rights of Women in Africa together with an external appointee before the mechanism was formally introduced in 1999, more along the trends now visible in the working groups of the African Commission.[34] However, this was not sustained after the mechanism had been formally initiated despite the interest shown by external candidates to head the mechanism. Instead, the African Commission chose a closed-up approach with sitting commissioners as its first choice for these mandates. What may have hindered the African Commission to retract its intention of outsourcing the mandate is not clear, but it surely speaks to the politicisation of its role and its constant submission, if not caution, to the political organs of the

31 Art 36 African Charter.
32 Art 33 African Charter.
33 Clause 8 of the United Nations Human Rights Council (UNHRC) *Manual of operations of the special procedures of the Human Rights Council* (2008) 6.
34 African Commission 'Chapter 9: Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-1996' (1996) para 9, https://archives.au.int/bitstream/handle/123456789/2082/9e%20Rapport%20Annuel_E.pdf?sequence=1&isAllowed=y (accessed 14 December 2019).

AU, to which it is ultimately accountable. Moreover, by limiting or holding its mandates under closer scrutiny with the Commission, the Commission may be seen as taking up a neutral position aimed at safeguarding the possibility of it exceeding or, at least, being seen as exceeding its core mandate of human rights protection and promotion. To this end, the selection and appointment procedure of mandate holders is an area that calls for reconsideration or reform.

3.3 Code of conduct

3.3.1 Independence

It is an undisputed fact that the strength of the special procedure mechanisms, whether at the universal or regional level, lies in its impartiality and independence as a system.[35] However, such independence is not an automated aspect of such systems. It is largely dependent on the safeguards extended to ensure such independence as well as the firm position to uphold impartiality on the part of mandate holders.[36] First, independence within the special mechanisms of the African Commission has been one of its most daunting challenges.

The initial shortcoming with the African Commission's special mechanisms can be traced to the fact that the institutional independence of the African Commission's special mechanisms is not completely guaranteed since it is merely an extension of the African Commission and, therefore, only functions semi-autonomously. However, there is some basis of such a guarantee. Clause 14(a) of the Standard Operating Procedures on the Special Mechanisms of the African Commission requires mandate holders to 'act in an independent capacity and not seek or accept instructions from any governmental or non-governmental entity or any individual in the execution of their mandate'. Furthermore, since the African Commission's special mechanisms are spearheaded by sitting commissioners, independence can be indirectly implied from the overall independence guaranteed these commissioners in the African Charter. In this regard, article 38 of the African Charter stipulates that 'after their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially

35 M Lempinen *Challenges facing the system of special procedures of the United Nations Commission on Human Rights* (2001) 40. See also J Connors 'Special procedures: Independence and impartiality' in A Nolan et al (eds) *The United Nations special procedures* (2017) 52.

36 Connors (n 36) 52.

and faithfully'. Whether independent experts who form part of the working groups of the Commission's special mechanisms undertake a similar declaration is doubtable but, in the absence of any guiding document on the part of the African Commission, should be implied as an inherent part of their functioning.

Second, the independence of the African Commission's special mechanisms is also questionable considering the extensive reliance on donor support and the industry of NGOs. Such support often comes with conditions – passively implied conditions and with a particular interest and agenda on the part of the NGOs.[37] In most cases it is a give-and-take situation. As the article indicates in the next part, NGOs are the lifeblood of the African Commission's special procedure mechanisms.

While NGO support to the African Commission's special mechanisms is crucial, especially as far as sustaining these mechanisms financially and profiling them positively are concerned, it could also be interpreted negatively. Extreme NGO involvement, especially when the contours of the support these NGOs provide have not been made clear and no proper boundaries are drawn between their role and responsibilities towards a specific mandate, they can be characterised as influencing the mandate. Such influences, whether for the good or made with positive motives, as seldom is the case,[38] amount to a weakening of the complete independent functioning of the mechanism.

Although most NGOs may have reasonably fair motivations and unquestionable commitment to human rights in Africa generally, the African Commission will have to strike a balance between the interests and involvement of these stakeholders in its special mechanisms and engage these NGOs with due circumspection, if it is to maintain independence within its special mechanisms. At all material times the special mechanisms of the African Commission should, for the lack of a better phraseology, be viewed, as Pinheiro has stated, 'independent of mind and action',[39] to ensure complete objectivity and impartiality, and moreover to ensure states' and the general public's confidence in its work. It is also a crucial determinant

37 J Oloka-Onyango 'Modern-day missionaries or misguided miscreants? NGO's, the women's movement and the promotion of human rights in Africa' in W Benedek (ed) *Human rights of women: International instruments and African experiences* (2002) 289.
38 As above.
39 P Pinheiro 'Being a Special Rapporteur: A delicate balancing act' (2011) 15 *International Journal of Human Rights* 166.

for the credibility of both the African Commission and its special procedure mechanisms.

A central question worth considering is whether, given the current nature and structure of the African Commission's special mechanisms, they function independently; in other words, whether the conflations between the African Commission's commissioners and their *ex officio* role as Special Rapporteurs and members of the working groups and committees affect the independent functionality of the special mechanisms of the African Commission. This question is worth interrogating not only to ensure the integrity and feasibility of the special mechanisms of the African Commission but more so in light of the common argument often advanced that the failure of the African Commission to afford its special mechanisms a distinct identity, one that is separate yet interrelated from the institutional framework of the African Commission, may also be seen as weakening the independence of its special mechanisms. Time and again, the African Commission has been criticised for its reluctance to appoint external experts to serve as Special Rapporteurs, although it has steadily opened up its doors to such experts for sittings on working groups and committees.[40] In this regard Murray makes the following point:[41]

> There are a number of difficulties with appointing members of the Commission as special rapporteurs. Despite the belief that having these roles occupied by its own members will ensure that the Commission would have a degree of control over their functioning, the Commission has, ironically, although unsurprisingly, found it difficult and uncomfortable to have to reprimand its own members for any shortcomings. It might be less reticent in doing so if the individual in question were answerable to the Commission but were not a part of it. In addition, adding further burdens to Commissioners who already only act in that capacity on a part-time basis is wholly unrealistic, compounded by their being required to function in areas that may be far removed from their full-time professional expertise.

The argument is not that sitting commissioners do not hold the required expertise to spearhead mechanisms. The strenuous process of appointment of commissioners disproves any such suggestion. Rather, the argument is that because the work of the African Commission remains demanding, commissioners generally are not able, as they should be, to dedicate ample time to their mandates. Adding to this shortcoming is the fact that the African Commission

40 Viljoen (n 1) 370.
41 R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 373.

now has more mandates than can be exhausted by the available commissioners and, therefore, some commissioners hold on average two to three mandates. Clearly, with such an overburdening of mandates, the sound discharge of mechanism duties remains compromised. As suggested before, the non-accumulation of human rights mandates, as is the case under the Human Rights Council's special procedures, is a viable option that can be invoked to address this state of affairs. Alternatively, the African Charter can be amended to increase the number of commissioners to meet the increases in mandates created.

Moreover, the fear is also that commissioners may give preference to their work as members of the African Commission and side-line their mandates as secondary. In the past, logistical and substantive challenges have occurred that may prove this point. In the rare but actual instances where a commissioner's work as member of the African Commission clashes with its mandate as Special Rapporteur, the activities of the special mechanisms are sacrificed at the expense of the work and activities of respective commissioners.[42]

3.3.2 Conflict of interest

Mandate holders are generally required to conduct themselves in a manner that furthers the interests of their mandates without compromise. In fact, it may be argued that their appointment is based purely on this assumption. Therefore, at all material times and in the furtherance of their mandates, mandate holders must avoid any conflict of interest. Such conflict of interest can be actual or potential. It is actual when mandate holders' conduct or interest is not evidently compatible with their mandate. In contrast, it is titular when the reasonable person apprehends a conflict based on the conduct or interest of a mandate holder. This can happen when perceptions arise as to the impartiality or objectivity of a mandate holder.

42 Eg, in 2014 the Working Group on Extractive Industries, Environment and Human Rights Violations had to cancel its long overdue country visit to Liberia because of a conflict in the schedule of its then) Chairperson, Commissioner Manirakiza, who had to subsequently participate in a commission of inquiry on the situation in South Sudan on behalf of the AU. See also African Commission on Human and Peoples' Rights *Inter-session Report Commissioner Pacifique Manirakiza* (12 May 2014) presented at the 55th ordinary session of the African Commission on Human and Peoples' Rights, Luanda, Angola, http://www.achpr.org/sessions/55th/intersession-activity-reports/extractive-industries/ (accessed 12 March 2018).

Special procedure mandate holders, especially Special Rapporteurs, are appointed on the basis that they are 'personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights'.[43] Although this is a requirement for appointment as commissioners of the African Commission, it can be extended to the Commission's special procedure mechanisms, given that all commissioners form part of these mechanisms. The general presumption that may be advanced is that 'outsiders' appointed to serve on the Commission's special procedure mechanisms must fairly also meet the same 'highest reputation' standard.

Implicit in this general standard is the fact that mandate holders must not use their office or knowledge acquired from their functions as mandate holders for private gain, financial or otherwise. This includes benefits to acquaintances, close associates or third parties, which is something likely to happen given that the stakeholders in the African regional human rights systems have close connections and ties with one another. In terms of the SOP, mandate holders may 'not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of their mandate, if doing so would appear to call into question their integrity or relationship with the entity offering the gift'.[44] This requirement does not in itself prevent any entity or individual from showing gratitude to a mandate holder. Gratitude can be shown by means of gifts or honorariums. In practice this is common. However, the expression of gratitude should be done prudently and openly. The existence of a conflict of interest will depend on the circumstances of the case or situation, but the end result should be the declaration of such interest. The basic aim with the declaration of interest is to protect the integrity of the 'system' of the special procedure mechanisms and, by extension, the African Commission and the individual mandate holder. The old public law adage that justice must not only be done, but must also be seen to be done is applicable here. Tokens, therefore, should in principle not undermine the work of the mandate or be geared towards silencing or interfering with the work of mandate holders. Ideally, a mandate holder, regardless of the value of the token, should declare same to the Commission in its annual reports for transparency purposes.

To circumvent a conflict of interest several checks and balances have been put in place in terms of the African Commission's legal

43 Art 38(1) African Charter.
44 Clause 14 (g) SOP.

framework. For example, commissioners and those appointed from outside the Commission to serve on its special procedure mechanisms serve in their personal capacity.[45] Thus, even though some commissioners may be senior government officials in their respective states, whether in the past or present, their service to the Commission's special procedure mechanisms is done as independent experts, separate and autonomous from their civic or other roles. Furthermore, mandate holders must disclose any interest, whether direct or indirect, which may be considered to be in conflict with their mandate. The discretion for such disclosure primarily lies with the mandate holder, but nothing prevents other stakeholders, including states, to require a mandate holder to disclose any conflict of interest. In fact, as part of requests for invitations for country visits, states can require a mandate holder to disclose any actual or potential conflict of interest, even though this has not been the practice.

Another measure in place is the invocation of the 'principle of recusal', when an actual or potential conflict of interest is established. Applied within the framework of the special procedures system, where a mandate holder discloses his or her actual or potential conflict of interest, ideally such a mandate holder must recuse, that is excuse, themselves from that particular process or activity. This is in order to erase any loss of public confidence, including on the part of state parties, in the system. The legitimacy of the African Commission's special procedure mechanisms to a large extent depends on the perceptions and apprehensions of those who engage the system. These include the wider public, NGOs, civil society, international organisations and state parties.

These measures notwithstanding, the circumvention of conflict of interest remains one of the challenging issues within the Commission's special procedure mechanisms. It is charged because conflict of interest is not always easy to establish. Moreover, viewed in light of the fact that most often mandate holders, by virtue of them being sitting commissioners, serve on a part-time basis, the likelihood of incompatible interest or bias can never be totally eliminated.

3.4 Working methods

In its working methods the African Commission's special mechanisms rely on roughly five modalities, dependent on the violation or issue being dealt with. These include (i) actions on allegations, which can include urgent appeals, letters of concern, letters of appreciation,

45 Art 38(2) African Charter.

public or press statements, and resolutions; (ii) engagements during periodic state reporting; (iii) country visits, whether promotional or fact-finding; (iv) engagements concerning thematic reports, studies and norm elaboration; and (v) awareness raising.

In carrying out its mandate through one or more of the general working methods, the mandate holders are not bound to obtain prior authorisation from the African Commission or the political organs of the AU in applying any of the working methods.

In the discharge of their mandates, special procedure mechanism mandate holders require certain basic guarantees depending on the working method used.[46] These include freedom of movement; freedom of inquiry and to seek information; security and intelligence support; and assurance of the protection of victims, NGOs and other institutions and actors, during and after interaction that may furnish information to a mandate holder.[47] Since the Rules and Procedures of the African Commission are to apply *mutatis mutandis* to the proceedings of its subsidiary mechanisms,[48] mandate holders are to carry out their mandates using the various working modalities at their disposal with the highest degree of 'morality, integrity, impartiality and sound competence'.[49] Moreover, the working modalities must be undertaken with due regard to the constructive dialogue procedure.[50]

3.5 Immunities and privileges

The African Commission's special procedure mechanisms are shielded with immunities and privileges for work carried out within the parameters of their mandates. Although this is relatively settled, it has not thus far been invoked by any mandate holder. It seems on face value that the special mechanisms of the African Commission, including the Special Rapporteur on the Rights of Women in Africa, enjoy the broad immunities and privileges provided by the 1965 OAU General Convention on Immunities and Privileges. Such privileges are derived from article VI immunities (relating to officials of the OAU/AU) and article VII immunities and privileges (relating to experts on missions) of the said instrument. That the special procedure mechanisms of the African Commission enjoy these privileges and

46 See also Lempinen (n 32) 19.
47 As above.
48 Rule 26 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2020).
49 See also art 31(1) of the African Charter.
50 Clause 5 SOP.

immunities is further corroborated by the 1999 Advisory Opinion of the International Court of Justice on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the High Commission on Human Rights,[51] which serves as an authoritative precedent under international law. In terms of this opinion, special mechanism holders enjoy immunity from legal processes provided the cause of action giving rise to a dispute of legal interest was carried out as part of fulfilling mandate terms and references.

As far as the scope of the protection, privileges and immunities enjoyed are concerned the special procedure mechanisms mandate holders are immune from, among others, legal processes in respect of words spoken, written and all acts performed by them in their official capacity;[52] enjoy exemption from taxation on salaries and emoluments paid to them by the OAU;[53] immigration restrictions and alien registration and finger printing;[54] and, where applicable, are given, together with their spouses and relatives residing with and dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys.[55]

In terms of article VII of the 1965 OAU General Convention on Immunities and Privileges, experts such as the mandate holders of the various special procedure mechanisms of the Commission 'shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions'.[56] These include immunities, among others, from personal arrest or detention or any legal processes of any kind, any official interrogation and from inspections or seizure of their personal baggage;[57] in respect of words spoken, written or votes cast and acts done by them in the course of the performance of their mission;[58] inviolability for all papers and documents; and for the purpose of their communications with the OAU/AU;[59] and further the right to use codes and to receive papers or correspondence by courier or in sealed bags.[60] While special mechanisms mandate holders broadly enjoy these rights and privileges, it is worth noting that 'such

51 See also the ICJ *Applicability of Article VI, sec 22 of the Convention on the Privileges and Immunities of the UN, Advisory Opinion* ICJ Reports (1989) 177 (order delivered on 10 August 1998).
52 Art VI 2(a) of the OAU General Convention on Immunities and Privileges (GCIP).
53 Art VI 2(b) GCIP (n 56).
54 Art VI 2(d) GCIP.
55 Art VI 2(f) GCIP.
56 See generally art VII 1 GCIP.
57 See generally arts VII 1(a) and (b) GCIP.
58 Art VII 1(b) GCIP.
59 Art VII 1(c) GCIP.
60 Art VII 1(d) GCIP.

privileges are granted to experts in the interests of the OAU/AU and not for the personal benefit of the individuals themselves'.[61] Among others, this may be interpreted to mean that special mechanism mandate holders may be required to account for particular actions or conduct taken in their private or personal capacity. It can also mean that at any given time the Chairperson of the AU can waive the privileges accorded any expert, if in his or her opinion the extension of immunity or privileges would impede the course of justice or be detrimental to the interests of the OAU/AU.[62] Generally, these possibilities are meant to avoid a *carte blanche* enjoyment of the vast immunities provided in the OAU General Convention on Immunities and Privileges, which can lead to absurdities. The immunities and privileges outlined in this section apply with much more importance to the fact-finding role of the mandate holders carried out through country missions, whether protective or promotional.

3.6 Procedure

In its engagements with stakeholders, especially states, the special procedure mechanisms of the African Commission are premised on a constructive dialogue procedure.[63] Hence, the mandate holders of the special procedure mechanisms of the African Commission have maintained a systematic and interactive discourse with states, human rights institutions, international and regional human rights organisations, individuals and NGOs. The constructive dialogue approach has been particularly core to the country visits and missions undertaken by mandate holders.

It is not surprising that the African Commission's special procedure mechanisms centre on constructive dialogue. To begin with, the international human rights system is generally rooted in constructive engagements between the various stakeholders. State reporting procedures, the African Peer Review Mechanism, and so forth, are all mechanisms modelled on a constructive dialogue approach. As rightly stated by Alston, sovereign states, that by far are the primary subjects of international law, can hardly be coerced by monitoring mechanisms with no binding authority.[64] Thus, positive and engaging dialogues, which form the epicentre of the constructive dialogue procedure, can sway the often uneven power dynamics to states by making them feel valued and treasured in the process

61 See generally art VI 4, read together with art VII 2 of GCIP.
62 As above.
63 Clause 50 SOP.
64 P Alston 'The purpose of reporting' in OHCHR *Manual on human rights reporting* (1997) 20.

of human rights monitoring. The constructive dialogue procedure, as opposed to the confrontational adversarial system, gives states room for engagement and thus recognises their sovereignty. In a sense it is a diplomatic approach and, thus, more acceptable to most states given that diplomacy forms a central hallmark of states' engagements with one another. Domínguez-Redondo and McMahon argue that constructive dialogue mechanisms generally provide a 'theoretical and pragmatic framework conciliating between universalist and relativist conceptual approaches to human rights, accommodating and integrating views that call for compliance with international human rights law as well as those emphasising respect for sovereignty'.[65]

There has been no open confrontation and condemnation of the special procedure mechanisms of the African Commission directly from states. This could be interpreted as a progressive or regressive sign. On the one hand, it could mean that the constructive dialogue approach of the special procedure mechanisms is working and relatively accepted and appealing to states. However, the converse could also be the case, namely, that this procedure has ritualised this system with no effective impact. Whether or not the constructive dialogue procedure of the Commission's special procedure mechanisms is effective has not been fully established and needs thorough scholarly research. Nonetheless, and arguable as is the case with any procedure, surely this technique also has its setbacks. As stated before, constructive dialogue procedures levels power balance in favour of states. This is because inherently it is a diplomatic procedure and diplomacy is the art of states. States can easily manipulate discussions because they are skilled in diplomatic engagements. Put differently, there is a power imbalance in the constructive dialogue procedure relatively in favour of states. Moreover, given its diplomatic character, the possibility of these dialogues ritualising into one of them being that the process of engagement becoming ceremonial engagements can loom large. This often leaves untapped the more desired answers to some of the pressing human rights issues raised during engagements with state parties.

Since constructive dialogue procedures have no parameters, other than that the two parties should dialogue and positively engage each other, state parties can easily provide condescending responses to important questions and issues raised, say, during missions by

65 E Domínguez-Redondo & ER McMahon 'More honey than vinegar: Peer review as a middle ground between universalism and national sovereignty' (2016) 15 *Canadian Yearbook of International Law* 61.

mandate holders. A terse example from the 2014 joint mission to the Republic of Gabon can serve as one example. During this mission, which was jointly undertaken by Commissioner Kayitesi Zainabo Sylvie (at the time Chairperson of the African Commission and commissioner assigned to the Republic of Gabon), the Special Rapporteur on the Rights of Women in Africa and the Chairperson of the Working Group on Indigenous Populations (at the time Commissioner Soyata Maiga), the then Gabonese Minister of Justice (Attorney-General, Human Rights and Relations with Constitutional Issues),[66] asked about the state of violence against women, including domestic violence or the maltreatment of widows in Gabon, acknowledged the existence of violence against women in Gabon, but narrated that there is a huge challenge in addressing violence against women in Gabon because of the failure of the victims of such acts to expose perpetrators as a result of cultural factors and traditions.[67] Typical of state party responses, it is interesting to note how the Minister's reaction put the blame on victims, thereby diverted attention from the government and the measures it ought to take to protect victims of gender-based violence. Although the Minister did mention some initiatives currently undertaken by the government, such as sensitisation campaigns,[68] no concrete response as to specific legislative and technical measures was provided. Despite this unsatisfactory response, the Special Rapporteur on the Rights of Women in Africa failed to react to the narration of the Minister, a move symbolic of the non-confrontational stance taken by Special Rapporteurs and, in fact, the African Commission, when engaging states. While the diplomatic and constructive dialogue approach is an admirable method followed by the African Commission's special procedure mechanisms mandate holders, at times it can lead to no fruitful outcomes as it leaves room for a more generalised and opaque dialogue and process of engagement. Although utter confrontation may not be ideal in engaging states, a nuanced approach blended somewhat between an open confrontation and dialogue may yield outcomes and even out the imbalances between states and mandate holders during constructive dialogue procedures.

66 At the time Ms Ida Reteno Assounuet was the Minister. The particular courtesy visit included ten senior officials from her ministry.

67 *Report of the human rights promotion mission to the Gabonese Republic* (2014) para 37, https://www.achpr.org/public/Document/file/English/achpr54os_misrep_promo_gabon_2014_eng.pdf (accessed 12 April 2020).

68 As above.

4 Conclusion

From the assessment made in this article, it is clear that the special procedure mechanisms form an important element of the human rights architecture of the African Commission. Their rapid expansion speaks to their rich and distinct contribution to human rights protection the world over. However, this growth did not come about automatically. It was influenced by numerous extra-legal determinants, predominantly geo-political developments, as discussed in the article. The need for their introduction, therefore, reinforced the point that either the then existing human rights mechanisms were not adequate to deal with the human rights situations of the time, or that they were well placed to complement and reinforce the pre-existing human rights apparatuses and approaches of the African Commission.

The African Commission's special mechanisms are malleable. To a large extent, the nature and scope of the African Commission's special procedure mechanisms allow them to navigate and complement existing mechanisms of the African human rights system in pursuit of the realisation of fundamental human and peoples' rights in Africa. The challenge, however, is that these mechanisms do not operate in a systemic manner nor distinctly separate from the African Commission. In this regard, there is a need for incremental reforms within the African Commission's special mechanisms. The call for reforms within the Commission's special procedures is not novel. Time and again, scholars have made this animated call to the African Commission.[69] However, reforms in and of themselves do not guarantee positive change and, if considered and undertaken by the Commission, should be done with great assessment and care. Reforms go hand in hand with complementarity, both internally within the Commission and externally with other similar mechanisms outside the Commission. Although there are indications of joint action between the special procedures of the Human Rights Council and those of the African Commission, more can be done in light of the Addis Ababa RoadRoad, which charts avenues for cooperation and complementarity between the two systems.[70]

69 See generally C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 175; Viljoen (n 1) 369-378; Nyanduga (n 34) 379-405; Murray (n 39) 344.

70 See, generally, Dialogue between Special Procedures Mandate-Holders of the UN Human Rights Council and the African Commission on Human and Peoples' Rights Framework Document (2012) 7, http://www.ohchr.org/Documents/HRBodies/SP/SP_UNHRC_ACHPRRoad%20Map.pdf (accessed 16 December 2017).

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Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

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Summary: *The state reporting process is one of the important means through which human rights compliance is monitored. Pursuant to article 62 of the African Charter on Human and Peoples' Rights and article 26(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, state parties are required to provide a detailed report on the human rights situation in their respective countries to the African Commission on Human and Peoples' Rights. The state report should be submitted every two years, and should outline the steps, the progress made, and challenges encountered in realising the rights provided for in the African Women's Protocol. Unfortunately, only a handful of states have fulfilled this reporting obligation. Consequently, this article identifies and investigates barriers to fulfilling reporting obligations under the African Women's Protocol. Specifically, it interrogates why some African governments have failed to fulfil their reporting obligations after showing significant commitment by their ratification of this instrument. It is acknowledged that while there might*

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be a myriad of barriers that could be advanced, the article identifies specific barriers to non-reporting on the African Women's Protocol. It concludes with some form of optimism, arguing that the difficulties to fulfilling the reporting obligations on the African Women's Protocol notwithstanding, African governments should be held accountable and made to see the value that could be derived from reporting on human rights compliance. The African Commission's need to take up proactive steps to facilitate increased seriousness to the reporting process itself, which would then encourage and compel state parties to begin to take their reporting obligations seriously and fulfil the obligations therein, is underscored. Finally, to overcome these barriers, recommendations are proffered to critical stakeholders such as the African Commission, African governments and civil society organisations.

Key words: *African Charter; African Women's Protocol; women's rights; state reporting; African Commission*

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted on 11 July 2003 and entered into force on 25 November 2005.[1] It is a substantive supplementary document drafted under article 66 of the African Charter on Human and Peoples' Rights (African Charter).[2] The African Women's Protocol's supplementary status earns it a close connection with the African Charter to the extent that it could be described as its offspring. The Preamble to the African Women's Protocol sets out the rationale behind its existence. It was drafted primarily because of the growing concern and response to ongoing violations of women's human rights in Africa.[3] This is despite the existence of its principal instrument, the African Charter, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), commonly referred to as the International Bill of Rights of Women.[4]

Commendably, the African Women's Protocol has expanded and included robust normative standards on women's rights since

1 The African Women's Protocol adopted in Maputo, Mozambique, supplements the African Charter and deals specifically with the rights of African women.
2 Art 66 African Charter.
3 Preamble to the African Women's Protocol para 12.
4 J Bond 'CEDAW in sub-Saharan Africa: Lessons in implementation' (2014) 241 *Michigan State Law Review* 243.

it entered into force.[5] This expansion is coupled with innovatively addressing African women's unique inequalities that many activists felt were omitted in CEDAW.[6] According to Banda, the adoption and the entry into force of the African Women's Protocol are powerful indications of the normative endorsement that human rights indeed are women's rights.[7] For Banda, because of the expansion of international women's human rights architecture exemplified in the African Women's Protocol, it no longer is justifiable to continue to claim that women's rights have been disregarded globally.[8]

However, despite the optimism that the African Women's Protocol carries as an instrument to ensure the fulfilment of the rights of African women, it remains doubtful whether, in reality, there has been any actual progress or improvement in the implementation of the rights of women in Africa. One criterion in determining how effective a human rights instrument has been is the extent to which its rights have been realised.[9] Research has shown that the failure to realise the rights in the African Women's Protocol can occur in three ways:[10] first, when a state does not sign or ratify the instrument; second, when there is ratification by the state but a failure to follow-up with domestication; finally, when there is ratification and domestication, but there is a failure to implement the provisions of the African Women's Protocol.

Unfortunately, as the argument is advanced here, the realisation of the rights of African women is deterred, among other things, by the failure of state parties to fulfil their reporting obligations as captured in article 62 of the African Charter and article 26(1) of the African Women's Protocol.[11] Article 26(1) of the African Women's Protocol, a reflection of article 62 of the African Charter, obligates ratifying states to not only ensure the implementation of rights but to also ensure that they draft a report every two years indicating the steps taken to ensure that the rights of women in their domestic jurisdictions are guaranteed.[12] Thus, a state report provides a detailed account of

5 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 21.
6 As above.
7 F Banda 'Blazing a trail: The African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 84.
8 As above.
9 V Ayeni 'Introduction' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 11.
10 K Davis 'The emperor is still naked: Why the Protocol on the rights of women in Africa leaves women exposed to more discrimination' (2009) 42 *Vanderbilt Journal of Transnational Law* 975.
11 Art 62 African Charter; art 26(1) African Women's Protocol.
12 Art 26(1) African Women's Protocol.

the human rights situation in the respective countries to the African Commission on Human and Peoples' Rights (African Commission).

In the same way as its principal instrument, the African Women's Protocol has acquired weak monitoring mechanisms.[13] One of these weak monitoring mechanisms is the state reporting process. Its weakness manifests in the non-reporting and late submission of reports that currently characterise the process. There is a rich body of literature that supports this claim. For example, Quashigah reviews the efficacy of the reporting process on the African Charter.[14] The effectiveness of the African Charter's reporting process's is essential, considering its close link to the African Women's Protocol.

Consequently, as predicted, the African Women's Protocol, similar to its principal instrument, has suffered the same fate of non-reporting or late submission of reports.[15] This prediction has proven to be accurate, considering that only a handful of ratifying states have included a section on the African Women's Protocol in their reports, almost 18 years after its adoption and 16 years after its entry into force. Unfortunately, even when included, state parties have failed to report consistently, timeously and comprehensively on that section.

Given this background, the question that arises is what the possible barriers are that prevent ratifying states from reporting consistently, timeously and comprehensively on the African Women's Protocol section of the state report. By posing this question, the article aims to identify and explore possible difficulties that prevent state parties from fulfilling their reporting obligations on the African Women's Protocol.

The article consists of six parts. This introduction forms the first part. The second part provides a brief elaboration of the African Commission's mandate with respect to the state reporting obligation. In the third part the rationale behind the state reporting process, especially on the African Women's Protocol, is discussed. This discourse lays a good foundation for part 4, which outlines difficulties that have thus far prevented state parties from fulfilling their reporting obligations. These difficulties are not necessarily an exhaustive list. There might be other difficulties not discussed

13 Viljoen (n 5) 35.
14 K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.
15 Viljoen (n 5) 35.

here that a state party might experience and that serve as barriers to fulfilling the reporting obligation, particularly on the African Women's Protocol. However, there is no denying that many African states commonly experience the difficulties identified and discussed here.

Part 5 concludes with some optimism that the difficulties notwithstanding, African governments should be held accountable to fulfil their reporting obligations, particularly under the African Women's Protocol. The conclusion, therefore, draws support from scholarship that advocates the need for the African Commission to take proactive steps that will facilitate increased seriousness to the reporting process itself. These steps would encourage and compel state parties to take their reporting obligations seriously and fulfil the obligations therein.

The last part proposes some recommendations to key stakeholders such as the African Commission, African governments and civil society organisations involved in the state reporting process to mitigate the barriers.

2 The African Commission' mandate with respect to the state reporting function

The African Commission is a quasi-judicial body established in 1986 under articles 30 and 31 of the African Charter.[16] Article 30 of the African Charter states two fundamental points. First, it provides that the African Commission will be set up within what was previously referred to as the Organisation of African Unity (OAU), now known as the African Union (AU). Second, it states the African Commission's mandate to promote and protect human and peoples' rights in Africa. These mandates will be performed through but not limited to the state reporting and communications procedures.[17] The African Commission also interprets and clarifies the provisions of the African Charter and the African Women's Protocol.[18] This interpretation is usually made through the adoption of General Comments.[19]

The 11-member African Commission was established as specially stipulated by article 31(1) of the African Charter.[20] According to

16 Art 30 African Charter.
17 As above.
18 Art 45 African Charter.
19 Art 45(3) African Charter. Examples of General Comments are General Comments 1 and 2 under art 14 of the African Women's Protocol.
20 Art 31(1) African Charter.

the article, these 11 members must be Africans of high repute, be morally sound, have high integrity, and be impartial and competent in human and peoples' rights.[21] They are to be nominated by their governments but expected to serve in their personal capacity, which means that they are expected to act without any interference or influence from the governments that nominated them.[22] They serve a six-year term, which may be continuously renewed.[23]

The African Commission is specifically entrusted with the task of examining state reports.[24] As suggested by Quashigah, the state reporting process is the backbone of the mission of the African Commission.[25] This includes the authority to monitor states' human rights compliance to treaties, for example, as captured under article 62 of the African Charter and article 26(1) of the African Women's Protocol. Specifically, the Rules of Procedure regulates the African Commission's activities, particularly with respect to state reporting.[26]

3 State reporting under the African Women's Protocol

It is essential at this juncture to explore the rationale and benefits of the state reporting process. The rationale of the state reporting process is hinged on its potency as the means through which the African Commission can monitor and ensure compliance with the promotion and protection of, in this case, women's human rights. This means that if state parties do not report on the African Women's Protocol, women's human rights compliance cannot be evaluated and monitored. Thus, it has been accurately established that where self-reflection, accountability, evaluation and monitoring are absent, it will be difficult, if not impossible, to track implementation. The state reporting process as a self-evaluation and oversight exercise, therefore, is apparent.[27] It is precisely on this basis that state reporting

21 As above.
22 As above.
23 As above. See also J Sarkin 'The African Commission on Human and Peoples' Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights' (2011) 18 *South African Journal of International Affairs* 283.
24 African Commission Resolution Reiterating the Importance of Compliance with Reporting Obligations under the African Charter' ACHPR/Res.108 (XXXXI) (2007) paras 2 & 3.
25 Quashigah (n 14) 265.
26 2020 Rules of Procedure (ROP) ch II (rules 78-83), adopted at the African Commission's 27th extraordinary session held from 19 February to 4 March 2020 entered into force 2 June 2020 as provided by rule 145. See https://www.achpr.org/legalinstruments/detail?id=72 (accessed 5 March 2020). The 2020 ROP replaces the 2010 ROP.
27 ROP (n 26) 261.

has become internationally recognised as a critical characteristic of human rights monitoring and evaluation.[28] To illustrate the salience of this point, the African Commission has gone to great lengths to explain and clarify the rationale behind the state reporting process.[29] This explanation was presented to dispel the misgivings that states had expressed that the state reporting process was a means of shaming and embarrassing states.[30]

Drawing from the African Commission's reasoning, fulfilling reporting obligations should be viewed as an opportunity to accomplish several objectives. The United Nations (UN) has outlined seven purposes and objectives of the state reporting process, including for initial review purposes; monitoring purposes; policy formulation; public scrutiny; evaluation purposes; identifying problems; and information exchange purposes.[31] In addition, the African Commission listed one of the main objectives of the state reporting process as the creation of a framework that will encourage constructive dialogue between the states and the African Commission.[32] In its elaboration of this point, the African Commission is clear that this dialogue is not an end in itself but a means through which other objectives can be achieved.[33] This means that once the state reporting process opens the lines of communication between the African Commission and a state party, then that communication line can be employed to enhance the promotion and protection of rights.[34]

Using the above reasoning, therefore, it will be correct to point out that when state parties report on the African Charter and particularly on the African Women's Protocol, it provides an opportunity for constructive conversation to be held on women's rights issues between eminent human rights experts in the African Commission and representatives of state parties who in turn would benefit from recommendations offered by the experts. Considering that women's human rights issues in most African countries usually are shrouded in silence and secrecy, the state reporting process as a useful framework through which constructive dialogues can be held cannot be overemphasised. In sum, as far as the African Commission

28 C Bernard & P Wille 'The preparation and drafting of a national report' in United Nations *Manual on human rights reporting under six major international human rights instruments* (1997) 24.
29 Website of the African Commission https://www.achpr.org/statereporting proceduresandguidelines (accessed 5 March 2020).
30 As above. See also Bernard & Wille (n 28) 24.
31 Bernard & Wille (n 28) 25.
32 Website of the African Commission (n 29).
33 As above.
34 As above.

is concerned, once the lines of communication and dialogue are open, the promotion and protection of women's human rights are strengthened.

The African Commission has furthermore outlined three benefits of the state reporting process.[35] First, state reports assist in monitoring the implementation and a state's human rights compliance with a treaty, for example, to monitor the realisation of the African Charter and its Protocols. Second, state reports are valuable tools in identifying implementation gaps and areas of non-compliance. In other words, it allows for a thorough examination of the state's promotion and protection of rights by highlighting the challenges that governments face that hinder the full realisation of human rights. Third, state reports are beneficial in detecting and sharing best practices between and among states.

Further, since the African Women's Protocol is a supplementary document to the African Charter, ratifying states are already bound by similar reporting obligations as encapsulated in article 62 of the African Charter. Therefore, it is not surprising that a similarly-worded reporting obligation is captured in article 26(1) of the African Women's Protocol.[36]

A careful examination of article 26(1) exposes that ratifying states have committed not only to the implementation of the African Women's Protocol in the respective states but also to ensuring that periodic reports are submitted. Viljoen suggests that this article's inclusion was necessary primarily for emphasis and to remove any reservations that ratifying states may have with regard to their reporting obligations under the African Women's Protocol.[37]

Interestingly, as of March 2021, 42 out of the 55 African member states of the AU have made commitments to this reporting obligation, specifically by ratifying the African Women's Protocol.[38] Yet, only a handful of these 42 state parties have fulfilled their reporting obligations. So far, 17 of the 42 state parties have included and

35 As above.
36 Art 26(1) of the African Women's Protocol provides that '[s]tates parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised'.
37 Viljoen (n 5) 21.
38 African Union 'List of countries which have signed, ratified/acceded to the African Women's Protocol' 9 March 2020, https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 9 March 2020).

incorporated a section on the African Women's Protocol provisions in their state reports and by so doing have submitted an initial report of the African Women's Protocol to the African Commission.[39] Kenya and Eswatini are among the latest states to have included a section on the African Women's Protocol in their reports.[40] According to the African Commission, only 11 state parties are up to date in their state reporting.[41]

3.1 Overview of the Reporting Guidelines on the African Women's Protocol

In 2009 the African Commission, at its 46th ordinary session, issued State Reporting Guidelines on the African Women's Protocol (Guidelines).[42] The compilation and adoption of these Guidelines have been widely commended.[43] They were issued to explain how states parties that have ratified the African Charter, and mainly the African Women's Protocol, could report on the instrument, thereby fulfilling reporting obligations.[44]

The Guidelines provide that a state party that has ratified the African Charter and the African Women's Protocol only needs to submit one report every two years from the date of ratification and accession. This report must be split into two parts: part A referring to the African Charter and part B referring to the African Women's

39 These countries include Angola, Burkina Faso, Cameroon, Democratic Republic of the Congo, Eswatini, The Gambia, Kenya, Lesotho, Malawi, Mauritania, Namibia, Nigeria, Rwanda, Senegal, South Africa, Togo and Zimbabwe. Malawi is submitting a subsequent report on the African Women's Protocol after having submitted its initial report on the African Women's Protocol in 2015. For more information, see https://www.achpr.org/statereportsandconcludingobservations (accessed 9 March 2021).

40 Kenya submitted its combined report of the 12th and 13th Periodic Reports to the African Commission on 15 March 2021 for the period covering 2015-2020. Eswatini submitted its combined report of the 1st to 9th Periodic Reports to the African Commission on 10 March 2021 for the period covering 2001-2020. For more information, see https://www.achpr.org/statereportsandconcludingobservations (accessed 23 March 2021).

41 See website of the African Commission, https://www.achpr.org/statereportsandconcludingobservations (accessed 5 March 2020).

42 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa's State Reporting Guidelines (African Women's Protocol State Reporting Guidelines) adopted at the African Commission's 46th ordinary session held from 11-25 November 2009. The full text of these guidelines is available at https://www.achpr.org/statereportingproceduresandguidelines (accessed 5 March 2020).

43 S Kamga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope?' (2011) Barbara Faye Waxman Fiduccia Papers on women and girls with disabilities, Centre for Women Policy Studies 9 12.

44 J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria gender expert meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618.

Protocol.[45] With regard to the contents of the initial report, state parties must provide comprehensive information following four simple steps.[46] The first step relates to the process of compilation of the African Women's Protocol section of the report. The state party, for example, has to provide information on the extent to which civil society organisations and other organisations working on gender and women's issues were involved in the preparation of the report. The second step involves providing background Information.[47]

State parties, for example, are expected to supply a brief description of the legal framework as it relates to women's rights. The information required from the state party is the process of domestication; reservations entered (if any); a description of institutions and gender machinery relevant to the African Women's Protocol; information on budgetary allocation for implementation of the African Women's Protocol; information on legal reform; as well as gender mainstreaming efforts. Step three requires state parties to report on all the African Women's Protocol provisions either chronologically or preferably thematically as grouped under eight themes.[48] The eight themes include the following: The first theme deals with equality and non-discrimination; the second theme covers the protection of women from violence; the third theme applies to rights relating to marriage; the fourth theme indicates health and reproductive rights; and the fifth theme relates to economic, social and cultural rights. Women's rights to peace must be reported on under the sixth theme. The seventh theme discusses the protection of women from armed conflict. The last theme explains the rights of specially-protected groups of women.

The final step requires that when reporting either thematically or chronologically on the provisions of the African Women's Protocol, state parties provide comprehensive, accurate and verifiable information on the legislative and other steps of implementation that have been taken to ensure the realisation of rights within their domestic jurisdictions. [49]

45 As above.
46 African Women's Protocol State Reporting Guidelines (n 42) 2.
47 As above.
48 African Women's Protocol State Reporting Guidelines (n 42) 3.
49 African Women's Protocol State Reporting Guidelines (n 42) 2 5. The contents to be included in subsequent or periodic reports are also addressed in the African Women's Protocol Reporting Guidelines. The subsequent and periodic report must (i) respond to the Concluding Recommendations and Observations from the examination of the initial report issued by the African Commission; the state must outline the steps taken to implement the observations; (ii) the state must outline steps taken to publicise and disseminate the Concluding Observations; (iii) the state must detail improvements and progress made on each right in the African Women's Protocol since the country last reported (initial report)

4 Barriers to fulfilling reporting obligations under the African Women's Protocol

The African Commission has expressed grave concerns about the lackadaisical attitude that state parties have shown towards their reporting obligations.[50] It raises the question of what could be responsible for the *lacunae* between the number of ratifying states and the number of states reporting on the African Women's Protocol. However, the non-reporting or late submission of reports is not limited to the African context.[51] For Quashigah, aside from the European Social Charter, none of the other reporting systems is without flaws in their reporting records.[52] Yet, it has to be stated that the reporting obligation cannot be achieved unless state parties fulfil this obligation consistently, timeously and comprehensively.

Therefore, the following part explores some difficulties that so far have prevented state parties from fulfilling their reporting obligations under the African Women's Protocol.

4.1 Limited or lack of clarity on how to write the report on the African Women's Protocol

One difficulty that state parties have often encountered with regard to fulfilling their reporting obligations is the lack of clarity on how to write the reports.

The effectiveness and impact of state reporting as a human rights-monitoring process is hinged on how clear and precise the reporting obligation is.[53] This argument has been proven to be accurate, especially when considering the ambiguity that often characterises the language and wording of treaties.[54] While the African Women's Protocol provisions are generally broadly drafted and worded, there are a few exceptions where the instrument is specific in the obligations required. For instance, it is a clear requirement that state

either thematically or chronologically; (iv) the state must detail challenges and future plans on each right in the African Women's Protocol since the country last reported (initial report) either thematically or chronologically.

50 Quashigah (n 14) 261.

51 As above.

52 As above.

53 Biegon (n 44) 618. The barriers discussed in this part are informed by a survey exercise conducted by the Women's Rights Unit (formerly called the Gender Unit) in 2015. Survey participants were primarily state representatives from ratifying states involved in the state reporting process in their different countries.

54 Biegon (n 44) 618.

parties must forbid female genital mutilation (FGM) in their domestic jurisdictions through law and sanctions.[55]

Nevertheless, there are ambiguities present in the African Women's Protocol, for example, in the requirement that state parties take measures to ensure the realisation of rights without clearly spelling out what these measures should be or how they should be achieved. Scholarship supports this claim, underscoring how several provisions in the African Women's Protocol are broadly drafted and worded.[56] A case in point is to be found in article 6(d) that requires state parties to record and register every marriage according to national laws to be legally recognised.[57] This article appears to stipulate an obligation without outlining how this obligation should be achieved. It seems to leave the fulfilment of this obligation to the discretion of the state. This fluctuation between specificity and ambiguity has led Rebouche to describe the African Women's Protocol as an inconsistent instrument.[58]

Unfortunately, the African Women's Protocol's ambiguity also extends to the reporting obligation as captured in article 26(1). This reporting obligation's attention is focused on the time line within which state parties are expected to submit reports, namely, bi-annually. [59] This timeline is given without providing clarity and precision on other vital questions that scholarship raises, such as how reports on the African Women's Protocol should be drafted.[60] Critical insights by Viljoen echo how the article does not answer relevant questions.[61] The difficulty that such ambiguities in the African Women's Protocol's reporting obligation create, therefore, becomes evident.

To mitigate this difficulty and aid state parties in fulfilling their reporting obligations, the African Commission was left with the responsibility of issuing Guidelines for state reporting.[62] Reporting Guidelines assist state parties to understand and fully grasp the expectations of what is required in a state report. With such a grasp, state parties would be well equipped to include pertinent and adequate

55 Art 5(b) African Women's Protocol.
56 Davis (n 10) 952.
57 Art 6 African Women's Protocol.
58 R Rebouche 'Health and reproductive rights in the Protocol to the African Charter: Competing influences and unsettling questions' (2010) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 110.
59 Art 26(1) African Women's Protocol.
60 Biegon (n 44) 618.
61 F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 111.
62 Biegon (n 44) 618.

information in their reports.[63] If this is true, it means that the opposite is also accurate, which is that, without a proper understanding of the Reporting Guidelines, state parties would not be adequately equipped to fulfil their reporting obligations. Consequently, the impact of Reporting Guidelines and the entire reporting process is hinged on three main points, as raised by Biegon:[64] first, how effectively the Reporting Guidelines are distributed; second, how harmonised the Reporting Guidelines are; and, finally, the improvement and reform of the African Commission's reporting process.

However, despite the adoption of the Guidelines, their effectiveness can be questioned. This question stems from the poor track record of the African Commission when it comes to drafting reporting guidelines if the one on the African Charter is anything to go by. The Guidelines on state reporting on the African Charter, for instance, has been generally criticised for being too lengthy, ambiguous and unhelpful.[65] It could explain why governments found it difficult and lacked clarity on reporting on the African Charter.[66] This lack of clarity had been inherited by the African Women's Protocol, particularly in the first few years of its entry into force. The salience of the above point cannot be overemphasised considering that the Reporting Guidelines have not necessarily always fulfilled the purpose they set out to achieve. Compared to the Guidelines on the African Charter, the Guidelines are detailed and precise.[67] The optimism shown that these Guidelines, if followed, would aid the implementation of rights, therefore, is valid.[68]

Nevertheless, precedence has demonstrated that state parties have been unaware of or displayed indifference to guidelines generally.[69] Although some states commendably have included a section on the African Women's Protocol, many do not necessarily follow the Guidelines or provide comprehensive information on this section as required.[70] This precedence depicts the difficulty that the lack or limited awareness on the state reporting guidelines on the instruments presents, proving that non-reporting and the late submission of reports are not the only problems that undermine the state reporting process.[71] As Viljoen argues (although with

63 As above.
64 Biegon (n 44) 616.
65 Quashigah (n 14) 261.
66 Viljoen (n 61) 111.
67 Kamga (n 43) 9.
68 Kamga 9 12.
69 Viljoen (n 61) 111.
70 Website of the African Commission https://www.achpr.org/statereporting proceduresandguidelines (accessed 5 March 2020).
71 Viljoen (n 61) 111.

reference to the African Charter but equally valid for the African Women's Protocol), even when state parties do fulfil their reporting obligations, the reporting process itself is questionable.[72] This is because, even when state parties do report, the pattern has been that, generally, states tend not to follow and disregard the Reporting Guidelines.[73] Aside from this, some state parties simply provide scant and piecemeal information.[74] Thus, it is hardly surprising that even when state parties do report, the reports often are not thorough and end up, as Viljoen suggests, lacking self-reflection and adequate analysis.[75]

4.2 Limited or lack of understanding of and conflicts arising from the radical provisions of the African Women's Protocol

Paradoxically, one difficulty that state parties might grapple with regarding fulfilling their reporting obligations under the African Women's Protocol is linked to its radical provisions.

The African Women's Protocol has generally been described as a comprehensive and landmark instrument that deals with African women's specific and unique interests.[76] It is the first time, for instance, that women's rights to be protected from the human immunodeficiency virus (HIV) has been explicitly recognised in an international treaty.[77] It is also the first time that women's rights to abortion have been explicitly recognised in certain circumstances.[78] Other radical provisions contained in the Women's Protocol include article 4(2)(a), which requires state parties to take effective steps to enact laws that innovatively and explicitly prohibit violence against women, including coerced sex, that occurs in the public and private life.[79] Article 5(b) innovatively and explicitly forbids harmful practices such as FGM.[80] Article 6(c) views monogamy as the preferred form of marriage while still protecting women's rights in marriage, including polygamous contexts.[81]

72 As above.
73 As above.
74 As above.
75 As above.
76 K Ebeku 'A new dawn for African women? Prospects of Africa's protocol on women's rights' (2004) 16 *Sri Lanka Journal of International Law* 85.
77 Art 14(d) African Women's Protocol.
78 Art 14(2)(c) African Women's Protocol.
79 Art 4(2)(a) African Women's Protocol.
80 Art 5 African Women's Protocol.
81 Art 6(c) African Women's Protocol.

While some scholars have praised the African Women's Protocol based on these radical provisions,[82] others have drawn attention to the way in which these radical provisions might hinder and frustrate the implementation of the African Women's Protocol provisions.[83] This can include the fulfilment of the reporting obligations as captured in article 26(1). This is particularly true where conflicts might arise between customary and religious norms, for instance, Shari'a law in some African states, on the one hand, and specific articles of the African Women's Protocol that emphasise the protection of women's rights, on the other.[84] The challenge with realising women's rights in Africa has not necessarily been only the scarcity of laws that the African Women's Protocol ostensibly fills. However, the challenge mainly lies in the conflicts and tensions that most times exist between harmful practices that are excused in the name of religion and tradition, on the one hand, and the rights of women, on the other.[85] It is this situation that Ebeku has referred to as 'cultural pull'.[86] In other words, what has happened is that the governments of many state parties are not entirely convinced that modern ideas of women's rights, as encapsulated in the African Women's Protocol, should supersede their traditions and local beliefs. The consequence is what Davis points to when describing the institutional resistance that a state party might encounter despite its best intentions exemplified by its ratifying the instrument.[87]

Consequently, even though states sign and ratify the African Women's Protocol, its implementation, including fulfilling reporting obligations, particularly on steps taken to realise controversial rights, might prove difficult.[88] Ebeku has rightly cited and documented how government officers in Zambia, barely a year after adopting the African Women's Protocol, stated how discrimination against women originated from 'God' and would be very difficult to abolish.[89] Yet another government delegate had also reportedly commented that practices such as polygamy, FGM and bride price are so deeply ingrained in the African fabric that it would be difficult, if not impossible, to forbid these practices.[90]

However, it is possible to question the integrity of this reasoning, especially considering a country such as Nigeria with substantial

82 Banda (n 7) 84.
83 Davis (n 10) 977.
84 Ebeku (n 76) 130.
85 Davis (n 10) 975.
86 Ebeku (n 76) 130.
87 Ebeku 133.
88 Davis (n 10) 975.
89 Ebeku (n 76) 133.
90 As above.

proof of conflictual issues between religion and tradition and women's human rights.[91] Yet, Nigeria is one of the few countries that is almost current with its reports and has reported on section B on the African Women's Protocol.[92] While there undeniably are merits to this argument, the rebuttal would be that part of state reporting expectations is the frankness in detailing the human rights situation and compliance. Perhaps this country's frankness, especially in the compilation and record of the steps it has taken to implement the provisions of the African Women's Protocol and realise the rights of its women, can be questioned.

4.3 Limited and/or lack of political will

Another barrier to fulfilling states' reporting obligations under the African Women's Protocol relates to limited political will.[93] In this context, limited or a lack of political will refers to the lack of resolve, disinterest or ambivalence that African governments usually portray when it comes to guaranteeing human rights for women. Yet, the submission of reports to treaty-monitoring bodies such as the African Commission has been identified as a legal obligation resting on state parties.[94] This is validated by the fact that inherent in the legal commitment is a requirement to take positive action. As such, the political will to prepare a candid and comprehensive report is necessary, mainly if the fulfilment of this reporting obligation is to be achieved.

Nevertheless, sufficient evidence shows how African governments are generally reluctant to prioritise the implementation of women's rights in their respective countries.[95] Unfortunately, this reluctance is extended and reflected in state parties' failure to fulfil the reporting obligations as outlined in the African Women's Protocol. This is exemplified generally by the state reporting process not being taken seriously, the lackadaisical attitudes that government delegates officials often display, and their lateness or absence even when their state reports are to be examined.[96] The reluctance to fulfil reporting

91 N Odiaka 'The concept of gender justice and women's rights in Nigeria: Addressing the missing link' (2013) 2 *Journal of Sustainable Development Law and Policy* 190.
92 As at the time of writing, Nigeria reportedly has two overdue reports. See website of the African Commission https://www.achpr.org/states/statereport?id=115 (accessed 5 March 2020).
93 Centre for Human Rights *A guide to the African human rights system celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016* (2016) 40.
94 Bernard & Wille (n 28) 25.
95 Davis (n 10) 975.
96 Viljoen (n 61) 111.

obligations connects to several reservations that states hold with regard to submitting a state report. An example could be the commonly-held misgiving that the reporting obligation is an indirect way of impinging on state parties' sovereignty.[97]

The reluctance also connects to the fact that governments generally do not understand why there is a special preference for women's rights. For instance, there is scepticism on why state parties should bother reporting on the human rights situation of women as prescribed in the African Women's Protocol when this is already done under article 18(3) of the African Charter.[98] This limited or lack of political will may be the consequence of the idea that the employment of a protocol for the implementation of women's rights rather than a stand-alone treaty has its difficulties. The insight Davis provides in this regard is valuable. Davis describes how protocols such as the African Women's Protocol tend to be perceived as more of an academic exercise than an answer or revisions to international law.[99] Outlining rights as is done in the African Women's Protocol may indicate that the rights of women in Africa are an afterthought, evidenced by the lack of initial backing and the near silence of the rights of women in the African Charter.[100] This point is exemplified in the indifference shown towards African women's rights when the African Charter was conceived.[101]

Nevertheless, the specialised focus on women's rights exemplified in women-specific treaties such as the African Women's Protocol comes with its troubles, one of which being the creation of a predicament where women's interests become 'ghettoised'.[102] This refers to a situation that eventually leads to assigning less power, reduced resources, and lower priority to the African Women's Protocol than the mainstream human rights.[103] With this reasoning, one can already foresee a difficulty that state parties may encounter with regard to fulfilling their reporting obligations.

97 Bernard & Wille (n 28) 25.
98 Davis (n 10) 975.
99 Davis 952.
100 Davis 976.
101 Ebeku (n 76) 84.
102 UA O'Hare 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364.
103 H Charlesworth 'What are women's international human rights' in RJ Cook (ed) *Human rights of women: National and international perspectives* 59.

4.4 Limited allocation of financial and administrative resources

Limited financial and administrative resources allocated to the reporting obligation also pose significant difficulties for state parties. This difficulty is likely to prevent state parties from reporting on the African Women's Protocol.

Evidence suggests that if the reporting process is to be taken seriously, it will require sufficient time and resources to be allocated to the state reporting activity.[104] Similarly, how a state party's national budget is outlined is a direct reflection and a mirror of the state's priorities.[105] The desirable reporting record of the European Social Charter, for instance, has been traced to several reasons raised by Quashigah.[106] One key reason is that state parties to the European Social Charter are generally believed to be better equipped administratively and financially to prepare and compile state reports.[107] Consequently, limited budgetary allocations to women's rights by most African state parties make the implementation of rights as outlined in the African Women's Protocol difficult.

However, an additional difficulty is the compilation of state reports with limited budgetary allocations, particularly every two years, as required under article 62 of the African Charter and article 26(1) of the African Women's Protocol.[108] This reporting obligation and time line of two years that state parties hold with respect to the African Charter and the African Women's Protocol are accompanied by serious cost, financial and administrative implications. Without sufficient financial and administrative resource allocation, it would be challenging to report, but there would also be nothing to report on. Research validates the above point by demonstrating how a state party may fail to implement its obligations, including the reporting obligation, because it is yet to meet some of the lofty objectives required by the instrument.[109] This situation is perhaps what the African Women's Protocol's drafters had in mind by requiring that state parties allocate sufficient budgetary allocations to the realisation of rights.[110] Yet, it is clear that because the ratification of treaties such as the African Women's Protocol is an expression of commitment,

104 Bernard & Wille (n 28) 26.
105 Davis (n 10) 976.
106 Quashigah (n 14) 275.
107 As above.
108 This point is informed by the unpublished results of the survey exercise conducted by the Women's Rights Unit (formerly called the Gender Unit) in 2015.
109 Davis (n 10) 976.
110 Arts 10(c) & 26(2) African Women's Protocol.

constrained budgetary and financial resources cannot be used as a justification for non-reporting.[111]

Nevertheless, it has been pointed out how the African Women's Protocol requires state parties to take specific measures that could be misconstrued as luxuries rather than necessities.[112] For instance, the African Women's Protocol requires state parties to ensure that women enjoy certain rights.[113] As commendable as these rights are, some African governments might wrongly see them as aspirational and progressive goals. Such a perception is evident, considering that the African Charter contains no specific provision relating to how states parties are expected to use their budgetary allocations and resources to guarantee rights. However, under the African Women's Protocol, state parties are obliged to take all necessary steps, including ensuring budgetary allocations to ensure the full implementation of rights. Unfortunately, many state parties for various reasons, including war and internal conflicts, can hardly afford to guarantee these rights for any member of society, whether it involves men, women or even children.[114]

Therefore, the foregoing could result in the struggle between competing needs and priorities for scarce financial resources that many state parties very often encounter. How state parties, for example, balance and reconcile meeting what rights may be considered a priority and what rights are subject to progressive realisation is questioned. This kind of conflict is easily reflected in the priority usually accorded to civil and political rights instead of economic, social and cultural rights. This could perhaps explain why it is common to see that for many state parties in Africa, male-centric rights tend to supersede the more female-centric economic, social and cultural rights.[115] This is exemplified in African societies where the right to vote, for instance, tends to supersede the right to food security as captured in the African Women's Protocol that could be viewed as unnecessarily burdensome.[116]

It is because of this tendency that the drafters of the African Women's Protocol included the obligation on state parties to ensure that budgetary allocations for the realisation of the rights for women and social development supersede military expenditures.[117] However,

111 Bernard & Wille (n 28) 25.
112 Davis (n 10) 975.
113 Arts 15 & 18 African Women's Protocol.
114 Davis (n 10) 975.
115 O'Hare (n 102) 367.
116 Davis (n 10) 975.
117 Art 10(3) African Women's Protocol.

whether international treaties can dictate how resources and, specifically, military resources, can be spent and how this obligation will translate in reality is subject to debate.

4.5 Limited technical expertise

Another possible barrier that state parties face concerning fulfilling their reporting obligations under the African Women's Protocol may be connected to a limited or lack of technical expertise.

Studies have described how many human rights departments in African countries are poorly staffed and under-resourced.[118] This difficulty may be linked to several factors and can often be attached to the limited incentives tied to working in a typical public service in African countries. Limited technical expertise could indicate the scarcity of and few or no qualified staff tasked with writing the reports, aggravated by an increased risk of staff turnover.[119] In addition, by this limited technical expertise, reference is made to the demand and burden placed on the scarce qualified staff and an already overstretched civil and public department to prepare and submit state reports every two years.

To mitigate this difficulty, the Centre for Human Rights at the University of Pretoria since 2013 has been involved in a state reporting project.[120] This project aims to strengthen the capacity of state parties to fulfil their reporting obligations under both the African Charter and the African Women's Protocol. Another aspect of the project is the technical assistant/consultancy project which began in 2017.[121] Although still in its embryonic stages, this project focuses on providing state parties with the necessary technical skills, expertise and assistance needed for drafting their state reports on the African Charter and, importantly, the African Women's Protocol.[122]

118 This argument is not a new one. This is considering that African states are usually among the weakest, unstable and underdeveloped countries in the world. However, what is relatively novel is how the poorly-resourced public and civil service in these countries affect the fulfilment of reporting obligations.

119 This point was informed by the survey responses where participants expressed how the number of public servants tasked with the duty of drafting reports for the state usually is small.

120 The Centre for Human Rights (CHR) started the state reporting project in 2013, aimed at strengthening the capacity of state parties to fulfil their reporting obligations to the African Charter and particularly on the African Women's Protocol. It has so far trained 32 out of the 42 state parties that have ratified the African Women's Protocol. For more information on the state reporting project, see www.African Women'sprotocol.up.ac.za (accessed 5 March 2020).

121 For further details on the project, see CHR 'Virtual platform on state reporting on the African Women's Protocol, www.African Women'sprotocol.up.ac.za (accessed 5 March 2020).

122 As above.

4.6 Reporting fatigue

Another possible barrier that state parties face in fulfilling their reporting obligations on the African Women's Protocol is reporting fatigue. This alludes to the burden that comes with the numerous reporting obligations, not only under the African human rights system but also under the UN human rights system.[123]

Some African states, for example, have to report to different monitoring mechanisms, including peer reviews such as the African Peer Review Mechanisms and the Universal Periodic Review. Therefore, reporting obligations can become burdensome to an overstretched government civil service, particularly given the short reporting time lines as contained in the African Charter and the African Women's Protocol.

Even where states do fulfil their reporting obligations, the state report to the African Commission sometimes is perceived as an administrative burden and less of an opportunity for critical engagement.[124]

4.7 Weak reporting mechanism of the African Commission

An added difficulty that state parties might encounter with regard to fulfilling their reporting obligations on the African Women's Protocol can easily be traced to the weak reporting mechanism of the African Commission.[125] For instance, as a monitoring body, the state reporting process is one of the mechanisms that the African Commission has employed to measure states' compliance with human rights treaties.

In the first place, as underscored earlier, the African Commission was entrusted by the Assembly of Heads of State and Government of the African Union with the task of examining state reports as captured under article 62 of the African Charter and article 26(1) of the African Women's Protocol. This could mean that the African Commission has been entrusted with the arduous task of monitoring the same governments' human rights compliance that gives it the authority and permission to do its state reporting function.[126] Given this state of affairs, one is immediately tempted to question whether

123 Bernard & Wille (n 28).
124 Bernard & Wille 31.
125 Quashigah (n 14) 261.
126 African Commission Resolution (n 24) paras 2 & 3.

the African Commission can thoroughly and effectively perform its state reporting function.

Although one argument might be that this is how treaty bodies are established, the problem arises where the Heads of State and Government could negatively influence the African Commission's state reporting function. Although not in respect of its state reporting function, a case in point is the withdrawal of the observer status of the Coalition of African Lesbians (CALS) at the behest of the Executive Council that consists of Heads of State and Government.[127] Another example is Rwanda's withdrawal of its article 34(6) declaration. This declaration had allowed individuals and non-governmental organisations (NGOs) direct access to the African Court on Human and Peoples' Rights (African Court). Many scholars view this unfortunate withdrawal as a dent in the African Court's authority.[128] These kinds of issues validate discussions that have been held on the difficulties that hinder the effective and efficient functioning of the African Commission in its role of examining state reports.[129]

The African Commission's function of examining state reports is sometimes undermined by a few of its methods and Rules of Procedure.[130] For example, although the 2010 Rules of Procedure were revised in 2020, the Rules relating to state reporting have not changed significantly.[131] Besides, the African Commission's method of dealing with the non-submission of reports by defaulting state parties as outlined in the African Commission's 2020 Rules of Procedure might not be appropriately suited to African governments.[132] Rules 81(1) and (2) of the 2020 Rules mention sending a reminder to defaulting states at the start of the year or the beginning of each ordinary session.[133] Although this effort is commendable, the effectiveness of sending what could be considered mere reminders may be questioned. This doubt is valid, considering that very few defaulting African governments respond to or act on such reminders.

127 The full text of the withdrawal decision can be found in the 39th Activity Report of the African Commission paras 49-51.
128 M Killander & MG Nyarko 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 742.
129 Quashigah (n 14) 261.
130 2020 ROP (Rules 78-83); 1988 ROP (Rules 81-86).
131 See 2010 ROP (Rules 73-78) *vis-à-vis* the 2020 ROP (78-83). One difference that can be identified is that the 2020 Rules 81(3) gives an indication of the information that would be included in the reminder letter, namely, the date of the next report or when information is to be received. Rule 83(3) of 2020 is also worded differently from Rule 78(3) of 2010.
132 2020 Rules 81(1-3) ROP.
133 Rule 81(1-2).

The above assertion is the exact point the African Commission made in its 2015-2019 strategic plan identifying slow responses by states to its requests as a threat to its work.[134] This is also true given that certain misgivings persist about the state reporting process. Reiterating one common reservation is the fear that reporting will encourage unnecessary criticism and the shaming of states.[135] Such misgivings fuel the indifference that African governments have generally shown to the compliance with their reporting obligations and the protection of human rights on the continent.[136] Such indifference to the compliance with reporting obligations could be potentially attacked with sustained criticism at the local level.[137] There are also more proactive methods of dealing with the non-submission of reports by defaulting states that might be more effective. For instance, as Viljoen suggests, there could be an implementation review even in the absence of reports.[138]

Also, the African Commission's 1988 Rules of Procedure had not dealt adequately with Concluding Observations.[139] For example, there was very little information about what is to be done by the state arising from the state report's scrutiny in the form of Concluding Observations and recommendations.[140] However, this error appears to have been corrected with the revised adopted 2020 Rule of Procedure.[141] Rules 82 and 83 provide detailed information on Concluding Observations and follow-up of state reports.[142] Yet, as Viljoen correctly points out, the African Commission itself is complicit in undermining the effectiveness of the state reporting process by, for instance, failing to adopt and publicise Concluding Observations and recommendations consistently and timeously.[143]

If this is the case, a similar question arises as to whether the African Commission would be able to cope realistically if all state parties to the African Charter and the African Women's Protocol reported consistently and timeously every two years. The feasibility of the time line of the two-year reporting cycle in the African human rights system evident in article 62 of the African Charter and article 26(1) of the African Women's Protocol is questionable. This question arises

134 Killander & Nyarko (n 128) 740.
135 Website of the African Commission https://www.achpr.org/statereporting proceduresandguidelines (accessed 5 March 2020).
136 Website of the African Commission (n 135) 265.
137 Viljoen (n 61) 117.
138 As above.
139 1988 ROP (Rules 81-86).
140 1988 ROP (Rules 85 and 86); Viljoen (n 61) 111 118; Quashigah (n 14) 264.
141 2020 ROP (Rule 82 on Concluding Observations and 83 on follow-up of implementation of Concluding Observations of state reports).
142 2020 ROP Rules 82-83.
143 Viljoen (n 5) 21.

especially when this time line is compared with the UN human rights system with a longer time line of a four-year reporting cycle. While there might be merits to this two-year reporting cycle, it is doubtful whether, with the addition of the African Women's Protocol as well as the recent adoption of other protocols, the African Commission would be able to cope with the burden of the additional reporting that comes with the expansion of the scope of rights to be reported upon, particularly within the short time lines, to an already overstretched monitoring body.

As such, it would be correct to assert that apart from the reporting fatigue that state parties encounter, the African Commission itself is overburdened and overstretched by its state reporting function given the short time lines. To illustrate the salience of this point, it would be helpful to look at what is steadily becoming an African Commission pattern with respect to responses. For instance, although Gabon is yet to submit its initial report on the African Women's Protocol, it had submitted a combined report on the African Charter from 1986-2012 in 2013, and the African Commission issued its Concluding Recommendations in 2014. One of the areas of concern identified in the Concluding Recommendations was the non-ratification of the African Women's Protocol. Yet, Gabon had reportedly ratified and deposited on the African Women's Protocol in 2011.[144] The area of concern at this point in 2014 should instead have focused on encouraging Gabon to submit its initial report to the African Women's Protocol. As a result, the quality of engagement the African Commission has with reporting states could be questioned.

Murray's point in querying the impact of the African Commission's work on the ground therefore is apt.[145] This is because, apart from the short time lines, the lack of resources, whether human or financial or both, presents a difficulty. Resources are essential to the effective performance of the state reporting function. Yet, there is a failure to adequately fund and allocate sufficient resources and a budget to perform the state reporting function. This situation confirms Sarkin's reference to the African Commission as a 'lame duck'.[146] This situation is aggravated by the potential and real doubts that shroud the African Commission's members' independence from their respective governments, particularly concerning the examination of state reports.

144 Website of the African Commission https://www.achpr.org/states/statereport?id=88 (accessed 6 March 2020).
145 R Murray 'International human rights: Neglect of perspectives from African institutions' (2006) 55 *International and Comparative Law Quarterly* 194.
146 Sarkin (n 23) 288.

5 Conclusion

It has been established that one of these weak monitoring mechanisms is the state reporting process. Its weakness manifests in the non-reporting and late submission of reports that currently characterise treaties. The African Women's Protocol has suffered the same fate of non-reporting or late submission of reports of preceding treaties. This argument is particularly valid when considering that almost 18 years after its adoption and 16 years after its entry into force, only a handful of state parties have fulfilled their reporting obligations. Generally, state parties have failed to report consistently, timeously and comprehensively on the African Women's Protocol. Therefore, the article explored the difficulties that prevent state parties, despite their ratification of the instrument, from fulfilling their reporting obligations.

The question arises as to what the way forward is to mitigate these difficulties. The mere fact that a state party has ratified the African Women's Protocol is an immediate expression of its commitment to protecting and promoting women's human rights in that state. Based on this, governments should be held accountable for their reporting obligations and made to see the value that is and could be derived from reporting on their women's human rights compliance. African governments must be willing and prepared to use and maximise the information and opportunities available and exist to assist with the reporting obligation on the African Charter and specifically the African Women's Protocol, particularly on the art of writing and compiling the state report.[147] The African Commission's need to take proactive steps that will facilitate increased resolve to the reporting process itself, which would then encourage and compel state parties to begin to take their reporting obligations seriously and fulfil the obligations therein, cannot be overemphasised.

6 Recommendations

Having outlined the barriers to reporting on the African Women's Protocol, it is essential to propose recommendations to key and specific stakeholders involved in the reporting process such as the AU, the African Commission, African governments and civil society

147 The CHR is currently developing a virtual platform on state reporting on the African Women's Protocol, www.African Women'sprotocol.up.ac.za (accessed 6 March 2020). It is anticipated that in the near future the virtual platform grows and expands to be a one-stop shop on the state reporting process on the African human rights system.

organisations in a bid to improve state party reporting and mitigate the outlined barriers.

First, the barriers outlined above have exposed the African Commission's need to establish a more effective and robust monitoring and evaluation mechanism to encourage state parties to understand the value of reporting. An example could be establishing a solid check and warning system to periodically oversee the state party reporting progress and ensure that the African Commission itself is adequately strengthened to fulfil its reporting function. Moreover, there is a need for the AU and the African Commission to consider seriously reviewing the two-year reporting time lines. A possible suggestion could be to consider extending this to a four-year reporting time line consistent with the UN treaty body systems. Such consideration and review of the two-year reporting period might assist in mitigating some of the outlined barriers. This includes reporting fatigue as well as improving the quality of engagement by the African Commission.

However, admittedly, a fixed reporting time line for state parties has become increasingly less feasible. Consequently, following the Human Rights Committee example, it might be helpful for the African Commission to adopt the Simplified Reporting Procedure.[148] This Simplified Reporting Procedure is a reporting procedure based on replies to lists of issues coupled with adopting the predictable review cycle.[149] This cycle could improve predictability in reporting and ensure that states that currently are not reporting or are late in reporting can begin to report regularly and consistently.

Additionally, another suggestion following the Human Rights Committee's example that might be beneficial for the African Commission is to create a new position of Special Rapporteur on Follow-Up to Concluding Observations and Recommendations.[150] This Special Rapporteur could be tasked with following up with states on the African Commission's recommendations. As indicated above,

148 Website of the United Nations (UN), https://www.ohchr.org/EN/HRBodies/CCPR/Pages/SimplifiedReportingProcedure.aspx (accessed 10 March 2020); International Covenant on Civil and Political Rights Focused Reports Based on Replies to Lists of Issues Prior to Reporting (LOIPR); Implementation of the new optional reporting procedure (LOIPR procedure Human Rights Committee 99th session (2010) CCPR/C/99/4; see generally General Assembly Resolution 68/268 'Strengthening and enhancing the effective functioning of the human rights treaty body system' A/RES/68/268 (2014).

149 Website of the UN https://www.ohchr.org/EN/HRBodies/CCPR/Pages/PredictableReviewCycle.aspx (accessed 5 March 2020).

150 Civil and Political Rights: The Human Rights Committee (Fact Sheet 15) 20, https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed 5 March 2020).

although Rule 83 of the African Commission's 2020 Rules of Procedure provides information on the follow-up of the implementation of Concluding Observations of state reports, it entrusts this follow-up task vaguely to members of the African Commission.[151]

Second, African governments need to take seriously their reporting obligations on the African Charter and specifically the African Women's Protocol. One way to show resolve is to allocate adequate budgetary, financial, administrative and human resources required to fulfil reporting obligations to the African Commission. A good practice that governments could adopt is establishing national task teams in respective countries that comprise a representation of the relevant stakeholders from government ministries, national human rights commissions and civil society organisations to be involved in the state reporting and drafting process.

Finally, civil society in African countries needs to work actively in creating awareness on the obligation and the value of reporting on the African Charter and the African Women's Protocol specifically. Civil society could also be instrumental in strengthening the capacity of relevant stakeholders with respect to reporting. Civil society needs to engage and initiate impactful projects that would encourage African states to fulfil their reporting obligations. A good example is the state reporting project discussed above.[152] With this state reporting project, 32 out of 42 states that have ratified the African Charter and the African Women's Protocol have been trained by the Centre for Human Rights.[153] Reiterating, the Centre for Human Rights has also been involved in the technical consultants' project.[154] Upon the state government's request, the project involves appointing technical consultants to provide technical expertise to the state reporting and drafting process in African states.

In addition, civil society organisations could help mitigate some of the barriers outlined through increased involvement in the state reporting process at the African Commission level by acquiring observer status. At that level, civil society can put the necessary pressure on governments to fulfil reporting obligations. By being involved in the state reporting process at the national level, civil

151 Rule 83(2) 2020 ROP.
152 See CHR virtual platform (n 121).
153 As above.
154 The technical consultant/assistant pilot project began in 2017. Lesotho and Zambia were the first states involved in the project. Under this project, Lesotho submitted its report on the African Charter (Part A) and initial report on the African Women's Protocol to the African Commission in 2018 which was examined in 2019. See www.AfricanWomen'sprotocol.up.ac.za for further details on the project.

society can be pivotal through the compilation of shadow and alternative reports.

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A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology

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Summary: *The incorporation of socio-economic rights in the African Charter on Human and Peoples' Rights should be considered a vital move towards the transformation of socio-economic conditions of the people on the continent. However, the envisaged socio-economic transformation depends largely on how these rights are interpreted. It is the task of the supervisory organs of the African Charter to develop the scope and content of these rights and their related obligations through interpretation. To achieve this interpretative objective, interpretive process of the supervisory organs should be guided by an appropriate approach to interpretation that is applied coherently. This article argues that the teleological approach to treaty interpretation is an appropriate approach to interpreting socio-economic rights in the African Charter. The article develops a methodology for application of the teleological approach through which socio-economic rights in the African Charter may be effectively interpreted.*

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Key words: *socio-economic rights; African Charter; effective interpretation; teleological approach to interpretation*

1 Introduction

Realising socio-economic rights[1] is significant for improving the living conditions of Africa's people, as these rights help to ensure individuals' access to socio-economic services[2] and a dignified life.[3] Despite their significance, millions of Africans are still denied access to socio-economic rights,[4] and socio-economic rights violations are a daily concern.[5] Since independence there have been frequent and serious incidences of socio-economic rights violations all over the continent.[6] Africa's colonial and post-colonial legacy continues to manifest widespread incidences of mass impoverishment, disease, unemployment and under-development, as well as other socio-economic rights violations.[7] The continent also faces many challenges to the enjoyment of socio-economic rights, such as insufficient access to clean water, food insecurity, inadequate shelter, poor health care[8] and inadequate housing.[9] Other challenges affecting the enjoyment of socio-economic rights in Africa include poverty, insufficient resource allocation to key sectors, notably social protection, health, housing, agriculture and education, which are of significant importance for the enjoyment of socio-economic rights.[10]

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1 For purposes of this article, socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. These include the rights to property, work, health, education, family, social security, adequate standard of living including water, food and housing, as well as the rights to freely dispose of wealth, development and a general satisfactory environment.

2 MA Baderin 'The African Commission on Human and Peoples' Rights and the implementation of economic, social and cultural rights in Africa' in MA Baderin & R Mccorquodale (eds) *Economic, social and cultural rights in action* (2007) 139.

3 M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 Years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358 359.

4 Baderin (n 2) 144.

5 JC Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *African Journal of Legal Studies* 1 2.

6 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 86.

7 CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 180-181.

8 SB Keetharuth 'Major African legal instruments' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) 180.

9 Udombana (n 6) 50.

10 M Ssenyonjo 'Development of economic, social and cultural rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights' (2015) 4 *International Human Rights Review* 150.

There are also low levels of awareness of the general public, members of the legal profession and the judiciary of socio-economic rights and the justiciability of those rights.[11] In its 2004 Resolution on Economic, Social and Cultural Rights in Africa (Resolution on SERs)[12] the African Commission on Human and Peoples' Rights (African Commission) noted that apart from the consensus on the notion of the indivisibility of human rights among African states, socio-economic rights remain marginalised.[13] According to the African Commission, states' failure to adequately realise socio-economic rights sustains their continued violation.[14]

The meaningful effect of the socio-economic rights in the African Charter on Human and Peoples' Rights (African Charter)[15] depends on their interpretation by the interpretive organs of the African Charter.[16] In short, this interpretation should address the socio-economic needs of the African people.[17] The African Commission on Human and Peoples' Rights (African Commission) held in the *SERAC* case that all human rights in the African Charter can be made effective.[18] This article demonstrates how such efficacy can be achieved in the specific context of rights with a socio-economic character.

In interpreting socio-economic rights under the African Charter, the African Commission has not always been consistent in its approach to treaty interpretation.[19] For example, the African Commission has on different occasions applied the textual, the 'golden thread',[20]

11 As above.
12 The African Commission Resolution on economic, social and cultural rights in Africa (2004) ACHPR/Res.73 (XXXVI)04.
13 Resolution on SERs (n 12) para 4.
14 Resolution on SERs para 5.
15 African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/3/rev 5, 21 ILM 58 (1982) (African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986.
16 In this article the interpretive organs of the African Charter refer to the African Commission on Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Court of Justice and Human Rights (African Court of Justice). The African Court was replaced by art 1 of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm el-Sheikh, Egypt on 1 July 2008. The African Court of Justice, however, is not in operation as the African Court of Justice Protocol has not yet entered into force.
17 EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 111.
18 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 68 (*SERAC* case).
19 F Viljoen *International human rights law in Africa* (2012) 323-324.
20 See F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 325, where he defines the 'golden thread' as an interpretation of rights that favours the individual and peoples' human rights. A detailed discussion of these approaches to treaty interpretation falls beyond the scope of this article. For a detailed discussion of these approaches, see A Amin 'A teleological approach

and the teleological approaches in interpreting socio-economic rights under the African Charter. This inconsistent approach to treaty interpretation has led to some jurisprudential inconsistencies. Moreover, the Commission does not always apply the teleological approach appropriately in its jurisprudence.[21] Similarly, the African Court on Human and Peoples' Rights (African Court) in its emerging socio-economic rights jurisprudence has been inconsistent regarding its interpretative approach and applied the teleological approach inappropriately.[22] This has led to socio-economic rights being ineffective in the sense that their scope and content is not transparent or predictable in offering meaningful guidance to beneficiaries and state parties.

This article examines the teleological approach to interpretation and argues that, if applied consistently, it has the potential to enhance the effectiveness of socio-economic rights under the African Charter.[23]

The article analyses the model of the teleological approach as formulated by the Harvard Research in International Law programme,[24] and Sir Gerald Fitzmaurice,[25] and codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[26]

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to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' unpublished LLD thesis, University of Stellenbosch, 2017 22-27.

21 Amin (n 20) 371.

22 See *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek* case) ACtHPR Application 6/2012.

23 Through the teleological approach the interpretation of socio-economic rights in the African Charter can benefit from the adjudicative procedure and detailed socio-economic rights provisions in 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); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); and the African Charter on the Rights and Welfare of the Child (African Children's Charter) respectively. As such relevant instruments will be referred to the extent, they elaborate the understanding of interpretation of socio-economic rights in the African Charter.

24 The Harvard Research in International Law was a research programme into international law carried out under the auspices of the Harvard Law School between the late 1920s and early 1930s. Through this programme, Harvard Law School developed the Harvard Draft Convention on the Law of Treaties.

25 At the time of writing his two articles, Sir Gerald Fitzmaurice was the United Kingdom Counsel to the International Court of Justice. Fitzmaurice ascertained that there existed three major approaches to treaty interpretation, namely, the intention of the parties, the textual, and the teleological approaches. See GG Fitzmaurice 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points' (1951) 28 *British Year Book of International Law* 1-2; GG Fitzmaurice 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points' (1957) 33 *British Year Book of International Law* 207-209.

26 The Vienna Convention on the Law of Treaties 8 ILM 679 (1969) was adopted on 23 May 1969 and entered into force on 27 January 1980.

By focusing on socio-economic rights, the article does not claim that the teleological approach is not also useful for interpreting other human rights in the African Charter. Various scholars have argued in favour of the viability of the teleological approach to all human rights.[27] However, the article focuses on socio-economic rights given doubts surrounding their interpretation, particularly the formulation of these rights, the nature of the obligations they impose, the absence of an explicit model of review in respect of states' compliance with their obligations under the African Charter and 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).

The analysis in the article is divided into three parts. The first part discusses the teleological approach and its elements and how they feature in the African context. In part 2 I examine the criticisms surrounding the interpretation of socio-economic rights in the African Charter, and the appropriateness of the teleological approach for their interpretation. The final part develops the methodology for the application of the teleological approach.

2 Teleological approach: Elements

The teleological approach is one of three major approaches to treaty interpretation. The other two are the textual approach[28] and the intention of the parties' approach.[29] The teleological approach emerged in international law in 1935 through article 19(a) of the Harvard Draft Convention on the Law of Treaties (Harvard Draft),[30] as formulated by the Harvard Research in International Law programme, and later elaborated by Fitzmaurice in his 1951 classification on approaches to treaty interpretation and subsequently codified in the Vienna Convention.

27 H Senden *Interpretation of fundamental rights in a multilevel legal system: An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011) 55-59.

28 The textual approach, which sometimes is referred to as the 'ordinary meaning' approach, posits that the meaning of the text of a treaty should be derived exclusively from the words of the text itself. See Fitzmaurice (n 24) 7.

29 The intention of the parties approach posits that a treaty should be interpreted by exclusively using the common intention of the parties to the treaty at the time of its conception. See M Fitzmaurice 'Interpretation of human rights treaties' in D Shelton (ed) *International human rights law* (2013) 745.

30 Art 19(a) of the Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971.

The teleological approach considers the object and purpose[31] of a treaty as the main element in its interpretation. The object and purpose of a treaty as the main elements of the teleological approach are established through a wide range of other significant elements from within and outside the treaty in question. These elements include the treaty's historical background and its preparatory work; the subsequent conduct of the parties in applying the provisions of the treaty; and the conditions prevailing at the time the treaty is interpreted.[32] Other elements include the treaty as a whole, relevant international, regional and national legal instruments and jurisprudence, and the principle of effectiveness.

2.1 Object and purpose of the treaty

The meaning of the object and purpose of a treaty is surrounded by two key concerns. The first is whether object and purpose is a single concept or two distinct concepts. The second is whether the notion requires a specific definition or a general definition. The debates among scholars and institutions regarding these concerns fall beyond the scope of this article. Rather, the article considers the approach adopted in the Vienna Convention, which treats 'object and purpose' as a single discursive concept. The efficacy of treaty interpretation requires the notion of 'object and purpose' of a treaty to be defined with a form of flexibility. The meaning of 'object and purpose' should not be limited to a specific fixed meaning,[33] since the content of the treaties changes on a regular basis.[34] The interpretation of a treaty is a single combined process,[35] whereby the text of the treaty and its context, as well as its object and purpose, should be examined together.[36] While the text is considered the logical starting point,[37] its effective meaning should always be obtained in the context in

31 J Klabbers 'Some problems regarding the object and purpose of treaties' (1999) 8 *Finnish Yearbook of International Law* 138, quoted in SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theories, laws, practices and prospects* (2013) 45. Klabbers identifies the object and purpose of a treaty as a 'comprehensive blanket term' referring to the 'aims, nature and end' of a treaty. It applies to a treaty 'as a whole rather than to its parts or articles'. In addition to Klabbers's definition, this article considers the 'object and purpose' of a treaty as a single concept (rather than two distinct concepts) that requires a general meaning rather than a specific fixed meaning. For a thorough discussion, see Amin (n 20) 43-49.

32 Harvard Draft (n 30).

33 Klabbers (n 31) 141.

34 C McLachlan 'The principle of systemic integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 282.

35 ILC *Yearbook of the International Law Commission* (1966) 219-220 para 8.

36 K Mechlem 'Treaty bodies and the interpretation of human rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 911.

37 As above.

which it was formulated and in light of its object and purpose.[38] In relation to human rights treaties, article 31 of the Vienna Convention specifically requires their interpretation to be performed in a manner that commits the parties to respect the object and purpose enshrined therein.[39] For example, in the case of the *Engel* case[40] the European Court of Human Rights (European Court) held that although the parties have the discretion to interpret the treaty in accordance with their domestic laws, this discretion should be compatible with the object and purpose of the European Convention on Human Rights (European Convention).[41]

In the context of socio-economic rights in the African Charter, this element enables the interpretive organs to engage the object and purpose of the African Charter which is to 'promote and protect human and peoples' rights'.[42] In interpreting socio-economic rights in the African Charter, the interpretive organs applying the teleological approach must inquire into this general object and purpose of the African Charter. In the *SERAC* case the African Commission referred to the object and purpose of the African Charter in relation to the requirement to exhaust local remedies.[43] It stated that the aim of the requirement to exhaust local remedies enshrined in the African Charter is to avail the domestic judicial system with an opportunity to determine cases in their states and issue appropriate remedies before such cases are referred to the international machinery.[44]

The African Court applied the notion of object and purpose of the African Charter in its landmark *Ogiek* case. In elaborating the nexus between the rights to non-discrimination and equality and socio-economic rights in the African Charter, the African Court stated that it considers the African Charter's object and purpose when establishing the forms of distinction covered in the phrase 'any other status' in the provisions of article 2 of the African Charter.[45]

2.2 Treaty as a whole

In establishing the object and purpose of a treaty in relation to provisions being interpreted, the teleological approach considers

38 Art 31(1) Vienna Convention.
39 M Scheinin 'Characteristics of human rights norms' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2012) 21.
40 *Engel v The Netherlands* (1976) Series A No 22.
41 *Engel* case (n 40) para 81.
42 Preamble to the African Charter para 11.
43 *SERAC* case (n 18) paras 37-38.
44 As above. See also *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 59.
45 *Ogiek* case (n 22) paras 142 & 146.

the treaty as a whole. Considering a treaty as a whole requires interpretive organs to engage the Preamble to the treaty and other relevant provisions in a treaty to assign meaning to the provisions in question.[46] The Preamble is composed of two characteristics, namely, interpretive and binding characters. Regarding its interpretive character, a treaty's Preamble enshrines and elaborates its object and purpose.[47] This inclusion renders it a useful interpretative tool for elaborating on the meaning of treaty provisions, as well as clarifying the context in which such provisions should be construed.[48] In its binding character the Preamble, when applied as an interpretive aid, becomes binding just as any other treaty provision.[49] It is for this reason that parties' statements contained in the Preamble to the treaty must be treated as relevant when interpreting the treaty in question.[50]

In the context of the African Charter, this element enables the interpretive organs to consider a wide range of preambular statements relevant to socio-economic rights. Specifically, the Preamble to the African Charter articulates the object and purpose of the African Charter to 'promote and protect human and peoples' rights'.[51] It also contains statements that give the interpretive organs a mandate to draw on the 'values of freedom, equality, justice, and dignity'; the principle of 'interdependence of human rights'; 'individual duties'; the notion of African philosophy;[52] and adherence to other international treaties of a human rights nature in order to elaborate the object and purpose of the African Charter. The values of freedom, equality, justice and dignity referred to in the Preamble are 'essential objectives for the achievement of the legitimate aspirations of the African peoples'.[53] As such, the interpretation of socio-economic rights in the African Charter should promote these values.

Furthermore, these values are elaborated in the substantive provisions of articles 1 to 5 of the African Charter. Article 1 of the African Charter provides for the general obligations of the parties. Through this article, the parties are required to 'recognise the rights, duties and freedoms enshrined in the African Charter' and 'to adopt legislative or other measures to give effect' to these rights, duties and freedoms. The provisions of article 2 embody the principle of non-

46 See also art 31(2) of the Vienna Convention.
47 Fitzmaurice (n 25) 25.
48 As above.
49 Fitzmaurice 229.
50 As above.
51 Preamble to the African Charter para 11.
52 A detailed discussion on the values, historical background and the notion of African philosophy falls in parts 2.3 and 2.3.4 of this article.
53 Preamble to the African Charter para 3.

discrimination that is relevant in the interpretation of the provisions of human rights, including the provisions of socio-economic rights. Article 3 embodies the individual's right to equality before the law, and the equal protection of the law, while article 4 provides for the right to life and article 5 provides for the right to dignity. These articles are significant in that they strengthen the values stated in the Preamble and have the potential to enrich the meaning of socio-economic rights enshrined in the African Charter. The interpretation of the treaty as a whole requires the interpretive organs to engage these provisions in interpreting socio-economic rights holistically.[54]

Considering the African Charter as a whole requires the interpretive organs to engage other civil and political rights provisions to assign meaning to the socio-economic rights being interpreted. These rights include the rights to be heard, freedom of conscience, freedom of information, freedom of association, freedom of assembly, freedom of movement and residence, and equal access to public services.[55] The use of these civil and political rights can help to enrich the scope and content of the socio-economic rights.[56] The African Charter as a whole provides the interpretive organs with the scope to engage the duties' provisions to ascertain the object and purpose of the African Charter in relation to socio-economic rights. These provisions include articles 27 to 29 of the African Charter which provide for the individual's duties to his or her family, 'respect his or her fellow beings without discrimination', and 'preserve the harmonious development of the family'.

Treating the African Charter as a whole also enables the interpretive organs to embrace the principle of interdependence of rights envisaged in the Preamble. The Preamble to the African Charter reiterates that 'civil and political rights cannot be dissociated from economic, social and cultural rights'.[57] In the *SERAC*[58] and *COHRE* cases[59] the African Commission applied this principle. It held in the *SERAC* case[60] that by violating these existing rights the respondent state not only violated these explicit rights but also violated the right to food that is implicit in the African Charter. In the *COHRE* case it

54 J Tobin 'Seeking to persuade: A constructive approach to human rights treaty interpretation' (2010) *Harvard Human Rights Journal* 39.
55 Arts 7-13 African Charter.
56 ST Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) *University of Tasmania Law Review* 158.
57 Preamble to the African Charter para 7.
58 *SERAC* case (n 18) para 64. See also para 60 regarding the implicit right to housing.
59 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 209 (*COHRE* case).
60 *SERAC* case (n 18) para 65.

interpreted the rights to adequate food, water and housing as the underlying components of the right to health.[61] In interpreting the right to life in the *Ogiek* case the African Court stated that this right guarantees the realisation of all rights in the African Charter.[62] It held that the right to life prohibits the arbitrary deprivation of life and establishes a link between the right to life and the inviolable nature and integrity of human beings.[63] It should, however, be noted that the African Court, in part, interpreted the right to life narrowly by stating that the right to life in article 4 refers to a physical right to life, rather than an existential understanding of the right.[64]

2.3 Preparatory work and historical background of the treaty

The teleological approach to interpretation engages the preparatory work and historical background as its vital element of treaty interpretation. Essentially, preparatory work includes 'exchanges among the parties and with the drafting body, treaty drafts, negotiation records, minutes of commission and plenary proceedings, notes and reports of drafters of a treaty worked, if any'.[65] The Vienna Convention endorses preparatory work (travaux préparatoires) as a supplementary element of treaty interpretation. Acknowledging preparatory work as a supplementary element implies that the interpretive organs can draw on this element only as a peripheral element of the treaty interpretation. Preparatory work should, however, be treated as a central element in interpreting the socio-economic rights in the African Charter. This understanding is important because the preparatory work of the African Charter incorporates significant historical background pertaining to the inclusion of socio-economic rights. This historical background helps to identify the object and purpose of the African Charter in relation to socio-economic rights. The preparatory work of the African Charter also enshrines and elaborates the object and purpose of the socio-economic rights recognised in the African Charter.

The Vienna Convention requirement that the text should be interpreted considering its object and purpose logically allows the consideration of the preparatory work of the African Charter, which enshrines its object and purpose, as a primary interpretative tool. It should be noted that in some international treaties, a treaty's

61 *COHRE* case (n 59) para 209.
62 *Ogiek* case (n 22) para 152.
63 As above.
64 *Ogiek* case (n 22) para 154.
65 Yeshanew (n 31) 52.

preparatory work forms part of the relevant law and it cannot be treated as a supplementary means of interpretation.[66]

The ensuing sub-parts analyse all the preparatory work of the African Charter relevant for interpretation of socio-economic rights.

2.3.1 Decolonisation movements

Decolonisation movements in Africa provide significant insight into the protection of socio-economic rights in the African Charter. The movements for decolonisation, particularly through Pan-African congresses, emphasised the respect and protection of human rights in Africa.[67]

The 1919 Pan-African Congress in Paris marked the beginning of African leaders' efforts to protect the human rights of African people, which eventually contributed to the adoption of the African Charter. At this congress, participants from Africa raised three significant concerns: first, the need for land ownership and equitable economic development in a manner that allows African people to benefit from the sale and extraction of their natural resources; second, provisions for educational opportunities in industrial fields, in language programmes, and access to health care, which was considered an effective tool for economic development. In the third place they requested the participation of African people in local government and the independence of African colonies.[68]

The second Pan-African Congress[69] emphasised self-determination and the protection of labour rights (especially the elimination of involuntary servitude, inadequate pay, and hard-working conditions). The third and fourth Pan-African Congresses took place in 1923 and 1927 respectively[70] and reiterated the concerns raised in the previous congresses. The fifth Pan-African Congress[71] emphasised

66 Yeshanew (n 31) 52.

67 M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* 389-391, http://ssrn.com/abstract=1438555 (accessed 5 December 2019). See also Viljoen (n 19) 151-156.

68 1919 Pan-African Congress, http://www.panafricanmovement.org/?page_id=391 (accessed 5 December 2019); Pan-African Congress in 1919, www.diaspora.northwestern.edu (accessed 21 October 2015).

69 1921 Pan-African Congress, http://www.panafricanmovement.org/?page_id=393 (accessed 5 December 2019).

70 1923 Pan-African Congress, http://www.panafricanmovement.org/?page_id=395 and 1927 Pan-African Congress, http://www.panafricanmovement.org/?page_id=397 (accessed 5 December 2019).

71 1945 Pan-African Congress, http://www.firstcutmedia.com/pac45-1945/pan-african-congress-in-manchester-1945 (accessed 5 December 2019).

the abolition of discriminatory land laws; forced labour; the inclusion of the right to freedom from poverty; the right of Africans to develop their economic resources without hindrance; the right to freedom of association and assembly; the right to compulsory free education, including free uniforms, meals, books and school equipment; the right to health, including the rights to medical services, equality of access to health and welfare services; and the right to work, including the right to equal pay for equal work.[72]

In 1958 the All African People's Conference was held in Accra and was attended by 300 delegates. This conference adopted a Resolution on Imperialism and Colonialism,[73] which extended fundamental human rights to all men and women in African countries, and the rights of African people to the fullest use and protection of their lands.[74] The Resolution required the independent African states to ensure that fundamental human rights were extended within their states to serve as an example to the colonial nations who violated and ignored the rights of African people.[75] The resolutions passed by the Pan-African congresses and the All-African People's Conference can give an insight into the normative scope and content of the socio-economic rights to work, education, health, property, food, as well as peoples' socio-economic rights to freely dispose of their natural wealth, development, and a satisfactory environment in the African Charter. This element of the preparatory work as a tenet of the teleological approach may be applied to interpret the scope and content of socio-economic rights in the Charter and advance the teleological approach to interpretation.

2.3.2 Organisation of African Unity Charter

A few years after the Resolution on Imperialism and Colonialism African leaders adopted the Charter of the Organisation of African Unity (OAU Charter).[76] Significantly, the OAU Charter contained provisions relevant to the protection of socio-economic rights and some human rights standards for which African leaders stood in their anti-colonial struggles.[77] Through its Preamble, African leaders

72 5th Pan-African Congress Resolutions and Declarations, www.13.+5th+PAC++ resolutions+ and+declarations,+1945.pdf (accessed 5 December 2019).
73 Resolution on Imperialism and Colonialism, Accra, 5-13 December 1958, http://nixonland74.files.wordpress.com/2016/1958colonies.pdf (accessed 5 December 2019).
74 Resolution on Imperialism and Colonialism (n 73) 5.
75 Resolution on Imperialism and Colonialism 7.
76 Charter of the Organisation of African Unity (OAU Charter), entered into force 13 September 1963, 479 UNTS 39.
77 Killander (n 67) 390-391.

declared the significance of the values of freedom, equality, justice and dignity for the realisation of human rights.[78] They also affirmed their adherence to the principles of human rights contained in the UN Charter and the Universal Declaration of Human Rights (Universal Declaration).[79] According to African leaders, these principles ensured common cooperation among states.[80] Moreover, they expressed the desire to protect the welfare and well-being of all individuals in Africa[81] through cooperation in various areas related to human rights,[82] including economic, educational and cultural, as well as health, sanitation and nutritional cooperation.[83] These provisions can significantly provide an insight into the scope and content of the socio-economic rights in the African Charter. The application of the OAU Charter as part of the preparatory work of the African Charter will create an avenue for the supervisory organs to advance the teleological approach to interpretation regarding the scope and content of the socio-economic rights in the African Charter.

2.3.3 Decision on human and peoples' rights in Africa

In their initiatives to adopt the African Charter, in 1979 the Summit of the African Leaders met in Monrovia (Monrovia Summit)[84] and declared their commitment to protecting human rights and the principles of dignity, equality and justice contained in the UN Charter. They also stressed their goal to protect socio-economic rights on the same level as civil and political rights. African leaders agreed to pay special attention to the socio-economic rights of individuals. Based on this background, these leaders adopted a resolution (OAU Resolution)[85] that initiated the process to draft the African Charter. The commitments of African leaders in the OAU Resolution are relevant for interpreting socio-economic rights and advance the teleological interpretation of these rights.

2.3.4 Opening speech by President Senghor

In response to the OAU Resolution, the OAU Secretary-General convened the Meeting of Experts in Dakar which was opened by

78 Preamble to the OAU Charter para 2.
79 Preamble to the OAU Charter para 8.
80 As above.
81 Preamble to the OAU Charter para 9.
82 Art II(2) OAU Charter.
83 Arts II(2)(b)-(d) OAU Charter.
84 16th ordinary session of the OAU Assembly of Heads of State and Government, Monrovia, Liberia, 16-20 July 1979.
85 Decision on Human and Peoples' Rights in Africa, Resolution AHG/Dec 115 (XIV) Rev 1 1979.

the then President of Senegal, Leopold Sedar Senghor.[86] In his speech (Address by Senghor) President Senghor highlighted the object and purpose of the African Charter to be adopted, including safeguarding the values of dignity, equality, freedom and justice,[87] taking into account the needs of African people, including their socio-economic needs.[88] He also highlighted the need for an African Charter that protects socio-economic rights in such a manner that it would improve the socio-economic conditions of African people.[89] Moreover, Senghor's speech stressed African leaders' goal of protecting socio-economic rights, both at the individual and collective level.[90] The recognition of these rights in the African Charter was significant for the socio-economic development of all people in Africa.[91] African leaders considered socio-economic rights and civil and political rights as equally important.[92] Senghor's speech emphasised the importance of the right to development, which embraces all rights of a socio-economic character. The full realisation of the right to development should be considered in a manner that improves the socio-economic conditions of individuals.[93] President Senghor also urged the experts to take African philosophy into account when developing the African Charter.[94]

The foundation of an African philosophy is the collective way of living in African societies. It is founded in the phrase 'I am, because we are; and since we are, therefore I am'.[95] The phrase demonstrates that the African philosophy is built on the collective nature of human beings, rather than on an individual basis. African philosophy is characterised by the vital relationship that an individual maintains with other members of the community.[96] The communal oriented nature of an individual in a society is characterised as an African philosophy since it was practised by many pre-colonial African societies. Scholars in contemporary African society identify the African philosophy as 'African personality'; 'negritude'; and *Ujamaa* (the Kiswahili term for African socialism).[97] Winks terms the

86 Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, OAU Doc CAB/LEG/67/5 (Address by Senghor).
87 Address by Senghor (n 86) para 3.
88 Address by Senghor para 16.
89 Odinkalu (n 7) 187.
90 Address by Senghor (n 86) para 19.
91 As above.
92 Address by Senghor (n 86) para 20.
93 Address by Senghor paras 21-22.
94 Address by Senghor paras 27 & 29.
95 JS Mbiti *African religions and philosophy* (1990) 106 141.
96 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: An introduction* (1984) 35.
97 M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 352.

African philosophy 'African humanism'[98] which was pre-dominant in pre-colonial societies and is similar to Kwame Nkrumah's modern reformulation of 'consciencism'; Kenneth Kaunda's 'humanism'; and Julius Nyerere's *Ujamaa*.[99] In South Africa it is known as ubuntu,[100] originating from the Zulu phrase *Umuntu ngumuntu ngabantu*, which literally means 'a person is a person through other persons'.[101] The concept of an African philosophy has direct implications for the interpretation of both individual and collective socio-economic rights in the African Charter. An African philosophy based on the values of cooperation, collectiveness, obligations, and interdependence is appropriate for developing socio-economic rights.[102]

2.3.5 M'Baye's draft of the African Charter on Human and Peoples' Rights

Keba M'Baye, who was the president of the Supreme Court of Senegal, prepared the preliminary draft of the African Charter (M'Baye Draft).[103] The M'Baye Draft incorporated various provisions on socio-economic rights and other related rights. These provisions were similar[104] to the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[105] The M'Baye Draft refers to socio-economic rights in three distinct provisions, namely, the preambular clauses; the general provisions; and the specific socio-economic rights provisions. The preambular clauses of the M'Baye Draft identify two significant elements relevant for interpreting socio-economic rights. First, the Preamble identifies the apparent object and purpose, as well as the underlying values, of the African Charter. According to the Preamble, African leaders commit to protecting fundamental human rights, including socio-economic rights, and the value of human dignity.[106] The respect for human dignity and fundamental rights is not restricted to civil and political rights but

98 BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 456.
99 As above.
100 As above.
101 T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 323. Based on available literature on ubuntu, this dissertation uses the notion of ubuntu to elaborate on the notion of African philosophy.
102 JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 331.
103 K M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1 (M'Baye Draft).
104 M'Baye Draft (n 103) para 1.
105 International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3. The final provisions of the African Charter, however, are quite different from those of ICESCR.
106 M'Baye Draft (n 103) para 2.

extends to socio-economic rights.[107] Therefore, every individual is entitled to the enjoyment of his or her socio-economic rights and civil and political rights.[108] Second, it stated the commitment of African leaders to protecting fundamental rights in accordance with the UN Charter and the Universal Declaration.[109]

The general provisions, on the one hand, recognise individuals' socio-economic rights and, on the other, they impose obligations on states to protect socio-economic rights. The M'Baye Draft also protected socio-economic rights through the formulation of specific substantive provisions on socio-economic rights, including the right to equal enjoyment of the socio-economic rights to work;[110] social security;[111] an adequate standard of living;[112] health;[113] and education.[114] Through the application of the preparatory work, the supervisory organs can engage these rights in the M'Baye Draft to interpret socio-economic rights in the African Charter in a manner that corresponds with the teleological approach to interpretation.

2.3.6 Dakar Draft

A group of experts under the chairmanship of Keba M'Baye met in Dakar and prepared the draft African Charter (Dakar Draft).[115] The Dakar Draft formulated various socio-economic rights and other provisions relevant to socio-economic rights. According to the Dakar Draft, the promotion and protection of human rights should be able to improve peoples' needs, including their socio-economic needs.[116] It recognised the values of freedom, equality, justice, and dignity as significant for the achievement of peoples' needs.[117] It formulated substantive provisions in relation to these values, including provisions on the rights to non-discrimination, equality, life and dignity.[118] The Dakar Draft emphasised the improvement of individuals' socio-economic conditions through the protection of socio-economic rights.[119]

107 As above.
108 M'Baye Draft (n 103) para 4.
109 M'Baye Draft para 1.
110 Art 6 M'Baye Draft (n 103).
111 Art 7 M'Baye Draft.
112 Art 10 M'Baye Draft.
113 Art 11 M'Baye Draft.
114 Art 12 M'Baye Draft.
115 Preliminary Draft of the African Charter, prepared during the Dakar Meeting of Experts at the end of 1979, OAU Doc CAB/LEG/67/3/Rev 1 (Dakar Draft).
116 Governing Principle of the Dakar Draft (n 115).
117 Preamble to the Dakar Draft (n 115) para 3.
118 Arts 2-5 & 19 Dakar Draft (n 115).
119 Governing Principle of the Dakar Draft (n 115) para 6.

Socio-economic rights in the Dakar Draft included the rights to property, work, health, education, family, wealth and natural resources, as well as the right to economic, social and cultural development.[120] Unlike the M'Baye Draft, the Dakar Draft formulated socio-economic rights in a general form in that it does not elaborate on their normative scope and content. The Dakar Draft also omitted some significant socio-economic rights provisions including the right to social security, as well as the right to an adequate standard of living.[121] Significantly, it provided the mechanism with which the omitted rights, and the normative content of socio-economic rights, should be developed. It required interpretive organs to develop the normative content of these rights through interpretation.[122]

The Dakar Draft also imposed obligations on states and individuals to realise socio-economic rights.[123] States are generally obliged to 'recognise' and 'guarantee' human rights and to adopt 'legislative and other measures' in order to 'give effect' to these rights.[124] The Dakar Draft recognised an individual's duties towards his or her family, community, other individuals and the country.[125] The formulation of rights provisions in the Dakar Draft does not distinguish between socio-economic rights and civil and political rights. This formulation allows the interpretation of socio-economic rights through the concept of the interdependence of rights and can assist interpretive organs to interpret socio-economic rights in a manner that recognise various states' obligations. The use of the principle of interdependence rights advances the teleological interpretation of socio-economic rights in that it allows other relevant rights provisions to enrich the scope and content of socio-economic rights in question and their concomitant obligations.

2.3.7 Report of the Rapporteur on the Dakar Draft

The Report of the Rapporteur (Rapporteur's report)[126] represents another significant piece of preparatory material for interpreting the socio-economic rights in the African Charter. The significance of the Rapporteur's report is found in the remarks by the Chairperson of the Committee of Experts that allow the interpretive organs to flexibly develop the scope and content socio-economic right and

120 Arts 14-19 Dakar Draft (n 115).
121 ICESCR contains these socio-economic rights in arts 9 and 11 respectively.
122 Dakar Draft (n 115) paras 2-3.
123 Arts 16(2) & 17(2) Dakar Draft (n 115).
124 Art 1 Dakar Draft.
125 Arts 27-29 Dakar Draft.
126 Rapporteur's report OAU Doc CAB/LEG/67/Draft Rapt Rpt (II) Rev 4.

their related obligations.[127] The Dakar Draft was submitted to the OAU Ministers of Justice for deliberation. Significantly, the provisions of the Dakar Draft did not undergo any substantial change during deliberation.[128] After deliberation, the Dakar Draft was submitted to the Assembly of Heads of State and Government, which adopted the African Charter on 17 June 1981.

In the *SERAC* case the African Commission applied the preparatory work to explain the right of peoples to freely dispose their wealth in article 21 of the African Charter.[129] It stated that article 21 traces its origin to colonial times when colonial powers violated peoples' rights and deprived them of their land and resources.[130] Through article 21, the drafters of the African Charter aim at reminding African governments of this painful history and restore co-operative economic development to African communities.[131] The African Court applied preparatory work in the *Ogiek* case and stated that during anti-colonial struggles the term 'peoples' meant populations in countries struggling for their independence and national sovereignty.[132] In the independent states the Court held that, provided that such groups do not challenge the sovereignty and territorial integrity of a state, they should be recognised as peoples.[133]

2.4 Reference to the relevant international treaties and the parties' subsequent agreements and practices

The 'relevant rules of international law' is another element of the teleological approach. The rules of international law encompass both customary and general international law related to the interpreted treaty of a similar nature.[134] Articles 60 and 61 of the African Charter enables the interpretive organs to clarify the scope and content of socio-economic rights in light of other international instruments.

The subsequent conduct of the parties includes the decisions of the interpretive organs,[135] and the rules of procedure formulated by

127 Rapporteur's report (n 126) para 13.
128 Yeshanew (n 31) 285.
129 *SERAC* case (n 18) para 56.
130 As above.
131 As above.
132 *Ogiek* case (n 22) para 197.
133 *Ogiek* case para 199.
134 International Law Commission 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the Study Group of the International Law Commission, 58th session (2006) A/CN.4/L.682) ch F, Systemic integration and art 31(3)(c) of the Vienna Convention para 461.
135 Fitzmaurice (n 25) 9. See also Fitzmaurice (n 25) 211.

these interpretive organs.[136] Recourse to such practices during the interpretative process is significant in that they assist in ascertaining the effective meaning of the treaty.[137] The subsequent conduct of the parties may take two forms, namely, subsequent agreements and practices of the parties.[138] While a subsequent agreement focuses 'on the fact of an agreement between the treaty parties',[139] subsequent practice includes 'executive, legislative and judicial acts'.[140] The parties' subsequent practices may be found in the rules of procedure and decisions formulated by interpretive organs.[141] In the context of human rights treaties, the parties' enforcement of the decisions of interpretive organs establishes their subsequent practices.[142] Such practices allow the application of decisions of interpretive organs, as well as states' undertakings (such as subsequent treaties and protocols) in the interpretation of socio-economic rights in the African Charter.

The African Commission has mostly applied this element in its socio-economic rights jurisprudence.[143] The African Court applied relevant international law in the *Ogiek* case through the provisions of articles 60 and 61 of the African Charter to define 'indigenous people'.[144] Through articles 60 and 61 of the African Charter, the Court drew inspiration from the African Commission's Working Group on Indigenous Populations/Communities, as well as the work of the United Nations Special Rapporteur on Minorities, which establish criteria to identify indigenous populations.[145]

2.5 Principle of effectiveness

The principle of effectiveness[146] presumes that texts are formulated to fulfil a specific effect. The principle requires the text to be interpreted in light of the declared or apparent object and purpose of the treaty. This should be done in a manner that gives such a text its effective meaning, consistent with the words used to formulate it and with

136 As above.
137 As above.
138 Arts 31(3)(a)-(b) Vienna Convention.
139 A Roberts 'Power and persuasion in investment treaty interpretation: The dual role of states' (2010) 104 *American Journal of International Law* 199.
140 Roberts (n 139) 200.
141 Fitzmaurice (n 25) 9.
142 Scheinin (n 39) 21.
143 See *SERAC* case (n 18) paras 52-53, *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80; *COHRE* case (n 59) para 209.
144 *Ogiek* case (n 22) paras 105-106, 108.
145 As above.
146 Fitzmaurice (n 25) 203 211. The principle of effectiveness is sometimes referred to as *ut res magis valeat quam pereat*.

the other provisions of the treaty.[147] In order to assign an effective meaning to the text, the principle of effectiveness, in its general meaning,[148] allows the interpretive organs to consider and apply different possibilities of interpretation, which will safeguard the effectiveness of the text.[149] In its substantive dimension, it requires interpretive organs to interpret human rights treaty broadly.[150] It also requires the limitations of such rights to be interpreted narrowly.[151] The implications of the substantive dimension of the principle of effectiveness, particularly for the human rights treaties, are twofold. First, the principle of effectiveness means that the texts of human rights treaties should be interpreted broadly.[152] Second, the principle of effectiveness requires the limitations and restrictions to human rights (including socio-economic rights provisions in the treaty) to be interpreted narrowly.[153]

In its temporal dimension,[154] the principle of effectiveness considers a treaty as a living instrument.[155] This means that a treaty should be interpreted in light of present-day conditions prevalent in society,[156] as this 'keeps the meaning of the rights both contemporary and effective'.[157] Significantly, this promotes an interpretation of socio-economic rights that takes into account the living conditions of people at the time of the treaty's interpretation. In this regard, interpretive organs can consider conditions that were not foreseen by the state parties to the African Charter at the time of its conception. Accordingly, this interpretation considers both the protection against the violations prevalent at the time of interpretation and at the time of the adoption of a treaty.[158]

The systemic dimension represents another facet of the principle of effectiveness. This dimension consists of both the internal and external coherence dimensions.[159] The internal coherence dimension

147 Fitzmaurice (n 25) *211.*
148 D Rietiker 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – No need for the concept of treaty *sui generis*' (2010) 79 *Nordic Journal of International Law* 256.
149 Rietiker (n 148) 256.
150 Rietiker 259.
151 As above.
152 M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 147.
153 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 3.
154 Rietiker (n 148) 261.
155 As above.
156 As above.
157 K Dzehtsiarou 'European consensus and the evolutive interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730.
158 Killander (n 152) 151.
159 Rietiker (n 148) 267-275.

emphasises a form of interpretation that reads the treaty as a whole in a manner that advances internal consistency and harmony among the various provisions of the treaty.[160] In relation to external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources. As such, interpretive organs should interpret treaties in light of other relevant international instruments.[161] This dimension is significant as it gives interpretive organs the latitude to interpret the socio-economic rights in the African Charter in a manner that harmonises with the normative provisions in other relevant human rights instruments.

Having discussed the elements of the teleological approach and the way it corresponds with the African Charter's context; the ensuing part demonstrates the criticisms of socio-economic rights under the African Charter and the appropriateness of the teleological approach for their interpretation.

3 Criticisms of socio-economic rights in the African Charter and the appropriateness of the teleological approach for their interpretation

3.1 Criticisms based on the broad formulation of socio-economic rights provisions

Scholars contend that socio-economic rights are broadly formulated and, therefore, their precise scope and content remain unclear.[162] However, the broad formulation of a treaty's provisions is not exceptional to socio-economic rights in the African Charter. Whether included in national bills of rights or regional or global human rights treaties, human rights often are vague.[163]

The scholars' doubts regarding the generic nature of socio-economic rights in the African Charter based on the stance of the narrow textual approach, namely, that the meaning of the text of a treaty should be derived from the text itself,[164] is a theoretical flaw. Considered holistically, the broad formulation of these rights avails the interpretive organs with an opportunity to interpret them flexibly in a manner that gives effect to the object and purpose of the African Charter. The generic formulation allows interpretive organs

160 Rietiker 267.
161 Rietiker 271.
162 Ssenyonjo (n 10) 153.
163 Killander (n 152) 145.
164 Fitzmaurice (1951) (n 25) 7.

to consider socio-economic changes at the time of interpretation of socio-economic rights in question. The Rapporteur's report acknowledged that these rights were formulated in general terms in order to allow interpretive organs the flexibility to interpret them by an appropriate interpretative approach.[165] Given the nature of the broad formulation of these rights in the African Charter, the teleological approach (which utilises various interpretive elements and principles) is appropriate to ascertain their adequate meaning. Although the text of the treaty is a starting point in the interpretation of human rights provisions, an approach to treaty interpretation that constructs the meaning of these rights through several interpretive tools is required.[166] The African Commission applied various aspects of the teleological approach to interpret socio-economic rights involved. For example, in the *Noca* case,[167] the *Endorois* case[168] and the *COHRE* case, the African Commission applied various relevant international, regional and national laws to interpret the right to property. In the *Noca* case, in conjunction with the provisions of article 2 of the African Charter, the African Commission identified that the right to property in article 14 is recognised for every individual.[169] This interpretation by the African Commission is significant as it establishes the holder of the right to property. In the *COHRE* and the *Noca* cases the African Commission identified two main principles relating to the right to property. These principles include the general right to ownership and peaceful enjoyment of the right to property, as well as the possibility and condition of deprivation of the right to property.[170] In the *Noca* case the African Commission stated that the right to property encompasses the right to adequate compensation.[171] The element of compensation is imperative in the right to property in that it recognises and protects an individual's right to ownership of property against unlawful deprivation. In the *Endorois* case the African Commission added other components of the right to property to include access to property, possession, use and control over the property as well as economic resources and rights on the collective land.[172] These elements are significant in that they assist to identify forms of interference by states and their implications for the right to property ownership. In the *SERAC* case the African Commission applied ICESCR as a relevant international

165 Rapporteur's report (n 126) para 13.
166 Senden (n 27) 52.
167 *Dino Noca v Democratic Republic of the Congo* Communication 286/2004.
168 *Centre for the Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).
169 *Noca* case (n 167) para 128.
170 *COHRE* case (n 59) para 143.
171 *Noca* case (n 167) para 147.
172 *Endorois* case (n 168 above) para 186.

human rights instrument and the relevant provisions of the African Charter to interpret the right to health. The African Commission elaborated upon the normative content of the rights to health and the right to a healthy environment to include environmental and industrial hygiene; scientific monitoring of threatened environments; the publishing of environmental and social impact studies; access to information; and meaningful participation by individuals.[173] In the *Purohit* case the African Commission, by engaging the provisions of articles 16 and 18(4) of the African Charter, extended the content of the right to health to encompass the right to health facilities and access to health goods and services without discrimination.[174] In the *COHRE* case the African Commission drew inspiration from relevant international human rights instruments and expanded the content of the right to health.[175] According to the African Commission, the right to health also incorporates timely and appropriate health care, access to safe and potable water, an adequate supply of food, nutrition and housing, as well as safe drinking water and electricity.[176] Moreover, other determinants of the right to health include availability, accessibility and acceptability.[177] These three elements are significant as they identify the guiding principles for the realisation of the right to health.

Furthermore, the African Commission in the *SERAC* case applied the preparatory work and the relevant international human rights jurisprudence to explain the right of peoples to freely dispose of their wealth in article 21 of the African Charter.

Critics of socio-economic rights challenge the lack of internal qualifiers of 'progressive realisation' and 'within maximum available resources'. Odinkalu argues that the omission of these two phrases implies that the socio-economic rights in the African Charter impose on states immediate obligations rendering their justiciability difficult.[178] The argument by scholars is based on the literal textual approach that considers a text of a treaty to be self-sufficient. It is admitted that unlike the provisions of article 2(1) of ICESCR, the formulation of article 1 of the African Charter does not expressly include a state's obligation to realise rights 'progressively' and within 'available resources'. The omission, however, does not necessarily

173 *SERAC* case (n 18) paras 52-53.
174 *Purohit* case (n 143) para 80.
175 *COHRE* case (n 59) para 209. It also applied relevant international human rights instruments and jurisprudence to interpret the right to the protection of the family.
176 *COHRE* case (n 59) paras 209 & 211.
177 *COHRE* case para 209.
178 Odinkalu (n 7) 196.

mean that these qualifiers are excluded from article 1 of the African Charter. The teleological approach that considers a wide range of interpretative tools in addition to the text in question is a viable approach. It can be applied through the principle of effectiveness and the element of a treaty as a whole to holistically interpret the phrase 'to adopt other measures' in article 1 to read into the African Charter the notions of 'progressive realisation' and 'within maximum available resources'. The phrases allow states to take into account non-legislative progressive measures,[179] such as resource consideration, planning and budgeting to realise the socio-economic rights in the African Charter.

Considering the scarcity of resources in many African countries, socio-economic rights need to be interpreted in a manner that guarantees progressive realisation. The poor levels of economic development, as well as the uneven allocation of resources, can hinder states from immediately realising these rights.[180] In the *Purohit* case the African Commission stated that poverty in many African countries hinders the enjoyment of the right to health.[181] The Commission confirmed that resource scarcity and poverty contribute to the failure of African states to effectively realise individuals' rights to health.[182]

It should also be noted that the notions of 'progressive realisation' and 'within maximum available resources' also impose on states concrete substantive and procedural obligations to make measurable progress in relation to the full realisation of socio-economic rights and to mobilise resources for their realisation. The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines)[183] elaborated that 'progressive realisation' requires states to implement 'a reasonable and measurable plan' by setting 'achievable benchmarks and time frames' for the realisation of socio-economic rights based on the available resources.[184] It further stated that states require adequate resources to realise socio-economic rights progressively. As such they have an obligation to put in place 'effective and fair taxation system' and 'budgeting process' to give effect to these rights.[185]

179 See also *Purohit* case (n 143) para 42.
180 Ankumah (n 17) 144.
181 *Purohit* case (n 143) para 84.
182 As above.
183 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, as adopted on 24 October 2011 (Guidelines).
184 Guidelines (n 183) para 14.
185 Guidelines (n 183) para 15.

Dealing with the right to housing in the Djazia case the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that article 2(1) of ICESCR requires state parties to take all necessary steps within their available resources to give effect to this right. State parties can develop a wide range of policies 'including the establishment of housing subsidies for those unable to obtain affordable housing'.[186] Whenever a state fails to provide alternative accommodation for persons evicted from their housing, it must prove that despite taking all reasonable measures within its maximum available resources it could not realise the victims' right to housing.[187]

Socio-economic rights are also considered to be imposing on states positive obligations and, therefore, they are resource-oriented.[188] While it is admitted that socio-economic rights entail positive obligations, they also incorporate negative obligations. Moreover, 'resource implication' is not exclusive to socio-economic rights, but the full realisation of civil and political rights also requires the deployment of resources. The rights to vote, fair trial and equality, for example, have resource and policy implications.[189] Considering socio-economic rights as exclusively positive in nature is a flaw of the narrow textual approach and does not give effect to the object and purpose of the African Charter. The teleological approach through the principle of effectiveness and interdependence of rights allows the interpretation of the provisions of articles 1 and 3 on non-discrimination to include in the provisions of socio-economic rights negative obligations.

3.2 Criticisms based on the legal status of the African Commission's recommendations

The legal status of the African Commission's recommendations has also been challenged. Eno argues, for example, that the Commission's recommendations are not legally binding.[190] In rejecting the African Commission's recommendations in *Kenneth Good v Republic of Botswana* (*Kenneth Good*) the respondent state argued that, unlike judicial bodies, the African Commission is a mere quasi-judicial

186 *Djazia and Bellili v Spain* Communication 5/2015 para 15.3 (*Djazia* case).
187 *Djazia* case (n 186) para 15.5.
188 Yeshanew (n 31) 76.
189 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 55.
190 R Eno 'The place of the African Commission in the new African dispensation' (2002) 11 *African Security Review* 65.

body with no mandate to give binding orders.[191] In response, the teleological approach has the potential to facilitate a holistic interpretation of the provisions of the African Charter in a manner that influences states to comply with decisions in good faith. The teleological approach enables interpretive organs to demonstrate that their recommendations are not alien to the Charter but that they rather emanate from it and reveal the effective meaning of socio-economic rights envisaged by the drafters.

States also challenge the mandate of the interpretive organs to review states' implementation of socio-economic rights.[192] In a broader context interpretation involves the mandate of the interpretive organs to review states' compliance to socio-economic rights obligations. It is in this spirit that the teleological approach becomes an appropriate approach for interpreting various provisions of the African Charter to read into the African Charter a model of review that advances the accountability for violations of socio-economic rights by states. Interpretive organs should apply a model of review that clears states' doubts regarding their sovereignty and discretion on socio-economic policies. A model of review is a vital mechanism to ensure that states advance the object and purpose of the African Charter by implementing their obligations. The teleological approach can be applied to demonstrate the model of review implicitly incorporated in the African Charter.

4 Coherent application of the teleological approach: Methodology

The major challenge facing the African Commission and the African Court is the inconsistencies in the application of these aspects of the teleological approach. In the *SERAC* case the African Commission relied exclusively on ICESCR. In some communications such as *Purohit* and Gunme it mixed the teleological approach and the narrow textual approach. The African Court also mixed the two approaches in the *Ogiek* case. In *Endorois* the African Commission made good use of the relevant provisions of the African Charter and the relevant international and regional human rights instruments only. This part suggests a methodology for the application of the teleological approach to guide the interpretive organs.

191 'Botswana will not honour African Union ruling on Prof Good' *Sunday Standard* 2 August 2010, http://www.sundaystandard.info/article.pnp?NewsID=8415&GroupID=1 and quoted in R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human Rights' (2014) 36 *Human Rights Quarterly* 353.

192 Yeshanew (n 31) 79-80.

4.1 Interpreting the socio-economic rights in the African Charter in light of its object and purpose

The object and purpose of the African Charter are vital for developing the effective meaning, scope and content of socio-economic rights and their related obligations. The significance is threefold. First, it helps the interpretive organs to identify the goals to be achieved, in relation to the substantive and procedural provisions being interpreted. Second, it helps the interpretive organs to identify the interpretive aids enshrined in the African Charter as a whole. As Swart correctly argues, the object and purpose of the treaty guides the interpretive organs to interpret the treaty in its entirety.[193] Third, it assists the interpretive organs to identify appropriate external interpretive aids that can be consulted during the interpretative process. As Senden rightly observes, the interpretive organs establish the interpretive aids to support the interpretation of the treaty through the object and purpose.[194] Thus, referring to the object and purpose of the African Charter requires the interpretive organs to take internal and external interpretive aids into account when interpreting its socio-economic rights provisions. The interpretive organs should engage these interpretive aids in line with the methodological sequence explained in order to give effect to the object and purpose of the African Charter.

4.1.1 Textual synthesis

In identifying the object and purpose of the socio-economic rights provisions in the African Charter the interpretive organs should start with the textual synthesis to identify the object and purpose of the African Charter in relation to the socio-economic rights provisions being interpreted. This sequence is justified within the provisions of articles 31(1)(2) of the Vienna Convention. Through the textual synthesis, the interpretive organs should apply the key elements, emerging from the African Charter read as a whole, to develop the meaning of the socio-economic rights provisions. The interpretive organs should begin with the Preamble to the African Charter and its clauses elaborated above.

Furthermore, the interpretive organs should engage the substantive provisions of articles 1 to 5 of the African Charter elaborated above. These articles are significant in that they strengthen the values

193 M Swart 'Is there a text in this court? The purposive method of interpretation and the *ad hoc* tribunals' (2010) 70 *Heidelberg Journal of International Law* 782.
194 Senden (n 27) 210.

stated in the Preamble to the African Charter. They also facilitate the construction of socio-economic rights.[195] For example, the right to equality enables the equal distribution of public resources related to socio-economic rights such as health, labour and education.[196] The provision of poor-quality food, and the denial of access to adequate medical care violate the right to dignity.[197] Furthermore, these provisions can be used to identify the socio-economic rights implicit in the African Charter through their socio-economic dimensions. They can, therefore, give effect to the scope of the socio-economic rights in the African Charter[198] and further the notion of the interdependence of rights. As Viljoen rightly argues, socio-economic rights are inter-linked with civil and political rights.[199]

Moreover, the textual synthesis creates room for interpretive organs to engage other civil and political rights provisions to give meaning to socio-economic rights. These rights include the rights to be heard, freedom of conscience, freedom of information, freedom of association, freedom of assembly, freedom of movement and residence, and equal access to public services.[200] Bulto rightly argues that the use of civil and political rights can help to enrich the scope and content of socio-economic rights.[201] Moreover, the textual synthesis provides interpretive organs with the scope to engage the duties provisions to ascertain the object and purpose of the African Charter in relation to socio-economic rights. These provisions include articles 27 to 29 of the African Charter.

4.1.2 Preparatory work of the African Charter

At the second stage of the interpretative process, interpretive organs should consider the African Charter's preparatory work, which embodies the object and purpose of the African Charter and should be applied as a primary interpretative tool. Thus, at this stage the interpretive organs should apply all relevant preparatory work detailed in part 2.3 above.

195 Odinkalu (n 7) 188-189.
196 TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *University of Tasmania Law Review* 163.
197 C Heyns 'Civil and political rights in the African Charter' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 150.
198 Bulto (n 196) 159.
199 Viljoen (n 7) 320.
200 Arts 7-13 African Charter.
201 Bulto (n 196) 158.

4.1.3 Reference to the relevant international treaties and the parties' subsequent agreements and practices

At the third stage of the interpretative process, interpretive organs should have recourse to other relevant international treaties, as well as the parties' subsequent agreements and conduct. The significance of applying the relevant international treaties at the third stage of the interpretative process is fourfold. First, they fill in the *lacunae* in the African Charter, which could not be solved by the application of the textual synthesis and the preparatory work. Second, they help to resolve ambiguities in the textual formulation of the provisions being interpreted. Third, they guarantee international acceptance of the interpretive organs' decisions. Fourth, they help to achieve external coherence[202] for maximum harmonisation between the interpretation of socio-economic rights provisions in the African Charter and the interpretation of socio-economic rights in line with other international and regional treaties recognised by African states. The relevant international laws to be applied[203] by the supervisory organs are provided in articles 60 and 61 of the African Charter, as well as articles 3 and 7 of the African Court Protocol and article 31 of the African Court of Justice Protocol.[204]

4.1.4 Principle of effectiveness

The principle of effectiveness as elaborated upon should be integrated throughout the above-mentioned interpretative process. This engagement is useful in ensuring that all interpretive aids referred to by interpretive organs assist in attaining the practical and effective meaning of the provisions being interpreted. Constant engagement of the principle of effectiveness ensures the effectiveness of treaty provisions.[205] The effectiveness of the provisions implies that the rights are broadly interpreted, and their restrictions are interpreted narrowly. Moreover, the principle of effectiveness ensures consistency and uniformity in the interpretation of the treaty.[206] This principle

202 The term 'external coherence' was used by Rietiker in his work on the principle of effectiveness to mean the interpretation of a treaty in light of other relevant international sources. See Rietiker (n 148) 271. In this article the term 'external coherence' is applied in the context envisaged by Rietiker and expanded to include relevant national legal sources.

203 The author develops the methodology for application of the relevant international treaties in Amin (n 7) 80-81.

204 The African Court of Justice Protocol has not yet entered into force. However, the discussion in this part is relevant to the understanding of art 31 of the African Court of Justice Protocol which provides for the laws that the African Court of Justice should be consulting in the interpretation of the African Charter.

205 N Fennelly 'Legal interpretation at the European Court of Justice' (1996) 20 *Fordham International Law Journal* 674.

206 As above.

also guarantees an interpretation of a treaty that addresses the conditions prevalent at the time of interpretation. In this regard, all four dimensions of this principle should be engaged in the entire interpretative process.

5 Conclusion

This article has shown that effective interpretation of socio-economic rights in the African Charter largely depends on its interpretive organs. To achieve effective interpretation, the interpretive organs should be guided by an appropriate approach to interpretation throughout the interpretative process.

The African Charter formulates socio-economic rights in generic form. As such, the meaning, scope and content of these rights and their related obligations remain unclear. Moreover, the African Charter lacks an express formulation of a significant number of socio-economic rights, as well as the nature of obligations imposed by these rights. Based on their potential to transform the socio-economic conditions of African people, the interpretive organs should apply an approach to interpretation that is suitable for interpreting socio-economic rights and their related obligations broadly.

The article demonstrates that the teleological approach to interpretation is appropriate for effectively interpreting socio-economic rights in the African Charter. However, it warns that this approach is feasible only if supervisory organs apply its tenets systematically rather than randomly. It argues that the systematic application of the teleological approach will assist supervisory organs to establish the object and purpose of the African Charter in relation to these rights. The article, therefore, develops the methodology for the application of the teleological approach to enable supervisory organs to apply this approach systematically.

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The right to return to one's country in Africa: Article 12(2) of the African Charter on Human and Peoples' Rights

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Summary: *At the height of the COVID-19 pandemic many African countries barred people, including citizens and foreign nationals, from entering or leaving their territories. This was the case although article 12(2) of the African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country'. However, article 12(2) also provides that '[t]his right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'. Article 12(2) of the African Charter provides for the rights both to leave and to return to one's country. In this article the discussion is limited to the right to return. Unlike other regional human rights treaties in Europe, the Americas and the Arab world where the right to return to or enter one's country is reserved for citizens only, the African Charter does not expressly limit this right to citizens. This raises the question of whether the right to return to one's country is reserved for citizens or nationals only. In answering this question, one of two arguments could be made. The first argument is that the right to return under article 12(2) is reserved for citizens only (the strict approach). The second argument is that it is applicable to both citizens and to a few categories of foreign nationals (the broader approach). The jurisprudence of the*

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*African Commission and the African Court shows that these bodies have adopted the strict approach. This could be attributed to the fact that the communications they have so far dealt with have been filed by citizens (*de jure *or* de facto*) or on behalf of citizens. However, these bodies are likely to adopt a broad approach should the facts of the case(s) so require. In the constitutions of most African countries, states have also taken a strict approach. This article explains why it is better to take a broader approach when dealing with article 12(2) of the African Charter. This argument is made by partly comparing and contrasting article 12(2) of the African Charter with other regional and international instruments that protect the right to return. The article also demonstrates how the right to enter or return to one's county has been approached in the constitutions of different African countries.*

Key words: *return; article 12(2); African Charter; one's country; entry; African Court; African Commission*

1 Introduction

Article 12(2) of the African Charter on Human and Peoples' Rights (African Charter)[1] provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.' Many African countries have ratified the International Covenant on Civil and Political Rights (ICCPR).[2] Article 12(4) of ICCPR provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'.[3] During the initial phase of the COVID-19 pandemic, countries in different parts of the world put in place measures to combat and prevent the spread of the Corona virus. One such measure was a restriction on the movement of people to and from these countries.[4] These measures not only

1 African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67 /3/Rev.5.

2 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. For the ratifications, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 25 March 2021).

3 The Court of Justice of the Economic Community of the West African States held that art 12(2) of the African Charter and art 12(4) of ICCPR are applicable to the movement of both people and goods. See *Ugwuaba v State of Senegal* (ECW/CCJ/JUD/25/19) [2019] ECOWASCJ 1 (28 June 2019).

4 For the measures taken by countries outside Africa to restrict the movement of people to and from their territories, see F Mégret 'COVID-19 symposium: Returning "home" – Nationalist international law in the time of the Coronavirus' *OpinioJuris* 30 March 2020, http://opiniojuris.org/2020/03/30/covid-19-

impacted on citizens, but also on migrants (including refugees)[5] and non-nationals (whether or not they had resided in the countries in question).[6] In order to give effect to this measure, ports of entry such as airports and borders were generally closed.[7] Three African countries, Senegal,[8] Namibia[9] and Ethiopia,[10] notified the Secretary-General of the UN that they had derogated from provisions of ICCPR including from article 12. Because the African Charter does not include a provision on derogation, it does not impose an obligation on state parties to notify the African Union (AU) of any derogation in cases of an emergency. This could explain why none of the African countries informed the AU that they had derogated from any of the provisions of the African Charter during the COVID-19 pandemic. It is also important to remember that the African Commission on Human and Peoples' Rights (African Commission) has held that all the rights in the African Charter are non-derogable.[11] African countries restricted the movement of people in different ways. Some countries, such as Lesotho,[12] Uganda[13] and Ghana,[14] prohibited all people, including citizens, from returning to their countries during

symposium-returning-home-nationalist-international-law-in-the-time-of-the-coronavirus/ (accessed 25 March 2021).

5 P Pillai 'COVID-19 symposium: COVID-19 and migrants – Gaps in the international legal architecture?' *OpinioJuris* 4 April 2020, http://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture/ (accessed 25 March 2021).

6 L Piccoli, J Dzankic & D Ruedin 'Citizenship, migration and mobility in a pandemic (CMMP): A global dataset of COVID-19 restrictions on human movement' (2020) 16 *PLoS One* 1, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0248066 (accessed 25 March 2021).

7 The airports and borders were open for cargo and essential services and also for the evacuation of foreign nationals.

8 See https://treaties.un.org/doc/Publication/CN/2020/CN.298.2020-Eng.pdf (accessed 25 March 2021).

9 See https://treaties.un.org/doc/Publication/CN/2020/CN.303.2020-Eng.pdf (accessed 25 March 2021).

10 See https://treaties.un.org/doc/Publication/CN/2020/CN.243.2020-Eng.pdf (accessed 25 March 2021).

11 See *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41, where the African Commission held that '[i]n 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 article 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".'

12 Regulation 3(1) of the Public Health Act, 1970: Public Health (COVID-19) Regulations, 2020 (2) (Legal Notice 41 of 2020) (6 May 2020) provided that '[n]o persons are allowed into or out of Lesotho during the period of lockout'.

13 See *Uganda v Hon Sam Kuteesa & Others* (HCT-00-CR-CM-CV-0010-2020) (30 August 2020) (private prosecution instituted against a cabinet minister who brought his family members into Uganda contrary to the COVID-19 regulations barring entry into Uganda).

14 Regulation 5(1) of the Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020 (Executive Instrument 64 of 2020) (23 March 2020) (the restriction was for two weeks but could be extended).

the height of the pandemic. Other countries, such as South Africa,[15] Botswana[16] and Zimbabwe[17] allowed not only citizens but also permanent residents (in the case of South Africa) or residents (in the case of Zimbabwe and Botswana) to return. Countries such as Namibia[18] and Malawi[19] allowed citizens, permanent residents, those domiciled in these countries and those who were lawful residents (in the case of Namibia) or ordinary residents (in the case of Malawi) to return. Although there was a general prohibition on the movement of people to and from these countries, there were exceptions with regard to those people who were essential for the movement of cargo, goods and services. After realising that several rights in the African Charter, including the right to freedom of movement, were being violated or limited, the African Commission called upon state parties to the African Charter to ensure that human rights are protected in the fight against COVID-19.[20] In particular, the African Commission called upon state parties to ensure that the right to freedom of movement of migrants, refugees, asylum seekers and stateless persons was protected in the fight against COVID-19.[21]

In different African countries the implementation of COVID-19 regulations was challenged on grounds such as inadequate provision of essential services for the most vulnerable;[22] that they were passed contrary to the Constitution;[23] and that they were in violation of

15 See Regulation 41(2) of the Disaster Management Act 2002: Regulations relating to COVID-19 (Government Notice R480 of 2020) (29 April 2020). See also generally Temporary Measures in Respect of Entry into or Exit Out of the Republic in Order to Prevent and Combat the Spread of the COVID-19 (Government Notice 416 of 2020) (26 March 2020).

16 See Regulation 2 of the Public Health (Prohibition of Entry into Botswana) Order 2020 (Statutory Instrument 31 of 2020) (20 March 2020); Regulation 2 of the Public Health (Prohibition of Entry into Botswana) Order 2020 (Statutory Instrument 37 of 2020) (24 March 2020).

17 Regulation 8(1)(a) of the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order 2020 (Statutory Instrument 83 of 2020) (28 March 2020).

18 Regulation 10(1) of the Stage 4: COVID-19 Regulations (Proclamation 28 of 2020) (29 June 2020).

19 Regulation 14(1) of the Public Health (Corona Virus Prevention, Containment and Management) Rules 2020 (Government Notice 5 of 2020) (9 April 2020).

20 Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery from its Socio-Political Impacts – ACHPR/Res. 449 (LXVI) 2020.

21 Resolution on Human and Peoples' Rights (n 20) para 13.

22 *Markham & Another v Minister of Health and Child Care & 3 Others* (HH 263-20, HC 2168/20) [2020] ZWHHC 263 (15 April 2020) (Zimbabwe). The argument that the government should have passed regulations to provide food, water and cash hand-outs to the most vulnerable during the lockdown was dismissed by the Court because the applicants cited wrong respondents. See also *Centre for Food and Adequate Living Rights (CEFROHT) v Attorney-General* (Miscellaneous Cause 75 of 2020) [2020] UGHCCD 157 (4 June 2020) (Uganda) where the application to compel the government to issue guidelines to provide food for the most vulnerable during the pandemic was dismissed.

23 *NEF & Others v President of the Republic of Namibia & Others* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 July 2020) (the Court held that

rights such as the right to family life.[24] However, there is no reported case where a person challenged the regulations relating to the right to enter one's country during the pandemic. The constitutions of different African countries provide for circumstances in which nationals and non-nationals may return to their countries. The African Commission and the African Court on Human and Peoples' Rights (African Court) have handed down a few judgments on article 12(2) of the African Charter. Since most African countries have ratified the African Charter,[25] courts in some of these countries may find the jurisprudence of the African Commission and African Court persuasive when interpreting the relevant constitutional provisions on the right to enter or return to one's country. I highlight case law from some African countries in which courts have interpreted the right to enter or return to one's country. I shall first briefly explain the right to enter or return under article 12(2) and how the African Commission and African Court have interpreted this provision.

2 Understanding article 12(2) of the African Charter

As mentioned above, article 12(2) of the African Charter provides for the rights to leave and return to one's country.

Although the African Commission has adopted a General Comment on the right to freedom of movement, it thus far is limited to article 12(1) of the African Charter.[26] Article 12(1) of the African Charter provides that '[e]very individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law'. It is beyond the scope of this article to discuss how the African Commission and African Court have interpreted article 12(1).[27] The African Commission has not yet explained its understanding of article 12(2) through a General Comment. However, as the discussion below illustrates, it has dealt with some communications on article 12(2). Article 12(2) provides for two rights. The first is the right to leave any country[28] and the second

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some regulations were unconstitutional). See also *State (on application of Lin Xiaoxiao et al) v The Director General – Immigration and Citizenship Services and The Attorney-General* (Judicial Review Case 19 of 2020) [2020] MWHC 5 (03 April 2020) (the Malawian High Court explaining the circumstances in which a state of emergency may be declared).

24 See, eg, *CD & Another v Department of Social Development* (5570/2020) [2020] ZAWCHC 25 (14 April 2020) (movement of children).

25 Morocco is the only country in Africa that is yet to ratify this treaty.

26 See General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (art 12(1)), adopted 10 November 2019.

27 For the relevant case law on art 12(1), see General Comment 5 (n 26).

28 In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) para 47 the African Commission held that

right is the right of a person to return to his country.[29] Both rights are available to 'every individual'. However, whereas every individual has a right to leave 'any country, including his own', the right to return is only available when the individual in question is returning to 'his country'. This raises the issue of whether the right to return to one's country is reserved for citizens or nationals only. In answering this question, one of the two arguments could be made. The first argument is that the right to return under article 12(2) is reserved for citizens only (the strict approach). The second argument is that it is applicable to both citizens and to a few categories of foreign nationals (the broader approach). Although the African Commission has handed down many decisions, very few of these deal with a communication addressing the right to return under article 12(2). Similarly, the African Court, to a limited extent, has dealt with the right to return under article 12(2).

Unlike some of the provisions of the African Charter which provide that some rights are for citizens only,[30] the right under article 12(2) is for 'every individual'. Likewise, unlike other regional human rights instruments, such as article 3(1) of Protocol 4 to the European Convention on Human Rights (European Convention),[31] article 22(5) of the American Convention on Human Rights,[32] and article 22 of the Arab Charter on Human Rights,[33] where the right to return to or

'[t]he communication alleges that on 6th August 1995, Mr Nongma Ernest Ouédraogo, Secretary General of the political party known as "Bloc Socialiste Burkinabé" was prevented from leaving the national territory, following the publication by the said party of a statement on the situation in the country. Information available to the Commission does not point to any threat to public security or morality that either the journey or even the person of the said Mr Ouédraogo could have represented. Therefore, it agrees that there was violation of Article 12(2).'

29 In *Jawara v Gambia* (2000) AHRLR 107 (ACHPR 2000) para 70 the African Commission referred to the right under art 12(2) as 'the right of ingress and egress'.

30 See eg art 13 which provides: '[1] Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. [2] Every citizen shall have the right of equal access to the public service of his country. [3] Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

31 Art 3(2) of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto Strasbourg (16.IX.1963) provides that '[n]o one shall be deprived of the right to enter the territory of the state of which he is a national'. The European Court of Human Rights has observed that art 3(2) is applicable to nationals. See *Khlaifia & Others v Italy* (Application 16483/12) (15 December 2016) para 46; *Shchukin & Others v Cyprus* (Application 14030/03) (29 July 2010) paras 143-145.

32 Art 22(5) of the American Convention on Human Rights, adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969 provides that '[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it'.

33 Art 22 of the Arab Charter on Human Rights (15 September 1994) provides that '[n]o citizen can be expelled from his own country, or deprived of the right to

enter one's country is available to citizens only, the African Charter does not expressly provide that the right to return to one's country is applicable to citizens or nationals only. It may thus be argued that, literally interpreted, 'every individual' under article 12(2) of the African Charter does not necessarily mean every citizen or national. Otherwise, the drafters of the Charter would have expressly stated so as they did with regard to other provisions of the Charter. This interpretation is strengthened when article 12(2) is read, for example, with article 13 of the Charter which provides for the rights of 'every citizen', on the one hand, and of 'every individual', on the other.

The above interpretation would be in line with the interpretation the Human Rights Committee recently adopted when dealing with the right to enter one's country under article 12(4) of ICCPR. As mentioned above, article 12(4) of ICCPR provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. In its General Comment 27 the Human Rights Committee observed:[34]

> The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

Although in its earlier case law the Human Rights Committee had held that article 12(4) is applicable to citizens only,[35] this position

return to it'.

34 General Comment 27, Freedom of Movement (art12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999) para 20.

35 *Stewart v Canada* Communication 538/1993, UN Doc A/52/40, Vol II 47 (HRC 1996); *Giosue Canepa v Canada* (CCPR/C/59/D/558/1993) (20 June 1997); *Toala v New Zealand* Communication 675/1995, UN Doc CCPR/C/63/D/675/1995 (HRC 1998).

has recently changed and the Committee, relying on General Comment 27, had expanded the categories of people, in addition to citizens, who are protected under article 12(4) of ICCPR.[36] This is the case although the *travaux préparatoires* of article 12(4) show that the drafters of this provision made it very clear that it is applicable to citizens only and the arguments that it should be extended to permanent residents, long-term residents and stateless persons were rejected.[37] The jurisprudence of the African Commission and African Court suggests that the Commission and the Court are likely to interpret article 12(2) as referring to the rights of citizens and a limited category of non-nationals to return to their countries. The jurisprudence of the African Commission is discussed first followed by that of the African Court.

2.1 The African Commission and article 12(2)

In one of its earlier decisions the African Commission expressed no opinion on whether the respondent state had violated article 12(2). This was the case although the applicants, whose citizenship had been contested by the Zambian government, had argued that their deportation to Malawi violated their right under article 12(2).[38] However, in its later decisions the African Commission dealt with article 12(2). For example, in *Huri Laws v Nigeria*[39] the complainant, a non-government organisation (NGO), argued that the Nigerian government had arrested its senior employees (Nigerian nationals) whenever they came back from abroad on human rights-related

36 *Stefan Lars Nystrom v Australia* (CCPR/C/102/D/1557/2007) (1 September 2011); *Jama Warsame v Canada* (CCPR/C/102/D/1959/2010) (1 September 2011); *Deepan Budlakoti v Canada* (CCPR/C/122/D/2264/2013) (29 August 2018).

37 See, generally, Economic and Social Council, Commission on Human Rights, 6th session, Comments of Governments on the draft International Covenant on Human Rights and measures of implementation (4 January 1950) (E/CN.4/353/Add.1); Summary record of the 150th meeting of the Commission on Human Rights held on 10 April 1950 (E/CN.4/SR.150) (17 April 1950); Economic and Social Council, Commission on Human Rights Summary record of the 151st meeting held on 10 April 1950 (E/CN.4/SR.151) (19 April 1950); Commission on Human Rights, 8th session: summary record of the 315th meeting (E/CN.4/SR.315)(17 June 1952); General Assembly, 14th session, Draft International Covenant on Human Rights: Report of the Third Committee (A/4299) (3 December 1959); General Assembly, 14th session, official records, 3rd committee, 954th meeting, Thursday, 12 November, 1959, New York (A/C.3/SR.954); General Assembly, 14th session, official records, 3rd committee, 957th meeting, Monday, 16 November, 1959, New York (A/C.3/SR.957).

38 Eg, in *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) the complainants, prominent politicians in Zambia, were deported to Malawi on the allegation that they were not Zambian citizens and were a threat to national security. They argued, *inter alia*, that their deportation was contrary to art 12(2) of the African Charter. However, although the Commission found that Zambia had violated several provisions of the African Charter, it did not express its opinion on whether or not art 12(2) had also been violated.

39 *Huri Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

missions. It argued that 'when re-entry points become sites of frequent harassment and arrest, freedom of movement is infringed' if such arrests cannot be justified on the basis of article 12(2).[40] The Commission referred to article 12 of the African Charter and held that the arrests and detention of the complainant's senior employees at ports of entry 'not being in consonance with the above restrictions is, therefore a violation of the victims' right to freedom of movement under article 12(1) and (2) of the African Charter'.[41] In this communication, the Commission does not clearly explain how the right under article 12(2) was violated. It blurs the distinction between the right to freedom of movement within the borders of the country (article 12(1)) and the right to return to one's country (article 12(2)).[42] Likewise, in *Modise v Botswana*[43] the African Commission held that the deportation of the complainant from Botswana to South Africa, despite the presence of compelling evidence to show that he was a citizen of Botswana, 'infringed upon his right to leave and to return to his country guaranteed by article 12(2) of the Charter'.[44] In *Elgak v Sudan*[45] the African Commission found a violation of article 12(2). In this case the complainants, human rights defenders, were forced to flee Sudan as a result of being harassed and intimated by the government for their human rights work.[46] They argued that 'their continued human rights work, coupled with the complete impunity with which the authorities perpetrated the violations against them, has prevented them from returning to Sudan'.[47] Against that background the Commission held:[48]

> As Sudanese nationals, the Commission considers that Mr Monim Elgak and Mr Amir Osman have a right of return to their country except if it can be shown that their return will be a danger to national security, law and order or public health or morality. This not being the case in the present Communication and without any information from the Respondent State to the contrary, the Commission considers that their

40 *Huri Laws* (n 40) para 50.
41 *Huri Laws* para 51.
42 See also *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) para 81 where the African Commission held that '[t]he allegation of mass transfer of persons from the eastern provinces of the Complainant State to camps in Rwanda, as alleged by the complainant and not refuted by the respondent, is inconstent [*sic*] with Article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection. It is also a breach of the right to freedom of movement, and the right to leave and to return to one's country guaranteed under Article 12(1) and (2) of the African Charter respectively.'
43 *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994).
44 *Modise* (n 44) para 93.
45 *Elgak v Sudan* Communication 379/09) (ACmHPR 14 March 2014).
46 *Elgak* (n 46) para 120.
47 *Elgak* para 125.
48 *Elgak* para 126.

> apprehension of a well-founded fear of persecution by the authorities should they return, is a violation of Article 12(2) of the Charter in respect of Mr Amir Suliman and Mr Monim Elgak.

In this communication, the Commission emphasised the fact that the right to return to one's country is not absolute. However, it can be limited only on the basis of one of the grounds under article 12(2). In *Open Society Justice Initiative v Côte d'Ivoire*[49] the complainant represented members of an ethnic group of children and grandchildren of migrants who were born and had lived in Côte d'Ivoire for all or most of their lives. They argued, *inter alia*, that the government's policy of refusing to recognise them as Ivorian citizens resulted in their inability to obtain passports and travel outside their country.[50] They also argued that some of them were issued with identity papers but that those who had travelled abroad 'were also later denied the renewal of their identity papers and were prevented from travelling, including being prevented from returning to visit their parents in Côte d'Ivoire'.[51] The African Commission referred to its earlier jurisprudence and held that 'the refusal [*sic*] to deprive a foreign resident of his residence permit without a justifiable reason automatically prevents him from moving from one place to another within the territory of the host State'.[52] The Commission concluded:[53]

> [O]wing to the lack of identity documents, the Dioulas have suffered restriction in their movements within Côte d'Ivoire as well as the enjoyment of the freedom to leave the country and to return to the same … [P]ersons belonging to the Dioula ethnic group who have emigrated to other regions of the world have then had the renewal of their identity and travel documents refused. They could not return to Côte d'Ivoire. As a result of the preceding conclusions, the Commission observes that such acts violate the provisions of Article 12 of the Charter.

In this Communication the African Commission recognised the fact that many people of the Dioula ethnic group had been denied Ivorian nationality contrary to the African Charter and called on the Ivorian government to amend its legislation to address this problem.[54] In other words, the Commission considered these people to be *de facto* citizens of Côte d'Ivoire. The above jurisprudence of the Commission shows, *inter alia*, that nationals have a right to return to their country and this right can only be limited by the state if it can show that their return is prohibited on one or more of the grounds under article

49 *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06).
50 *Open Society Justice Initiative* (n 50) para 71.
51 As above.
52 *Open Society Justice Initiative* (n 51) para 160.
53 *Open Society Justice Initiative* para 161.
54 *Open Society Justice Initiative* paras 191-196.

12(2). This jurisprudence also shows that a state party violates article 12(2) if it creates an environment which makes it almost impossible for nationals to return to their country.[55] In other words, for the right under article 12(2) to be violated, the state party does not have to expressly bar nationals from returning to their country. In all the cases in which the African Commission has dealt with article 12(2), the complainants have been nationals of the respondent states[56] or the Commission was of the view that they had been denied or deprived of nationality contrary to the relevant provisions of the African Charter.[57] Put differently, the Commission considered them to be *de facto* nationals. Therefore, it has not been necessary for the Commission to express its opinion on whether article 12(2) is also applicable to non-nationals. However, the Commission's reasoning in cases where it has considered some people to be *de facto* citizens who have a right to identity documents and not to be denied citizenship contrary to the African Charter creates room for the argument that the Commission is likely to adopt a broad interpretation of article 12(2) of the African Charter.

2.2 The African Court and article 12(2)

Since its establishment, the African Court has handed down three judgments dealing with article 12(2).[58] These judgments are discussed in the order in which they were decided. The first case in which the African Court dealt with the right under article 12(2) was that of *Anudo v Tanzania*.[59] In this case the applicant, a Tanzanian citizen, was stripped of his nationality by the Tanzanian authorities

55 See also *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) where the Commission found a violation of art 12(2) because the harassment of the complainant by the government forced him to flee Kenya and there was no guarantee that he would not be harassed by the government on his return. See also *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999) para 30.

56 See also *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 126 where the Commission held that '[e]victing Black Mauritanians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12(1). The representative of the Mauritanian government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the State.'

57 *Open Society Justice Initiative* (n 50); *The Nubian Community in Kenya v The Republic of Kenya* Communication 317/2006.

58 In *Lucien Ikili Rashidi v United Republic of Tanzania* (Application 9/2015) (Judgment of 28 March 2019) the Court found, *inter alia*, that Tanzania had violated art 12(1) of the African Charter when it deported the applicant, a foreign national from the Democratic Republic of the Congo, to Burundi although he was legally residing in Tanzania.

59 *Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248.

and deported to Kenya. He argued, *inter alia*, that his deportation was a violation of his rights to 'freedom of movement and residence in his own country as guaranteed by Article 12 of the Charter'.[60] However, he did not specifically allege that Tanzania had violated his right under article 12(2) of the African Charter. This explains why the Court observed that the application alleged 'the violation of three fundamental rights: (i) the applicant's right to nationality and the right not to be arbitrarily deprived of his nationality; (ii) the right not to be arbitrarily expelled; and (iii) the right to have his cause heard by a court'.[61] However, the Court added that the application, in addition to those rights, also involved the alleged violation of 'other incidental rights'.[62] The Court held that the evidence before it showed that the applicant was a Tanzanian national and that in stripping him of his nationality and deporting him to Kenya, Tanzania had acted arbitrarily and violated the applicable international law principles.[63] The Court observed that although the applicant had not specifically alleged a violation of article 12(2),

> [i]n the opinion of the Court, the relevant portion of this provision which relates to the instant matter is Article 12(2), in particular, the right 'to return to his country'. In the instant case, the Court will consider this aspect, notwithstanding the fact that the Applicant left the Respondent State's territory involuntarily.[64]

After finding that the applicant had been arbitrarily deprived of his nationality, the question the Court had to answer was 'whether a citizen can be expelled from his own country or prevented from returning to his country'.[65] Against that background, the Court referred to the Human Rights Committee's General Comment 27 in which the Committee indicated the circumstances in which a state party to ICCPR may prevent a person from entering his country.[66] The Court added that if Tanzania had considered the applicant a foreign national, his deportation should have complied with article 13 of ICCPR.[67] The Court concluded that the applicant's right under article 13 of ICCPR had been violated.[68] Although the Court did not express its opinion on whether Tanzania had violated article 12(2), its observation that one of the questions it was dealing with was 'whether a citizen can be expelled from his own country or

60 *Anudo* (n 60) para 14.
61 *Anudo* para 61.
62 *Anudo* para 62.
63 *Anudo* paras 63-88.
64 *Anudo* para 96.
65 *Anudo* para 97.
66 *Anudo* para 98.
67 *Anudo* para 100.
68 *Anudo* paras 105-106.

prevented from returning to his country'[69] creates the room for the argument that the Court considered the right under article 12(2) to be applicable to citizens.

The issue of the right under article 12(2) again arose in the case of *Robert John Penessis v United Republic of Tanzania*.[70] The applicant was convicted of being in Tanzania illegally and sentenced to imprisonment. However, even after having served his sentence, he was not released from prison. The Minister of Home Affairs ordered his expulsion from Tanzania after serving his sentence. However, the applicant argued that he was born in Tanzania and that his conviction and expulsion amounted to him being arbitrarily stripped of nationality. The government argued that the applicant was not a Tanzanian citizen but rather a dual citizen of South Africa and the United Kingdom.[71] The applicant argued, *inter alia*, that his expulsion amounted to a violation of articles 12(1) and (2) of the African Charter.[72] He added that the fact that the right to freedom of movement is provided for in the Universal Declaration of Human Rights (Universal Declaration) and ICCPR means that it is a fundamental right and that 'this right involves not only movement within the country but also protection from forced expulsion or displacement'.[73] He submitted that according to articles 12(1) and (2) of the African Charter 'every individual has the right to move freely within a country, the right to leave the same, including his or hers, and return to it, subject only to restrictions provided by law and required for the protection of national security' and that he had 'neither threatened the Respondent State's public order nor breached Article12 of the Charter'.[74] He added that as a Tanzanian citizen, he 'has the right to freedom of movement, including the right to leave and return to his country' and that the jurisprudence of the African Commission shows that the right to freedom of movement was guaranteed to nationals and non-nationals.[75] The state reiterated its submissions that the evidence had showed that the applicant was a foreign national who was on its territory illegally.[76] In resolving this issue, the Court referred to articles 12(1) and (2) of the African Charter[77] and to article 12(1) of ICCPR[78] and held that

69 *Anudo* para 97.
70 *Robert John Penessis v United Republic of Tanzania* (Application 13/2015) (Judgment of 28 November 2019).
71 *Robert John Penessis* (n 71) paras 4-8.
72 *Robert John Penessis* paras 10 and 22.
73 *Robert John Penessis* para 112.
74 *Robert John Penessis* 113.
75 *Robert John Penessis* para 115.
76 *Robert John Penessis* paras 117-120.
77 *Robert John Penessis* para 121.
78 *Robert John Penessis* para 122.

> [t]he right to freedom of movement as enunciated under article 12 of the Charter is guaranteed to 'every individual' lawfully present within the territory of a state regardless of his national status, that is, regardless of whether or not he or she is a national of that state. According to article 12 of the Charter and of ICCPR, this right 'may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'.[79]

The Court added that whereas a state is entitled to enact legislation imposing restrictions on foreign nationals who intend to enter its territory, such restrictions must comply with the state's international law obligations.[80] The Court further held that according to the evidence before it, the applicant was presumed to be a Tanzanian national and that, therefore, he was in the country lawfully and had the right to freedom of movement.[81] In holding that the state had violated article 12(2) of the Charter, the Court reasoned that

> [t]he Applicant has been convicted, detained and sentenced for illegal entry and still continues to be in prison even after having served the two (2) years' prison sentence that was meted out to him in 2010. The Respondent State has not provided any justification for restrictions that would fall under the provision of Article 12(2) of the Charter such as protection of national security, law and order, public health or morality warranting the restriction of the Applicant's freedom of movement.[82]

The above judgment raises a few points that should be emphasised. First, the right to freedom of movement is to be enjoyed by both nationals and non-nationals. This is so because the Court interpreted the words 'every individual' to be broad enough to accommodate both categories – nationals and non-nationals. If this interpretation is to be extended to article 12(2), the implication is that the right to return is also available to non-nationals. However, because the Court had already found that the applicant was a citizen of Tanzania, one would not have expected it to specifically decide whether a foreign national had a right to return to a country in which he or she was not a citizen. Had the applicant been a foreign national, the Court would in all likelihood have relied to the Human Rights Committee's General Comment 27 to decide whether or not he was one of the very few exceptions of non-nationals who have a right to return. This is so because the Court relied on the same General Comment when dealing with the issue of the restrictions on the right to freedom of movement. Second, the Court blurs the distinction between article

79 *Robert John Penessis* para 123.
80 *Robert John Penessis* para 124.
81 *Robert John Penessis* para 125.
82 *Robert John Penessis* para 126.

12(1) and Article 12(2) of the African Charter. Yet, as evidenced by the text of article 12 and the African Commission's General Comment 5,[83] these are distinct rights. It does this by holding that the restrictions on the right to enter one's country under article 12(2) are also applicable to the rights under article 12(1). This article argues that this approach is not supported by the text of article 12 of the African Charter. The restrictions under article 12(2) are only applicable to the right under this specific, namely, article 12(2).

The third case in which the African Court has dealt with article 12(2) is that of *Kennedy Gihana & Others v Rwanda*.[84] All the applicants were Rwandan nationals who were living in exile in South Africa and their passports had been revoked by the Rwandan government without affording them a chance to be heard.[85] They argued, *inter alia*, that the invalidation of their passports amounted to an arbitrary deprivation of their nationality which rendered them stateless and violated many of their rights, including their right to freedom of movement.[86] The Court held that although the government had the power to invalidate the applicants' passports, it had to demonstrate that the revocation of the passports 'was done in line with the relevant international standards'.[87] The Court added that those 'pertinent aforementioned international standards are set out in article 12(2) of the Charter as this provision provides for the right to freedom of movement to which the issue of possession of passports relates'.[88] The Court further held that the provisions of article 12(3) of ICCPR are similar to those of article 12(2) of the African Charter,[89] and that

> [i]n view of the aforesaid provisions, the Respondent State ought to have demonstrated that the revocation of the Applicants' passports was for the purposes of the restrictions set out in Article 12(2) of the Charter and Article 12(2) and (3) of the ICCPR. The Respondent State has not provided any explanation regarding the revocation of the Applicants' passports.[90]

The Court further held that international law prohibits countries from expelling their nationals or rendering them stateless.[91] It observed that in terms of Rwandan law, the applicants were required to be in

83 General Comment 5 on the African Charter: The Right to Freedom of Movement and Residence (art 12(1)).
84 *Kennedy Gihana & Others v Rwanda* (Application 17/2015) (Judgment of 28 November 2019).
85 *Kennedy Gihana* para 3.
86 *Kennedy Gihana* paras 5 & 77.
87 *Kennedy Gihana* para 88.
88 *Kennedy Gihana* para 89.
89 *Kennedy Gihana* para 90.
90 *Kennedy Gihana* para 91.
91 *Kennedy Gihana* para 106.

possession of valid Rwandan passports to be able to travel to Rwanda as citizens.[92] The Court held that

> [b]y arbitrarily revoking the Applicants' passports, the Respondent state deprived them of their traveling documents and consequently prevented them from returning to their country and traveling to other countries and thus exercising their right to freedom of movement as provided under Article 12(2) of the Charter.[93]

Against this background, the Court concluded that Rwanda had violated article 12(2) of the African Charter.[94]

In this case, the Court also links the right under article 12(2) to nationality. This is understandable as all the applicants were Rwandans. However, the Court's reasoning that the restrictions under article 12(3) of ICCPR and, by implication, the reasoning of the Human Rights Committee, are also applicable to the right to return to one's country under article 12(2) of the African Charter and should not create the impression that the right to enter one's country under article 12(4) of ICCPR is also subject to the restrictions under article 12(3) of ICCPR. This is because unlike article 12(2) of the African Charter, which provides for specific circumstances in which the right to return to one's country may be restricted, article 12(4) of ICCPR provides that the right should not be 'arbitrarily' taken away. This distinction is important because, unlike the African Charter which provides for the rights to leave any country and to return to one's country in one paragraph, these rights are provided for in separate paragraphs of ICCPR and, therefore, are subject to different restrictions.

3 Examining article 12(2) in light of the Universal Declaration and ICCPR

Another point to make about article 12(2) is that it provides for every individual's right to 'return to his country'. This is the same language used in article 13(2) of the Universal Declaration which is to the effect that '[e]veryone has the right to leave any country, including his own, and to return to his country'. However, it is different from the language used in article 12(4) of ICCPR which provides for 'the right to enter his own country'. For a clear understanding of the difference in the two provisions, one may benefit from the drafting history of article 12(4) of ICCPR.

92 *Kennedy Gihana* para 107.
93 *Kennedy Gihana* para 108.
94 *Kennedy Gihana* para 109.

The earlier draft of article 12(4) of ICCPR provided that '[a]nyone is free to return to the country of which he is a national'.[95] However, it was later amended to provide that 'anyone shall be free to enter the country of which he is a national'.[96] In explaining the rationale behind replacing the word 'return' with 'enter', the representative of the United States at the Commission of Human Rights, which was entrusted by the UN General Assembly to come up with the draft ICCPR, argued that the 'amendment was intended to extend the right accorded by guaranteeing to persons born abroad the right to enter the country of which they were nationals'.[97] This rationale was supported by delegates from countries such as Lebanon,[98] India[99] and Chile.[100] The delegate from the Philippines said that he supported the amendment because 'persons who wished to clear themselves of charges against them would be free to enter the country of which they were nationals'.[101] Thus, there are two possible interpretations of article 12(2) of the African Charter. Strictly interpreted, the right under article 12(2) of the African Charter can only be claimed by a person, whether or not a citizen, who has already been in the country in question and where he or she is interested in returning to this country. In other words, they are exercising the right of return. They are returning to the country in which they have been living. This would exclude citizens who have never been to such a country, for example, those who were born abroad. Broadly interpreted, it also covers citizens who were born abroad and who wish to enter a given country and also non-nationals who have lived in the country in question and would wish to return to it.

It is argued that the broad interpretation should take precedence over the strict interpretation. This is so because it protects the right of a citizen to enter his or her country (irrespective of whether they have been in that country before) and it also enables a non-citizen to enjoy the rights associated with his return to a country in which he or she had been living. In more than one communication the African Commission has held that the deportation or expulsion of

95 Report of the 5th session of the Commission on Human Rights to the Economic and Social Council, Lake Success, New York, 9 May-20 June 1949 (E/1371, E/CM.4/350) (23 June 1949) 32.
96 Economic and Social Council, Commission on Human Rights, 6th session, Comments of Governments on the draft International Covenant on Human Rights and measures of implementation (4 January 1950) (E/CN.4/353/Add.1) (Annex).
97 Summary record of the 150th meeting of the Commission on Human Rights held on 10 April 1950 (E/CN.4/SR.150) (17 April 1950) para 48.
98 Summary record (n 98) para 54.
99 Summary record paras 58-60.
100 Summary record paras 63-65.
101 Economic and Social Council, Commission on Human Rights Summary record of the 151st meeting held on 10 April 1950 (E/CN.4/SR.151) (19 April 1950) para 54.

non-nationals should not be done contrary to the African Charter. In particular, these should not be carried out in violation of the rights in the African Charter, including the right to family life.[102] This interpretation should be extended to the issue of preventing non-nationals from returning to countries in which they had lived for a long time and where, for example, they have family ties.

The final comment to be made on the right under article 12(2) of the African Charter relates to the circumstances in which this right may be limited. Article 12(2) of the African Charter provides that the right to return to one's country 'may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality'. This means that the right to return to one's country is not absolute. However, there are very limited circumstances in which this right can be restricted. First, there has to be a law that imposes restrictions on this right. Second, there are only four circumstances in which the law can restrict the right to enter one's country, namely, (i) for the protection of national security; (ii) for the protection of law and order; (iii) for the protection of public health; and (iv) for the protection of morality. This means that any law that is enacted to restrict the right under article 12(2) has to be aimed at achieving one or more of the above aims, otherwise it would be contrary to article 12(2). This explains why, as mentioned earlier, many countries closed their borders in the early stages of the COVID-19 pandemic to prevent citizens and non-citizens from 'bringing' the Corona virus into their territories. This was done to protect public health. Unlike under article 12(4) of ICCPR where a state can restrict the right to enter one's country provided the restrictions are not arbitrary, state parties to the African Charter have very little room to manoeuvre. This is so because the purposes for which the restrictions may be imposed are specifically provided for in article 12(2) of the African Charter. The Human Rights Committee has also explained the circumstances in which the right to enter one's country under article 12(4) of ICCPR may be restricted. The Human Rights Committee's General Comment does not provide examples in which a state may be justified in preventing a person from entering his country. It gives general guidelines to the following effect:[103]

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all state action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the

102 *Good v Republic of Botswana* Communication 313/05) paras 209-215.
103 General Comment 27, Freedom of Movement (art12) UN Doc CCPR/C/21/Rev.1/Add.9 (1999) para 21.

> provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A state party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

In its jurisprudence on article 12(4), the Human Rights Committee held that deporting a permanent resident from his country of residence, on the ground of his criminal record, to a country with which he has no social or economic links whatsoever, would be contrary to article 12(4) especially if the permanent resident is a rehabilitated offender.[104]

Against that background, we now illustrate how the right to return to or enter one's country has been addressed in the constitutions of different African countries. This is important because it was on the basis of these constitutions that many African countries, including those that did not notify the UN Secretary-General about their derogations from some of the provisions of ICCPR, restricted the right to freedom of movement during the COVID-19 pandemic.

4 The right to return to or enter one's country in African constitutions and case law

African countries have dealt with the right to return in different ways. In some countries it is referred to as the right to enter one's country,[105] whereas in others it is referred to as the right to return to one's country.[106] In other countries, citizens have the right to enter and also return.[107] As mentioned above, the drafting history of ICCPR shows that these two terms do not mean one and the same thing.

104 *Jama Warsame v Canada* (CCPR/C/102/D/1959/2010) (1 September 2011); *Deepan Budlakoti v Canada* (CCPR/C/122/D/2264/2013) (29 August 2018).

105 Art 17(1) of the Constitution of Tanzania (1977); art 21(2) of the Constitution of Somalia (2012); art 25(2) of the Constitution of Seychelles (1993); art 41(1) of the Constitution of Nigeria (1999); art 13(b) of the Constitution of Liberia (1986); art 39(3) of the Constitution of Kenya (2010); sec 21(3) of the Constitution of South Africa (1996); art 66(1)(a) of the Constitution of Zimbabwe (2013).

106 See, eg, art 25 of the Constitution of Tunisia (2014); art 60(2) of the Constitution of Sudan (2019); art 27(2) of the Constitution of South Sudan (2013); art 26(2) of the Constitution of Rwanda (1993); art 1(3) of the Constitution of Gabon (2011); art 32(2) of the Constitution of Ethiopia (1994); art 19(9) of the Constitution of Eritrea (1997); art 21 of the Constitution of Côte d'Ivoire (2016); art 48 of the Constitution of Chad (2018); art 49(2) of the Constitution of Cape Verde (1980); art 46(2) of the Constitution of Angola (2010); art 22(1) of the Constitution of Congo (Brazzaville) (2015); art 62 of the Constitution of Egypt (2014); art 22(1)(c) of the Constitution of Zambia (1991); art 33 of the Constitution of Burundi (2008).

107 See, eg, art 29(2)(b) of the Constitution of Uganda (1995).

However, for the purposes of the discussion below, unless otherwise expressly stated in a relevant constitutional provision, the words 'enter' and 'return' will be used interchangeably.

In most countries the right to return is only applicable to citizens or nationals[108] whereas in a few other countries it is available to 'all persons',[109] to 'every person',[110] or to 'any resident'.[111] In some African countries courts have dealt with the right to return to one's own country. For example, the Constitutional Court of Zimbabwe held that a regulation that prohibited a citizen from entering Zimbabwe violated his right to enter his country and was unconstitutional.[112] The South African Constitutional Court[113] and the Kenyan High

108 Art 46(2) of the Constitution of Angola (2010); art 49(2) of the Constitution of Cape Verde (1980); art 48 of the Constitution of Chad (2018); art 22(1) of the Constitution of Congo (2015); art 21 of the Constitution of Côte d'Ivoire (2016); art 19(9) of the Constitution of Eritrea (1997); art 32(2) of the Constitution of Ethiopia (1994); art 1(3) of the Constitution of Gabon (2011); art 25(3) of the Constitution of The Gambia (2018); art 39(3) of the Constitution of Kenya (2010); art 13(b) of the Constitution of Liberia (1986); art 41(1) of the Constitution of Nigeria (1999); art 26(2) of the Constitution of Rwanda (1993); art 25(2) of the Constitution of Seychelles (1993); art 21(2) of the Constitution of Somalia (2012); art 27(2) of the Constitution of South Sudan (2011); art 60(2) of the Constitution of Sudan (2019); art 17(1) of the Constitution of Tanzania (1977); art 25 of the Constitution of Tunisia (2014); art 29(2)(b) of the Constitution of Uganda (1995); art 22(1)(c) of the Constitution of Zambia (1991); art 66(1)(a) of the Constitution of Zimbabwe (2013); sec 21(3) of the Constitution of South Africa (1996); art 62 of the Constitution of Egypt (2014); art 22(1)(c) of the Constitution of Zambia (1991); art 33 of the Constitution of Burundi (2008).

109 Art 30 of the Constitution of the Democratic Republic of the Congo (2005) provides that '[a]ll persons who are on the national territory have the right to circulate freely in it, to establish their residence in it, to leave it and to return to it, under the conditions established by the law'. See also art 26(1) of the Constitution of Swaziland (2005); art 21(1)(g) of the Constitution of Ghana (1996); art 15(1) of the Constitution of Mauritius (1968); art 24(4) of the Constitution of Morocco (2011); art 21(1)(i) of the Constitution of Namibia (1991).

110 Art 39(2) of the Constitution of Malawi (2017); art 18(1) of the Constitution of Sierra Leone (1991).

111 Art 12(1) of the Constitution of Madagascar (2010) provides that '[a]ny resident Malagasy has the right to leave the national territory and to return to it within the conditions established by the law'.

112 *Madzimbamuto v Registrar General & Others* (CCZ 114/13) [2014] ZWCC 5 (4 June 2014).

113 In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 para 18 the Court held that '[t]he right, in terms of the ICCPR, to enter a particular country is accordingly reserved for nationals only. This would reserve to States Parties the right to regulate nationality, citizenship or naturalisation.' See also *Nandutu & Others v Minister of Home Affairs & Others* 2019 (5) SA 325 (CC) para 98.

Court[114] and Court of Appeal[115] referred to article 12(4) of ICCPR and held that the right to enter one's own country applied to citizens only. This should be understood against the background that the constitutions of these countries provide that the right to enter one's country is for citizens only. This raises the question as to the compatibility of these constitutional provisions with article 12(4) of ICCPR as interpreted by the Human Rights Committee in General Comment 27 and the relevant case law mentioned above. It also means that this approach could be contrary to article 12(2) of the African Charter if it is interpreted to mean that it provides for the right of every individual, as opposed to citizens only, to return his or her country.

The constitutions of some of these countries in which the right to entry is reserved for citizens also require courts to refer to international law in interpreting the Bill of Rights.[116] Even in some countries where the constitutions do not require courts to refer to international law when interpreting the Bills of Rights, courts often refer to international law.[117] Should courts in these countries be confronted with the issue of whether a foreign national who belongs to one of the exceptions

114 In *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another* [2013] eKLR para 27 the High Court held that '[t]he right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law'. In this case a Pakistan national, who was on a working permit in Kenya for less than two years, was deported and he argued, *inter alia*, that he had a right to return to Kenya as he had a family in that country. See also *Kamal Jadva Vekaria v Director-General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR para 32; *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 Others* [2015] eKLR 7; *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR para 395; *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 Others* [2014] eKLR.

115 *Attorney-General v Kituo Cha Sheria & 7 Others* [2017] eKLR 11-12.

116 See, eg, sec 39(1)(b) of the Constitution of South Africa (1996); sec 46(1)(c) of the Constitution of Zimbabwe (2013).

117 This is the case in countries such as Uganda and Rwanda. The case law from Uganda include *Carolyne Turyatemba & 4 Others v Attorney-General & Another* (Constitutional Petition 15 of 2006) [2011] UGCC 13 (8 August 2011) and *Law & Advocacy for Women in Uganda v Attorney-General* (Constitutional Petition 8 of 2007) [2010] UGCC 4 (28 July 2010) (the Court refers to different human rights treaties); *Ssebuliba Kiwanuka v Musisi Kiwanuka* (Miscellaneous Cause 249 of 2019) [2019] UGHCCD 184 (27 September 2019) (Convention on the Rights of Persons with Disabilities and the Convention against Torture). Case law from Rwanda include *In Re Akagera Business Group (Petition for the Repeal of the Legal Provision Inconsistent with the Constitution)* RS/SPEC/0001/16/CS (23 September 2016) (the Court referred to ICCPR); *In Re Murorunkwere*, RS/Inconst/Pén.0001/08/CS (26 September 2008) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women); in *Nyirakamana & Others v Mukasharangabo & Others* RS/REV/INJUST/CIV0007/15/CS (4 December 2015) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women); *Re Mugisha* RS/INCONST/SPEC 00002/ 2018/SC (24 April 2019) (the Court referred to ICCPR); *In Re Murorunkwere,* RS/Inconst/Pén.0001/08/CS (26 September 2008) (the Court referred to the Convention on the Elimination of All Forms of Discrimination against Women).

developed by the Human Rights Committee on article 12(4) has a right to enter these countries, they may consider such a foreign national a *de facto* citizen for the purpose of ensuring that they enter these countries. The Kenyan Court of Appeal has adopted this approach, albeit in a different context. Article 39 of the Constitution of Kenya provides that '(1) Every person has the right to freedom of movement; (2) Every person has the right to leave Kenya; (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.' It is clear that the rights under article 39(3) are applicable to citizens only. In *Attorney-General v Kituo Cha Sheria & 7 Others*[118] the government issued a directive to the effect that all refugees should leave the urban areas and report to refugee camps. The urban-based refugees argued, *inter alia*, that this directive violated their right to freedom of movement under article 39 of the Constitution. The government argued that the rights under article 39(3) are not applicable to non-citizens. The Court of Appeal held that

> [t]he question that arises is whether the express application of entry, remaining and residence rights to citizens means that non-citizens cannot enter, remain or reside anywhere in Kenya. We think at once that such a conclusion would on the face of it be absurd and is not borne out by the text itself.[119]

The Court further held that

> it must be recalled that the right of freedom of movement and residence is provided for within the Bill of Rights. As such, our interpretation of the provision relating thereto has to accord with the interpretative guidance which, fortunately for us, is provided by the Constitution itself. Article 259(1) enjoins courts to interpret the Constitution in a broad and purposive as opposed to a narrow and mechanistic manner.[120]

The Court explained the principles applicable to constitutional interpretation and stated that the Bill of Rights must be interpreted in a manner that furthers the rights of individuals and communities and that the rights of individuals are not granted by the state. Rather, they are inherent in every human being.[121] Against that background, the Court held:[122]

> The enumeration of various rights and fundamental freedoms in the Bill of Rights is indicated to be a guide as to the content of rights. It is not meant to be exhaustive, however, so that one cannot be heard to say that unless a right is expressly provided then it does not exist

118 *Attorney-General v Kituo Cha Sheria & 7 Others* [2017] eKLR.
119 *Attorney-General v Kituo Cha Sheria* (n 118) 8.
120 *Attorney-General v Kituo Cha Sheria* 9.
121 *Attorney-General v Kituo Cha Sheria* 9-10.
122 *Attorney-General v Kituo Cha Sheria* 10.

> and cannot be claimed. So long as a right exists by recognition or is conferred by law, that right is equally valid and efficacious unless and to the extent only as it may be inconsistent with the Bill of Rights in chapter 4. We take that to mean that if some right exists independent of the Bill of Rights but has the effect of undermining or compromising the constitutionally declared Bill of Rights, then the constitutional provision prevails.

The Court added that refugees have the right to choose where to reside in Kenya but that this right is not absolute. The Court presented the following factors to substantiate its conclusion: the Bill of Rights does not expressly exclude refugees from the rights provided for under article 39(3); the Bill of Rights applies to all in Kenya; the Bill of Rights has to be interpreted in line with international law; international treaties ratified by Kenya are part of Kenyan law; article 12(4) of ICCPR is applicable to both nationals and non-nationals; the Human Rights Committee in its General Comment 27 has stipulated the circumstances in which the right to freedom of movement may be limited; and the UN Refugees Convention provides for the refugees' right to freedom of movement which means that the Bill of Rights cannot take away this right.[123] The central argument that the Court advanced is that the mere fact that a right is not expressly mentioned in the Bill of Rights does not mean that that right should not be recognised in Kenya. Such a right will be recognised in Kenya as long as it is provided for in international law and its recognition does not violate the Bill of Rights.

The Court's reasoning above may be extended to foreign nationals who regard Kenya as their own country. The challenge is that unlike in the case of refugees where their rights are expressly provided for in the Refugees Conventions,[124] article 12(4) of ICCPR and article 12(2) of the African Charter are silent on the right of non-nationals. However, the jurisprudence and practice of the Human Rights Committee show that article 12(4) of ICCPR is applicable to some categories of non-nationals. This means that it could be extended to a limited number of non-nationals. These could include those who were born in Kenya and have lived in Kenya all their lives and have no other nationality,[125] and those foreign nationals who have lived in

123 *Attorney-General v Kituo Cha Sheria* 11-12.

124 See, eg, the Convention Relating to the Status of Refugees (1951); the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

125 Kenyan case law shows that some people were born in Kenya and lived in Kenya and have no other nationality but they are struggling to be granted Kenyan citizenship. See, eg, *Kamal Jadva Vekaria v Director-General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR.

Kenya for many years and have families there.[126] In some cases, the High Court has held that foreign nationals who are in Kenya lawfully have rights under article 39 without specifying which rights.[127]

In some countries, such as Chad,[128] the Constitution does not contain a specific or general provision limiting the right to return to one's country. However, in most countries this right is subject to some conditions. For example, the Constitution of Angola provides that the right to return is 'without prejudice to any restrictions arising out of the fulfilment of legally established duties'.[129] The right is subject to conditions established by law[130] or it is 'limited only by a respect for the public order'.[131] In countries where the right is subject to limitations, countries have adopted different approaches on how such restrictions may be imposed. In some countries such restrictions can be imposed only by a judicial officer and for a limited period of time,[132] whereas in others such limitations may be imposed by judicial or administrative means.[133] In other countries the right can only be restricted 'by law'.[134] In this case, the criteria such laws must meet are not provided for. In some countries where the constitutions provide that such a right can be limited by legislation, the criteria that such legislation must meet are also provided for. For example, article 26(1) of the Constitution of Eritrea provides that the right to return, as in the case of other rights, 'may be limited only in so far as in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others'.[135] Article 26(2) of the same Constitution provides:

126 See, eg, *Republic v Cabinent Secretary, Ministry of National Security and Interior Co-ordination & 3 Others; Ex parte Shukri Adihafid & Another* [2014] eKLR (an Ethiopian national who had worked in Kenya for approximately five years and had a family in Kenya was deported and his application to return to Kenya was dismissed by the Court on the ground that he was not a citizen). See also *Republic v Director, Department of Immigration Services & 2 Others Ex parte Michael Olanrewaju Adeboye* [2017] eKLR.

127 *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 Others* [2015] eKLR paras 40-42.

128 Art 48 of the Constitution (2018) provides that '[e]very Chadian has the right to circulate freely in the interior of the national territory, to leave it and to return to it'.

129 Art 46(2) Constitution of Angola (2010).

130 Art 30 of the Constitution of the Democratic Republic of the Congo (2005); art 12(1) of the Constitution of Madagascar (2010); art 24(4) of the Constitution of Morocco (2011).

131 Art 1(3) of the Constitution of Gabon (2011).

132 Art 49(2) of the Constitution of Cape Verde provides that '[r]estrictions on the rights set forth above [[to leave, return and emigrate] may only be imposed through judicial decision, and must always be temporary in nature'.

133 Art 22(2) of the Constitution of Congo (2015).

134 Art 21(3) of the Constitution of Côte d'Ivoire (2016); art 60(2) of the Constitution of Sudan (2019).

135 Art 26(1) of the Constitution of Eritrea (1997).

> Any law providing for the limitation of the fundamental rights and freedoms guaranteed in this Constitution must (a) be consistent with the principles of democracy and justice; (b) be of general application and not negate the essential content of the right or freedom in question; (c) specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

The constitutions of other African countries also provide for clear circumstances in which the right to return may be limited or derogated from. This applies especially to cases of public emergencies, to protect public order, to protect the rights and freedoms of others, or pursuant to a court order and such limitations must be necessary in a democratic society.[136] However, in some countries the constitutions do not provide for specific circumstances in which the right to return may be limited. In these constitutions, the right to return, as in the case of many other rights in the constitution, is subject to a general limitation or interpretation clause. For example, article 32(2) of the Constitution of Ethiopia provides that '[a]ny Ethiopian national has the right to return to his country'. Article 32 does not provide for the limitations on the right to return. However, it should be read with article 13(2) of the same Constitution which provides:

> The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

Thus, since article 12(4) of ICCPR provides that the right to return cannot arbitrarily be limited and article 12(2) of the African Charter provides for circumstances in which the right to return may be restricted, Ethiopia can enact legislation or adopt measures that restrict the right to return as long as that legislation or those measures are not arbitrary and not contrary to article 12(2) of the African Charter.

136 Arts 26(2)-(6) of the Constitution of Swaziland; art 21(2) of the Constitution of Namibia (1990); art 35 of the Constitution of The Gambia (2018); art 21(4) of the Constitution of Ghana (1996); arts 24 & 25 of the Constitution of Kenya (2010); art 86 of the Constitution of Liberia (1986); arts 44 & 45 of the Constitution of Malawi (2017); art 15(3) of the Constitution of Mauritius (1968); art 41(2) of the Constitution of Nigeria (1999); art 26(3) of the Constitution of Rwanda (1993); art 25(3) of the Constitution of Seychelles (1993); art 18(3) of the Constitution of Sierra Leone (1991); arts 38 & 131 of the Constitution of Somalia (2012); art 190 of the Constitution of South Sudan (2013); art 17(2) of the Constitution of Tanzania (1977); art 49 of the Constitution of Tunisia (2014); arts 43 & 44 of the Constitution of Uganda (1995); arts 22(2) & (3) of the Constitution of Zambia (1991); arts 86 & 87 of the Constitution of Zimbabwe (2013); sec 36 of the Constitution of South Africa (1996).

In cases where constitutions provide for the circumstances in which the right to return may be limited, a person who alleges that his right to return has been violated can rely exclusively on the constitution for his or her argument. However, in countries where the constitutions provide that the right to return is subject to law, a person who alleges that his or her right to return has been violated has to rely on both the constitution and the law to substantiate his or her argument. The challenge is that if the constitution is silent on the specific circumstances in which such a right may be limited or derogated from, legislators may enact legislation that provides for many grounds on which a citizen or person may be barred from returning to his or her country. Should this happen, such legislation has to be assessed against the yardstick provided for under article 12(4) of ICCPR, which is to the effect that the limitation on the right to return should not be arbitrary, and article 12(2) of the African Charter.

The constitutions of some African countries are silent on the right of return.[137] However, this does not mean that the right to return is not guaranteed in those countries. For example, the Constitution of the Comoros is silent on the right to return. However, the same Constitution provides that upon ratification, a treaty becomes part of Comoros law and is superior to any law.[138] Since the Comoros ratified the African Charter (in June 1986) which provides for the right to return to one's country, citizens of the Comoros have a right to return by virtue of this treaty. Likewise, the Constitution of Mozambique does not provide for the right to return.[139] However, it provides that international treaties that are ratified by Mozambique are part of the domestic law.[140] The position is the same in the Constitutions of Cameroon[141] and Djibouti.[142]

In some countries where the constitutions are silent on the right to enter or return to one's country, the constitutions also provide that states are bound by international treaties on condition that those

137 See, eg, the Constitution of Comoros (2018); art 55(2) of the Constitution of Mozambique (2007) provides that '[a]ll citizens shall be free to travel inside the national territory and abroad, except those who have been legally deprived of this right by the courts'.
138 Art 12 of the Constitution (2018).
139 Art 55 of the Constitution of Mozambique (2007) provides: '(1) All citizens shall have the right to take up residence in any part of the national territory. (2) All citizens shall be free to travel inside the national territory and abroad, except those who have been legally deprived of this right by the courts.'
140 Art 18 of the Constitution.
141 Art 45 of the Constitution of Djibouti (2008).
142 Art 70 of the Constitution of Djibouti (2010).

treaties are not contrary to these constitutions.[143] It could be argued that if an international treaty, for example, the African Charter, provides for the right to enter one's country and the same right is not provided for in national constitutions, such an international treaty is contrary to the constitution and, therefore, such right is not recognised in these countries. However, this argument would be unsustainable in light of articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969) (Vienna Convention). Article 26 of the Vienna Convention provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 27 of the same treaty provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Therefore, even in countries in which their constitutions do not provide for the right of citizens to enter their countries, such citizens have that right by virtue of international law.

5 Conclusion

In this article I have discussed how the right to enter or return to one's country is protected in the African Charter and in the constitutions of different African countries. I have also demonstrated the circumstances in which this right may be restricted in both the African Charter and the constitutions of different African countries. I have demonstrated that the circumstances in which this right may be restricted in the constitutions of some African countries are broader than those permitted under article 12(2) of the African Charter. However, these circumstances could be justified under article 12(4) of ICCPR. This could cause a tension on the part of these countries between complying with article 12(2) of the African Charter and article 12(4) of ICCPR. I have also demonstrated that according to article 12(2) of the African Charter and article 12(4) of ICCPR, the right to return to or enter one's country is not absolute. According to article 12(2) of the African Charter, the right to return to one's country may be restricted on the ground of, among others, the protection of public health. Thus, African states that barred people from entering their territories during the COVID-19 pandemic could argue that they were justified in doing so on the basis of article 12(2) of the African Charter. However, this raises the question of whether invoking one of the grounds under article 12(2) (for example public health) is sufficient to justify the barring of citizens and residents from returning to their countries as happened in some countries such as Uganda, Ghana and Lesotho during the early phase of the COVID-19

143 See, eg, art 116 of the Constitution of Comoros (2018); art 62 of the Constitution of Djibouti (2010).

pandemic. I argue that the use of the word 'or' as opposed to 'and' before 'morality' in article 12(2) means that those grounds should be interpreted disjunctively. In other words, a state can limit the right to return on any of the four grounds under article 12(2). I argue that in invoking the limitations of the right to return under article 12(2), proportionality should be the guiding principle.[144] In other words, are the measures adopted to bar a person from returning to their country proportionate to the real or perceived danger that they pose should they return? If the answer is in the affirmative, then the measures are justified. If the answer is in the negative, then the measures are not justified. In the case of preventing the spread of an epidemic, it is important that the focus is not solely on the need to prevent or combat the spread of the virus. The personal circumstances of the person who is being barred from returning to his or her country should be taken seriously, for example, the social and economic circumstances in the country in which he or she is presently living. Another important factor is that before a state bars a person from returning to his or her country, it should first explore the possibility of putting measures in place to prevent or mitigate the real or perceived danger that he or she poses on his return. For example, if the argument that the person in question is barred from returning to their country because they could be or in fact are carrying a virus and that on their return they will infect other persons with that virus, the state should ensure that such a person returns in strictly-regulated circumstances. For example, they should be screened and, where necessary, quarantined and treated (if they are carrying the virus) and only be released when they are cured and no longer pose a danger to society. The state should pay for the cost of quarantine if the returnee is unable to do so. I have also argued that article 12(2) of the African Charter should be interpreted as applicable to citizens and a limited category of non-citizens.

144 The African Court on Human and Peoples' Rights and the African Commission have explained the meaning of proportionality in the context of art 27(2) of the African Charter. See *Tanganyika Law Society v Tanzania* (Judgment, 9/2011; 11/2011) (ACtHPR, 14 June 2013) para 106.1 (and the jurisprudence discussed thereunder).

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A legally-binding instrument on business and human rights: Implications for the right to development in Africa

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Summary: *This article examines the relationship between business actors and the implementation of the right to development in Africa. It focuses on the implications of a possible (future) international legally-binding instrument on business and human rights. Although there is no guarantee that such an instrument will eventually be adopted and ratified by states in the near future, the article nevertheless critically examines ways in which the clarification of some issues associated with this process could help revitalise the implementation of the right to development in Africa. It concludes that a legally-binding instrument on business and human rights might elucidate certain contested human rights principles such as international cooperation and assistance; extraterritoriality and accountability, which are central to a meaningful implementation of the right to development on the continent.*

Key words: *Africa; transnational corporations and human rights; right to development and accountability; African Charter*

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1 Introduction

The UN Declaration on the Right to Development (RTD Declaration) proclaims the right to development as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.[1] Both the content and obligations that flow from the RTD Declaration remain contested although its status as part of the international human rights framework has been reaffirmed at the Vienna World Conference on Human Rights[2] as well as the 2030 Agenda for Sustainable Development.[3] The right to development could be referred to as an umbrella right that amalgamates all other rights and seeks to mainstream human rights principles into development. In its current form, the obligations towards the realisation of the right to development are placed primarily on states thus reinforcing the conservative analysis of international law, which still suggests that states are the only subjects of international law.[4] Within the African regional human rights system, the African Charter on Human and Peoples' Rights (African Charter) promulgates a legally-binding right to development with corresponding duties[5] and remains 'one of the precious few hard law guarantees of a [right to development] that currently exist in the realm of international human rights'.[6]

Notwithstanding the clarity that exists within a regional human rights system such as that of Africa on the content of the right to development, international human rights law still lacks certainty regarding the obligations of transnational corporations (TNCs).[7] TNCs

1 Art 1 RTD Declaration adopted by the UN General Assembly on 4 December 1986.

2 Vienna Declaration on Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

3 'Transforming our world: The 2030 Agenda for Sustainable Development' (Gen Ass Res A/RES/70/1) Resolution adopted by the General Assembly on 25 September 2015. See in particular paras 10 and 35.

4 See *inter alia* R McCorquodale *International law beyond the state: Essays on sovereignty, non-state actors and human rights* (2011); C Cutler 'Critical reflections on the Westphalian assumptions of international law and organisation: A crisis of legitimacy' in A Bianchi (ed) *Non-state actors and international law* (2009) 19; Opinion of the International Court of Justice *Reparation for injuries suffered in the service of the United Nations* case ICJ Report (1949) 174.

5 Art 22 African Charter on Human and Peoples Rights, adopted 27 June 1981.

6 OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in OHCHR *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 373.

7 J Klabbers *An introduction to international law* (2010) 51; T Atabongawung 'New thinking on transnational corporations and human rights: Towards a multi-stakeholder approach' (2016) 34 *Netherlands Quarterly of Human Rights* 147; M Pentikäinen 'Changing international "subjectivity" and rights and obligations

as non-state actors profit enormously from economic globalisation in the form of trade liberalisation. The dramatic changes brought about by economic globalisation and advances in communication technology have rendered the state-centric focus of international law increasingly obsolete and have led human rights scholars to call for a 'reimagining' of our conception of the nature of human rights and the relationship between different actors within the human rights regime.[8]

This is because the opportunities presented by globalisation for business actors have consequences on global development and may sometimes result in human rights violations, including the denial of the right to development, especially for those in the global South.

Take, for instance, the recent conviction of Royal Dutch Shell's subsidiary in Nigeria by The Hague Court of Appeals, regarding environmental contamination in Nigeria's Niger Delta region with wider implications on the right to development of the Ogoni peoples.[9] When such events occur, human rights practitioners and scholars are confronted with the fundamental question as to what it means to have an efficient global economy, operating in parallel with a more accountable legal system that ensures social justice for local communities.[10] It is increasingly obvious that the current misalignment between international law and business actors, such as TNCs, 'creates intolerable gaps in the structure of the international normative order' in terms of inclusive human rights accountability and ensuring sustainable development.[11]

In June 2014 the United Nations (UN) Human Rights Council adopted a resolution calling for the creation of an Open-Ended Intergovernmental Working Group to elaborate on the possibility of an international legally-binding instrument on TNCs and other

under international law: Status of corporations' (2012) 8 *Utrecht Law Review* 154.

8 B Andreassen 'Development and the human rights responsibilities of non-state actors' in B Andreassen & S Marks (eds) *Development and human rights: Legal, political and economic dimensions* (2010) 150.

9 'Shell loses Dutch court case over Nigeria oil spills' *Bloomberg* 29 January 2021. For more, see https://www.bloomberg.com/news/articles/2021-01-29/dutch-court-orders-shell-nigeria-to-compensate-for-oil-spills (accessed 31 January 2021). For reference to the original lawsuit, see *Kiobel v Royal Dutch Petroleum Co* 10-1491 (2013).

10 M Monshipouri et al 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' in D Kinley (ed) *Human rights and corporations* (2009) 125.

11 K Nowrot *New approaches to the international legal personality of multinational corporations: Towards a rebuttable presumption of normative responsibilities* (2005).

business enterprises with respect to human rights.[12] This momentum is built on previous attempts and initiatives, including the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights (UN Norms);[13] the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises;[14] the UN Global Compact;[15] and the UN Guiding Principles on Business and Human Rights (UN Guiding Principles).[16] The current effort seeks an instrument that legally binds states while imposing direct legal obligations on TNCs with regard to human rights.[17] The initiative is driven by two principal reasons. First, the recognition that the existing soft law instruments in the area of business and human rights, which include the UN Guiding Principles, so far have failed to clarify the most important hurdles – whether or not TNCs indeed can be attributed with human rights responsibilities and be held to account based on existing practice under international law. Second, some commentators maintain a view that most soft law instruments currently in place are fragmented and have failed to commit states to 'enforce well described set of international norms against transnational corporations and to change their domestic legal orders to comply'.[18] This includes states being duty bound under international law to not only respect human rights but also to protect persons from third party violations, including violations committed by TNCs.

The above notwithstanding, any concerted efforts aimed at regulating corporate human rights conduct can also be observed from at least two perspectives. First, these initiatives reinforce the view that duties to realise human rights can no longer be limited to sovereign states. They must involve all global actors whose actions affect human rights. Second, corporations as economic actors can affect the development capabilities of individuals. It is widely agreed that 'TNCs and other businesses are central actors in development

12 UN Human Rights Council Resolution A/HRC/26/L.22/Rev.1 (25 June 2014).
13 UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).
14 OECD Guidelines for Multinational Enterprises (updated 2011).
15 The UN Global Compact (2000). See also http://www.unglobalcompact.org/AboutTheGC/ (accessed 20 August 2014).
16 UN Human Rights Council Resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.
17 The vote on the matter in the UN Human Rights Council was divisive, with 20 votes for, 14 against and 13 abstentions. It might be worth mentioning that all EU members of the Human Rights Council and the US voted against the Resolution. This may hint at the political confrontations that have marred this process.
18 L Backer 'And a treaty to bind them all – On prospects and obstacles to moving from the GPs to a multilateral treaty framework: A preliminary assessment' *Law and the End of the Day* 3 July 2014, http://lcbackerblog.blogspot.nl/2014/07/and-treaty-to-bind-them-allon-prospects.html (accessed 2 February 2021).

[although] … development discourse has only recently manifested concern with the ethics of corporate behaviour and specifically the human rights impact of TNCs in the global economy as "agents of development"'.[19] Some scholars also maintain that trade and investment fulfil an important role in alleviating abject poverty from communities.[20]

Evidently, TNCs cannot secure long-term sustainable development when their activities fall short of international human rights standards, including the protection of the right to development for local communities in which they operate. Unlike the economic development construct, the right to development specifically addresses development from the human rights perspective, deviating from the classical gross domestic product (GDP) quantification of development and growth. This may explain why the United Nations Development Programme (UNDP) conceives development as 'human development' that is focusing on 'an environment in which people can develop their full potentials and lead productive, creative lives in accord with their needs and interest'.[21] Similarly, Sengupta has defined the right to development as incorporating a 'process of development which leads to the realisation of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards'.[22] Accordingly, any development process and actors involved therein should be respectful of all human rights and fundamental freedoms, and advance the realisation of human rights for all.

In this article I examine the connection between business actors (particularly TNCs) and the implementation of the right to development in Africa by focusing on the implications of a possible (future) international legally-binding instrument on business and human rights.[23] Although there is no guarantee that such an instrument will eventually be adopted and ratified by states in the near future, I nevertheless critically examine ways in which the clarification of some of the concepts associated with this process could help revitalise the implementation of the right to development in Africa. In so doing, I adumbrate on the relationship between

19 Andreassen (n 8) 151.
20 W Meyer *Human rights and international political economy in the Third World nations: Multinational corporations, foreign aid and repression* (1998).
21 See UNDP 'Human Development Report', http://hdr.undp.org/en/humandev/ (accessed 1 February 2021).
22 A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 846.
23 HRC Res 26/9 (26 June 2014).

TNCs and human rights with a particular focus on development. The article considers the peculiarities of TNCs' activities on the right to development in Africa and concludes that a legally-binding instrument on business and human rights might elucidate certain contested human rights concepts such as international cooperation and assistance, extraterritoriality and accountability, which are central to the implementation and realisation of the right to development in Africa.

2 Transnational corporations and human rights

Corporations are generally not excluded from international law and remain beneficiaries of rights under specific regimes of international law.[24] In terms of rights, Cassel and Ramasastry have noted that '[c]urrent investment and trade treaties grant corporations both substantive and remedial rights'.[25] These include the right to arbitrate in international investment disputes alongside states.[26] Within the human rights regime, there is jurisprudence from the European Court of Human Rights to suggest that corporations share certain rights with natural persons, such as the right to a fair trial and due process.[27] Nevertheless, these rights have not translated into concrete duties and the question of whether an obligation to realise human rights extends to TNCs still is not sufficiently addressed.

Regarding the question of whether an obligation to realise human rights extends to TNCs, the former UN Independent Expert on the Right to Development has responded affirmatively by indicating that human rights obligations 'fall not only on states nationally and internationally, but [also] on international institutions'.[28] Although the meaning of international institutions is contested, it can nevertheless be understood as implying both formal international organisations, for example, the World Bank, as well as other prominent players, such as non-governmental organisations (NGOs) and TNCs of which the

24 Atabongawung (n 7)
25 D Cassel & A Ramasastry 'Options for a treaty on business and human rights' White Paper prepared for the American Bar Association, Centre for Human Rights and the Law Society of England and Wales, May 2015 6, http://business-humanrights.org/sites/default/files/documents/whitepaperfinal%20ABA%20LS%206%2022%2015.pdf (accessed 2 February 2021).
26 Atabongawung (n 7).
27 *Sunday Times v United Kingdom* (Series A No 30) European Court of Human Rights (1979-80) 2 EHRR 245, 26 April 1979. See also W van den Muijsenbergh and S Rezai 'Corporations and the European Convention on Human Rights' presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.
28 'Third Report of the Independent Expert on the Right to Development' UN Doc E/CN.4/2001WG.18/2 para 25.

impact is felt increasingly within the international normative order.[29] TNCs have become powerful global institutions, in part due to their economic and sometimes political power. They are capable of jostling the state for influence on both the domestic and international scenes. In Africa, for example, the delivery of certain public goods and services such as security, education and health, which traditionally were perceived as the sole province of the state, are increasingly being carried out by powerful business actors. A practical example here will include companies that operate in conflict zones and maintain their own private security arrangements, sometimes beyond state oversight. In general, corporations have for a long time exerted influence 'over natural resources, state sovereignty, and [the] national identities of developing countries', and this is seen as a precursor for the establishment by the UN General Assembly in 1974, of the New International Economic Order (NIEO).[30] The UN Resolution establishing the NIEO forms a key contribution to the subsequent adoption of the RTD Declaration.[31] This notwithstanding, the exact nature and scope of corporate obligations towards international human rights, and the right to development in particular, remain a subject of debate, despite the fact that the corporate duty to respect human rights might be grounded in several human rights instruments. Even with this growing understanding of attributing human rights obligations to corporation, its normative content, if not 'coverage is scattered and often indirect and incomplete'.[32]

In general, the human rights responsibility of non-state actors, such as the corporate responsibility to respect human rights, begins with the Universal Declaration of Human Rights (Universal Declaration.[33] The Universal Declaration embodies a variety of rights ranging from political, civil to economic, social and cultural rights while being 'recognised as the foundation for establishing worldwide consensus on a universal jurisprudence of human rights'.[34] Its Preamble states:[35]

> [As] a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education

29 J Duffield 'What are international institutions?' (2007) 9 *International Studies Review* 1.
30 UN General Assembly Res 3201 (S-VI) 29 UN GAOR Supp No 1 3, UN Doc A/9559 (1974); UN General Assembly Res 3202 (S-VI), 29 UN GAOR Supp No 1 5, UN Doc A/9559 (1974).
31 R Sarkar *International development law: Rule of law, human rights, and global finance* (2009) 206.
32 Cassel & Ramasastry (n 25) 11.
33 S Joseph *Corporations and transnational human rights obligations* (2004).
34 Sarkar (n 31) 202; for more analysis, see M Mutua 'The ideology of human rights' (1996) 36 *Virginia Journal International Law* 589.
35 See para 8 of the Preamble to the Universal Declaration (my emphasis).

> to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

The insertion of *organ of society* into the Preamble to the Universal Declaration is given a broader interpretation as extending human rights duties beyond the state to include other organs and actors that are capable of affecting those rights.[36] Similarly, article 29 states that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'.[37] In the same vein, article 30 imposes a negative duty by stating that '[n]othing in this Declaration may be interpreted as implying for any state, *group* or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.[38] Some human rights treaties offer similar formulations, for example, article 5 of the International Covenant on Civil and Political Rights (ICCPR).[39] The Committee on the Rights of the Child (CRC Committee has equally interpreted the UN Convention on the Rights of the Child (CRC) as extending the 'duties and responsibilities to respect children's rights in practice beyond the state and state-controlled services and institutions and apply to private actors and business enterprises'.[40] Accordingly, business actors are increasingly being considered actors capable of affecting human rights both positively and negatively.[41]

The UN Guiding Principles – though not a legally-binding instrument – have also elaborated on the 'corporate responsibility to respect human rights'.[42] In particular, Ruggie has noted that 'there are few if any internationally recognised rights [that] business cannot impact – or be perceived to impact – in some manner'[43] and '[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their

36 L Henkin 'The Universal Declaration at 50 and the challenge of global markets' (1999) 25 *Brooklyn Journal of International Law* 17; S Ratner 'Corporations and human rights: A theory of legal responsibility' in D Kinley (ed) *Human rights and corporations* (2009) 257.
37 Art 29(1) Universal Declaration.
38 Art 30 Universal Declaration.
39 International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966.
40 CRC Committee General Comment 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights para 8.
41 D Leipziger *The corporate responsibility code book* (2010) 135.
42 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, respect and remedy" framework', https://digitallibrary.un.org/record/705860?ln=en (accessed 2 February 2021).
43 J Ruggie 'Protect, respect and remedy: A framework for business and human rights' UN Doc A/HRC/8/5, 7 April 2008 para 2.

responsibility to respect applies to all such rights'.[44] It is in this respect that Alston has argued that

> [a]n international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.[45]

The UN Human Rights Council, while endorsing the Guiding Principles on Business and Human Rights, calls 'upon all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles'.[46] At the same time, the current disagreement among states regarding the need for a legally-binding instrument on business and human rights does not so much involve the substance but rather a manifestation of decades-long ideological divides. As De Schutter has noted:[47]

> The gap between the states supporting the proposal by Ecuador and South Africa and the other states – including all industrialised countries who are members of the OECD (Organisation for Economic Co-operation and Development) club – is less wide than the voting patterns seem to suggest. The suspicion towards the Ecuador-South Africa proposal is in fact largely a matter of perception, to be explained by the connotation attached to the initiative. Many see this proposal as an attempt to reopen a battle fought during the 1970s, when the regulation of transnational corporations (TNCs) was a major component of the attempts to establish [NIEO], or as a resurrection of the proposal made in 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights for the adoption of a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Draft UN Norms).

2.1 Business actors and development

The role of business actors as 'vehicles for social development' was accentuated at the World Summit on Social Development at Copenhagen (1995),[48] which 'marked a paradigm shift from

44 Commentary to UN Guiding Principle 12 (n 16).
45 P Alston 'The not-a-cat syndrome: Can the international human rights regime accommodate non-state actors' in P Alston *Non-state actors and human rights* (2005) 19.
46 Human Rights Council 'Human Rights and Transnational Corporations and Other Business Enterprises' A/HRC/Res 26/22 (27 June 2014) (Resolution 26/22) para 6.
47 O de Schutter 'Towards a new treaty on business and human rights' (2015) 1 *Business and Human Rights Journal* 43.
48 At the World Summit for Social Development (WSSD) held in March 1995 in Copenhagen, states represented unanimously agreed on the need to put people

development through aid, to development through trade and investment'.[49] Since then the role of corporations and the private sector as development actors has been increasingly recognised. The contribution of private actors, including business actors, towards the realisation of human rights (and development) is emphasised in several international instruments. For example, the Vienna Declaration and Programme of Action,[50] the High-Level Plenary Meeting of the UN General Assembly on the Millennium Development Goals,[51]and the now adopted 2030 Agenda on Sustainable Development, which incorporates the Sustainable Development Goals (SDGs)[52] reiterate the role of non-state actors in development, while emphasising the need for public-private partnerships in ensuring the full and effective enjoyment of human rights.[53] In particular, the SDGs acknowledge the role of business in development and governance. It

> call[s] upon all businesses to apply their creativity and innovation to solving sustainable development challenges … [and States have pledged to] foster a dynamic and well functioning business sector, while protecting labor rights and environmental and health standards in accordance with relevant international standards and agreements.[54]

A holistic reading of the 2030 Agenda and the SDGs would seem to suggest a bold attempt at placing the future of international development in the hands of business actors alongside states.

The RTD Declaration identifies states as both right bearers and duty holders at the same time. Nonetheless, the Declaration also alludes to the individual's contribution towards the realisation of the right to development. The RTD Declaration calls upon individuals to actively participate in development, both individually and collectively as members of a community.[55] Unlike the interpretation of *organs of society* referred to above in the context of the Universal Declaration, it is difficult to conceptualise the *individual* in this case as encompassing legal entities such as corporations. The RTD Declaration is more explicit on the role of states, which requires that states

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at the centre of development. For more, see https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html (accessed 26 January 2021).

49 C Dias 'Corporate human rights accountability and the human right to development: The relevance and role of corporate social responsibility' (2011) 4 *NUJS Law Review* 497.

50 Part I, art 13 of Vienna Declaration and Programme of Action (n 2).

51 Para 17 reiterates the role of 'private sector and other relevant stakeholders.

52 Sustainable Development Goals (n 3). See in particularly the role of private actors in achieving Goals 8, 9 and 12.

53 As above.

54 Sustainable Development Goals (n 3) para 67.

55 Art 2 RTD Declaration.

> [create] national and international conditions favourable to the realisation of the [RTD] … States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development … States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development.[56]

The ramification of the above formulation is that the legal and political debates that follow right to development tend to revolve around states with a strong demarcation of ideologies between the developed and less developed countries. Commenting on the need to move beyond the state-centric model and embracing a multi-actor approach for the realisation of right to development, De Feyter has suggested a rethink of the role of TNCs and other actors in the implementation of right to development as one of the possible outcomes of negotiating a Framework Convention on the right to development.[57] Similarly, Vandenbogaerde has noted that 'in order to change the current international order … it should be possible to hold all relevant international organisations accountable … [and they] be made legally responsible for implementing the right to development'.[58]

The high-level task force on the implementation of the right to development has examined Millennium Development Goal 8, on the 'global partnership for development',[59] which now features as SDG 17 under the 2030 Sustainable Development Agenda.[60] The criteria it has developed for periodic review of global partnerships from a right to development perspective includes the 'mainstreaming of [RTD] in policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade and development institutions'[61] which extend to corporations and other business actors. As elucidated by Andreassen, the formulation in the RTD Declaration of states being the 'primary' duty holders in realising the right to development 'indicates that there are "secondary" or "lower order" responsibilities for the implementation of [RTD]'.[62] In particular, some of the core human

56 Arts 3 & 4 RTD Declaration.
57 Discussion on a Framework Convention on RTD (Roundtable THIGJ 27 May 2015).
58 A Vandenbogaerde 'The right to development in international human rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 187 (footnote omitted).
59 The HLTF on the implementation of the RTD had a mandate from 2004-2010, and comprised of five independent experts from distinct geographical regions.
60 Goal 17 calls for 'strengthen[ing] the means of implementation and revitalise the Global Partnership for Sustainable Development'.
61 'Background report submitted by the United Nations High Commissioner for Human Rights' UN Doc A/HRC/SF/2011/2, 25 July 2011 para 8.
62 Andreassen (n 8) 157-158.

rights principles, such as participation and self-determination, which the right to development seeks to protect, can be violated by TNCs in the course of doing business. As pointed out elsewhere, corporations can violate these human rights either directly or as accomplices to the state.[63] Self-determination and participation are mutually reinforcing in this context and speak to the central idea that locals must be given a right to participate in the design and implementation of any development agenda that affects them. This has been a noteworthy factor in some of the complaints that have appeared in the African regional human rights system in respect of TNCs' violation of human rights, to which I now turn.

2.2 Transnational corporations and the right to development in Africa

Recent litigations around the globe have shown that business violations of human rights form a significant proportion of right to development infringement on the African continent. For example, in the Democratic Republic of the Congo (DRC) alone, more than 80 multinational corporations from around the globe have been implicated in the illegal exploitation of natural resources, forced labour, and the distribution of weapons to different armed groups.[64] Corporate greed continues to be detrimental to the realisation of the right to development for these communities. The sheer volume of cases that have sprouted globally in the realm of corporate violation of human rights are linked to the African continent considering that 'African countries contain more than half of the world resources [such as] cobalt, manganese, gold and significant supplies of platinum, uranium and oil'.[65] These resources are mostly situated in territories deemed indigenous. Indigenous communities, in particular, continue to face legal challenges in the struggle against the increasing encroachment from foreign investors, especially those in the extractive resource sector.

Mujyambere has observed that

63 T Atabongawung 'Corporate complicity for human rights violations in Africa post-*Kiobel* case' in J Cernic & Tara van Ho (eds) *Human rights and business: Direct corporate accountability for human rights* (2015) 447.

64 N Gotzman *Legal personality of the corporation and international criminal law: Globalisation, corporates human rights abuses and the Rome Statute* (2008) 39.

65 The institute of West-Asia and Africa Studies of the Chinese Academy of Social Sciences and John Kennedy School of Government, Harvard University, M Forstater et al 'Corporate responsibility in African development' October 2010 9, sites.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper_60.pdf (accessed 2 February 2021).

> the lack of redress regarding human rights abuses committed by TNCs in [Africa] has become a major concern. There are many TNCs that stand accused of involvement in human rights abuses [in Africa] and yet their victims still face many barriers to access effective remedies.[66]

The current economic race to the bottom[67] makes African states less inclined to any stringent forms of corporate regulation partly due to the desire to attract direct foreign investments.[68] Relatedly, some domestic courts are equally hesitant at using their remedial power to enforcing violations of economic and social rights, including the right to development. For example, in the case of South Africa, Ngang has attributed this hesitancy on the part of domestic courts to some inclination towards upholding the separation of powers doctrine in a constitutional democracy.[69] Whatever the justification, the reality is that most victims of corporate human rights violations in Africa can mostly rely on forum shopping in other jurisdictions (sometimes beyond Africa) for seeking justice. Some high-profile cases emanating from Africa have been litigated in the United States under the Alien Tort Claim Act (1789),[70] as well as in the United Kingdom and The Netherlands.[71]

As noted earlier, the African Charter promulgates a legally-binding right to development with corresponding duties as follows:[72]

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

66 JP Mujyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union member states' (2017) 5 *Groningen Journal of International Law* 256.

67 'Race to the bottom' reveals that some MNCs tend to invest in countries where there is less regulation, and for states to be at a competitive advantage over one another, provide such incentives, with detrimental effects on human rights (workers' rights) and environment. For more, see W Olney 'A race to the bottom? Employment protection and foreign direct investment' Draft Paper July 2012.

68 D Graham & N Woods 'Making corporate self-regulation Effective in developing countries' (2006) 34 *World Development* 869.

69 C Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take "other measures"' (2014) 14 *African Human Rights Law Journal* 664-667.

70 The Alien Tort Claim Act enacted in 1789 as part of the first Judiciary Act provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations'. For more background, see E Young 'Universal jurisdiction, the Alien Tort Statute, and transnational public law litigation after *Kiobel*' (2015) 64 *Duke Law Journal* 1023.

71 *Kiobel v Royal Dutch Petroleum Co* [2013] 569 US 108; *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe* [2019] UKSC 20; and *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

72 Art 22 African Charter.

The African Commission on Human and Peoples' Rights (African Commission) has ruled on cases concerning the right to development with business links, for instance, in the case brought before the African Commission by the Social and Economic Rights Action Centre (SERAC) concerning environmental degradation and health concerns resulting from the contamination of the environment in the Niger Delta region of Nigeria.[73] SERAC and the ESCR Committee alleged that the contaminations resulted from oil production by a consortium jointly owned by the state oil company, the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC), which is a local subsidiary of the Royal Dutch Shell plc.[74] This case involved several alleged violations of the African Charter, including article 21 on free disposition of wealth and natural resources in the exclusive interest of the people, read together with articles 22 and 24 of the African Charter. In granting its decision against the Nigerian government, the African Commission did not directly attribute any human rights responsibility to the corporations involved but stated that 'the state is obliged to protect right-holders against other subjects' including business actors.[75] Some have suggested that the reason for the African Commission not discussing the 'direct' human rights responsibilities of corporations in this case probably is the lack of substantive jurisprudence in the area of direct corporate accountability for the violation of any specific category of human rights.[76] Nevertheless, others have noted the direct responsibility of Royal Dutch Shell plc in these violations,[77] and in a recent judgment of 29 January 2021 a Dutch Court of Appeals in The Hague did find Royal Dutch Shell plc, Nigeria's subsidiary, liable for this environmental contamination as well as the related human rights violations associated therewith.[78]

73 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
74 As above.
75 *SERAC* (n 73) para 46.
76 O Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 910.
77 O Amao 'The African regional human rights system and multinational corporations: Strengthening the host state responsibility for control of multinational corporations' (2008) 12 *International Journal for Human rights* 771.
78 In its final judgments, 'the court … assessed the claims substantively under Nigerian law … and found Shell Nigeria is therefore liable for the damage resulting from the leakage of those pipelines'. Equally, 'the court finds that Shell should build in a better warning system in the Oruma pipeline, so that future leaks are detected sooner. Then the outflow of oil in the event of a leak, and thus the (environmental) damage, can be limited. This obligation is imposed on both Shell Nigeria and the Shell parent company.' For more, see https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx (accessed 1 February 2021).

The above case illustrates that corporate responsibility towards the right to development lies at the core of the discourse on business accountability for human rights. Dias has identified two tasks that are vital if the right to development is not to be relegated to the dustbin of history. These include the fact that '[c]orporations must be held fully, and expeditiously accountable for all of the adverse human rights impacts that result from their activities and conduct [and secondly] communities affected by the activities of corporations must have all of their human rights fully respected, protected, promoted, and fulfilled'.[79]

The ongoing negotiations in Geneva concerning a possible international legally-binding instrument on TNCs and human rights seem to incorporate some of these concerns. If such an initiative succeeds notwithstanding the political sensitivities that have marred previous attempts, it could be beneficial for the revitalisation of the right to development in many ways, especially its implementation by clarifying certain contested human rights principles such as extraterritoriality, as well as the range of accountability for the different actors. The current draft of the legally-binding instrument allows for cases to be filed in a wide range of jurisdictions, including any country where an act or omission contributing to the human rights abuse occurred, and against individuals who are not domiciled in a jurisdiction if the claim is connected to an individual who is domiciled there.[80] Equally, the draft document emphasises accountability and access to remedies that are central to the right to development discourse.

3 Legally-binding instrument on business and human rights

Since June 2014 there have been concerted international efforts toward the drafting of a legally-binding instrument on business and human rights (legally-binding instrument). This follows the adoption of Human Rights Council Resolution 26/9, which was co-sponsored by Ecuador and South Africa on exploring the possibility of an international legally-binding instrument to regulate TNCs and other business enterprises with respect to human rights.[81] Currently in its second draft, this instrument seeks:

79 Dias (n 49) 513 (footnote omitted).
80 https://www.lexology.com/library/detail.aspx?g=d3c49d62-8e05-4bf6-82be-3819ef4d33f6 (accessed 4 January 2021).
81 HRC Res 26/9 of 26 June 2014.

(a) to clarify and facilitate effective implementation of the obligation of states to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard;
(b) to prevent the occurrence of human rights abuses in the context of business activities;
(c) to ensure access to justice and effective remedy for victims of human rights abuses in the context of such business activities; and
(d) to facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses.[82]

As in the case of most human rights instruments, the proposed legally-binding instrument is bound to face enforcement as well as compliance challenges even when fully ratified by states. This is partly attributable to the fact that the human rights system is 'designed with significantly limited enforcement capacity'[83] and a proliferation of new human rights instruments as such is no guarantee for universal adherence. Nonetheless, a monumental shift brought about by the current draft legally-binding instrument is in its expansive understanding of corporate human rights accountability as well as the range of business actors included in the process. It specifically takes notice of the RTD Declaration as one of its guiding human rights frameworks.[84] The draft instrument, whenever adopted, certainly will be opened for ratification by states. Accordingly, it shall be binding on state parties while at the same time defining a set of legal standards 'apply[ing] to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character'.[85] While reinstating the current international human rights standards, the legally-binding instrument reminds states of their primary duty to

> [r]egulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction. For this purpose states shall take all necessary legal and policy measures to ensure that business enterprises … within their territory or jurisdiction, or otherwise under their control, respect all internationally recognised human rights and prevent and mitigate human rights abuses throughout their operations.[86]

82 Art 2 legally-binding instrument.
83 D Donoho 'Human rights enforcement in the twenty-first century' (2007) 35 *Georgia Journal of International and Comparative Law* 5.
84 See para 4 legally-binding instrument.
85 Art 3(1) legally-binding instrument.
86 Art 6(1).

Under the proposed framework, business actors are under a duty to exercise human rights due diligence procedures as well as measures to prevent and mitigate other human rights and environmental impacts of their activities. In terms of granting access to remedy, the draft instrument specifically calls on both home and host states to ensure access to adjudicative remedies and to eliminate all forms of procedural hurdles such as *forum non conveniens*,[87] which remains a significant hurdle for most plaintiffs seeking compensation for a corporate violation for human rights.

The most impactful elements of this proposed legally-binding instrument (from a right to development perspective) involve adjudicative accountability, mutual legal assistance and international cooperation as well as its extraterritorial scope. As Arts and Atabongawung have argued elsewhere, these are essential concepts necessary for the revitalisation of the right to development in international law.[88] In what follows, I will adumbrate on how these principles are particularly consequential in the African context as it pertains to the implementation of the right to development.

3.1 International cooperation

The duty to cooperate has a long-standing history in international law and features prominently in several human rights treaty regimes. In particular, the International Covenant on Economic, Social and Cultural Rights (ICESCR) calls on states to 'take steps, individually and through international assistance and cooperation, especially economic and technical'[89] to realise the Covenant. Since then several legally-binding instruments have re-emphasised international cooperation and assistance. For example, the Convention on the Rights of Persons with Disabilities (CRPD) is among some of the most recent to recognise the principle.[90] The normative content of the duty to cooperate can further be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

87 See specifically arts 9 and 10 above.

88 K Arts & T Atabongawung 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 221.

89 See arts 11 and 15 of the International Covenant on Economic, Social and Cultural Rights, art 2(1), adopted 16 December 1966, entry into force 3 January 1976, with 164 state parties on 1 July 2016 according to https://treaties.un.org (accessed 3 February 2021).

90 See art 32 of the Convention on the Rights of Persons with Disabilities, signed on 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3. Art 32 'recognise[s] the importance of international co-operation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention' and 'undertake[s] appropriate and effective measures in this regard'.

or Punishment (CAT),[91] which calls on state parties to provide each other 'the greatest measure of assistance in connection with criminal proceedings ... and the supply of all evidence at their disposal necessary for the proceedings'.[92] Other similar clauses containing international cooperation and assistance can be found in the International Convention for the Protection of all Persons from Enforced Disappearance.[93] Equally, article 4 of the Convention on the Rights of the Child (CRC),[94] read together with the first two Optional Protocols to the Convention on the Rights of the Child, oblige states to cooperate to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict. They also require states to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.[95]

There also is a growing understanding that

> states must cooperate to ensure that non-state actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-state actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.[96]

The different treaty bodies through their General Comments have further elucidated and emphasised the instrumentality of international cooperation towards the realisation of human rights. As noted elsewhere,

> [s]ince 1989, the Committee on Economic, Social and Cultural Rights has adopted more than 23 [General Comments]. Only four of these lack references to international cooperation/assistance … while the Committee on the Rights of the Child has issued over 17 General

91 Art 9(1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed on 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

92 As above.

93 Art 15 International Convention for the Protection of all Persons from Enforced Disappearance, signed on 20 December 2006, entered into force on 23 December 2010 2716 UNTS 3.

94 UN Convention on the Rights of the Child, adopted on 20 November 1989, entered into force September 1990. The Convention has over 196 state parties as at February 2021 according to https://treaties.un.org (accessed 3 February 2021).

95 Art 10 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227; art 7 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2173 UNTS 222.

96 See, in particular, Principle 27 of the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011. For more, see https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (accessed 21 February 2021).

> Comments. All except two of these refer (succinctly or elaborately) to international cooperation and/or assistance.[97]

The draft legally-binding instrument has gone a step further in reaffirming not only the importance of international cooperation in achieving human rights,[98] but also the duty of state parties to offer mutual legal assistance and international judicial cooperation.[99] De Schutter has identified '[t]he lack of effective cooperation between the different states across which … corporations operate … as a major source of impunity in this area'.[100] Accordingly, states are called upon to 'cooperate in good faith to enable the implementation of their obligations recognised under this (legally-binding instrument) and the fulfilment of the purposes of this (legally-binding instrument)'. Furthermore, they

> recognise the importance of international cooperation, including financial and technical assistance and capacity building, for the realisation of the purpose of the present (legally-binding instrument) and will undertake appropriate and effective measures in this regard, between and among states and, as appropriate, in partnership with relevant international and regional organisations and civil society.

The measures imposed on States for the realisation range from

> promoting effective technical cooperation and capacity-building … [to] raising awareness about the rights of victims of business-related human rights abuses and the obligations of states … [equally] facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of a transnational character; [not excluding their duty to contribute] within their available resources, to the International Fund for Victims.[101]

Unlike other instruments mentioned earlier, the draft legally-binding instrument goes a step further in elaborating a legal duty of state parties to request and provide mutual legal assistance. The provision dealing with mutual legal assistance is the most detailed of all its articles and offers a break through on one of the most important hurdles that human rights victims in Africa have to confront. Too often allegations of corporate violation of the right to development in Africa are complex and with limited resources on the side of host states, and these allegations usually are not properly investigated or prosecuted. A clear case in point involves allegations brought against the Canadian-owned corporation Anvil Mining operating in

97 Arts & Atabongawung (n 88) 21.
98 Art 13 legally-binding instrument.
99 Art 12 legally-binding instrument.
100 De Schutter (n 47) 63.
101 Art 13 legally-binding instrument.

the DRC. The allegations documented in the UN Report involving this company included the killing of more than 100 civilians, torture, rape, widespread looting, extortions of civilians' properties and arbitrary detentions.[102] Despite proceedings initiated in both the DRC (host state) and Canada (home state), these litigations were dismissed as 'inadmissible'[103] and a lack of forum, respectively.[104] Accordingly, the draft legally-binding instrument expands on judicial cooperation from civil to criminal litigation as including 'the gathering of evidence, [p]roviding information, evidentiary items and expert evaluations'[105] and other forms of documentary evidence. The provision also emphasises cooperation in ensuring the protection and assistance of 'victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements, including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment'.[106] At the level of enforcement, states are called upon to consider

> any judgement of a court having jurisdiction in accordance with this legally-binding instrument which is enforceable in the state of origin of the judgement and is not subject to any appeal or review shall be recognised and enforced in any State Party as soon as the formalities required in that State Party have been completed.[107]

African states are already duty-bound to realise the right to development under the African Charter, As observed earlier, the African Charter remains the only international or regional human rights instrument that legally binds states on the right to development. Thus, assuming that many African states, led by South Africa, are in favour of a legally-binding instrument on business and human rights[108] and are committed to its ratification, one can rashly presume

102 United Nations Missions in the Democratic Republic of Congo (MONUSCO) Report on the Conclusions of the Special Investigation Concerning Allegations of Summary Executions and Other Human Rights Violations Perpetrated by Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa, Katanga Province of 15 October 2004, 23 September 2005, raid-uk.org/sites/default/files/monuc-final-report.pdf (accessed 3 February 2021).

103 Global Witness 'Military Court of Appeal succumbs to political interference in Kilwa trial in 21 December 2007', globalwitness.org/en/archive/military-court-appeal-succumbs-political-interferencekilwa-trial/ (accessed 3 February 2021).

104 J Mujyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union member states' (2017) 5 *Groningen Journal of International Law* 262.

105 Art 12(3) legally-binding instrument.

106 As above.

107 Art 12(8) legally-binding instrument.

108 Many African states, including other emerging economies, regard corporate human rights immunity as an example of capitalism excesses resulting from the neo-liberal economic agenda. Thus, some have argued that the current support for a binding instrument is a 'response to the failure of neo-liberal politics that have dominated the practice of politics and law since the emergence of this

that these efforts will help concretise current regional efforts. The jurisprudence emerging from the African human rights system on the right to development has emphasised the need for international cooperation among states in achieving the right to development. In particular, the African Commission in the case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*[109] noted that

> [t]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the [RTD], guaranteed under article 22 of the African Charter.[110]

Thus, it is evident that by reinstating the duty for states to cooperate in the realm of corporate accountability for human rights, it adds another layer of concretisation and fills an important gap in the current debate on human rights accountability. It will be instrumental in the revitalisation of the right to development in Africa, especially as the instrument targets both states and non-state actors (businesses).

3.2 Extraterritoriality

In the context of business and human rights, extraterritorial obligations are thought to

> arise when a state party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[111]

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debate in its current form in the 1970s'. For more, see S Khoury & D Whyte *Corporate human rights violations: Global prospects for legal action* (2017).

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003); *DR Congo v Burundi, Rwanda and Uganda* decided at the 33rd ordinary session, May 2003, 20th Activity Report. In this case the DRC alleged grave and massive violations of human and peoples' rights committed by the armed forces of these three respondent countries in the Congolese provinces where there had been rebel activities since 2 August 1998, and for which the DRC blames Burundi, Uganda and Rwanda. For more context, see OO Oduwole 'International law and the right to development: A pragmatic approach for Africa' inaugural lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered on 20 May 2014 at the International Institute of Social Studies, The Hague, The Netherlands 15.

110 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (n 109) para 95.

111 General Comment 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, adopted by the Committee on Economic, Social and Cultural Rights at its 61st session (29 May-23 June 2017) para 28.

There have been growing calls within the UN treaty bodies for states to 'take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, or that have their main seat or their main place of business under their jurisdiction'[112] The Committee on Economic, Social and Cultural Rights (ESCR Committee) has persistently noted that states' obligations under ICESCR does not stop at their territorial borders and, as a result,

> states parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.[113]

In the past, the ESCR Committee has expounded on this extraterritorial application by addressing specific extraterritorial obligations of state parties concerning business activities [in its] General Comments relating to the right to water,[114] the right to work,[115] the right to social security,[116] and the right to just and favourable conditions of work,[117] as well as in its examination of states' periodic reports.[118]

While the above formulation of extraterritoriality may seem controversial at first sight considering that sovereignty and territoriality principles are fundamental to international law,[119] the ESCR Committee nevertheless has clarified that it is

> consistent with the admissible scope of jurisdiction under general international law, [that] states may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.[120]

Accordingly, the 'competence of the state to regulate the conduct of its nationals abroad is well established under international law,

112 De Schutter (n 47) 45.
113 See 'Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights' (E/C.12/2011/1), adopted by the Committee on Economic, Social and Cultural Rights at its 46th session, in particular paras 5 & 6.
114 See General Comment 15 paras 31 & 33.
115 See General Comment 18 para 52.
116 General Comment 19 para 54.
117 General Comment 23 para 70.
118 For more, see General Comment 24, in particular para 26.
119 H King 'The extraterritorial obligations of states' (2009) 9 *Human Rights Law Review* 521.
120 General Comment 24 para 32.

which in this regard refers to the principle of active personality'.[121] The American Law Institute's Third Restatement on Foreign Relations Law affirms extraterritorial regulation of corporations 'on the basis that they are owned or controlled by nationals of the regulating state'.[122] This understanding is further clarified under the Maastricht Principles on the Extraterritorial Obligations of States (Maastricht Principles).[123] Although not a binding instrument, the Maastricht Principles, aimed at clarifying states' duties towards a violation of human rights outside of their own territorial borders, remain 'an important point of reference both for civil society and international human rights bodies'.[124]

The legally-binding instrument incorporates the extraterritorial obligations of states under article 9 dealing with 'adjudicative jurisdiction'.[125] In particular, it recognises:

> Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under [the legally-binding instrument], shall vest in the courts of the state where:
>
> (a) the human rights abuse occurred;
> (b) an act or omission contributing to the human rights abuse occurred; or
> (c) the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.[126]

Extraterritoriality (especially adjudicative) is timely for many human rights victims in Africa considering that the lack of local enforcement mechanisms has typically led to 'forum shopping', which itself encounters different obstacles, including *forum non conveniens*. Most cases emanating from Africa have gained public awareness not because of the efforts of local law enforcement in their host states but rather the fact that victims have been able to form coalitions with powerful NGOs to explore extraterritorial adjudication. The recent judgment of the Dutch Court of Appeals in The Hague, cited above, is a clear example of how extraterritorial adjudication can be beneficial for victims in Africa. This case, spanning more than a decade, involved four Nigerian farmers and Friends of the Earth

121 De Schutter (n 47) 46.
122 Restatement (Third) of the Foreign Relations of the United States, § 414.
123 Maastricht Principles (n 96).
124 https://www.etoconsortium.org/en/main-navigation/our-work/what-are-etos/ (accessed 20 January 2021).
125 Art 9 Draft Instrument.
126 Art 9(1) legally-binding instrument.

Netherlands as plaintiffs.[127] In a related case (*Okpabi & Others v Royal Dutch Shell Plc*) the United Kingdom Supreme Court has allowed proceedings and asserted jurisdiction over the tort claim brought by the plaintiff against the defendants in the UK.[128] This follows the same Court's previous judgment in a similar litigation from a group of Zambian citizens regarding toxic emissions from the Nchanga copper mine in Zambia.[129] Accordingly, these recent developments may bring hope to human rights victims of the potential use of extraterritorial adjudication, although it remains to be seen which other jurisdictions will follow suit.

However, there are still thousands of victims across Africa that are not able to benefit from these coalitions, worse still, not able to dismantle the current hurdles associated with *forum non conveniens*. To this effect, the draft legally-binding instrument specifically notes that '[w]here victims choose to bring a claim in a court as per article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*'.[130] By so doing, the draft legally-binding instrument notes that

> all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another state where … the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights … is domiciled.[131]

3.3 Accountability

In arguing for a new momentum towards the implementation of the right to development under international law, Arts and Atabongawung have noted that a 'vital element in pushing for more implementation action concerning the RTD is that of assigning more concrete responsibilities to both rights holders and duty bearers'.[132] The responsibility of states towards the implementation or realisation of the right to development is not so contested despite the political and ideological wrangling that persists between northern and

127 https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx (accessed 1 February 2021).
128 *Okpabi & Others v Royal Dutch Shell Plc* [2021] UKSC 3, UK Supreme Court judgment, https://www.supremecourt.uk/press-summary/uksc-2018-0068.html (accessed 22 March 2021).
129 *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20.
130 Art 9(4) legally-binding instrument.
131 As above.
132 Arts & Atabongawung (n 88) 22.

southern states with respect to the legal binding nature of those duties. In the African regional human rights system, the duties imposed on states are pretty clear but, most importantly, these duties are legally binding.[133] Nevertheless, and as noted earlier, the African Charter, like most human rights instruments, is silent on the responsibility of non-state actors such as corporations despite being the only human rights instrument to forcefully pronounce on both the 'rights and duties' of man.[134]

The African Commission in rendering its decisions (communications) on the right to development has been very careful in maintaining a state-centric interpretation of human rights law – that is, states being the primary duty holders. As discussed earlier, some have noted that a failure by the African Commission in the *SERAC* case to attribute direct human rights responsibility to Royal Dutch Shell plc was mostly guided by the Commission's perception of the lack of substantive jurisprudence in the area of direct corporate accountability for the violation of any specific category of human rights.[135]

The right to development is simply unachievable without an inclusive accountability – that is, the identification of all actors involved in the process of globalisation who can impact this right. Thus, a need to move beyond the state-centric model and embracing a multi-actor approach for the realisation of the right to development or, what De Feyter has suggested, as a rethink of the role of TNCs and other actors in the implementation of the right to development,[136] thus making it 'possible to hold all relevant international organisations accountable … [and] be made legally responsible for implementing [RTD]'.[137]Inclusive accountability remains crucial for the implementation of the right to development. Lamenting on this point, Dias has identified two tasks that are vital if the right to development is not to be relegated to the dustbin of history. These include the fact that

> [c]orporations must be held fully, and expeditiously accountable for all of the adverse human rights impacts that result from their activities and conduct [and secondly] communities affected by the activities

133 Art 22 African Charter.
134 As above.
135 O Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 910.
136 Discussion on a Framework Convention on the Right to Development (Roundtable THIGJ, 27 May 2015).
137 Vandenbogaerde (n 58).

> of corporations must have all of their human rights fully respected, protected, promoted, and fulfilled.[138]

By identifying corporations as potential violators of human rights and the setting up of what is presumed to be a monitoring mechanism similar to the Special Procedures of the Human Rights Council, the legally-binding instrument on business and human rights seeks to clarify at least some of the above concerns. Article 2 of the draft legally-binding instrument identifies as one of its purposes to 'clarify and facilitate effective implementation of the obligation of states to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard'.[139] In addition to that, article 3 stipulates that the draft legally-binding instrument 'shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character'.[140] In addition, it 'shall cover all internationally recognised human rights and fundamental freedoms emanating from the [Universal Declaration], any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law'.[141] Even more meaningful is the fact that the draft legally-binding instrument in paragraph 4 of its Preamble clearly refers to the RTD Declaration as one of these instruments.[142]

> It is acknowledged that
>
> all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights, environmental and health standards in accordance with relevant international standards and agreements.[143]

More specifically, it affirms

> that all business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships.[144]

138 Dias (n 49) 513 (footnote omitted).
139 Art 2 legally-binding instrument.
140 Art 3 legally-binding instrument.
141 As above.
142 Para 4 Preamble, legally-binding instrument.
143 Para 12 Preamble, legally-binding instrument.
144 Para 13 Preamble, legally-binding instrument.

If states were to adopt and ratify the legally-binding instrument, it will fill an important gap in the current jurisprudence on the right to development in Africa by extending accountability to business actors. As noted above, the impact of business activity on communities across Africa is enormous – something which the draft legally-binding instrument reaffirms by '*[r]ecognising* the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples … and other persons in vulnerable situations'.[145] It will make it normative and provide a legal guide for communities affected by business activities in Africa to have certainty when bringing such litigations before the African Court on Human and Peoples' Rights (African Court), the African Commission and elsewhere. In the past, both the African Court and the African Commission have demonstrated their boldness in ruling on right to development cases despite the lack of clarity on corporate accountability for a human rights violation. With the over 260 decisions that have been rendered by the African Commission until September 2020, at least seven have centred on the violation of article 22 of the African Charter, dealing with the right to development.[146] If there were to be a global consensus on a common set of codified norms on business and human rights, this will create new momentum and go a long way in clarifying doubts that persist in this domain.

4 Conclusion

I have examined the relationship between business actors and the implementation of the right to development in Africa by focusing on the implications of a possible international legally-binding instrument on business and human rights.[147] In so doing, I adumbrated on the current *lacunae* that exist in human rights law in the realm of inclusive accountability for business actors. The focus has been on the implementation of right to development in Africa and how a possible legally-binding instrument on business and human rights can both revitalise and bring more meaning to its implementation. While acknowledging that there is no guarantee that a final draft of this instrument will eventually be adopted in the near future, I have nevertheless critically examined ways in which the clarification of some of the issues associated with this process could advance the implementation of the right to development in Africa and perhaps human rights accountability, more generally, on the continent.

145 Para 15 Preamble, legally-binding instrument.
146 Arts & Atabongawung (n 88) 24.
147 HRC Res 26/9 (26 June 2014).

Several conclusions are drawn in respect of international cooperation and assistance, extraterritoriality and accountability, which are central to the right to development discourse. First, the article reveals that international cooperation and assistance already feature prominently in international human rights law. The jurisprudence emerging from the African human rights system on the right to development has emphasised the need for international cooperation among states in achieving the right to development. Therefore, reinstating the duty for states to cooperate in the realm of corporate accountability for human rights adds another layer of concretisation and fills an important gap in the current debate on human rights accountability and, in particular, the right to development in Africa. Second, I have emphasised that the extraterritoriality principle developed in the draft legally-binding instrument on business and human rights is particularly timely for many human rights victims in Africa considering the lack of local enforcement and the fact that most victims of corporate human rights violations continue to rely on forum shopping. Lastly, I conclude that if the draft legally-binding instrument on business and human rights is adopted and ratified, it will fill an important accountability gap in the current jurisprudence on the right to development in Africa by extending accountability to business actors considering the impact of business activity on communities across Africa. What remains to be seen is whether the current efforts in Geneva will galvanise global consensus for the legally-binding instrument to come to fruition and attract significant state ratifications.

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The 'Africa we want' in the African Union's Agenda 2063 on the realisation of women's human rights to access justice

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Summary: *This article examines the envisioned design of the 'Africa we want' through the lens and intersection of the principles of the rule of law and access to justice in the elimination of the barriers that compromise the promotion of the rights of women in contemporary Africa as envisaged in Agenda 2063. The objective is to affirm the language of rights as an enabling environment that will advance the promotion of the rights of women in the regulation of state authority. The purpose of the article is grounded by many of the challenges faced by women of Africa in the enjoyment and fulfilment of their rights. The article raises questions on the improvement of access to justice by women, capacitation of the enforcement agencies and their contribution*

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to socio-legal change. These questions are limited to the rights of women within the interrelationship that exists between the rule of law and access to justice. The article starts by setting the tone on the intersection of the two principles and their potential to advance the rights of women in Africa. It then focuses on the significance of the people-centred approach within the framework of the two principles in the advancement of the rights of women of Africa as envisaged in Agenda 2063.

Key words: *rule of law; justice; women; contemporary Africa; human rights; Agenda 2063; social change*

1 Introduction

Following the progress made in the promotion of the rights of women within the community of nations through legal and other reforms, Africa has since aligned itself with the said community in order to remove all the barriers that are faced by women in the enjoyment of their rights. The hosting of the Fourth World Conference on Women of the United Nations (UN),[1] and the subsequent adoption of the Beijing Declaration and Platform for Action,[2] were some of the many measures and reforms that opened Africa's eyes to the primary role of states' obligations in addressing various challenges faced by women of Africa. The commitment became a stimulus for Africa's empowerment of women in the advancement of socio-political and legal change. It encapsulates an acknowledgment that Africa's progression within the framework of rights of the global community strengthens the domestication of international human rights laws[3] in the promotion of the rights of women. It also reinforces the states' obligations in the enforcement of human rights laws on the African

1 Held in Beijing, China, 1995.

2 With the Declaration, the governments were to take note of the following critical areas: (a) women and poverty; (b) education and training of women; (c) women and health; (d) violence against women; (e) women and armed conflict; (f) women and the economy; (g) women in power and decision making; (h) institutional mechanisms for the advancement of women; (i) human rights of women; (j) women and the media; and (k) women and the environment, http://www.genderequality.ie/en/GE/Pages/BeijingPlatform (accessed 22 August 2019).

3 These laws include, but are not limited to, the Universal Declaration of Human Rights, adopted 10 December 1948 (Universal Declaration); the International Covenant on Civil and Political Rights, adopted 16 December 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965 (CERD); the International Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979 (CEDAW).

continent, which is known for the arbitrary protection of rights.[4] The significance of the stimulus depends on the creation of opportunities and the consolidation of the regulatory framework that is enforced through principles such as the rule of law. The latter principle is of direct relevance for the rights of women's access to justice as the most vulnerable members of society.[5]

With the progress so far made, the adoption by the African Union (AU) of Agenda 2063 with an affirmation of 'the Africa we want'[6] has established the rule of law as one of Africa's seven aspirations that are at the epicentre of promoting the rights of women, especially around access to justice. Agenda 2063 envisages the development and transformative areas of importance, which are encapsulated in seven overarching aspirations. For purposes of this article, the Agenda 2063 encompasses gender equality in aspiration 3 on 'Africa of good governance, democracy, respect for human rights, justice and the rule of law with its people-driven objective which is inclusive of women as envisaged in aspiration 6'.

However, Africa is still faced with many challenges regarding the implementation of the aforementioned principles as many women are subject to various forms of abuse and discrimination. African governments are also implicated in human rights violations, which in turn has dire consequences for women.[7] Although the African continent appears progressive on paper through the adopted legal reforms that were designed to address the plight of women, sexual, domestic violence, murder and other violent and extreme crimes against women tend to be less frequently reported, lack proper investigation, barely or rarely leading to meaningful conviction that will serve as a deterrent to the future commission of horrific crimes against women.[8] Hence, the judiciary as the last line of defence in the substantive realisation of all fundamental freedoms is a subject of

4 MG Nyarko & AO Jegede 'Human rights development in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 294. See also M Segun 'Human rights abuses escalate in Africa during the pandemic' 18 January 2021, https://www.hrw.org/news/2021/01/18/human-rights-abuses-escalate-africa-during-pandemic (accessed 21 April 2021).

5 D Kobrynowicz & NR Branscombe 'Who considers themselves victims of discrimination? Individual difference predictors of perceived gender discrimination in women and men' (1997) 21 *Psychology of Women Quarterly* 347.

6 Adopted at the 24th Summit of the African Union held on 23-31 January 2015, Addis Ababa, Ethiopia.

7 E Durojaye 'The Special Rapporteur on the Rights of Women in Africa (SRRWA) 2007-2015' (2018) 16 *Gender and Behaviour* 10700.

8 R Jacobson 'Women and the rule of law' (2018) 38 *The Fletcher Forum of World Affairs* 101.

intense scrutiny and unwarranted attacks from the general populace, especially in South Africa.[9]

With this in mind, the article examines the envisioned 'Africa we want' through the lens and intersection of the principles of the rule of law and access to justice in the elimination of the barriers that compromise the promotion of the rights of women in contemporary Africa as envisaged in Agenda 2063. The objective is to affirm the language of rights as an enabling environment that will advance the promotion of the rights of women in the regulation of state authority. The purpose of the article is grounded by many of the challenges faced by African women in the enjoyment and fulfilment of their rights. The article raises questions as to the improvement of access to justice by women, capacitation of the enforcement agencies and their contribution to socio-legal change. These questions are limited to the rights of women within the interrelationship that exists between the rule of law and access to justice.

The article starts by setting the tone on the intersection of the two principles and their potential to advance the rights of women in Africa. It then focuses on the significance of the people-centred approach with reference to the rule of law and access to justice in the advancement of the rights of women in Africa as envisaged in Agenda 2063.

2 The rule of law and access to justice: The double-edged sword for women's rights

2.1 Rule of law and access to justice: Africa's integrated approach for the advancement of women's rights?

This part puts the emphasis on the envisioned aspiration for the intersection of the rule of law and access to justice in the context of Agenda 2063. It discusses the core content of these principles as fundamentals that are grounded in the promotion of the human rights of women. The focus is motivated by Africa's bold step in adopting a common approach that seeks to address the root causes of inequality between men and women in order to ensure the improvement of human rights for all, especially of ensuring women as equal beneficiaries of rights in contemporary Africa.

9 See N Ntlama 'Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority' (2020) *De Jure Law Journal* 286.

It is without doubt that the rule of law and access to justice have an intrinsic relationship, which is founded on the basic principles of human rights. Both principles are a cornerstone of a functioning democracy in contemporary Africa. Their intersection is essential in bringing stability and promoting peace in Africa, especially for women who are mostly vulnerable. The AU's adoption of Agenda 2063, which is highly commended, gave impetus to the rule of law and access to justice as central values of African governments in ensuring the promotion of the rights of women. Agenda 2063 is a progressive plan that is meant to advance the rights of women which, in turn, has the potential to affirm the principles of gender equality.

Agenda 2063 is evidence of Africa's advancement of women's rights towards the reinforcement of the existing legal framework such as the African Charter on Human and Peoples' Rights (African Charter),[10] which is the founding instrument that is couched and moulded in the language of human rights in Africa.[11] The African Charter guarantees human rights to all without exception and requires states not only to protect rights but to go further and ensure their fulfilment. Of particular significance regarding the African Charter is its commitment to the 'African conception of human rights which takes into account the African philosophy of law and the needs of Africa as it set out to combine the specific needs and values of African cultures with standards that have been recognised as universally valid'.[12] This is the envisioned people-centred conception of human rights, to be further discussed below, which starts at the bottom level of family in the consolidation and promotion of the rights language in Africa. The launch of the AU Strategy for Gender Equality and Women's Empowerment 2018-2028 (GEWE) at the AU Summit in 2019 reinforces the African Charter and is testimony to Africa's commitment to the ideals of the global community in the advancement of women's human rights. GEWE is focused on ensuring (a) women's economic empowerment and sustainable development; (b) social justice, protection and women's rights; (c) leadership and governance; gender management systems; (d)

10 Adopted in Nairobi, Kenya in June 1981 and entered into force on 21 October, 1986. It was registered with the United Nations on 10 September 1991 with Certificate 26363.

11 See art 1 of the African Charter which sets the threshold for state compliance with the requisites of the African Charter by reading as follows: 'Member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

12 See Amnesty International 'A guide to the African Charter on Human and Peoples' Rights' (2006) Amnesty International Publications AI Index: IOR 63/005/2006] 10; see also eg art 18 of the African Charter.

women, peace and security; and (e) media and information and communications technology.

The GEWE strategy buttresses Agenda 2063 which envisages the intersection of the rule of law and access to justice without which the rights of women could not be upheld. It envisions Africa's democratic character, which aspires to be grounded on universal principles of human rights, good governance and justice. These principles underpin the provisioning of a framework for the legal empowerment of women, transparent and accountable institutions, which are charged with the responsibility of improving the quality of the enjoyment of women's human rights.[13]

Agenda 2063 endorses the rule of law as the foundation of regulating effective state authority where the branches and all spheres of the state should adhere and account to the promulgated laws by states. The obligation requires equal and consistent enforcement of the law in ensuring compliance not only with domestic laws but also with those of international human rights law. Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly* (*EFF*)[14] expressed and contextualised the significance of the rule of law which is of direct relevance to the aspirations of Agenda 2063 and foundational to the regulation of state of authority. It was held:[15]

> The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.

With the projected vision of the rule of law, it also is difficult to define it. However, its outcomes are a determinant of the principles it seeks to bring to the respective communities as it is characterised by legal certainty; principles of the supremacy of the law; equality before the law; accountability to the law; fairness in the application of the law; participation in decision making; avoidance of arbitrariness;

13 C Fombad & E Kibet 'Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects' (2018) 18 *African Human Rights Law Journal* 205. The authors contend that 'the rule of law is the bedrock on which democracy and democratic practices are supposed to be anchored' (208).

14 [2016] ZACC 11.

15 *EFF* (n 14) para 75.

and procedural and legal transparency.[16] Botero expresses the same sentiments, that the rule of law is founded on universal principles where government and its officials and agents as well as individuals and private entities are accountable under the law; that laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property; that the process by which the laws are enacted, administered and enforced is accessible, fair, and efficient; that justice is delivered timely by competent, ethical and independent representatives and neutrals of sufficient number and who have adequate resources and reflect the makeup of the communities they serve.[17]

Drawing from these features the adoption of Agenda 2063 endorses Africa's aspirations of developing common goals that envision the use of the rule of law that is founded in the language of human rights. The foundation entails the effective system of governance, accountability, enabling environment and equitable process in the socio-political spheres. On the African continent, which experienced the historic trauma of inequalities, the rule of law is a regulatory legal framework, which should chart an approach for African governments to ensure its transmission to substantive reality. This means that the rule of law should remain a 'pillar of good governance'[18] where states are required to conform and adhere to laws, which are beneficial not only in their promotion and respect but the fulfilment of the rights of women. The rule of law guides the work of government as it set parameters and performance standards against which the implementation of human rights may be tested.[19] There can be no meaningful promotion and protection of rights without the strengthened systems of governance, which are grounded on the rule of law, because they are equally supportive and

16 See also statements made by many African governments at the High-Level Meeting of the 67th session of the General Assembly on the rule of law at the national and international levels, 24 September 2012, New York, https://www.un.org/ruleoflaw/high-level-meeting-on-the-rule-of-law-2012/ (accessed 22 August 2019).

17 JC Botero et al 'Report on the World Justice Project: Rule of Law Index' (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (accessed 20 October 2019). The report also characterises the principle of the rule of law as a system where (a) government and private entities are accountable under the law; (b) laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights; (c) the processes by which laws are enacted, administered and enforced are accessible, fair and efficient; and (d) justice is delivered in a timely fashion by competent, ethical and independent representatives and others who are supported by adequate resources and reflect the makeup of the communities they serve.

18 M Mutua 'Africa and rule of law' (2016) *International Journal of Human Rights* 4.

19 Office of the United Nations High Commissioner for Human Rights 'Good governance practices for protection of human rights' (2007) Geneva (United Nations Publications (iv).

dependent.[20] Hence, Khampepe J in *Welkom High School v Harmony High School*[21] held:[22]

> The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. Accordingly, section 7(2) and the rule of law demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help.

The proper regulation of state authority, which is founded in the rule of law, has a greater effect and is a critical factor on the evolution of the language of rights for women as it is informed by equal rights, responsibility and accountability. In the South African context, the rule of law is included as a foundational value of the new democratic dispensation.[23] The affirmation of the rule of law as a founding value informs the interpretation of the rights and the setting of positive standards as envisaged not only in the South African Constitution but also in all constitutions of Africa and their respective laws, which require compliance in order to be valid.[24]

The rule of law was conceptualised by Beaulac as not 'only a represented reality but also played a leading role in the creation and transformation of reality … accordingly, it has contributed to the modelling of the shared consciousness of society including that of international society'.[25] He traced his conception from Dicey's[26] theory of the rule of law that it may be considered from three different points of view in that it –

(a) gives an expression to absolute supremacy of regular law as opposed to the influence of arbitrary power;
(b) entails equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts; and

20 M Mogoeng 'The role of the judiciary in promoting peace, good governance and sustainable economic development' 10 May 2013, Cotonou, Benin, https://www.judiciary.org.za/images/chief_justice_2013/Speech-CJ_10-May-2013_Benin.pdf (accessed 10 October 2019).
21 2013 (9) SA 989 (CC).
22 *Welkom High School* (n 21) para 86 (footnotes omitted).
23 See sec 1 of the 1996 Constitution.
24 See *United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 para 19.
25 S Beaulac *The rule of law in international law today* (2009) 199.
26 AV Dicey *Introduction to the study of the law of the Constitution* (1961).

(c) entails that the laws of the constitution … are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[27]

The viewpoints by Dicey are an indication of the uniqueness of the 'human rights lens in the intersection of the rule of law and the language of rights'.[28] This means that the rule of law and human rights are integral in the fight for protection against those subject to vulnerability. At the heart of Agenda 2063, which infused the principle of the rule of law, is the rooting of the elimination of the barriers that compromise the equal rights of women in the enjoyment of their human rights.

It is also important to affirm that rule of law is a *sine qua non* to access to justice as it has long been regarded as one of the important cornerstones of the principles of democracy, good governance and effective and equitable development.[29] Access to justice is multi-faceted because it integrates all the other rights such as equality, dignity, freedom and security, and many other fundamentals that are included in various instruments, including domestic and international customary law. It is characterised by fairness in the treatment of litigants, justness of results delivered, the timeous resolution of disputes brought before the courts and responsiveness of the system to those who use it.[30] To that end, the acceptance of the interrelationship that exists between the rule of law and access to justice is indicative of the reflection of the interests of the citizens of the state that provides an avenue through which the fundamental rights of everyone, especially women, are protected and fulfilled.[31]

Access to justice is a vital component of the rule of law in the promotion of the rights of women and serves as a fundamental value of justice.[32] This means that access to justice is interwoven with the rule of law as a fundamental element for the realisation of women's human rights in Africa. It reinforces the multi-dimensional approach to the language of rights, which encompasses accessibility, availability, accountability and the provision of adequate remedies in the enforcement of rights. The two entail commonality in the

27 Dicey (n 26) 202, quoted in Beaulac (n 25) (footnotes omitted).
28 JD Mujuzi 'The African Commission on Human and Peoples' Rights and its promotion and protection of the right to freedom from discrimination' (2017) 17 *International Journal of Discrimination and Law* 86.
29 Fombad & Kibet (n 13) 208.
30 R Bowd 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' 13 October 2009, Policy Brief 1.
31 Bowd (n 30) 3.
32 A Clark, J Williams & S Wydall 'Access to justice for victims/survivors of elder abuse: A qualitative study' (2016) 15 *Social Policy and Society* 207.

provision of an effective system of accessing justice, which should be characterised by fairness, transparency, non-discrimination and accountability. These factors do not entail mere access to justice but for the equitable and effective remedies, which are essential for the rights of women. The quality of access to justice is reflective of each state's commitment to good governance and the advancement of the democratic principles.

The adoption by the AU in 2003 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[33] was an acknowledgment that Africa needed legal certainty in addressing issues that affect women, including their right to access justice.[34] By mid-2021, 42 states have become party to the African Women's Protocol. The 13 states that to date have not become party to the Women's Protocol could draw comparative lessons on the existing need for the development of a gender-sensitive agenda which is biased against women and 'not to be islands unto themselves'[35] from the states that have become party to it, and align with the legal requirements that, if implemented, would serve as a pace setter in the elimination of all forms of discrimination against women. It is also imperative for the AU to encourage the ten states that have only signed the Protocol ratify it with reservations,[36] failing which, to 'pull the bull by the horns' and ensure that all member states, including the three that have neither signed nor ratified the Protocol, adhere to the reforms that are designed to promote the rights language in Africa. It is the same in the case of those states that ratified the Protocol to ensure that they are accountable and report on the progress made in order to identify best practices and challenges in its implementation.[37]

The Southern African Development Community (SADC) followed suit by the adoption of the Protocol on Gender and Development,[38] which is also an acknowledgment by regional governments to

33 Adopted 11 July 2003, Maputo, Mozambique.

34 See eg art 2 of the African Women's Protocol which prohibits all forms discrimination and puts the emphasis on state responsibility to adopt legal and other measures to promote the rights of women. Art 2 is directly linked to art 8 which entitles women to equal access to justice and for states to ensure the fulfilment of the rights in question.

35 Idiom extracted from Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

36 D Apollos 'Slow progress in meeting commitment to 2020 as the year of universal ratification of Maputo Protocol' Press release, African Union, 20 November 2020, https://au.int/sites/default/files/pressreleases/39613-pr-accelerating_the_implementation_of_commitments_to_african_women.pdf (accessed 25 May 2021).

37 As above.

38 Adopted in August 2008 with a revised amendment adopted on 20 August 2018.

advance the rights of women on access to justice.[39] This instrument envisages adherence to the principles of the rule of law that should transmit to the upholding of women's rights wherein access to quality justice is upheld. In turn, the principles should transmit to the upholding of the fundamental rights of all, including women.

The intersection of the rule of law and access to justice puts greater emphasis on the empowerment of women for the advancement of the principle of gender equality. The recent appointment of the first female chief justice in Kenya, Justice Martha Koome, is commendable as a progressive and transformative step towards advancing the intersection of the rule of law and access to justice.[40] The appointment is viewed as having the potential to shape the jurisprudence that will emanate from the courts. First, her appointment would legitimise the democratic character of the judiciary by ensuring the representation that mirrors the diverse nature of the population in terms of race, gender and class, among others. Second, the appointment would make a difference by bringing an essentially female perspective to judging law by sensitising and educating male judges about gender stereotypes, myths and male bias is reflected in their judgments.[41] This is the case in South Africa with the appointment of the first woman as acting chief justice, which is viewed as transformative in leading the highest court of the land.[42] Without much focus on these appointments, if they are viewed from a 'womanhood perspective' instead of being judges with capabilities to deliver access to justice which, in turn, would uphold the rule of law, their potential is likely to fade into the cloud of being 'women' and not 'judges'.

Therefore, it cannot be denied that notwithstanding the plethora of adopted legal reforms in addressing women's challenges, African governments are still accused of being at the pinnacle of perpetuating women's subordination. This means that challenges facing women in Africa do not exist in a vacuum.[43] African women have long been faced by high levels of violence (domestic and otherwise); delays in the enforcement of their rights which is perpetuated by high costs of litigation; questionable enforcement of the law and limitations in

39 See arts 7(a)-(g) of the Protocol.
40 A Soyinka 'Kenya has its first female chief justice: Why this matters' *The Conversation* 3 May 2021, https://theconversation.com/kenya-has-its-first-female-chief-justice-why-this-matters-160108 (accessed 6 May 2021).
41 As above.
42 L Bhengu 'Justice Khampepe appointed as acting chief justice', https://www.news24.com/news24/southafrica/news/justice-sisi-khampepe-appointed-as-acting-chief-justice-20210505 (accessed 7 May 2021).
43 R Matzopoulos et al 'Utility of crime surveys for Sustainable Development Goals monitoring and violence prevention using a public health approach' (2019) 109 *South African Medical Journal* 382.

the existing remedies; and complex legal procedures and the lack of national information flow about rights and legal processes.[44] These challenges raise important questions: first, as to what strategies to put in place to eliminate perceptions that access to justice depends on the purse of a person; second, how to develop an inclusive-oriented approach that is sensitive to gender nuances in order to ensure the empowerment of women; third, the effect that the law has in eliminating societal norms that entrench gender stereotypes; lastly, whether law can be relied upon as an effective measure to determine social change.

These questions are mentioned here because they bring to the fore contested views on the meaning and essence of the rule of law and access to justice, especially in Africa, wherein arguments are raised that they cannot be transplanted onto the continent without taking into account the geographic and economic peculiarities of each state. To an extent, Mutua argues that the understanding of the principles became sophisticated because 'no credit was given to pre-existing African legal systems, where attempts could be made to view the law in a wider social context both domestically and internationally'.[45] With this argument Mutua raises a plethora of questions, which will not be repeated here but can be summed up as follows: Can the law be used as a tool for social justice?[46] It is also not the intention to engage with the complexity and sophistication of the questions other than acknowledging that all states, despite the shortcomings that might be experienced, intend to strive and root their systems of governance to the core values of the principles of the rule of law and access to justice.[47] This is important for Africa which continues to suffer from the historic legacy of colonisation and the further abuse and discrimination suffered by women.

44 See MD Muluneh et al 'Gender-based violence against women in sub-Saharan Africa: A systematic review and meta-analysis of cross-sectional studies' (2020) 17 *International Journal of Environmental Public Health* 1.
45 Mutua (n 18) 163.
46 Mutua 164.
47 Mutua 170.

3 Agenda 2063: Unleashing the potential for women's rights to gender equality?

3.1 Snail-pace approach of legal reforms in fulfilling women's rights?

As argued here, African governments at times are accused of being at the forefront of compromising the rights of women which, in turn, questions their commitments to the overall goal of liberating the women of Africa. The article also contends that Agenda 2063 is unlikely to achieve its aspirations, as is the case with many other projected legal reforms, such as the African Women's Protocol and the SADC Gender and Development Protocol, without forging relations with other institutions such as those of higher learning. For example, the snail-pace concept is used here to indicate the extreme low levels of the impact of legal reforms in addressing the challenges faced by women. It then becomes a great challenge to determine the effect of the reforms in contributing to socio-legal change in the fulfilment of their rights. It is our considered view that the African Charter, as the founding document of the rights language, supplemented by the African Women's Protocol, with the latter, which continues to be celebrated as a symbol of hope for the fulfilment of the rights of women of Africa, guarantees various rights, including the right of access to justice and, further, not just equal protection but benefit of the law.[48] Thus, the guarantee, as evidenced by the adoption of Agenda 2063, shows that the Women's Protocol has not yet fulfilled its desired purpose of eliminating all the barriers that compromise the achievement of equal rights for all, including the evolution of the prescripts of gender equality in ensuring the substantive realisation of the rights of women.

The progressive step taken by the adoption of Agenda 2063 is commendable. However, the challenges facing women of Africa continue to manifest themselves in various forms as evidenced by

48 See art 8 of the Protocol which provides that 'women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure (a) effective access by women to judicial and legal services, including legal aid; (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; (e) that women are represented equally in the judiciary and law enforcement organs; and (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.'

the development of legal reforms, which are meant to address their continued strife. The above questions remain unanswered about the impact of earlier legal reforms that were designed to address women's issues. The release of the report on crime statistics in South Africa for the year 2018, which were assessed by the Minister of Police, Bheki Cele, as 'not a rosy picture', raises questions about the significance of the rule of law and its relationship with access to justice.[49] The interdependence of the two principles seek to forge instruments of governance by enforcement agencies, which should translate to the language of rights for women.

It appears that Africa is out of depth in dealing with horrendous crimes against women in order to translate into reality the principles that are envisaged in various instruments.[50] It bears repetition that with numerous legal reforms and other adopted measures and the continued challenges faced by women today, the question is whether this means that law is not a vehicle for social change. How would Agenda 2063 make a difference to what already is in the public knowledge, which has seen the snail-pace approach of the legal reforms in contributing to socio-political change?

The questions are borne out by Agenda 2063, which envisions the development that is 'people driven' with great reliance on empowerment of women and youth. The people's approach raises further questions, namely, whether by the year 2063 the projected vision would have been achieved in, first, eliminating all forms of violence and discrimination (social, economic, political) against women and girls; second, fulfilling the enjoyment of all human rights by women; third, empowering women to access equal opportunities, more especially women in rural areas who are mostly affected by factors that compromise their human worth; last, seeing the attainment of gender equality.[51]

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49 Citizen Reporter 'Police Minister Bheki Cele's assessment that the stats paint a "not very rosy" picture may be an understatement' 12 September 2019, https://citizen.co.za/news/south-africa/crime/2178229/crime-stats-sex-offences-increase-by-4-6-murder-increases-by-3-4/ (accessed 12 September 2019).

50 L Volgeman & G Eagle 'Overcoming endemic violence against women in South Africa' (1991) 18 *Social Justice* 209. See also TB Zimudzi 'African women, violent crime and the criminal law in colonial Zimbabwe' (2004) 30 *Journal of Southern African Studies* 499.

51 M Botha 'Gender inequality in the workplace remains an uncomfortable conversation for many' *Sowetan Newspaper* 8 January 2020, https://www.sowetanlive.co.za/opinion/columnists/2020-01-08-gender-inequality-in-workplace-remains-uncomfortable-conversation-for-many/ (accessed 8 January 2020). Botha appears to have lost faith in the achievement of gender equality as he argues that with the overwhelming challenges faced by women despite the spate of legal reforms the structural impediment prevents women from achieving professional success, which means that no matter how hard women work, chances of progression are minimal.

The questions are not borne out of 'prophecy' for the likely 'doom' of Agenda 2063. They have a background on the challenges that continue to be faced by women of Africa today. At the risk of repetition, Africa has seen a steady progression towards developing human rights-oriented laws and especially for women in line with the requisites of the laws of the international community. In terms of implementation, the laws seem not to be transmitting towards their intended objectives. Many women continue to be undervalued even in countries such as South Africa that are highly regarded in the area of not promoting equality through legal reforms but their translation into substantive reality.

Despite the projected vision to liberate women from socio-political, legal and cultural injustices, the conducts of African governments continue to be questionable around their commitment to advance the rights of women. The arrest and sentencing of Dr Stella Nyanzi, who was found guilty and sentenced to 18 months' imprisonment for allegedly insulting and harassing President Museveni of Uganda, left a bitter taste in the area of drawing an appropriate balance on the limitation of rights.[52] The jailing of Dr Nyanzi is indicative of the struggles women face to an extent of having to lose their own humanity and dignity to fight the authorities in Africa. There are a number of other examples in Africa where women had to go to extreme levels to attract the attention of governments in the fight for equal rights. In South Africa a woman protested naked outside the South African Union Buildings, demanding to see President Cyril Ramaphosa.[53] The situation of women's subordination is acute in Sudan when they are still subject to the marital authority of their husbands who determine whether or not the woman should work. Notwithstanding the numerous legal reforms in Sudan enabling women to negotiate legal constraints that placed them under the guardianship of their husbands, they remain subjected to a strict public dress code and behavioural codes and the upholding of occupational segregation even in the workplace environment.[54]

52 E Lirri 'Challenging power isn't polite and beautiful: Dr Stella Nyanzi and the right to be impolite in Uganda' *Equal Times* 28 June 2019, https://www.equaltimes.org/challenging-power-isn-t-polite-and?lang=en#.XWJ7PugzZ1s (accessed 22 August 2019).

53 C Maphanga 'Woman arrested during naked protest outside Union Buildings' *News24* 13 March 2019, https://www.news24.com/SouthAfrica/News/watch-woman-arrested-during-naked-protest-at-union-buildings-20190313 (accessed 25 August 2019). See also K Abdelaziz 'Sudanese women protesters sentenced to 20 lashes, month in jail' *World News* 9 March 2019, https://www.reuters.com/article/us-sudan-protests/sudanese-women-protesters-sentenced-to-20-lashes-month-in-jail-idUSKBN1QQ0KW (accessed 25 August 2019).

54 L Tonnessen 'Women at work in Sudan: Marital privilege or constitutional law? (2019) 26 *Social Politics: International Studies State, Gender and Society* 223.

Furthermore, against the backdrop of the questions raised above, Africa's compliance with human rights norms and ethos raises questions, resulting in many women subjected to extreme levels of gender-based violence, and numerous forms of abuse and discrimination.[55] President Yoweri Museveni of Uganda has gone to the extent of calling for an 'eye-for-an-eye' and a 'tooth-for-a-tooth' approach[56] in addressing the escalation of violence, which has proved to have disastrous consequences for the promotion of the rights of women. President Museveni is calling for these approaches, which is reflective of the weaknesses in his own system of governance in adhering to the principle of the rule of law which, in turn, would have enabled the fulfilment of the right to access justice for women. This is the case with President Cyril Ramaphosa of South Africa who seems to be slow into signing into law the amendments to the gender-based violence laws. The public pressure is piling on the President to sign, first, the Domestic Violence Amendment B20-2020, which seeks to extend the definition of domestic violence to victims of assault to those engaged to be married, those who are dating, those in customary relationships and those in actual or perceived romantic, intimate or sexual relationships of any duration. As of 11 March 2021, South Africa's Parliamentary Portfolio Committee on Justice and Correctional Services was still in discussion over the correct terminology to be properly used in the proposed amendments to the Bill.[57] Second, the Criminal and Related Matters Amendment B17-2020, which is a direct response to the public outcry against accused offenders being easily granted bail, and perpetrators only, having to serve minimum sentences for very serious crimes. The third amendment is in the Criminal Law Sexual Offences and Related Matters B16-2020 which recognises sexual intimidation as an official offence, something it had not done before.[58]

The broader question emanating from the questions and examples highlighted above in an attempt to fulfil the aspirations of Agenda 2063 is whether the concept of law for social change is an elusive concept

55 Ntlama (n 9).

56 M Frykberg 'Museveni demands "eye for an eye" sentencing after nephew murdered' *IOL* 12 September 2019, https://www.iol.co.za/news/africa/museveni-demands-eye-for-an-eye-sentencing-after-nephew-murdered-32848585 (accessed 12 September 2019).

57 See minutes, https://pmg.org.za/page/Domestic%20Violence% 20Amendment %20Bill:%20deliberations2 (accessed 7 May 2021).

58 K Mlaba 'South Africa's new gender-based violence laws: What you should know and how to have your say' *Global Citizen* 23 September 2020, https://www.globalcitizen.org/en/content/south-africa-new-laws-gender-violence-what-to-know/ (accessed 20 October 2020). See also President Cyril Ramaphosa 'Address on public and gender-based violence' 5 September 2019, https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-public-and-gender-based-violence-5-sep-2019-0000 (accessed 14 October 2019).

for the advancement of good governance within the framework of the rule of law with reference to the rights of women to access justice in addressing all the ills that they experience. This is important because of the need not to frame the rights of women within the context of 'victimhood'. Women are entitled to equal fundamental rights as citizens of each respective state. Their characterisation as victims stigmatises their entitlement as equal human beings for no other reason than being human. The manifestation of barriers that inhibit women's fulfilment of their rights, even remedies that are provided by the courts, do not seem to bridge the gap and serve as deterrent to the further perpetration of horrific crimes against women.[59] If in South Africa the 2018 Crime Against Women Report[60] highlights that approximately 3 000 women were killed in the year 2018, which entails the death of one woman every three hours, more than five times than the global average, serious questions have to be asked about the impact of the laws and those entrusted with the responsibility to enforce them. It is not our intention to delve into the quality of the investigation processes by the criminal justice system, but the continued scourge of violent crime against women leaves a bitter taste on the advancement of their rights.[61]

3.2 The rights language: A determinant for a common approach?

Africa's progress to date, on legal reform, especially the aspirations that are focused around the people-centred approach in advancing human rights, is not merely a commitment to legal obligations but seeks to define Africa's identity. Africa's identity is defined around the concept of collectivism where the pain of one is also the pain of the other person. This means the sharing of the values and principles, which are a core determinant of the attachment that is placed on the humanity of the human person. The defined identity is a commitment to principles and values in the affirmation of due diligence in the affirmation of the language of rights as it provides a framework for societal change objectives that are envisaged in various instruments. Africa's Agenda 2063 obligates states to sharpen

59 See art 25 of the African Women's Protocol which requires states to provide appropriate remedies to be determined by a competent judicial or legislative authority for any woman whose rights have been violated.

60 R Maluleke 'Crime against women in South Africa: An in-depth analysis of victims of crime survey data' (2018) Statistics South Africa, https://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf (accessed 27 December 2019).

61 See South African Police Service 'Annual Crime Report 2019/2020' 30 October 2020 ISBN 978-0621-48614-8, https://static.pmg.org.za/SAPS_CRIME_REPORT_2020_WEB.pdf (accessed 24 May 2021).

their claws in the monitoring and influence of the enforcement of the operationalisation of the legal reforms for the language of rights of women.

The common approach entails that in dealing with Africa's challenges, African governments cannot undertake such a mammoth task in isolation. Various institutions, including those of higher learning, which are a reservoir of knowledge, could prove useful in the generation of knowledge and the production of innovative strategies in addressing the challenges faced by governments in ensuring the people-centred conception of addressing the plight of women. These institutions may also devise mechanisms in assisting governments with pro-active and concrete ways of transmitting national information flow for better enforcement, monitoring and evaluation of the impact of the rights laws in the resolve of the barriers faced by women in the fulfilment of their human rights.

The envisioned people-centred approach in Agenda 2063 was long affirmed by former President Nelson Mandela in his inaugural speech in 1994 when he stated:[62]

> We must construct that people-centred society of freedom in such a manner that it guarantees the political and the human rights of all our citizens. My government's commitment to create a people-centred society of liberty binds us to the pursuit of the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of human dignity. They will therefore constitute part of the centrepiece of what this government will seek to achieve, the focal point on which our attention will be continuously focused.

The people-centred approach, with former President Mandela as an advocate for such a conception in South Africa, as substantiated by Schenk and Louw, is at least characterised by awareness, motivation and behaviour of individuals and in the relations between individuals as well as groups within society; legal empowerment which enables the people to elicit the power they have by joining hands in the use of their skills and confidence building in ensuring the promotion of their rights; and participating in the planning, assessment, implementation of the plans and programmes designed for the

62 1994 – President Mandela, State of the Nation Address, 24 May 1994 (after national elections), https://www.sahistory.org.za/archive/1994-president-mandela-state-nation-address-24-may-1994-after-national-elections (accessed 18 November 2019).

enforcement and fulfilment of their rights.[63] The envisaged 'Africa we want' in Agenda 2063 encapsulates the people-centred approach which requires the taking of the people's aspirations of equal society as a fundamental goal that seeks to promote their needs with the intended benefits for all including the vulnerable members of our communities. The centred approach entails a common conception in the furthering of Agenda 2063 by requiring African governments to (i) affirm their political will and commitment to create greater awareness about the existing laws in curbing the lack of national information flow, which disadvantages women, mostly those in rural areas; (ii) empower institutions of higher learning in conducting evidence-based research on issues that affect women on access to justice; and (iii) encourage, support and strengthen national and regional partnerships in Africa to ensure an integrated vision on the elimination of barriers that undermine the progress made by Africa today.

Without a doubt the consolidation of the legal rights of women, which should serve as a direct response to the advancement of their rights, on the one hand, and the enforcement of state accountability, on the other, is of great significance for the promotion of the right to gender equality. As noted above, the institutions of higher learning serve as the apex for research and production of human rights-oriented knowledge that seeks to enhance the construction of a more human society as a basis of the new development strategy from various stakeholders. Since these institutions are interdisciplinary in their respective fields, they produce social, legal, economic and cultural leaders that have special qualities to steer the production of human rights-oriented knowledge, which is of equal concern for both men and women. These institutions have the potential to advance the interrelationship of the principles of the rule of law and access to justice for women, which has essential implications for the determination of the impact of the law in addressing socio-political and legal challenges. In essence, the unearthing of knowledge, which is socially and legally relevant through various methodologies, is of significance for the evolution of the principles of the law, which are fundamental for the rights of women. Equity and societal transformation will remain an aspiration if there is no marshalling of the human capital, especially from institutions of higher learning, to develop and adapt innovative strategies for the elimination of barriers that subjugate women.

63 CJ Schenk & H Louw 'A people centred perspective on people centred community development' (1995) 10 *Journal of Social Development in Africa* 84.

The construction of a people-centred approach for Africa's development has a great potential to succeed in the conducting of research, analysis, examination and production of knowledge that is founded on human rights. In this way, assumingly, Africa will be enabled to determine the impact of legal reforms in addressing the plight of women by focusing on and taking stock of the intersection of the rule of law and access to justice as core principles that should be grounded on a human rights-inspired approach. The human rights approach has the potential to contextualise the rule of law as an integral part of the facilitation of women's access to justice. The rights approach is two-pronged in that it requires the development of human capacity of those charged and responsible for the enforcement and implementation of the adopted legal reforms. On the other hand, it also envisages the building of capacity in the creation of the greater awareness of the rights to which women are entitled.[64] The focus on vulnerability and exclusion which is acute against women should, within the common approach of Agenda 2063, include an integrated, interdisciplinary, multi-sectoral and multi-disciplinary approach in the advancement of the rights language which is inclusive of women.

It is our considered view that this integration is at the epicentre of transmitting the production of the rights language for the advancement of the rights of women. The integration is grounded in the carriage of an in-depth review and analysis of various human rights theories and human rights education in diverse forms in the popularisation and dissemination of knowledge about laws that impact on human rights. It strives to enhance society's human rights awareness, which is meant to build capacity in the area of human rights education. Therefore, it is without doubt that the commitment to eliminate barriers that undermine the rights of women, the commitment of Africa's Agenda 2063 to advance the rule of law and access to justice has a potential to contribute to the prescripts of the values and principles of the community of nations and not enclose itself to its continental location.

4 Conclusion

The interdependence of Agenda 2063, in line with the other already adopted legal reforms and measures, is an indication of Africa's boldness not to shy away from its problems, which continue to

64 See UN Women 'Adopting a human rights-based approach' 31 October 2010, https://www.endvawnow.org/en/articles/304-adopting-a-human-rights-based-approach.html (accessed 22 October 2020).

subjugate women. The legal and other measures that Africa has since adopted responded to the various challenges that face women by publicly pledging to resolve them by adopting an envisaged people-centred approach that is meant to embark on a road towards the progression to the language of rights. The progression is founded on the principles of the rule of law, which strengthens the construction of an important goal of building a regional/continental system of consensus on human rights education. Although Agenda 2063 is commendable, its adoption and success, measured against the existing legal reforms in the advancement of the rights of women, such as the African Women's Protocol, remains to be seen. The uncertainty is shown by the many questions that are left unanswered in this article which limit the determination of the impact of the two principles: the rule of law and access to justice in the advancement of the rights of women. This uncertainty is likely to bring to its knees the 'Africa we want'.

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Tension between the individual's fundamental human rights and the protection of the public from infectious and formidable epidemic diseases

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Summary: *Emerging infectious and formidable epidemic diseases are a cause for concern and a serious threat to the global health. At the time of writing a number of these diseases have no cure. States in their domestic legislation applicable to matters of public health have come up with approaches to deal with such diseases. Zimbabwe has enacted primary legislation and regulations dealing with public health in an effort to suppress and prevent these diseases. The Zimbabwean Public Health Act, for example, authorises the notification of infectious and formidable epidemic diseases and the inspection of infected premises. The Act further empowers the Minister of Health and Child Care to enact regulations. Through the Public Health Regulations, the government of Zimbabwe declared COVID-19 a formidable epidemic disease. Warranted by the Health Act, the Minister of Health and Child Care made treatment, testing, detention and isolation compulsory during the period in which COVID-19 is declared a formidable epidemic disease. This article seeks*

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to provide a critical analysis of these measures as provided in the Public Health Act and health regulations in light of the constitutionally-guaranteed rights of privacy, freedom of security, liberty and freedom of movement. The question sought to be answered by the author is whether these measures justifiably trumps the rights of individuals.

Key words: *infectious diseases; formidable epidemic diseases; public health; fundamental human rights; legislation*

1 Introduction

The twenty-first century has seen the emergence of many new high-profile diseases, including the severe acute respiratory syndrome (SARS) to avian influenza A (H 7N9).[1] Such diseases are called emerging infectious diseases and are of serious public health concern. They also have a huge economic and social impact.[2] Emerging infectious diseases are diseases that have appeared and affected a population for the first time, or have existed previously but are rapidly increasing either in terms of the number of new cases within a population, or its spread to new geographical areas.[3] Diseases that have affected a given area in the past, declined or were controlled, but are again being reported in increasing numbers are also grouped under emerging infectious diseases.[4] A number of emerging and re-emerging diseases have emerged from animals and crossed the species barrier to infect humans.[5] There are a number of emerging infectious diseases but for the purposes of this discussion, the article will focus on those included in section 46 of the Public Health Act.[6]

1 World Health Organisation, Regional Office for South-East Asia 'A brief guide to emerging infectious diseases and zoonoses' 2014, https://apps.who.int/iris/handle/10665/204722 (accessed 12 November 2020).
2 As above.
3 World Health Organisation, Regional Office for South-East Asia 'Combating emerging infectious diseases in the South East Asia region' 2005.
4 As above.
5 As above.
6 Zimbabwean Public Health Act 11 of 2018 (Public Health Act). Sec 46 states that '[f]or the purposes of this Act, the term "infectious disease" includes any of the following diseases: (a) chicken pox; (b) diphtheria; (c) erysipelas; (d) pyraemia and septicaemia; (e) scarlet fever; (f) typhus fever; (g) plague; (h) cholera; (i) typhoid or enteric fever (including para-typhoid fever); (j) undulant or Malta fever; (k) epidemic cerebro-spinal meningitis (or cerebro-spinal fever or spotted fever); (l) acute poliomyelitis; (m) leprosy; (n) anthrax; (o) glanders; (p) rabies; (q) trypanosomiasis (or sleeping sickness); (r) yellow fever; (s) viral haemorrhagic fevers; and all forms of tuberculosis and such other infections or communicable diseases including sexually-transmitted diseases as the Minister may declare, by statutory instrument, to be infectious diseases either throughout Zimbabwe or in any part of Zimbabwe'.

Section 64[7] of the Public Health Act interprets the term formidable epidemic disease as follows:

> A formidable disease means cholera, epidemic influenza, typhoid, plague, viral haemogaric fevers and any other disease which the Minister may by statutory instrument, declare to be a formidable epidemic disease for the purposes of this Act.

COVID-19 was proclaimed a global pandemic by the World Health Organisation (WHO) on 11 March 2020. The Public health (COVID-19 Prevention, Containment and Treatment) Regulations 2020, published as Statutory Instrument 77 of 2020,[8] were made law by the Minister of Health and Child Care. The Public Health Regulations were passed on the basis of section 64 of the Public Health Act which provides for 'special provisions regarding formidable epidemic diseases and conditions of public health importance'. The Public Health Regulations declared COVID-19[9] a formidable epidemic disease and the declaration had effect until 1 January 2021 unless the Minister earlier terminated or extended the regulations. A number of regulations were passed which had a foundation on Statutory Instrument 77 of 2020. Although the aim of the regulations was to contain COVID-19, they infringed a number of constitutionally-guaranteed rights. Statutory Instrument 77 of 2020 lapsed on 1 January 2021 and with the Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No 5),[10] which were published as Statutory Instrument 314 of 2020, COVID-19 was declared a formidable epidemic disease until such a time as the Minister by General Notice in the Gazette terminates the declaration.

The Public Health Act provides for the notification[11] of infectious diseases. In terms of the Act, formidable epidemic diseases are

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7 Public Health Act (n 6); see sec 64(1)(a).

8 Public Health (COVID-19 Prevention and Containment) Regulations (Statutory Instrument 77 of 2020) (Public Health Regulations).

9 The World Health Organisation defines the corona virus disease (COVID-19) as an infectious disease caused by a newly-discovered corona virus. Abebe et al define corona viruses as large family RNA viruses that belong to the order *Nidovirales*, family *Coronaviridae*, subfamily *Coronaviridae*. The authors state that COVID-19 infection is caused by a beta corona virus called SARS-COV-2. They explain that the most common symptoms of the disease are fever, cough and dyspnea. See EC Abebe et al 'The newly emerged COVID-19 disease: A systematic review' (2020) 17 *VirolJ* 96, https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01363-5 (accessed 24 November 2020).

10 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations 2020 (No 5) (Statutory Instrument 314 of 2020). See sec 2 of the statutory instrument.

11 A notifiable disease is one required to be reported to the local authorities and health officials when diagnosed, because of infectiousness, gravity and prevalence of occurrence. See the *Free medical dictionary* by Farlex: Notifiable diseases, http://medical-dictionary.thefreedictionary.com/notifiable+diseases (accessed 11 March 2021). Notification of diseases in terms of the Public Health

also notifiable. The Act also provides for the inspection of infected premises of persons suspected to be suffering from infectious diseases, mandatory isolation and that the Minister of Health and Child Care may make regulations related to the imposition of quarantine, the regulation of the movement of persons, the medical examination of persons who are suspected of being infected with the disease and the detention and isolation of persons who may have been exposed to the disease. Statutory Instrument 77 of 2020,[12] which declared COVID-19 a formidable epidemic disease, provides for compulsory treatment, testing and detention of persons suspected to be infected with COVID-19 in order to contain the disease.

What is clear from the above is that the legislation regulating public health accords health authorities powers of notification, the inspection of infected premises, mandatory treatment, isolation and compulsory testing. The Constitution of Zimbabwe provides for the rights to privacy,[13] personal liberty,[14] freedom of movement[15] and personal security.[16] This article discusses the above measures in light of the individual's fundamental rights to privacy, personal security, personal liberty and freedom of movement. The question sought to be answered by the article is the extent to which fundamental freedoms can be limited by public health and policy. Public health has generally been defined to include the safety of population of people, society and community. The article reflects the decision in the South African case of *Minister of Health, Western Cape v Goliath*[17] where the respondents, (XDR-TB) patients, in a counter-application argued that their detention at the Brooklyn Chest Hospital was inconsistent with their right to bodily integrity, freedom of movement and their right to personal freedom. The decision is important for this article as the Court discussed the right of the public to be protected from infectious diseases juxtaposed with the individual's rights to bodily integrity, freedom of movement and the right to personal freedom. The Court answered the question of whether or not the isolation of the respondents at the Brooklyn Chest Hospital was 'arbitrary', or 'without just cause' in light of justifiable limitation of rights in an

Act entails the reporting of notifiable diseases to the local and health authorities when a diagnosis has been made. Infectious and formidable epidemic diseases are notifiable in terms of the Public Health Act. The aim of notification is to monitor and investigate the cases, thus averting their spread.

12 Statutory Instrument 77 of 2020 (n 8).

13 The Constitution of Zimbabwe Amendment (No 20) (Constitution). See sec 57 which provides for the right to privacy.

14 See sec 49 of the Constitution.

15 See sec 66 of the Constitution.

16 See sec 52(c) of the Constitution.

17 *Minister of Health, Western Cape v Goliath* 2009 (2) SA 248 (C).

open and democratic society based on human dignity and equality and freedom.

The maxim *salus populi suprema lex*, applied in the case of *Rodger Dean Stringer v Minister of Health and Child Care and Sakunda Holdings*,[18] will also be discussed. The maxim *salus populi suprema lex* translates into 'the health (or welfare, good, salvation, felicity) of the people is the supreme law', or 'let the welfare of the people be the supreme (or highest) law'.[19] The article will discuss the regional and international human rights framework as it is the best standard for the protection and limitation of rights. It will further discuss the Zimbabwean legislative framework in so far as the freedoms under discussion are concerned. By way of comparison, the article will analyse the Ghanaian Constitution,[20] in so far as it limits the protection of personal liberty in the case of a person suffering from an infectious disease.

2 Regional and international human rights structure

It is important for this article to look at regional, international treaties and conventions, legislation and case law of foreign countries. When interpreting the Declaration of Rights, the courts are required by section 46(1)(c) of the Constitution to take into account international law, treaties and conventions to which Zimbabwe is a party.[21] It is mandatory for the courts to consider international law when interpreting the Declaration of Rights,[22] and courts must prefer an interpretation that is consistent with international law.[23] Guided by section 46(e) of the Constitution, the courts may also consider relevant foreign law when interpreting the Declaration of Rights.[24]

A number of regional and international human rights instruments deal with the right to health. The African Charter on Human and Peoples' Rights (African Charter)[25] provides for the right to health.

18 *Rodger Dean Stringer v Minister of Health and Child Care and Sakunda Holdings* HH259/20.
19 MT Cicero *On the Republic and on the laws* trans D Fott (2014).
20 Ghana's Constitution of 1992 with amendments through 1996.
21 JA Mavedzenge & DJ Coltart *A constitutional law guide towards understanding Zimbabwe's fundamental socio-economic and cultural rights* (2014) 21.
22 Mavedzenge & Coltart (n 21).
23 As above.
24 As above.
25 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. Art 16 provides as follows: '1 Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2 State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[26] compels governments to take steps for the 'prevention, treatment and control of epidemic, occupational and other diseases'. The Zimbabwean government has an obligation to protect the health of its citizens. The measures taken in the protection of the public health should meet the international human rights standards. It is important in this discussion to refer to the recent position taken by the African Commission on Human and Peoples' Rights (African Commission) regarding the COVID-19 pandemic. In the face of the threat posed by COVID-19, the African Commission recognised the necessity of maintaining public health measures to contain the disease. However, the African Commission noted the disproportionate impact on fundamental human rights some of the measures adopted by governments to contain COVID-19.

The African Commission also noted severe violations of human rights by states during the COVID-19 pandemic. With this background, the Commission through Resolution 449 of 2020 urged governments in the enforcement of COVID-19 regulations to ensure that the response to states of emergency during the COVID-19 pandemic is legal, necessary and proportional. The Resolution emphasises the prohibition against torture and that 'national emergencies' or 'public order' shall not be invoked as a justification for the violation of fundamental human rights, in particular the freedom from torture, cruel, inhuman or degrading treatment or punishment.

It was the African Commission's emphasis that measures adopted by governments in an effort to curb COVID-19 should meet the minimum standards for the protection of human rights. The African Commission urged governments to ensure that law enforcement institutions are given stern guidelines on enforcing emergency regulations and that no arbitrary arrests and detentions should be carried out.

The African Commission's position on COVID-19 is in line with the article's argument. It endorses the line of reasoning of this article that measures adopted by governments in the control of epidemic and formidable epidemic diseases to protect public health are necessary. However, the measures adopted should meet the standards for the protection of human rights. The African Commission also endorsed

26 International Covenant on Economic, Social and Cultural Rights, 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.

the article's argument that the limitation of fundamental human rights should not be arbitrary or unreasonable.

The benchmark for the protection of the right to privacy on the international plane can be found in the United Nations Universal Declaration of Human Rights (Universal Declaration).[27] Article 12 of the Universal Declaration states that 'no one shall be subjected to arbitrary interference with his privacy'. The right to privacy is also entrenched in article 17 of the United Nations International Covenant on Civil and Political Rights (ICCPR),[28] which states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy'. Article 8 of the European Convention on Human Rights (European Convention)[29] provides for the right to privacy and states that 'everyone has the right to respect for his private and family life'.

The right to liberty is also protected on the regional and international domain. Article 19 of the Universal Declaration[30] provides that everyone has the right to liberty. Article 6 of the African Charter states that 'every individual shall have the right to liberty and to the security of his person'. The right to liberty is also guaranteed in terms of article 9 of ICCPR.[31] Article 5 of the European Convention provides for the right to liberty and states that 'everyone has the right to liberty and security of person'.

The liberty of movement is guaranteed in article 12 of ICCPR. Articles 12(1) and (2) of ICCPR states that every citizen of a state has a right to liberty of movement, to choose his residence and also the freedom to leave any country. What is clear from the above discussion is that the rights to health, privacy, liberty and security of the person and the liberty of movement are fundamental freedoms that are protected under the regional and international human rights framework. However, it is important to note that the rights contained in regional and international treaties and conventions are not absolute. They can be limited by the rights of others, public order, safety, public health and democratic principles. The next part of the article looks at the limitation of rights under regional and international law.

27 United Nations Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly Resolution 217A).
28 International Covenant on Civil and Political Rights, adopted for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1996, entry into force 23 March 1976.
29 European Convention on Human Rights, as amended by Protocols 11 and 14 supplemented by Protocols 1, 4, 6, 7,12, 13 and 16.
30 Universal Declaration (n 27).
31 ICCPR (n 28). The article also protects the right to security.

3 Limitation of rights in regional and international law

The Universal Declaration provides for the limitation of rights in article 29(2).[32] The Declaration endorses that rights and freedoms may be limited in instances of morality, public order and the welfare of a democratic society. Article 19 (3) of ICCPR states that rights may be limited as provided for by the law as well as for the protection of public health, the rights of others, public safety, public order and morals. ICESCR provides for the limitation of rights in articles 4[33] and 5.

Article 8(2) of the European Convention[34] states that the right to privacy may be interfered with by public authorities in the interests of public safety and health. The European Convention also provides that 'the lawful detention of persons for the prevention of the spreading of infectious diseases'[35] is a justifiable limitation of the right to liberty. ICCPR states that the right to freedom of movement may be limited by restrictions provided for by law, public health and the freedoms of others.[36] Section 25 of the Siracusa Principles on the limitation and derogation of provisions in ICCPR[37] provide:

> Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

The regional and international human rights framework provides that fundamental freedoms may be limited when the limitation is provided for by the law, and the limitation is legitimate and proportional. The health of the public is one legitimate basis for the limitation of freedoms under regional and international law.

32 Art 29(2) states that '[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the requirements of morality, public order and the general welfare of a democratic society'.

33 Art 4 states that '[t]he state parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for promoting the general welfare in a democratic society'.

34 European Convention (n 29). See art 8(2).

35 Art 5(e) European Convention.

36 Art 12(3) ICCPR.

37 Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights UN Doc E/CN.4/1984/4 (1984).

4 Zimbabwean legal framework on public health

The Public Health Act and the Public Health Regulations provide for the notification of infectious and epidemic diseases, the inspection of premises as well as an examination of persons suspected to be infected with infectious diseases. The legislation also provides for mandatory treatment, detention and isolation of infected persons as well as mandatory testing in a bid to prevent and suppress the spread of infectious and formidable epidemic diseases. In this part the article will discuss these measures in light of the constitutionally-guaranteed fundamental freedoms including the rights to privacy, liberty, movement and personal security. The question sought to be answered is whether or not the measures justifiably infringe the freedoms.

4.1 Notification of infectious, formidable epidemic diseases and inspection of premises

Section 46 of the Public Health Act provides for the notification of infectious diseases. In terms of the provision, other infectious or communicable diseases may be declared to be infectious by the Minister. Notification of infectious diseases can be done in the cases of children as well as adults[38] who are suffering from infectious diseases and who are patients.[39] In the case of an outbreak, all cases and deaths from infectious diseases are to be notified to the Chief Health Officer.[40]

Section 47 provides for notification of infectious diseases in cases of children attending school and any person residing in institutions including hotels and boarding houses. The section states:

> Whenever any child attending school, orphanage or other like institution, or any person residing in any hotel, boarding-house or other like institution, is known to be suffering from any infectious disease … the principal or the person in charge of such school, orphanage or other like institution, or the manager or proprietor or person in charge of such hotel, boarding house or other like institution shall forthwith send notice thereof to the local authority of the district, and shall furnish to the Director of health services, on his or her request, a list of scholars or residents thereat, together with their addresses.

38 Sec 47 Public Health Act (n 6).
39 Sec 48 Public Health Act.
40 Sec 49 Public Health Act.

Failure to give notice shall result in a fine not exceeding level eight or to imprisonment not exceeding six months. Section 48 provides for notification by medical practitioners. It states**:**

> If a patient suffering, to the knowledge of the medical practitioner attending him or her, from an infectious disease dies therefrom, such medical practitioner shall immediately furnish to the local authority of the district and district medical officer a written certificate containing the appropriate particulars relating to the patient's illness and cause of death.

Failure to furnish a certificate of notification by the medical practitioner shall result in imprisonment for a period not exceeding three months or a fine not exceeding level five. In the case of an outbreak, local authorities shall transmit to the chief health officer particulars of all cases of infectious diseases and of all deaths from infectious diseases.[41]

Formidable epidemic diseases are also notifiable in terms of the Act. Section 65 of the Act provides for notification of suspected cases of formidable epidemic diseases. In terms of section 65, medical practitioners, principals of schools, heads of families or households, employers of labour, owners or occupiers of land or premises, chiefs, headmen and 'others' shall notify the district medical officer, local authority or district administrator of any illness and death due to any formidable epidemic disease. Failing to comply with the section attracts imprisonment for a period not exceeding six months or a fine not exceeding level eight. Considering the penalty that the provision carries, it is key to analyse its wide scope. What does the term 'others' mean in this context?

The literal approach to statute interpretation provides that the words of a statute must be given their ordinary literal meaning. In determining what Parliament has said, courts several times use dictionaries in ascertaining terms used in a statutory provision.[42] The *Cambridge dictionary*[43] states that the word 'others' 'refers to the

41 Sec 49 Public Health Act. Sec 49 states that '[i]n the time of an outbreak, every local authority shall, at the end of each week and on the form prescribed, transmit to the Chief Health Officer particulars of all cases of infectious diseases and of all deaths from infectious diseases notified to it during the week, and all information which it may possess as to the outbreak or prevalence of any infectious, communicable or preventable disease in the district'. Failure to comply with the provision shall attract a fine not exceeding level eight or imprisonment not exceeding two years.

42 See the case of *Agricultural and Rural Development Authority (ARDA) v Francis Baureni & Others* SC 284/18, where the Court referred to the Cambridge dictionary to interpret the word 'respond'.

43 *Cambridge dictionary* OTHERS; meaning in the *Cambridge English dictionary*, https://dictionary.cambridge.org/dictionary/english/others (accessed 12 March 2021).

people in general, not the person you are talking to or about'. The paper concludes that the word 'others' in section 65 of the Public Health Act refers to the public entailing that all Zimbabwean citizens are covered under this provision.

Local authorities shall also report to the chief health officer cases suspected of being any formidable epidemic disease.[44] Notification of infectious diseases and formidable epidemic diseases conflict with the fundamental freedom of the right to privacy.

The Public Health Act also provides for the inspection of premises and the examination of persons suspected to be suffering from infectious diseases. This is provided for in section 51 of the Act, which states:

> Director health services of any urban or rural area or any medical practitioner duly authorised thereto by the local authority may at any reasonable time enter and inspect any premises in which he or she has reason to believe that any person suffering or who has recently suffered from any infectious disease is or has recently been exposed to the infection of any infectious disease, and may medically examine any person in such premises for the purpose of ascertaining whether such person is suffering or has recently suffered from any such disease.

Section 51 of the Public Health Act also infringes the right to privacy. The right to privacy includes the right not to have one's home or property searched and possessions seized.[45] The next part of the article will analyse the right to privacy as provided for in the Zimbabwean legislation. It will answer the question of whether or not the provisions on notification of infectious and formidable epidemic diseases that are provided for by the Public Health Act justifiably limit the right to privacy.

4.2 Right to privacy

The right to privacy entails that every person has the right not to be exposed to scrutiny of his or her business life.[46] In the case of *National Media Ltd v Jooste*[47] Harms JA accepted the definition of privacy as put forward by[48] Neethling et al, that[49]

44 Sec 67 Public Health Act.
45 I Currie *The Bill of Rights handbook* (2013) 259.
46 *Netone Cellular (Private) Limited v Econet Wireless* SC 695/15.
47 *National Media Ltd v Jooste* 1996 (3) SA 262.
48 South African Law Reform Commission Project 124 'Privacy and data protection' Issue paper 24 December 2003 48.
49 J Neethling, J Potgieter & A Roos *Neethling's law of personality* (2005) 132.

> [p]rivacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the outsiders and in respect of which he has the will that they be kept in private.[50]

The right to privacy is described as 'the right to be left alone'.[51] It embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals.[52] The right to privacy is closely linked with the right to dignity and freedom of expression.

4.3 Zimbabwean domestic law on privacy

In May 2013 the Zimbabwean government affirmed citizens' fundamental rights to privacy by including in the Constitution a specific guarantee of the right to privacy.[53] The constitutional guarantee represented a significant improvement on the rights set out by international covenants and declarations that had already been ratified by the country.[54] Unlike its predecessor the Constitution has reached a major milestone in protecting the right to privacy. The previous Zimbabwean Constitution[55] did not contain an explicit constitutional right to privacy. The right was deduced from sections 17[56] and 20(1).[57]

The right to privacy is enshrined in section 57 of the Constitution, which provides:[58]

> Every person has the right to privacy, which includes the right not to have

50 South African Law Reform Commission Project (n 48) (translation from Afrikaans).
51 WL Prosser *Handbook of the law of torts* (1971) 802, citing TM Cooley *Cooley on torts* (1888) 29; D Samuel et al 'The right to privacy' (1890) 4 *Harvard Law Review* 193.
52 M Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* 2009, A/HRC/17/34.
53 Submissions by the Zimbabwean Human Rights NGO Forum 'The right to privacy in a digital age, General Assembly Resolution 67/167' 25 March 2014.
54 As above..
55 Constitution of Zimbabwe, as amended on 14 September 2005 (up to and including Amendment 17).
56 See sec 17 of the Constitution of Zimbabwe which provided for protection from arbitrary search or entry.
57 Sec 20(1) of the Constitution of Zimbabwe which provided for protection of freedom of expression.
58 Sec 57 Constitution.

(a) their home, premises or property entered without their permission;
(b) their person, home, premises or property searched;
(c) their possessions seized;
(d) the privacy of their communications infringed; or
(e) their health condition disclosed.

The Constitution entrenches the right of a person not to have their person, home, premises or property searched or entered without permission. In the South African constitutional case of *Mistry v The Interim National Medical and Dental Council of South Africa & 6 Others*[59] the Court reiterated that '[t]he existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state'.

The right of freedom from arbitrary searches therefore is important in a constitutional democracy. The Constitution also guarantees non-disclosure of a person's health status. This is of paramount importance as the information concerning one's health is sensitive or delicate in nature.[60] Releasing the information without the consent of the person concerned may give rise to serious emotional and material harm.[61] In the Kenyan case of *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others*[62] the Court held:

> A person's privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwarranted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable.

The Court further held that the right to privacy is central to the protection of human dignity and forms the basis of democratic societies. It further held that the right also reinforces other rights such as freedom of association, expression and information.

The question raised in this part of the article is whether or not the notification of infectious and formidable epidemic diseases as well as the inspection of premises and examining persons suspected to be suffering from infectious diseases justifiably infringes the right to privacy. The article will answer this question by exploring the

59 *Mistry v The Interim National Medical and Dental Council of South Africa & 6 Others* CCT 13/97.
60 JL Nell 'Aspects of confidentiality in medical law' LLM dissertation, University of Pretoria, 2006 15.
61 As above.
62 *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others* (2018) EKLR.

limitation of rights as provided for by the domestic legislation. It will also discuss case law where the right to privacy was limited on the basis of public health and interest. The earlier discussion on regional and international law established that fundamental freedoms may be limited justifiably when the limitation is legitimate, proportional and provided for by the law. The article noted that the legitimate aims in the limitation of rights under regional and international law include public health, public order, national security, morals as well as protecting the rights of others.

4.4 Limitations to the right to privacy

Fundamental human rights and freedoms are not absolute.[63] They have limitations that are set out by the rights of others and social concerns such as public order, safety and health.[64] The Constitution provides for the limitation of rights in section 86(2).[65] 'Limitation' is a synonym for a 'justified infringement'.[66] In terms of section 86(2) of the Constitution the limitation should only be in terms of a law of general application and should be fair, reasonable, necessary and justifiable. The law of general application is the 'expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law'.[67] The article concedes that the Public Health Act is a law of general application that can limit the right to privacy. The author submits that section 47, which provides for notification of infectious diseases, and section 51, which provides for the inspection of infected premises cannot be said to be unfair, unreasonable, unnecessary and unjustifiable in a democratic society. The limitation is legitimate as it aims to protect the public health and interests.

63 Currie (n 45).
64 As above.
65 Sec 86(2) of the Constitution states that '[t]he fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent to which the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, taking into account all relevant factors, including: (a) the nature of the right concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation'.
66 Currie (n 45).
67 As above.

The question of whether or not the right to privacy may be limited in light of public interest has been litigated before the courts. In the case of *The Minister of Safety and Security v Gaqa*[68] the applicant sought an order from the Court that the bullet lodged in the respondent's leg be removed, without his consent, for the purposes of conducting ballistic tests. The applicant believed that the respondent had been shot while he was committing the crime of robbery. The Court cited with approval the United States Supreme Court case of *Winston v Lee*,[69] where Brennan commented as follows:

> The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers.

The Court granted an order for the removal of the bullet. In the case of *S v Orrie*[70] the accused were charged with two counts of murder. They were alleged to have broken into a safe house and shot two witnesses. The state sought an order from the Court that it be authorised to take blood samples of the accused in order to 'ascertain whether such sample(s) had any mark, characteristic or distinguishing feature by means of DNA analyses'. The accused opposed the application. In explaining the limitation of the right to privacy in light of public policy, Bozalek J reiterated as follows:

> There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the subject's right to privacy and an infringement albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for use in criminal proceedings infringes his or her right to privacy, dignity and bodily integrity, I am of the view that the limitation clause in the constitution (section 36 of Act 108 of 1996) permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e), such limitation is necessary and justifiable in an open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples for DNA testing for the purposes of a criminal investigation is reasonable and necessary in balancing the interests of justice against those of individual dignity.

The cases brought it to clarity that freedoms can be limited for broad public considerations. Public health is a legitimate aim for

68 *The Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).
69 *Winston v Lee* 470 US 753 1985.
70 *S v Orrie* 2004 (3) SA 584 (C).

the limitation of fundamental rights. The infringement will not be unconstitutional if it can be a justified 'infringement' of rights in an open and democratic society based on human dignity, equality and freedom.[71]

4.5 Mandatory detention, isolation and testing

Section 68 of the Public Health Act provides for regulations regarding formidable epidemic diseases. Section 68(1) empowers the Minister of health to make regulations concerning:

> (a) the imposition and enforcement of quarantine and the regulation of the movement of persons;
> (b) …
> (c) …
> (d) …
> (e) …
> (f) the medical examination of persons who are suspected of being infected with, or who may have recently been exposed to the infection of such disease, and of persons about to depart from any infected area, and the disinfection of their baggage and the detention of such persons until they have after such examination been certified to be free from any infectious diseases and until their baggage and personal effects have been disinfected;
> (g) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have been recently exposed to the infection of, and who may be in the incubation stage of such disease, the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and in the case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant any person who has escaped from such detention or isolation;
> (h) the establishment of isolation hospitals and the removal and isolation of persons who are or suspected to be suffering from such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such disease … and other matters that the Minister of Health may deem necessary for the prevention and spread of the diseases.

Failure to comply with the regulations made under section 68(1) attracts a fine not exceeding level 12 or imprisonment for a period not exceeding one year. The Public Health Regulations that were

71 Currie (n 45).

passed in terms of section 68 of the Public Health Act provide for compulsory testing, detention and isolation of persons suspected of being infected with COVID-19 in order to contain the disease. Section 6 of the Public Health Regulations provides that an enforcement officer may in relation to persons who are suspected of being infected with COVID-19:

> (a) order an examination for an individual or individuals which may include taking any bodily sample by a health practitioner;
> (b) order the mandatory treatment or prophylaxis of the individual or individuals concerned;
> (c) …
> (d) …
> (e) order the on-site detention, isolation or quarantining of the individual or the individuals concerned.

The next part of the article analyses the measures provided in section 68 of the Public Health Act as well as the Public Health Regulations juxtaposed with the individual's constitutionally-guaranteed rights to personal security, personal liberty and movement.

4.6 Right to personal security

The article argues that the procedures infringe the individual's rights personal security, liberty and freedom of movement. Ordering an examination on individuals, which may include the taking of body samples and mandatory treatment or prophylaxis without consent, contradicts section 52 of the Constitution. Section 52 of the Constitution provides:

> Every person has the right to bodily and psychological integrity which includes the right –
>
> (a) …
> (b) …
> (c) not to be subjected to medical or scientific experiments, or to the extraction or use of their bodily tissue, without their informed consent.

The section brings out the concept of informed consent when extracting bodily tissue from every person. Informed consent is the voluntary and revocable agreement given by a competent individual to participate in a therapeutic or research procedure.[72] The Public Health Act provides for consent of user in section 35. However, the informed consent is limited when the 'provision of a health service

72 J Sim *Informed consent: Ethical implications for physiotherapy* (1986) 584-587.

without informed consent is authorised in terms of any law or court order'.[73] The right to personal security thus is not absolute.

4.7 Right to personal liberty and freedom of movement

The article further argues that ordering the on-site detention, isolation or quarantining of individuals who are suspected of being infected with or have been recently exposed to the infection of COVID-19 infringes their rights to liberty and movement. The right to liberty seeks to avert the unjustified use of detention powers on citizens by governments. The right to personal liberty is guaranteed in terms of section 49 of the Constitution which provides as follows:

> (1) Every person has the right to personal liberty, which includes the right –
> (a) not to be detained without trial, and
> (b) not to be deprived of their liberty arbitrarily or without just cause.

In terms of the section, a person cannot be detained arbitrarily or without a just cause. In the case of *Allan v Minister of Home Affairs*[74] Reynolds J reiterated:

> Since time immemorial, the liberty of the individual has been regarded as one of the fundamental rights of man in a free society … Revolutions have been staged in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe and courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principles involved.

The case brought to clarity that the right to liberty is one of the important fundamental freedoms in a democratic society. As the freedoms referred to above, the right to liberty is not absolute.[75] By way of comparison, the author refers to section 14 of the Ghanaian Constitution,[76] which provides for the right to liberty and its limitation in the cases of infectious diseases. Section 14 of the Ghanaian Constitution provides as follows:

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73 Sec 35(2)(c) Public Health Act. The section provides that '(2) a health service shall not be provided to a user without the user's informed consent unless … (c) the provision of a health service without informed consent is authorised in terms of any law or court order'. See also the case of *S v Orrie* referred to earlier (n 70).

74 *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H). See also the South African case of *Ochse v King William's Town Municipality* 1990 (2) SA 855, where the Court held that the right to personal liberty is one of the fundamental freedoms that has always been jealously guarded by the courts.

75 Sec 86(2) Constitution.

76 The Constitution of the Republic of Ghana (Amendment) Act 1996.

> Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law:
>
> (a) …
> (b) …
> (c) …
> (d) in the case of persons suffering from an infectious or contagious disease.

The right to liberty can thus be limited as a way of public health enforcement. Closely linked to the right to liberty is the right to freedom of movement. In terms of section 66[77] of the Constitution, 'every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to move freely within Zimbabwe'. The article concludes that the right to liberty and freedom of movement may be limited in cases of public health. The author's concern is section 68(1)(g) of the Public Health Act which provides for the use of force and in the case of necessity the use of firearms and weapons. The author urges the enforcement authorities to adhere to the Basic Principles.

5 *Minister of Health, Western Cape v Goliath*

To buttress the discussion above, the article reflects on the decision in the South African case of *Minister of Health, Western Cape v Goliath*[78] where the Court was faced with balancing the public's right to be protected from infectious diseases and the freedoms of individuals. The judgment was delivered by Griesel J.

5.1 The facts

The respondents were diagnosed with the infectious disease of tuberculosis (XDR-TB). The question for determination was whether their mandatory detention and isolation at Brooklyn Chest Hospital (the detention facility) was legally justifiable. The Minister of Health of the Province of the Western Cape brought the application before the Court in his official capacity as the Provincial Minister of the Western Cape. The Minister of Health filed the application in terms of section 38 of the South African Constitution,[79] and also in the interests of

77 Sec 66(2)(a) Constitution.
78 *Minister of Health, Western Cape v Goliath* (n 17).
79 See sec 38 of the Constitution of the Republic of South Africa, 1996. Sec 38 provides that anyone acting in the public interest has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.

persons who were likely to contract tuberculosis (XDR) from the respondents. A *rule nisi* was issued calling upon the respondents to show cause why the following order was not to be granted:

(1) compelling the respondents to be admitted to the Brooklyn Chest Hospital;
(2) authorising the sheriff, if necessary, to request members of the South African Police Service to assist him in ensuring that the respondents were admitted to Brooklyn Chest Hospital and remained there until compliance with paragraph 4 below;
(3) …
(4) compelling the respondents to remain at Brooklyn Chest Hospital until they had fulfilled the criteria for negative sputum culture conversion for XDR tuberculosis for a period of consecutive months;
(5) compelling the respondents to adhere to the rules of behaviour for XDR tuberculosis patients at the Brooklyn Chest Hospital.[80]

In their counter-application Cedric Goliath and Cornell Gideon (respondents) sought an order that declared their detention at the Brooklyn Chest Hospital inconsistent with their right to personal freedom as enshrined in section 12 of the South African Constitution.[81]

5.2 Legal issues

The legal issue for determination was whether or not the compulsory isolation and detention of the respondents amounted to arbitrary infringement of their rights to liberty and freedom of security of the person. The Court's reasoning was that their isolation and detention did not infringe on their rights without just cause. Griesel J reiterated:

> Isolation of patients with infectious diseases is universally recognised in open and democratic societies as a measure that is justifiable in the protection and preservation of the health of citizens, even though it necessarily involves some intrusions upon the individual liberty of the patients concerned.

The Court referred to an article by Singh et al[82] in which the authors stated that 'WHO recommends that persons with MDR-TB voluntarily refrain from mixing with the general public'. The authors stated that infection control measures that depend on voluntary cooperation and least restrict human rights are favoured. However, if the measures are ineffective, restrictive measures may be adopted. The authors stated

80 *Minister of Health, Western Cape v Goliath* (n 17).
81 Constitution of the Republic of South Africa (n 79). See sec 12 which provides for freedom and security of the person.
82 JA Singh, R Upshur & N Padayatchi 'XDR-TB in South Africa: No time for denial or complacency' (2007) 4 *Public Library of Science* 19, http://medicine.plosjournals.org (accessed 12 March 2021).

that involuntary detention may be permitted as a means to prevent the spread of infection to others. They further stated that involuntary treatment and isolation measures in the interests of the public health are justifiable and necessary measures that limit fundamental human rights.

The Court cited with approval the decision in the Canadian case of *Toronto (City Medical Officer of Health) v Deakin*[83] where the Court held that the detention of the respondent, a tuberculosis patient, by the medical officer of health under a regulatory scheme was justifiably to protect public health and the spread of the disease. The decision in the case is important for this article as the Court endorsed the position that the limitation of the rights to liberty and freedom of movement of patients with infectious diseases is not arbitrary and is reasonable and justified in an open and democratic society.

5.3 *Salus populi suprema lex* maxim

Of paramount importance to the discussion in this article is the principle of *salus populi suprema lex* which is the foundation of every modern constitution, including the Zimbabwean Constitution. The maxim *salus populi suprema lex* translates into 'the health (or welfare, good, salvation, felicity) of the people is the supreme law', or 'let the welfare of the people be the supreme (or highest) law'.

It finds its origin as early as 100BC-1AD, and is found in the book *De legibus* written by Cicero.[84] John Locke uses it as the inscription in his *Second treatise on government* and refers to it as the fundamental rule of government. The maxim has been applied in a number of jurisdictions. In India the principle was invoked in many cases. In the Indian case of *Gargula Chandra Sekhar & Others v State Through Police Station*[85] it was held:

> The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the *detenus*, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (the safety of the state is the supreme law) co-exist and are not only

83 *Toronto (City Medical Officer of Health) v Deakin* (2002) OJ No 2777 (Ont Crt Just).
84 Cicero (n 19).
85 *Gargula Chandra Sekhar & Others v State Through Police Station* 2006 5 ALD 504; 2006 4 ALT 726.

> important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community.

The Court emphasised that the action of the state must be 'just' and 'fair'. In *Viswanatha Reddy*[86] the Court stated:

> It must be remembered that ... the public interest should prevail over the private interest, be it at ownership or be it at a possessory ownership by reason of a lease. There is nothing wrong to apply the legal maxim *salus populi suprema lex* with regard to public welfare and the court is bound to follow the same when almost a million residents … are suffering the shortage of drinking water and the after effects.

This principle is part of Zimbabwean law and should apply in cases of extreme emergency when the welfare of the people has to be protected. An exchange has to take place between the safety of the people and the rights of an individual. The principle *salus populi suprema lex* places the welfare of the public above the rights of an individual where the welfare of the populace is threatened. However, the author argues that the principle is not absolute. It has the potential of being misinterpreted and abused by dictatorial governments. Public health cannot be protected outside the law. If the principle of *salus populi suprema lex* was intended for unlimited application, it would legitimise all dictatorial regimes and their arbitrary limitation and derogation of fundamental rights.

5.4 Application of the *salus populi suprema lex* maxim in the *Rodger Dean Stringer* case[87]

In this case the applicant filed an urgent chamber application with the High Court of Zimbabwe alleging a violation of his constitutional right to an environment that is not harmful to his health or well-being if the Arundel hospital to accommodate COVID-19 patients was to be set up in his neighbourhood. It was the applicant's contention that his right to protection by the law would be violated if the isolation hospital was established without him being given a chance to object to it. In this vein the applicant's case was that he was exposed to the corona virus by reason of the proximity of his residence to the hospital.

The maxim *salus populi suprema lex* was applied in this matter. It was held that the rights of an individual cannot override the rights of the public. The establishment of Arundel hospital was meant to serve

86 *D Viswanatha Reddy And Company v Government of Andhra Pradesh & Others* 2002 4 ALD 161. See para 19.
87 *Rodger Dean Stringer* (n 18).

the interests of the public to a greater extent. Given the fact that COVID-19 was a global pandemic, the government of Zimbabwe was obliged to prepare a proper infrastructure to curb the spreading of COVID-19. The obligation to respect, protect, promote and fulfil the fundamental rights and freedoms enshrined in the Constitution was imposed upon the state and on every person by the Constitution. The applicant in this case, as all other persons, had the rights to equal protection and benefit of the law. However, the rights that the applicant alleged to have been violated were limited by the same Constitution in terms of section 86. What is fundamental to note is that the action to save the public interest, public health, welfare good or interest must be right, just and fair. The action taken must not be more than what is reasonably necessary to protect the welfare of the public from the threatening danger. The Court emphasised that in appropriate cases, fundamental human rights may be limited where public safety, public health and the public interest so demand.

6 Conclusion

The article sought to discuss striking a balance between the individual's fundamental human rights and the protection of the public from infectious and formidable epidemic diseases. The article was divided into five parts. The first part gave an introduction and also defined emerging infectious and formidable epidemic diseases. The article then analysed the regional and international human rights framework in so far as it provides for the protection and limitation of fundamental rights. This was key as regional and international is the best standard in the protection and limitation of fundamental freedoms. The article proceeded to analyse the Zimbabwean legal framework on public health. For the purposes of the article, the author referred to the infectious and formidable epidemic diseases referred to in the Public Health Act and the public health regulations. The article noted that primary legislation applicable to matters of public health (the Public Health Act) and its regulations authorises the notification of infectious diseases and formidable epidemic diseases.

The Public Health Act empowers the Minister of Health to enact regulations encompassing the imposition and enforcement of quarantine, the regulation of the movement of persons, the medical examination of persons who are suspected of being infected with the disease and the detention and isolation of persons who may have been exposed to the disease. The Public Health Act and the Public Health Regulations also provide for the inspection of infected premises and the examination of persons suspected of suffering from

infectious diseases, mandatory treatment, isolation and detention. The article then analysed the measures of notification of infectious and formidable epidemic diseases as well as the inspection of premises in light of the right to privacy. The article discussed the right to privacy as provided for by the Zimbabwean domestic legislation. The limitations on the right to privacy were discussed and the article concluded that the right to privacy may be limited by public health and policy. The author concluded that the limitation of the right to privacy for the aim of protecting public health is not arbitrary and is justifiable in a democratic society. This part also discussed the measures of mandatory treatment, detention, isolation and testing in light of the rights to personal security, freedom to personal liberty and freedom of movement. The limitations of the rights were discussed and the article concluded that the limitations of the rights in terms of the Public Health Act and the Public Health Regulations are not unconstitutional. For comparison, the article referred to the Constitution of Ghana which provides for the limitations to the right to liberty as well as case law authority, both regionally and internationally.

The article proceeded to discuss the case of *Minister of Health, Western Cape v Goliath* where the Court was faced with the question of whether or not mandatory detention and isolation of patients at a tuberculosis detention centre arbitrarily violated their rights to personal liberty and movement. The Court's reasoning was that their isolation and detention did not infringe on their rights without just cause. The practice of isolation of patients with infectious diseases was universally recognised in open and democratic societies as a justified measure to protect the public's health. The decision in the case is important for this article. It endorsed the position that fundamental human rights may be justifiably limited as a measure of protecting the public's health.

The last part of the article discussed the maxim *salus populi suprema lex* and its application in the *Rodger Dean Stringer* case. The Court in the *Stringer* case held that the rights of an individual cannot override the rights of the public. The rights that the applicant alleged to have been violated are limited by section 86 of the Constitution. However, the article concluded that the maxim *salus populi suprema lex* is not absolute. The principle has to be applied within the confines of the law. The author thus concludes that fundamental freedoms may be limited constitutionally when the limitation is legitimate, proportional and provided for by the law. Public health is one legitimate aim that can constitutionally limit fundamental freedoms.

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Sub-regional organisations and the responsibility to protect: A case for the localisation and normative repatriation of sub-regional authority for coercive measures

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Summary: *The adoption of the responsibility to protect by the United Nations General Assembly marked a key milestone in the advancement of human security and the international protection of human rights. The textual adoption by the UNGA, however, was skewed in favour of the world order as it existed at the adoption of the Charter of the United Nations. Key among the recommendations downplayed by the UNGA text is the place of regional and sub-regional organisations in the implementation of the responsibility to protect. The consequence has been that sub-regional organisations have often been sidelined and their position on conflicts overlooked by the United Nations Security Council in its authorisation of R2P-related interventions. This article utilises the differences between the original R2P concept and the R2P norm adopted by the UNGA as well as subsequent discourses and state practice flowing from these differences to argue for R2P's localisation in the African context and for the normative repatriation of the authority of sub-regional organisations to adopt coercive measures under R2P. The article uses the Economic*

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Community of West African States to illustrate the potential for sub-regional organisations to implement R2P when accorded the requisite regional and international support.

Key words: *sub-regional organisations; responsibility to protect; norm localisation; norm repatriation; peace and security*

1 Introduction

The inability of the United Nations (UN) to offer a timely and decisive response to avert the Rwandan genocide jolted the Organisation of African Unity (OAU) to acknowledge the UN's inadequacy and Africa's 'primary responsibility to protect the lives of its citizens'.[1]

In respect of the response of the United Nations Security Council (UNSC) to situations of mass atrocities committed in territories of UN member states, a 2004 report of a UN High-Level Panel pointed out that the UNSC had been 'neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'.[2] A similar opinion persists among African leaders whose common position has been the following:[3]

> Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and the development of (internal) conflict situations, it is imperative that regional organisations, in areas of proximity to conflicts, are empowered to take action in this regard.

However, although the existence of 'regional' arrangements is permitted under chapter VIII of the Charter, the UNSC, which has the primary responsibility for the maintenance of international peace and security, is not obligated to utilise these for enforcement action (article 53(1)). Further, the prerogative of these arrangements to undertake enforcement action is subjected to UNSC approval, thus limiting their ability to act in deserving cases. Notwithstanding the misgivings against the UNSC highlighted above, the blueprint

1 African Union *Rwanda: The preventable genocide* (2000) ch 24 para 22, https://www.refworld.org/docid/4d1da8752.html (accessed 8 July 2019). See also S Gumedze 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 140.

2 United Nations Secretary-General (UNSG) *A more secure world: Our shared responsibility – Report of the Secretary General's high-level panel on threats, challenges and change* (2004) 65-66.

3 African Union *The common African position on the proposed reform of the United Nations: The Ezulwini consensus* (2005) 6.

adopting the responsibility to protect (R2P) proceeded to reinforce the *status quo*. This, therefore, calls to question what role regional and sub-regional organisations have in the maintenance of regional/sub-regional peace and security. This article seeks to answer this question with reference to sub-regional organisations and their involvement in R2P-related interventions.[4]

Of all sub-regional organisations the Economic Community of West African States (ECOWAS) has been the pioneer in R2P-related interventions at the sub-regional level[5] having experienced the highest frequency of internal armed conflicts in Africa.[6] Consequently, the peace and security framework of ECOWAS has been termed one of the best in Africa[7] and is argued to have inspired the African Union (AU) to replicate the same at the regional level.[8] This article, therefore, analyses the role played by ECOWAS in the implementation of R2P-related interventions with a view to drawing lessons from its interventions in The Gambia, Côte d'Ivoire and Mali in support of an enhanced role for sub-regional organisations in R2P implementation. These cases represent interventions conducted after the adoption of R2P at the UN level. The Gambian intervention represents an effective sub-regional intervention; the Côte d'Ivoire case brings out challenges of sub-regional intervention; while the Mali case represents an archetypal R2P intervention that involves national, sub-regional, regional and global actors working in concert for the protection of populations at risk. While interventions in some of these cases were in part motivated by a pro-democracy objective, their use in this article focuses primarily on the human protection imperative that underpinned their initiation.

4 'R2P-related interventions' is used in this article to refer to all interventions focused on the protection of populations at risk. This excludes interventions that are purely for the enforcement of democratic ideals with no underlying human security concerns.

5 M Belmakki *African sub-regional organisations in peacekeeping and peacemaking: The Economic Community of West African States (ECOWAS)* (2005) 3-4.

6 B Fagbayibo 'A politico-legal framework for integration in Africa : Exploring the attainability of a supranational African Union' PhD thesis, University of Pretoria, 2010 81.

7 As above.

8 B Nkrumah & F Viljoen 'Drawing lessons from ECOWAS in the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) 251.

2 The concept and norm of the responsibility to protect

2.1 The concept

The R2P was first articulated by the International Commission on Intervention and State Sovereignty (ICISS) which served as the norm entrepreneur.[9] The report of the ICISS built on Deng's initial conceptualisation of 'sovereignty as responsibility'[10] and presented two fundamental propositions.[11] The first was a redefinition of sovereignty from 'sovereignty as control' to 'sovereignty as responsibility'.[12] This made a state's primary sovereign responsibility that of protecting its population from massive violations of fundamental rights. The second was a proposition that where the state is unable or unwilling to discharge this responsibility or is itself the perpetrator, then the responsibility shifts to the international community which is under a duty to intervene to protect the populations at risk.[13] Jointly, these two elements were presented as the core of what the ICISS termed the 'responsibility to protect' (R2P *concept*). In its purest sense, therefore, the R2P concept primarily was human security centred.[14]

The *concept* encompasses three key responsibilities, namely, the *responsibility to prevent* mass atrocities by addressing causes of internal conflict; the *responsibility to react* in the event of conflict by intervening using appropriate means including sanctions and, where necessary, military force; and the *responsibility to rebuild*, where military force is used, by assisting with recovery, reconstruction and reconciliation.[15]

9 A Bellamy 'The three pillars of the responsibility to protect' (2005) 20 *Pensamiento Propio* 40. The term 'norm entrepreneur' refers to an agent that takes the initiative to develop and promote the adoption of a normative idea. See A Bloomfield 'Norm antipreneurs and theorising resistance to normative change' (2016) *Review of International Studies* 1 3.

10 See, generally, FM Deng et al *Sovereignty as responsibility: Conflict management in Africa* (1996).

11 H Breakey *The responsibility to protect and the protection of civilians in armed conflicts: Review and analysis* (2011) 7.

12 Bellamy (n 9) 37.

13 International Commission on Intervention and State Sovereignty (ICISS) *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* (2001) XI.

14 Human security refers to security as the protection of the people as opposed to the protection of state apparatuses or territory (the security of the individual is the primary focus). See PH Liotta & T Owen 'Why human security?' (2006) *The Whitehead Journal of Diplomacy and International Relations* 37-39. See also United Nations General Assembly (UNGA) Resolution 66/290 (2012) para 3.

15 ICISS (n 13) 8.

With respect to resort to the use of military force, the ICISS proposed that it should only be undertaken under the *right authority*, which the UNSC was best suited to give.[16] While the ICISS made proposals aimed at curing any mischief occasioning inaction or delay to act on the part of the UNSC, including proposals for constructive abstention[17] as well as resort to the UNGA's 'Uniting for peace' procedures,[18] what is key for this article, however, is the proposal by ICISS that regional and sub-regional organisations could be resorted to under chapter VIII of the UN Charter (for authorisation) subject to the organisations' seeking subsequent ratification from the UNSC.[19]

2.2 The norm

At the 2005 UN World Summit held at the Heads of State and Government level, the R2P *concept* was truncated and condensed into three paragraphs.[20] These were then unanimously adopted as a part of a resolution of the UNGA (Summit Outcome).[21] The postulations contained in the Summit Outcome constitute what is here referred to as 'the R2P *norm*'.

The R2P *norm* comprises three pillars: The first limits the application of R2P to the commission or incitement of atrocity crimes (genocide, war crimes, ethnic cleansing and crimes against humanity);[22] the second calls for international support for states' obligations under R2P; and the third requires international action to be undertaken through the UN.[23] Specifically, the third pillar requires that where pacific means have proven inadequate, coercive measures should be adopted under chapter VII of the UN Charter and only through the UNSC in cooperation with relevant regional organisations where appropriate (optional).[24]

The *concept* as developed by the ICISS differs significantly from the *norm* as adopted in the Summit Outcome.[25] For instance,

16 ICISS 49.
17 ICISS 51.
18 ICISS *The responsibility to protect: Research, bibliography, background* (2001) 159: The Assembly is authorised under the Uniting for Peace Resolution of 1950 to make recommendations on enforcement action when the Security Council is unable to take a decision, more so as a result of veto.
19 ICISS (n 13) 54.
20 UNGA Resolution adopted by the General Assembly on 16 September 2005: 2005 World Summit Outcome (2005) 30 paras 138-140.
21 Bellamy (n 9) 42.
22 UNGA (n 20) para 138.
23 UNGA para 139.
24 As above.
25 ICISS (n 13) 32-33; E Heinze 'Humanitarian intervention, the responsibility to protect, and confused legitimacy' (2011) 11 *Human Rights and Human Welfare* 23.

while the scope of the *concept* extended to situations such as state collapse, the norm restricted the scope to four atrocity crimes.[26] Of significance to this article, however, is that the norm makes the UNSC the only body mandated to authorise military intervention[27] with no mention of regional and sub-regional organisations as alternative sources of authority.[28] This leaves open the question of whether these organisations can rightly undertake coercive measures under R2P or whether the restriction of this mandate to the UNSC is binding on them.

2.2.1 The responsibility to protect norm lacks normative prescription

Although the R2P norm was adopted by a unanimous UNGA resolution and was re-affirmed by the UNSC in Resolutions 1674 of 2006,[29] 1894 of 2009[30] and 2150 of 2014,[31] it remains shrouded in controversy as to whether it can be termed a legal obligation with prescriptive force, only a political concept or just an emerging norm.[32] Notwithstanding R2P advocates' rhetoric of 'consensus', a genuine consensus on R2P cannot be said to exist beyond the policy community.[33] Grave reservations, scepticism and even hostility has been expressed towards R2P by scholars, policy makers, practitioners, civil society organisations as well as by states with a colonial history.[34] Against this background, therefore, the question arises as to whether R2P can be said to have been established as an international norm with prescriptive force.

From a legal perspective, outside the confines of a convention or treaty, a new international norm has normative prescription, once it is established as a rule of customary international law having achieved

26 ICISS (n 13) 32-33.
27 UNGA (n 20) para 139.
28 ICISS (n 13) 53; V Marusa *Regional organisations and the responsibility to protect: Challenging the African Union's implementation of the responsibility to protect* (2014) 11.
29 https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674(2006) (accessed 8 July 2020).
30 As above.
31 http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2150.pdf (accessed 8 July 2020).
32 J Eaton 'An emerging norm – Determining the meaning and legal status of the responsibility to protect' (2011) 32 *Michigan Journal of International Law* 800; A Peters 'The Security Council's responsibility to protect' (2011) 8 *International Organisations Law Review* 7; S Marks & N Cooper 'The responsibility to protect: Watershed or old wine in a new bottle?' (2010) 2 *Jindal Global Law Review* 115.
33 N Crossley 'Is R2P still controversial? Continuity and change in the debate on "humanitarian intervention"' (2018) 31 *Cambridge Review of International Affairs* 431.
34 As above.

constant and uniform usage by states supported by *opinio juris*.[35] While the unanimous adoption of R2P at the UNGA is argued to have demonstrated the existence of *opinio juris* on the need to act in cases of mass atrocity crimes, subsequent inconsistencies in the conduct of states as well as in the application of R2P takes away from any consideration of R2P as an international norm with any prescriptive force.[36] In this regard, Evans argues that although R2P cannot be said to have attained the status of a rule of customary international law, it should be viewed as a new international norm on moral and political terms,[37] neither of which has any binding force.

With respect to the subsequent conduct of states at the UN level, various states are reported to have developed a 'buyer's remorse' soon after the summit endorsement of R2P and 'revolted' against R2P with some arguing against there having been any consensus on the normative status of R2P.[38] Consequently, states failed to adopt a subsequent report of the UNSG that sought to make R2P more prescriptive.[39] Further, the UN membership is argued to have demonstrated a reluctance to strengthen the institutional capacity of the UN with respect to R2P by implicitly rejecting a proposed establishment of a Joint Office for Genocide Prevention and R2P by declining to fund the proposal;[40] opposing the creation of an R2P-related early warning unit within the UN[41] as well as by approving a paltry 25 officers in what was expected to be a standby police force for R2P implementation.[42] Bellamy argues that this failure to strengthen the institutional capacity of the UN demonstrates the backtracking of states in their commitment, thus eroding the consensus on R2P.[43]

With regard to how R2P has been applied in actual cases, Deitelhoff and Zimmerman argue that its role has been 'ambivalent at best' and that it has been used to further private interests but ignored in real crises, hence its application is crippled by selectivity and hypocrisy.[44] This has been reflected in the invocation and application of R2P

35 MN Shaw *International law* (2008) 75-76; Eaton (n 32) 767.
36 Eaton (n 32) 801; S Africa & R Pretorius 'South Africa, the African Union and the responsibility to protect: The case of Libya' (2012) 12 *African Human Rights Law Journal* 398.
37 G Evans 'R2P: The next ten years' in AJ Bellamy & T Dunne (eds) *The Oxford handbook on the responsibility to protect* (2016) 4.
38 G Evans 'The responsibility to protect: An idea whose time has come … and gone?' (2008) 22 *International Relations* 288; AJ Bellamy 'Realising the responsibility to protect' (2009) 10 *International Studies Perspectives* 112.
39 Eaton (n 32) 800.
40 Evans (n 38) 288.
41 Bellamy (n 38) 112.
42 As above.
43 As above.
44 N Deitelhoff & L Zimmermann *Things we lost in the fire: How different types of contestation affect the validity of international norms* (2013) 7.

(or lack thereof) in the cases of Georgia, Myanmar, Burma, Libya and Syria, thus significantly impacting any notions of R2P having any normative force with respect to uniformity, objectivity and consistency in its application.[45] The above arguments demonstrate that R2P cannot be termed a norm in legal terms but rather an evolutionary norm in need of consolidation through consistent state practice.[46]

From the perspective of international norm dynamics studies (on the diffusion of transnational norms), R2P is yet to evolve into an international norm. This requires the norm to have undergone three stages of what Finnemore and Sikkink refer to as the life cycle of a norm (emergence, norm cascade and internalisation).[47] From this perspective, the adoption of R2P by the UNGA established the critical mass support required for it to be said to have *emerged* as an international norm.[48] To be internalised, a norm requires to have acquired a taken-for-granted quality 'that makes conformance with the norm almost automatic'.[49] The arguments proffered above on R2P's want of usage rule out any possibility of R2P having been internalised, thereby leaving R2P in the norm cascade stage.

What happens at the norm cascade stage depends on whether one ascribes to the constructivist or the critical approach to norm diffusion. For constructivists, the second stage is a linear and conflict-free 'norm acceptance' stage, hence they expect a dichotomous outcome of either acceptance or rejection of the norm which itself remains static.[50] Acharya criticises this view as engaging in 'moral proselytism' which presents 'global' norms as inherently good and regional or sub-regional norms as innately bad, hence viewing any form of normative contestation[51] as illegitimate.[52] Critical approaches, however, view a norm as being dynamic throughout the norm cascade stage and emphasise the agency role of 'norm

45 Crossley (n 33) 420; J Sarkin 'The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: Connecting humanitarian intervention and the responsibility to protect' (2009) 53 *Journal of African Law* 31

46 S Gagro 'The responsibility to protect (R2P) doctrine' (2014) III *International Journal of Social Sciences* 74; Deitelhoff & Zimmermann (n 44) 7.

47 M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 892.

48 Deitelhoff & Zimmermann (n 44) 7.

49 Finnemore & Sikkink (n 47) 895.

50 Bloomfield (n 9) 4; Deitelhoff & Zimmermann (n 44) 1-2.

51 Contestation refers to the emergence of differences about the right interpretation and application or about the validity of a norm. See Deitelhoff & Zimmermann (n 44) 1-18.

52 A Acharya 'How ideas spread: Whose norms matter? Norm localisation and institutional change in Asian regionalism' (2004) 58 *International Organisation* 242.

takers', thus opening up the norm to contestation and change.[53] In the latter view, therefore, norm localisation[54] is presented as being critical in building normative congruence and, thus, helping to settle most cases of normative contestation.[55] This article adopts a critical approach in its analysis and argues that R2P is currently undergoing contestation, hence providing room for localisation.

Wiener argues that often, as is the case herein, the contestation involves the legitimacy of 'standardised procedures' for implementing norms (what Welsh refers to as procedural contestation)[56] and that such contestation is necessary for the regularisation of such procedures to strengthen the norm and for legitimacy.[57] Contestation with respect to R2P surrounds the procedure on how it should be implemented under the third pillar[58] and specifically, herein, whether regional and sub-regional organisations have the right to adopt coercive measures.

A key factor in norm contestation is the realisation that new norms do not seek application in a vacuum, hence they have to contend with legitimate pre-existing domestic normative, social and institutional orders.[59] Key in this respect, therefore, is any normative orders for regional and sub-regional intervention that were in existence prior to the emergence of R2P (cognitive priors).[60] The AU as well as sub-regional organisations (ECOWAS) had already adopted indigenous normative frameworks that allowed them to intervene in the territory of their members for human protection purposes way before the emergence of R2P.[61] The implementation of R2P after its emergence, therefore, provided an opportunity for its localisation so as to ensure congruence with these pre-existing orders[62] that

53 Acharya (n 52) 241; R Madokoro 'International commissions as norm entrepreneurs: Creating the normative idea of the responsibility to protect' (2019) 45 *Review of International Studies* 102.
54 Norm localisation refers to the reconstruction of foreign norms to tailor these to prevailing local traditions (cognitive priors) and identities (including collective identities). See Acharya (n 52) 239-240.
55 Acharya (n 52) 239.
56 J Welsh 'Norm contestation and the responsibility to protect' (2013) 5 *Global Responsibility to Protect* 365.
57 Bloomfield (n 9) 6; Deitelhoff & Zimmermann (n 44) 1.
58 J Welsh 'Norm robustness and the responsibility to protect' (2019) 4 *Journal of Global Security Studies* 53.
59 Acharya (n 52) 241; TR Eimer, S Lutz & V Schuren 'Varieties of localisation: International norms and the commodification of knowledge in India and Brazil' (2016) 23 *Review of International Political Economy* 451.
60 Acharya (n 52) 239-240.
61 A Acharya 'The R2P and norm diffusion: Towards a framework of norm circulation' (2013) 5 *Global Responsibility to Protect* 478; Evans (n 38) 289; A Alao *The role of African regional and sub-regional organisations in conflict prevention and resolution* (2000) 3-4.
62 Eimer, Lutz & Schuren (n 59) 451.

had arguably proven to be efficacious and were already considered legitimate in their pre-existing normative communities.[63]

3 The place of sub-regional organisations in the implementation of the responsibility to protect

Regional and sub-regional organisations continue to play an ever-increasing role as front-line responders to mass atrocity crimes, more so in Africa.[64] In this respect, Bellamy and Williams acknowledge that some regional organisations have actually become 'important *peacekeepers in their own right*'.[65] They also point out that a strong partnership between the UNSC and regional (as well as sub-regional) organisations is crucial in guaranteeing effective responses to human protection crises.[66] However, the persisting question is whether the nature of this 'partnership' ought to allow sub-regional organisations to undertake coercive measures under R2P.

The ICISS pondered over the issue in the following terms:[67]

> In the mid-1940s, regional organisations were unquestionably subordinated to the authority of the UNSC. At the turn of the century, it is less certain whether the text of the Charter remains definitive on the issue of regional authority. Specifically, there are questions as to whether regional [and sub-regional] enforcement action under all circumstances continues to fall under the subordinate status of the UNSC covered by Article 53(1).

The ICISS argued that the UN Charter 'is a living instrument that has evolved over the years and will continue to do so', hence 'a literal reading of the Charter is no longer an accurate reflection of contemporary international law'.[68]

63 Bloomfield (n 9) 8; UNSG *The role of regional and sub-regional arrangements in implementing the responsibility to protect: Report of the Secretary-General* (2011) 3 para 6. In this report the UNSG argued for norm localisation stating that the implementation of R2P should 'respect institutional and cultural differences from region to region' and that these regions are open to operationalise the principle in their own way.

64 Evans (n 37) 12; V Adetula, R Bereketeab & O Jaiyebo *Regional economic communities and peacebuilding in Africa:The experiences of ECOWAS and IGAD* (2016) 7 38; Alao (n 61) 3 10; B Bojang 'Protection of civilians in armed conflicts in West Africa' in D Kuwali & F Viljoen (eds) *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (2017) 321.

65 AJ Bellamy & PD Williams 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs (Royal Institute of International Affairs)* 826.

66 Bellamy & Williams (n 65) 848.

67 ICISS (n 18) 168.

68 ICISS 170.

The UNSG, for its part, in its 2009 report to the UNGA pointed out that the UNSC has *primary* and not *total* responsibility for the maintenance of peace and security.[69] It added that some crimes under R2P may not necessarily be deemed to pose a threat to international peace and security such as to fall right within the UNSC's purview.[70] The UNSG, therefore, urged better modes of collaboration between the UN and regional as well as sub-regional arrangements and emphasised that this new collaboration ought to consider and be based on *capacity sharing* and not merely *capacity building*.[71]

The above essentially called for a rethinking of the relationship between the UNSC and regional as well as sub-regional organisations, with respect to the authority to impose coercive measures under R2P with the emphasis on the need to acknowledge the authority of regional and sub-regional organisations.

3.1 Interpretative approaches to sub-regional authority

Given the persisting need to place coercive measures by sub-regional organisations under R2P within the prevailing UN system, resort has been had to interpreting the requirement for UNSC authorisation in a manner that permits action by sub-regional organisations. This has given rise to two schools of thought around the temporal essence of the requirement: those that insist on the UNSC's approval prior to intervention ('green light' interpretation); and those that argue for intervention to proceed unless the UNSC specifically votes to halt it ('red light' interpretation).[72]

The red light interpretation picks up from the UNSG's argument above that although the UNSC has the primary mandate to approve military interventions, such mandate is not exclusive.[73] Gagro argues that from state practice, even though the UNSC authorisation is most desirable, it no longer is regarded by the international community as an absolute must.[74] As an alternative, Gagro paints a picture of a legitimacy ladder at the top of which sits the UNSC. She argues that states show respect for this legitimacy ladder when considering intervention and have always climbed the necessary stairs in their respective circumstances. She then presents regional (including sub-regional) organisations as the second best authority which is lower in

69 UNSG *Implementing the responsibility to protect: Report of the Secretary-General* (2009) 27 para 63.
70 As above.
71 UNSG (n 69) para 65.
72 ICISS (n 18) 170.
73 Gagro (n 46) 67.
74 Gagro 68.

the ladder and hence more accessible and preferable in authorising and effecting coercive measures under R2P.[75]

Further support for the red light interpretation is found in the ICISS report where the Commission pointed out that recent practice showed that UNSC's approval could be sought *ex post facto*.[76] Examples given in that respect included the interventions undertaken by ECOWAS in Liberia and Sierra Leone which were retroactively sanctioned by the UNSC through Resolutions 788 of 1992 and 1132 of 1997 respectively. These, among other regional examples, have even been argued as providing evidence that intervention without UNSC authorisation is an emerging legal custom.[77]

The UN High-Level Panel as well as the AU supported the idea that approval could be sought after the fact.[78] However, they qualified this as being applicable only in urgent cases. While the AU does not provide temporal specifications, the High-Level Panel proposed that authorisation should be sought after commencement of the intervention.[79]

It is, however, argued in support of the green light interpretation that intervention without prior approval of the UNSC poses the risk of 'undermining the imperfect, yet resilient, security system created after the Second World War (WWII) and setting dangerous precedents for future interventions'.[80] This argument, however, fails to consider, among other factors, the need to adapt World War II-old systems to prevailing realities regarding the organisation of states and attendant security dynamics adopted at regional and sub-regional levels.[81]

3.2 Legitimacy as a basis for sub-regional authority

Alongside the interpretative arguments above lie arguments that place primacy on the legitimacy of sub-regional intervention regardless of any 'illegality' that may arise from a failure to obtain prior UNSC approval. The ICISS argued that 'in the blurred area where international custom is evolving or unclear, the notion of

75 As above.
76 ICISS (n 13) 54.
77 ICISS (n 18) 166.
78 UNSG (n 2) 85; AU (n 3) 6.
79 As above.
80 Bellamy (n 9) 40.
81 P Arthur 'Promoting security in Africa through regional economic communities (RECs) and the African Union's African Peace and Security Architecture (APSA)' (2017) 9 *Insight on Africa* 2. Other contentious issues against the system include the continued structuring of veto powers based on World War II power dynamics.

legitimacy takes on greater significance'.[82] To echo this position, the High-Level Panel stated:[83]

> The effectiveness of the global collective security system … depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy – their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.

In this respect, the intervention by the North Atlantic Treaty Organisation (NATO) in Kosovo in 1999, for instance, was found to be 'illegal but legitimate' thus ensuring a victory for NATO when a resolution was presented in the UNSC seeking to declare its intervention a violation of international law.[84] Increasingly, therefore, some decisions about intervention may require the use of force without UNSC approval and the merits of each case will determine the legitimacy of such interventions.[85]

To ensure that interventions are legitimate, regional and sub-regional organisations therefore need to ascertain that there is an objectively-perceived or actual humanitarian situation; undertake and demonstrate that reasonable efforts to reach a diplomatic or peaceful resolution have failed; and comply with the requirements of international humanitarian law in the conduct of their military interventions.[86] The sustainability of the protection measures adopted will also serve to legitimise such interventions. Also, the presence of a treaty instrument ratified by the subject state and bestowing on the regional or sub-regional organisation the right to intervene for human protection purposes will also serve as a critical legitimising tool.[87] Moreover, this serves as proof of grant of anticipatory consent to the intervening regional or sub-regional organisation.

The above arguments, therefore, make a strong case for the authority of regional and sub-regional organisations to undertake coercive measures under R2P in their own right to ensure the protection of populations at risk. Besides, the human protection imperative should always bend towards saving lives rather than to the prizing of anachronistic procedural hurdles.[88]

82 ICISS (n 18) 170.
83 UNSG (n 2) 66; G Evans 'From humanitarian intervention to the responsibility to protect' (2006) 3 *Wisconsin International Law Journal* 710.
84 Draft UNSC Resolution, UN Doc S/1999/328 (26 March 1999); ICISS (n 18) 166-168.
85 Bellamy (n 38) 125.
86 ICISS (n 18) 170.
87 As above.
88 UNSG (n 69) 19 para 50.

3.3 The comparative advantage of sub-regional organisations

The ICISS acknowledged that neighbouring countries in the context of regional and sub-regional arrangements often have comparative advantages that make them better placed to take action in response to conflict than the UN.[89]

To begin with, internal conflicts in states always tend to have negative spill-over effects, such as the inflow of refugees, which significantly impact neighbouring countries.[90] Second, conflict in one country always tends to spark related or resultant conflicts in neighbouring states. For instance, 'international terrorist groups prey on weak states for sanctuary', thereby posing security threats to neighbouring countries.[91] Third, the close proximity of states within sub-regional organisations gives them a better appreciation of a conflict's dynamics, hence equipping them with knowledge on where and how to effect intervention measures.[92] Lastly, the sharing of borders, joint regional institutions and trade makes sub-regional organisations better placed to effect economic sanctions imposed on countries experiencing conflict.[93] Sub-regional organisations' involvement in their formulation therefore assures their commitment to ensure that they are not breached.

The above factors give neighbouring states in sub-regional organisations (even more that regional organisations) a strong collective interest in swiftly and effectively putting an end to R2P-related conflicts. This interest, moreover, is sufficient to mobilise the necessary political will not only to act but to also to ensure the sustainability of the specific measures adopted in resolving the conflicts.[94]

89 ICISS (n 13) 53.
90 As above; T Kabau 'The responsibility to protect and the role of regional organisations: An appraisal of the African Union's interventions' (2012) 4 *Goettingen Journal of International Law* 57.
91 UNSG (n 2) 14.
92 UNSG (n 69) 7; T Ajayi *The UN, the AU and ECOWAS – A triangle for peace and security in West Africa?* (2008) 8.
93 UNSG (n 69) 11.
94 ICISS (n 13) 54; UNSG *A vital and enduring commitment: Implementing the responsibility to protect: Report of the Secretary-General* (2015).

4 Implementation of the responsibility to protect in ECOWAS: Lessons from sub-regional intervention

ECOWAS was established under the Treaty of Lagos in 1975 and is currently made up of 15 states.[95] It has established various institutions that play different roles in the implementation of decisions that ideally fall under R2P. These include the Authority of Heads of State and Government (ECOWAS Authority) which is the highest decision-making body on peace and security matters;[96] the Mediation and Security Council (MSC) which takes all decisions on peace and security matters upon delegation from the ECOWAS Authority;[97] the Council of Elders who use their good offices to pursue pacific settlement of disputes;[98] and the ECOWAS Monitoring Group (ECOMOG) which is a stand-by military force and an early warning mechanism referred to as the Monitoring and Observation Centre.[99]

ECOWAS is highly supranational, a factor that has largely contributed to the success of its decisions on peace and security.[100] Its decisional supra-nationalism that allows it to utilise a majority-based decision-making process[101] as opposed to a consensus-based process has been critical in ensuring timely and decisive action.[102] The democratic density[103] of ECOWAS is also a key facilitator of its effectiveness.

4.1 How the ECOWAS framework supports R2P implementation

Although largely put in place long before the emergence of R2P, the ECOWAS framework provides a sound basis for R2P implementation. This part examines how the framework provides room for the implementation of R2P's three core responsibilities.

95 http://www.ecowas.int/about-ecowas/basic-information/ (accessed 8 July 2020): Nigeria, Ghana, Senegal, Mali, Côte d'Ivoire, Liberia, The Gambia, Guinea, Guinea-Bissau, Sierra Leone, Niger, Cape Verde, Burkina Faso, Benin and Togo.
96 1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol on the ECOWAS Mechanism (PEM)) art 6.
97 PEM (n 96) arts 4 & 10.
98 PEM art 17.
99 Revised Treaty art 58.
100 Adetula, Bereketeab & Jaiyebo (n 64) 22.
101 Art 9(4) of Revised Treaty as read with art 9 of the PEM allows only four in a meeting of six states to make a decision to intervene in any one of ECOWAS' 15 states.
102 B Fagbayibo 'Article 4(h): A supranational perspective' in Kuwali & Viljoen (n 8) 130.
103 The relative number of democratic regimes in a sub-region.

With respect to the responsibility to prevent, ECOWAS has adopted a continuum of peace-building measures that range from those aimed at preventing social and political upheavals to those aimed at building the capacity of member states emerging from conflict.[104] These include involvement in preparation, organisation and supervision of elections in member states;[105] observation of respect for human rights; as well as its active support for the development of democratic institutions.[106] Most importantly, the establishment of a decentralised early warning system[107] goes a long way in ensuring that ECOWAS has requisite prior information on potential triggers of conflict to enable it to provide timely assistance to member states in addressing the root causes of conflict.

Where the above fails, leading to conflict, ECOWAS is mandatorily required to intervene.[108] For a start, the ECOWAS Prevention Framework provides an elaborate and comprehensive mechanism for peaceful intervention through diverse preventive diplomacy initiatives.[109] Where pacific means fail, the mechanism for military intervention may be initiated by a decision of either the ECOWAS Authority or the MSC; on the initiative of the president of the ECOWAS Commission; or at the request of either a member state, the AU or the UN.[110]

Lastly, the ECOWAS mechanism makes explicit provision for the rebuilding and reconstruction of its member states after interventions. In this regard, ECOWAS requires all its financial institutions to develop policies to facilitate funding for reintegration and reconstruction programmes.[111] It further undertakes to supervise and monitor cease-fires through its observation missions;[112] to implement disarmament, demobilisation and reintegration programmes; as well as to resettle and reintegrate refugees and internally-displaced persons.[113]

It is worth noting, however, that while the ECOWAS framework largely commends itself to aspects of the R2P *concept*, it diverts from the strict boundaries of the R2P *norm* in the sense that it envisions

104 PEM (n 96) ch IX.
105 PEM art 42; Protocol on Democracy art 12.
106 PEM (n 96) art 31.
107 PEM arts 23 & 24.
108 PEM art 40.
109 2008 ECOWAS Conflict Prevention Framework (Prevention Framework) para 1; Revised Treaty art 77(2)(iv) & (v)
110 PEM (n 96) arts 25 & 26.
111 PEM art 42.
112 PEM art 31.
113 PEM art 44.

a wide scope of situations warranting intervention and fails to make military intervention subject to the prior authorisation of the UN.

Nevertheless, ECOWAS acknowledges that although it acts on the basis of the sub-region's realities, it constitutes a building block and an integral part of the continental and global security architecture, and thus needs to work in partnership and in cooperation with the AU and the UN.[114] For this reason, article 52 of the Protocol to the ECOWAS Mechanism requires ECOWAS to inform the UN of any military intervention undertaken.[115] Additionally, the ECOWAS Mechanism consistently requires cooperation between ECOWAS, the AU and the UN mechanisms[116] and goes to the extent of allowing the AU and UN to initiate the ECOWAS mechanism.[117] This is a critical feature for any sub-regional enforcement actions under R2P.

4.2 ECOWAS' involvement in R2P-related cases

Since inception, ECOWAS has undertaken various successful interventions. This article focuses on interventions in The Gambia, Côte d'Ivoire and Mali. The focus in each of the cases is on events and steps taken in respect of the responsibility to react under R2P.

4.2.1 ECOWAS intervention in The Gambia (2016/2017)

The situation in The Gambia involved a contested presidential election in which the incumbent had rejected the results that had declared the opposition candidate the winner.[118] This was despite the fact that ECOWAS, the AU and the UN had issued a joint statement declaring the elections as having been free and fair.[119] This led to a political stand-off that saw Gambian refugees as well as the opposition candidate flee to neighbouring Senegal.[120]

114 Prevention Framework paras 117 & 118.
115 Sarkin (n 45) 26: Sarkin argues that in practice there may be consultation and unilateral action by ECOWAS may only occur where there is no agreement. Notwithstanding this, the fact that the obligation is to *inform* rather than to seek prior authorisation means that ECOWAS can resort to the use of force in the absence of UNSC approval.
116 PEM (n 96) arts 41(b) & 52; Revised Treaty art 83.
117 PEM art 26.
118 T Gouegnon 'Yahya Jammeh loses to Adama Barrow in Gambia election' (2016), http://www.aljazeera.com/news/2016/12/gambia-yahya-jammeh-loses-election-adama-barrow-161202130519550.html (accessed 8 July 2020).
119 'ECOWAS, AU and UN statement on the Gambian December 1 presidential election', http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-gambian-december-1-presidential-election/ (accessed 8 July 2019).
120 C Hartmann 'ECOWAS and the restoration of democracy in The Gambia' (2017) 52 *Africa Spectrum* 87 94.

The AU Peace and Security Council (PSC) condemned the incumbent's actions, stressed the imperative of dialogue and expressed the AU's determination to take all necessary measures to ensure that the will of the Gambian people as expressed in the elections was respected.[121] It also acknowledged and expressed support for the efforts that were being made by ECOWAS.[122] The ECOWAS Authority also issued a Communiqué in the same terms as the AU and requested the AU and UN's endorsement of its decisions as well as technical assistance in mediating the conflict.[123] This was followed by a statement by the president of the UNSC recognising the president-elect and commending the efforts being undertaken by ECOWAS and the AU to reach a peaceful solution.[124]

In an attempt to secure pacific settlement, ECOWAS dispatched a high-level mission of heads of state, accompanied by the Special Representative of the UNSG for West Africa to attempt to reach a political solution.[125] No concession, however, was reached.[126]

On the side-lines of the negotiations, ECOWAS was engaged in a contingency plan that involved the gathering of sub-regional troops in Senegal under the banner of the ECOWAS Mission in The Gambia (ECOMIG) in readiness to move into The Gambia should the situation so demand.[127] The mission's objective was to create an enabling environment for the enforcement of the election results and to ensure the safety of the population in the process.[128]

In the meantime, in line with the decision of ECOWAS to seek the endorsement of the UN, Senegal (an ECOWAS and UNSC member at the time) drafted and presented a resolution to the UNSC for approval to use all means necessary to restore order in The Gambia.[129] However, the unanimous resolution adopted by the UNSC only passively welcomed the ECOWAS decision to intervene

121 AU 'Communiqué of the Peace and Security Council's 644th meeting held on 12 December 2016 in Addis Ababa, Ethiopia' 3.
122 As above.
123 ECOWAS 'Final communiqué of the fiftieth ordinary session of the ECOWAS Authority of Heads of State and Government held on 17 December 2016'.
124 UN 'Security Council statement says Gambian leaders must respect vote result, ensure peaceful transfer of power to president-elect' (2016), https://www.un.org/press/en/2016/sc12650.doc.htm (accessed 8 July 2019).
125 ECOWAS (n 123) 7.
126 As above.
127 The Presidency, Republic of Ghana 'Press release: Ghana deploys troops to support ECOWAS Mission in The Gambia' (2017), http://presidency.gov.gh/index.php/2017/01/18/ghana-deploys-troops-to-support-ecowas-mission-in-the-gambia/ (accessed 8 July 2019).
128 As above.
129 What's in blue 'Resolution on The Gambia' (2017), http://www.whatsinblue.org/2017/01/resolution-on-the-gambia.php (accessed 8 July 2019).

but expressed its 'full support to ECOWAS in its commitment to ensure, *by political means first*, respect of the will of the people of The Gambia'.[130] Notably, the UNSC fell short of authorising the use of 'all means necessary', [131] failed to issue the resolution under chapter VII of the UN Charter and did not declare the situation a threat to international peace and security, thereby creating uncertainty as to the basis upon which it was exercising its authority over the internal conflict.[132]

Shortly after the resolution had been passed the ECOWAS troops crossed the border into The Gambia, leading to a political settlement for the relinquishing of power.[133] This was done notwithstanding the failure by the UNSC to authorise the use of military force and its insistence on the use of political means (first). The UNSC's resolution, therefore, arguably served as a legitimising tool rather than dictating action by ECOWAS.

Although it may be argued, from a human security perspective, that the ECOWAS intervention pre-empted a foreseeable lapse into conflict and the potential commission of atrocity crimes (earlier expressed by the UNSG Special Adviser on the Prevention of Genocide following statements that incited ethnic violence by the incumbent),[134] the intervention falls short of compliance with the R2P norm's procedural standards. This is because the intervention was largely aimed at enforcing democratic ideals and the military deployment was not specifically authorised by the UNSC. Although it has been argued that the UNSC did not specifically prohibit military intervention and that the loose but strategic wording of the resolution that emphasised a solution 'by political means *first*', indirectly expressed support for the possibility of a military solution,[135]

130 UNSC Resolution 2337.
131 UN 'Provisional record of the Security Council 7866th meeting of 19 January 2017: Peace consolidation in West Africa' (2017): Comments made by some UNSC member states after the passing of the resolution specifically made it clear that the approval was not an authorisation for the use of force.
132 C Kreß & B Nußberger 'Pro-democratic intervention in current international law: The case of The Gambia in January 2017' (2017) 4 *Journal on the Use of Force and International Law* 242.
133 P Williams 'A new African model of coercion? Assessing the ECOWAS mission in The Gambia' (2017), https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/ (accessed 8 July 2019); Office of the Spokesperson for the UNSG 'Note to Correspondents - Joint declaration on the political situation in The Gambia' (2017), https://www.un.org/sg/en/content/note-correspondents/2017-01-21/note-correspondents-joint-declaration-political-situation (accessed 8 July 2019).
134 M Nouma 'Note to correspondents – Statement by Special Adviser on the Prevention of Genocide' (2016), https://www.un.org/sg/en/content/sg/note-correspondents/2016-06-10/note-correspondents-statement-special-adviser-prevention (accessed 27 August 2019).
135 Kreß & Nußberger (n 132) 244.

it is only when viewed from the eyes of the broader *R2P concept* that the attributes above may be argued as falling within the ambit of R2P.

The fact that Senegal was at the forefront of the intervention in The Gambia has been argued as having been motivated by political ends[136] more than the need to enforce any normative ideals.[137] Worth noting, however, is the strategic location of Senegal which encloses The Gambia within its territory; the fact that over 45 000 refugees had already entered Senegal; and the fact that Senegal was the only West-African country in the UNSC, which informed Senegal's lead role.[138] Even so, the fact that the decision to intervene was taken collectively at the sub-regional level went a long way in sheltering The Gambia from any negative impacts of any self-interest on the part of Senegal.[139] However, such self-interest arguably is imperative in the successful implementation of R2P when channelled along objectively-identifiable legal grounds for action coupled with a multilateral decision-making system.

The ECOWAS intervention in The Gambia goes to show that sub-regional organisations are better placed to act in a timely and decisive manner to ensure peace where coercive means are necessary and where the UNSC is reluctant or does not regard such situations as commending themselves to coercive measures.

4.2.2 ECOWAS intervention in Côte d'Ivoire (2011)

Côte d'Ivoire had since 2002 endured a longstanding civil war between its southern and northern regions. The conflict that informed this intervention erupted after the incumbent President, Laurent Gbagbo (Gbagbo) rejected the results of the 2010 presidential elections in which Alassane Ouattara (Ouattara) was declared the winner.[140] Gbagbo contested the results before the Constitutional Council alleging fraud in departments in the northern region.[141] The Council, which was supportive of Gbagbo, annulled results from

136 Williams (n 133); Hartmann (n 120) 94. These include the failure of the 'Senegambia' confederation talks with The Gambia and the incumbent's longstanding support for separatist movements in Southern Senegal's Casamance region.
137 Williams (n 133).
138 http://www.un.org/en/sc/members/elected.asp (accessed 8 July 2019).
139 F Mugisha & G Mittawa 'Multilateral intervention: The AMISOM experience' in Kuwali & Viljoen (n 8) 266.
140 X Rice 'Conflict looms over Ivory Coast while poll-loser Gbagbo refuses to cede control' (2010), https://www.theguardian.com/world/2010/dec/06/ivory-coast-election-stalemate-gbagbo (accessed 8 July 2019).
141 ECOWAS 'Final communiqué on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire (7 December 2010)'.

seven northern departments and proceeded to declare Gbagbo the winner.[142] Two separate inaugurations took place, for Gbagbo in the south and for Ouattara in the north, resulting in a political impasse marred by acts of violence.[143]

ECOWAS and the AU endorsed the election results as declared by the electoral commission, recognising Ouattara as the legitimate President-elect and called on Gbagbo to respect the will of the people and to yield power.[144] They both proceeded to impose sanctions on Côte d'Ivoire.[145] The UNSC welcomed these decisions and expressed support for the efforts in promoting dialogue.[146] It moreover reiterated the readiness of the UNSC to impose targeted sanctions to all obstructing the peace process or committing serious violations of human rights.[147]

In an attempt to arrive at a peaceful resolution, ECOWAS and the AU undertook separate mediation efforts with both failing to procure a truce.[148] ECOWAS proceeded to threaten to use 'legitimate force' in a bid to force a settlement.[149] However, this decision was contradicted by that taken by the AU's PSC a month later calling for a peaceful resolution and putting in place its own high-level panel to pursue a political solution.[150] This only served to further the existing impasse.[151]

Presented with the above conflicting positions, the UN chose to downplay the position of ECOWAS by only *taking note* of it while emphasising the AU's political approach.[152] Pursuant to this, ECOWAS recalled its resolutions and instead appealed to the UNSC to impose stiffer targeted sanctions and to also strengthen the mandate of UN

142 J James 'Ivory Coast poll overturned: Gbagbo declared winner' (2010), http://www.bbc.com/news/world-africa-11913832 (accessed 8 July 2019).
143 BBC 'Ivory Coast crisis as presidential rivals both sworn in' (2010), http://www.bbc.com/news/world-africa-11919256 (accessed 8 July 2019).
144 AU 'Communiqué of the AU PSC of its 252nd meeting held on 9 December 2010'; ECOWAS (n 141).
145 As above.
146 UN 'Security Council press statement on Côte d'Ivoire' (2010), https://www.un.org/press/en/2010/sc10105.doc.htm (accessed 8 July 2019).
147 As above.
148 ECOWAS (n 141); ECOWAS 'Final communiqué of the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire held on 24 December 2010' paras 10-11; UN 'Côte d'Ivoire chronology of events : Security Council report' (2017)'.
149 As above.
150 AU 'Communiqué of the AU PSC of its 259th meeting held on 28 January 2011'; Marusa (n 28) 30.
151 E Abatan & Y Spies 'African solutions to African problems? The AU, R2P and Côte d'Ivoire' (2016) *South African Journal of International Affairs* 4.
152 UNSC Resolution 1975.

Operation in Côte d'Ivoire (UNOCI)[153] to enable them use all means necessary to protect civilians.[154]

The UNSC proceeded to impose an arms embargo on Côte d'Ivoire as well as targeted sanctions against Gbagbo and his associates.[155] The UNSC also extended its prior authorisation to UNOCI (and the supporting French forces) to use all means necessary to protect civilians.[156] The duo intervened using force, with the assistance of pro-Ouattara fighters, leading to the surrender of Gbagbo.[157]

In addition to the above measures, it is argued that the adoption and use of the CFA franc and the use of a single central bank among ECOWAS member states made it easy for ECOWAS to impose sanctions on Gbagbo's government.[158]

The fact that special advisers to the UNSG on genocide and R2P had expressed concern over 'the possibility of genocide, crimes against humanity, war crimes and ethnic cleansing in Côte d'Ivoire'[159] placed the conflict under R2P, thus necessitating international action. The UNSC declared the situation a threat to regional peace and security and called for action under chapter VII of the UN Charter in its authorisation of intervention by the UNOCI.[160] Although the conflict also sought to enforce democracy, the overwhelming human security concerns justified intervention even though the UNSC fell short of directly invoking R2P.

However, it is argued that the proactiveness of the UN was not entirely altruistic but was driven by French interests.[161] France, the former colonial power of Côte d'Ivoire and a permanent member of the UNSC, is argued to have had a regime-change agenda given Gbagbo's stand for the economic interests of his country[162] and,

153 UNSC Resolution 1933: UNOCI had been deployed by the UN after the 2002 Ivorian conflict as a peacekeeping force in Côte d'Ivoire and was supported by French forces.
154 UN (n 148).
155 UNSC Resolution 1975.
156 UNSC Resolution 1975 para 6.
157 UN (n 148).
158 K Chitiyo 'Ivory Coast: Africa's democracy lesson' (2011), http://www.bbc.com/news/world-africa-13092437 (accessed 12 October 2019).
159 F Deng & E Luck 'Statement attributed to the UN Secretary-General's special advisers on the prevention of genocide and the responsibility to protect on the situation in Côte d'Ivoire' (2011), https://www.un.org/en/genocideprevention/documents/media/statements/2011/English/2011-01-19-OSAPG,%20Special%20Advisers%20Statement%20on%20Cote%20d'Ivoire,%2019%20Jan%202011.pdf (accessed 10 October 2019).
160 UNSC Resolutions 1933, 1967 & 1975.
161 Abatan & Spies (n 151) 6.
162 A Little 'Q&A: Ivory Coast crisis' (2011), http://www.bbc.com/news/world-africa-11916590 (accessed 12 October 2019).

further, given France's interest in re-establishing French influence in Francophone Africa.[163] Although Bellamy and Williams argue that 'regional arrangements played a crucial "gatekeeping" role in defining the problem and terms of engagement',[164] this is not entirely correct. Statements made by ECOWAS and the AU only provided a pretext for UN action. There is no record of any consultation by the UN with either the AU or ECOWAS in determining the terms of engagement in the conflict. France's undue influence in the decision to intervene and the execution of the intervention, therefore, overshadowed the UN's impartiality while dwarfing any role by ECOWAS or the AU.[165]

Additionally, 'the lack of unity of response, duplication of efforts' and the AU's contradiction of the position adopted by ECOWAS undermined their effectiveness in resolving the conflict at the regional level, thus necessitating the UN's involvement.[166] However, it is worth noting that while ECOWAS gave room for the participation of a representative of the Chairperson of the AU Commission in all its meetings on Côte d'Ivoire,[167] the AU failed to reciprocate this. Arguably, therefore, the AU's failure to coordinate its response with ECOWAS undermined the leadership role of ECOWAS and its ability to achieve a timely and amicable settlement.

This intervention contributes numerous lessons while equally bringing to fore challenges associated with sub-regional intervention. The first is the demonstration that sub-regional organisations are in a better position to enforce targeted sanctions as seen from the UN's request to ECOWAS members to help enforce its sanctions.[168] Second, joint sub-regional entities such as a sub-regional currency and a central bank are instrumental in the enforcement of targeted economic sanctions. Lastly, there is a need for closer cooperation between sub-regional and regional organisations in the implementation of R2P to ensure the adoption of concerted measures that will enjoy greater international legitimacy and have a better chance of achieving timely settlements of R2P-related conflicts.[169] In this regard, the principle of subsidiarity is recommended in the hierarchical sequencing of

163 B Plett 'Did UN forces take sides in Ivory Coast?' (2011), http://www.bbc.com/news/world-africa-13004462 (accessed 12 October 2019).
164 Bellamy & Williams (n 65) 837.
165 As above.
166 Abatan & Spies (n 151) 5; K Striebinger 'Coordination between the African Union and the regional economic communities' (2016) 14.
167 See all the communiqués of the ECOWAS Authority above.
168 UNSC Resolution 2045 para 8.
169 Arthur (n 81) 15; Alao (n 61) 29.

interventions with sub-regional organisations acting first and resort to the UN as a last call.[170]

4.2.3 ECOWAS intervention in Mali (2012)

The conflict in Mali presents what R2P envisions as a situation where a state is unable to discharge its responsibility to protect. The conflict began as a push/rebellion by civilian separatist movements in Northern Mali for self-determination but was later replaced by Islamic extremism and the commission of war crimes by Islamist rebel groups that took control of the region.[171] The inability of the Malian government to effectively combat the rebellion led to mutiny and a *coup* against President Amadou Toure prompting the UNSC and ECOWAS to respond to the crisis.

ECOWAS committed to taking all necessary measures to guarantee the protection of affected populations and to assist Mali in safeguarding its sovereignty and territorial integrity.[172] In this regard, it succeeded in negotiating with the military junta for the restoration of constitutional order and the installation of an interim civilian government. It achieved this through a mix of negotiation through a high-level delegation[173] and the threat of general political/diplomatic, economic and financial sanctions against the Mali state as well as through individual sanctions against the military junta's leaders.[174] This, therefore, provided room to focus on the insurgence by rebels.

Despite efforts by ECOWAS at mediating the rebellion, the insurgence could not be contained. ECOWAS, therefore, resolved to adopt a military solution of deploying troops to Mali under the banner of 'ECOWAS Mission in Mali' (MICEMA).[175] Although this decision received the endorsement of the AU,[176] various stakeholders in the

170 Striebinger (n 167) 17; K Aning & S Atuobi 'Application of and responses to the responsibility to protect norm at the regional and sub-regional levels in Africa: Lessons for implementation' in The Stanley Foundation (ed) *The role of regional and sub-regional arrangements in strengthening the responsibility to protect* (2011) 13.

171 Human Rights Council, 'Situation of human rights in the Republic of Mali' (3 July 2012) para 2 read with art 8 of the Rome Statute; UNSC Resolution 2085.

172 ECOWAS 'Final Communiqué – 40th ordinary session of the Authority of Heads of State and Government' (16-17 February 2012) para 14; ECOWAS 'ECOWAS statement on the situation in the North of Mali' (19 March 2012).

173 ECOWAS 'Final Communiqué from the extraordinary summit of ECOWAS Heads of State and Government' (27 March 2012) para 14.

174 ECOWAS 'Communiqué – Emergency mini-summit of ECOWAS Heads of State and Government on the situation in Mali' (29 March 2012).

175 See ECOWAS Summit Communiqués of 26 April 2012 (para 21); 3 May 2012 (para 13) and 28-29 June 2012 (para 25).

176 AU 'Communiqué of the PSC 316th Meeting' (3 April 2012).

region were opposed to a military solution, key among them being Mali's interim leadership.[177] Other core countries, such as Algeria and Mauritania, are also reported to have been opposed to the decision.[178] This, when coupled with the fact that the Islamic militants had extensive military experience and sophisticated equipment, dealt a blow to the ability of ECOWAS to muster sufficient political, military and financial capacity to go through with the deployment. ECOWAS, therefore, was compelled to seek UNSC's authorisation and support for an international force to intervene in Mali.[179]

The UNSC, however, was reluctant to approve the use of force despite the decision having received the AU's endorsement and despite the UN having been part of all ECOWAS meetings leading up to the decision to intervene militarily. This was also despite receiving a direct request from Mali's interim leadership for intervention.[180] Having received the request by ECOWAS in June,[181] the UNSC delayed the approval until December under the bureaucratic pretext of requiring 'additional information' from ECOWAS and the AU.[182] Even when the UNSC finally authorised intervention through an Africa-led Support Mission in Mali (AFISMA), it withheld the provision of logistical and financial support, only expressing its 'intention to consider' providing the support upon being furnished with additional implementation details.[183] In the end, what was authorised was an 'unfunded' and logistically-unsupported mission to Mali, thus lending credence to the view that 'AFISMA had clearly been set up to fail'.[184] A donors' conference had to be held by the AU and ECOWAS for contributions towards the Mission.[185] The lack of

177 D Francis 'The regional impact of the armed conflict and French intervention in Mali' (2013) *NOREF Report* 7-8.

178 Although not ECOWAS members, both countries were strategic to the resolution of the conflict given their influence over the northern part of Mali as well as their interest in the spill-over effect in the form of returning extremists. See W Lacher 'The Malian crisis and the challenge of regional security cooperation' (2013) 2 *International Journal of Security and Development* 3.

179 ECOWAS 'Communiqué of the ECOWAS Commission on the situation in Mali' (7 June 2012) para 7.

180 UNSC Resolution 2071.

181 AU 'Communiqué – Peace and Security Council 323rd Meeting' (12 June 2012) para 16.

182 UNSC 'Security Council Press Statement on Mali' (18 June 2012); UNSC Resolution 2056 para 18; UNSC 'Security Council press statement on Mali' (10 August 2012); UNSC Resolution 2071 para 6.

183 UNSC Resolution 2085 para 21; Compare this to the nature of logistical and financial support provided to the UN's own mission (MINUSMA) established to succeed AFISMA. See, eg, paras 7, 10, 12, 13, 14 & 15 of UNSC's Resolution 2100.

184 A Oluwadare 'The African Union and the conflict in Mali: Extra-regional influence and the limitations of a regional actor' (2014) 3 *African Journal of Governance and Development* 18; UNSC 'Report of the Secretary-General on the situation in Mali' (26 March 2013) para 46.

185 ECOWAS 'Final Communiqué Extraordinary Session of the Authority of ECOWAS Heads of State and Government' (19 January 2013) paras 20-21.

unqualified support from the UNSC from inception hence impacted the deployment and effectiveness of AFISMA.

Following the deepening of the insurgence due to the delays in the approval and deployment of AFISMA, Mali's interim leadership was compelled to seek France's military assistance.[186] The French-led offensive against the rebellion, with subsequent assistance from the AFISMA troops, saw an end to the insurgence and gave room for the establishment of a stabilisation mission.

While the Mali case highlights the timely quality of sub-regional intervention as well as the importance of regional organisations deferring to the leadership of sub-regional organisations, as demonstrated by the AU's consistent support for and endorsement of ECOWAS measures, it also reveals challenges of multilateral military action in the context of the strict limits of the R2P *norm*. Some of the lessons it holds for sub-regional intervention include the following:

(i) Financial capacity is crucial for military intervention, hence there is a need for sub-regional organisations to focus on and strengthen their individual capacity to finance their missions.
(ii) Sub-regional organisations need to have a clear financing framework where a military operation is beyond both their military/logistical and financial capacity.

The resolution of the Mali conflict is argued as being an archetypal R2P *norm* implementation case with respect to obtaining the UNSC's prior authorisation before the deployment of military force.[187] While the 'Mali case' allows for action, especially in instances where sub-regional organisations are lacking in capacity to intervene on their own, its effectiveness will require a clear framework regulating how the UNSC should handle requests received from sub-regional organisations for approval of military intervention, for human protection purposes. The framework should detail, among other things, the specific roles and obligations of each of the multilateral actors in executing the specific intervention. This will ensure certainty in the process and facilitate timely action.

5 Conclusion

Human security sits at the core of R2P (the R2P *concept*). For this reason, the concept prized the protection of populations at risk over any procedural bureaucracies based on the world order as it existed

186 M Caparini 'The Mali crisis and responses by regional actors' (2015) Working Paper Norwegian Institute of International Affairs 9-10.
187 Nkrumah & Viljoen (n 8) 262 345; UNSC Resolution 2085 para 17.

in 1945 at the adoption of the Charter of the UN. The realities of the post-Cold War era organisation of states highlight an increasing role for regional and, even more so, sub-regional organisations in the maintenance of sub-regional peace and security. This underscored the recommendation by ICISS to confer authority on regional and sub-regional organisations to adopt coercive measures under R2P. The recommendation, however, was omitted under the R2P *norm* in favour of the continued preservation of the special privileges of hegemony held by a few states, more so, the permanent veto-bearing members of the UNSC and protected under the UN Charter.

The result has been the perpetuation of an inherently unequal international security system where a few states have the exclusive privilege of deciding when another state ceases to benefit from the protection afforded by principles of sovereign equality and non-interference under the pretext of R2P. This has given leeway for the use of R2P to mask ulterior motives for intervention as well as for the obstruction of decisive action in situations meriting the invocation of R2P based on the geopolitical and strategic interests of the few states rather than the imperative of human security. The former was the case in NATO's UNSC-sanctioned intervention in Libya while the latter has been demonstrated by Russia's more than nine vetoes against attempts by the UNSC to adopt coercive measures in Syria's years-long conflict.[188] Proposals for constructive abstention, resort to UNGA's Uniting for Peace procedures and proposals for a 'responsibility not to veto' have fallen flat, thus necessitating better democratised and human security-focused alternatives. The role of sub-regional organisations in this regard therefore is key and can no longer be ignored or downplayed.

As demonstrated by intervention actions undertaken under ECOWAS and discussed herein, sub-regional organisations possess unique comparative advantages over regional and international actors which make their enhanced involvement (including the adoption of coercive measures) central to effective R2P implementation. While the R2P *concept* acknowledges this, the R2P *norm* does not.

Fortunately, the R2P *norm* lacks normative prescription. As an emerging norm, therefore, R2P is subject to the rigours of normative contestation and change that are attendant to the norm cascade stage where R2P currently finds itself. As part of the norm localisation process, therefore, R2P is compelled to seek congruence with

188 *The Guardian* 'Russia uses veto to end UN investigation of Syria chemical attacks' (2019), https://www.theguardian.com/world/2017/oct/24/russia-uses-veto-end-un-investigation-chemical-attacks (accessed 29 October 2019).

domestic cognitive priors, key among them being the practice of the sub-regional use of coercive measures for human protection purposes.

The need for international legitimacy of sub-regional intervention, however, demands that norm localisation goes an extra step to produce bottom-up feedback (normative repatriation) that will lead to the modification of R2P at the international level[189] to make provision for the authority of sub-regional organisations to adopt coercive measures under R2P. In this respect, therefore, international norm creation and implementation ceases to be a top-down one-way street process[190] and embraces a dynamic norm diffusion process that allows room for norm localisation and repatriation rather than proselytism and the supplanting of domestic cognitive priors. Only such a process can guarantee the successful development of R2P into a prescriptive international norm while ensuring its legitimacy, local appropriateness, stability and endurance.[191]

In the meantime, the red-light interpretation of the need for the UNSC's approval coupled with the imperative of ensuring the legitimacy of interventions provide a basis for sub-regional adoption of coercive measures under R2P. This, however, needs to be tempered with a close cooperation between sub-regional organisations, regional organisations as well as the UN to guarantee objectivity in decision making. Such cooperation, however, should be based on sovereign equality, capacity sharing and will as well as requiring the UNSC's subsequent ratification, albeit until sub-regional coercive authority is officially adopted as part of the R2P norm at the international level.

189 A Acharya 'Norm subsidiarity and regional orders: Sovereignty, regionalism, and rule-making in the Third World' (2011) 55 *International Studies Quarterly* 96; Bloomfield (n 9) 8.

190 Acharya (n 61) 471; Eimer, Lutz & Schuren (n 59) 470.

191 Acharya (n 52) 242; Deitelhoff & Zimmermann (n 44) 3; L Zimmermann 'Same same or different? Norm diffusion between resistance, compliance, and localization in post-conflict states' (2016) 17 *International Studies Perspectives* 105.

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An assessment of the regulatory legal and institutional framework of the mining industry in South Africa and Kenya for effective human rights protection: Lessons for other countries

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Summary: *The priorities of African governments regarding the extractive industry tend to focus on economic interests leading them to provide a conducive environment for investments by private entities. Furthermore, reforms in the industry are inclined to promote these priorities with less consideration for adequate protection for affected people and their environment, including protection from resulting social and environmental impacts. The result in economies endowed with mineral resources is that resources are poorly managed and the outcomes of exploitation of mineral resources are environmental*

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degradation, loss of lives, displacement, conflicts between companies and mining communities, protests against mining projects, and human rights violations. These problems in the long run slow down development and forestall its benefits because of poor regard for the concerns of affected people by the government and companies. Filling the gaps in extractive policies, particularly in the area of protection of communities and their environment affected by activities of the extractive industry, is essential to tackle the environmental and social outcomes of mining activities. In this article the legal and institutional framework regulating the mining industry in selected jurisdictions in Africa is examined to determine the extent to which they respond to the problems arising from the development of mineral resources, particularly the human rights violations caused by the adverse impacts of mining. Some lessons are drawn for the benefit of other countries. The article argues that some of these mining policies poorly encourage effective protection of affected communities, particularly human rights, in mining developments. The article proposes that mineral legal regimes need to be strengthened for the effective protection of affected people and their environment.

Key words: *mining industry; mineral resources; mining; mining policies; human rights*

1 Introduction

In Africa the extractive industry is a major source of revenue for the economies of countries endowed with various mineral resources.[1] These huge deposits of mineral resources in countries represent wealth capital where they are exploited sustainably. Mining, therefore, contributes significantly to the economic activity of several countries in both developed and developing countries.[2] There is no doubt that the exploration of solid minerals will generate economic benefits and contribute considerably to the development of a nation, but the benefits may be outweighed by social and environmental costs. Therefore, governments and other stakeholders need to be mindful of the negative impacts caused by the exploitation of mineral resources on the rights of host communities, the environment, and even the national economy in the long run. The mining industry, by its nature, has a massive footprint such as environmental, social,

1 K Tutu 'Improving the management of mineral resources for sustainable development in Africa' in T Afful-Koomson & K Owusu Asubonteng (eds) *Collaborative governance in extractive industries in Africa* (2013) 29.

2 P Crowson 'The resource curse: A modern myth?' in J Richards (ed) *Mining, society, and a sustainable world* (2009) 5.

and economic impacts.[3] There is evidence that host communities are threatened by the dangers posed by the exploitation of mineral resources in some countries in Africa.[4] This requires an adequate and effective response to reduce and avoid these negative effects. The Working Group on Extractive Industries, Environment and Human Rights Violations in Africa indicated that the increase in exploitation of natural resources on the African continent has given rise to the violation of human rights.[5]

A major problem is that the legal and institutional framework regulating the mining sector in some states on the African continent does not adequately cater for the protection of mining host communities and their environment. One reason is that governments in such states strive to attract investment in the sector and, therefore, take steps towards creating a conducive environment for non-state actors with less stringent laws to control their activities and protect communities and their environment. The effect is that host communities become poorer and their environment is left devastated. The absence of or poor national frameworks regulating the industry on the African continent, including the poor observance of human rights, results in human rights abuses by the operations of extractive industries.[6]

This article discusses mining and highlights the positive and adverse impacts of mining activities with instances. Most importantly, it considers how these adverse impacts are addressed in selected jurisdictions. It examines the legal and institutional regime governing the mining sector in selected jurisdictions in Africa, such as in South Africa and Kenya. Mining contributes significantly to the development of these countries. The mining law regimes are analysed to establish their contribution towards minimising adverse mining impacts and the avoidance of human rights violations. Although the Constitution is progressive towards the protection of human rights

3 Mining and Development 'Treasure or trouble? Mining in developing countries' World Bank and International Finance Corporation 2002 2, http://siteresources.worldbank.org/INTOGMC/Resources/treasureortrouble.pdf (accessed 30 August 2019).

4 Eg, in South Africa mining causes harm to host communities. See Centre for Environmental Rights et al 'The threats to human rights from mining and coal-fired power production in South Africa' 5 October 2016 para 1, https://cer.org.za/wp-content/uploads/2016/10/2017-SA-UPR-submission-mining-and-HR-2016-10-5-final.pdf (accessed 1 November 2019).

5 African Commission on Human and Peoples' Rights Working Group on Extractive Industries, Environment and Human Rights Violations, https://www.achpr.org/specialmechanisms/detail?id=13 (accessed 25 March 2021).

6 African Commission on Human and Peoples' Rights State reporting guidelines and principles on articles 21 and 24 of the African Charter relating to the extractive industries, human rights and the environment, https://www.achpr.org/presspublic/publication?id=75 (accessed 26 March 2021).

in both countries, and their mining laws aim for the sustainable development of mineral resources, the mining host communities still encounter problems caused by mining developments. The legal and institutional frameworks in the jurisdictions are analysed under main themes to consider the extent to which they ensure sustainable mining and the protection of host communities and prevent human rights abuses. Strengthening policies, plans and capacities are suggested in the article to ensure the effective legal protection of human rights and the environment. In order for mining to be sustainable, there is a need for recognition and effective protection of human rights.

2 Mining and its benefits in Africa

Mining contributes significantly to the economic growth of several countries endowed with vast mineral resources in Africa and it is a primary source of income in some of these countries. For instance, the mining industry in South Africa is described as the bedrock of the country's economy.[7] The mineral industry in South Africa is largely supported by gold, diamonds, coal and platinum production and contributes significantly to the country's economy.[8] The abundance of mineral resources introduced investment from mining companies operating on a large scale. The availability of mineral deposits opens up opportunities for export. The industry value of mining in South Africa was R452,67 billion (US $33,17 billion) in 2017 and accounted for approximately 60 per cent of the country's exports by value for the year.[9] In 2018 mining contributed R93 billion to fixed investment.[10] In the 2017/2018 fiscal year, R7,6 billion was paid in royalties and the industry paid R22 billion in company taxes.[11] Mining contributed 7,3 per cent to the gross domestic product (GDP) in 2018 and the industry exported R312 billion worth of commodities.[12] The industry value of mining in South Africa was 452,67 billion (US $33,17 billion) in 2017 and accounted for approximately 60 per cent of the country's exports by value for the year.[13]

7 South African Government 'Minerals and mining policy of South Africa: Green paper', https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper (accessed 1 November 2019).
8 Department of Minerals and Energy Republic of South Africa *South Africa's Mineral Industry 2001/2002* (2002) 1.
9 Africa Mining iQ 'Mining in South Africa', https://www.projectsiq.co.za/mining-in-south-africa.htm (accessed 1 November 2019).
10 Minerals Council South Africa 'Facts and figures-pocketbook 2018' 8, https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures (accessed 1 November 2019).
11 Minerals Council South Africa (n 10) 12.
12 As above.
13 Africa Mining iQ (n 9).

Kenya has different mineral resources, such as gold, iron ore, limestone and coal, and mining contributes significantly to the economy.[14] The mining industry is one of the major employers in South Africa with more than 1 million people in mining-related employment and is the largest contributor by value to black economic empowerment.[15] In 2018 mining contributed to employment in the country as 6,4 per cent of private non-agricultural employment and 4,7 per cent of total non-agricultural employment.[16] Other opportunities include technology transfer and infrastructure, especially in communities where mining occurs.

The harmful effects caused by the operations of mining companies in affected communities with instances will be discussed in the next part.

3 Impacts of mining and their human rights implications

The adverse impacts of mining on people and the environment are enormous and should therefore be taken seriously. Although the extraction of resources will contribute to the growth of the economy, it also comes at a cost to the environment, community health and social outcomes, most of which are borne by mining host communities.[17] Mining has a huge impact on the environment. Mining activities cause harm to humans and the environment in the affected areas. An outcome of these adverse impacts of mining activities is human rights implications. Human rights can be undermined by mining companies in the process of exploration and development of mineral resources. Mining releases toxic substances into the air and water, spills from power plants contaminate domestic water and cause air and water pollution, and ecosystems are destroyed. The estimates of the impacts of air pollution from coal-fired power stations on affected South Africans is reported as 2 239 deaths per year: 157 from lung cancer; 1 110 from ischaemic heart disease; 73 from chronic obstructive pulmonary disease; 719 from strokes;

14 Institute for Human Rights and Business 'Human rights in Kenya's extractive sector: Exploring the terrain' December 2016 14-15.
15 'Public regulation and corporate practices in the extractive industry: A south-south advocacy report on community engagement' The Mandela Institute, University of Witwatersrand 2017 19.
16 Minerals Council South Africa (n 10) 12.
17 Global Rights 'Protecting host community rights: An assessment report on extractive host communities in Nigeria', http://www.globalrights.org/ngn/wp-content/uploads/2016/08/Assessing_Community_Rights_Report.pdf (accessed 19 October 2019).

and 180 from a lower respiratory infection.[18] Therefore, mining causes ill health and death in the communities that are the most vulnerable since they are located around the mines and coal-fired power plants and they breathe in toxic pollutants. These impacts cost the government over R30 billion annually through admissions to hospital and lost working days.[19] These impacts threaten lives and expose people to harm, resulting in poor health, and loss of lives and livelihood. They violate rights to life, health, water, and a safe and healthy environment. Another impact caused by mining projects is the displacement of people, especially by moving affected communities to other locations.[20] Mining projects are mostly situated in remote areas and locations inhabited by local peoples where the environmental dangers are considerably high.[21] The impacts caused by mining on traditional lands result in displacement and impacts that endanger livelihoods.[22] For instance, an Australian company, Minerals Commodities Limited (MRC) proposed to mine titanium-rich sands at Umgungundlovu community of Xolobeni on the Wild Coast. The execution of the Xolobeni Mine Sands Project will affect five villages – Sgidi, Mtentu, Sikombe, Kwayana and Mdatya.[23] Residents protested against the project and organised themselves under the Amadiba Crisis Committee. They fear that the mining project will cause displacement of the people, destruction of their environment and take away their small-scale farming. Fertile agricultural lands become decreased with lower food production, violating the right to food. Mining activities affect cultural practices, violating people's right to culture. For example, in Mpumalanga, a wetland that was significant for its cultural and spiritual value to the Madadeni community, was destroyed in the construction of the

18 Centre for Environmental Rights 'Air pollution from coal power stations causes disease and kills thousands of South Africans every year, says UK Expert' 12 September 2017, https://cer.org.za/news/air-pollution-from-coal-power-stations-causes-disease-and-kills-thousands-of-south-africans-every-year-says-uk-expert (accessed 1 November 2019); M Holland 'Health impacts of coal fired power plants in South Africa' 31 March 2017, https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf (accessed 1 November 2019).

19 Centre for Environmental Rights (n 18).

20 M Conde & P le Billon 'Why do some communities resist mining projects while others do not?' (2017) 4 *The Extractive Industries and Society* 684.

21 D Shapiro et al 'Natural resources, multinational enterprises and sustainable development' (2018) 53 *Journal of World Business* 6, D Kemp et al 'Just relations and company-community conflict in mining' (2011) 101 *Journal of Business Ethics* 95.

22 Shapiro et al (n 21) 6.

23 L Ledwaba 'Mining will remove the intestines of our land' *Mail & Guardian* 12 January 2018, https://mg.co.za/article/2018-01-12-00-mining-will-remove-the-intestines-of-our-land (accessed 30 August 2019).

Nkomati anthracite mine, without the community being consulted before the commencement of the construction.[24]

Social conflict is another occurrence in mining communities in instances where mining companies and government officials refuse to obtain their consent or are secluded from active participation in decision-making processes regarding development or negotiations that concerns resettlement or the compensation for losing their land. For instance, in Kitui county, Eastern Kenya, where coal is mined in the Mui Basin, local communities claimed that their land had been grabbed without their knowledge and they did not participate in the negotiations regarding resettlement or the compensation to be paid for the loss of land.[25] In 2012 members of the community filed a petition in court against the Ministry of Energy, the Attorney-General and the mining company (Fenxi Mining Industry Company Limited) highlighting the violation of their rights under the Constitution, namely, their rights to public participation (article 10); to information (article 35); to private property (article 40); to a clean and healthy environment (articles 42 or 70); and the threat to health under the Constitution (article 43).[26] The petition, however, was dismissed but the defendants were required to continue their engagement with the local community and make available reasonable opportunities for public participation during the process of preparing an environmental impact assessment and the process of resettlement as outlined in the Benefits Sharing Agreement.[27]

Furthermore, mining companies violate the right of access to information and the right to participation of communities in instances where they are denied access to necessary information of mining projects or are not consulted and involved in the decision-making process concerning the development of mineral resources on their land. For instance, it was reported that several communities complain that mining companies consult with their traditional leaders, enter into an agreement with the leaders without their awareness and any benefit to the community.[28] Companies rarely make accommodation to ensure that members of mine communities comprehend mining

24 Centre for Environmental Rights et al https://www.upr-info.org/sites/default/files/document/south_africa/session_27_-_may_2017/js14_upr27_zaf_e_main.pdf para 21 (accessed 29 March 2021).

25 Both ENDS et al 'Coal mining disrupts people's livelihood in Mui Basin, Kenya' November 2015, http://www.ciel.org/wp-content/uploads/2017/11/Coal-mining-disrupts-peoples-livelihoods-in-Mui-basin-Kenya.pdf (accessed 29 March 2021).

26 *Peter Makau Musyoka & Others v Ministry of Energy & Others* Constitutional Petition 305 of 2012.

27 The Mui Coal Basin Local Community (2015) EKLR para 140.

28 Centre for Environmental Rights et al (n 24) para 41.

projects and fully participate in those matters and they do not ensure that necessary information is made accessible to the community. Consultation and participation of mine host communities in development processes are significant but are usually not taken into account by the government and mining companies, in the long term leading to protests against projects and other problems. In instances where they are deprived of access to necessary information and meaningful consultation, communities cannot defend the rights threatened by mines and power plants, or exercise their rights to participate in government and to have effective remedies for rights violations.[29]

Similar experiences of host communities include poor consultation of host communities in decision making; poor access to information about mining-related matters; environmental degradation; and poor access to remedies. In the next part mining laws in selected jurisdictions will be examined to determine their response to these issues.

4 Legal and institutional regimes governing the mining industry

In this part the relevant mining policies regulating the mining industries in South Africa and Kenya are examined to determine the extent to which these regulations ensure the protection of affected communities in the course of the exploitation of mineral resources. The relevant laws will be examined to determine the extent to which they incorporate human rights concerns. These laws are examined *vis-à-vis* themes such as social concerns, participation, consultation and engagement, compensation and access to remedies.

4.1 An examination of the existing regulatory framework in South Africa

Among the laws regulating the mining industry in South Africa are the 1996 Constitution;[30] the Mineral and Petroleum Resources Development Act of 2002 (MPRDA);[31] the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry

29 Centre for Environmental Rights et al para 6.
30 The Constitution of the Republic of South Africa, 1996 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).
31 Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

2018 (Mining Charter);[32] and National Environmental Management Act.[33] The South African Constitution recognises that mining must be carried out in a sustainable manner, which is affirmed in the right to a healthy environment.[34] The South African Constitution recognises a Bill of Rights which is a cornerstone of democracy in the country.[35] The state is mandated to respect, protect, promote and fulfil the rights in the Bill of Rights.[36] In addition, the National Environmental Management Act directs the state to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and to strive to meet the basic needs of previously disadvantaged communities.[37]

The MPRDA is the main legislation governing the mining industry in South Africa and was enacted to give effect to the constitutional provisions in South Africa.[38] The Preamble affirms the obligation of the state to ensure ecologically-sustainable development; sustainable development of the resources, and promote economic and social development, which are also part of the objectives of the Act.[39] The National Environmental Management Act further states that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations.[40] Another mining regulation is the 2018 Mining Charter which gives effect to the objectives of the MPRDA. The discussion in this part will focus on these laws to determine the extent to which they address concerns such as the participation of communities, access of information, social concerns, environmental protection, access to remedies and compensation.

4.1.1 Consultation/community engagement/participation

Some provisions of the MPRDA encourage consultation with mining communities. The MPRDA provides that any person who engages in any mining-related activity must notify and consult with the owner or occupier of a mining area.[41] The holder of a mining right is required to give an owner or occupier of land 21 days' written notice

32 The Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry 2018 (Mining Charter).
33 National Environmental Management Act 107 of 1998.
34 Sec 24(b).
35 Sec 7 1996 Constitution.
36 Sec 7(2).
37 Preamble National Environmental Management Act.
38 E van der Schyff *Property in minerals and petroleum* (2016) 139.
39 Sec 2(h) MPRDA.
40 Preamble National Environmental Management Act.
41 Sec 5(4)(c) MPRDA.

of their intention to exercise allocated rights.[42] The acceptance of the application of mining right over land must be publicised within 14 days,[43] and interested or affected persons are to submit their comments on the application within 30 days of the notice.[44] These provisions on consultation do not give interested parties ample opportunity to participate effectively in decision-making processes concerning the application for mining on their land. The time allocated is short for effective negotiation between parties. Granting the application for mining rights before receiving comments may not accommodate the concerns of interested parties regarding the proposed project. These provisions indicate that mining agreements are between the government and mining companies without consideration of the affected people. Host communities and other stakeholders such as civil societies should be involved in the decision-making process from planning to implementation, including the monitoring of activities. The Court considered the importance of consultation in the case of *Bengwenyama Minerals*.[45] One of the issues considered was whether consultation was properly conducted by Genorah with Bengwenyama Minerals and the community in terms of the provisions of the Act.[46] The Court stated that a purpose of the consultation is the possibility of accommodation between the applicant for a prospecting right and landowner and must be engaged in good faith in order to reach an accommodation.[47] The aim of consultation is to provide landowners or occupiers with information useful for them to make an informed decision.[48] The Court declared that Genorah had failed to comply with the requirements of consultation under the Act.[49]

Community engagement is encouraged through a trust and mine community development (MCD) which must be set up for affected communities. The Mining Charter provides that a trust must be set up for the benefit of host communities by the mining right holder according to the applicable legislation,[50] and will involve representation from host communities, community-based organisations, traditional authorities and mining companies.[51] Also, a mining right holder is required to consult with relevant municipalities, host communities, traditional authorities and other affected stakeholders to identify

42 Sec 5A(c).
43 Sec 10(1)(a).
44 Sec 10(1)(b).
45 *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2010 ZACC 26.
46 *Bengwenyama Minerals* (n 45) para 26.
47 *Bengwenyama Minerals* para 65.
48 *Bengwenyama Minerals* para 66.
49 *Bengwenyama Minerals* para 68.
50 2.1.4.1.2 Mining Charter 2018.
51 2.1.4.1.3.

the development needs of host communities.[52] The trust provides for a host community development programme[53] published in two common languages in the community.[54] Hence, host communities are recognised as stakeholders in mining development. The Charter states that mine communities are an essential part of mining development which requires a balance between mining and their socio-economic development needs.[55] Hence, to keep the social licence to operate, a mining right title holder must contribute to a mine community development (MCD).[56] Concerning the MCD, the title holder consults with mining communities and other stakeholders to identify their developmental priorities to be contained in the prescribed and approved social and labour plan of the title holder.[57] In order to promote human resource development, a mining right holder is required to invest in skills development to achieve the aim of the Charter, which includes producing a skilled work force that will meet the demands of a modern industry; developing skills that will improve employment prospects of historically disadvantaged persons; and developing entrepreneur skills to improve the livelihoods of people.[58]

4.1.2 Access to information

Section 32 of the 1996 Constitution affirms the right to access any information held by the state and any other person and that is required for the protection of any rights.[59] National legislation is required to be enacted to give effect to that right.[60] Therefore, national mining policies are expected to ensure that stakeholders have access to relevant information useful to make an informed decision.

4.1.3 Access to remedies and compensation

According to section 34 of the 1996 Constitution, everyone can have any dispute decided before a court or independent and impartial tribunal or forum.[61] The regional manager considers issues in instances where the land owner or occupier refuses to permit a mining right

52 2.1.4.1.4.
53 2.1.4.1.5.
54 2.1.4.1.7.
55 2.5.
56 2.5.
57 2.5.1.
58 2.3.
59 Secs 32(1)(a) & (b) 1996 Constitution.
60 Sec 32(2).
61 Sec 34 1996 Constitution.

holder to enter the land, gives unreasonable demands in return for access to the land, or cannot be found where the holder of right needs to apply for access.[62] The MPRDA provides for arbitration and access to court on mining matters particularly in instances where the holder of a mining right and land owner or occupier fails to reach an agreement on the compensation payable for any loss or damage.[63] Compensation can be determined through arbitration under the Arbitration Act[64] or by a court where parties fail to reach an agreement.[65]

4.1.4 Environmental protection

The Constitution affirms everyone's right 'to an environment that is not harmful to their health or well-being'.[66] It further affirms the right of everyone to the protection of the environment for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation, and ensure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.[67] The National Environmental Management Act directs the state to respect, protect, promote and fulfill environmental rights.[68]

The MPRDA gives effect to section 24 of the 1996 Constitution regarding the protection of the environment by preventing degradation and destruction to the environment. An applicant for a mining right must ensure that 'mining will not result in unacceptable pollution, ecological degradation or damage to the environment and that he has provided financially and otherwise for the prescribed social and labour plan'.[69] The applicant must ensure that they can comply with the relevant provisions of the Mine Health and Safety Act[70] and they are not in contravention of any provision of MPRDA.[71] The Minister must refuse a mining right if the application does not meet the requirements.[72] Before the Minister can grant a mining right,

62 Secs 54(1)(a)-(e) MPRDA.
63 Sec 54(4) MPRDA.
64 Arbitration Act 42 of 1965.
65 Sec 54(4) MPRDA.
66 Sec 24(a) 1996 Constitution.
67 Sec 24(b).
68 Preamble National Environmental Management Act.
69 Secs 23(1)(d) & (e) MPRDA.
70 Act 29 of 1996.
71 Sec 23(1)(g) MPRDA.
72 Sec 23(3).

environmental assessment,[73] environmental management plan[74] and guidelines under the National Environmental Management Act[75] must be provided by the applicant. However, the Act did not include impacts of environmental degradation on persons that are likely to be affected by mining operations. Mining operations adversely impact the environment including the people located around the mine. The Court gave interpretation to section 24 of the Constitution and pointed out that the provision recognises the obligation to promote justifiable economic and social development which is essential to the well-being of human beings.[76] According to the Court, to protect the environment, development needs to consider the costs of environmental destruction. Thus, there is a link between environment and development.[77] The Constitution 'contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.'[78] It was mentioned further that the protection of the environment is crucial to the enjoyment of other rights in the Bill of Rights and to life and that it is the court's duty to ensure that the responsibility to protect is observed.

4.1.5 Social concerns

In addition to the protection of fundamental rights and freedoms in the Constitution, the objectives of the MPRDA promote equitable access to resources;[79] substantial and meaningful expansion of opportunities for historically-disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;[80] employment and advancing the social and economic welfare of all South Africans,[81] and ensuring the development of resources in an ecologically-sustainable manner.[82] The Act protects marginalised people and provides that the Minister can grant a

73 Sec 39(1).
74 Sec 39(2).
75 Sec 37(1)(a).
76 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management & Others* (*Fuel Retailers* case) 2007 ZACC 13 para 44. The Preamble to the Declaration on the Right to Development adopted by General Assembly Resolution 41/128 of 4 December 1986 describes development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population'.
77 *Fuel Retailers* (n 78) para 44.
78 *Fuel Retailers* (n 78) para 45.
79 Sec 2(c) MPRDA.
80 Sec 2(d) MPRDA.
81 Sec 2(f) MPRDA.
82 Sec 2(h) MPRDA.

mining right if granting such right will further the objects referred to in sections 2(d) and (f) following the Charter and the prescribed social and labour plan (SLP).[83] Information to be provided in the environmental assessment and management plan includes the assessment and evaluation of the impact of the proposed prospecting or mining operation on the environment, socio-economic conditions of persons that are likely to be affected, and any national estate.[84] However, the Act does not provide further details on the socio-economic conditions of persons that are likely to be affected by mining operations. The National Environmental Management Act identifies inequality in the distribution of wealth and resources and poverty as outcomes of environmentally-harmful practices.[85] Elaboration on the effects of mining activities on affected communities is needed. The members of the affected communities suffer the effects of the environmental impacts. Therefore, it is necessary to consider and address these effects in the laws.

Furthermore, coupled with the trust and MCD which must be set up by mining companies to address the developmental needs of host communities, a mineral title holder is required to submit SLP[86] and comply with the requirements of the prescribed SLP before a mining right is granted.[87] A mineral title holder must submit the prescribed annual report dealing with the extent of the holder's compliance.[88] Granting the right will expand opportunities for historically-disadvantaged persons and promote the employment and welfare of citizens.[89] The objectives of SLPs are primarily to promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry, and ensure a contribution by holders of mining rights towards the socio-economic development of the areas in which they are operating.[90] The SLP regulation fails to require that the plan be disclosed to the public and mining communities that are beneficiaries. Although the SLP aims to benefit mine workers and mining host communities, the MPRDA and its regulations lack provisions on an obligation on mining companies or the government to disclose SLPs to the public.[91] This prevents the monitoring of the implementation and compliance with the plan by stakeholders. Therefore, the gap may allow companies to evade

83 Sec 23(1)(h) MPRDA.
84 National estates are those included in sec 3(2) of the National Heritage Resources Act 25 of 1999 except those in subsecs (i), (vi) and (vii).
85 Preamble NEMA.
86 Sec 2(1)(h).
87 Sec 25(2)(f).
88 Sec 25(2)(h).
89 Secs 23(1)(h) & 2(d) & (f).
90 Regulation 41 of the MPRDA.
91 'Public regulation and corporate practices in the extractive industry' (n 15) 20.

their responsibility to carry out their obligations with regard to SLPs under the law.

The developmental needs of a community are important, but social concerns such as displacement, resettlement, loss of livelihood, settlement of disputes and prevention of conflicts need to considered and addressed in the laws.

4.1.6 Institutional framework regulating mining in South Africa

The Department of Mineral Resources (DMR) assumes the custodianship of all mineral resources in South Africa on behalf of its citizens. The DMR seeks to promote and regulate the minerals and mining sector for transformation, growth and development, and to ensure that all South Africans derive sustainable benefit from the country's mineral wealth.[92] Mining is regulated by three branches, namely, the Mineral Policy and Promotion Branch; the Mineral Regulation Branch; and the Mine Health and Safety Inspectorate. The Mine Health and Safety Inspectorate was established by the Mine Health Safety Act, 1996[93] to protect and safeguard the health and safety of mine employees and affected mining communities.[94] The function of the Mineral Regulation Branch is to regulate the minerals and mining sector to promote economic growth, employment, transformation and sustainable development.[95] The branch is responsible for the administration of prospecting rights, mining rights, mining permits and compliance with the MPRDA, including environmental management. The Mineral Policy and Promotion branch is responsible for formulating mineral-related policies and helps to promote the mining and minerals industry of South Africa to make it attractive to investors.[96] The Minister is required to ensure sustainable development of the mineral resources within a framework and promote economic and social development.[97]

92 Department of Mineral Resources: Republic of South Africa, https://www.dmr.gov.za/about-dmr/overview (accessed 25 March 2021).
93 Act 29 of 1996.
94 Department of Mineral Resources 'Mine health and safety', https://www.dmr.gov.za/mine-health-and-safety/overview (accessed 25 March 2021).
95 Department of Mineral Resources 'About mineral regulations', https://www.dmr.gov.za/mineral-regulation/overview (accessed 25 March 2021).
96 https://www.gcis.gov.za/sites/default/files/MineralResources.pdf (accessed 25 March 2021).
97 Sec 3(3) MPRDA.

4.2 Examination of the mining laws and institutions in Kenya

Among the laws regulating the mining industry in Kenya are the 2010 Constitution[98] and the Mining Act.[99] The Constitution contains provisions on fundamental human rights, social and environmental rights including the obligations of companies and the government. Human rights are one of the national values and principles of governance in the country which is binding on all state organs, state and public officers and all persons.[100] The Constitution is progressive towards the protection of fundamental human rights and freedoms such as the rights to life;[101] non-discrimination;[102] human dignity;[103] access to information;[104] property;[105] a clean and healthy environment;[106] health;[107] adequate housing;[108] adequate food;[109] clean and safe water;[110] participation in cultural life;[111] and freedom from torture.[112] It recognises and protects groups of people who are likely to be endangered by the activities of the extractive sector. According to the Constitution, the Bill of Rights is binding on all state organs and all persons.[113] Furthermore, the Constitution guarantees the sustainable use of resources. Under the constitutional provisions, the state is under an obligation to ensure the sustainable exploitation and management of the environment and natural resources and ensure the equitable distribution of the benefits.[114] Besides, other parties must ensure the sustainable development of natural resources.[115] Land must also be held and managed sustainably in accordance with principles such as sustainable and productive management of land resources.[116] These provisions inform the mining laws regulating the mining industry in Kenya.

Aside from the Constitution, the Mining Act of 2016 is the main legislation regulating the mining industry in Kenya. Under the Mining Act, conditions to obtaining a mineral right include the protection of

98 Constitution of Kenya, 2010.
99 Mining Act 12 of 2016.
100 Sec 10.
101 Sec 26.
102 Sec 27.
103 Sec 28.
104 Sec 35.
105 Sec 40.
106 Sec 42.
107 Sec 43(1)(a).
108 Sec 43(1)(b).
109 Sec 43(1)(c).
110 Sec 43(1)(d).
111 Sec 44.
112 Sec 29(d).
113 Sec 20.
114 Sec 69(1)(a).
115 Sec 69(2).
116 Sec 60(1)(c).

mineral interests and the environment; community development; the safety of mining operations; and the health and safety of workers.[117] Mining is required to be carried out reasonably and responsibly in a way that does not adversely affect the interests of other mineral title holders and landowners.[118] The discussion in this part focuses on these laws to determine the extent to which they address concerns such as participation of communities, access to information, social concerns, environmental protection and access to remedies.

4.2.1 Participation, consultation, access to information and community engagement

Participation of the people, integrity, transparency and accountability are part of the national values and principles of governance which are binding on all state organs and individuals.[119] The state is required to put in place affirmative action programmes to ensure the participation and representation of minorities and marginalised groups in governance and other spheres of life.[120] The Constitution encourages public participation in the management, protection and conservation of the environment.[121] However, the Constitution does not elaborate on the nature of public participation.[122] It is expected that other spheres of life will include the extractive sector which will encourage the participation of these groups in projects that occur on their land. Individuals and communities that seek to enforce their right to public participation in the court will be required to prove how their right was infringed upon and the remedies they seek.[123]

Access to information is encouraged by the Constitution and the Mining Act. Article 35 of the Constitution affirms the right of every citizen to access of information held by the state and other persons and information required for the exercise or protection of any right or fundamental freedom.[124] The state is under an obligation to publish and publicise necessary information that affects the nation.[125] All mineral agreements are required to be made accessible to the public

117 Secs 42(1)(a)-(e) Mining Act 2016.
118 Sec 44.
119 Secs 10(2)(a) & (c).
120 Sec 56(a).
121 Art 69(1)(d) 2010 Constitution.
122 Institute for Human Rights and Business 'Human rights in Kenya's extractive sector' 27, https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf (accessed 1 July 2020).
123 *Pasred Youth Group/Forum & Others v Attorney-General & Others* Petition 621 of 2014; Institute for Human Rights and Business (n 122) 27.
124 Arts 35(1)(a) & (b) 2010 Constitution.
125 Art 35(3).

subject to article 35 of the Constitution and other written law.[126] The cabinet secretary is required to ensure access to information and that the mineral agreements be made available on the website of the Ministry.[127]

The cabinet secretary who receives the application for a mineral right notifies the owner or occupier of land with mineral deposits, the community and relevant county government.[128] The cabinet secretary circulates the notice of application by publishing it in a widely-circulated newspaper.[129] The notice is published in the *Gazette* for 21 days and in the office of the county government where the land is located.[130] Individuals or communities may object to the granting of a prospecting[131] or mining licence[132] within 21 and 42 days respectively. The publication of the notice of application for mineral right serves as information to the public. However, the number of days given for notification and objection is not sufficient. Interested parties should be given ample time and opportunity to acquire knowledge about the project and to respond accordingly. They need to have access to the necessary information to inform their consent to give their land away for mining purposes.

Express consent of the owner of private land or community land must be obtained before prospecting or mining rights can be granted.[133] The Act allows for the compulsory acquisition of land if consent is 'unreasonably withheld' or if the withholding of consent is considered 'contrary to the national interest'.[134] This implies that there is no right to veto mining projects but rather open and meaningful dialogue between companies and affected communities must take place in all cases.[135]

Affected communities are allowed to raise objections against the granting of the licence. However, the level of participation provided in the Act may not suffice as communication between these parties is necessary to avoid conflict in the future. Host communities require strategic engagement with government and mining companies on

126 Sec 119(1) Mining Act 2016.
127 Sec 119(2).
128 Sec 34(1).
129 Sec 34(2).
130 Sec 34(3)(b).
131 Sec 34(4)(a).
132 Sec 34(4)(b).
133 Secs 37 & 38.
134 Sec 40.
135 'Human rights in Kenya's extractive sector: Exploring the terrain' 36-37, https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf (accessed 12 March 2019).

mining-related matters. In *Friends of Lake Turkana Trust v Attorney-General & Others* the Environment and Land Court in Nairobi reasoned as follows:[136]

> Such public participation can only be possible where the public has access to relevant information and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore, a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.

Hence, access to relevant information is necessary to enhance participation in decision making.

4.2.2 Environmental protection

The Constitution affirms the right to a clean and healthy environment which includes environmental protection for the benefit of present and future generations.[137] The Constitution ensures the protection management of the environment.[138] Both state organs and other parties should collaborate to protect the environment.[139] The state is under an obligation to establish systems of the environmental impact assessment (EIA), environmental audit and monitoring.[140] The state must also 'eliminate' activities that can endanger the environment[141] and use the environment and natural resources for the benefits of citizens.[142] A mineral title holder is required to comply with any law on the protection of the environment.[143] A mining licence is granted subject to obtaining an EIA licence, social heritage assessment and approval of environmental management plan.[144] The law focuses primarily on environmental protection, hence, an environmental impact assessment is required. The EIA focuses on identifying and addressing mining impacts on the environment. Therefore, the EIA may not identify or consider human rights impacts since it is not explicitly required to address the impacts.

136 ELC Suit Co 825 of 2012 (19 May 2014).
137 Sec 42(a).
138 Secs 69(1)(a) & (d).
139 Sec 69(2).
140 Sec 69(1)(f).
141 Sec 69(1)(g).
142 Sec 69(1)(h).
143 Sec 176(1).
144 Sec 176(2).

4.2.3 Social concerns

According to the Constitution the state is under an obligation to protect minority and marginalised groups. Human dignity, equity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised are all part of the national values and principles of governance of the state which are binding on all state organs, state and public officers and all individuals.[145] In addition to the protection of the rights and freedoms, the state is under an obligation to design programmes to ensure their participation and representation in governance and all spheres of life;[146] the provision of special opportunities in educational and economic fields;[147] access to employment;[148] developing their cultural values, languages and practices[149] and having reasonable access to water, health services and infrastructure.[150] Cultural values are promoted by the Constitution.[151] Also, land held by communities is protected by the Constitution based on ethnicity, culture or similar interest.[152] Community land includes land registered by law in the name of representatives under law;[153] land transferred to a community by process of law;[154] land declared by an Act of Parliament;[155] land used for forest, grazing or shrines;[156] ancestral lands;[157] and land lawfully held as a trust by county governments.[158] Such land cannot be disposed of or used except as determined by legislation.[159] The holder of a mineral title must employ and train the citizens of Kenya.[160] The Mining Act further provides that in employment, the mineral title holder should give preference to community members and citizens;[161] provide social investment for local communities;[162] and implement a community development agreement.[163] However, the CDA was not defined but may be prescribed in regulations. In the Mining Act, the displacement of communities is recognised as an impact of mining in the definition of a community. The Mining Act defines a community as a group of

145 Art 10(2) 2010 Constitution.
146 Art 56(a) 2010 Constitution.
147 Art 56(b).
148 Art 56(c).
149 Art 56(d).
150 Art 56(e).
151 Art 11.
152 Art 63(1).
153 Art 63(2)(a).
154 Art 63(2)(b).
155 Art 63(2)(c).
156 Art 63(2)(d)(i).
157 Art 63(2)(d)(ii).
158 Art 63(2)(d)(iii).
159 Art 63(4).
160 Sec 46(1) Mining Act 2016.
161 Sec 47(1).
162 Sec 47(2)(f).
163 Sec 47(2)(g).

people living around an exploration and mining operations area or a group of people who may be displaced from land intended for exploration and mining operations.[164] The Constitution addresses important concerns such as the protection of culture, ancestral land, and cultural values, and poor accessibility to water, health services and infrastructure. These concerns are not given further elaboration in the mining law which mentions displacement and addresses the employment of community members. Social concerns should be articulated in the mining policies to safeguard the interests of the marginalised and members of the community.

4.2.4 Access to remedies

Social justice is one of the national values and principles of governance of the state binding on all state organs and officers and all persons.[165] The Constitution promotes access to justice for individuals who are wronged or whose right to a healthy environment is violated. Persons whose right to a clean and healthy environment is being or likely to be infringed and violated can apply to the court for redress.[166] Disputes can be resolved by the application of law and must be decided in a fair and public hearing before a court, independent and impartial body or tribunal.[167] Every administrative action must be 'expeditious, efficient, lawful, reasonable and procedurally fair'.[168] The state must ensure that all persons have access to justice and fees must be reasonable and must not hinder access to justice.[169] Under the Mining Act, any dispute that involves a mineral right may be determined by the cabinet secretary,[170] through process of mediation or arbitration,[171] or in a court of competent jurisdiction.[172]

4.2.5 Institutional framework regulating mining in Kenya

Minerals are vested in government as administered by the Commissioner of Mines and Geology under the authority of the Minister (now cabinet secretary) in charge of minerals and mining. The cabinet secretary is responsible for the administration of the Mining Act.[173] The cabinet secretary is supported by the principal secretary

164 Sec 4 Mining Act 2016.
165 Art 10 2010 Constitution.
166 Art 70.
167 Art 50(1).
168 Art 47(1).
169 Art 48.
170 Sec 154(a) Mining Act 2016.
171 Sec 154(b).
172 Sec 154(c).
173 Sec 12(1).

and, as provided in the Mining Act, the commissioner of mines and geology is the chief technical advisor to the cabinet secretary. The cabinet secretary must respect and be guided by the values and principles in the Constitution (articles 10, 66(2), 69(1)(a) and (h), 201(c) and (d) and 232) including the principles of leadership and integrity in the Constitution.[174] These provisions imply that the cabinet secretary must be guided by human rights, non-discrimination, human dignity, good governance, transparency and accountability and sustainable development. In addition to those mentioned in article 10, others include ensuring the enactment of legislation by Parliament that ensures that investments in property benefit local communities and their concerns; ensuring the sustainable utilisation of the environment and natural resources for the benefit of Kenyan citizens, principles of public finance that involves equitable sharing of the burdens and the benefits of the use of resources between present and future generations and usage of public money prudently and responsibly, and principles of public service such as the efficient, effective and economic use of resources.[175]

5 Useful lessons for other countries

Some lessons may be drawn from the mining policies and sustainable practices in both countries. First, other countries in Africa can draw lessons from the constitutional statement on the application of human rights to mining. The Constitutions of both countries are progressive in respect to the protection of human rights and socio-economic rights and affirm the responsibility of the state towards the protection of human rights. The Kenyan Constitution further affirms the responsibility of both the state and other parties towards human rights as it states that the Bill of Rights is binding on all state organs and all persons. Therefore, parties such as mining companies have a responsibility to respect human rights. In the Constitutions of both countries, the state must ensure sustainable exploitation and management of the environment and natural resources. The provision on the right to a clean and healthy environment in the Constitutions includes the protection of the environment for the benefit of future generations. In addition to the responsibilities of the state, the Kenyan Constitution further provides that other parties are obligated to ensure the sustainable development of natural resources and the protection of the environment. In Kenya, human rights and sustainable development are listed as part of the national values and principles of governance in the Constitution.

174 Secs 5 & 12(2).
175 Secs 66(2), 69(1)(a) & (h), 201(c) & (d) & 232.

This implies that human rights and sustainable development should guide resource governance. Therefore, drawing from the example of the Kenyan Constitution, in addition to state responsibility, there is a need for the emphasis on the responsibility of non-state actors such as mining companies to respect and fulfil human rights and ensure the sustainable development of mineral resources. Similar to the provisions of the Kenyan Constitution, human rights should be listed as one of the principles that guide resource governance in the mining industry. This will create a platform to access and identify human rights that can be affected in the course of mining, as well as the adverse impacts of mining on human rights, and find possible solutions to the impacts. These provisions will also provide the basis to hold the government and mining companies accountable for their wrongful acts and violations.

Second, other countries can draw a lesson from the provision of the Constitution of Kenya, where the state is required to publish and publicise necessary information that affects the nation.[176] Subject to article 35 of the Constitution, which affirms the right to access information, all mineral agreements must be accessible to the public.[177] These provisions imply that affected communities and other stakeholders should have access to relevant information concerning mining projects. Therefore, communities and stakeholders must be provided with the necessary information concerning mining developments in their area and they must comprehend the information.

Third, access to remedies is important for victims to challenge the bad conduct of companies. Both countries promote access to justice in their Constitutions. In Kenya the state must ensure that all persons have access to justice and a barrier such as unreasonable fees must not impede access to justice. Individuals can bring actions before a court for infringement of their right to a clean and healthy environment. In South Africa, in addition to the court, an independent and impartial tribunal is encouraged. The courts have encouraged victims by granting them access to court and ensuring that they obtain justice. Other countries can draw lessons from the role played by the courts through judicial interpretations in interpreting provisions in the laws and statutes as an approach to give effect to social change. The courts have played their role by providing further explanations, thereby filling the gaps in some of the mining legislation. Effective remedies such as judicial and non-

176 Art 35(3) 2010 Constitution.
177 Sec 119(1) Mining Act 2016.

judicial remedies will be required to ensure that affected people have access to justice. Therefore, governments should facilitate access to judicial or non-state complaint mechanisms of redress against violations of human rights of this community committed by mining companies. Barriers to access to remedies should also be eliminated to ensure that victims have access to justice. Judges must become active and creative in contributing to the development in the area of mining and human rights in other countries. Judges must be trained to enable them to expand their knowledge in the field. A good understanding of the issues relating to human rights concerns in the mining industry will inform the judgments pronounced by judges. This will in the long run encourage the institution of related actions in court by victims or other stakeholders after having exhausted all dispute mechanisms and where the court is their last remedy.

Fourth, as in the provisions of the Kenyan Mining Act, mining policies must ensure that the officials of institutions governing the mining industry should be guided by principles of human rights, good governance and sustainable development. Policies can be passed to make provision for such.

6 Recommendations and conclusion

In addition to the previous recommendations, the mining laws need to be reviewed to adequately accommodate the participation of stakeholders in the decision-making processes involving mining projects. Similar to the provisions of the Kenyan Constitution, mining policies should encourage public participation, integrity, transparency and accountability and principles of governance. The policies should encourage public participation in the management, protection and conservation of the environment and extend such to matters related to mining developments. Express provisions in the mining laws regarding the participation of mine host communities are lacking. The mining laws fail to give affected parties ample opportunity to negotiate on mining on their lands and fail to recognise them as important stakeholders in the negotiation of proposed mining operations. Therefore, there is a need to strengthen mining policies to accommodate mine communities and ensure their adequate participation in the decision-making process on developments that exist on their land. Their participation should be required in the planning, implementation and monitoring activities of the projects since they are particularly affected. This will guarantee their access to information on important aspects of the project which will empower them to challenge the mining company. To promote participation, mining policies will need to be strengthened to encourage

transparency in the industry. Therefore, states must take legislative measures to ensure public participation in decision making in the development of mineral resources in host communities. Also, state governments should take legislative measures to ensure access to information and free, prior and informed consent of concerned communities in mining development projects. This will inform the consent of host communities in mining projects on their lands. The consent of a community counts and in as much as the state is adamant about acquiring land for mining purposes, the interests of those that will be affected should be considered and safeguarded by the state.

Social concerns such as conflict, displacement and resettlement of communities, loss of farmlands and livelihood, loss of ancestral land and culture should be taken into consideration in the planning of a mining project. For instance, in Kenya community land, land used for grazing or shrines and ancestral lands are protected under the Constitution. The definition of the community by the Mining Act recognises the displacement of a community, which is good but should include other adverse impacts of mining activities they suffer. The impact assessment of mining activities should identify the impacts on members of a host community. The mandatory EIA focuses primarily on environmental impacts and may poorly consider the socio-economic impacts of mining, including the human rights impacts. Therefore, the EIA in the national legislation needs to be reviewed to accommodate social concerns and human rights impacts of mining activities. The advantage of that is to identify human rights impacts alongside environmental impacts to enable mining companies and experts to find solutions to the problems. A human rights impact assessment will therefore need to be integrated with the assessment of the impacts of mining projects to determine human rights impacts and proffer solutions to tackle the problems.

Furthermore, state parties are urged to collaborate with the Working Group on Extractive Industries to address human rights violations that occur in their territory. To address human rights abuses in the extractive industries, the African Commission on Human and Peoples' Rights adopted Resolution ACHPR/RES 148 (XLVI) 09 and established the Working Group on Extractive Industries. The Working Group has carried out regional consultations on extractive industries, environment and human rights violations in Southern, East and Central Africa. The Group also travelled on a mission to Marikana, South Africa, because of the incidents at the mine which resulted

in the deaths of approximately 44 people, and attended a public hearing of the Marikana Commission of Inquiry (May 2013).[178]

The realisation of these recommendations in mining laws and policies for substantial benefits will require collaboration between the government, companies, civil societies, non-governmental organisations, the society and the relevant community. The government should therefore build the capacity of these groups to participate in mining-related matters and to be involved in community engagement to guide parties in the decision making.

178 African Commission on Human and Peoples' Rights Working group on extractive industries, environment and human rights violations, https://www.achpr.org/specialmechanisms/detailmech?id=13 (accessed 26 March 2021).

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Utilising the due diligence standard to interrogate Kenya's accountability efforts with regard to survivors of sexual violence in the 2007-2008 post-election violence

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Summary: *Sexual violence is a human rights violation and is addressed under a growing number of international agreements including the 1993 Declaration on the Elimination of Violence against Women, among others. This article uses the due diligence standard, as elaborated on by the UN Special Rapporteur on Violence against Women, to interrogate Kenya's domestic accountability efforts with regard to sexual violence*

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in the 2007/2008 post-election violence. It finds that Kenya suffered from a number of structural and systemic shortcomings that resulted in its failure to meet its obligation to prevent, investigate, prosecute and compensate for such acts of sexual violence perpetrated by both state and non-state actors. Key among them are a lack of well-coordinated multi-sectoral approaches to address sexual violence; human capacity gaps in the provision of medico-legal services to survivors; and systemic failures in the investigation and prosecution of sexual violence cases. The article further highlights the hope for future accountability inherent in the recent ruling in Constitutional Petition 112 of 2013 which held the state accountable for all gaps and shortcomings in responding to sexual violence during the post-election violence. The article concludes by advocating community-based multi-sectoral approaches in prevention and response to sexual violence in the Kenyan context with an emphasis on improving both human and technical capacities for provision of medico-legal services to survivors.

Key words: *sexual violence; human rights; Kenya 2007-2008 post-election violence; medico-legal responses to sexual violence*

1 Introduction

Since the restoration of multiparty politics in 1992, violence and displacements are a recurring feature of Kenyan elections.[1] This is largely attributable to the Kenyan political elite's ethnic mobilisation and sensitisation of voters based on both actual and perceived inequalities in the distribution of national resources.[2] They utilise these divisive ethnic strategies with the objective of securing political and economic resources.[3] Fjelde and Hoglund[4] observe that the dominance of ethnicity in political organisation in post-colonial Africa formed the basis for its prominence with the advent of multiparty politics in the 1990s. Similarly, Bates[5] notes that politics in Africa since independence has centred around control of patronage resources by ethnically-defined coalitions. Both observations hold true in the Kenyan context.

1 H Fjelde & K Hoglund 'Ethnic politics and elite competition: The roots of electoral violence in Kenya' in MS Kovacs & J Bjarnesen (eds) *Violence in African elections: Between democracy and big man politics* (2018) 27.
2 Fjelde & Hoglund (n 1) 28.
3 As above..
4 Fjelde & Hoglund (n 1) 29.
5 RH Bates 'Modernisation, ethnic competition and the rationality of politics in contemporary Africa' in D Rothchild & V Olorunsola (eds) *State versus ethnic claims: African policy dilemmas* (1983) 27.

The utilisation of ethnicity as a strategy for political mobilisation in Kenya is shaped by violence and repression, resulting in a strong sense of victimisation and injustice among ethnic minorities.[6] This is further aggravated by the 'winner take all' nature of the Kenyan electoral system which is an identified trigger for electoral violence.[7] Moreover, the centralisation of power in the presidency and weak political institutions further serve to normalise and institutionalise political violence.[8] Ultimately, ethnicity remains a key factor in political mobilisation and a critical source of patronage, thereby serving as a key influencer of voting patterns in contemporary Kenyan politics.[9] Consequently, ethnic mobilisation results in ethnic voting with violence as a means of deterring rival supporters and suppressing the undecided voters.[10]

Since the formal installation of multi-party democracy in 1992, and despite the continued support for increased participation of women in Kenyan politics to date, Kenya's democracy has diminished neither ethnic nor sexual violence attached to politics with the two being a recurrent feature of every electoral cycle. The 2007-2008 post-election violence erupted when the presidential election results were disputed amid allegations of vote rigging.[11] It was the most violent and destructive cycle during which 900 cases of sexual violence were documented.[12] The most common perpetrators were reported to be both men and women affiliated with government or political groups.[13] The ethnicisation of state security responses to electoral violence[14] and the appropriation of ethnic militias by politicians[15]

6 Fjelde & Hoglund (n 1) 33.
7 H Fjelde & K Hoglund 'Electoral institutions and electoral violence in sub-Saharan Africa' (2016) 46 *British Journal of Political Science* 297.
8 D Mueller 'The political economy of Kenya's crisis' (2008) 2 *Journal of East African Studies* 185.
9 M Bratton & MS Kaimenyi 'Voting in Kenya: Putting ethnicity in perspective' (2008) 2 *Journal of East African Studies* 272.
10 Fjelde & Hoglund (n 1) 33.
11 'Post-election violence in Kenya and its aftermath', https://www.csis.org/blogs/smart-global-health/post-election-violence-kenya-and-its-aftermath (accessed 6 June 2019).
12 Government of Kenya Commission of inquiry into the post-election violence (CIPEV), final report (2008).
13 K Johnson et al 'A national population-based assessment of 2007-2008 election related violence in Kenya' (2014) 8 *Conflict and health* https://doi.org/10.1186/1752-1505-8-2 (accessed 6 June 2019).
14 Eg, during 2007-2008 PEV in Luo Nyanza the state sent in security agents predominantly sourced from the ethnic group of the regime in power, Kikuyus, and in some instances accompanied by mungiki militia. See Government of Kenya (n 12) 178.
15 Examples include Mungiki in Nairobi and Central; Chinkororo and Amachuma in Kisii; Baghdad Boys in Kisumu; Taliban in Kibera and Mathare; and Republican Force in Mombasa. See M Ossome 'States of violence: Structural dynamics of gendered, ethnicised, and sexualised violence in Kenya's democratic transitions' unpublished PhD thesis, University of the Witwatersrand, 2015 35, http://wiredspace.wits.ac.za/bitstream/handle/10539/18279/Ossome%20thesis_final.pdf?sequence=1&isAllowed=y (accessed 6 June 2019).

created a fertile ground for electioneering violence, in general, and sexual violence, in particular.

Sexual violence is defined as any sexual act or attempt to obtain a sexual act using coercion, threats of harm or physical force that results in physical or psychological harm.[16] It is a human rights violation and is addressed under a growing number of international agreements and treaties, including the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the 1993 Declaration on the Elimination of Violence against Women (DEVAW); the 1994 Programme of Action (Cairo); the 1995 Beijing Declaration and Platform of Action; the International Covenant on Civil and Political Rights (1966) (ICCPR); the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); the Convention on the Rights of the Child (1989) (CRC); the Convention on the Rights of Persons with Disabilities (2006) (CRPD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT); the Rome Statute (1998); the African Charter on Human and Peoples' Rights (1981) (African Charter); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) (African Women's Protocol); the African Charter on the Rights and Welfare of the Child (1990) (African Children's Charter); and the United Nations Security Council Resolutions on Women, Peace and Security 1325 (2000); 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010); 2106 (2013); and 2122 (2013).

Human rights principles require that sexual violence receives the same treatment, attention and resources as other serious violent crimes.[17] Although sexual violence affects both men and women, it disproportionately impacts women. DEVAW recognises that violence against women is a manifestation of historically unequal power relations between men and women.[18] Article 4(c) of DEVAW provides that states should 'exercise due diligence to prevent, investigate, and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. This due diligence standard can therefore be

16 EG Krug et al (eds) *World report on violence and health* (2002) 167.
17 ACLU Women's Rights Project et al Domestic and sexual assault in the United States: A human rights-based approach and practice guide, https://www.law.columbia.edu/sites/default/files/microsites/human-rights institute/files/dv_sa_hr_guide_reduce.pdf (accessed 6 June 2019).
18 UN General Assembly Declaration on the elimination of violence against women (20 December 1993) UN Doc A/RES/48/104, https://www.refworld.org/docid/3b00f25d2c.html (accessed 12 June 2019).

interpreted to hold that the government must prevent and respond to sexual violence committed by either public or private actors.

Article 4(c) of DEVAW adopts the due diligence standard as a benchmark for assessing whether the state has met its obligation to prevent, investigate and punish acts of violence against women by either state or private perpetrators.[19] However, its application prior to Erturk's[20] elaboration in 2006 was state-centric and limited to responses to such acts as and when they occur.[21] The focus on response led to a neglect of the corresponding obligations to prevent the violence and compensate the victims. Also, the state-centredness led to further the neglect of the responsibility of non-state actors.[22] It was because of these shortcomings that the UN Special Rapporteur on Violence against Women[23] elaborated on the four core components of the due diligence standard as a tool for the elimination of violence against women. This forms the international standard of the state's obligation regarding violence against women, which is one of due diligence to prevent, investigate, prosecute and compensate for such acts of violence. This obligation is binding on the state and cannot be delegated, even in instances where some functions are performed by another state or a non-state actor.[24]

Based on the foregoing, the article subsequently uses the lens of the due diligence standard as elaborated on by the Special Rapporteur to interrogate Kenya's domestic accountability efforts regarding survivors of sexual violence in the 2007-2008 post-election violence. It utilises such interrogation to determine whether Kenya fulfilled its international human rights obligations with specific regard to prevention and response to election-related sexual violence in the post-election violence. Moreover, it seeks to analyse prevention and response mechanisms employed by duty bearers during the post-election violence with the aim of identifying priority gaps and proposing concrete measures that can be pursued to ensure effective mechanisms to election-related sexual violence.

The article consists of three parts. The first part elaborates on the four core components of the due diligence standard as elaborated on by the Special Rapporteur. The second part utilises this due

19 As above..
20 Yakin Erturk, UN Special Rapporteur on Violence against Women (2003-2009).
21 The due diligence standard as a tool for the elimination of violence against women (20 January 2006) UN Doc E/CN.4/2006/61, https://www.refworld.org/pdfid/45377afb0.pdf (accessed 12 June 2019).
22 UN Doc E/CN.4/2006/61 (n 21) 2.
23 As above.
24 UN Doc E/CN.4/2006/61 (n 21) 9.

diligence standard to critically analyse the prevention and response mechanisms deployed by duty bearers during the post-election violence. The third part concludes by highlighting priority gaps in the mechanisms deployed as identified in the critical analysis and proposing some concrete measures to prevent their recurrence in future elections.

2 Elaboration of the four core components of the due diligence standard as a tool for the elimination of violence against women

2.1 Prevention

Prevention addresses the systemic causative factors of sexual violence which include discrimination against women in all its forms, socio-cultural biases and a lack of adequate institutional responses.[25] Invariably, states seek to discharge this obligation through the adoption of specific legislation; the development of national action plans and multisectoral approaches to prevent violence; awareness-raising campaigns; and the training of specified professionals who attend to survivors.[26] Ultimately, prevention seeks to overcome gender stereotypes, biases and societal norms that facilitate violence against women. However, despite states initiating varied preventive programmes, Erturk[27] notes that scant evidence exists of state engagement in overall societal transformation to eliminate existing gender biases, or to support civil society initiatives on the same.[28]

2.2 Protection

Protection addresses itself to keeping survivors safe, avoiding recurrences, and ensuring that they receive adequate and timely support services once the violence has occurred. Measures undertaken by states in discharging this obligation centre around the provision of services to survivors. These include telephone hotlines for reporting sexual violence, the provision of both medical and legal services to survivors, shelters and safe spaces, and financial aid to

25 UN General Assembly Convention on the Elimination of All Forms of Discrimination Against Women 18 December 1979 United Nations, treaty series, vol 1249 13, https://www.refworld.org/docid/3ae6b3970.html (accessed 12 June 2019).
26 UN Doc E/CN.4/2006/61 (n 21) 9.
27 Yakin Erturk, UN Special Rapporteur on Violence Against Women (2003-2009).
28 UN Doc E/CN.4/2006/61 (n 21) 11.

survivors.[29] However, despite the adoption of such measures states continue to face major challenges in the enforcement of protective obligations. This is caused by, among other challenges, the lack of adequate enforcement of civil remedies and criminal sanctions and the absence or inadequate provision of medico-legal services and shelters.[30]

States must therefore strive to ensure that survivors have access to justice as well as basic support services which include health care and counselling that (a) respond to their immediate needs; (b) help protect them against further harm; and (c) address the longer-term consequences of violence.[31] This can be achieved through the development and implementation of robust legal frameworks to create a safe environment that enables survivors to report violations and obtain effective protective measures. Such measures should not only be survivor centred but should also guarantee the rights of the accused perpetrators.[32]

2.3 Punishment

Punishment as an obligation requires that states investigate and appropriately punish these criminal acts of violence against women. States have mainly perceived this as an obligation to adopt or modify laws alongside strengthening the capacities and powers of investigators, prosecutors and adjudicators. These efforts are thus focused on the police, the prosecution and the judiciary through enactment of specialised legislation and the formation of dedicated investigation and prosecution units, to ensure that such acts are met with appropriate punishments.[33]

The effective and responsive investigation and punishment of offenders serve as a deterrent to potential offenders. An environment that allows offenders to get away with their crimes perpetuates individual recidivism and reinforces the normalisation of violence against women in society. There therefore is a correlation between the prevalence of violence against women and effective deterrence measures. Hence, thorough investigations and punishment of perpetrators are important measures of accountability and indicators

29 As above.
30 UN Doc E/CN.4/2006/61 (n 21) 12.
31 ACLU Women's Rights Project et al (n 17).
32 UN General Assembly Universal Declaration of Human Rights 10 December 1948, 217 A(III), https://www.refworld.org/docid/3ae6b3712c.html (accessed 12 June 2019). Arts 8-11 specify the rights of an accused person.
33 UN Doc E/CN.4/2006/61 (n 21) 12.

of compliance with the due diligence standard.[34] However, the punishment should be in a manner consistent with the right to due process, also emphasising the dignity of survivors.

2.4 Reparation

The main objective of reparation is to address the harm or losses suffered by survivors and mitigate the effects of the violence to the extent possible, including compensation for physical and psychological injuries; the loss of employment; educational opportunities and other benefits; as well as any legal, medical and other costs incurred as a consequence of the violence.[35] States are also required to facilitate access to appropriate rehabilitation and support services. This aspect of due diligence is grossly underdeveloped and there is little information available regarding state obligations to provide adequate reparations to survivors of sexual violence.[36]

3 Adopting the Special Rapporteur on Violence against Women due diligence standard to interrogate Kenya's accountability efforts towards sexual violence survivors of the 2007-2008 post-election violence

The majority of sexual violence survivors during the 2007-2008 post-election violence were women. Consequently, the Special Rapporteur due diligence standard provides an adequate assessment framework for ascertaining what constitutes effective fulfilment of Kenya's obligations, as well as for analysing its actions or omissions in that respect.[37] This is not to say that there were no male survivors. Johnson et al [38] found that during the post-election violence one of the more commonly-reported forms of sexual violence[39] was genital mutilation perpetrated by men and, to a lesser extent, women who were affiliated with a government or political group. The Commission of Inquiry

34 ACLU Women's Rights Project et al (n 17).
35 UN General Assembly Report of the Special Rapporteur on Violence Against Women, its Causes and Consequence 28 May 2014 UN Doc A/HRC/23/49, http://www.unwomen.org/en/docs/2014/5/special-rapporteur-on-violence-against-women-a-hrc-26-38 (accessed 12 June 2019).
36 UN Doc E/CN.4/2006/61 (n 21) 13.
37 S Hassim *Rethinking gender politics in a liberal age: Institutions, constituencies and equality in comparative perspective* (2009), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.463.7570&rep=rep1&type=pdf (accessed 12 June 2019).
38 Johnson et al (n 13).
39 Others were rape and molestation.

into the Post-Election Violence (CIPEV)[40] documented incidences where *mungiki* used blunt objects such as broken glass to undertake forcible circumcision of Luo men,[41] and Kamau-Rutenberg[42] found that some of the survivors were as young as 11 and five years old. Male survivors also suffered sodomy, castrations and even mutilation of their penises. These sexual violations were meant to terrorise not only individuals but also targeted ethnic communities.[43] Therefore, it can be surmised that men and boys were targeted as an attack on the symbol of manhood for communities that do not practise circumcision to humiliate, traumatise and intimidate them both as individuals and as a community.[44] Such violations also fall within the purview of election-related sexual offences, which are the focus of this article.

3.1 Prevention interventions prior to the 2007-2008 post-election violence

CIPEV Chairperson, Justice Waki, notes that 'sexual violence is silent and preying because it is underreported, under-investigated and insufficiently addressed'.[45] Testimony adduced during the hearings revealed that women were the worst hit and constituted the most sexual violence victims. This was mainly attributed to the existing inequalities between men and women in Kenya.[46] Moreover, it is reported that women are traditionally perceived as lesser human beings which promotes sexual violence and insensitive police response to the crime when reported.[47] This creates fear in survivors to report violations in the belief that they could be turned away or even killed if they did so.

CIPEV found that 82 per cent of the victims did not formally report to the police, the reasons for non-reporting ranging from being attacked by the police; a fear of being attacked again; thinking that

40 Government of Kenya (n 12).
41 Traditionally the Luo community did not circumcise their men, instead opting for the removal of six front teeth as their rite of passage to initiate boys into manhood.
42 W Kamau-Rutenberg 'Watu Wazima: A gender analysis of forced male circumcisions during Kenya's post-election violence' (2009) *African Arguments*, https://africanarguments.org/2009/07/17/watu-wazima-a-gender-analysis-of-forced-male-circumcisions-during-kenyas-post-election-violence/ (accessed 12 June 2019).
43 Government of Kenya (n 12).
44 Ossome (n 15) 125.
45 Government of Kenya (n 12) 240.
46 Government of Kenya (n 12) 244. The mandate of CIPEV was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.
47 Government of Kenya (n 12) 245.

nothing would be done; not being able to identify the rapist; not knowing where to report the incident; being asked not to report the matter; and not knowing how to do so.[48] Moreover, a national population-based assessment of the 2007-2008 post-election violence revealed, among other things, that 68 per cent of Kenyans were unaware of the Sexual Offences Act; survivors lacked access to the formal justice system in many areas that substitute it with traditional court systems that do not recognise sexual violence as a crime; and that police had limited training in the documentation of sexual violence.[49] Despite all these existing shortcomings there was no evidence of official state engagement in interventions aimed at the prevention of sexual violence prior to the 2007 elections, as discussed below.

3.1.1 Lack of internal coordination and multi-sectoral approaches to prevent sexual violence

CIPEV faulted the government for their failure to anticipate sexual violence as a possible threat during the elections, and their delayed response once it began.[50] Furthermore, officers in the public administration and security agencies admitted being overwhelmed and their lack of coordination resulted in a breakdown of law and order, hence perpetuating the spread of violence.[51] Sexual violence is often higher during conflict because the corresponding breakdown in law and order creates both opportunities and incentives for perpetrators to engage in such criminal acts.[52] Thomas et al[53] observe that the suspension of the rule of law during times of transition is a potential cause of sexual and gender-based violence, and this proved to be the case during the post-election violence.

The Kenyan government failed to set up a national coordinating mechanism to promote peacebuilding and conflict management prior to the elections. Such a mechanism would have enabled it to coordinate conflict prevention efforts by both state and non-state actors and put in place early warning systems that could have prevented or contained the violence. Its key objectives would have been to identify possible flashpoints for violence, to anticipate and

48 Government of Kenya (n 12) 247.
49 Johnson et al (n 13).
50 Government of Kenya (n 12) 265.
51 Government of Kenya 266.
52 Ossome (n 15) 27.
53 K Thomas, M Masinjila & E Bere 'Political transition and sexual and gender-based violence in South Africa, Kenya, and Zimbabwe: A comparative analysis (2013) 21 *Gender and Development* 519, https://doi.org/10.1080/13552074.2013.846617 (accessed 13 June 2019).

mitigate potential threats, and to enhance the government's capacity to deal with moments of vulnerability through targeted responses and community-based approaches.

Moreover, the state's own organisational inconsistencies and internal politics prevented it from effectively mitigating and responding to incidences of sexual violence, as well as violence in general once they started to occur. An effective coordination mechanism would have enabled the state to identify security, social, political and cultural factors that could undermine the electoral process as well as potential causes of sexual violence. The identification of the risk factors would have enabled the state to come up with security counter-measures involving cooperation between different government law enforcement agencies. This would have enabled the government to reach out in good time to the security agencies for better inter-agency collaboration and coordination; to implement an enhanced security programme of training security agencies on electoral security; and to ensure that security issues affecting women's participation in the electoral process are monitored and addressed.

In addition, a major challenge to Kenyan government ministries, departments and agencies is a silo mentality which leads even those pursuing similar objectives, for instance, law enforcement agencies,[54] to work separately rather than together. This greatly affects their capacity to implement crime prevention measures by creating overlaps and a duplication of efforts. Moreover, most government bodies do not allocate adequate resources towards sexual violence prevention and response programmes.[55] This is attributable to the fact that the results of such programmes are not tangible and hence the benefits are not obvious to the electorate, thus making them unpopular with policy makers.

54 An attempt to remedy this shortcoming led to the formation of the National Council on the Administration of Justice under sec 34 of the Judicial Service Act. It is a high-level policy-making, implementation and oversight coordinating mechanism and is composed of state and non-state actors from the justice sector.

55 A 2016 study found that the mean cost of providing a minimum package of GBV services, as defined in the one-stop model in a first referral public hospital, is KES 44 717 (US $502) per survivor whereas the median cost is KES 43 769 (US $492). National Gender and Equality Commission Gender-based violence in Kenya: The cost of providing services, a projection based on selected service delivery points (2016), https://www.ngeckenya.org/Downloads/GBV%20Costing%20Study-THE%20COST%20of%20PROVIDING%20SERVICES.pdf (accessed 12 June 2019).

3.1.2 Challenges in implementing a specialised sexual violence law

CIPEV reported that, whereas Kenya had ratified several international and regional instruments prohibiting violence against women, it had not incorporated these into its laws or acted on those parts of the law that reflected them.[56] Moreover, the law comprehensively addressing sexual violence was only enacted the year prior to the elections, in 2006. Therefore, despite its existence it was established that many government officers handling sexual violence matters were ill-informed on its provisions and therefore were not able to provide either quality or standardised services to survivors of sexual violence.[57] Additionally, it was only in March 2007 that the Attorney-General appointed and launched the National Task Force on the Implementation of the Sexual Offences Act (TFSOA) to prepare and recommend a national policy framework and guidelines for the implementation and administration of the Act.[58] TFSOA was also mandated to propose effective measures to secure acceptable schemes, programmes and other mechanisms for the protection, treatment and care of sexual violence victims; as well as the treatment, supervision and rehabilitation of sexual offenders.

Therefore, although a specialised sexual violence law was in place, the lack of a national policy framework and guidelines for its implementation and administration greatly hindered its effectiveness in addressing cases of sexual violence. This further contributed to the ineffective investigation, prosecution and adjudication of such cases, resulting in an injustice to survivors. Such injustice took many forms, including insufficient courts, police and prosecution officers, cases not being reported, and cases taking too long to be resolved.[59]

3.1.3 Gaps in training of police officers to address cases of sexual violence

Going into the 2007 elections the Kenyan police were those mandated with the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, and the apprehension of offenders.[60] However, in terms of mindset and training the Kenyan police force (as it was then

56 Government of Kenya (n 12) 268.
57 Republic of Kenya *Report on the audit and review of existing policies, laws, regulations, practices, and customs relating to sexual offences in Kenya* (2011).
58 Gazette Notice 2155 'Task Force on Implementation of the Sexual Offences Act, 2006', https://www.law.berkeley.edu/wp-content/uploads/2015/04/Sexual-Offences-Act_Summary-Report-May-2011.pdf (accessed 3 June 2021).
59 Republic of Kenya (n 57).
60 Police Act Cap. 84 sec 14.

known) was still enthralled by its colonial past which emphasised the protection of the Crown[61] above its subjects. Murunga notes that in the post-independence period the police retained their historical position as functionaries of the authoritarian state.[62] In the 2007 elections they were subsequently deployed specifically for purposes of regime maintenance as a key cog in the ruling regime's Party of National Unity (PNU) vote manipulation strategy.[63] Consequently, they were ill prepared to maintain law and order in the ensuing mayhem and actually ended up being key perpetrators of atrocities against Kenyans. CIPEV heard testimony that in some instances police were the perpetrators of sexual violence[64] and were also identified as the sector most responsible for post-election violence deaths.[65] Overall CIPEV found that the police totally failed to 'engage in professional, timely and quality planning and preparation for the elections event'.[66]

Moreover, the police were not adequately trained on human rights and over time had proved to be the greatest violators of the rights of the citizens they were supposed to protect. More particularly, during the Kenyatta and Moi regimes they had formed the habit of abusing their wide discretionary powers to maintain law and order to control and brutalise citizens as a mode of regime maintenance.[67] Similarly, in the months leading up to the 2007 elections the police had been cited for extra-judicial killings of *mungiki*[68] members with the Kenya National Commission on Human Rights (KNCHR) having investigated and established police participation or complicity in the killings.[69] Correspondingly, CIPEV heard testimony that of the 24 rapes reported during the post-election violence seven were committed by police by way of gang rapes with officers being variously described as being drawn from the General Service Unit (GSU); the Kenyan police and the administration police.[70] Ultimately, the police were irredeemably deficient in their understanding and internalisation of international human rights standards and consequently were

61 In this context the term 'crown' is used in reference to protection of the interests of the British Empire since Kenya at the time was a Crown colony.
62 GR Murunga *Spontaneous or premediated? Post-election violence in Kenya* (2011) 40.
63 Murunga (n 3) 43.
64 Government of Kenya (n 12) 397.
65 Murunga (n 3) 43.
66 Government of Kenya (n 12) 375.
67 M Tamarkin 'The roots of political stability in Kenya' (1978) 77 *African Affairs* 308.
68 The word means 'multitude' in the Kikuyu language and it can best be described as a politico-religious sect which mainly draws its members from poor and disenfranchised youths of the Kikuyu ethnic group.
69 KNCHR *On the brink of the precipice: A human rights account of Kenya's post-2007 election violence* (2008).
70 Government of Kenya (n 12) 379.

ill-prepared to identify and redress human rights violations, including sexual violence, during the post-election violence.

3.2 Protection measures taken by the state during the 2007-2008 post-election violence

The World Health Organisation (WHO) guidelines for medico-legal care for victims of sexual violence provide that the appropriate management of sexual violence requires a standardised clinical evaluation alongside an effective interface with law enforcement for the handling of forensic evidence.[71] Moreover, the effects of sexual violence cut across aspects of both public health and human rights as applied to the survivors with public health concerns being guided by legal procedures to be observed in the collection of forensic evidence from survivors to be used in the prosecution of the perpetrators.[72] Guedes et al[73] argue that gender-based violence should be viewed as both a public health and human rights problem, hence any response should entail government collaboration with the health services (public or private).[74] Such response would ensure sensitive and appropriate care for survivors respectful of their human rights and promoting their human dignity. Guedes et al[75] further note that such a human rights-based approach is essential since it gives health workers a clear set of principles for understanding the wider context of gender-based violence and the need to protect the survivors' dignity and rights.

All Kenyans are entitled to the highest attainable standard of health, which includes the right to health care services as provided for in article 43(1)(a) of the Constitution. This is also provided for in article 12 of ICESCR which Kenya has ratified and therefore is bound by it. The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) which monitors compliance with ICESCR adopted a General Comment on the Right to Health in 2000. It defined four elements of the right to health, namely, availability, accessibility,

71 World Health Organisation *Guidelines for medico-legal care for victims of sexual violence* (2003), https://apps.who.int/iris/bitstream/handle/10665/42788/924154628X.pdf?sequence=1 (accessed 14 June 2019).

72 C Ajema et al *Standards required in maintaining the chain of evidence in the context of post-rape care services: Findings of a study conducted in Kenya* (2009).

73 A Guedes et al 'Gender-based violence, human rights, and health sector: Lessons from Latin America' (2002) 6 *Health and Human Rights* 177, https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2013/07/11-Guedes.pdf (accessed 14 June 2019).

74 M de Bruyn *Violence, pregnancy and abortion: Issues of women's rights and public health* (2001).

75 As above.

acceptability and quality (AAAQ).[76] The Kenyan government must therefore ensure that it provides health services that meet these four key elements of the right to health.

CIPEV[77] indicated that many victims of sexual violence could not get to hospitals to receive treatment owing to the lack of security and means of transport because of the breakdown in law and order. The lawlessness emboldened people to set up illegal roadblocks and engage in criminal acts such as sexual violence. Moreover, those who were able to get to hospital did not do so within the prescribed 72-hour window for post-rape care services. This is the critical window period for survivors to receive post-exposure prophylaxis (PEP) to prevent HIV infection as well as for the collection and storage of medical evidence necessary for investigation and prosecution. As a result, some contracted HIV whereas those who were already infected could not obtain their daily doses of anti-retroviral drugs (ARVs) to manage the disease. Also, some victims fell pregnant because of the violations[78] while other harmful effects suffered included physical injury; psychological trauma; desertion by their spouses; unwanted pregnancies; and a loss of trust they previously had in state security agencies.[79]

Furthermore, owing to the lawlessness many medical staff were unable to go to work or access their work stations. There were also not enough trained personnel to assist the survivors of sexual violence and drugs often were in short supply.[80] The problem was further compounded by a lack of a coordinated government policy on the provision of medico-legal services to survivors of sexual violence. CIPEV notes that the state was undecided on whether to keep systematic figures on casualties and incidences of sexual violence or to ignore it altogether.[81] Furthermore, the state did not communicate instructions to both hospitals and citizens that medical fees had been waived. As a result, some survivors did not seek medical attention because they thought they would have to pay when they could not afford to do so.[82]

76 *The right to health*, WHO/OHCHR Joint Fact Sheet/323 August 2007, https://www.who.int/mediacentre/factsheets/fs323_en.pdf (accessed 14 June 2019).
77 Government of Kenya (n 12) 268.
78 Government of Kenya (n 12) 245.
79 Government of Kenya 261.
80 Government of Kenya 266.
81 As above.
82 As above.

A survey by the Centre for Rights Education and Awareness (CREAW)[83] found that in the 2007-2008 post-election violence female rape survivors were only able to access free medical treatment from private hospitals whereas they were charged a fee in public hospitals. Moreover, the number of women and girls seeking such treatment in public hospitals diminished in the two months subsequent to the outbreak of the post-election violence.[84] Health care providers interviewed by CREAW attributed this decrease to challenges encountered by women and girl survivors in accessing services while fleeing the violence and in the circumstances of internal displacement owing to the violence.[85] It was also observed that 25 per cent of health centres were temporarily closed as a result of staff shortages during the height of the post-election violence. The staff shortage was a direct result of the post-election violence since they too were caught up in flight and internal displacement because of the violence. From the foregoing it is evident that there was an inadequacy in the state response in terms of provision of medical treatment to survivors through the government hospitals because of cost and staff constraints.

Interestingly, Ossome[86] observes that even where women's organisations stepped in to ensure survivors access to free medical treatment, this did little to change the survivors' own negative perceptions of these organisations. They viewed them as exploitative and self-serving, which was a result of the high expectations formed by the survivors of long-term support and economic sustenance from the donor funds channelled through the women's organisations. The survivors had hoped that the funds would benefit them on an individual basis beyond the generalised access to free treatment. However, this was not possible since the 'rapid-response and urgent action' interventions undertaken in the immediate aftermath of the post-election violence focused on material provisioning and were time-bound, as well as being heavily influenced and enabled by the donor-funding objectives. They were restricted to emergency funding to provide for the needs of highly-affected populations, particularly the internally-displaced persons (IDPs). Neither state nor non-state actors had imagined the extent or form the violence and dispossession would assume, hence all were caught unprepared.

83 Centre for Rights Education and Awareness *Women paid the price: Sexual and gender-based violence in the 2007 post-election conflict in Kenya* (2008).
84 The survey was conducted among hospitals in the PEV hotspots, including Kitale District Hospital, Nakuru Provincial Hospital, Moi Teaching and Referral Hospital, Kenyatta National Hospital, and Mbagathi Hospital. Private hospitals where women received free treatment included Nairobi Women's Hospital and Kibera PAG Hospital.
85 CREAW (n 83) 6.
86 Ossome (n 15) 161.

Moreover, all forms of such material assistance ceased with the cessation of hostilities after the 2008 peace accord.[87] Consequently, these interventions left a larger vacuum of unfulfilled expectations and demands by the survivors, many of whom lamented the betrayal and abandonment by both the state and women's organisations that had stepped in to assist them. [88]

These barriers to survivors' access to medical treatment and care during the 2007-2008 post-election violence is a pointer to the fact that the state did not meet the first two elements of the right to health, namely, availability and accessibility. Regarding the element of availability, this means that the state was unable to guarantee functioning public health and health care facilities, goods and services, as well as programmes in sufficient quantities. As for the element of accessibility, this means that the health facilities, goods and services were not accessible to everyone within the state. The lack of sufficient and proper equipment to cater for survivors means that the local health facilities available did not meet the fourth element of the right to health, namely, quality, which requires that the health facilities, goods and services must be scientifically and medically appropriate and of good quality.

Moreover, it should be noted that accessibility has four overlapping dimensions, namely, non-discrimination, physical accessibility, economical accessibility (affordability) and information accessibility,[89] none of which was met in the context of the 2007-2008 post-election violence. The failure to meet these first two elements automatically means that the state could not meet the subsequent elements of acceptability and quality. Therefore, it can be concluded that the state failed to meet all four elements (AAAQ) of the right to health in the context of the 2007-2008 post-election violence. Both state and non-state actors working on sexual violence should have cooperated to map out medico-legal service providers across the country. They ought to have thereafter assessed their institutional capacity to adequately support them both technically and financially to provide medico-legal services to survivors of sexual violence at the local level.

Specific attention ought to have been given to low-income communities living in informal settlements who constituted the main source of both perpetrators and survivors.[90] Communities needed to be empowered so that their youth could be engaged in gainful

87 Ossome 164.
88 Ossome 166.
89 WHO/OHCHR (n 76).
90 Government of Kenya (n 12) 251.

economic activity to avoid them joining the criminal gangs exploited by politicians to perpetrate acts of violence during the elections. On the other hand, women and girls, being the most vulnerable to sexual violence, also needed to be empowered so that they could use their economic might to improve their lives and those of their children. This would have helped them reduce their vulnerability since they would have been independent and able to seek justice and medical treatment without the need for intermediaries to foot the costs. An empowered community is also an informed community and community members therefore need to be empowered to be more knowledgeable on how to prevent and respond to cases of sexual violence when they occur. Armed with such knowledge they could have formulated community-based prevention and response mechanisms to ensure that members were protected from sexual violence and assisted to access medical treatment and justice when they became victims of sexual violence.

3.3 Punishment

The due diligence standard also requires governments to investigate sexual violence when it does occur, to punish and to hold to account perpetrators for their actions, and to adhere to the principles of accountability and non-impunity.[91] Thorough investigations and arrest, prosecution and punishment of perpetrators of sexual violence are important measures of accountability and indicators of compliance with the due diligence standard.[92]

CIPEV established that the perpetrators of sexual violence during the 2007-2008 post-election violence included state security agents; members of organised gangs; neighbours; relatives; friends; and individuals working in the camps for internally-displaced persons.[93] The Commission further found that perpetrators committed the sexual violence crimes for different reasons, such as to pressure people to abandon their homes; as retaliation against those perceived to have voted for the wrong candidate; and to dominate, humiliate and degrade those belonging to the 'wrong' tribe.[94] Survivors' recollections of insults directed at them and the language of their attackers led many to believe that they had been deliberately targeted due to their party affiliations, political loyalties and ethnicity.[95] However, in other areas criminals simply took advantage

91 ACLU Women's Rights Project et al (n 17).
92 As above.
93 Government of Kenya (n 12) 252.
94 As above.
95 Ossome (n 15) 7.

of the lawlessness and power vacuum to engage in sexual violence as a purely criminal act.[96] Furthermore, in the IDP camps victims were preyed upon by individuals from neighbouring communities, security personnel and humanitarian workers.[97]

3.3.1 Shortcomings in the investigation of sexual offences committed during the post-election violence

Witnesses at the CIPEV hearings singled out members of the security agencies as perpetrators. They reported that security officers would enter their houses under the pretext of looking for weapons used by the young men barricading the roads or for members of *mungiki* and then sexually violate them when they could not find what they were looking for.[98] Aside from such acts of commission, the security officers were also cited for acts of omission such as refusing to record cases of sexual violence when they were reported to them. Additionally, it was reported that some of the security agents were ethnically biased and hostile towards survivors who did not belong to their own ethnic groups or political parties.[99]

CIPEV hence concluded that the involvement of the security agents in perpetrating sexual violence and fear of self-incrimination are what led the police to omit sexual violence data on the reports they presented to the Commission. Such omission amounts to injustice to the victims since it is the police that were mandated to detect and investigate crimes before subsequently arresting the perpetrators so that they may be prosecuted and, ultimately, punished in a court of law.[100] The failure to act on reports of sexual violence presented to them meant that such offences could not be investigated and prosecuted with the definitive objective of punishing the offenders, thereby denying justice to the victims.

Nevertheless, the then Commissioner of Police, Major General Ali, was emphatic that only the police had the authoritative figures.[101] Moreover, CIPEV expressed disappointment that Major General Ali testified that he could not assess whether sexual violence incidents were fit to be included in the reports and was not aware of anyone who had been arrested and charged for the commission of such crimes.[102] Consequently, despite implications of state security

96 Government of Kenya (n 12) 253.
97 As above.
98 As above.
99 Government of Kenya (n 12) 256.
100 Police Act (n 60) sec 14.
101 Government of Kenya (n 12) 306.
102 Government of Kenya 257.

officers as perpetrators there was no pressure on the police to either investigate or act against officers who were perpetrators of sexual violence in the 2007-2008 post-election violence. An investigation by a task force formed at the instigation of the then first lady, Lucy Kibaki, saw the police investigate 66 complaints of rape by security agents. However, in all the cases the police recommended closure for lack of evidence and when these files were submitted to the Director of Public Prosecutions (DPP) they were returned to the police for further investigation and this marked the end of the matter. The task force never submitted a final report.[103] CIPEV also found numerous shortcomings on the part of the police that hindered reporting and the investigation of sexual violence. Among these shortcomings was the fact that no complaints of rape were recorded by the police during the period and no internal investigations into police conduct was ever undertaken.[104]

This blatant failure to investigate occurred despite a robust and facilitative legal framework. At the time the police held the sole mandate for the prevention and detection of crime, as well as the apprehension of offenders and the enforcement of all laws and regulations as provided for in section 14 of the Police Act.[105] The failure to investigate was an abdication of this mandate. Similarly, a specialised sexual violence law was in place which, albeit new, had already come into force and could be used in the aftermath of the post-election violence to pursue justice for the victims of sexual violence. This is the Sexual Offences Act[106] which provides for sexual offences, their definition, prevention, and the protection of all persons from such offences, and prescribes punishment for perpetrators. However, as discussed earlier, its major challenge was the lack of a national policy framework and guidelines for its implementation and administration. Aura notes that the enactment of the Act was not matched with adequate training and dissemination to law enforcement officers and relevant criminal justice actors as well as the public.[107] As a result, most were not even aware of its existence.

Nevertheless, these challenges do not justify why investigations could not be picked up after the promulgation of the 2010 Constitution which brought about a slew of reforms in the criminal

103 Government of Kenya 449.
104 Government of Kenya 404.
105 Cap 84 of the Laws of Kenya. In the 2020 constitutional dispensation it was replaced by the National Police Service Act.
106 Act 3 of 2006.
107 R Aura 'Situational analysis and the legal framework on sexual and gender-based violence in Kenya: Challenges and opportunities' 16, http://kenyalaw.org/kl/index.php?id=4512 (accessed 9 March 2021).

justice sector. Article 48 of the Constitution specifically mandates the state to ensure access to justice for all persons, yet apart from one murder investigation many months after the post-election violence, and despite the many failures of the police to investigate, there were no internal investigations into the conduct of culpable police officers.[108] The International Centre for Transitional Justice (ICTJ)[109] also observed that despite the vast documentation on sexual and gender-based violence during the 2007-2008 post-election violence, no one has ever been convicted.

3.3.2 Resultant challenges in prosecution and securing convictions in court

Ambani[110] notes that failures by the state investigative agencies subsequently led to very few arrests, prosecutions and convictions of perpetrators of sexual violence in the 2007-2008 post-election violence. Moreover, Asaala[111] observes that the post-election violence also highlighted prosecutorial weaknesses and judicial shortfalls since of the few cases the police prosecuted, most of them ended up in acquittals with only six convictions. She attributes this to the following factors: poor investigations, police corruption and incompetence, a lack of local ownership, and a lack of political goodwill.[112] Similarly, CIPEV found the overall challenges in securing accountability for post-election violence to be a lack of political will, a lack of credible, independent and timely investigations, political interference in investigations, and other failings within the criminal justice system.[113]

For his part the Director of Public Prosecutions, Keriako Tobiko, faulted the files forwarded to him for not being prosecutable owing to a lack of evidence.[114] This was occasioned by the lack of proficient investigations by the police, if any; victims reporting many days after

108 Government of Kenya (n 12) 404.
109 International Centre for Transitional Justice (ICTJ) *The accountability gap on sexual violence in Kenya: Reforms and initiatives since the post-election crisis* (2014).
110 JO Ambani 'The roots and effects of electoral sexual and gender-based violence on women's political participation in Kenya' in J Biegon (ed) *Gender equality and political processes in Kenya: Challenges and prospects* (2016) 143.
111 E Asaala 'Prosecuting the 2007 post-election violence-related international crimes in Kenyan courts: Exploring the real challenges' in M Mbondenyi et al (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 361.
112 As above.
113 Government of Kenya (n 12) 443.
114 C Ombati 'Police: Why post-election violence cases cannot be prosecuted in Kenya' *The Standard* 7 April 2016, https://www.standardmedia.co.ke/nairobi/article/2000197439/police-why-pev-cases-cannot-be-prosecuted-in-kenya (accessed 9 March 2021).

violations hence hindering the collection of forensic evidence; and the failure of victims to identify perpetrators as well as forgetting the exact dates when they were violated.[115] Tobiko further acknowledged that the prosecution of sexual offences was severely hampered by poor investigations owing to a lack of equipment to collect and preserve evidence. He also stated that prosecutors lacked appropriate training and skills to prosecute such cases.[116] Consequently, from 2007 to the present, despite several attempts to review cases of sexual violence during the post-election violence, the Director of Public Prosecutions is yet to achieve the successful conviction of perpetrators.[117] Moreover, there has been no discernible effort to secure accountability for those affected during that time through the criminal justice process.

3.3.3 Consequences of the systemic failures in investigation and prosecution

Given the foregoing, it is evident that Kenya did not fulfil the punishment component of the due diligence standard. Investigatory and prosecutorial agencies should be aware of laws, regulations, avenues, measures and considerations that have been put in place to overcome the above-mentioned challenges, to deliver justice to victims of such violations. For the internalisation of human rights standards, particularly in the police, continuous engagement is required. This should have been done alongside continuously sensitising communities so that they know about sexual violence in general and what to expect from the investigative, prosecutorial and judicial agencies in terms of resolving such cases. This multi-sectoral approach involving engagement and capacitation of duty bearers, on the one hand, and engagement and sensitisation of communities, on the other, contributes towards effectively combating sexual violence both in and outside the context of elections. CIPEV recommended the training of the police in handling cases of sexual violence but noted that this would only be of use if accountability mechanisms within the security agencies are also established and acted upon.

115 J Kiplagat 'Lack of evidence derails local trials' *Daily Nation* 17 August 2012, https://www.nation.co.ke/news/Lack-of-evidence-derails-local-trials-/1056-1482054-12dp1uq/index.html (accessed 9 March 2021).

116 K Tobiko 'Responses to sexual and gender-based violence (SGBV) in Kenya' Proceedings of the National Consultations Leading to the International Conference on the Great Lakes Region (ICGLR) Special Session on SGBV 25-26 October 2011, Nairobi, Kenya.

117 See court proceedings in Constitutional Petition 122 of 2013: *Coalition on Violence Against Women (COVAW) & 11 Others v Attorney-General & 5 Others* (2016) eKLR.

This would facilitate the punishment of security officers who engage in such crimes.[118]

Additionally, the state must always strive to punish the perpetrators through prosecution and conviction in accordance with existing laws[119] to achieve justice for the survivors. Weru[120] found that calls for peace by government in the aftermath of the 2007-2008 post-election violence were viewed with mistrust as it was perceived to be either unwilling or incapable of responding to the violence since government efforts did not go far enough in punishing the perpetrators of violence, hence leaving an unresolved issue in the violence affected areas. This had the negative effect of concealing tensions the cumulative nature of which built up over time resulting in a prolonged state of potential and unpredictable political violence that has the potential to explode at subsequent elections. The overall question therefore remains as to the commitment of relevant agencies and officers to genuinely investigate and prosecute acts of sexual violence.

3.4 Reparation

The Truth, Justice and Reconciliation Commission (TJRC) was established in 2008 to investigate historical injustices and gross violations of human rights since independence (1963-2008).[121] It was a non-judicial body and did not have the power to prosecute but could recommend prosecutions, reparations for victims, institutional changes and amnesty for perpetrators who confessed, were willing to testify and had not committed gross human rights violations. Even though it could not pronounce itself on criminal accountability for perpetrators of sexual violence in the 2007-2008 post-election violence, the TJRC documented crucial findings, confirming the findings of CIPEV that numerous cases of sexual violence occurred during the 2007-2008 post-election violence.[122] Importantly, the TJRC corroborated the CIPEV finding that state security agencies, specifically the police and the army, were the main perpetrators of

118 Government of Kenya (n 12) 269.
119 Sexual Offences Act 3 of 2006.
120 M Weru 'Impact of violent conflict on pre-school children: A case of 2007-2008 post-election violence in Kibera' MA thesis, University of Nairobi, 2013 (on file with author).
121 Established under the Truth Justice and Reconciliation Commission Act 6 of 2008.
122 Government of Kenya Report of the Truth, Justice and Reconciliation Commission (TJRC): Volume IV (2013) 40, https://www.jfjustice.net/downloads/1460970274.pdf (accessed 14 June 2019).

sexual violence alongside other human rights violations, such as massacres, enforced disappearances, and torture and ill-treatment.[123]

Moreover, the TJRC made comprehensive recommendations regarding the establishment of a responsive reparations framework, and the provision of appropriate reparations to victims of gross human rights violations; including victims of sexual violence.[124] Additionally, the TJRC recommended further investigations into the conduct of state security agents, politicians and other individuals who were responsible for gross human rights violations in order to ensure accountability for these crimes. The TJRC also recommended the establishment of the Office of the Special Rapporteur on Sexual Violence.[125] This office was meant to play a key monitoring and evaluation role in the implementation of legislative, policy, administrative, policy, educational and other measures towards addressing sexual violence in Kenya.

The TJRC recommendations were never implemented by the state and the report served only as an archive on historical injustices in Kenya. Reparation, not only for victims of sexual violence in the 2007-2008 post-election violence but also for victims of gross human rights violations since independence is an issue that to date remains unaddressed.[126] Kenya therefore did not fulfil this component of the due diligence standard and this is attributable largely to the lack of political goodwill stemming from the aftermath of the 2007-2008 post-election violence.

4 Recourse through constitutional petitions

4.1 Constitutional Petition 112 of 2013

The case was filed by eight post-election sexual violence survivors, six women and two men, who primarily sought to hold the government accountable for its failure to prevent or mitigate the post-election violence, investigate and prosecute the offenders, and provide redress to survivors. It was their contention, among other things, that the failure to prepare adequate and lawful police responses to the

123 Government of Kenya (n 12) vii.
124 Government of Kenya 97.
125 Government of Kenya 64.
126 M Ongala 'Implement TJRC report to earn forgiveness, Kingi tells Uhuru' *Standard Digital* (Nairobi) 8 May 2018, https://www.standardmedia.co.ke/article/2001279585/implement-tjrc-report-to-earn-forgiveness-kingi-tells-uhuru (accessed 14 June 2019).

anticipated post-election violence contributed to sexual and gender-based violence and that the failure to prosecute the perpetrators or provide effective remedies to victims violated their fundamental rights. These fundamental rights were guaranteed under the former Constitution and included the right to life, the right to security of the person, the right to protection of the law and the right to remedy and rehabilitation.[127]

The case was filed in February 2013 and concluded in December 2020, seven years after it had been filed and 13 years after the post-election violence during which the sexual violence was suffered. This in itself was a case of justice delayed. Fortunately, the Court ultimately ruled in favour of the petitioners and issued, among others, a declaratory order to the effect that the failure to conduct independent and effective investigations and prosecutions of sexual and gender-based violence-related crimes during the post-election violence was a violation of the positive obligation on the Kenyan state to investigate and prosecute violations of the right to life, the prohibition of torture, inhuman and degrading treatment, and security of the person.[128] The Court also issued a declaratory order that the petitioners' right to life, the prohibition of torture, inhuman and degrading treatment, the right to security of the person, the right to protection of the law, the right to equality and freedom from discrimination and the right to a remedy were violated during the 2007-2008 post-election violence, as a result of the failure of the government to protect these rights.[129]

This case is ground-breaking since it establishes a precedent whereby the state was found liable for a violation of its international and national human rights obligations towards its citizens with specific regard to the investigation and prosecution of sexual and gender-based violence-related crimes. It therefore holds the government to account for all the gaps and shortcomings in responding to incidences of sexual violence that occurred during the 2007-2008 post-election violence. Moreover, in terms of reparations the Court awarded four of the petitioners general damages of Kshs 4 million each for the violation of their constitutional rights. In future, other survivors can use this case to hold the government liable when it fails to investigate and prosecute sexual violence in any context, even outside the election cycle.

127 Constitutional Petition 112 of 2013.
128 As above.
129 As above.

5 Conclusion

The due diligence standard as elaborated by the UN Special Rapporteur on Violence against Women is useful in holding states accountable when they fail to fulfil their obligations to protect victims and punish perpetrators of sexual violence. Utilising the due diligence standard to interrogate state accountability for sexual violence has the potential of ensuring the full implementation of generalised obligations of prevention and compensation, alongside the effective realisation of existing objectives to protect and punish.[130] When evaluated against the due diligence standard as adopted for sexual violence cases, it is evident that Kenya did not meet its obligations to the 2007-2008 sexual violence victims and had shortcomings in fulfilling all four components of prevention, protection, punishment and reparations, as discussed above. To redress these shortcomings both state and non-state actors can consider some of the recommendations discussed hereafter.

5.1 Develop, implement, and monitor joint prevention mechanisms

Both state and non-state actors working on sexual violence at both the national and county level should collaborate in mapping prevention and response actors at both levels of government. They should then assess their institutional capacity to adequately support them both technically and financially to develop, implement and monitor prevention and response mechanisms ahead of any election cycle. These efforts can utilise the line ministry responsible for gender affairs as a secretariat since government ministries tend to have officers working in all levels of the administrative units and their officers can hence be effective and permanently present coordinators of sexual and gender-based violence cluster working groups in these units. Direct financial support can be given to non-state actors whereas both national and county governments can be supported to prioritise budgeting and the establishment of prevention and response mechanisms that can serve Kenyans even during the non-election period.

130 UN Doc E/CN.4/2006/61 (n 21).

5.2 Utilise existing community-based structures in developing effective protection mechanisms

Both the perpetrator and the survivor come from within the same community, especially in the context of election-related sexual violence. Protection mechanisms should therefore be geared towards ensuring that survivors are supported at the community level to report violations and access medical treatment. It would hence be beneficial to involve the communities in the planning, implementation, monitoring and evaluation of all sexual violence protection mechanisms. Involvement should go beyond having community representatives on planning committees dominated by government and civil society officials.

Counties can use a model such as the public participation framework currently utilised for planning, implementation, monitoring and evaluation of county development programmes. This is specifically provided for in article 10(2)(a) and the Fourth Schedule Part 2(14) of the Constitution and is stipulated as a function of the county government.

This would ensure that participation in these forums is purely voluntary with no benefit whatsoever accruing to members because of their engagement, hence eliminating rent seekers and coming up with a truly and robustly community-based protection mechanism specifically tailored to the needs of the community.

5.3 Training, internalisation and implementation of international human rights standards by law enforcement officers

The capacity building of police, prosecutors and magistrates using a multi-sectoral approach (joint trainings) would be best placed in terms of having them train on, internalise and implement international human rights standards. This can be done through support to existing training institutions in this sector such as the Judicial Training Institute (JTI). Partners can offer both technical and financial support to the JTI to develop a curriculum for such a joint training specific to gender-based violence and undertake to train on the same to the various actors in the criminal justice system.

For the internalisation of human rights standards, particularly in the police, continuous engagement is required. This can be done alongside continuously sensitising communities so that they know about sexual violence in general and what to expect from the

investigative, prosecutorial and judicial agencies in terms of resolving such cases. This multi-sectoral approach involving engagement and capacitation of duty bearers, on the one hand, and engagement and sensitisation of the communities, on the other, contributes towards effectively combating sexual violence both in and outside the context of elections. The UN Special Rapporteur on Violence against Women argues that whereas international human rights law provides the guiding principles for state action, there should be alternative discussions and innovative strategies to eliminate sexual violence against women.[131] Therefore, both state and non-state actors must utilise a multiplicity of approaches in their interventions to prevent, protect, prosecute and compensate survivors of sexual violence.

131 As above.

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The right to privacy under the Constitution of Kenya and the criminalisation of consensual sex between same-sex adults

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Summary: *This article argues that the provisions of the Kenyan Penal Code (sections 162 and 165) criminalising consensual sex between partners of the same sex limit the right to privacy enshrined in article 31 of the Constitution of Kenya of 2010. This limitation is not justifiable according to the Bill of Rights limitation clause in article 24 of the Constitution. Article 45(2) of the Constitution, which provides for a right to 'marry a person of the opposite sex', also does not justify this limitation. Embracing the idea of an open and democratic society, the Constitution precludes the state from imposing upon the individual moral choices, provided that those choices do not harm others. Therefore, the decision whether or not consensual sex is moral must be left to the individual concerned. By refusing to declare sections 162 and 165 unconstitutional in 2019, the High Court of Kenya misinterpreted the Constitution and consequently failed in its mandate to uphold the right to privacy of homosexual persons in Kenya.*

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Key words: *right to privacy; Constitution of Kenya; rights of LGBT+ persons; open and democratic society; criminalisation of same-sex relationships; right to marry*

1 Introduction

Although afforded enhanced protection in the current Constitution promulgated in 2010,[1] the enjoyment of the right to privacy in Kenya is not free from controversy. One of the contentious issues is defining a demarcation between individual privacy and the state's obligation to safeguard the collective conception of morality. In its formulation, the right to privacy was not intended to protect only select categories of persons. As in the case of all rights espoused in the constitutional Bill of Rights, it remains inherent and owed to all irrespective of the sentiments of others.

In this article we seek to address the question of whether making consensual sex (both penetrative and non-penetrative) between consenting same-sex adults a criminal offence via sections 162 and 165 of the Penal Code is compatible with the right to privacy as enshrined in the Constitution of Kenya.[2] To this end, we first explain our approach against the background of the 'homosexuality is un-African' claims. We subsequently examine the historical protection of human rights in the independence Constitution of Kenya focusing on the deficiencies and challenges encountered during the pendency of that Constitution. We further discuss the clamour for a new Constitution and the expansive constitutional review process that led to the promulgation of the current Constitution in 2010. This background is important for understanding the origin, character and scope of two provisions, namely, article 31 of the Constitution providing for the right to privacy and article 24 setting out the requirements for the limitations of fundamental rights. We argue that the 'homosexuality is un-African' narrative is not capable of limiting the right to privacy. We also demonstrate that there is nothing in the drafting history of the Constitution of Kenya, 2010 that would mandate the imposition of criminal sanctions for consensual sex between same-sex adults. We show, rather, that the historical context in which this Constitution was enacted forms a solid basis for the ideas of an open and democratic society and the moral autonomy of the individual, to which the limitation clause of article 24 refers.

1 Constitution of the Republic of Kenya, 2010, http://kenyalaw.org/kl/index.php?id=398 (accessed 20 January 2020).

2 Penal Code Cap 63 of the laws of Kenya, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063 (accessed 20 January 2020).

After defining the scope of application of article 31, the article proceeds to examine whether the criminalisation of consensual sex between persons of the same sex, which limits the right to privacy, is justifiable under article 24. In this context we analyse the 'right to marry a person of the opposite sex' provided for in article 45(2). Finally, we confront our findings with the arguments advanced by the High Court of Kenya in the case of *EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)*[3] in 2019, in which the Court refused to declare sections 162 and 165 unconstitutional. Our aim, however, is not to review this judgment in full. We concentrate on the arguments that are relevant for the question addressed. We also leave aside the (important) questions of Kenya's international human rights obligations and prohibition of discrimination. Our focus is the Constitution of Kenya, 2010 and the right to privacy.

2 'Homosexuality is un-African'?

It is not uncommon to use the idea that homosexuality is un-African as a response to advocacy for lesbian, gay, bisexual and transgender (LGBT+) rights.[4] It is an offspring of a toxic transnational discourse with some actors pursuing unsavoury agendas.

To start with, the statement that homosexuality is un-African simply is not true. This is evidenced not only by the presence of African LGBT+ advocacy groups, but also by the research showing that African traditional religions tolerated homosexual practices.[5] As will be shown, the criminalisation of homosexual practices also is a colonial legacy. The recent invigoration of the anti-LGBT+ sentiments is attributable to the United States (US) renewal evangelical movements aligned to the neo-conservative right.[6] The 'homosexuality is un-African' narrative thus is a myth invented for political purposes.[7]

3 Petition 150 & 234 of 2016 (consolidated).

4 A Wahab "'Homosexuality/homophobia is un-African"? Un-mapping transnational discourses in the context of Uganda's Anti-Homosexuality Bill/Act' (2015) 63 *Journal of Homosexuality* 10; S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 165.

5 Tamale (n 4) 161.

6 JT Gathii 'Writing race and identity in a global context: What CRT and TWAIL can learn from each other' (2020) 67 *University of California Los Angeles Law Review* 24 with further references, https://ssrn.com/abstract=362034324 (accessed 20 January 2020); Wahab (n 4) 7 11; Tamale (n 4) 155.

7 According to Wahab (n 4) 10, Africa has become a battleground for the American culture wars.

The myth is gaining traction for a number of reasons. The first reason is the abuse of LGBT+ advocacy to portray Africans as 'exceptionally homophobic' and backward in order to support racist claims to moral superiority of whites and white hegemonic aspirations.[8] The disgraceful thinking of Africans as backward has a long tradition in the European thought[9] and is currently used to justify the US-American and European own securitisation narratives exemplified, among others, by exclusionary immigration policies.[10] As a consequence, it is not surprising that in the view of such racialised discourses about homophobia,[11] the LGBT+ rights advocacy may be regarded as an assault on the sovereignty of African states and a security threat[12] triggering securitised responses by African governments.[13] Second, the myth of the un-African nature of homosexuality may help African leaders to build up their legitimacy by positioning themselves as defenders of an invented traditional symbolic order against perceived threats of Western decadence. The legitimacy boost through defence of a symbolic order rather is a low-hanging fruit and helps to mask inadequacies in other areas of governance. Third, the myth is used to construct what Tamale calls 'hegemonic sexual discourse',[14] which facilitates the exercise of disciplinary power, by setting standards of 'correct' sexual behaviour, policing deviations from the same and marginalising those who do not comply.[15] This is the position of power which political and religious leaders are not disinclined to assume and cement by legal regulations.

The fact that the rights of LGBT+ persons are being weaponised in different ways domestically and in a transnational political discourse does not render those rights invalid. These discourses must not obscure the human rights dimension of the right to privacy or, in other words, while analysing the political dimension of anti-gay agendas, LGBT+ rights advocacy and responses to it one must not forget the individual person. The validity and scope of the right to privacy of LGBT+ persons in Kenya may be proved through a rigorous interpretation of the Kenyan Constitution, the legitimacy of which in

8 Wahab argues that the failures in protection of the rights of LGBT+ persons in Africa are 'the foil against which 'the West' and whites measure their legitimacy and value'; Wahab (n 4) 13. This attitude of 'the West' disregards its own persisting homophobia and its not too distant legacy of persecution of homosexuals.

9 See V Mudimbe *The invention of Africa: Gnosis, philosophy and the foundation of knowledge* (1988) 85-88 149.

10 Gathii (n 6) 24, Wahab (n 4) 26. On the immigration policies, see J Laine 'Ambiguous bordering practices at the EU's edges' in E Vallet & A Bissonnette (eds) *Borders and border walls: In-security, symbolism, vulnerabilities* (2021).

11 Wahab (n 4) 13.

12 Wahab (n 4) 2.

13 Wahab (n 4) 10.

14 Tamale (n 4) 170.

15 Tamale (n 4) 163 166.

Kenya is undisputed. Such a rigorous constitutional interpretation is the ambition of the present article.

3 The post-colonial journey to the 2010 Constitution of Kenya

Kenya attained its independence from British colonial rule on 1 June 1963. The independence Constitution was based on a settlement with the British. Kenya became a sovereign republic on 12 December 1964 by virtue of a constitutional amendment.[16] The Constitution was repeatedly amended to suit the evolving governance realities of the new state. Also entrenched in the Constitution was a chapter on the protection of fundamental rights and freedoms of the individual, with section 84 conferring the power of enforcement and protection on the High Court.[17] President Jomo Kenyatta became the founding leader of the new republic and he ascended into power with promises to stabilise and unite the new republic to forge a common future.[18] However, following an outbreak of riots over the death of a popular politician, the President resorted to authoritarian rule starting with a declaration of Kenya as a *de facto* one-party state in 1969. By this, President Kenyatta triggered a cycle of violation of human rights protections in the Constitution through political detainments, assassinations and enforced disappearances to stifle his opponents and potential threats until his death in office in 1978.[19]

Following the death of the founding President, the Vice-President, Daniel Arap Moi, ascended into the presidency with promises of a united country free of human rights abuses.[20] Adar and Munyae recount that these promises were short-lived because soon thereafter, in 1982 following a failed *coup* attempt, President Moi embarked on a 'centralisation and personalisation' of power by amending the Constitution through section 2(A) which designated Kenya from a *de facto* to a *de jure* one-party state. President Moi presided over gross human rights violations ranging from torture, detainments without trial, arbitrary arrests to the forcible exile of opponents and

16 LG Francheschi & PLO Lumumba *The Constitution of Kenya: A commentary* (2019) 214.

17 The Constitution of the Republic of Kenya 1963 (repealed), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf (accessed 30 January 2020).

18 C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in WO Oyugi et al (eds) *The politics of transition in Kenya from Kanu to Narc* (2003) 51.

19 Equal Rights Trust and Kenya Human Rights Commission *In the spirit of Harambee: Addressing discrimination and inequality in Kenya* (2012) 28.

20 KG Adar & IM Munyae 'Human rights abuse in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* 1.

critics of his authoritarian rule, during most of what would be his 24-year reign.[21] Notably, these violations often occurred within the confines of legislation (enacted to suit such purposes) and through state institutions.

The constitutional review process in Kenya began in the early 1990s with calls for the repeal of impugned section 2(A) and a return to multi-party politics to check the excesses of the executive arm of government.[22] This process, which spanned a number of years, was faced with many challenges including opposition from political parties and religious divides, but ultimately culminating in a number of drafts and two referenda. With the background of gross human rights violations in mind, the process to review the Constitution began through the enactment of the Constitution of Kenya Review Act in 1997 and the swearing in of the Constitution of Kenya Review Commission (CKRC). The Commission presided over constituency disseminations through the civic education of people in all constituencies and the collation of views across the country. The Commission came up with a draft in 2002, which was tabled before the National Constitutional Convention convened in Bomas of Kenya (a cultural centre in Nairobi). This culminated in the draft Constitution that would be known as the Bomas Draft. The Bomas Draft was further changed by the Parliamentary Select Committee on Constitutional Review into the Wako Draft (named after the Attorney-General at that time) which was rejected during the referendum held in 2005. The constitutional review process was relaunched in 2008 through the enactment of another Act, the Constitution of Kenya Review Act 2008, which formed a basis for the appointment of a Committee of Experts (CoE), both Kenyan and international.[23] The task of the Committee was very elaborate, starting with a thorough examination of the prior drafts, proposals and reports of the previous constitutional review processes and proceeded to further collate the views of Kenyans from diverse backgrounds on the enactment of a new draft Constitution.

To sum up, the drafts that were adopted during the constitution-making process include the Constitution of Kenya Review Commission (CKRC) Draft of 2002; the Bomas Draft (2004); the Proposed New Constitution (2005); and the CoE Draft which eventually was enacted as the 2010 Constitution, after some changes made by Parliament. The Constitution was approved in a referendum.

21 GK Kuria 'The rule of law in Kenya and the status of human rights – Interview' (1991) 16 *Yale Journal of International Law* 217.
22 PK Mbote & M Akech *Kenya: Justice sector and the rule of law* (2011) 33.
23 Equal Rights Trust and Kenya Human Rights Commission (n 19) 31.

Mbondenyi and Ambani[24] were of the view that the protective model imbued in the repealed Constitution for the protection of fundamental rights proved weak and ineffective as a result of the many exceptions and limitations as well as a weak and often disinclined judiciary. The 2010 Constitution is meant to be different. Accordingly, it entrenches a progressively comparative wider range of rights from civil, political to economic rights. One of the peculiar aspects entrenched in the Preamble to the Constitution as a symbol of the historical violation of human rights is the recognition of the ethnic, cultural and religious diversity of the people of Kenya as well as the aspirations of Kenyans for a government based on respect for human rights. Article 8 of the Constitution provides that there shall be no state religion in Kenya, and article 20 obligates all state authorities to the values that underlie an open and democratic society based on human dignity, equality, equity and freedom while implementing the Constitution's Bill of Rights. These principles are crucial for the present inquiry.

One of the factors that legitimises the Constitution of Kenya is the rigorous process of its drafting, which not only involved the selected commissioners and Committee of Experts members drawn from various disciplines and jurisdictions, but also various stakeholders such as clergymen, civil societies and citizens through various representations. It is these groups of persons that played a major role in the delicate sculpting of various articles of the Constitution to reflect the popular views of religion, culture, traditions and social norms. These discussions were carried out in various levels and stages spanning years, including constituency disseminations, expert reviews, and submissions of memoranda by interested persons to the Committee.[25]

4 Sections 162 and 165 of the Penal Code

4.1 Origin

The core legislations that touch on the right to privacy in the context of sexual relations in Kenya are the Penal Code and the Sexual Offences Act of 2006. The Penal Code is a legacy of the colonial regime in Kenya having been adapted from the Indian Penal Code of

24 MK Mbondenyi & JO Ambani *The new constitutional law of Kenya: Principles, governance and human rights* (2012) 155.

25 Committee of Experts on Constitutional Review, Final Report of the Committee of Experts on Constitutional Review (2010).

1866,[26] while the Sexual Offences Act is a recent statute enacted in 2006.[27] Of the two statutes, it is the Penal Code under sections 162 and 165 that defines and prescribes sanctions for acts which it terms as 'unnatural offences' and proceeds to pronounce them as against the 'order of nature'. Although the Penal Code has undergone a number of amendments to reflect change in social norms and morality, some of the provisions remain unchanged.

The Sexual Offences Act does not contain a provision similar to that contained in the Penal Code criminalising unnatural offences. However, it defines indecent acts under section 2 to mean acts that compel or induce contact with the genitalia of another to the exclusion of penetration.

4.2 Carnal knowledge against the order of nature

The Penal Code provision that limits the right to privacy of homosexual persons in Kenya prohibits sexual contact using the term 'unnatural offences'. Unnatural offences with respect to homosexual sex are defined as 'carnal knowledge against the order of nature'. Section 162 criminalises carnal knowledge against the order of nature as a felony attracting imprisonment of 14 years.

4.3 Grossly indecent practices

Further prohibited and criminalised in the text of section 165 as felony are acts termed as 'grossly indecent practices' between male persons either in public or privately. The penalty is seven years' imprisonment. While the Penal Code does not define the components of these acts, the High Court in *EG & 7 Others v Attorney-General*[28] adopted the definition of 'indecent practices' given in the text of the Sexual Offences Act 2006 to include all other acts that cause contact with genitalia to the exclusion of penetration.[29]

In a nutshell, according to Kenyan laws, penetrative sex between persons of the same sex may attract up to 14 years' imprisonment and non-penetrative sex up to five years.

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26 DE Sanders '377 and the unnatural afterlife of British colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* 1-10.

27 Sexual Offences Act 3 of 2006, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202006 (accessed 22 March 2020).

28 Petition 150 & 234 of 2016 (consolidated) (n 3).

29 Petition 150 & 234 of 2016 (n 3) 273.

4.4 Sections 162 and 165 as a political question

These provisions have been subjected to civil, political and judicial contention in Kenya with different parties advancing conflicting arguments. On the one hand, opponents of these provisions argue that they do not conform to the stipulated standards of human rights entrenched in the Constitution, as well as the international obligations that Kenya has with regard to respecting and protecting the rights of minority categories of persons.[30] On the other hand, the parties that incessantly uphold and advocate the formulation of even more stringent measures argue that such sexual relations should not be recognised or permitted to thrive in Kenya for being offensive to religion, culture and traditions,[31] which is in line with the 'homosexual is un-African' narrative explored above. The current Kenyan President, for example, stated that 'Kenya's cultural beliefs do not consider gay rights as human rights'.[32]

The opposing views, however, barely find their way into Parliament, since even those politicians who are not necessarily pursuing the 'homosexuality is un-African' agenda, generally consider the rights of LGBT+ persons to be a 'non-issue' or they prefer to remain politically safe by upholding what they think are the beliefs of a majority of the electorates.[33] Also the judiciary, which has the mandate to safeguard against the encroachment of human rights (article 165 of the Constitution), failed to protect the right to privacy in its holding in *EG & 7 Others v Attorney-General* where it gave a broad deference to the legislator on the continuing penalisation of consensual sex between adults of the same sex. By so doing, the Court delegated the role of reviewing the impugned sections 162 and 165 of the Penal Code and the right to privacy to a political stalemate in Parliament. But is it a right approach? Even the lowest level of judicial scrutiny – the rational basis test[34] – presupposes a rational connection between the impugned regulation (sections 162 and 165 of the Penal Code) limiting an individual right (a right to privacy, for example) and a constitutionally admissible purpose of such limitation. As will be shown, there is no such connection here. First, an official conception of the order of nature alone may

30 Amnesty International *Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa* (2013).
31 Kenya Human Rights Commission *The outlawed amongst us: A study of the LGBT+I community's search for equality and non-discrimination in Kenya* (2011).
32 Kenya Human Rights Commission (n 31) 5.1.5.
33 Independent Advisory Group on Country Information *Country policy and information note Kenya: Sexual orientation and gender identity and expression* (2020) 22.
34 See K Roosevelt 'Constitutional calcification: How the law becomes what the court does' (2005) 91 *Virginia Law Review* 1649.

not serve as a valid limitation purpose in an open and democratic society. Second, there is no rational connection between protecting a certain family model, the constitutional entrenchment of which is questionable, and criminalising consensual homosexual sex between adults.

Moreover, even if the argument made here works on the lowest level of judicial scrutiny, one could even argue that a judge deciding on the constitutionality of sections 162 and 165 should adopt a higher level. The level of deference towards the legislator that the judges should apply while reviewing legislation is one of the most debated problems of constitutional law. Given the direct democratic legitimacy of the legislator, the judge may not simply replace the latter's assessment of constitutionality of the law passed with her own, an issue discussed as a 'counter-majoritarian difficulty'. One of the common methods of addressing the majoritarian difficulty is varying the levels of judicial scrutiny depending on the types of cases.[35] According to Ely, the judges are best positioned to police the quality of a political decision-making process and not the results of the same. Based on this, the level of scrutiny would be higher, if channels of political change are choked and minorities are systematically disadvantaged or denied a voice. [36] One may argue that this is precisely the effect of sections 162 and 165 when it comes to actually giving a voice to the LGBT community in Kenya.

5 Right to privacy (article 31)

5.1 Importance of the right to privacy

The right to privacy is a quintessential right of the individual as it secures the sense of humanity allowing the individual to not only live but also to thrive in the immutable facets of life, such as personality, consciousness, character, belief and social interaction with other humans as well as the environment around him or her.[37] Warren and Brandeis[38] argued that it is important to protect privacy as it is inextricably linked to other human rights, inter alia, the rights to life, dignity, health, ownership of property, enjoyment of family life, information and communication. Therefore, a failure to respect and protect the right to privacy can lead to devastating effects to the

35 As above.
36 JH Ely *Democracy and distrust. A theory of judicial review* (1980) 181-182.
37 J Rubenfeld 'The right to privacy' (1989)102 *Harvard Law Review* 739.
38 SD Warren & LD Brandeis 'Right to privacy' (1890) 4 *Harvard Law Review* 193.

individual. Recognising and protecting it as being inherent in all humankind protects against any arbitrary or unwanted interference either by other individuals or the state in the sexual sphere and moral choices of a person. In a recent ruling, the High Court of Kenya in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others*[39] depicted the right to privacy as being 'central to the protection of human dignity' and forming 'the basis of any democratic society'.[40] It is also presumed to 'support and reinforce other rights, such as freedom of expression, information, and association'. Moreover, in the particular Kenyan context, the entrenchment of the right to privacy is largely a lesson learned from the past power abuses.

5.2 The right to privacy in the drafting process of the Constitution

During the drafting process of the 2010 Constitution, the CoE endeavoured to incorporate the right to privacy in a manner that it could be limited only by law, and 'only to the extent that the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[41] The right to privacy was envisioned to contain a general protection to individuals from state agencies as well as from private persons. It was meant to cover protection for family, property, private information and communication. Notably, according to the Commission on Constitutional Review[42] the formulation of the content of this right did not elicit much debate during the drafting process as there was general consensus that the repealed Constitution was inadequate in its provision and enforcement of the contents of the right to privacy.

The inclusion of this right in the text of the Constitution, therefore, was not an afterthought. Indeed, privacy as a right in Kenya bears a deeply-disturbing historical account of an era of extra-judicial surveillance, arbitrary intrusion in private lives and property of individuals, and violation of rights that culminated even in political assassinations. It resulted from the systemic failures and the consequent atrocities committed largely by state machineries during the tenure of the repealed Constitution.

39 eKLR (2018).
40 *Kenya Human Rights Commission* (n 40) 52.
41 Art 24 Constitution of Kenya.
42 Commission on Constitutional Review, Document III (An Annotated Version of the Draft Bill: Volume II (2003).

5.3 Scope of the right to privacy: What is protected?

The present text of article 31 extends the protection of the right to privacy to persons, their property, private information and communication against any search, seizure, unnecessary disclosure or infringement. Noteworthy in the context of sections 162 and 165 of the Penal Code is article 31(c), which is the right to have information relating to the family or private affairs not unnecessarily required or revealed. In essence, the postulation of this is that the law upholds the right to privacy in family life as well as in what it terms 'private affairs', which in the ordinary meaning denotes 'relating or belonging to an individual as opposed to the public'.[43]

Consequent to the protection of the right to privacy in article 31 of the Constitution, a number of cases have been adjudicated in Kenyan courts on the interpretation, permutations and implications of interference with this right. The cases of *Okiya Omtatah Okoiti v Communications Authority of Kenya*[44] and *Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others*[45] were founded upon similar issues on whether the proposed Device Management System (DMS) by the government threatened or violated the right to privacy of subscribers as it was contrary to the constitutional protection. In adjudicating the matter, the Court subjected the proposed limitation to the test of article 24 premised on the notion that although unpopular, should the intended encroachment on privacy be found reasonable and just, it would be lawful.[46] The Court dissected the interpretation, the content of the right to privacy, and its importance in the preservation of the fundamental facets of human personality and dignity. It conclusively opined that protecting the right to privacy necessarily dictated that there be non-interference with personal choices.[47] In view of those definitions, it may be concluded that also the choice of homosexual persons to engage in consensual sex or relationships falls within the scope of the protection of article 31. Sections 162 and 165 of the Penal Code, therefore, impose a limitation on the right to privacy. It could be added that according to article 20(b) of the Constitution the rights contained in the Bill of Rights shall be enjoyed by 'every person'.

43 BA Garner & HC Black *Black's law dictionary* (2009).
44 [2018] eKLR.
45 *Kenya Human Rights Commission* (n 40).
46 *Okiya Omtatah Okoiti* (n 45) para78.
47 *Okiya Omtatah Okoiti* (n 45) para 75.

Significantly, the Court restated that 'human rights enjoy a *prima facie*, presumptive inviolability', and often rank over notions of public interest.[48] This is of particular interest to the question of the violation of the right to privacy to homosexual persons in Kenya, given that most of the arguments advanced for upholding the impugned penal provisions are founded on notions of public and religious interests.

6 Limitations to the right of privacy

6.1 Characteristics of the limitation clause of article 24

Similar to most of the rights protected in the Constitution, the right to privacy is not absolute. To distinguish the protection of human rights in the 2010 Constitution from that of the repealed Constitution, the CoE designed a system that not only specified the rights to be protected but ensured the respect thereof by minimising possibilities of violation. This culminated in a protection that could be traversed only through legal measures and standards of reasonableness compatible with democratic principles and the rule of law. By this, the drafters ensured that the Constitution would not only pronounce human rights as unequivocally inalienable but also indivisible and subject only to legal limitations. Article 24 sets out the requirements that any limitation of the Bill of Rights (including the right to privacy) must meet cumulatively, otherwise the limitation would be unlawful. Article 24 is the only provision in the 2010 Constitution that provides for the legal limitation of the non-absolute human rights and, compared to the repealed Constitution, is a 'progressive clause'.[49]

Specifically, article 24 of the Constitution requires that a limitation to the right to privacy be designed taking into consideration the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that such enjoyment does not prejudice the rights of others; and whether less restrictive means exist to achieve the purpose. All these considerations must be analysed against the frame of an open and democratic society based on human dignity, equality and freedom. Sections 162 and 165 of the Penal Code, therefore, must be examined in compliance with this standard.

48 *Okiya Omtatah Okoiti* (n 45) para 79.
49 Mbondenyi & Ambani (n 24) 208.

6.2 Right to marry a person of the opposite sex in article 45(2): The drafting history

Article 45(2) states that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. The statement is made in the context of the protection of the family. According to article 45(1), the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state. Before examining article 45(2) as providing for a purpose for the limitation of the right to privacy through sections 162 and 165 of the Penal Code, we shed some light on its drafting history.

The provision for the protection to family formed the subject of debate during the drafting of the CKRC Draft. Article 38 of original text of the Draft (version from 2003) provided for the right to marriage of 'consenting adults of at least 18 years of age', and a right to found a family. According to the *Compendium of public comments* compiled by the CKRC, this phrasing elicited some opposition during the dissemination to the public, particularly from Kenyan churches that made strong recommendations that the provision on the right to marry expressly read 'person of the opposite sex' to protect against what they termed as 'foreign concepts of familyhood that have perverted this institution in other parts of the world'.[50] During the expert review of the draft, a Commission legal expert recommended that the text be formulated in a manner that would prevent ambiguity and erroneous interpretation. The expert in particular recommended that the concept of a family 'should be clearly defined', in order to make clear whether it includes extended family, polygamous family, sororate unions and – this is particularly relevant here – heterosexual unions and same-sex union.

Other sentiments gathered from the constituency disseminations and included in the *Compendium* were two newspaper articles. One contributor, Kabukuru, claimed that the original formulation that allowed consenting adults to marry (without the 'opposite sex' qualifier) would 'probably champion sexual orientations',[51] while another, Kirui, claimed that 'a marriage or a family unit should clearly stipulate that it does not include a gay one. This careless provision

50 Commission on Constitutional Review, Document II: Compendium of Public Comments on the Draft Bill to Alter the Constitution: Volume II (2003).

51 FM Kabukuru 'Recommendations during constituency disseminations' *The People* (Nairobi) 27 October 2002.

could destroy a God-given, sacred institution, and so it should be re-written.'[52]

The deliberations noted in the *Compendium* include no sentiments and opinions of proponents of gay marriages or families. Ultimately, in 2005, these deliberations led to the amendment of the text to the current formulation of article 45 which recognises the family institution as the 'natural and fundamental unit of society', and specifies that 'every adult has a right to marry a person of the opposite sex, based on the free consent of the parties'.[53]

By adding the words 'a person of the opposite sex' the CKRC took up the recommendation submitted by the churches of Kenya. However, it is an open question whether, by so doing, it also shared the churches' intentions. Most notably, the CKRC did not follow the expert recommendation and did not define the family, for example, stating explicitly that marriage is the union of a man and (one) women or expressly excluding same-sex marriages as proposed in the newspaper article of which CKRC took note. One may thus regard the current formulation as a compromise formula. Article 45(2) does not proclaim an unqualified right to marry and in so doing does not 'champion' same-sex marriages, as feared by the dissemination feedback quoted in the *Compendium*. On the other hand, it also does not define the family, leaving it for the decision to be made by the legislator, whether or not to establish a right to marry a person of the same sex. According to article 19(3)(b) of the Constitution, the legislator is free to confer upon individuals rights that go beyond those enshrined in the Constitution, as long as they do not contravene the same.

It follows that the preparatory works are not conclusive, whether a homosexual marriage should be prohibited by the Constitution, and the answer to this question should be given by interpreting the text of the Constitution as it is. However, what can be said with certainty is that debates documented in the *Compendium* do not touch upon the question of whether informal unions of persons of the same sex should be prohibited. Apparently, a prohibition of such relationships was not considered in the drafting process, which accordingly does not suggest that such prohibition can be read into article 45(2).

52 K Kirui 'Recommendations during constituency disseminations' *Kenya Times* (Nairobi) 12 November 2002.
53 Art 45 Constitution of Kenya.

While coming up with final draft in 2010, the CoE, having received close to 40 000 views from various stakeholders,[54] identified a number of issues which it deemed contentious. Notably, the questions of family and marriage were not in this group.

6.3 Protection of a family model enshrined in article 45(2): A valid limitation purpose?

It is doubtful if there is any relation between consensual sex between partners of the same sex and article 45(2) of the Constitution. The provision singles out its one aspect of the privacy, namely, the right to marry a person of the opposite sex, and puts it under special constitutional protection. Hence, article 45(2) reinforces the guarantee of article 31, rather than limiting it. Accordingly, there also is no basis for a claim that article 45(2) is a constitutional ban on same-sex marriages. The right to enter into a relationship – heterosexual or homosexual – is an expression of the right to privacy protected by article 31. However, it is only a marriage between persons of the opposite sex and the right to enter into such a marriage to which Article 45 accords *constitutional* protection. As Franchesci and Lumumba[55] explain, same-sex unions do not trigger the constitution of a family within the meaning of article 45, as same-sex unions do not have 'any special relationship to bearing and rearing children'.[56] However, even accepting these reasons for the constitutional protection and recognition of a family based on a heterosexual marriage does not mean that the legislator may not allow persons of the same sex to get married. Of course, such a marriage and a family thus established would not enjoy the *constitutional* protection by article 45(2) and the decisions in this regard will be at the discretion of the legislator. Therefore, it cannot be said that the Constitution promotes homosexual marriages, which was raised as a point of concern at the drafting stage. By no means, however, can the recognition and protection granted to the family grounded on a heterosexual marriage be construed as a ban on homosexual relationships of any kind, especially the informal ones, and even less as a valid reason, or even a constitutional requirement, to penalise such relationships. Franchesci and Lumumba[57] who are, however, of the opinion that article 45(2) precludes homosexual marriages, point out that such 'relationships or unions may be considered under a different heading' and stress that the constitutional stipulation may

54 Committee of Experts on Constitutional Review, Final Report of the Committee of Experts on Constitutional Review (2010).
55 Franchesci & Lumumba (n 16) 214.
56 Franchesci & Lumumba 211.
57 As above.

not be construed as condoning 'homophobia or any related type of hatred that may lead to discrimination of any kind'.[58] Indeed, even assuming that article 45(2) introduces a constitutional ban on homosexual marriages or formal homosexual relationships (which does not seem to be the case) one cannot logically make an *a fortiori* claim that if the Constitution prohibits 'more' – the formal homosexual relationships – it also prohibits 'less', namely, the informal ones.

6.4 Justifiability in an open and democratic society based on human dignity, equality and freedom

In the Third Periodic Report to the Human Rights Committee, the Kenyan government submitted that 'Kenya may not decriminalise same-sex unions at this stage as such acts are considered as taboo and offences against the order of nature which are repugnant to cultural values and morality'.[59]As explained, article 45(2) may not be styled up to a constitutional expression of some official conception of the order of nature but it is worth examining whether a conception of the order of nature as such could serve a limitation purpose in light of article 24. Taking this path of reasoning would mean that the state positions itself as a guardian of such a conception which encapsulates some values and morality that the Third Periodic Report mentions, but fails to define. As a deontological category, values may be defined as ideas of what is right and what is wrong. Accordingly, the 'value' which the state protects by sections 162 and 165 of the Penal Code would be that it is wrong to engage in homosexual sex. One may even go further and assume that since the core expression of homosexuality is considered wrong, the homosexuality itself is also considered wrong. Hence, the 'order of nature' which the legislator seeks to uphold and enforce in the Penal Code is an order, in which homosexuality is a wrong thing. This is the moral choice which the state makes. The choice echoes the 'homosexuality is un-African' narrative which is a myth and a political manipulation.

The crucial question is whether the Constitution confers upon the state the entitlement to make such choices. Obviously, it cannot be argued that the state is not entitled to make any moral choices at all. The legal system is a reflection of morality, for instance, the criminalisation of manslaughter is a reflection of the moral choice that it is wrong to take somebody's life. But are there moral choices

58 As above.
59 Government of Kenya Third Periodic Report to the Human Rights Committee (2010) para 86.

which should be left to individuals exclusively? Articles 31 and 24 of the Constitution suggest that there indeed are such choices, and the choice whether being homosexual is a right or wrong thing belongs precisely to this category.

As stated, article 31 presupposes that there are some individual choices with which the state cannot interfere. A society that is 'open and democratic' as provided for in article 24 and the values of which the courts are obliged to promote according to article 20 is a society that allows for different moral choices of individuals or at least tolerates them. There must, therefore, be some space for the moral autonomy of the individual as an expression of freedom which article 24 invokes. Once admitted that there are moral choices that individuals are entitled to make on their own, the boundary of this moral autonomy is the distinction between the individual and the common. Dworkin[60] underscores that the respect for moral autonomy is a crucial condition for a legitimate exercise of political power in a democracy, since only those who are treated as genuine members of a community may be legitimately expected to comply with the majority decisions. No member of the community may thus be required to sacrifice essential elements of the control of his or her own life. Is one's own sexuality not such an essential element? A society that requires from the individual to make such a sacrifice would be neither an open nor a democratic society. Therefore, the limitation clause of article 24 cannot be used to suppress individual moral choices that have no bearing on others or the conduct of public affairs that are of concern for all. A decision to engage in consensual homosexual sex is such a choice. Mill calls this rule the 'harm principle'.[61] The idea is traceable to John Locke, for whom 'naturally equal and independent men'[62] agree to subject themselves to political power for a certain purpose, namely, to preserve property, life, liberty and possessions from other men.[63] Such a government necessarily is a limited government of which the power, as Locke explicitly observes, does not encompass an individual's private judgments.[64]

This is the idea of a democratic society, which the High Court of Kenya invoked in one of the previous judgments. In *Eric Gitari*

60 R Dworkin *Freedom's law. The moral reading of the American Constitution* (1997) 22-25.
61 JS Mill *On liberty* (1859), https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf (accessed 16 April 2020).
62 J Locke *Second treatise on government* (1690) para 95, https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf (accessed 20 April 2020).
63 Locke (n 64) 13.
64 As above.

v Non-Governmental Organisations Co-ordination Board & 4 Others,[65] decided in 2015, the High Court ruled that a refusal to register a non-governmental organisation (NGO) advocating the rights of LGBT+ persons was unconstitutional. The Court observed that 'in a representative democracy, and by the very act of adopting and accepting the Constitution, the state is restricted from determining which convictions and moral judgments are tolerable'. [66]

Allowing the state to decide that it is (morally) wrong to be homosexual and enforce this choice through penal provisions has consequences that are not compatible with the notion of human dignity. Human dignity is not only to be respected and protected by the state (article 28 of the Constitution) but it is also according to article 24 a yardstick for the admissibility of the limitation to the Bill of Rights, including the right to privacy. Protection of dignity implies that the state should treat the individual as an end in itself, rather than a means towards other ends.[67] This is well illustrated by the High Court judgment in *COL & Another v Resident Magistrate*,[68] in which the judge rejected the petitioners' contention that an examination of the anus against the will of the applicants would amount to 'an affront to human dignity, cruel, inhuman and degrading treatment'.[69] According to the judge, such an examination was the only way in which to establish whether there had been 'anal sex'.[70] The answer to this question was necessary to decide whether the petitioners had committed the crime envisaged in section 162 of the Penal Code .[71] Here, the state's drive to enforce a moral choice that being a homosexual is wrong led to a cruel deprivation of the core of one's intimacy. Moreover, the cruelty and disrespect of the most intimate sphere of an individual was portrayed as legitimate as it was the only way in which to enforce a certain conception of the order of nature. Paramount importance was attached to what the state thinks is 'natural'. Allowing this to happen means treating a human being as an instrument of enforcement and not as an end in itself. This goes against the idea of human dignity. The case sheds light on the link between dignity and privacy mentioned earlier.

The cited case proved it impossible for a state to uphold dignity and, at the same time, usurp moral choices that do not impact on

65 [2015] eKLR.
66 *Gitari* (n 67) 88.
67 A Narrain 'Brazil, India, South Africa: Transformative constitutions and their role in LGBT+ struggles' (2014) 20 *SUR International Journal on Human Rights* 151.
68 [2016] eKLR.
69 *COL* (n 70) 45.
70 *COL* (n 70) 53.
71 *COL* (n 70) 51.

individuals other than those whom those choices concern. What follows is that the choice of whether or not being homosexual is moral must be left to every individual and not made by the state. Otherwise, the human being becomes a tool of an ideology, which is at odds with the idea of an open and democratic society based on human dignity, equality and freedom and the lessons learned from the past human rights abuses. The limitation of the right to privacy enshrined in article 31 based on the official idea that homosexuality is wrong thus cannot pass the limitation test of article 24. The idea of an open and democratic society is an idea that allows individuals to hold different opinions about what the order of nature is and whether homosexuality belongs to it. It does not allow for hegemonic discourses on sexuality. Accordingly, sections 162 and 165 of the Penal Code encroach upon the right of privacy guaranteed in article 31 of the Constitution and this encroachment cannot be justified in an open and democratic society based on human dignity, equality and freedom, as article 24 of the Constitution requires. Those provisions, therefore, are a violation of the Constitution of Kenya.

7 The 2019 judgment on the constitutionality of sections 162 and 165 of the Penal Code

The Kenyan High Court is tasked to adjudicate upon any matters that touch on the interpretation and/or application of human rights in articles 26 to 57 of the Constitution. It is in the performance of this mandate that *EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)*[72] was instituted to adjudicate on the constitutionality of sections 162 and 165 of the Penal Code.

When called upon to interrogate the constitutionality of sections 162 and 165 for reasons of vagueness and uncertainty against article 31 of the Constitution, the High Court proceeded to an elaborate definition of terms using both judicial precedents and law dictionaries.[73] In its interpretation the Court restated the values and principles entrenched in the Constitution as a reflection of the history, economy, socio-cultural and political realities and aspirations of Kenyans. The Court went on to interpret article 31 in connection with article 45 (2) justifying it with the need of systemic interpretation. As the Court put it, 'the entire Constitution has to be read as an integrated whole'.[74] Following this, the Court declined to declare

72 Petition 150 & 234 of 2016 (consolidated) (n 3).
73 Petition 150 & 234 of 2016 (n 3) 242-408.
74 Petition 150 & 234 of 2016 404.

sections 162 and 165 of the Penal Code unconstitutional, as that would contradict the protection accorded to the family institution in the Constitution and thereby 'defeat the purpose and spirit of article 45(2) of the Constitution'.[75] The Court held that 'decriminalising same-sex sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of article 45(2)'.[76] Claiming the 'clear wording of article 45(2)', the Court refused to address the question of whether the impugned sections satisfy the requirements of the limitation clause of article 24 of the Constitution and, in particular, whether the limitation of the right to privacy is 'justifiable in an open and democratic society based on human dignity'.[77]

Clearly, the High Court does not examine the impugned sections of the Penal Code as a limitation to the right to privacy. By refusing to address the clause of article 24, the Court seems to suggest that homosexual relationships simply fall outside the scope of protection of article 31. From the fact that 'article 45(2) only recognises marriage between adult persons of the opposite sex',[78] the Court deduces that this norm serves not even as an exception to article 31, but rather as a carve-out. Homosexual relationships, the Court claims, 'whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution'.[79] From the allegedly holistic interpretation of the Constitution[80] the Court seems to leave out the commitment to 'the values that underlie open and democratic society' which it is obliged to promote according to article 20(4)(a). The Court does not discuss this provision.

For attaching such far-reaching consequences to article 45(2), the Court gives the following explanation:[81]

> We remind ourselves that in interpreting the Constitution, the Article should not be 'unduly strained' and we should avoid 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene', which includes the political and constitutional history leading up to the enactment of a particular provision. We have already referred to the historical context of the constitution making process and the fact that marriage union was reserved for adults of the opposite sex.

75 Petition 150 & 234 of 2016 400.
76 Petition 150 & 234 of 2016 396.
77 Petition 150 & 234 of 2016 401.
78 Petition 150 & 234 of 2016 396.
79 As above.
80 The Court stresses that 'the entire Constitution has to be read as an integrated whole'; Petition 150 & 234 of 2016 (n 3) 404.
81 Petition 150 & 234 of 2016 (n 3) 392.

The Court adds that 'throughout the discussion, we have not come across a country that has a provision the equivalent of our Article 45(2) and has decriminalised similar provisions'.[82] In this regard it can be noted that, for example, the 1997 Constitution of Poland outrightly defines marriage as a 'union between a man and a woman', while the Kenyan Constitution does not do so. Yet, in Poland homosexual consensual sex has since 1932 been decriminalised. [83]

The Court unduly magnifies article 45(2) to a ban of any sexual relationship between persons of the same sex. To support this conclusion, the Court insists on clarity of the wording and meaning of article 45(2). However, as argued in the previous parts, article 45(2) conveys a very different meaning.

The idea of a carve-out is an unusual argument in constitutional law. The Court is not consistent in applying this. While invoking the 'tenor and spirit', the holistic interpretation of the Constitution and even explicitly distancing itself from 'excessive peering at the language', the Court clearly does not look at articles 31 and 45(2) as a rule and a carve-out, but as a conflict of values which it seeks to resolve. Yet, if a conflict of values had existed between the values enshrined in article 31 and those in article 45(2), it should have been resolved through balancing, for which article 24 provides a test. It is a test that the Court is keen to avoid. It is also a test that sections 162 and 165, as argued, cannot pass.

In this case, however, a conflict of values does not even exist. The Court misconstrues the relationship between articles 31 and 45(2). As explained in part 6.3 of the present article, article 45(2) does not limit the right to privacy in article 31, but reinforces it by placing its one particular aspect – the right to marry a person of the opposite sex – under special protection.

To sum up, the Court's argument is based on a multi-layered misinterpretation of the Constitution. First, it wrongly presents article 45(2) as a carve-out in relation to article 31, whereas the rights of article 31 may be limited only according to the requirements of article 24. The latter norm provides that the limitation must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Second, the Court undervalues the idea of the open and democratic society, for it allows to enforce an official conception of morals in an area where such choices must be

82 Petition 150 & 234 of 2016 (n 3) 396.
83 *Journal of Laws of the Republic of Poland* 1932, 60 item 571.

left to the individual. Third, the Court fails to establish the necessary rational connection between the limitation of the right to privacy (the criminalisation of consensual sex between same-sex adults) and a legitimate purpose for this limitation (the 'reasonableness' test of article 24) and, as such, a legitimate purpose simply is missing. The extra-constitutional narrative that 'homosexuality is un-African' – or any version thereof – may not serve as such a purpose. Imposing it upon individuals under a threat of criminal sanctions would amount to the imposition of moral choices, already outlawed by the idea of an open and democratic society and the moral independence of the individual on which such a society necessarily is established. Whether sexuality is African or not African is not more than a matter of political opinion which in a democratic society may be debated, but never imposed or used to wield power over minorities and marginalise them. Also, the 'political and constitutional history' and the 'tenor and spirit' of the Constitution, which the court invokes as a legitimate purpose of the limitation of the right to privacy, point rather in the opposite direction than the court suggests. Born out of a struggle against an authoritarian regime, the abuse of power and the clamour for freedom, the Constitution with its extensive human right guarantees hardly envisages the individual as needy of moral guidance by the politicians. In addition, the drafting history of article 45(2) does not warrant the conclusion that the norm was meant to criminalise not formalised homosexual relationships, neither does the safeguarding of the right to marry a person of the opposite sex enshrined in this norm require or even mandate such a step.

The judgment can also be looked at from the perspective of judicial policy. After years of subjugation, the Kenyan judiciary has only begun to reinstate its assertiveness towards other branches of government. The annulment of the 2017 presidential election by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* is its most prominent,[84] but not the only, example. One may wonder whether the Court did not want to risk the position of the judiciary by clashing with the legislator over a contentious issue without having the backing of the majority of the population. Of course, given that human rights are designed precisely to protect the minorities, the judgment cannot be justified with judicial policy.

84 [2017] eKLR.

8 Conclusion

This article has noted that Kenya's Penal Code violates the right to privacy of homosexual persons as protected by the Kenyan Constitution. It notes that the current Sexual Offences Act enacted in 2006, which ought to be a reflection of evolved beliefs and morality, does not contain penal provisions similar to those in the Penal Code that are an inheritance of colonialism. Further, the article noted that certain individual traits and choices should not be the basis of deciding who merits the enjoyment of human rights and, thus, the protection of the law. Any purported limitation of human rights other than through the test set in article 24 of the Constitution is not permissible.

According to the Kenyan Constitution every person has the right to enjoy privacy in their person and property. The Constitution embraces the idea of an open and democratic society, in which every person has a right to make his or her own moral choices as long as these choices do not impact on the freedom of others. This includes the freedom to decide on cultural and religious standards for one's own sexuality. Given the recognition of Kenya as a secular state, purportedly religious and cultural arguments that propagate intrusion into the lives of homosexual persons under the guise of the 'majority' have no legal basis. In particular, such intrusion is not supported by article 45(2). Also, it cannot be legitimised by a hegemonic sexual discourse rooted in the myth of 'homosexuality is un-African'. As has been demonstrated, the Constitution is not only the fruit of a constitution-making process, the inclusiveness of which is unprecedented, but also a lesson learned from past injustices. It is a Constitution meant to transform the state and inspire Kenyans to embrace the diversity of the culture, beliefs and morals of its people while keeping pace with the dynamic nature of the society.

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The Administration of Criminal Justice Act, 2015 as a harbinger for the elimination of unlawful detention in Nigeria

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Summary: *Sections 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) guarantee the rights to dignity of the person, personal liberty and freedom of movement. These rights connote that no one shall be arbitrarily arrested; anyone arrested shall be brought before a court of competent jurisdiction within a reasonable time, otherwise such detention is unlawful; where a person is lawfully detained, it shall be under humane conditions. Despite these constitutional safeguards, people continue to be detained in detention centres beyond the permissible periods without an order of court and in inhumane conditions. Thus, unlawful detention is one of the challenges confronting the administration of the criminal justice sector in Nigeria. In 2015 the National Assembly, in a bid to address the challenges in the sector, particularly unlawful and inhumane detention, enacted the Administration of Criminal Justice Act (ACJA) which is generally perceived as revolutionary legislation owing to provisions such as sections 29, 33 and 34 thereof. These sections require the chief judges of the various High Courts to appoint a judge or magistrate to visit detention centres at least once in a month to review cases of unlawful*

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detention and awaiting trial detainees. This article adopts a doctrinal research methodology in examining the impact of these provisions in overcoming the menace of unlawful detention in Nigeria. It examines the challenges that may confront the implementation of these sections of the Act, such as administrative bottlenecks and unscrupulous attitudes of the personnel of the various detention centres. The article makes vital recommendations on how to overcome the challenges of taming the negative tides of unlawful detention in Nigeria.

Key words: *Constitution; criminal justice system; detention centres; magistrate; Nigeria*

1 Introduction

Domestic and international legal frameworks recognise the fundamental rights of freedom of movement, personal liberty and dignity of the person.[1] These rights, like others,[2] are inherent and inviolable inuring to every human being whose humanity is not in question and, therefore, ought to be respected by all and sundry.[3] Their creation or existence is not accredited to any human institution or person but bequeathed by nature.[4] Their existence is merely recognised by their inclusion in the various statutes, which makes them immutable to the extent of the immutability of the statute, particularly the Constitution.[5] The enjoyment of these rights is not

1 Eg, both the 1999 CFRN in secs 34, 35 and 41, the Universal Declaration of Human Rights in arts 4, 5 and 9 as well as the African Charter on Human and Peoples' Rights in arts 5, 6 and 12 recognise the rights of freedom of movement, liberty and dignity of the person of all individuals.

2 Other rights are the rights to life, to freedom from discrimination, to freedom of expression, to freedom of religion and to own property.

3 MO Imasogie 'Human rights, women's rights: So long a journey' 2-3 *Bowen University Inaugural Lecture Series* 3, presented on 30 November 2017, Chris Alabi Lecture Theatre, Iwo, Nigeria.

4 AO Bamidele *Human rights, and the new world order: Universality, acceptability and human diversity* (1997) 7.

5 *Ransome Kuti v AG Federation* (1988) 2 NWLR (pt 6) 211, where Kayode Eso JSC (as he then was), elaborating on the meaning of human rights, states that '[h]uman rights are rights that stand above the ordinary laws of the land; and which in fact are an antecedent of political society itself. It is a primary condition to civilised existence, and what has been done by the Constitution since independence is to have these rights enshrined in the Constitution so that the right could be 'immutable' to the extent of the non-immutability of the Constitution itself. The very specificity of the concept of 'human rights' is that they belong to the individual in his quality as a human being, who cannot be deprived of his substance in any circumstances. Human rights are thus intrinsic to the human condition. Human rights refer to the concept or belief that every member of the human race irrespective of age, sex, tribe, colour, religion, nationality, creed or any human distinguishing factor has a set of basic claims by virtue of his humanness. The almighty single qualification to the enjoyment or entitlement to human rights is being human or humanness.'

absolute, sacrosanct or untrammelled as under limited permissible circumstances, their exploitation may be sequestrated.[6] The freedom of movement and right to dignity of the person requires that, where a person is apprehended for allegedly having committed an offence, the person, pending an appearance before a court of competent jurisdiction, is not subjected to inhuman and degrading treatment.[7] No one may be incarcerated beyond the latitude provided for in section 35 of the 1999 Constitution of the Federal Republic of Nigeria, which is either 24 or 48 hours.[8]

Despite this, the law enforcement agencies, particularly the Nigerian police, in exercising their power of arrest have detained persons arrested for longer periods without bringing them before court.[9] This has led to the unwholesome phenomenon of 'awaiting-trial inmates', some of whom have remained incarcerated for longer than the period for which, if found guilty, they would have been incarcerated.[10] In fact, studies[11] have shown that at least three-quarters of Nigeria's total prison population are inmates serving time without being sentenced. Data released by the Nigerian Correctional Service (NCS) shows that 51 983 inmates are awaiting trial out of the prison's total population of 73 726 inmates.[12] This is about 70 per cent of the total number. Hence, only 22 773 inmates are actual convicts serving their terms of imprisonment.[13] Ideally, arrest ought to be effectuated only after the conclusion of the investigation to facilitate speedier trials except in a few instances.[14] In fact, it is not uncommon to have the police effect 'weekend or holiday arrests' of suspects with an intention other than suspicion of a crime but as

6 Eg, the right to life guaranteed under sec 33(1) of the 1999 Constitution of the Federal Republic of Nigeria can be derogated from by secs 33(2) and 45 thereof.

7 *Emeka v Okoroafor & Another* (2017) LPELR-41738 (SC); *Bassey v Akpan & Others* (2018) LPELR-44341 (CA); *Adamu v Commissioner of Police Kaduna Command & Another* (2018) LPELR-494556 (CA).

8 Sec 35 of the 1999 Constitution of the Federal Republic of Nigeria Cap C28 LFN 2004.

9 CT Orjiakor 'Waiting for trial can be worse than facing the sentence: A study in Nigerian prisons', https://www.google.com/amp/s/theconversation.com/amp/waiting-trail.can.be.worse-than-facing-the-sentence-a-study-in-nigerian-prisons-145480 (accessed 4 March 2020).

10 AA Sanda *Prison congestion: Our responsibility* (2007) 5-7.

11 N Gbadamosi 'The all-women law firm helping prisoners get justice in Nigeria', https://www.google.com/amp/s/www.aljazeera.com/amp/features/2020/6/24/the-all-women-law-firm-helping-prisoners-get-justice-in-nigeria (accessed 4 December 2020).

12 Nigeria: 70% of Nigerian Prisoners held without Trial https://www.prison-insider.com/en/articles/nigeria-70-of-nigerian-prisoner-held-without-trial (accessed 4 December 2020).

13 JK Ukwayi & JT Okpa 'Critical assessment of Nigeria criminal justice system and the perennial problem of awaiting trial in Port Harcourt maximum prison, River State' (2017) 16 *Global Journal of Social Sciences* 34-48.

14 Eg, where the suspect is caught red-handed while committing an offence, or running away immediately after its commission it is desirable to effect arrest immediately.

bait for bail.[15] This situation has become endemic and is a clog in the wheels of the administration of criminal justice in Nigeria as it leads to the congestion of cells in these agencies.[16] This state of affairs requires urgent attention to ensure that the rights guaranteed by the Constitution are not violated with impunity.

Thus, in 2015, in a bid to address the various challenges confronting the administration of criminal justice in Nigeria, the National Assembly enacted the Administration of Criminal Justice Act, 2015 (ACJA). Since its enactment, several states[17] have domesticated the ACJA with minimal amendments to suit their local circumstances, while a few others are yet to do so.[18] However, before the enactment of the ACJA in 2015 by the federal government there had been some pathfinder efforts by some states. Thus, Lagos and Ekiti states have enacted their laws, which had been repealed in 2011, in 2007[19] and 2014[20] respectively, which one may rightly say inspired or strengthened the resolve of the federal government to enact the ACJA. For instance, section 4 of the Lagos State Administration of Criminal Justice Law (Repeal and Re-enactment) Law prohibits the practice of arrest in lieu which is contained in section 7 of the ACJA.[21] Section 17 permits an officer in charge to release on bail on self-recognisance any person arrested for an offence not punishable by death.[22] According to section 18, where a person taken into custody is not released on bail, a magistrate upon application can release the detainee. In this instance the application for bail does not need to be in writing.[23] According to section 19 of the law, where a person is taken into custody for any offence not punishable by death, at the close of investigation, if the officer in charge is satisfied that the

15 PA Akhihiero 'Arrest, remand and awaiting trial syndrome in criminal justice: Fixing the jigsaw to end prison congestion', http://edojudiciary.gov.ng/wp-content/uploads/2018/08/ARREST-REMAND-AND-AWAITING-TRIAL.pdf (accessed 10 March 2020).

16 As above.

17 The following states have domesticated the ACJA/L: Anambra, 2010; Lagos, 2007 and repealed in 2011; Ekiti, 2014; Federal Capital Territory, Abuja, 2015; Ondo, 2015; Rivers 2016; Oyo, 2017; Enugu, 2017; Akwa Ibom 2017; Cross River, 2017; Kaduna, 2017; Delta, 2017; Kogi, 2017; Abia, 2017; Edo, 2018; Ogun 2018; Plateau 2018; Osun 2018; Kwara, 2018; Adamawa, 2018; Bayelsa, 2019; Kano, 2019; Nasarawa, 2019; Benue, 2018; Ebonyi, 2019; Bauchi, 2018; Sokoto, 2019; Kastina 2020; Imo, 2020.

18 See eg Oyo State Administration of Criminal Justice Law, 2016, Cross River State Administration of Criminal Justice Law, 2016, and Edo State Administration of Criminal Justice Law, 2016.

19 Administration of Criminal Justice Law (Repeal and Re-enactment) Law 32 of 2011, formerly Administration of Criminal Justice Law 10 of 2007.

20 Administration of Criminal Justice Law 2 of 2014.

21 Sec 9 of the Administration of Criminal Justice Law, Oyo State, 2016 contains an equivalent provision.

22 Sec 31 Administration of Criminal Justice Law, Oyo State, 2016 (n 21).

23 Sec 18(3) Administration of Criminal Justice Law (Repeal and Re-enactment) Law 32 of 2011.

suspect has not committed the alleged offence, the person is to be released forthwith. Under section 20(1), an officer in charge of a police station shall report to the nearest magistrate within three days of arrest a record of the cases of all persons arrested without warrant. The magistrate shall forward the record of the arrested persons to the attorney-general for immediate necessary action. All these provisions are aimed at curbing the menace of unlawful detention within Lagos state.

The ACJA has been described as a revolutionary procedural criminal legislation[24] due to the several innovations it has introduced in the administration of criminal justice in Nigeria.[25] Sections 29, 33 and 34 contain provisions for the chief judge of the federal capital territory[26] to designate judges and magistrates who are to visit detention centres to attend to cases of unlawful detention, and place the responsibility on the detaining agency to account for the detainee. This practice, if judiciously implemented, can resolve the quagmire of unlawful detention in Nigeria. Despite the prospects of these innovative provisions of the ACJA, several challenges, such as administrative bottlenecks, a lack of or poor funding, threaten their viability.[27] What role can the Nigerian Bar Association (NBA) and other non-governmental organisations (NGOs) play in the realisation of the intendment of the legislature? This article addresses these issues.

The article is divided into five parts. Part 1 is a general introduction. Part 2 is an exposé on the right to personal liberty and dignity of the person. Part 3 examines the quagmire of unlawful detention in Nigeria with an emphasis on the infamous practice of holding charge which is one of the practices that have been abolished by the ACJA. Part 4 examines pathfinder provisions of the ACJA that seek to eliminate unlawful detention in Nigeria by highlighting the roles to be played by human liberty stakeholders such as the NBA and other NGOs. Part 5 contains the conclusion and recommendations.

24 BFM Nyako 'The Administration of Criminal Justice Act 2015: Issues arising' paper presented at the Federal High Court Legal Year Ceremony and Annual Judges Conference, 12-15 September 2017, Abuja.

25 CJ Dakas 'Beyond legal shenanigans: Towards engendering a symbiotic relationship between law and justice in Nigeria' keynote address delivered at the 52nd Nigerian Association of Law Teachers Conference, 2018, Nigerian Law School, Abuja, published in proceedings of the 52nd Nigerian Association of Law Teachers Conference (2018) 23.

26 Its states equivalent empowers the chief judges of the various states to appoint or designate a magistrate to visit, at least once every month, police stations or detention centres to review cases of persons being detained.

27 Y Akinseye-George *ACJA – Emerging issues and challenges* (2017) 3-5.

2 Exposé on the right to personal liberty and dignity of the person

This part examines the nuances of the rights to freedom of movement, liberty and dignity of the person enshrined in the 1999 CFRN and some international legal instruments to which Nigeria is a signatory. The rights to the dignity of the person, personal liberty and freedom of movement are guaranteed under the 1999 Constitution of the Federal Republic of Nigeria as well under certain international legal frameworks. Sections 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria[28] recognises these rights in clear and unambiguous terms.

Section 34(1) provides that '[e]very individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude and no one shall be required to perform forced labour'. According to this provision, the dignity of the person of every individual is preserved. Accordingly, it is an infraction of this right to expose any person to any treatment or deprivation that affects the dignity of their person. The right to dignity of the person is sacrosanct, untrammelled and inviolable under any conditions. For instance, it would be an infraction of the dignity of the person for the police or any security agency to stop commuters at a checkpoint and order them to sit on the bare floor or slap anyone of them as a result of a provocative action or omission. In fact, a person who has committed an offence and has been prosecuted and convicted shall not be subjected to inhumane treatment that detracts from the dignity of their person as conviction does not sequestrate this right.[29] For instance, where a convict is

28 Secs 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria Cap C28 LFN 2004.

29 Secs 1, 2, and 3 of the Anti-Torture Act, 2017 prohibits all forms of torture. According to sec 3 thereof, torture is committed when an act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person to obtain information or a confession from him or a third party; punish him for an act he or a third party has committed or is suspected of having committed; or intimidate or coerce him or a third party person for any reason based on discrimination of any kind. When such torture is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in an official capacity provided that it does not include pain or suffering in compliance with lawful sanction. For the purpose of the Act, subsec 2 provides that torture includes physical torture, which refers to such cruel, inhumane or degrading treatment which causes pain, exhaustion, disability or dysfunction of one or more parts of the body, such as systemic beatings, head-bangings, punching, kicking, striking with rifle butts and jumping on the stomach, food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten; cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds; the submersion

sentenced to hard labour, it will be wrong to subject him to torture as such does not amount to labour but is inhuman treatment.[30] This right avails all persons irrespective of their criminal status and is detractable only to the extent recognised by the Constitution. In fact, where an accused person has been tried and found guilty and sentenced to imprisonment, the requirement of the dignity of his person is not terminated by virtue of imprisonment. Such a convict must serve his jail term in prison conditions under humane conditions, except in respect of labour where 'hard labour' is included as part of the punishment during imprisonment.[31] As such, the prisoner is entitled to wholesome feeding, decent accommodation, health care, clothing, and so forth.[32] Thus, depriving prisoners of nutritious and wholesome food (which is the norm in Nigerian correctional centres), potable drinking water, health care, good accommodation, clothing and bedding and a means of ensuring personal hygiene constitutes an affront to their dignity.[33] The fact that a person is serving a jail term does not mean that he or she is stripped of human rights to the extent that incarceration has not been sequestered and, hence, it is not a licence to their violation.[34]

Section 35(1) provides that '[e]very person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law'. Intrinsic to the right to personal liberty is the freedom of movement contained in section 41 of the 1999 CFRN. These provisions connote that every citizen is free to move within Nigeria and shall therefore not be arbitrarily restrained or arrested. Every person is born free and his or her freedom of movement and

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of the head in water or water polluted with excrement, urine, vomit or blood; being tied or forced to assume fixed and stressful bodily positions; rape and sexual abuse, including the insertion of foreign bodies into the sex organs or rectum or electrical torture of the genitals, other forms of sexual abuse; mutilation, such as amputation of the essential parts of the body such as the genitalia, ears or tongue and any other part of the body; dental torture or the forced extraction of the teeth; harmful exposure to the elements such as sunlight and extreme cold, the use of plastic bags and other materials placed over the head to the point of asphyxiation, and so forth.

30 Sec 3 of the Anti-Torture Act, 2017 provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any public emergency, may be invoked as a justification for torture. Secret detention places, solitary confinement, incommunicado or other similar forms of detention, where torture may be carried out are prohibited. Any confession, admission or statement obtained as a result of torture shall not be invoked an evidence in a proceeding, except against a person accused of torture as evidence that the confession, admission or statement was made.

31 M Uwakornudi 'The law and prisoners' human rights in Nigeria' (2018) 7 *Port Harcourt Law Journal* 163-164.

32 TO Ifaturoti 'Nigerian prisons and the human rights campaign: Some challenges' (1994) *Nigerian Current Law Review* 79.

33 Uwakornudi (n 31) 163.

34 OO Subrina 'The plight of prison inmates in Nigeria: An issue of human rights violation' (2018) 2 *University of Jos Journal of Private Law* 153-157.

liberty must be assured at all times by every individual and institution exercising powers over the person unless it is otherwise justifiable. Where the personal liberty and freedom of movement of any person is temporarily withdrawn due to an allegation of the commission of a crime and subsequent arrest, the person arrested is expected to be brought before a court of competent jurisdiction within one day if the court is situated within the radius of 40 kilometres and, in other cases, within two days or a longer period as the court may consider reasonable.[35] Any period of incarceration other than this is regarded as unlawful and therefore an infraction of the person's right to liberty and freedom of movement.

Any person who is unlawfully arrested or detained contrary to what these sections contemplate is entitled to compensation and a public apology from the appropriate authority or person.[36] These remedies are mutually inclusive once it has been established that a person's detention is unlawful. In such an event, even if no specific amount is claimed as compensation for the unlawful arrest or detention, the court is duty-bound to award commensurate compensation, as was held in *Jim-Jaja v Commissioner of Police, Rivers State*.[37] The right to personal liberty and freedom of movement has been judicially approved and affirmed by both the Court of Appeal and the Supreme Court.[38]

In *Okafor v Lagos State Government*,[39] where the appellant was arrested pursuant to the order of the governor of Lagos state directing all Lagosians to stay indoors from 09:00 to 10:00 am every last Saturday of the month for environmental sanitation and transported in a Black Maria, the Court of Appeal held that the act by the respondent of transporting the appellant in a Black Maria car, which is caged and meant for dangerous and hardened criminals, amounted to degrading and inhuman treatment and an infraction of her right to liberty and freedom of movement. The Court held that this act of the respondent violated section 34(1)(a) of the 1999 CFRN which guarantees the appellant's right to dignity of her person, which is inviolable.[40] Where these rights have been, are being or are likely to be infringed, the cause of action accrues entitling the affected person to commence proceedings to seek a remedy.[41]

35 Secs 35(5)(a) & (b) 1999 CFRN.
36 Sec 35(6) 1999 CFRN.
37 [2013] 6 NWLR (Pt. 1350) 225.
38 *First Bank of Nigeria Plc v Attorney-General of the Federation* [2018] 7 NWLR (Pt 1617) 121.
39 [2017] 4 NWLR (Pt 1556) 404.
40 As above.
41 *Economic and Financial Crimes Commission v Diamond Bank Plc* [2018] 8 NWLR (Pt 1620) 107 80G-H.

On the international plane, these rights are well recognised. Thus, articles 4, 5 and 9 of the Universal Declaration of Human Rights[42] (Universal Declaration) in recognition of these rights provide that 'no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected to arbitrary arrest, detention or exile.' These articles of the Universal Declaration clearly recognise every individual's right to personal liberty, movement and dignity of person and enjoin all civilised states to give effect to the articles. Also, articles 5, 6 and 12 of the African Charter on Human and Peoples' Rights (African Charter),[43] in recognising these rights, provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, all forms of exploitation and the degradation particularly slavery, slave trade, torture, cruel, inhuman punishment and treatment shall be prohibited'. Further, 'every individual has the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or defamed.'[44]

It is worth noting that the African Charter, which is enforceable domestically in Nigeria,[45] has been domesticated in Nigeria pursuant to section 12 of Nigeria's Constitution and, therefore, is part and parcel of Nigeria's *corpus juris*.[46] Article 5 of the African Charter makes it clear that the dignity of the person is an inherent right of every human being; it is not bequeathed by any statute or government but is the gift of nature and, therefore, is as old as man's existence. The Court of Appeal has given judicial impetus to the aforementioned provisions of the African Charter in *Eze v Inspector General of Police*,[47] where it held that the provisions of article 5 of the African Charter accords to every individual the right to respect of the dignity inherent in his human being and to the recognition of his human status.[48]

In every police station it is conspicuously displayed that 'bail is free'. However, in practice this is far from the truth. Accused persons or their relatives part with large sums of money to regain their freedom from police stations and other detention centres, particularly the

42 Arts 4, 5 and 9 Universal Declaration of Human Rights 1948.
43 Arts 5 and 6 African Charter.
44 Art 12 African Charter.
45 *Gani Fawehinmi v Abacha* [2000] 6 NWLR (Pt 660) 247.
46 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Cap A10 LFN 2004.
47 [2017] 4 NWLR (Pt 1554) 44.
48 As above.

notorious Special Anti-Robbery Squad (SARS).[49] Should a suspect or his relations insist on being released without payment, such a person runs the risk of spending more time in custody than is necessary as dilatory tactics may be deployed to frustrate his or her release.[50] This unfortunate practice is a major drawback in Nigeria's criminal justice administration system with its inimical effects. It is an affront to the right of movement and liberty.

It is apposite to note that an action to enforce the violation of these rights, like other rights, can be maintained against a private citizen other than someone acting for and on behalf of the government where the circumstances of the violation so warrant, as held in *Akwa Savings and Loans Ltd v Udoumana*.[51] Thus, it is not the case that fundamental rights enforcement proceedings can be commenced only against the government or its agencies or agents, as was held in *Peterside v IMB (Nig) Ltd*.[52] In fact, the tenor of section 46(1) of the 1999 CFRN, which empowers anyone whose right is being threatened or has been breached to apply to a High Court for redress, does not discriminate between juristic persons whether it is a private citizen or government or its agency.

It is apposite to note that although these rights are conspicuously omitted from the derogation provisions of the Constitution, namely, section 45, this does not mean that they cannot be derogated from. With the exception of the right to freedom of expression contained in section 36 of the 1999 CFRN, all other rights are not absolute. While the rights to personal liberty and freedom of movement are subject to permissible exceptions, when detracting from these rights, it must be in 'accordance with a procedure permitted by law' and not arbitrary.[53] Where the detraction is arbitrary, it will amount to a violation of the right.

3 The anatomy of unlawful detention in Nigeria

This part examines the anatomy of the quagmire of unlawful detention, albeit succinctly. Unlawful detention may be regarded as any detention, irrespective of its duration, which is contrary to what is expected by the law, that is, detention that does not accord with the dictates of the law. From the preceding part it has been established

49 Akhihiero (n 15) 10.
50 Akhihiero 13.
51 (2009) LPELR-98861.
52 [1993] 2 NWLR (Pt 278) 712.
53 Secs 35(1) & 45 1999 Constitution of the Federal Republic of Nigeria Cap. C28 LFN 2004.

that where a person is arrested on allegation of having committed an offence, where there is a court situated within a 40 kilometre radius, he or she must be brought before a court of competent jurisdiction within 24 or 48 hours, as the case may be. Any detention contrary to this stipulation is wrong and unlawful.[54] Unlawful detention denotes the restraint of a person in a bounded area without any justification. The infringement may arise from restraint by a private citizen as well as detention by agencies of the government, such as false arrests by the police. The person so restrained is said to be a 'prisoner,' so long as he has no liberty to freely go at any time (however short) to any place he wishes without bail or otherwise.[55]

Several factors contribute to unlawful detention in Nigeria. The inability of an accused person to secure the service of a lawyer could be a reason for prolonging pre-trial incarceration. Emeka et al,[56] who undertook a study on the correlation between awaiting-trials and a lack of legal representation in three major prisons (Afokang, Ikom and Ogoja) in Cross River state, came to the following conclusion:

> Arguably there exists a positive link between the inability of indigent accused persons to access legal practitioners and prolonged pre-trial detention. Put differently, lack of legal representation for the accused persons delays timely pre-tria … as many pre-trial detainees' trials were pending in several criminal courts due to the poor financial status of the detainees which disables them from paying for legal services.

Ajomo[57] opined that more than 64 per cent of awaiting-trial persons were yet to be charged as they were unable to hire the services of a lawyer. Hence, in his submission the absence of legal representation for the indigent accused person delays their trial. In the same vein, while agreeing with the inability of indigent accused persons to access the services of a lawyer as a reason for prolonged awaiting trial in Nigeria, Osinbajo stated:[58]

54 Ukwayi & Okpa (n 13) 19.
55 O Okoye 'Victims of unlawful detention have right to compensation', https://www.sunnewsonline.com/victims-of-unlawful-detention-have-right-to-compensation/ (accessed 10 February 2020).
56 JO Emeka et al 'Awaiting trial among suspected criminal persons and lack of legal representation in Cross River State, Nigeria' (2016) 2 *International Journal of Sociology and Anthropology Research* 2, http://www.eajournals.org/wp-content/uploads/Awaiting-Trial-among-Suspected-Criminal-Persons-and-Lack-of-Legal-Representation-in-Cross-River-State-Nigeria.pdf (accessed 10 March 2020).
57 Al Ajomo *Human rights and the administration of criminal justice in Nigeria* (1991) 24.
58 Y Osibanjo 'Reform of criminal law' paper presented at the 20th international conference of the International Society on the Reform of Criminal Law, Brisbane, Australia (2006) 12.

> The major reason for prolonged pre-trial detention in many third world countries is the absence of lawyers to represent the majority of the accused persons in detention; though several legal practitioners do render free legal services (pro bono) to indigent accused persons, insignificant to assuage for the backlog; the number of persons awaiting trial was still very high.

Osinbajo observed that while the legal aid scheme was set up to assist poor persons who could not afford to hire lawyers to defend them, the services of the scheme amounted to nothing considering the number of lawyers currently in the scheme and the percentage of indigents in detention who require their services.

The above undesirable situation subsists despite the fact that the Constitution enjoins the state to provide everyone charged with an offence but who cannot afford the services of a lawyer with a lawyer at no expense to the accused person. A former Comptroller-General of Nigerian prisons, Mr Olusola Ogundipe, in July 2010 disclosed that, while the population of prisoners stood at 47 628, with 13 300 or 23 per cent being convicted persons, 77 per cent were 'awaiting-trial' inmates.[59] Based on statistics released by Nigeria's National Bureau of Statistics (NBS) from 2011 to 2015, 72 per cent of inmates in Nigerian prisons are awaiting trial.[60] Meanwhile, statistics from the Nigeria Correctional Services as at 13 January 2020 shows that, out of a total inmate population of 72 627, the total number of convicted prisoners is 21 890 (30 per cent) while those awaiting trial is 50 737 (30 per cent).[61]

The infamous holding charge practice has been one of the roguish means that detaining authorities have used to 'unlawfully' detain suspects. This practice involves that where an offence is alleged to have been committed which a magistrate's court has no jurisdiction to adjudicate, the arresting authorities charge the accused person before the magistrate and obtain a remand order to detain him or her pending formal charges being preferred at the High Court.[62] This practice is a clear violation of an accused person's right to liberty as the liberty of a person may be restricted only pursuant to the order

59 Okoye (n 55) 10.
60 Y Kazeem 'Up to three-quarters of Nigeria's prison population is serving time without being sentenced', https://www.google.com/africa/892498/up-tp-three-quarters-of-nigerias-prison-population--s-serving-time-without-being-sentenced/amp/ (accessed 4 March 2021).
61 Al Agbator 'Non-custodial sentence as a means of prison decongestion in Nigeria', https://www.google.com/amp/s/thefirmaadvisoty.com/new-blog/2020/1/17/non-custodial-sentences-as-a-means-of-prison-decongestion-in-nigeria%3fformat=amp (accessed 4 March 2021).
62 *Lufadeju v Johnson* [2007] All FWLR (Pt 371) 1532.

of a court of competent jurisdiction.[63] This procedure persists despite the settled principle of law that where a court lacks the requisite jurisdiction over a matter before it, the court is duty bound to make an order striking out the suit in order for the same to be instituted before a court that has jurisdiction to be seized of the matter.[64] The Court of Appeal in *Agundi v COP*[65] held that it is unconstitutional for a magistrate's court to take cognisance of an offence, to remand a suspect into prison custody and to make binding orders when the court lacks the requisite jurisdiction to entertain such a matter. It is clear that the practice of holding charge is an aberration. In *Bola Kale v The State* the Court of Appeal held:[66]

> It is an aberration and an abuse of judicial process for an accused person to be arraigned before a magistrate for an offence over which it has no jurisdiction only for the accused person to be remanded in prison custody and not tried or properly charged before a competent court for trial. It will be an infraction on the rights to fair hearing and liberty of the accused person.

Unfortuately, section 293(1)[67] of the ACJA has tacitly given statutory impetus to this practice by providing that 'a suspect arrested for an offence which a magistrate court has no jurisdiction to try shall, within a reasonable time of arrest, be brought before a magistrate court for remand'. This is possible once the magistrate is satisfied that there is a 'probable cause' to remand the suspect pending the receipt of a copy of the legal advice from the Attorney-General before the arraignment of the suspect before the appropriate court. Although the timeline within which the Attorney-General has to issue legal advice is 14 days, a remand by a court that lacks jurisdiction is strengthening the arms of impunity and brutality against the accused person's liberty, which ought not to be. Disturbing is the fact

63 *Ahmed v COP Bauchi State* (2012) 9 NWLR (Pt 1304) 104. The Court of Appeal held: 'It is both a notorious fact and established law, that allegation of culpable homicide shall be triable in the High Court of the state concerned. In this regard, where jurisdiction to try alleged offenders is vested by law in the High Court, the taking to or arraignment of an alleged offender before a chief magistrate court is tantamount to 'holding charge' which has been strongly and soundly condemned and described as illegal and unconstitutional ... in the instant case, the chief magistrate had no jurisdiction to try the case, the chief magistrate had no jurisdiction to try the case of culpable homicide punishable with death. Additionally, no such charge has been placed or filed before the High Court at the time the application for bail was made, considered and refused by the lower court.'

64 *UBA Trustees Ltd v Niger Ceramic Ltd* [1987] 3 NWLR (Pt 62) 6000 per Nnaemeka-Agu JSC (as he then was) where it was held that 'in our hierarchical system of court, the law is in the final analysis of what the Supreme Court says it is; once they have decided a point of law, their decision as by the doctrine of *stare decisis* is binding on all other courts in the country. The farthest to which any court can go is to criticise but apply it.'

65 [2013] All FWLR (Pt 660) 1243.

66 [2006] I NWLR ((Pt 962) 507 765.

67 Sec 293(1) ACJA 2015.

that agencies that are charged with the responsibility of detecting, preventing and prosecuting crimes in Nigeria find it easier to arrest before investigating. This practice must be aggressively discouraged particularly when there is no *prima facie* case. A court that cannot try a matter should not be permitted to grant a remand order in the matter or any order at all save to decline jurisdiction.[68]

In light of sections 35(1) and 41 of the 1999 CFRN and articles 5, 6 and 12 of the African Charter it is contended that this practice is not only illogical but illegal. The aforementioned section of the ACJA is subservient to the provisions of section 35 of the 1999 CFRN by virtue of section 1(3) thereof and the various articles of the African Charter (being a statute that deals with matters in chapter IV) and, therefore, null and void to the extent of its inconsistency. It is suggested that the court should espouse the provisions of the above-mentioned relevant provisions of the 1999 Constitution and the African Charter to declare ineffective the offensive provision of the ACJA (section 293) that impedes on the right to freedom of movement and liberty.

While this article focuses on the provisions of the ACJA, some reference is also made to selected legislation in Nigeria that deals with the quagmire of unlawful detention. On 8 May 2020 President Mohammadu Buhari signed into law the Correctional Services Act, which repealed the Prison Act Cap P LFN 2004. The Act changed the Nigerian Prison Service to Nigeria Correction Services (NCS). Correctional service consists of custodial and non-custodial services.[69] The objectives of the Act are to ensure compliance with international human rights standards and good correctional practices; provide an enabling platform for the implementation of non-custodial measures; enhance the focus on corrections and the promotion of the reformation, rehabilitation and reintegration of offenders; and establish institutional, systemic and sustainable mechanisms to address the high number of persons awaiting trial.[70] To ensure the dignity of the person of inmates, section 15 provides that inmates shall not be held in servitude, and labour carried out by inmates shall be neither of an afflictive nature nor for the personal benefit of any correctional officer. This is recognition of the fact that being in custody does not erode the dignity of the inmate so as to subject him or her to inhumane or degrading treatment and same cannot be used for the aggrandisement of any officer of the correctional services.

68 Sec 291 of the Administration of Criminal Justice Law of Oyo State, 2016 contains provisions similar to that in ACJA.
69 Secs 1(2)(a) & (b) Nigerian Correctional Services Act, 2019.
70 Sec 2(1) Nigerian Correctional Services Act, 2019.

Through certification by a medical officer, an inmate sentenced to labour may be excused from such or made to undertake light labour, as the aim of custodial sentence is not to inflict pain but to enable the offender to realise the wrong, to rehabilitate and reintegrate him or her back into society as a responsible member of society. By virtue of section 16 of the Act, through an order of court issued to the correctional service authority, an inmate shall be brought before court whenever same is required. Thus, where a person is kept as awaiting trial, this provision could be used to require his or her production before a court having competent jurisdiction over the allegedly committed offence. This would help to stop the tide of unlawful imprisonment. Section 18 deals with the quagmire of awaiting trial. According to section 18(1) the NCS, in compliance with efficient criminal justice administration, should liaise with the heads of the justice institution and other stakeholders to review and eradicate causes of the high numbers of pre-trial detainees and develop effective mechanisms to enhance speedy trials and the resolution of such cases. The NCS should supply information to the relevant bodies regarding persons awaiting trial in their facilities, and should notify the relevant bodies and authorities such as the judiciary, the prerogative of mercy committee, the ACJMC, and so forth, when facilities are exceeding their capacity with regard to the custody of inmates for necessary action to be taken. These provisions are to ensure that persons that are arrested and taken into custody for allegedly having committed offences are not made to remain in custody but are accorded the opportunity to have their cases heard speedily or to be administratively released. After an inmate is released from custody, it is in the interests of the public to reintegrate him or her back into society to avoid recidivism. The NCS has the duty of assisting inmates in their reintegration process.[71]

4 ACJA as a panacea to unlawful detention in Nigeria

This part examines salient provisions of the ACJA that have addressed the quagmire of unlawful detention in Nigeria and explores means through which these provisions may be effectuated towards the eradication of the menace. However, it is worth noting the purpose of the ACJA as provided in section 1 thereof, which is to ensure that the system of administration of criminal justice promotes the efficient management of criminal justice institutions; the speedy dispensation of justice; the protection of society from crime; and the protection

71 Sec 19 Nigerian Correctional Services Act, 2019.

of the rights and interests of the suspect, the defendant and the victim. It enjoins the courts, law enforcement agencies and other authorities or persons involved in criminal justice administration to ensure compliance with the provisions of the Act so as to realise the above-mentioned purposes. It is clear that the ACJA is a piece of legislation that is geared to effective, efficient, humane and inclusively beneficial criminal justice administration. The Act protects the interests of the accused as well as the state (society) which is the object of criminal wrongs. It does not prejudice the interests of either of the parties but is crafted in manner which, if same is rigorously implemented, will create a balance between all the contending interests in the criminal justice administration sector. It is geared towards establishing restorative justice[72] which is a way of responding to criminal behaviour by balancing the needs of the community, the victim and the offender.[73]

Section 33(1) of the ACJA provides:

> An officer in charge of a police station or an official in charge of an agency authorised to make arrest shall, on the last working day of every month, report to the nearest magistrate the cases of all suspects arrested without a warrant within the limits of their respective station or agency whether the suspects have been admitted to bail or not. The report shall contain all the particulars of the suspects arrested as prescribed in section 15 of this Act. The magistrate shall on receipt of the reports, forward them to the criminal justice monitoring committee which shall analyse the reports and advice the Attorney General of the Federation as to the trends of arrests, bail and related matters. The Attorney General of the Federation shall, upon request by the National Human Rights Commission, the Legal Aid Council of Nigeria or a non-governmental organisation, make the report available to them.

Section 34 provides:[74]

> The Chief Magistrate, or where there is no Chief Magistrate within the police division, any Magistrate designated by the Chief Judge for that purpose, shall, at least every month, conduct an inspection of police stations or other places of detention within his territorial jurisdiction other than the prison. During the visit, the Magistrate may: call for, and inspect, the record of arrests, direct the arraignment of a

72 Y Akinseye-George *Administration of Criminal Justice Act, (ACJA) 2015 with explanatory notes and cases* (2017) 3-4.

73 See the *dictum* of Oputa JSC in *Josiah v State* [1985] 1 NWLR (Pt 1) 125 141. The learned Law Lord held: 'Justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even a two-way traffic. It is really a three-way traffic, justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man, the deceased whose blood is crying to heaven for vengeance and finally, justice for the society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of.'

74 Sec 34 Administration of Criminal Justice Act, 2015.

> suspect; where bail has been refused, grant bail to any suspect where appropriate if the offence for which the suspect is held is within the jurisdiction of the Magistrate. An officer in charge of a police station or official in charge of an agency authorised to make arrest shall make available to the visiting Magistrate or designated Magistrate exercising his power under subsection (1) of this section: the full record of arrest and record of bail; applications and decisions on bail made within the period; and any other facility the Magistrate requires to exercise his powers under that subsection.

Besides the above section of the ACJA, other sections are geared towards taming the tides of unlawful detention in Nigeria. Section 7 prohibits the anachronistic and obnoxious practice of surrogate arrest,[75] which was declared unlawful by the Court of Appeal per Niki Tobi JCA (as he then was) in *ACB v Okonkwo*.[76] Section 31(1) empowers the officer in charge of a station where a person has been taken into custody and where it appears that an inquiry into the matter cannot be finalised forthwith, to release the suspect on bail on self-recognisance with or without surety to report at the station as may be specified. Under section 32, where a person is taken into custody in respect of a non-capital offence and is not released within 24 hours, an application for bail may be filed in a court having jurisdiction over the offence. The application in this case need not be in writing.[77] Similarly, section 33 requires the police or any agency that has the power to arrest, to report to a magistrate, on the last working day of the month, cases of all persons arrested without warrant. The magistrate, in turn, must forward the report to the Criminal Justice Monitoring Committee, which must transmit it to the Attorney-General (of the federation as well as the state) for the necessary action. These three stakeholders work symbiotically to ensure that suspects are not unjustly and wrongfully detained beyond the permitted time frame as contained in section 36 of the 1999 CFRN. These provisions are aimed at preventing unlawful detention in Nigeria.

The above provisions of the ACJA with their equivalent in some states' Administration of Criminal Justice Law[78] are geared towards stemming the tide of unlawful detention in Nigeria. In fact, the majority of the cases awaiting trial are based on non-capital offences in which arrests were made without warrant, in which circumstances

75 Akinseye-George (n 72) 61.
76 [1997] 1 NWLR (Pt 480) 195 (CA).
77 Sec 32(3) ACJA 2015.
78 Eg secs 33 and 34 of the Oyo State Administration of Criminal Justice Law, 2016 contains the same provisions.

bail ought to be granted without delay.[79] Although bail is said to be free, nothing is further from the truth, as onerous bail conditions are imposed for administrative or police bail, which conditions mostly are not met by suspects. Where the official report of cases of arrest without a warrant is forwarded on a monthly basis to the designated magistrate together with the bail conditions, it enables the magistrate to evaluate the conditions of the arrested suspects whether or not he or she has been granted bail. This report, once forwarded to the Administration of Criminal Justice Committee,[80] must accordingly advise the Attorney-General as to bail and other ancillary matters. This report could be requested by human liberty organisations such as the National Human Rights Commission, the Legal Aid Council of Nigeria and non-governmental organisations so as to secure bail for detained suspects who might not be able to secure the services of a lawyer. The importance of this reporting mechanism towards curbing the menace of unlawful continuous detention cannot be overemphasised. It is a step in the right direction.

Once a magistrate or a judge is designated by the chief judge to visit a detention centre other than the correctional centres,[81] it is mandatory for the visit to be made at least once a month, and during the visit the magistrate is empowered to grant bail to persons who are being detained unlawfully.[82] The magistrate has the power to review the previous bail application made with a view to granting the application.[83] In the case of default by an officer in charge of a police station or in charge of an agency authorised to make an arrest to comply with the provisions of the section requiring the making available the record of arrest and record of bail, applications and decisions on bail made within the period, and any other facility that may facilitate the discharge of the duties placed on the magistrate, the default is to be treated as misconduct and should be dealt with in accordance with the relevant police regulation under the Police Act, or pursuant to any other disciplinary procedure prescribed by any provision regulating the conduct of the officer or official of the

79 RO Ugbe, AU Agi & JB Ugbe 'Nigeria's Administration of Criminal Justice Act (ACJA) 2015: Innovations relating to women and children' (2019) 3 *Obafemi Awolowo University Law Journal* 131-133.

80 Also known as the Administration of Criminal Justice Monitoring Committee (ACJMC).

81 While it is believed that the prison houses persons who have been tried and sentenced and, as such, aside from the usual visit by the Chief Judge, it would be unnecessary to have a magistrate inspect the prison. The reality, however, is that there are inmates in prisons that are awaiting trial pending the advice of the Director of Public Prosecution and would therefore qualify for protection under secs 33 and 34 of the ACJA.

82 Unlawful detention means any detention done contrary to what is prescribed in sec 35(1) of the 1999 CFRN, eg, where a person is imprisoned beyond the permissible period of time (awaiting trial).

83 Sec 34(3)(b) ACJA 2015.

agency.[84] A police officer or official of any agency authorised to arrest who obstructs the magistrate from discharging his responsibility outlined by the aforementioned section stands the risk of being sanctioned.

Sections 8(1)(a) and (b) of the ACJA provides that a suspect shall be accorded humane treatment, having regard to his right to the dignity of his person, and not be subjected to any form of torture, cruel, inhuman or degrading treatment. Sub-section 3 provides that a suspect shall be brought before court as prescribed by this Act or any other written law or otherwise released conditionally or unconditionally. Section 14(2) provides that 'a person who has the custody of an arrested suspect shall give the suspect reasonable facilities for obtaining legal advice, access to communication for taking steps to furnish bail, and otherwise making arrangements for his defence or release'. The tenor of these provisions is the total abhorrence of unlawful detention, particularly of an inhumane nature, which usually is the case in all unlawful detentions, especially of those less powerful. The Act further makes provision for the rendering of quarterly reports of arrest to the Attorney-General of the federation. It provides: [85]

> The Inspector General of Police and the head of every agency authorised by law to make arrests shall remit quarterly to the Attorney-General of the Federation a record of all arrests made with or without a warrant in relation to federal offences within Nigeria. The Commissioner of Police in a state and head of every agency authorised by law to make arrests within a state shall remit quarterly to the Attorney-General of that state a record of all arrests made with or without a warrant in relation to state offences or arrests within the state.

The report to be remitted shall contain all the particulars of the suspects as prescribed by section 15 of the Act.[86] A register of arrests containing the particulars prescribed in section 15 of the Act shall be kept in the prescribed form at every police station or agency authorised by law to make arrests, and every arrest, whether with or without a warrant, within the local limits of the police station or agency, or within the federal capital territory, Abuja, shall be entered accordingly by the officer in charge of the police station or official in charge of the agency as soon as the arrested suspect is brought to the station or agency.[87] The Attorney-General of the federation shall

84 Sec 34(5) ACJA 2015.
85 Secs 29(1)(2) & (3) ACJA 2015.
86 As above.
87 Secs 29(4) & (5) ACJA 2015.

establish an electronic and manual database of all records of arrests at the federal and state levels.[88]

The ACJA has paved the way for a liberal regime of bail in Nigeria. In the case of offences of a capital nature where bail may not be granted on self-recognisance, such cases must be referred to the Attorney-General for legal advice which must be issued within 14 days of the reference.[89] Thus, where a suspect has been taken into police custody without a warrant for an offence other than an offence punishable with death, an officer in charge of a police station must inquire into the case and release the suspect on bail on his entering a recognisance with or without surety for a reasonable amount of money to appear before the court or at the police station at the time and place named in the recognisance. This is to be done once it is evident that it is impracticable to bring the suspect before a court having jurisdiction with respect to the alleged offence within 24 hours or other period as provided after the arrest.[90]

The implementation of this reporting and monthly visitation of detention centres is capable of curbing the menace of unlawful detention.[91] However, as in the case of every other law, unless implemented the benefits remain untapped. Several states have domesticated the ACJA with minor modifications that have not altered the content of the Act. However, in Lagos (noted for being in the fore of positive innovations in Nigeria), the federal capital territory, Ekiti, Kano and Oyo states, the chief judges are yet to comply with the requirement of appointing or designating magistrates to visit, on a monthly basis, detention centres with a view to effectuating the Act. It therefore is imperative for the various chief judges to do the necessary, and where it is being delayed unnecessarily, an order of mandamus should be sought to compel the appointment. The shenanigans of the police and personnel of agencies authorised to arrest, due to their unwillingness to grant bail to suspects, cannot be overlooked as they can go to reprehensible ends to frustrate the release of persons in their custody. The civil society and human liberty organisations have a role to play in preventing malfeasance from the police and their counterparts.[92]

88 As above.
89 Sec 30(3) ACJA 2015.
90 As above.
91 YDU Hambali et al 'Administration of criminal justice review in Nigeria: A mere review or revolution in Nigeria' in IH Chiroma & YY Dadem (eds) *Proceedings of the 51st Nigerian Association of Law Teachers Conference* (2018) 46.
92 A Otunlana 'Implementation strategies for the Administration of Criminal Justice Act 2015' presentation at the Stakeholders Workshop on the Implementation Strategy of the Administration of Criminal Justice Act 2015, cited in RO Ugbe, AU Agi & JB Ugbe 'A critique of the Nigerian Administration of Criminal Justice

Human liberty NGOs and the Nigerian Bar Association (NBA) are better suited to see that the intentions of the legislature encapsulated in the aforementioned sections of the ACJA are realised. Each branch of the NBA[93] should set up a committee on the implementation of the monthly visits, which will always accompany the judge or magistrate on such visits to the police stations or detention centres.[94] By so doing, they can bring to the attention of the magistrate detainees who have been detained beyond the constitutionally-prescribed timeframe and bring an application for their bail. Their vigilance will ensure that shadiness does not truncate the exercise.

Furthermore, agencies such as the National Human Rights Commission (NHRC) and the Legal Aid Council of Nigeria and even youth corps members under the auspices of the Human Rights Protection Group, should accompany the magistrates on their visits and assist in bringing to his attention cases of persons who are being detained unlawfully. Within the National Youth Service Corps (NYSC) Scheme, servicing corps members are required to engage in community development services (CDS) groups. Lawyers are usually organised into one or another human rights/liberty CDS group such as Legal Aid, Independent and Corrupt Practices, and so forth, and often take up *pro bono* legal services, a veritable tool in the implementation of the provisions of the ACJA. There is a need to create public awareness of this mechanism. This will enable relations or colleagues of persons who are being unlawfully detained to be on the ground during such visits, and where the police or any arresting agency seeks to hide a detainee, they can bring this to the attention of the magistrate as the possibility of the police withholding information of certain detainees is not improbable.

Apart from the fact that members of the legal community accompany the designated magistrate to a detention centre to prevent foul play, such as the hiding of detainees, it will also embolden the visiting magistrate to discharge his duty courageously. The possibility of assault by the operators of the detention centre (the police, Civil Defence Corps, State Security Service, Economic

Act 2015 and challenges in the implementation of the Act' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 81.

93 The NBA Human Rights Committee at the branch level could take up this task of accompanying the magistrate to a detention centre whenever the visit is to be made.

94 ML Garba 'Administration of Criminal Justice Act 2015: Innovations, challenges, and way forward' paper presented at 2017 Lecture of the National Association of Judicial Correspondents, https://www.lawyard.ng/administration-of-criminal-justice-act-2015-innovations-challenges-and-way-forward, cited in RO Ugbe, AU Agi & JB Ugbe 'Nigeria's Administration of Criminal Justice Act (ACJA) 2015: Innovations relating to women and children' (2019) 3 *Obafemi Awolowo University Law Journal* 133.

and Financial Crimes Commission (EFCC) or any other agency having and exercising such powers) cannot be totally ruled out. In recent times there have been occurrences when officers of the Nigerian police force, particularly those attached to the notorious Special Anti-Robbery Squad (SARS), have assaulted lawyers who visit their stations to effect the release of their clients. If lawyers can be physically assaulted, the same treatment can be meted out to a magistrate under any disguise and it will be a matter of the particular magistrate's word against that of the relevant agency.

It is apposite to reiterate that the ACJA is only applicable in the federal capital territory, Abuja. Thus, unless and until each state domesticates the Act, this laudable initiative cannot be effectuated there.[95] This is one of the challenges confronting the effective implementation of these laudable provisions of the ACJA beyond the federal capital territory. It therefore is imperative for the local NBA and other groups in the various states that are yet to domesticate the ACJA to engage the various houses of assembly to ensure that the ACJA is domesticated in every state in Nigeria. The domestication of the ACJA by federating states is necessary because of the constitutional arrangement of Nigeria as a federation with different legislative capacities.[96]

The federal government as well as the different states have legislative power and can make laws.[97] While the federal government is competent to make laws on matters in both the exclusive[98] and concurrent legislative lists, the state government can only make laws on the concurrent and residual list.[99] Thus, since criminal law is not an item under the exclusive legislative competence of the federal government but falls under the concurrent legislative list, both the federal and state governments have legislative competence to enact law on it.[100] Hence, for the ACJA to become applicable in the various federating states in Nigeria, these states have to domesticate the ACJA for it to become applicable in criminal proceedings in these states,

95 RO Ugbe, AU Agi & JB Ugbe 'A critique of the Nigerian Administration of Criminal Justice Act 2015 and challenges in the implementation of the Act' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 69.

96 See Part I and II, Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004.

97 See sec 4 1999 Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004.

98 Only the federal government can make law on matters enumerated under the Exclusive Legislative List.

99 J Onyekwere 'It is unconstitutional for National Assembly to legislate on residual list', https://guardian.ng/features/law/its-unconstitutional-for-the-national-assembly-to-legislate-on-residual-list/ (accessed 29 December 2020).

100 *Attorney-General of the Federation v Attorney-General of Lagos State* (2013) LPELR-20974 (SC).

although in doing so they must bear in mind the doctrine of covering the field.[101] The doctrine requires that any matter on the concurrent legislative list, once the federal government has legislated on it, the state retains the power to also legislate on it. However, in doing so it must not legislate contrary to what the federal government has already legislated.[102]

While this generally is the law, it is safe to argue that in criminal matters, particularly those involving constitutionally-guaranteed rights, in domesticating the ACJA, despite the requirement of the doctrine of covering the field, states can positively obliterate from the provisions of ACJA without any offensive outcome. For instance, under the ACJA the legal advice of the Attorney-General is expected to be issued within 14 days, while if a state, in domesticating the ACJA, reduces the period to seven days, this will not be regarded as an offensive derogation as it affords better protection to human rights. In fact, the federating states are not bound to wholly adopt and adapt to the ACJA because criminal law, being a substantive matter over which they have legislative competence, they are legally permitted and have the liberty to enact procedural law or adopt the federal legislation with suitable modifications based on their needs.

It is apposite to note that the MacArthur Foundation is sponsoring several NGOs on various projects towards the domestication of the ACJA by the various federating states in Nigeria with significant positive outcomes as 30 states have domesticated the ACJA. Only a few states in Northern Nigeria are yet to domesticate the Act. It is hoped that, sooner than later, every state would have domesticated the law with amendments to suit its peculiarities. The strides made by organisations, both governmental and non-governmental, such as CLEEN Foundation,[103] the Centre for Socio-Legal Studies, the Nigerian Institute of Advanced Legal Studies (NIALS),[104] all with support from MacArthur Foundation, towards the implementation of the ACAJA must be duly acknowledged. The Police Duty Solicitors Scheme (PDSS) is an initiative that seeks to curb the menace of pre-trial detention, focusing on institutions that feed detention centres with detainees unlike other programmes that are focused on the prisons. The PDSS was introduced out of necessity as earlier efforts

101 *Edo State Agency for the Control of AIDS v Comrade Austin Osakue & Others* (2018) LPELR-44157 (CA).
102 *Attorney-General of Lagos State v Eko Hotels Ltd & Another* (2017) LPELR-43713(SC).
103 CLEEN Foundation 'Promoting accountability and transparency in the implementation of ACJA', https://cleen.org/promoting-accountability-and-transparency-in-the-implementation-of-acja (accessed 4 March 2021).
104 See https://www.nials.edu.ng/index.php/mac-arthur-project-on-iacja (accessed 4 March 2021).

had proved inadequate in addressing the increasing number of pre-trial detentions and elongated periods of pre-trial detention.[105] Open Society Justice Initiative (Justice Initiative JI) and Legal Aid Council of Nigeria (LACON) commissioned a research that revealed that existing initiatives tended to focus on the receiving side of the justice system (prisons) without contemporaneously reviewing the supply side (law enforcement) with the result that 'prison decongestion' efforts did not decongest the prisons as long as there was a steady supply of detainees from the police stations through the rest of the criminal justice system.[106] PDSS was packaged by the JI and LACON to seek creative means of reducing the number of pre-trial detainees as well as reducing the time of pre-trial detention in Nigeria. It trains and deploys young lawyers under the National Youth Service Scheme in various states to police stations to provide legal aid assistance to indigent detainees within 48 hours of arrest.[107] In 2006 the Nigerian police force (NPF) agreed to collaborate with the initiative. It became operational in 2007 with Justice Initiative's partner NGO, Rights Enforcement and Public Law Centre (REPLACE) as main implementing organisation.[108]

In Nigeria, at present politically-motivated detention without trial, particularly that of journalists and activists, is on the increase and the avenues provided for under the ACJA 2015 (as well as those contained in the various ACJLs) may be explored as a leeway to this questionable unlawful incarceration since the law in some of these states is in accordance with the ACJA.[109]

A lack of political will or nefarious political interest is another challenge confronting the effective implementation of this laudable initiative.[110] A state may 'lack' the political will to domesticate the ACJA, or domesticate it but neglect to set in motion the machinery for its implementation. In the period 2019 and 2020 several journalists who alleged corrupt practices against some politically-disposed persons, especially governors, were arrested and jailed without being brought before court. For instance, Agba Jalingo was arrested and jailed for months in 2019 without being charged to court despite the fact that both in Abuja and Cross River state the ACJA and ACJL

105 S Ibe *Police duty solicitor scheme training manual* (2020) 10.
106 As above.
107 As above.
108 As above.
109 E Okolo 'Issues on the Administration of Criminal Justice Act 2015 – Opinion', https://investadvocate.com.ng/2016/10/21/issues-on-the-administration-of-criminal-justice-act-2015-opinion/ (accessed 30 December 2020).
110 I Maraizu 'A critique of Administration of Criminal Justice Act (ACJA) 2015', https://www.presstrader.com/nigeria/thisday/20151006/281792807850335 (accessed 20 December 2020).

are applicable. Cross River state domesticated the ACJA in 2016[111] although the governor assented to it on 27 May 2017 as part of the activities lined up for the celebration of the fiftieth anniversary of the creation of the state.[112] It contains provisions similar to those of section 34 of the ACJA[113] and even prohibits the holding charge.[114] Despite the domestication of the law but because the allegation made by Mr Jalingo was directed at the person of the executive governor of Cross River state, he was kept in prison/correctional centre for months without being brought before court.[115] It took protests by domestic human liberty organisations and an international outcry for him to be charged to court when he was finally granted bail.[116] Such political shenanigans are capable of suffocating the initiative engendered by the ACJA, as seen in the Agba Jalingo case.

Another challenge is the unwillingness or failure of the Chief Judge to appoint the magistrate in compliance with the provisions of either the ACJA or any of its state equivalents.[117] The chief judge may not set out to deliberately fail or refuse to appoint a magistrate for the purpose of implementing the law, but it could be due to administrative inadvertence which cannot be overlooked. Where the chief judge has appointed a magistrate in compliance with the law, it does not automatically translate into implementation unless and until the designated magistrate performs the work.[118] The reluctance of the magistrate to visit detention centres may be due to a work load as it is customary for the dockets of the magistrate's courts to be over-congested, and the purpose of the law would be technically defeated. The ACJA has taken into account the need for the expeditious trial of criminal cases by providing in section 306 that trials shall be on a day-to-day basis. This provision has been upheld as valid and constitutional by the Supreme Court per Ogunbiyi JSC in *Olisa Metuh v Federal Republic of Nigeria*.[119]

111 The Cross River State Administration of Criminal Justice Law 16, 2016.
112 E Iyamba 'The Cross River State Administration of Criminal Justice Law No 16, 2016 and matters arising', https://crossriverwatch.com/2017/12/the-cross-river-state-administration-of-criminal-justice-law-no-16-2016-and-matters-arising-by-eno-iyamba-esq/ (accessed 11 December 2019).
113 Secs 31, 32, 33 & 293 Cross River State Administration of Criminal Justice Law 16, 2016.
114 Secs 15, 28 & 467(2) Cross River State Administration of Criminal Justice Law 16, 2016.
115 O Kehinde 'Why Agba Jalingo is still in detention – Governor Ayade', https://dailytrust.com/why-agba-jalingo-is-still-in-detention-governor-ayade (accessed 9 December 2020).
116 C Ukpong 'Court grants Agba Jalingo bail', https://www.premiumtimesng.com/news/headlines/377231-just-in-court-grants-agba-jalingo-bail.html (accessed 4 December 2020).
117 Ugbe, Agi & Ugbe (n 95) 75-78.
118 Y Akinseye-George *Introductory notes on the Administration of Criminal Justice Act 2015* (2017) 1.
119 [2017] 11 NWLR (Pt 1575) 157.

Another factor that could negatively impact on the realisation of the objectives of the ACJA, resulting in unlawful detention, is the springing of surprises on the defendant by the prosecution which could lead to a delay in the trial of an accused person. Where the prosecution springs surprises on the defence counsel, this can destabilise the defence counsel, requiring him to seek an adjournment to adequately prepare and accurately respond to the surprise. Each adjournment is an elongation of the period of the trial, resulting in the continuous incarceration of the accused person while the trial is ongoing. Fortunately, this practice, which is easily resorted to by prosecution counsel especially when they have a weak case, has been outlawed by section 379 of the ACJA which is in pari materiae with section 146 of the Administration of Criminal Justice Law of Anambra state. The validity and constitutionality was upheld in *Okoye v Commissioner of Police*[120] and *Nweke v State*.[121] It is expected that trial courts will give full force to this provision of the ACJA in order to prevent prosecution counsel from resorting to the springing of surprises on the defendant during the course of a trial in a bid to delay the trial while the accused person remains in detention while his or her culpability is yet to be determined.

It is worth noting that while the ACJA is not applicable to proceedings before the court martial, it is applicable to proceedings before quasi-judicial tribunals such as the Code of Conduct Tribunal, as was held by the Supreme Court in *Saraki v Federal Republic of Nigeria*.[122] Further, the ACJA has amalgamated the Criminal Procedure Act and the Criminal Procedure Code, the two procedural laws regulating criminal proceedings in Southern and Northern Nigeria, into one by repealing both by virtue of section 493 of the ACJA. Thus, from 2015 when the ACJA came into force, there is henceforth only one federal procedural criminal legislation regulating criminal proceedings in Nigerian trial courts.[123] The hitherto dichotomy, with its inherent difficulties, has been phased out by the ACJA and uniformity has been introduced. Apart from the difficulties arising from the dual system of procedural criminal legislation, the laws (that is, the Criminal Procedure Act and the Criminal Procedure Code) led to a steady decline in the administration of criminal justice as they had become obsolete and inadequate for the prevailing modern-day criminal realities.[124] Thus, the ACJA is a welcome development

120 (2015) LPELR-24675 (CA).
121 [2017] 15 NWLR (Pt 1587) 120.
122 [2016] 3 NWLR (Pt 1500) 531 578.
123 MO Imasogie, RO Adeoluwa & AO Ojekunle 'Re: Administration of criminal justice review in Nigeria: Mere revision or revolution' in Chiroma & Dadem (n 91) 334.
124 Hambali et al (n 91) 42-43.

and it is hoped that all stakeholders in the criminal justice sector will cooperate towards achieving its aims and objectives.

5 Conclusion and recommendations

It is clear that, even though the Constitution of Nigeria recognises the rights to freedom of movement and dignity of the person, security agencies in Nigeria more often than not violate these rights with impunity. Unlawful detention based on arrest without warrant for non-capital offences is rampant despite being bailable offences. This situation is a detraction from human decency and democratic ethos, hallmarks of a democratic society, which Nigeria claims to be. The provisions of the ACJA discussed above as well as other legislation can curb this menace if they are implemented. The Nigerian Bar Association, civil society and other human liberty groups have a role to play in ensuring the implementation of the provisions of the ACJA. Despite the laudable provisions of the ACJA, its application is limited to the federal capital territory. Therefore, it is necessary for public-spirited individuals and organisations to ensure that states that are yet to domesticate the ACJA do the necessary. Public enlightenment will help create awareness of this mechanism and even enable relations of the victims of unlawful detention to be present at the police stations or detention centres when the magistrate is conducting the monthly visit to volunteer information. This provision of the ACJA not only is innovative but a welcome panacea to the menace of continuous unlawful detention in Nigeria.

Based on the above, it is recommended that the NBA and other stakeholders in the fight for human liberty engage with the legislature of the states of the federation that are yet to domesticate the Administration of Criminal Justice Act to do so with a view to opening the channel of taking advantage of the innovation in the said Act to curb unlawful detention.

Further, in states that have domesticated the Administration of Criminal Justice Act but where the chief judge is yet to appoint a magistrate for the purpose of visiting detention centres with a view to ensuring that persons are not detained unjustly, the civil liberty stakeholders should engage the chief judge with a view to implementing the law. Where the chief judge is unwilling to perform his function, an order of mandamus should be sought and obtained compelling him to appoint a magistrate for the purpose connected with the law.

Moreover, in the locality where a magistrate has been designated to visit the detention centre, the NBA should always accompany the magistrate on all his visits in order to assist with useful information as well as to serve as an impetus for the magistrate to discharge his function without fear of intimidation or harm from the officials of the centre. There is also a need for the NBA and other human liberty organisations to sensitise the public on the availability of this right and how best to exploit it.

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Liberalisation of Nigeria's abortion laws with a focus on pregnancies resulting from rape: An empirical analysis

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Summary: *One of the reasons why women seek abortion in Nigeria is to get rid of unwanted pregnancies resulting from rape. However, due to the prohibition of the procedure, in such circumstances many women resort to secret and mostly unsafe abortions. These abortions contribute to the soaring rates of maternal deaths and morbidity in the country. It is against this background that this article examines the Nigerian laws on abortion and elicits peoples' attitudes to the call for liberalisation thereof, with a focus on pregnancies resulting from rape. The study employs both the doctrinal and the non-doctrinal methods of research. The doctrinal method comprises a contents analysis of literature and the law. The non-doctrinal method consists of field research to obtain information via interviews, which is imperative because of the dearth of primary data to work on. The field research involves representative participants that are selected using a purposive sampling technique. Findings are presented on thematic bases. It is established that the current law is dysfunctional and counter-productive, and that people support its liberalisation.*

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Consequently, the study concludes that an effective strategy to combat unsafe abortion and enhance women's reproductive health in Nigeria is to liberalise the law to conform to the nation's treaty obligations, while deriving insights from the South African experience.

Key words: *rape; unsafe abortion; reproductive autonomy; right to choose; Nigeria*

1 Introduction

Nigerian law prohibits abortion[1] except for the purpose of 'saving the life' of a woman.[2] The offence is punishable with imprisonment for a term of up to 14 years, or with a fine, or both.[3] Ultimately, the law limits access to abortion without envisaging other situations that may warrant the procedure such as in the case of women that fall pregnant as a result of rape. In effect, such women are required to bring their foist pregnancies to term, and thus are denied the right to choose as to whether to bring the pregnancy to term. Although researches in Nigeria so far are not able to empirically obtain data on rape-related pregnancies and the abortion thereof as the phenomenon usually is not reported to avoid being stigmatised, among other reasons, it is a notorious fact in the country that, to avoid humiliation and mockery, most pregnant rape victims, rather than yielding to the legal restriction, would resort to secret and, more often than not, unsafe abortions.[4]

The menace of unsafe abortions is exposed by the soaring rate of avoidable maternal deaths and morbidity arising therefrom.[5] The maternal death ratio in Nigeria was projected to be 814 out of every 100 000 births.[6] This makes Nigeria a country with one of the highest

1 Sec 232 of the Penal Code Act, Northern States Federal Provisions Act Cap P3 Laws of the Federation of Nigeria 2010 (Penal Code), applicable to the 19 northern states and the Federal Capital Territory; sec 228 of the Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2010 (Criminal Code), applicable to the 17 southern states.

2 As above; see also *Rex v Edga* [1938] 4 WACA 133 following *Rex v Bourne* [1938] 2 All ER 615.

3 Penal Code and Criminal Code (n 1).

4 CO Muoghalu 'Rape and women's sexual health in Nigeria: The stark realities of being female in a patriarchy world' (2012) 19 *The African Anthropologist* 39; O Olopade *Law of abortion in Nigeria* (2008) 111.

5 AP Aboyeji *Pregnancy: The burden of womanhood* (2014) 14 33; OO Fakeye *That our women die not without gains* (2011) 11.

6 JP Vogel et al 'The burden of severe maternal outcomes and indicators of quality of maternal care in Nigerian hospitals: A secondary analysis comparing two large facility-based surveys' (2019) 126 *British Journal of Obstetrics and Gynaecology* 49-50; AI Adanikin et al 'Maternal near-miss and deaths associated with abortive pregnancy outcome: A secondary analysis of the Nigeria near-miss and maternal

maternal death rates in the world.[7] Even worse, complications resulting from unsafe abortions account for approximately 40 per cent of the maternal deaths in Nigeria.[8] It is difficult to validate these figures, or otherwise obtain precise data on the prevalence of unsafe abortions, partly because of the lack of measures to track the trends, the stigma attached, and the secrecy surrounding the performance of abortion, resulting in a dearth of official data. Despite the lack of reliable statistics, it is unarguable that unsafe abortions are common, and that thousands of women die or suffer from post-abortion complications.[9] It is not inconceivable that the figures are even understated.

Depite the aforementioned, remarkably sparse consideration is given to the need for liberalisation of the law, to allow for safe legal abortions as a means of countering the epidemic of unsafe abortion. This is also regardless of the exploits relating to women's reproductive health rights at the international and regional levels to the effect that countries should liberalise aspects of their laws that provide penalties for abortion, most of which Nigeria has ratified. It is for this reason that this study, exploring women's autonomy and the right to choose frameworks, delves into the extent to which the Nigerian law impacts on safe abortion and the extent to which the law conforms to international human rights standards.

The article is divided into seven parts including this introduction. The second part elucidates the research design and methodology, and the sources of and the way in which data is obtained in the course of the study. It is in this part that I justify the need to embark on field research; how and why participants therein are selected and who they are. In the third part entitled 'literature and theoretical framework' I review relevant literature and shed light on the theoretical underpinning of the study. The fourth part, designated 'Legal frameworks on abortion in Nigeria: A critique' examines the Nigerian law on abortion. I delve into the extent to which the extant laws have impacted on access to safe abortion. In addition, I discuss some of the international treaties relating to the right to safe

death survey' (2019) 126 *British Journal of Obstetrics and Gynecology* 34. Cf UNICEF 'Situation of women and child in Nigeria', www.unicef.org/nigeria/situation-women-and-children-Nigeria (accessed 16 June 2020).

7 As above.

8 A Bankole et al 'The incidence of abortion in Nigeria (2015) 41 *International Perspectives on Sexual and Reproductive Health* 170-181; EI Akpanekpo, DE Umoessien & EI Frank 'Unsafe abortion and maternal mortality in Nigeria: A review' (2017) 1 *Pan-African Journal of Medicine* 2.

9 R Oghu 'Illegal abortion in Nigeria: The cringing reality' *Daily Times* 11 April 2013; J Benson et al 'Public hospital costs of treatment of abortion complications in Nigeria' (2012) 118 *International Journal of Gynaecology and Obstetrics* 34.

abortion which Nigeria has ratified, and the extent to which Nigeria's law conforms to the nation's obligations under those treaties. The next part entitled 'South Africa's legal framework and safe abortion' underscores aspects of that country's law that can work for Nigeria in its quest for safe abortion. The sixth part probes into the perceptions of people about the law and their attitude with regard to whether it should be liberalised in favour of pregnant rape victims. This part contrasts the literature with the outcome of the field research, then reviews and presents issues arising therefrom on thematic bases. The last part concludes the article.

2 Methodology and data

The study adopts both doctrinal and the non-doctrinal methods of research. The doctrinal method comprises contents analysis of literature, statutes and case law. The non-doctrinal method involves field research with a view to obtaining first-hand information from representative participants that are selected through a purposive sampling technique. Data is elicited from the participants through semi-structured interviews.

It is imperative to engage in field research for this study because, due to the secrecy surrounding rape, unwanted pregnancy and unsafe abortion, there is remarkably scant primary data in the public domain available for analysis. Also, since the study proceeds on the assumption that abortion, especially by rape victims, is mostly carried out clandestinely, obtaining quality primary data regarding the need to liberalise the law in that respect can best be undertaken by direct interaction with frontline actors and victims. It is by engaging in field research that it is possible to elicit not only opinion but also the demeanour and underlying reasons for the attitude of respondents in this study. It is also by engaging in the field research that the correctness of some of the data from literature review for this study was corroborated.

Furthermore, the study adopted purposive sampling as a technique in the selection of the respondents for the interviews. This is because the study required carefully-selected respondents that can provide informed responses to questions that are specific to them. The interview questions were aimed at eliciting information on the personal experiences of frontline actors and women, on the nexus between the current law, rape-related pregnancies, unsafe abortions and morbidity. Such questions are best put to informed, not indiscriminately-selected respondents.

The 22 participants interviewed for this study were chosen from five main groups. The first group consists of medical doctors, academics, and other healthcare providers: two professors that are also senior consultant gynaecologists and obstetricians (IRs 13-14) and a professor of reproductive and family health (IR12). These were selected as they engage with rape victims and women with unwanted pregnancies. Most of them were selected also because they have qualifications that could draw those in need of abortion services to them. The second group consists of lawyers: legal scholars that have carried out extensive research on the focus of the present study (IRs 1, 3 and 7); a private legal practitioner (IR2); and a Muslim Shari'a jurist (IR8). The third group consists of a policy and law maker: a public servant in the health sector (IR16) and a lawmaker (IR18). They were chosen because of their impact on law and policy making. The fourth group comprises religious clerics or leaders of the Islamic faith (IRs 4-6) and of the Christian faith (IRs 9-11). These were selected, considering the religious perspectives on the focus of this study, and influence of religion on public sentiments on the issues in Nigeria. The fifth group comprises women who are believed to have been or suspected of having been victims of rape or had cause to seek or undergo abortion (IRs 19-21). Their inclusion in the study is indispensable as the study concerns them.

The interviews were conducted with respondents across nine locations covering the six geo-political zones of Nigeria, namely, in the North-Central (Ilorin and Offa, Kwara-State); South-West (Osogbo, Osun-State, Abeokuta, Ogun-State, Ojo, Lagos-State); South-South (Okrikah Rivers-State); South-East (Owerri, Imo-State); North-West (Kano, Kano-State); and in the North-East (Jimeta, Adamawa-State). The interviews took place between 23 May 2017 and 12 February 2018. Twenty-two individual interviews were carried out. Ethical clearance for the purpose of this study was sought and obtained from the Ethical Review Committee of the University of Ilorin, Nigeria.

The qualitative content analysis of literature was blended with the thematic analysis of data obtained from the interviews. I studied the entire data from the transcript of the interviews so as to be familiarised with the content. The transcript subsequently was summarised. The summary was reviewed to distil the initial ideas that could be used to generate code names for the data. Codes were then assigned to the datasets. After generating codes, those codes and the related extracts of the transcript were examined to identify patterns to generate potential themes. The codes were then given broader themes that more clearly expressed the data. Some of the codes were merged to have more concrete themes. The themes were

compared with the dataset to ensure that they correctly represented the data from the interviews and answered the research question. Thereafter, I determined the scope and focus of each of the themes and gave them informative titles. After this I wrote my report on the analysis of the data. The audio-recorded and long-hand notes of the interviews which were earlier transcribed were subsequently saved electronically. The printouts of the transcript were produced and marked. These are available with the author.

Table showing details of the respondents to the interviews

	Study area	**Occupation**	**Academic and professional qualifications**	**Sex**	**Unit of analysis**
IR1	Oshogbo	University scholar	PhD BL professor	M	Legal scholar
IR2	Lagos	Legal practitioner	LLM BL	F	Legal practitioner
IR3	Ilorin	University scholar	PhD BL	F	Legal scholar
IR4	Ilorin	University scholar	PhD professor	M	Muslim leader and cleric
IR5	Abeokuta	Legal practitioner	LLM BL	M	Muslim leader
IR6	Ibadan	Islamic cleric	BA	M	Muslim cleric
IR7	Ilorin	University scholar	PhD professor	M	Islamic/Shari'a scholar
IR8	Ilorin	Judicial officer	LLB BL	M	Muslim jurist
IR9	Ilorin	University scholar	PhD professor	M	Christian leader
IR10	Ibadan	Pastor	B Sci	M	Christian clergy
IR11	Kano	Pastor	B Theology	M	Christian clergy
IR12	Ilorin	University scholar	PhD Professor	M	Reproductive & family health expert
IR13	Ilorin	University scholar	MBBS FWACS professor	M	Obstetrician & gynaecologist
IR14	Ilorin	University	MB BS FWACS professor	M	Obstetrician & gynaecologist
IR15	Jimeta	Medical practitioner	MB BS	F	Healthcare provider
IR16	Concealed	Public servant	MBBS	M	Policy maker
IR17	Okrika	Nurse	M Sci	F	Healthcare provider
IR18	Owerri	Politician	BA	M	Law maker
IR19	Offa	Business woman	HND	F	Woman: pregnant date rape victim
IR20	Ilorin	Teacher	NCE	F	Woman: a non-pregnant rape victim
IR21	Ilorin	Nursing student	SSCE	F	Woman: survivor of an unsafe abortion
IR22	Oshogbo	Journalist	MA	F	Women's welfare

- Source: Field research 2017/2018
- IR: Interview respondent

3 Literature and theoretical framework

This part assesses the literature that is germane to the study. Although most of the works are written in broader contexts, they have been used without losing sight of the theme of the present study. In discussions on abortion there are two core groups holding completely competing standpoints. These are the pro-choice group, which posits that abortion should be legalised; and the pro-life group, which argues that abortion should be outlawed. The literature on the questions of abortion may likewise be broadly classified by virtue of the two groups.

The first writings were by Malthus,[10] Darwin[11] and Galton.[12] Malthus hypothesises that when unchecked the population will increase in geometrical proportion while the resources to cater for it increase in arithmetical progression.[13] To Malthus, therefore, population should be checked[14] and his solution to the foreseen problem included delayed marriage, birth control and elective abortions.[15] Darwin postulates that the way in which plants and animals struggle for existence reveals a propensity to preserve the good variations and destroy the bad ones in order to form new species.[16] According to Darwin 'one general law, leading to the advancement of all organic beings … [is to] let the strongest live and the weakest die'.[17] To Darwin, man originates not by being 'independently created' but as a self-creating species or 'through inheritance and the complex action'[18] of what he called the laws of variations and natural selection.[19] In simple terms, Darwin attributes conception to hormones and genes rather than to God, thus promoting reproductive autonomy. This presents support to the debate over legalisation of abortion in that it encouraged those who had been prevented from talking about it owing to religious beliefs to be able to do so. For his part, Galton suggests bringing to term only healthy foetuses,[20] selective breeding and abortion of foetuses that are of no or less preferred traits[21]as

10 TR Malthus *An essay on the principle of population as it affects the future improvement of society* (1798).
11 C Darwin *On the origin of species by means of natural selection, or the preservation of favoured races in the struggle for life* (1859).
12 F Galton *Essays in eugenics* (1909).
13 Malthus (n 10) 4 6.
14 Malthus (n 10).
15 Malthus 17-22.
16 Darwin (n 11) 79.
17 Darwin 244.
18 Darwin 129.
19 Darwin 127.
20 Galton (n 12) 27.
21 Galton 24-25.

a way of increasing output[22] and enhancing the makeup of later generations.

The gist of the foregoing is the danger of over-population and the need to abort foetuses likely to be born with deformities, or otherwise unable to contribute to the growth of the economy so as to create an avenue for those that are healthy and are able to contribute meaningfully. To do otherwise is to sacrifice other important things to take care of defective babies since they would become burden. These theories, though flawed by economists and demographic studies,[23] have influenced the demand for abortion.

Feminist writers such as Scales[24] and Kay[25] posit that women cannot claim to have been liberated or free moral agents, let alone considered as equals with men unless they are able to protect their bodily and reproductive autonomy.[26] It is argued that the unique physical experience of pregnancy justifies that the right to choose on abortion, particularly in a case of rape or when a woman otherwise finds herself pregnant against her wishes, must be left to the woman, free from interference.[27] Scales insists that if the law must take 'a sufficiently broad view of equality … a woman [should] not be forced to choose between children and career, just as a man need not make that choice'.[28] She contends that a woman must be availed the 'opportunity to live a continuous life, integrated with respect to career and procreation just as are the lives of men'.[29] Also, West[30] argues that a forced pregnancy not only is an attack on woman's reproductive autonomy but also an assault on her physical integrity,[31] and that it is a harm that may be abated by an abortion.[32] Feminists' literature thus has offered women reproductive autonomy and the right to choose as a theoretical foundation for liberalising abortion law in favour of pregnant rape victims.

22 Galton postulates that 'if we desire to increase the output of V-Class offspring, by far the most profitable parents to work upon would be those of the V-Class, and in a threefold less degree those of the U-Class'. See Galton (n 12) 18.
23 K Marx *Capital volume1* trans B Fowkes (1990); RB Emmett *Malthus reconsidered: Population, natural recourses and markets* (2006).
24 AC Scales 'The emergence of feminist jurisprudence: An essay (1986) 95 *Yale Law Journal* 1373.
25 HH Kay 'Equality and difference: The case of pregnancy' (1985) 1 *Berkeley Women's Law Journal* 38.
26 Scales (n 24) 1398; Kay (n 25) 23 fn 125.
27 Kay (n 25) 23 fn 125.
28 Scales (n 24) 1381 fn 46.
29 Scales 1398 fn 129; see also AC Scales 'Towards a feminist jurisprudence' (1981) 56 *Indiana Law Journal* 435 fn 9.
30 R West 'Jurisprudence and gender' (1988) 55 *The University of Chicago Law Review* 29-30.
31 West (n 30) 29.
32 West (n 30).

The notion of autonomy became renowned through the works of Kant[33] and Mill.[34] Kant reflects on the concept of autonomy from the point of view of man's capacity to reasonably choose and take action without extraneous control.[35] According to Kant a regard for an individual's autonomy emanates from the knowledge that everybody has the ability to decide his fate. For his part, Mill postulates that the basis of a person's value is his 'choices', hence, to all intents and purposes values should not be forced on an individual except where his activities may hurt others.[36] To Mill, therefore, a person's autonomy is a limitation on the state's powers to determine what he should do or abstain from doing. As the concept of autonomy is relevant in most spheres, so it is in respect of the exercise of women's right to choose a safe abortion. In view of this, Slowther[37]contends that the recognition of women's reproductive autonomy should imply that women are regarded as competent to decide, and that the choices made thereon should be recognised.

Adebimpe[38] assesses the concept of foetal personhood with respect to the debate over women's rights to an abortion. He also examines the laws of selected jurisdictions and international instruments on the legal status of the foetus. It is contended that neither the domestic law nor international law confer an inherent legal personality a fortiori a prevailing right to life on the foetus as to reject women's right to a safe abortion.[39] Thus, it is posited that a woman ought to be entitled to abort an enforced pregnancy.[40] To Adebimpe the fact that the foetus is a potential person[41] is a basis to confer on it some measure of protection but that alone cannot match a woman's right to self-determination[42] unless such provision is unequivocally imputed in domestic law.[43]

On the contrary, Elegido[44] discusses the jurisprudential problem posed by legal personality in relation to abortion. Debunking the argument that a foetus is not a person as it is unable to reason or choose, Elegido contends that characteristics such as the ability to

33 AW Wood (ed) *Groundwork for the metaphysics of morals* trans I Kant (2002).
34 JS Mill *On liberty and other essays* (1991) 14.
35 Wood (n 33) 16-17 29.
36 Mill (n 34) 14.
37 A Slowther 'The concept of autonomy and its interpretation in health care' (2007) 2 *Clinical Ethics* 173.
38 RJ Adebimpe 'Foetal personhood in the jurisprudence of abortion in international and comparative law' (2020) 10 *Bahir Dar University Journal of Law* 146.
39 Adebimpe (n 38) 168.
40 Adebimpe 150-151.
41 Adebimpe 148-149.
42 Adebimpe 150.
43 Adebimpe 168.
44 JM Elegido *Jurisprudence* (1994) 231-233.

think or choose is irrelevant as a basis for inferiority as, after all, a six months-old child is also unable to choose. Similarly, Izunwa and Ifemeje[45] posit that the life of a pregnant woman and that of the foetus are on an equal footing. Hence, it is argued that a woman should not be legally excused to abort her pregnancy even with the aim of saving her life.[46] Izunwa and Ifemeje postulate that the lone tolerable ground for abortion should be when it is for an unintended or inevitable – though foreseeable – consequence of a medical remedy for a life-threatening ailment.[47] The present study differs with Elegido, and with Izunwa and Ifemeje, to the extent that they see no difference between the foetus and the pregnant woman, thereby liking abortion in all circumstances to homicide, which should be outlawed without exception.

Conclusively, it is evident that neither of the diametrical opposing positions of the two groups with respect to abortion debate is appropriate to the circumstances of Nigeria. Nigeria's situation requires that there should be a mid-point to the discourse, and this should to be reflected in the law. Indeed, a third sort of literature, which is in support of neither of the pro-life nor the pro-choice, seems to be emerging, for as Ogiamien[48] rightly posits, 'the right to abortion is not absolute nor can its prohibition be absolute'.[49] Thus, abortion should be allowed – though not absolutely – on broader grounds such as in the case of pregnancies resulting from rape.[50]

4 Legal frameworks on abortion in Nigeria: A critique

The law on abortion in Nigeria is embodied in the provisions of the two principal penal statutes. These are the Penal Code[51] and the Criminal Code.[52] In order to appreciate the law, the provisions of the

45 MO Izunwa & S Ifemeje 'Right to life and abortion debate in Nigeria: A case for the legislation of the principle of double-effects' (2011) 2 *Nnamdi Azikiwe University Journal of Jurisprudence and International Law* 111.
46 Izunwa & Ifemeje (n 45) 122.
47 Izunwa & Ifemeje 125-126.
48 TBE Ogiamien *Abortion law in Nigeria: The way forward* (2000).
49 Ogiamien (n 48) 23.
50 See Olopade (n 4) 109 111 who, while not supporting a 'too liberal abortion law', suggests that the law should take a more tolerant stance than it presently takes to the issue of abortion.
51 Penal Code and Criminal Code (n 1). For a fuller discussion on the Nigerian law on abortion, see WO Chukudebelu & PC Nweke 'Abortion and the law' in BC Umerah (ed) *Medical practice and the law in Nigeria* (1989) 60-67; Olopade (n 4); O Odunsi 'Abortion and the law' in IO Irehobhude & RN Nwabueze (eds) *Comparative health law and policy: Critical perspectives on Nigerian and global health law* (2016) 197.
52 As above.

Codes deserve to be quoted. Section 232 of the Penal Code provides as follows:

> Whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to fourteen years or with fine or both'.

Section 228 of the Criminal Code provides:

> Any person who with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever is guilty of a felony, and is liable to imprisonment for fourteen years.

It is to be noted that while the Penal Code explicitly states that abortion is allowed 'for the purpose of saving the life of the woman' the Criminal Code is silent on when abortion is lawful. Thus, but for the decision in *Rex v Edgal*,[53] which followed the English decision in *Rex v Bourne*,[54] that the word 'lawful' has the same connotation which it has in common law, that is, 'to preserve the mother's life', the provision of section 228 of the Criminal Code may have been without an exception. The two cases underscore the vital role of the court in the quest to libralise the Nigerian law on abortion.[55] However, the law continues to restrict abortion without envisaging any other situation that may warrant the procedure such as in cases of gruesome rape resulting in pregnancy, and an established case of monstrous birth and foetal indication of severe impairments.

However, in spite of the prohibition, those in desperate need of the procedure resort to it secretly in the hand of quacks or otherwise self-induce it, as skilled practitioners are more likely to refuse to do it for fear of the legal consequences. It follows that the extant legal prohibition of abortion has failed to lower the prevalence of abortion. It has merely pushed women to clandestine abortion with the associated maternal deaths or morbidity[56] and a high degree of negative impact on public health.[57] This study now turns to

53 *Rex v Edga* (n 2).
54 *Rex v Edga* (n 2) where it was held that although there may not be an instant threat to the life of the girl who became pregnant following a gang-rape, but because she could be mentally wrecked if forced to continue with the pregnancy, an abortion may be allowed. Thus, preserving the woman's life was held to include efforts to save mental health.
55 Odunsi (n 51) 214; see *Roe v Wade* (1973) 410 US 113 which is the most famous case on liberalisation of prohibitive abortion law by the court in the US. The Supreme Court upturned the restrictive legislation on abortion, thus making access to safe abortion in the early months of gestation a constitutional right in the US.
56 Odunsi (n 51) 197.
57 Aboyeji (n 5); Fakeye (n 5); Akpanekpo et al (n 8) 2.

assessing the extent to which Nigeria's laws on abortion conform to her international treaty obligations relating to safeguarding women's reproductive autonomy and right to choose.

First, Nigeria ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)[58] in July 1993. The human rights provided in ICESCR include the right to health[59] in terms of which Nigeria is obliged to take step towards reducing maternal deaths.[60] Health in the context of ICESCR is taken as including the rights to exercise autonomy over an individual's health, and it is understood as including reproductive health services.[61] Nigeria is also enjoined under the treaty to give prospects for its youths to be counselled on behavioural choices made by them on health, and to provide the youths with appropriate health care in a way that shows consideration for their privacy.[62]

Furthermore, the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[63] and its Optional Protocol were also ratified by Nigeria in 1985 and 2004, respectively, without reservations. By ratifying CEDAW, Nigeria is obliged, in the context of non-discrimination,[64] to focus on the reproductive rights of women by guaranteeing women the same privileges as men in decision making involving self-determination, particularly as to the 'number and spacing of children'[65] and to grant women access to information on reproductive healthcare services, facilities, family planning[66] as well as resources to be able do so.[67] Notably, CEDAW obligates governments to take actions to change socio-cultural practices that are founded on the notion of inferiority, especially of women,[68] by affording women freedom from men-on-women aggression such as rape and forced pregnancy.

While the right of access to family planning services by women features prominently in CEDAW, the context in which it is used is not explicitly stated. This gives room for uncertainties as to whether family planning can be tied to safe abortion in situations such as in rape cases. It is in order to fill the identified gap, and consistent with

58 GA Res 2200A (xxi) UN Doc A/6316 (1966) 993 UNTS 3.
59 Art 12 CESCR.
60 As above.
61 UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14 para 9.
62 Arts 12(1)-(2) CESCR.
63 UN GA Res 34/180 (1979) UN Doc A/34/46 1981.
64 Art 16(1) CEDAW.
65 Art 16(1)(e) CEDAW.
66 Arts 10(h) & 14(b) CEDAW.
67 Art 16(1)(e) CEDAW.
68 Art 5(a) CEDAW.

articles 12 and 16 of the Convention that Recommendation 24 of the CEDAW Committee has construed articles 10(h), 12 and 14(2)(b) of CEDAW to the effect that abortion is part of states' treaty obligations, and has called on state parties to liberalise aspects of their laws that proscribe and penalise women for abortion.[69] To this extent Nigeria ought to have liberalised its restrictive law on abortion – in situations such as in pregnancies resulting from rape – by resorting to the right to choose under article 12 of the Convention.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[70] was also ratified by Nigeria, in 2004. The Protocol supplements the African Charter on Human and Peoples' Rights (African Charter)[71] by containing more detailed provisions on women's reproductive rights.[72] The Protocol enunciates women's reproductive rights as fundamental rights[73] and requires states to promote these, particularly the right to choose with respect to child bearing, child spacing, family planning, and so forth, devoid of coercion[74] and to seek to eradicate every form of violence and prejudice against women.[75]

The African Women's Protocol is a foremost human rights treaty to safeguard women's reproductive autonomy and right to choose, particularly by its explicit provision for the right to abortion to terminate pregnancy resulting from rape, among others.[76] Article 14 of the Protocol articulates two main points, namely, that therapeutic abortion to get rid of unwanted pregnancies resulting from rape is a human rights concern, and that the issue has serious adverse effects on women in Africa.[77] This aspect of the Protocol has been expounded by the African Commission on Human and Peoples' Rights (African Commission) in its General Comment 2 when it declared that the unique situation of women on the continent pertaining to the increasing incidences of unsafe abortions, the soaring rate of abortion-related maternal deaths and other effects of enforced pregnancies justifies the case for the reform of abortion laws at national levels.[78] Therefore, compelling a victim of rape to

69 General Recommendation 24 on Women and Health A/54/38/Rev1 (1999).
70 OAU Doc CAB/LEG/66.6 11 July 2003, ratified in December 2004, entered into force on 25 November 2005.
71 OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) ratified in1983, entered into force 21 October 1986.
72 Art 16 of the Protocol.
73 Arts 1-26.
74 Arts 14(1)(a)-(b).
75 Arts 2 & 4.
76 Art 14(2)(c).
77 See generally art 14.
78 *SERAC & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2000) para 68.

bring pregnancy resulting from rape to term is in contravention of the Protocol.

Regrettably, this Protocol which imposes a duty on states to allow law reform towards liberalisation of the law on abortion, as a means of eradicating deaths and associated morbidity caused by unsafe abortion,[79] has not been incorporated into Nigerian law. While Nigeria is under an obligation in international law to abide by all treaties it has ratified, in the Nigerian legal system ratification of a treaty without more does not make it part of the corpus of the national laws.[80] As rightly pointed out by Ngwena,[81] 'the human right efficacy of the Protocol is best assured when it is given tangible domestic enforcement ... through the adoption of domestic legislation'.[82] Nonetheless, the African Charter,[83] which the Protocol augments, has been domesticated by the enactment of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[84] The human rights guaranteed in the Act include the right to health[85] which, in the context of the Charter, requires state parties to take action to reduce maternal mortality and morbidity that invariably encompasses access to safe abortion. Therefore, non-domestication of the Protocol should not affect its effectiveness.

5 The South African legal framework and safe abortion

The South African legal system is reputed for its safeguard of the 'right to bodily integrity' and the right to choose 'concerning reproduction' in its Constitution[86] and for its reformist's law on abortion, with the

79 CG Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynaecology and Obstetrics* 163-164.

80 Sec 12 of the Constitution of the Federal Republic of Nigeria 1999. For discussions on the rationale for the requirement of domestication, see AO Enabulele 'Implementation of treaties in Nigeria and the status question: Whither Nigerian courts?' (2009) 17 *African Journal of International and Comparative Law* 328. The rationale for the requirement of domestication notwithstanding, the Nigeria's foreign policy objective *inter alia* 'shall be respect for international law and treaty obligations'; sec 19(d) of the Constitution.

81 C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 786.

82 Ngwena (n 81) 786.

83 African Women's Protocol (n 71).

84 See ch A9 of the Laws of the Federation of Nigeria 2010.

85 Art 16 Laws of the Federation of Nigeria (n 84).

86 Sec12(2)(a) of the Constitution of the Republic of South Africa, 1996 which provides that 'everyone has the right to bodily and psychological integrity which include … the right to make decisions concerning reproduction'; and sec 27(1)(a) which states among others that 'everyone has the right to have access to … heath care services, including reproductive health care'.

passage of the Choice on Termination of Pregnancy Act (Choice Act)[87] which changed the law on abortion from being that of restrictive access depending on race and status towards that which recognised the procedure as a constitutionally-guaranteed right for all women in the country.[88]

Under the Choice Act, the circumstances in which abortion can be done are widened while the period of pregnancy is split into three for the purpose of an abortion. Abortion is permitted on demand until the end of the twelfth week of gestation.[89] A medical practitioner or a 'registered midwife' who has, in addition, undergone prescribed training can perform abortion[90] and neither spousal nor parental consent is needed to have it in the circumstances.[91] After the twelfth week until the end of the twentieth week the law allows abortion, in specific situations, namely, if a medical practitioner is of the opinion that the pregnancy endangers the woman's health, or there is a considerable danger that the foetus would suffer a serious deformity, or where the pregnancy is the result of rape or incest, or if the pregnancy would seriously 'affect the social or economic circumstances of the woman'.[92] Afterwards, an abortion may be done in rare cases, only if two medical practitioners are of the view that 'the continued pregnancy would endanger the woman's life; would result in a severe malformation of the foetus; or would pose a risk of injury to the foetus.[93] In these circumstances the procedure 'may only be carried out by a medical practitioner'.[94]

The enactment of the Choice Act has portrayed South Africa as the leading country in Africa, in terms of the safeguard of reproductive rights. Although there are still hindrances to procuring a legal abortion, as a result of which some women continue to procure the procedure illegally,[95] the enactment of the Act and its subsequent amendment to allow for more devolution of power over licensing of

87 Act 92 of 1996 (Act).
88 C Ngwena 'Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *South African Public Law* 330; C Albertyn 'Claiming and defending abortion rights in South Africa' (2015) 11 *Revista Direito GV* 430; LB Pizzarossa & E Durojaye 'International human rights norms and the South African Choice on Termination of Pregnancy Act: An argument for vigilance and modernisation' (2019) 35 *South African Journal on Human Rights* 50.
89 Sec 2(1)(a) of the Act.
90 Sec 2(2).
91 Sec 5(1).
92 Sec 2(1)(b).
93 Sec 2(1)(c).
94 Sec 2.
95 For a fuller discussion on the barriers to access abortion in South Africa, see RK Jewkes et al 'Why are women still aborting outside designated facilities in metropolitan South Africa?' (2005)112 *International Obstetrics and Gynaecology* 1236-1242; Pizzarossa & Durojaye (n 88).

facility to the provinces, and for the inclusion of trained providers[96] has beyond a doubt and to a great extent enhanced access to safe abortion in state-owned hospitals and other healthcare facilities.[97] Also, it has to a very large extent lowered the incidence of maternal deaths and morbidity linked to abortion.[98] These manifest in the reduction in the number of women reporting for medical treatment over complications arising from abortion, even shortly after the commencement of the Choice Act.[99]

6 The debates on liberalisation of abortion law in Nigeria: Empirical findings and discussions

In this part a thematic analysis is carried out of the main insights derived from the interviews. This analysis is to support the assumptions contained in the reviewed literature that there is a need to liberalise the Nigerian laws on abortion. On the whole, the responses from the interviews seem to show criss-crossing themes in support of liberalisation of the law with respect to rape-related pregnancies. An analysis of the responses by interviewees reveals that the debate revolves around public health concerns, constitutional and human rights, and professional ethics. These are discussed in turn.

6.1 Public health concerns

The available literature reveals that in Nigeria there exists a nexus between the restrictive abortion law and unsafe abortion. Olopade[100] argues that the extant blanket prohibition on abortion has not achieved its aim of discouraging abortion; rather that it has pushed most women into clandestine and unsafe abortions. Okonofua[101]

96 Secs 1(b) & (c)-(d) of the Choice on Termination of Pregnancy Amendment Act 1 2008.

97 J Benson, K Andersen & G Samandari 'Reductions in abortion-related mortality following policy reform: Evidence following Romania, South Africa and Bangladesh' (2011) 8 *Reproductive Health* 5; M Favier, JMS Greenberg & M Steven 'Safe abortion in South Africa: "We have wonderful laws but we don't have people to implement those laws"' (2018) 143 *International Journal of Gynecology and Obstetrics* 39.

98 Favier et al (n 97); Benson et al (n 97) 6.

99 R Jewkes et al 'Prevalence of morbidity with abortion before and after legalisation in South Africa' (2000) 324 *British Medical Journal* 1252-1253; RE Mhlanga 'Abortion: Developments and impact in South Africa' (2003) 67 *British Medical Bulletin* 123; R Jewkes & H Rees 'Dramatic decline in abortion-related mortality due to the Choice on Termination of Pregnancy Act' (2005) 95 *South African Medical Journal* 250.

100 Olopade (n 4) 111.

101 FE Okonofua et al 'Perceptions of policymakers in Nigeria towards unsafe abortions and maternal mortality' (2009) 35 *International Perspectives on Sexual and Reproductive Health* 194.

and Oye-Adeniran[102] examine the correlation between Nigeria's restrictive abortion law, secret abortion and unsafe abortion. They posit that the legal restriction of abortion is the reason why most women seek unsafe abortion; of women's disinclination to report on the issue and the leading cause of maternal mortality and morbidity which is a serious public health problem in Nigeria.[103] Thus, an attempt was made in the field to investigate the findings contained in the literature.

Public health concern is articulated as a basis for the case for liberalisation of the law particularly in cases of pregnancies caused by rape. IR12, a reproductive and family health expert, IRs13-14, obstetricians and gynaecologists, IR15, a medical practitioner, IR16, a policymaker, and IR17, a nurse, all acknowledge the reality of unsafe abortion-related deaths and the need for legal and policy reform in Nigeria. IR15 hinted as follows:[104]

> As high as 35% or more of pregnancy related deaths in Nigeria are as a result of unsafe abortions … we must do something about it and in earnest too … we are not supposed to be helpless about it … it isn't a natural disaster which is beyond human control. We know the cause and are not oblivious of how to tackle it … importantly we should relax the law by providing for safe legal abortion if we are serious about dealing with the ugly trend.

The above position was confirmed by IR12, IRs13-14 and IR17 who disclosed that from their experiences and researches most women with pregnancies caused by rape consider abortion as an option, but that, because the law on abortion is too restrictive in the circumstances most women secretly resort to it from non-experts. Even IR3 – a legal scholar and who is also 'a pro-birth' writer – concurs that the law is restrictive, and that there is a nexus between the restrictive nature of the law and resort by most pregnant rape victims to unsafe abortion. For this reason, IRs12-15 and 17 opine that if the law is not liberalised towards safe legal abortion for such women, Nigeria should be prepared to contend with the rising cases of maternal deaths and/or 'post-abortion treatments'. It is thus confirmed in the field that the law on abortion is perceived by the people as too restrictive; and not only non-functional but also counterproductive since it succeeds in only forcing women into undercover, mostly unsafe abortion rather than stopping the incidence of induced abortions.

102 BA Oye-Adeniran et al 'Advocacy for reform of the abortion law in Nigeria' (2004) 12 *Reproductive Health Matters* 209.

103 See Ngwena (n 88) 328; CG Ngwena 'Reforming African abortion laws to achieve transparency: Arguments from equality' (2013) 21 *African Journal of International and Comparative Law* 398.

104 IR15, medical practitioner, male aged 49+.

Furthermore, respondents such as IR11, a member of the Christian clergy, IR13, an obstetrician and gynaecologist, IR15, general medical practitioner; IR17, a nurse and IRs19-22, who are all women, introduced and emphasised the aspect of the mental well-being of most pregnant rape victims seeking abortion to the discourse. The respondents are favourably disposed to relying on mental health grounds to 'assist' women requiring abortion services in cases of rape. In this regard, IR22 said:[105]

> While the law places importance on the injury or harm to the 'body' of rape victims, the psychological or inner aspect of rape should not be regarded as less important. So when a raped victim insists that the resulting pregnancy is unwanted, and it seems that her condition is turning into mental wreck … her choice to do away with the foist pregnancy should not be discountenanced, because while she may supposedly be in 'good health' she is not … in fact she may be in a very hopeless emotional disorder as to be forced to resort to any foul means of terminating the pregnancy.

6.2 Constitutional and human rights

The constitutional right to freedom of religion[106] is also advanced in favour of the case for liberalisation of Nigeria's abortion law for rape victims. Remarkably, this standpoint is canvassed by the Muslims who are estimated to constitute 50 per cent of the roughly 200 million Nigerians.[107] IRs 4-6, Muslim leaders and clerics, illustrated how the extant law on abortion is inconsistent with section 38 of the Nigerian Constitution which guarantees the freedom to practise one's religion to all citizens. IR5 articulated the point as follows:[108]

> From the standpoint of Muslim women … the extant abortion law is a denial of a constitutional right … The Constitution guarantees, amongst others, the right to religion, and our religion grants women the right to choose to keep or abort pregnancies caused by rape … it is therefore perverse that our statute laws are impediments to the exercise of this religious and constitutionally-recognised right.

Thus, the available literature and the findings in the field suggest that although Islam negates abortion,[109] the adherents to the Islamic

105 IR22, female, journalist aged 44.
106 Sec 38 of the Constitution of the Federal Republic of Nigeria 1999.
107 United Nations World population prospectus: The 2015 revision (2015) 21. Cf Z Pierri & A Barkindo 'Muslims in Northern Nigeria: Between challenge and opportunity' in R Mason (ed) *Muslim minority-state relations, violence, integration and policy* (2016) 133.
108 IR5, Muslim leader and lawyer, male aged 44+.
109 Qur'an ch 17 verse 31 states: 'Kill not your children for fear of want … verily the killing of them is a great sin.' Also, Qur'an ch 6 verse 151. These verses have been construed as outlawing abortion.

faith – the Muslims – strongly believe that since their religion permits safe and timely abortion in cases of rape, their women in those circumstances ought to be entitled to it. Most other people consider it unconscionable to require a pregnant rape victim to carry an unwanted pregnancy to term, especially when the right to choose is sought to be exercised before the foetus gains a soul, which in Islamic religion is the beginning of human personhood, and which takes place arguably by the 120th day of conception. IRs 5-6 decry the Nigerian law on abortion and denounce the policy and law makers of failing to make a significant effort towards liberalising the law in spite of the rampancy of rape, unsafe abortions and pregnancy-related mortality in the country.

6.3 Professional ethical codes of medical personnel

Another argument canvassed for the liberalisation of the law on abortion for rape victims involves the professional or ethical codes of medical practitioners ordained to protect their patients' lives, as contained in the Physicians' Oath and other ethical codes. IR13, an obstetrician and gynaecologist, IR15, a medical practitioner and IR17, a nurse, regard compliance with their ethical obligations to protect human lives as including saving pregnant women from killing or injuring themselves, and curtailing them from becoming mentally wrecked because of unwanted pregnancies caused by rape.

IR17 related an incident in which the ethics of her profession, namely the Nurses' Pledge, and that of another doctor, namely, the Physicians' Oath, justified performing an abortion in order to safeguard a patient against killing or fatally injuring herself. She recounts:[110]

> I've had cause to participate in terminating pregnancy caused by rape … there was no way we could do otherwise to save the woman from herself. The woman had attempted to commit suicide because of stigma … [pause] … it wasn't a joyful decision but one that had to be taken and fast too. By our callings we are to save lives but in the circumstance … we had to forgo the foetus – a lesser-ill – as a compromise to the woman who otherwise was ready to 'end it all'.

Most of the respondents, particularly members of the medical profession, regard abortion in circumstances such as those portrayed by IR17 above as choosing the 'lesser-ill'. This is notwithstanding the fact that the oaths to which they had averred appear to discourage the procedure. To IR17, the woman's dreadful state of health

110 IR17, nurse, female, aged 55+.

following a rape incident, an unwanted pregnancy and the fact that she had attempted to commit suicide were not consistent with the requirements of the oaths to protect the foetus. Thus, abortion was 'done to save the life of the woman, who otherwise was prepared to "end it all" by again attempting suicide'.

Indeed, it is not uncommon to hear of rape victims attempting to wound themselves or even resorting to suicide. A well-known female newscaster on the national television station, Tokunbo Ajayi, was reported to have committed suicide after being raped by robbers.[111] There have also been many reported cases, for instance, of teenagers who committed suicide in order to avoid stigmatisation after being raped.[112] Thus, to most people, rather than suicide, abortion in the circumstances is rational and in harmony with medical ethics. On this point, IR2, a legal practitioner, is of the opinion that nothing should stand in the way of the 'choice' or decision of a woman to abort an unwanted pregnancy resulting from rape. Rather, the respondent posits that the situation should be dealt with 'in line with the professional ethics' by allowing her to undergo a safe abortion.

6.4 Complexities in respondents' arguments; and how doctors resolve the conflicting religious instructions and professional ethics

The foregoing reveals that public health concern is used unanimously to buttress the arguments for liberalisation of Nigeria's law on abortion. However, while the constitutional and/or human rights argument is used in support of the relaxation of the law, the same is relied on by a few respondents to oppose the call for liberalisation. In the same vein, as religious instructions and morality are used to oppose legal abortion, the same is used by other participants to support a safe legal procedure. This part analyses the complexities found in the respondents' arguments, and discusses the factors influencing the conflicting positions while relying on the same basis.

First, human rights are resorted to by some respondents in support and by others in opposition to the call for legal abortion in favour of a rape victim. The stand of the three respondents who are opposed to legal abortion, namely IR3, a legal scholar, and IRs9-10, a Christian leader and clergies respectively, is that the foetus has a right to life which is equal to the right to life of the woman. To IR3 'the right to

111 A Chizoba 'Sexual exploitation and rape of women and children' *The Vanguard* 22 July 2010.
112 'Nigeria: Rape victim commits suicide' *PM News* 22 October 2013.

abortion is in contradiction to the foetus's right to life'. Similarly, IR9 sees a foetus as having the right to life 'which is by no means less significant to that of its pregnant mother'. However, none of the 19 other respondents regards the foetus as having a right to life which is near to being equal to that of its mother. All these show that there is no unanimity in the discourse on abortion right from the perspective of the foetus's personality and/or right to life.

Furthermore, in spite of the acknowledgment of the adverse effects of unsafe abortion on women and public health, IRs 9-10 are not in support of legal abortion on religious and moral grounds. However, some other respondents such as IR11, also a Christian clergy, rely on the same religious and moral grounds to support safe legal abortion. IR11 believes that the majority of people would be in support of safe legal abortion rather than obedience to a restrictive abortion law that merely forced women into secret, unsafe abortions. IR11 posits that the right to safe abortion ought to be granted particularly to pregnant rape victims on a moral basis, arguing that to continue to deny women abortion in the circumstances would be immoral, especially where such women are ultimately forced into resorting to deadly abortion. The allusion to religion and morality, by both sides of the divide, in support of their conflicting positions points to the reality that the religion and moral sentiments must be worked on for a proposal towards liberalisation of the abortion law to be successful.

Furthermore, some of the respondents who are healthcare providers express the fact that they often are in a dilemma as to what decision to take between the requirements of their professional ethics and religious beliefs on safe abortion. IR16 professes Christianity, which forbids abortion, but he considers himself obliged by his professional ethic to avert abortion-related maternal deaths especially if a woman would otherwise resort to an unsafe abortion. As a middle course, IR16 disclosed that what he did on one occasion was to refer a woman in need of an abortion to another qualified provider. He said:[113]

> (after heaving a sigh) … as a Christian my faith detests abortion … but I may be in a tight spot because our profession has to do more with stopping maternal deaths ... I have on some occasions resolved this difficulty by referring abortion seekers to other providers … it is a hard decision which cannot be snubbed because of the reality of unsafe abortions.

113 IR16, policy maker and doctor, male, aged 54.

It is found in the course of the field research that situations similar to the above are being faced by many other healthcare providers. The responses show that while many of them are not favourably disposed to conducting abortion because of their religious beliefs, they may wish that the woman is able to obtain a safe abortion from another certified professional.

The dilemma faced by healthcare providers on abortion, particularly for rape victims, is shown in the responses of IR15, a medical practitioner. The respondent insists that it is difficult to resolve the rate of maternal deaths arising from clandestine abortion in Nigeria with her religious creed which condemn the procedure. She added that it is because of her being aware of the reality of the maternal deaths resulting from unsafe abortions that she has tried to regard herself as under an obligation to carry out the procedure when needed. She confirms:[114]

> When I experienced such dilemma, I opted for the lesser evil which was safe abortion. Religion is against abortion, but a woman who was raped by dare devil armed robbers was pregnant, and she had attempted to commit suicide because of the stigma … yet the church is against safe timely abortion. As a doctor I am to assist in saving the woman's life … this is a dilemma … I chose the 'lesser evil' … which is to abide by my medical training … it was not an exciting decision but one cannot overlook such a serious problem.

Furthermore, IR17, a nurse who regards herself as a 'deeply' religious person, mentioned how she had handled the dilemma of choosing between professional ethics and religious teachings on abortion. This, she said, was resolved by considering the 'greater good' intended to be attained by a safe abortion. IR17 consider that the 'greater good' tilted towards the rules of professionally ethics – averting abortion-related maternal deaths. She cited the Bible inspiring her favourable attitude towards safe legal abortion instead of an unsafe abortion for rape victims. Relying on the scriptures, she contends that the Nigerian abortion law may sometimes be circumvented while showing empathy, particularly to a rape victim. She said:[115]

> While my (Christian) faith could be said to prohibit the procedure I have participated in an abortion on compassionate ground … I believe that it would be wrong to deny a woman a safe abortion .... As a Christian I believe that the life of an unborn is sacred ... But as a caregiver I shouldn't see a woman's life endangered by unsafe abortion and yet insist on the foetus's life.

114 IR15, medical practitioner female, aged 48+.
115 IR17, nurse, female, aged 55.

This demonstrates that most providers would prefer to avert the possible death of a woman and/or other complications arising from unsafe abortion, thus putting their professional obligations over religious principles.

6.5 Patterns versus dissenting views

This study found as a pattern that respondents who are members of the medical profession are generally in support of safe legal abortion and, by implication, the call for liberalisation of the law in favour of rape victims. Conversely, it is also found as a pattern that those who are Christian clergies are anti-abortion. There are, however, also respondents from these two groups who hold opinions that fundamentally tend to refute the generally-held views of their group and hold opinions that are profoundly at variance with those evolving from this author's hypothesis and analysis of data.

The succeeding paragraphs therefore focus on the two respondent groups in which the dissent occurred, the opinions of the 'dissenters', the motives for having such significantly different, though not necessarily negative or unacceptable, opinions from those of their groups and the lessons that can be learned therefrom. The respondents are referred to as dissenters as their opinions appear to be somewhat peculiar to them.

Dissenting views emanated from IR16, a doctor and policy maker. The respondent doctor is not favourably disposed to legal abortion even in the case of pregnancies resulting from rape. He believes that the undisclosed motive of the proponents of safe legal abortion ultimately is towards abortion on request. He appears not to be hopeful that a liberalised abortion law would ensure safe abortion or reduced abortion-related maternal deaths in Nigeria. This position of IR16 is against the generally-held views of others in his group, who are convinced that the broadening of access to safe abortion would bring down the rates of maternal deaths. However, it is found that what prompted the doctor's attitude is his status in the church. He is a deacon.

Dissenting information is also elicited from IR11, a pastor. It was expected as a pattern that the respondent would be opposed to the procedure. However, it turned out that the respondent pastor supported abortion on what he referred to as 'ethical grounds' such as for pregnant rape victims, and on broader medical grounds of mental health and to save a woman's life. IR11 insisted, even as a clergy, that he would rather support safe legal abortion for rape

victims, because many women in the circumstances would otherwise be so frustrated as to resort to clandestine andmore often than not, unsafe abortions, resulting in deaths or life-long indispositions.

IR11 is of the opinion that religious instructions could be circumvented in order to avoid a fatality that would otherwise be caused by an unsafe abortion. When the respondent was told that most other Christian clerics regard abortion as a sin, his response was to refer this researcher to how Christ himself circumvented the law by doing what was unlawful on the Sabbath when he healed a man who had a withered hand. The respondent also narrated how King David did what was against the law, because of starvation, by his eating the bread of the 'Presence' which was lawful to priests alone.[116] To IR11, these imply that the law may be side-stepped for safe legal abortion in situations such as in the case of an unwanted pregnancy caused by rape. It is found that the respondent's attitude is a reflection of his experiences of women who have been hospitalised for life-threatening health issues or had died following complications from unsafe abortions. It is found that the respondent had previously worked in the gynaecology department of a hospital. This explains why the respondent insisted that women should be granted access to safe legal abortions in order to 'save lives'. IR11 strongly believes that[117]

> the position of religion notwithstanding … most pregnant-rape victims would (rather) opt for an abortion … [and] if they [could be so] desperate as to seek abortion we should not be indifferent to their plight. They ought to be assisted to access a safe procedure.

The stand taken by IR11 above show that when people are enlightened they could attach greater importance to tackling the reality of the menace of maternal deaths caused by unsafe abortions, instead of being dogmatically inclined to follow religious principles. Conversely, this also means that devotion to professional ethics by medical doctors may not necessarily be the case with some doctors such as IR16 whose stance, as reported above, shows that an individual's religious conviction may not necessarily be thrust aside, regardless of the level of his education or knowledge of the reality of unsafe abortion. Thus, religion sentiment is an issue that needs to be addressed if the current calls for liberalisation of Nigeria's laws on abortion are to be successful.

116 St Luke ch 6, verses 1-11.
117 IR11, Christian clergy, male, aged 53+.

7 Conclusion

The finding of this study, namely, that the Nigerian law on abortion has failed to achieve its aim of lowering the rate of abortion, but encourages clandestine and unsafe abortion, is in line with the hypothesis that the law is inconsistent with the general attitude of the people. It is also found that people support the liberalisation of the law. As predicted by Ngwena, agitation for abortion law reform would not abate 'as long as criminalisation remains the main tool for regulating abortion'.[118] Consequently, the study concludes that it is imperative for Nigeria to liberalise the law in a way that conforms to the country's treaty obligations so as to avail women of their reproductive autonomy and the right to choose whether or not to bring pregnancies caused by rape to term. This would be consistent with the progress made in some other jurisdictions, particularly that of South Africa, which offer strong evidence that the enactment of a less restrictive law on abortion enhances women's reproductive health.

118 Ngwena (n 103) 398.

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The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation

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Summary: *South Africa lags behind with regard to an effective framework supporting substantive equality in the legal profession. The structure of the legal profession and the number of women represented in the legal profession do not as yet reflect the diversity of South African society. A number of factors play a role in the skewed representation of female attorneys and advocates in the legal profession. In addition, formal equality cannot translate into gender transformation, as the issues that cause such inequalities extend beyond the scope of attaining sameness. International instruments suggest that special measures be adopted to achieve substantive equality specifically with regard to*

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the role of women in the workplace. This article analyses the current composition of the legal profession from the perspective of gender and race, while promoting the concept of substantive equality as a preferred approach to gender transformation in the legal profession. It considers the theoretical framework for gender equality as a human right in South Africa by examining relevant legislation and international and regional instruments, and analysing the extent to which the Cape Bar maternity policy, as an existing transformation initiative, implemented on the basis of a gender stereotype, encourages substantive gender transformation in the legal profession.

Key words: *gender equality; human rights; legal profession; substantive equality; formal equality; gender transformation; gender stereotypes*

1 Introduction

The structure of the legal profession and the number of women represented in the legal profession do not as yet characterise the diversity of South African society.[1] A number of factors play a role in the skewed representation of female attorneys and advocates in the legal profession, including pre-existing social networks predominated by male professionals based on established relationships;[2] clients and colleagues who question the intelligence, talent and experience of female practitioners;[3] an unequal distribution of work to female practitioners;[4] a lack of face time (being seen) by female practitioners as a result of them remaining primary child care givers in society;[5] maternity leave as an obstacle to achieving target billable hours;[6] a referral system that is slanted in favour of men;[7] and gender

1 T Meyer 'Female attorneys in South Africa : A quantitative analysis' (2018) 42 *African Journal of Employee Relations* 2.
2 Centre for Applied Legal Studies 'Report on transformation of the legal profession in South Africa' (CALS Report) (2014) 37-38, https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformationpercent20ofpercent20thepercent20Legalpercent20Profession.pdf (accessed 9 June 2019).
3 CALS Report (n 2) 44.
4 Commission for Gender Equality 'Discussion document on gender transformation in the judiciary and the legal sector' (2018) 104, http://www.cge.org.za/wp-content/uploads/2016/12/DISCUSSION-DOCUMENT-ON-GENDER-TRANSFORMATION-IN-THE-JUDICIARY-AND-THE-LEGAL-SECTOR.pdf ((accessed 9 June 2019).
5 CALS Report (n 2) 55.
6 CALS Report 37.
7 CALS Report 41.

stereotypes and gender bias which resounds throughout the legal profession.[8]

Reference to transformation, as applicable to the judiciary, has several meanings as expressed in legal writing.[9] Moerane notes various opinions on the meaning of transformation. These include that judicial appointees espouse and promote the values enshrined as fundamental in the Constitution of the Republic of South Africa, 1996 (Constitution); the process of fostering a culture of accountability among the judiciary; the process whereby the courts are made more accessible to litigants and other court users; the re-organising and re-engineering of the structures and branches of the judiciary; and an evolution of the way in which judges perform their work.[10] This article adopts the definition of transformation of the judiciary as a process whereby the appointment of judges reflects the broad composition of South African society, particularly with regard to gender.[11] It analyses the current composition of the legal profession from the perspective of gender and race, while promoting the concept of substantive equality as a preferred approach to gender transformation in the legal profession. It considers the theoretical framework for gender equality as a human right in South Africa by examining relevant international and regional instruments and analysing the extent to which the Cape Bar maternity policy, as an existing transformation initiative, implemented on the basis of a gender stereotype, encourages substantive gender transformation in the legal profession.

2 Current composition of the legal profession from the perspective of gender and race

As at January 2019, there were 27 223 reported attorneys, of which 12 084 were black, representing 44 per cent of attorneys in practice, 11 055 of these being women, translating to only 39 per cent of attorneys. Of the total number of attorneys, 4 849 – or 17,8 per cent – are black women.[12] The General Council of the Bar of South Africa's membership statistics as at 30 April 2017 demonstrate that

8 F Kathree 'Eight years at the bar and still discriminated against' (2004) *Advocate* 23.

9 G Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 *South African Law Journal* 715; see also MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *South African Law Journal* 708.

10 Moerane (n 9) 708.

11 As above.

12 Law Society's statistics on the attorneys' profession, http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession (accessed 6 June 2021).

there were 2 915 advocates on the roll, of which 1 065 were black, representing 36,5 per cent of advocates, of which 796 were women, translating to only 27,3 per cent. Of the women advocates, 338 were black.[13] Thus, according to the latest statistics, 39 per cent of practising attorneys are women, of which 44 per cent are black; 27,3 per cent of advocates are women, while 36,5 per cent are black. The racial population in the country is such that black people constitute the majority of the population with white people constituting 8,9 per cent of the population.[14] Women, on the other hand, constitute a majority of the population at 50,7 per cent.[15] On the basis of the statistical comparison above, the gender and race composition of the attorneys' and advocates' profession does not reflect the population demographics of the country, especially when it comes to women legal practitioners. Gender equality is introduced in this context to explore whether substantive gender transformation can be achieved through feminist legal theory by making 'women and men within the legal profession, equal legally, socially and culturally'.[16]

From the information set out above, it appears that whereas there have been significant strides aimed at attaining equal numbers at representations of race and gender within the legal professions, gender representation still is not yet on par with race representation. Race representation remains significantly higher than gender representation in the attorneys' and advocates' fields of the legal profession. If gender equality is considered to mean that all persons who are in the same situation being accorded the same treatment,[17] a marked gender inequality remains within the profession. A consideration of transformation of the legal profession in South Africa is viewed from a lens that places racial equality at the centre of the debate.[18] There appears to be a perception of the 'ranking' of gender after race in the order of the recognised prohibited grounds of equality, which speaks to the order of transformation priorities. This perceived ranking may be informed by the fact that the recognised prohibited grounds of discrimination in the Bill of Rights list race

13 As at the date of this article, the 2017 statistics in respect of the advocates' profession were the most recent statistics available for consideration.
14 Statistics SA 'South Africa's population', https://www.brandsouthafrica.com/people-culture/people/population (accessed 6 June 2021).
15 As above.
16 J Lorber *Gender inequality*: *Feminist theories and politics* (2009) 4.
17 A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 612.
18 M Norton 'The other transformation issue: Where are the women?' (2017) *Advocate* 28.

prior to gender. In this regard, South African Constitutional Court Judge Kriegler in a minority judgment noted:[19]

> Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); *the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2).*

The political history of South Africa offers some insight into the reason why gender transformation is seen as less important than racial transformation, in that race has been prioritised over gender, both in general debates about transformation and in discussions of the legal system specifically.[20] This is based on the historical view of the African National Congress (ANC) of the root cause of oppression for women as racial and colonial domination as opposed to patriarchal power dynamics. This meant that when the ANC eventually accepted the goal of gender equality, it focused on the inclusion of women in formal state institutions.[21] It did not look into the question of how to achieve substantive gender equality and fundamentally transform the gendered nature of formal state institutions, such as the judiciary.[22]

Gender transformation initiatives must be differentiated from initiatives aimed at attaining racial transformation. This is not to suggest that racial and gender transformation initiatives ought to be considered as having competing interests. However, from the statistical information available on the racial and gender composition of the attorneys' and advocates' professions, it is apparent that the formal inclusion of women in these professions is still lagging behind as compared to the inclusion of black men which has significantly increased.

The gender and race composition of the attorneys' and advocates' profession, as demonstrated by the statistics above, does not reflect the population demographics of the country, especially when it comes to female legal practitioners. Due to the fact that women make up the majority of the population, one would have expected that the current makeup of the legal profession would be representative

19 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) (our emphasis).
20 S Hassim 'Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa' (2005) 32 *Politicon* 182. Hassim details the 1980s liberation movement's focus on activities that would directly challenge the apartheid state with women contesting male domination within the political organisation that they belonged to.
21 Hassim (n 20) 182.
22 As above.

of women. As this is the definition of transformation adopted for purposes of this article (where the composition of the profession is a reflection of the composition of society) it is apparent that gender transformation in the legal profession is yet to be achieved.

3 Substantive equality as a preferred approach to promoting gender transformation in South Africa

A formal approach to equality seeks to attain sameness with like being treated the same.[23] This formal approach necessarily requires a comparison between similarly-placed persons, usually against the dominant norm that possesses the attributes of the dominant gender (male), culture, religion, ethnicity or sexuality.[24] In the case of pregnancy rights, in particular, the application of formal equality presents the practical problem of there being no male comparator for pregnancy.[25] A formal approach to gender equality calls for a direct comparison of male versus female practitioners to determine whether there is equality before the law.[26] As discussed by Fraser,[27] a formal equality analysis fails to recognise the social and cultural context that necessarily renders it incorrect to have a direct comparison between males, being the dominant norm comparator, and women. For instance, the terms on which merit in the legal profession is judged are often a product of the dominant group. Women's time spent on child care usually is ignored in assessing their prospects of career advancement in the profession.[28] While recognising these limitations of a formal application of the concept of gender equality, the statistics provided above demonstrate formal gender inequality in the legal profession.

Statistics demonstrating inclusion in the legal profession of women by comparing their numbers against their male counterparts are prized as an indicator of gender transformation in the profession. Such figures and statistics are a good starting point to bring about gender transformation in the profession. However, this article postulates that the legal profession should adopt a more reflective manner in which to determine the progress and extent of gender equality and, therefore, transformation, to one that extends beyond formal equality.

23 S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 713.
24 Fredman (n 23) 716.
25 Fredman 719.
26 Smith (n 17) 612.
27 N Fraser 'From individual to group' in B Hepple & E Szyszczak (eds) *Discrimination: The limits of the law* (1992) 102-103.
28 Fredman (n 23) 719.

The preferred approach to understanding gender equality is substantive equality. This approach calls for a consideration of the impact of measures and policies aimed at attaining gender equality and is said to be manifested through legal mechanisms such as affirmative action.[29] In this regard, the idea of creating substantive equality within the legal practice profession is based on the understanding that inequality stems from long-established political, social and economic differences between men and women in the profession. These inequalities are entrenched in social values and behaviours, the institutions of society, the economic system and power relations. That substantive equality is intentionally asymmetrical is found in the fact that it focuses on the disadvantaged group rather than requiring equal treatment for its own sake.[30] In looking to capture the principle that equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded or ignored,[31] Fredman has proposed a frame of analysis for substantive equality. The four aims of substantive equality suggested by Albertyn and Fredman are to (i) redress social and economic disadvantage; (ii) counter stereotyping, stigma, prejudice, humiliation and violence based on a protected characteristics; (iii) enhance voice and participation countering political and social exclusion and accommodating and affirming differences, diversity and identity; and (iv) achieving structural changes.[32] Fredman presents these components as a four-dimensional framework of aims and objectives that can be used to assess and assist in modifying policies and initiatives to attain substantive equality.[33] All dimensions are to be addressed in an interactive manner in order for substantive equality to be attained.[34] MacKinnon has challenged this proposed tool of analysis suggesting that the four dimensions fail to recognise the centrality of power relations – social hierarchy – that makes inequality unequal.[35] An analysis of the extent of gender equality in the legal profession, therefore, requires consideration of the extent to which legislative and non-legislative measures in the profession assist in creating equality of opportunity, and in eliminating barriers, which exclude women from participating and advancing in the profession.[36]

29 Smith (n 17) 613.
30 C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* 434.
31 Fredman (n 23) 713.
32 Albertyn & Fredman (n 30) 439.
33 Fredman (n 23) 728.
34 S Fredman 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' (2016) 14 *International Journal of Constitutional Law* 749.
35 CA MacKinnon 'Substantive equality revisited: A rejoinder to Sandra Fredman' (2017) 15 *International Journal of Constitutional Law* 1176.
36 Smith (n 17) 613.

Such an analysis would take into account that overcoming these impediments makes greater equality of outcomes possible.

4 Legal framework for gender equality in South Africa: An analysis of international and local instruments

4.1 International instruments

Gender equality has been codified in several international human rights documents. Section 39 of the Constitution indicates that when interpreting the provisions in the Bill of Rights, a court, tribunal or forum must consider international law. For this purpose, we turn to discuss key international instruments that are relevant to South Africa, and consider whether the definition of equality that is intended in these documents is that which requires the implementation of formal equality or substantive equality.

4.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (Universal Declaration)[37] acknowledges equality of all men and women. Article 1 provides (in gender-neutral language) that 'all human beings are born free and equal in dignity and rights'. Article 7 provides for equal protection of the law and prohibits discrimination and any incitement to such discrimination. However, article 25(2) recognises an entitlement to special care and assistance for motherhood and childhood. The Universal Declaration is not binding on member states. However, this document codifies the human right to equality as an international law norm.

4.1.2 International Covenant on Civil and Political Rights

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides for equal enjoyment of all the rights in the treaty without distinction on any grounds, including sex or other status.[38] Article 26 provides for equality before the law and prohibits discrimination on any grounds. Article 3 provides that states

37 Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 (1948) 71.

38 International Covenant on Civil and Political Rights GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, 23 March 1976; ratified by South Africa in 1998.

undertake 'to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant'. That it is intended that the observance of this obligation by member states will result in the attainment of substantive equality, as opposed to formal equality, is captured by the Human Rights Committee's interpretation of article 3 in its General Comment 4. In the General Comment the Human Rights Committee criticised member states for under-reporting their compliance with article 3. It called for state reports to contain more information regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations on gender equality. Recognising that substantive gender equality cannot be attained by simply enacting laws, the Human Rights Committee noted that states are required not only to have measures of protection but also affirmative action designed to ensure the positive enjoyment of rights.[39]

4.1.3 International Covenant on Economic, Social and Cultural Rights

Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[40] contains the 'equality guarantee' in similar language to that contained in ICCPR. Article 3 places an obligation on member states to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. On a plain reading of this provision it is difficult to determine the precise definition of equality as envisaged in the Covenant. In its interpretative role, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) endorsed the perspective that member states undertake to ensure that their citizens enjoy substantive and formal equality in the enjoyment of the rights contained in the Covenant.[41] The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of substantive equality. This means that while expressions of formal equality may be found in constitutional provisions, legislation and policies, article 3 also

39 Human Rights Committee General Comment 4 art 3 (13th session 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 1 4 (1994).

40 International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), 21 UN Gaor Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, 3 January 1976; ratified by South Africa in 2015.

41 ESCR Committee General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art 3 of the Covenant) para 6.

mandates the equal enjoyment of rights in the Covenant for men and women in practice.[42]

Taking consideration of the lived experiences of women into account in its interpretation of article 3, the ESCR Committee further noted that the obligation undertaken by member states in this article calls on them to address gender-based social and cultural prejudices, provide for equality in the allocation of resources, and promote the sharing of responsibilities in the family, community and public life.[43] Article 7(a) of ICESCR speaks particularly to the work context. It requires member states to recognise the right of everyone to enjoy just and favourable conditions of work. Article 3, requiring gender equality in the work environment, requires that member states take steps to reduce the constraints that are faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for child care.[44]

4.1.4 Convention on the Elimination of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[45] focuses on non-discrimination against women.[46] Article 3 on equality must be read together with articles 2, 4 and 5. These require that measures be put in place by member states to attain formal equality and substantive equality. Article 3 forms the core of the obligation on member states to effect gender transformation. It provides a framework for the measures for structural transformation that are set out in articles 4 and 5 and reinforces the means by which this is to be done.[47] Article 3 provides:

> 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.

42 As above.
43 ESCR Committee (n 41) para 22.
44 ESCR Committee para 24.
45 Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180, 34 UN Gaor Supp (No 46) 193, UN Doc A/34/46, 3 September 1981; ratified by South Africa in 1995.
46 C Chinkin & MA Freeman 'Introduction' in A Marsha et al *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A commentary* (2013) 17.
47 Chinkin & Freeman (n 46) 114.

Article 4 introduces the concept of special measures aimed at achieving substantive equality. Article 4 provides:

> (1) Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
> (2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 4(2) highlights that special measures aimed at protecting maternity are not considered discriminatory. This provision is key in understanding the need for the integration of special programmes such as the Cape Bar maternity policy which will be considered in part 5. Raday states that for substantive equality to materialise, it is legitimate and necessary to make provision for the role that women play in procreation and to put in place special measures as required to address their specific needs in this role despite these measures only targeting women in their reproductive roles.[48] In contrast, however, is the question of child rearing, which is a non-biological aspect of maternity. Raday states that article 4(2) of CEDAW allows for special measures to protect maternity, which includes child rearing. However, Raday further states that this protected measure would be available to men and women on a gender-neutral basis, so as to counter the stereotypically imposed gendered division of labour that currently predominantly allocates child rearing to women.[49] Phooko and Radebe have suggested specific measures that may achieve the purpose of countering imposed gendered division of labour for the legal profession as a whole.[50] These include paternity leave so that parenting responsibilities are equally shared between men and women; a flexible and clear transfer policy for judges that does not require them to apply to the Judicial Service Commission (JSC) when requesting to be transferred to another division of the High Court, where their family members are based, and flexible working hours for both female and male legal practitioners.[51]

48 F Raday 'Article 4' in Marsha et al (n 46) 137.
49 Raday (n 48) 139.
50 R Phooko & S Radebe 'Twenty-three years of gender transformation in the Constitutional Court of South Africa: Progress or regression' (2016) *Constitutional Court Review* 306.
51 Phooko & Radebe (n 50) 313.

Holtmaat's assessment is that article 5 of CEDAW acknowledges that the foundation of gender discriminatory practices affecting women in society are gender stereotypes and fixed parental gender roles.[52] It therefore follows that eliminating gender discrimination requires that these root causes of gender discrimination are eradicated.[53] Article 5 of CEDAW creates obligations on member states to take steps towards modification of mind sets on stereotypes and predetermined gender roles in society. The key provisions in understanding gender equality, articles 2, 3, 4 and 5 of CEDAW, indicate that CEDAW requires member states to take measures towards attaining a change in access to opportunities for men and women, a change in the value systems of institutions and systems to enable them to shift away from historically-determined male paradigms of power and life patterns.[54]

4.1.5 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 2 of the African Charter on Human and Peoples' Rights (African Charter)[55] guarantees gender equality by recognising an entitlement to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, such as sex. Article 18(3) of the African Charter requires that states ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[56] further expounds on this right. Acknowledging that addressing gender stereotypes is central to attaining gender equality, article 2(2) of the Women's Protocol calls on member states, in fulfilling their African Charter obligation, to address gender inequality, to

> commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

52 R Holtmaat 'Article 5' in Marsha et al (n 46) 145.
53 As above.
54 Raday (n 48) 140.
55 African Charter on Human and Peoples' Rights 21 October 1986; signed by South Africa in 1996 and ratified in 1996.
56 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 25 November 2005.

On this basis, article 2(2) of the African Women's Protocol supplements the equality clause contained in the African Charter and intends for the realisation of substantive gender equality rather than formal equality. Article 6(i) of the Women's Protocol seeks to dismantle stereotypes relating to parental roles in a marriage context by requiring that a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children. Broader than a marriage context, the Women's Protocol addresses this under article 13(l) which recognises that both parents bear the primary responsibility for the upbringing and development of children. Article 8 of the Women's Protocol provides for equality before the law and equal benefit and protection of the law. This obligation includes requiring that states ensure that women are represented equally in the judiciary and law enforcement organs. We now turn to discuss relevant national legislation that has a bearing on gender equality in South Africa.

4.2 South African constitutional framework

4.2.1 South Africa's historical context with regard to the recognition of the right to equality

Before 1994 South Africa was a repressive regime characterised by a widespread system of political, economic and social discrimination and disenfranchisement.[57] However, gender inequality can be traced in the historically, yet universally-existing patriarchal systems and structures that have existed for many years, placing males at the centre of decision making, headship and occupation of the political and production arenas of societies – African and non-African.[58] South Africa, as with many countries that attained independence as a result of liberation struggles, officially recognised the contribution of women in the struggle for independence.[59] This recognition should have led to the elimination of the legal trials affecting women, primarily through the inclusion of equality and non-discrimination clauses in the national Constitution.[60]

57 M Rapatsa 'The right to equality under South Africa's transformative constitutionalism: A myth or reality?' (2015) 11 *Acta Universitatis Danubius Juridica* 2. See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).

58 B Akala & JJ Divala 'Gender equity tensions in South Africa's post-apartheid higher education: In defence of differentiation' (2006) 30 *South African Journal of Higher Education* 1.

59 F Banda *Women, the law and human rights: An African perspective* (2005) 171.

60 Banda (n 59) 26.

Equality was poised in the interim Constitution of South Africa as a tool to augment the process of transforming a nation deeply divided by its past, characterised by strife, conflict, untold suffering and injustice, into one based on democratic values, social justice and the respect and protection of human rights for all.[61] South African women with diverse backgrounds were involved in the constitutionalisation of women's rights, including gender equality in South Africa.[62] This was achieved by ensuring that women's participation in the process was initiated well before the constitutional process embarked in earnest, with a series of workshops and conferences in which a Charter for Women's Rights was discussed.[63] Through this process, a counter-conservative group of lobbyists calling for the retention of male authority in the home and recognition of traditional rule and customary law as superior to gender equality came about and sought to similarly inform the post-apartheid constitution-making process.[64] Despite this conservative group's agenda, gender equality was secured by the fact that the counsels of parties in the negotiations were required to have a female negotiator and advisor. The women selected as negotiators in the constitution-making process organised themselves into a women's caucus to address issues of concern specific to women. Their participation in the process can largely account for the recognition of gender issues in the constitution-making process.[65]

4.2.2 Equality in the Constitution

Post-1994 the Constitution pursued constitutional transformation from the pre-1994 dispensation, by affirming the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of, *inter alia,* gender.[66] Equality among all our people lies at the heart of the Constitution.[67] Section 1 of the Constitution promotes the values upon which the Republic of South Africa is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms. Equality is one of the three foundational constitutional values captured under section 7(1) of the Constitution.[68] Holistically,

61 Rapatsa (n 57) 2.
62 B Mabandla 'Women in South Africa and the constitution-making process' in J Peters & A Wolper (eds) *Women's rights: Human rights* (1995) 68.
63 As above.
64 As above.
65 As above.
66 Rapatsa (n 57) 2.
67 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) para 74.
68 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46, where Justice Yacoob described them as the foundational values of

equality is enshrined in the Constitution as a legal right and as a value. Section 9 provides for the legal right providing procedural and remedial action for enforcement. The Preamble to the Constitution and section 7(1) articulate the value system that informs the legal right. Read in this way, although the Constitution does not contain a definition for the term 'equality' on various grounds, it was intended that equality, as contemplated therein, was to provide substance to transformative constitutionalism that, in turn, will transform the past and present, to build a better future.[69] Existing jurisprudence provides an indication of the meaning of gender equality as required by the Constitution. In addition, case law[70] adopts diverging views on the content of equality. Although the South African Constitutional Court in a number of cases has pronounced that equality as envisioned in the Constitution is substantive equality as opposed to formal equality, stark contrasts exist in the oscillating nature of the Constitutional Court's judgments in dealing with the distinction in the meaning of equality as envisaged in the Constitution. The judgments of the *National Coalition* and *Jordan* cases demonstrate that often times while the intention is to effect substantive equality, the outcomes of the judgment, in fact, does not achieve this.

Equality as meaning, acknowledging sameness – with equal importance and equal value – was first captured in *Hugo*[71] as according all human beings equal dignity and respect regardless of their membership of particular groups.[72] Albertyn suggests that equality in this sense is measured by dignity which requires that women are affirmed as autonomous human beings, not property of another, whose bodies are owned and disposed of by others, or glorified as wives and mothers defined only on the basis of their reproductive and sexual roles as relative to the role of men.[73]

Equality in the Constitution also has to be understood to entail a remedial and redistributive aspect captured as a legal right in section 9(2) of the Constitution. The recognition of sameness and the redistributive aspect of equality nonetheless are not mutually exclusive.[74] Section 9(1) serves to recognise sameness and the dignity

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our society by stating that '[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society ...'

69 Rapatsa (n 57) 8.

70 *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC); see also *Jordan & Others v State* 2001 (6) SA 642 (CC).

71 *President of the Republic of President of the Republic of South Africa & Another v Hugo* (n 67) para 73.

72 *President of the Republic of President of the Republic of South Africa & Another v Hugo* (n 67) para 41.

73 Albertyn & Fredman (n 30) 188.

74 S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 3 *South African Journal on Human Rights* 223.

of women, but this alone will not result in substantive equality. Redistribution through substantive equality addressed in section 9(2) of the Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.[75]

The redistributive element of substantive equality calls into question the extent to which the implementation of special measures aimed at achieving equality results in the limitation of the equality rights of men in the legal profession. This assessment requires a consideration of the circumstances under which the limitation of the equality rights of men in the legal profession is justifiable. Section 36 of the Constitution provides for the limitation of rights, including the right to equality. The right to equality is a non-derogable (protected) right with respect to *unfair* discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.[76] The right to equality in respect of gender is derogable and hence subject to limitations. Sex is a prohibited ground of discrimination that renders differential treatment on the basis of physical characteristics of either being a man or a woman automatically unfair discrimination. Sex is more concerned with physical characteristics of men and women, whereas gender is more concerned with the social and cultural construction of men and women.[77] The limitation of rights as captured in section 36 of the Constitution is a reflection of the international Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[78] which provide for circumstances under which the human rights contained in ICCPR can be limited. One of the principles that has received international acceptance is that the provisions allowing for restrictions or limitations of rights must be narrowly and strictly construed.[79] This is premised on the idea that the protection of human rights is a general rule and human rights limitations are a mere exception to the rule.[80]

75 C Ngwenya '*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 144.

76 Table of Non-Derogable Rights as set out in the Bill of Rights in the Constitution, 1996 (our emphasis).

77 A Bizimana 'Gender stereotyping in South African Constitutional Court cases: An interdisciplinary approach to gender stereotyping' LLM dissertation, University of Pretoria, 2015.

78 Siracusa Principles (n 57).

79 Siracusa Principles (n 57) art 3 provides that '[a]ll limitation clauses shall be interpreted strictly and in favour of the right at issue'.

80 H Nyane 'Limitation of human rights under the Constitution of Lesotho and the jurisprudence of superior courts' (2015) 23 *Lesotho Law Journal* 8.

In the case of *Pretoria City Council v Walker*[81] the Constitutional Court was faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case Walker sought a declaration that, *inter alia*, a policy by the City Council to charge residents of a formerly 'white area' in the suburbs rates based on consumption tariffs where consumption was measured by meters on the property and residents of formerly 'black areas' in the townships, a flat rate per household regardless of actual consumption, unconstitutional for being unfair discrimination. On this particular point the Court found that the action of the City Council was discriminatory but that such discrimination was held to be fair. This measure of differentiating the tariffs was found to be a reasonable limitation on the right to equality of other groups. The Court found that the discrimination did not have an unfair impact on the residents of the suburbs who had not been disadvantaged by the racial policies and practices of the past. From an economic point of view, the victims of the discrimination were neither disadvantaged nor vulnerable.[82]

In *Parks Victoria* (Anti-Discrimination Exemption), an Australian case,[83] the tribunal was also faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case Parks Victoria wanted to advertise for and employ indigenous people to care for Wurundjeri country. The tribunal held that the purpose of the activity was to provide employment opportunities to indigenous people, to increase the number of indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The tribunal was satisfied that the measure was proportionate because at the time the application was made, only 7,6 per cent of Parks Victoria's workforce was indigenous. This measure of limiting the employment opportunity to aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

81 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).
82 *Pretoria City Council v Walker* (n 81) para 47.
83 L Papaelia 'Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act' Human Rights Case Summaries, https://www.hrlc.org.au/human-rights-case-summaries/tribunal-considers-special-measures-and-discrimination-under-the-charter-and-new-equal-opportunity-act (accessed 9 June 2019).

Similarly, it is arguable that should a limitation of the right to equality of men in the legal profession be proposed, by the intentional action of increasing the number of women in the legal profession, this would be justifiable in accordance with the criteria in section 36 of the Constitution and, therefore, constitutionally valid.[84] In addition, the purpose of the limitation would not constitute *unfair* discrimination based on sex or gender, as the goal of such limitation would be to balance and proportionally allow for the adequate representation of women in the legal profession. Furthermore, section 9(5) of the Constitution outlines that discrimination is unfair unless it is established that the discrimination is fair. On this basis, such discrimination would not be 'unfair' but rather would allow for the realisation of the right to equality, in a just and fair manner, as enshrined in the Bill of Rights.

The legitimacy of the laws that enable these special measures is determined by considering if it is a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[85] All forms of legislation and common law qualify as 'a law of general application' but policies or practices do not.[86] On this basis, the laws in South Africa that are in place to promote the attainment of equality in the legal profession are considered.

4.3 South African legislative framework

Section 9(2) of the Constitution requires the state to put in place legislative and policy measures to promote the attainment of equality. There are several laws that give effect to the right to equality in various arenas in South Africa. Some of these laws operate to regulate women's private life experiences, such as the recognition of customary marriages under the Recognition of Customary Marriages Act,[87] and others operate to regulate women's public life experiences. In the context of employment law, the Employment Equity Act (EEA)[88] provides the legal framework for the advancement of women in employment. All other gender relationships and interactions in society, not bound by the equality provisions of the EEA, are regulated under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[89] The Women Empowerment

84 I Currie & J de Waal *The Bill of Rights handbook* (2005) 164.
85 Currie & De Waal (n 84) 168.
86 Currie & De Waal 169.
87 Act 120 of 1998.
88 Act 55 of 1998.
89 Act 4 of 2000.

and Gender Equality Bill was passed by the National Assembly in March 2014. However, following the receipt of comments from various civil society organisations working on human rights, in general, and women's rights, in particular, the Bill was referred for further consultation to Parliament.[90] The Bill's stated objective was:

> to give effect to section 9 of the Constitution of the Republic of South Africa, 1996, in so far as the empowerment of women and gender equality is concerned; to establish a legislative framework for the empowerment of women; to align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures; and to provide for matters connected therewith.[91]

The Bill sought to impose a quota system of a minimum of 50 per cent gender representation in institutions. This in itself was a source of criticism against the Bill, as it could result in a new form of inequality. The Centre for Constitutional Rights submitted the view that the pursuit of achieving a minimum of 50 per cent representation of women in various walks of society is paradoxical, as anything more than 50 per cent representation, in effect, will create a new inequality.[92] The Legal Resources Centre in its submission to Parliament noted that this model would not amount to substantive equality, but rather formal equality.[93]

4.3.1 Employment Equity Act

The purpose of the Employment Equity Act (EEA) is to

> achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure *their equitable representation* in all occupational categories and levels in the workforce.[94]

90 L Nomadolo 'Gender-based discrimination in the workplace in South Africa' *Joburg Post* 28 July 2017, https://www.joburgpost.co.za/2017/07/28/gender-based-discrimination-workplace-south-africa/ (accessed 9 March 2018).

91 Women Empowerment and Gender Equality Bill, https://www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (accessed 9 June 2019).

92 CFCR 'An analysis: The Women Empowerment and Gender Equality Bill', https://www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (accessed 9 June 2019).

93 LRC 'Submission to the Portfolio Committee on Women, Children and People with Disabilities on the Women's Empowerment and Gender Equality Bill' 30 January 2014, https://constitutionallyspeaking.co.za (accessed 18 March 2018).

94 Sec 2 Employment Equity Act 55 of 1998 (our emphasis).

Tapanya distinguishes broad representivity and demographic representivity as a means to be adopted in the attainment of equality.[95] In May 2017 Tapanya argued that the EEA adopts a standard of affirmative action measures, not reflected in section 9(2) of the Constitution which reads in equitable representation as a requirement of substantive equality. The practical effect of this standard is the potential application of the concept of demographic representivity – a mechanism that operates in the same way as racial quotas.[96] Broad representivity, on the other hand, is the standard required under section 174(2) of the Constitution in the appointment of judicial officers. This standard only requires the presence in an employer's workforce, of the race and gender classes, which are represented in South Africa's national demographic profiles.[97]

The EEA applies to all employers and employees except to members of the national defence force, the national intelligence agency and the South African secret service.[98] The implementation of affirmative action measures is not by choice under the EEA. Designated employers must design and implement affirmative action measures for people from designated groups. In *Naidoo v Minister of Police*[99] the essence of affirmative action was stated to be differentiating and preferring one member of a designated group of people so as to ensure substantive equality with the aim of redressing the effects of past discrimination and to promote equality. The EEA prohibits unfair discrimination, *inter alia*, on the basis of race and/or gender in terms of section 6. In this case the South African Police Services (SAPS) Employment Equity Plan was the subject of scrutiny. Despite Naidoo, a black[100] woman, scoring higher than an African male officer similarly shortlisted for the position, the SAPS appointed the male for the position with the view that his appointment would address the underrepresentation of Africans on the police force. This equity plan was found to fall short of the EEA's aim of promoting equal representation in the workplace and the court ordered the appointment of Naidoo over her African male counterpart. However, an affirmative action measure, in terms of the EEA, to the extent that it embodies a preference, whether on the grounds of race or gender, does not constitute unfair discrimination, if it is designed to promote substantive equality of a designated group.

95 G Tapanya 'Unpacking the affirmative action equation from a constitutional perspective' (2017) *De Rebus* 32.
96 As above.
97 As above.
98 Sec 4 Employment Equity Act 55 of 1998.
99 *Naidoo v Minister of Safety and Security & Another* 2013 (3) SA 486 (LC) para 72.
100 According to sec 1 of the Employment Equity Act 55 of 1998, 'black people' is a 'generic term which means Africans, coloureds and Indians'.

While the EEA does not contain a definition of equality, it may be argued that from the affirmative action purpose articulated in section 2 of the Act, the 'equality' that the EEA intends to attain is that of providing redress for past disadvantages experienced by certain designated groups. This would be in line with substantive equality that goes beyond merely treating all persons alike.

4.3.2 Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) defines equality as including the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes,[101] in other words, substantive equality, as opposed to formal equality. Section 24(2) of PEPUDA places an obligation on all persons, not only the state, to promote equality. It binds the state and all persons in the country, but does not apply to any person to whom and to the extent to which the EEA applies.[102] As a general rule, the EEA will apply where an employment relationship arises and PEPUDA will apply in all other cases to regulate equality.

One such case was *Du Preez v Minister of Justice and Constitutional Development & Others*.[103] In this case PEPUDA applied and not the EEA, as magistrates were not considered to be employees of the state. In this case a highly-experienced white magistrate claimed that he had been unfairly discriminated against, by the interview panel applying selection criteria which acted as an absolute barrier to his selection, by excluding him from being considered for appointment to the Port Elizabeth regional court. The Department's defence was that the selection criteria was justified by its affirmative action policy. On the one hand, the Court recognised that affirmative action measures must be seen as essential and integral to the goal of equality, and not as limitations of or exceptions to equality rights.[104] In terms of the definition of discrimination in PEPUDA, on the other hand, it found that the applicant's exclusion from the selection process amounted to discrimination and, therefore, it was necessary to consider whether it was fair. Although section 174(2) of the Constitution requires the

101 Sec 1 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
102 Secs 5(1) & 5(3) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
103 *Du Preez v Minister of Justice and Constitutional Development & Others* (2006) 3 All SA 271 (SE).
104 *Du Preez* (n 103) para 18.

need for the judiciary to reflect broadly with regard to the racial and gender composition of South Africa, when judicial officers are appointed, the Court noted that this is not the only criterion, and that other criteria, such as experience, legal knowledge, leadership and management skills, must also be taken into account. However, such consideration had not been concluded and, as a result, black women with minimum qualifications automatically prevailed over all other applicants. The selection, therefore, was held to be unfair.

4.4 National Policy Framework for Women's Empowerment and Gender Equality

Although not a law of general application for purposes of the limitation clause in section 36 of the Constitution, cabinet in December 2000 adopted, as a policy document, the National Framework for Women's Empowerment and Gender Equality (National Gender Framework).[105] The National Gender Framework was formulated by the Office on the Status of Women, comprising of the Office on the Status of Women, the Commission for Gender Equality (CGE), the Parliamentary Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and several non-governmental organisations (NGOs) working on gender and women's rights.[106] It applies to all government departments, provincial administrations, local structures, parastatals and other public entities.

The main purpose of the National Gender Framework is to establish a clear vision and structure to guide the process of developing laws, policies, procedures and practices that will serve to ensure equal rights and opportunities for women and men in all spheres and structures of government as well as in the workplace, the community and the family. The National Gender Framework is very clear on its definition of gender equality. It defines gender equality as

> a situation where women and men have equal conditions for realizing their full human rights and potential; are able to contribute equally to national political, economic, social and cultural development; and benefit equally from the results. Gender equality entails that the underlying causes of discrimination are systematically identified and removed in order to give women and men equal opportunities. The concept of gender equality, as used in this policy framework, takes into account women's existing subordinate positions within social relations and aims at the restructuring of society so as to eradicate

105 J Hills 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation' (2015) 20 *Deakin Law Review* 167.
106 As above.

> male domination. Therefore, equality is understood to include both formal equality and substantive equality; not merely simple equality to men.[107]

This definition is clear that the intended equality to be implemented under the National Gender Framework entails both formal equality and substantive equality. It also adopts an approach to equality that calls for the recognition of sameness and autonomous dignity for men and women while at the same time calling for the remedial and redistributive aspects of equality.

5 An analysis of the Cape Bar maternity policy as a 'transformation' initiative of the legal profession in South Africa

Cornell offers a definition of transformation as bringing about a change radical enough to so dramatically restructure any system that the identity of the system itself is altered.[108] This is the objective of transformation initiatives in the legal profession with the aim being to achieve a judiciary that is broadly reflective of South African society as a whole. Taking from the principles set out by Moseneke J in *Minister of Finance v Van Heerden,*[109] read with those set out in the *Hugo* case, the analysis of this selected initiative in this part will consider the following:

(1) Is it a measure adopted to achieve equality?
(2) Is it necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession?
(3) Is the impact of the measure proportionate to the objectives?

On this test, it will be considered whether it is a measure that causes the differential treatment of women and men based on a gender stereotype, therefore amounting to discrimination and, if so, whether the discriminatory impact is proportionate to the objective of the measure. The test in determining proportionality asks whether the application, enforcement or perpetuation of a gender stereotype denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them.[110]

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107 National Gender Policy Framework Glossary of Terms xviii, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=94056&p_country=ZAF&p_count=1051&p_classification=05&p_classcount=38 (accessed 9 June 2019).

108 K van Marle 'The doubly prized world – On transformation, ethical feminism, deconstruction and justice' (1996) *Comparative and International Law Journal of Southern Africa* 329.

109 2004 (6) SA 121 (CC). This case was concerned with sec 9(2) of the Constitution, 1996 which prescribes affirmative action measures generally.

110 RJ Cook & S Cusack *'Gender stereotyping: Transnational legal perspectives'* (2010) 17.

This initiative will be analysed here to test whether it in itself is justifiable as a gender transformation measure.

The Cape Bar has a maternity policy that was introduced in discussions at its 2009 annual general meeting.[111] It is not aimed at addressing the organisation of the family. In terms of this policy, *inter alia*, members of the Bar taking maternity leave are entitled to a year's leave of absence without any loss of domestic seniority (this period may be extended on good cause shown), remission from Bar dues and partial remission from chambers rental and floor dues. In addition, members on maternity leave may, at election, practise at home during their maternity leave period.[112] This type of transformation initiative is set up on the basis of the gender stereotype that women are the primary care givers. Despite it being a stereotype, this is a role that female advocates continue to play in their everyday realities. The Johannesburg Bar has a similar policy.[113] However, this article analyses the Cape Bar policy as it was the first to be implemented in the advocates' profession. These maternity policies acknowledge the reality of women's child-bearing and parental roles and attempt to create conditions that will enable women to remain in practice at the Bar, despite their child care responsibilities. These policies are the only policies in the legal profession that attempt to attain gender equality by relying on gender stereotypes that relate to child-bearing and parental roles of women in society. The test as to the appropriateness of adopting this measure as a means to transform the Cape Bar despite it reinforcing gender stereotypes will be considered on the basis of the principles set out in the *Van Heerden* and *Hugo* cases.

5.1 Is it a measure adopted to achieve equality?

The policy was adopted to remove, or at least mitigate, one of the serious obstacles to women becoming members of the Bar, and retaining their membership – the consequences of maternity. This is noted as a hindrance to the success of many female practitioners.

111 Transformation at the Cape Bar, https://capebar.co.za/transformation/ 2019 (accessed 9 June 2019).

112 G Budlender 'Cape Bar adopts new maternity policy' 2009, https://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf (accessed 9 June 2019). See also K Pillay 'The Cape Bar's maternity policy' 2012, https://www.sabar.co.za/law-journals/2012/august/2012-august-vol025-no2-p13.pdf (accessed 9 June 2019).

113 Johannesburg Society of Advocates maternity policy in relation to members 2012, https://johannesburgbar.co.za/wp-content/uploads/MATERNITY-POLICY-2-OCT-2012.pdf (accessed 9 June 2019).

5.2 Is it necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession?

The necessity of a measure aimed at addressing the imbalance with regard to the burden of motherhood and child care as imposed on women by societal norms is undeniable. However, it is not appropriate that the measure does not in itself address the family dynamics or societal dictates that require that a woman must remain the primary child minder in society.

5.3 Is the impact of the measure proportionate to the objective?

The impact of the measure is such that it causes the differential treatment of women and men based on a gender stereotype, therefore amounting to discrimination. Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibility for men. This results in men being denied the opportunity to enable them to assume family responsibility. The impact of the maternity policy is such that men, who become fathers and elect to stay at home to care for their children, will not receive the same benefits from the policy as their female counterparts. This, therefore, amounts to discrimination. The question then remains whether this discriminatory impact is proportionate to the objective of the measure.

The test in determining proportionality is whether the application, enforcement or perpetuation of a gender stereotype in the measure denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them. As much as the measure is discriminatory, it is submitted that the perpetuation of the gender stereotype in respect of the role of women as mothers, which is used to justify this policy, neither denies women a benefit, impose on them a burden or degrade women, nor does it diminish their dignity or otherwise marginalise them. It in effect is a recognition of the reality of women's lives as they experience it. Until such time as societal attitudes are addressed and women are no longer perceived as primary child care providers, this measure serves to achieve substantive equality at the Cape Bar.

6 Proposals to ensure substantive equality is attained in the legal profession in South Africa

6.1 Special measures to achieve gender equality

Redistribution through substantive equality addressed in section 9(2) of the Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.[114] Section 5 of the EEA applies to all employers and provides that '[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. The argument by Furgus and Collier on the interpretation of this section by courts and employers informs this recommendation. They propose that this section of the EEA imposes a duty on employers to pre-empt discrimination in their workplaces, rather than merely respond to it and that in interpreting the section, one should not confine policies and practices to cleanly identifiable programmes and systems, and overt forms of discriminatory conduct. Discriminatory cultures, as well as more opaque barriers to change, are omitted from its scope. Yet, this is contrary to the EEA's definition of 'employment practices', which expressly includes 'working environments'.[115] This requires that practitioners acknowledge that race transformation is not a substitute for gender transformation. They should internalise equality as a value and as a human right contained in the Constitution.[116]

6.2 Individual accountability for championing gender equality

An individual's perceptions about women's place in private and public life do not change because they arrive at the workplace. It is impractical to expect such a person who may, for example, hold beliefs that women are incapable of focused critical thought, to think a woman capable of being the lead counsel in a complex corporate law class action suit – no matter what his or her organisation's position is on gender transformation. This recommendation call for an acknowledgment that is not aimed at a blaming exercise, but rather to say that 'from here on out' they will work not to submit

114 Ngwenya (n 75).
115 E Fergus & D Collier 'Race and gender equality at work: The role of the judiciary in promoting workplace transformation' (2014) 30 *South African Journal on Human Rights* 486.
116 S Pather 'Equal treatment: Addressing sexual and gender discrimination' 1999 *Alternation* 164.

to their unconscious bias. This requires that the individuals in the profession reflect on and work to change their habits and attitudes.

6.3 Review the advancement requirements

There is a need for institutions to re-assess how they define leadership and how they identify and nurture talent.[117] The legal profession is required to address the advancement criteria to take into account requirements that are based on the 'lack of fit criteria' that uses the masculine norm as the standard for determining suitability. This not only has a negative impact on female legal practitioners but also fails to provide space for gender diversity by excluding male practitioners who do not conform to the masculine socially-assigned gender roles and behaviours. These members of the profession include homosexual, transgender, intersex and bisexual men. In reviewing the policy measures to achieve gender equality, the legal profession is required to create spaces within which female experiences can be shared and concretised in a manner that will inform the policy-making processes.

7 Conclusion

Formal equality cannot translate into gender transformation of the legal profession, as the issues causing such inequalities extend beyond the scope of attaining sameness. The domestic, regional and international law framework suggests that special measures be adopted in order to achieve substantive equality specifically with regard to the role of women in the workplace. The Cape Bar maternity policy is an example of a special measure that recognises the realities of women's lived experiences with regard to pregnancy and child care and aims to cater for these realities. This article has demonstrated the validity of the dilemma facing feminists of how to affirm the feminine without reverting to stereotypes about women as all accounts of the feminine seem to reset the trap of rigid gender identities, deny real differences among women and reflect the history of oppression and discrimination instead of the idea of equality.[118] The Cape Bar maternity policy concluded that with the aim of attaining equality for a group that has historically been marginalised in the work space, reliance on gender stereotypes to inform special measures targeted at women can be justified. While discriminatory,

117 R Richter 'Mending the gender gap: Advancing tomorrow's women leaders', https://www.pwc.com/us/en/industries/financial-services/library/gender-gap-women-in-financial-services.html (accessed 7 June 2018).
118 Van Marle (n 108) 329.

it is a case of fair discrimination, as supported by section 9 of the Constitution and an instance of a special measure from which South Africa should learn with respect to achieving meaningful gender transformation in the legal profession.

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Is the forfeiture of criminally-acquired property in Tanzania compliant with the Constitution?

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Summary: *Asset recovery, which involves the forfeiture of criminally-acquired property, is considered to be an effective mechanism of addressing serious and organised crime within national boundaries and across international frontiers. This is a paradigm shift from penal law and policy-making bodies of concentrating on persons only to also address their minds to property. The current legal position is that asset recovery in Tanzania is conviction based. This means that forfeiture orders must be preceded by the conviction of an accused. When carried out as expected, the mechanism has an impact of depriving criminals of their ill-gotten wealth, thereby striking them at a point where it hurts most. All this is aimed at ensuring that the convict is denied the enjoyment of the fruits of his criminal acts, serving as a deterrent and an attempt by the state to suppress the conditions that lead to unlawful activities. It disrupts criminal activities and prevents the possibilities of using the proceeds of crime to reinvest in other forms of crime. Tanzania has a legal and institutional framework that deals with the forfeiture of criminally-acquired assets. However, the basic question into which this article enquires is whether this framework is human rights compliant. To respond to this question, the discussion looks at the provisions of the Bill of Rights as entrenched in the country's Constitution in relation to the asset recovery legal regime and inquires whether the latter reflects those constitutional provisions. Despite some limitations that are apparent*

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in the course of enforcing legal provisions on asset recovery, the article concludes that all Tanzanians, including suspects, are treated equally before the law. As such, they are all expected to enjoy the rights and freedoms that are contained in the Constitution. There are avenues through which those who feel aggrieved can pursue their complaints.

Key words: *forfeiture; illegally-acquired property; concealing profits from crime; Constitution; human rights compliance*

1 Introduction

This article attempts to look at whether the forfeiture of illegally-acquired property, popularly known as asset recovery, is human rights compliant in Tanzania.[1] In doing so, the article enquires into the issue of whether the asset recovery process complies with human rights aspects in relation to suspects and other persons that are involved in the asset recovery process. It should be noted at the outset that the Tanzanian Constitution contains a Bill of Rights.[2] Therefore, it is crucial to examine whether the asset recovery process is human rights compliant. The discussion therefore covers aspects such as the asset recovery regime in Tanzania with the emphasis on analysing stages of the asset recovery process, the Bill of Rights in Tanzania and the extent to which is it reflected in the procedural and substantive legal regime in the asset recovery process. Some limitations in the course of enforcing the legal provisions on asset recovery are also examined.

2 Asset forfeiture legal regime in Tanzania

This part sets out to discuss the main features of what the law provides in the asset recovery process. It is a widely-accepted notion in the international community that criminals should be stripped of the proceeds of their crimes. The objective is to remove the incentive for the commission of crime. The legal framework that deals with asset recovery in Tanzania, therefore, is premised on this objective. It should be noted that the current legal position is that asset recovery in the country is conviction-based save for two instances where civil forfeiture may be effected.[3] These are, first, where a person has

1 The current legal position is that asset recovery in Tanzania is conviction based.
2 See Part III of Chapter One of the Constitution of the United Republic of Tanzania of 1977.
3 See secs 9 and 14 of the Proceeds of Crime Act, Cap 256 [RE 2002], which provide that conviction is one of the preconditions for the forfeiture order to be

died while under investigation or after being charged but before a conviction; and, second, where a person cannot be brought before the court.[4] This means that, except for civil forfeiture, full criminal trials are carried out in respect of predicate (income-generating) offences.

The asset recovery legal regime in Tanzania is not contained in a single law. There are several statutes that make provision for the recovery of criminally-acquired assets. However, such provisions are ancillary to other matters. As long as the country has a conviction-based forfeiture system, all predicate offences must first undergo full criminal trials. This explains why various pieces of legislation ranging from substantive to procedural laws are involved. Most of these pieces of legislation create several predicate offences and penalties to be meted out. In addition, however, they contain forfeiture provisions to those predicate offences, most of which are also covered by the main forfeiture law, namely, the Proceeds of Crime Act.[5] The laws that contain forfeiture provisions include the Prevention of Terrorism Act;[6] the Wildlife Act;[7] the Fisheries Act;[8] the Economic and Organised Crime Control Act;[9] the Criminal Procedure Act;[10] the Forest Act;[11] the Anti-Trafficking in Persons Act;[12] and the Drug Control and Enforcement Act.[13]

The following part of the discussion gives an appraisal of the main forfeiture law, namely, the Proceeds of Crime Act, with a view to establishing the extent to which asset recovery processes and mechanisms are effected. The Proceeds of Crime Act is the primary legislation that deals specifically with the forfeiture of proceeds and instrumentalities of crime. Part II of the Act contains provisions for making application for a confiscation order.[14] In this part of the Act the

issued by the court.

4 See secs 4(1)(c), 5 and 12 of the Proceeds of Crime Act (n 3) in respect of the issuing of a forfeiture order where a person has absconded. See also secs 13A and 30 of the same Act regarding civil forfeiture due to the death of the accused and due to the practical impossibility to prosecute the accused person, respectively.

5 Cap 256 [RE 2019]. According to its long title, this is an Act to make better provision for dealing with the proceeds of crime.

6 Cap 19 [RE 2019] sec 36(1).

7 Cap 283 [RE 2009] sec 111(1).

8 Act 22 of 2203 secs 38(1) & 39.

9 Cap 200 [RE 2019] sec 23.

10 Cap 20 [RE 2019] secs 351 & 352.

11 Cap 323 [RE 2002] sec 7.

12 Act 6 of 2008 sec14.

13 Cap 95 [RE 2019]. The Act states explicitly in sec 49(1) that where any person is convicted for an offence under Part III, the property owned by him on the date of the conviction or acquired by him after that date shall be forfeited to the government in accordance with the provisions of the Proceeds of Crime Act.

14 See secs 9-13 of the Proceeds of Crime Act.

granting of forfeiture orders is provided for, and their effect not only on the accused who has been found guilty, but also on third parties who had an interest in the forfeited assets. Modalities of dealing with registered foreign forfeiture orders are also provided under this part.[15] Non-conviction-based forfeiture occurs where the Director of Public Prosecutions (DPP) suspects, on reasonable grounds, that any person has acquired, holds or is dealing with tainted property and it is not possible (a) for any person to bring the person before a court on a charge of any serious offence; or (b) for a foreign pecuniary penalty order or a foreign forfeiture order to be made in respect of the person. In such a situation the DPP may apply to the High Court for an order to declare the property forfeited to the United Republic of Tanzania.[16] Part VI provides for information-gathering powers, such as production orders, search powers, monitoring orders and obligations of financial institutions.[17] Part VII, the last part, is reserved for miscellaneous provisions.[18]

Having outlined the main contents of the Act, the following discussion revolves around the way in which those salient features of the Act are made use of in the asset recovery processes and mechanisms. The discussion is mainly guided by four related, connected and interdependent stages that are involved in the asset recovery process. The stages are, first, identifying and tracing the criminally-acquired assets through the institution of an investigation; second, securing the assets; third, the confiscation or forfeiture of identified criminally-acquired assets; and, fourth, the enforcement of a forfeiture order. The discussion ventures to analyse the legal framework that is involved in all these stages. In the course of this analysis, the discussion underscores which institutions are mandated by the law to undertake a given assignment in order to accomplish the processes and mechanisms in place.

2.1 Identifying and tracing criminally-acquired assets

Identifying and tracing assets that are alleged to have been acquired through criminal activities is a very important and basic stage in the asset recovery process. This stage involves tracking and unveiling hidden assets through financial investigation. It forms the foundation of the rest of the stages because the collection of intelligence and evidence aimed at enabling tracing the assets and establishing

15 Secs 14-17 of the Proceeds of Crime Act.
16 Under secs 4(1)(c), 5 and 12 of the Proceeds of Crime Act (n 4).
17 Secs 58-70 Proceeds of Crime Act.
18 Secs 71-79 Proceeds of Crime Act.

ownership is undertaken. All recovery efforts that follow thereafter largely depend on this preliminary stage.

Criminals increasingly develop sophisticated ways of concealing their illicitly-acquired assets without respecting borders. Efforts to recover these assets must cross borders. However, a jurisdiction where assets have been hidden will not confiscate or repatriate the assets to the country of origin unless evidence is presented, linking them to an illegal activity.[19] Therefore, whether assets are located in or outside the country, the evidence should 'establish that the targeted assets derive directly or indirectly from the commission of a crime'.[20] It is at this stage where investigation is instituted for that purpose and other stages that follow thereafter. The role of investigators in this endeavour is not only to locate assets but also to establish the manner in which criminals hold those assets.

In view of the above, investigators should in the course of investigation strive to meet three objectives, namely, locating the assets, linking them to an unlawful activity and proving the commission of a predicate offence. The identification and tracing of the proceeds of crime and securing the property for final confiscation are essential and integral parts of the whole asset recovery process. At this stage investigators not only strive to locate the assets but also to gather evidence that establishes the manner of holding the assets and to link them with criminality. As such, investigators trace assets for the purpose of freezing and seizing them, so that these assets can ultimately be confiscated through a judicial order and returned to the victims of crime.[21] This is an uphill task which should be conducted in parallel with the investigation of a predicate offence, which is a criminal offence generating material benefit. It sometimes is very challenging to gather evidence that links the assets and instrumentalities of crime to the criminal activities. The reason behind this is that criminals always seek to transfer and hide assets that are illicitly acquired. They are prepared to exploit any available opportunity at any cost in order to obscure the location and path of the assets.

19 T Lasich 'The investigative process: A practical approach' in Basel Institute on Governance, International Centre for Asset Recovery *Tracing stolen assets: A practitioner's handbook* (2009) 49.

20 UNODC *Manual on international cooperation for the purposes of confiscation of proceeds of crime* United Nations, Vienna International Centre, Vienna, Austria, September 2012 35.

21 C Monteith & A Dornbierer 'Tracking and tracing stolen assets in foreign jurisdictions' International Centre for Asset Recovery, Basel Institute on Governance, Basel, Switzerland, Working Paper Series 15 2013 10, http://www.fatf-gafi.org/pages/faq/Moneylaundering (accessed 10 November 2015).

The Proceeds of Crime Act, which is the main law that governs criminally-acquired assets in the country, provides for both substantive and procedural aspects of recovering proceeds and instrumentalities of crime located in and outside the country.[22] The Act provides for investigative powers of a police officer to identify and trace any property believed to be tainted property.[23] As such a police officer may enter any premises and conduct a search if he believes on reasonable grounds that there is tainted property on such premises.[24] The officer may seize any property found in the course of the search which the officer believes, on reasonable grounds, to be tainted property.[25] The Act mandatorily requires a police officer to seek and obtain a search warrant from the court before conducting a search.[26] It is apparent that a search warrant, being a written authority, generally speaking, is a precondition for validating the search. The police officer must have it duly and properly issued.

However, a police officer may enter premises and conduct a search and seize tainted property without the authority of an order of the court or a court warrant where he believes on reasonable grounds that it is necessary to do so in order to prevent the concealment, loss or destruction of the tainted property, or where the seriousness and urgency require and justify immediate intervention.[27] Search and seizure may sometimes be carried out even in the absence of the accused, as in the case of *Rajabu Athumani v R*.[28] In this case the accused was convicted of burglary and theft. The main matter raised on appeal was his contention that the conviction should be quashed as it was based upon the discovery of the stolen property in his house while he was not present. It was not contended that the search was invalid in any other way. It was held that the absence of the accused does not invalidate the search of premises.

A police officer is further empowered to enter and search any premises for any property-tracking document in relation to a serious offence, and to seize any document found in the course of the search which he believes, on reasonable grounds, to be a property-tracking document in relation to the serious offence.[29] The document is important to the investigator as it is relevant to identifying, locating

22 AA Mbagwa 'The role of procedural laws in asset recovery: A roadmap for Tanzania' LLM dissertation, University of the Western Cape, 2014 49.
23 Sec 31(1) Proceeds of Crime Act.
24 Sec 31(2) Proceeds of Crime Act.
25 Sec 31(3) Proceeds of Crime Act.
26 Sec 32 Proceeds of Crime Act.
27 Criminal Procedure Act Cap 20 [RE 2019] sec 42 and sec 34 Proceeds of Crime Act.
28 (1967) HCD n 449.
29 Sec 62 Proceeds of Crime Act.

and quantifying tainted property or any property of an offender in a serious offence.[30] The entry and conducting of the search by the officer should be authorised by a court order. Furthermore, where a police officer has reasonable grounds to suspect that a person has in his possession or control a property-tracking document, he may apply to a court for an order directing the person to produce to the police officer a document prescribed in the order.[31] A person against whom a production order is issued cannot refuse to produce it on the ground that its production might tend to incriminate him or make him liable to a penalty or would be in breach of any obligation or privilege not to disclose the existence or contents of the document.[32] Where a document is produced to the police officer, he may inspect, take extracts from, make copies of or retain the document.[33] The provision is a breakthrough in asset recovery as it denies criminals the opportunity to conceal illicit assets and evidence on the basis of confidentiality, thereby clearing the way for the recovery of illegal assets.[34]

2.2 Securing the assets

It is worth noting that at times an organised crime and asset tracing investigation may take a long time to complete. As such possibilities of assets being dissipated or transferred cannot be ruled out altogether. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. All this is done to ensure that the assets are available to satisfy a final forfeiture order.[35] According to the Proceeds of Crime Act, the securing of assets is effected through a restraining order issued by court upon an application made by the DPP.[36] The restraining order issued by a court remains in force until the criminal charge against the person in relation to whom the order was issued is withdrawn or such person is acquitted of the charge.[37] The order also ceases to have effect when the confiscation order is satisfied or discharged.[38]

30 Sec 3 Proceeds of Crime Act.
31 Sec 58(1) Proceeds of Crime Act.
32 Sec 58(8) Proceeds of Crime Act.
33 Sec 58(6) Proceeds of Crime Act.
34 Mbagwa (n 22) 51.
35 A Adekunle 'Proceeds of crime in Nigeria: Getting our act together' Inaugural Lecture Series, Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria (2011) 18.
36 Sec 38(1) Proceeds of Crime Act.
37 Sec 52(1) Proceeds of Crime Act.
38 Sec 52(2) Proceeds of Crime Act.

2.2.1 Forfeiture through court process

The third stage in the asset recovery process is the forfeiture of identified assets that are alleged to have been acquired through criminal activities. Forfeiture is effected through a court due process. As mentioned, forfeiture under the Proceeds of Crime Act generally is conviction based. This means that a conviction for the commission of a serious offence is a precondition for forfeiture.[39] Under Part II of the Proceeds of Crime Act, where a person is convicted of a serious offence, the DPP may, within six months of the conviction of a person of a serious offence, apply to the convicting court for a forfeiture order against any property that is tainted property in respect of the offence.[40] Upon application, the DPP has to give notice to the person convicted and to any other person interested in the property to be forfeited.[41] The purpose of the notice so given is to enable the person convicted and any other person interested in the property to be forfeited to appear and to contest the application.[42]

2.2.2 Enforcement of a forfeiture order

When the court grants a forfeiture order, the said order has to be enforced. The DPP is empowered under the National Prosecutions Service Act[43] to take any appropriate measures to enforce the forfeiture order. The enforcement of the forfeiture order is effected domestically and in foreign jurisdictions using mutual legal assistance. In other words, assets that are located outside the country can be forfeited through a formal request to the foreign country to that effect. This It means that if the assets are located in a foreign jurisdiction, a mutual legal assistance request must be submitted. It is well settled under the Mutual Assistance in Criminal Matters Act[44] that where the assets are in a foreign country, the DPP may request the foreign country to enforce the order.[45] The order may then be enforced by authorities in the foreign jurisdiction by directly registering and enforcing it.[46] Normally the forfeited property is vested in the United Republic of

39 According to the Written Laws (Miscellaneous Amendments) Act 15 of 2007, which amended, among other laws, the Proceeds of Crime Act, Cap 256 [RE 2019], the term 'serious offence' means money laundering and includes a predicate offence.
40 Sec 9(1) Proceeds of Crime Act.
41 Sec 10 Proceeds of Crime Act.
42 As above.
43 Cap. 430 [RE 2019] sec 12.
44 Cap 254 [RE 2002] sec 4.
45 As above.
46 See United Nations Convention against Corruption (UNCAC) arts 54 and 55; United Nations Convention against Transnational Organised Crime (UNTOC) art 13; United Nations Convention against Narcotics Drugs and Psychotropic Substances art 5; and the Terrorist Financing Convention, art 8.

Tanzania and is registered in the name of the Treasury Registrar on behalf of Tanzania.

3 The Bill of Rights in Tanzania

With the entrenchment of the Bill of Rights in the Constitution of the United Republic of Tanzania of 1977 in 1984 as per the Fifth Constitutional Amendment,[47] Tanzania had taken a step forward towards not only respecting but also creating an avenue for its citizens to be able to realise human rights. According to the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984,[48] with the Bill of Rights coming in force in March 1988, all basic rights and freedoms, also referred to as political civil liberties as provided for under Part III of Chapter One of the Constitution of the United Republic of Tanzania of 1977, are guaranteed.[49] Section 5(1) of the Act provides that '[w]ith effect from March, 1988 the courts will construe the existing law including customary law with such modifications, adaptations and exceptions of the Fifth Constitutional Amendment Act 15 of 1984, ie, the Bill of Rights'.

Before March 1988 Tanzania did not have a Bill of Rights providing for basic rights that include freedom of assembly and association,[50] freedom of movement,[51] freedom of expression[52] and freedom of religion.[53] Other rights are the right to work,[54] the right to life,[55] equality before the law,[56] personal freedom,[57] the right to participate in government,[58] the right to acquire and own property[59] and the right to a fair remuneration.[60] These are the rights and freedoms that have to be enforced subject to the laws of the land. All Tanzanians are entitled to enjoy these rights and freedoms. These are natural rights and freedoms bestowed on them by the fact that they are human beings. The state therefore is duty bound to ensure that in the course of implementing appropriate law enforcement measures,

47 See the Fifth Constitutional Amendment Act 15 of 1984.
48 Act 16 of 1984.
49 This part covers arts 12 to 32 of the Constitution.
50 The Constitution of the United Republic of Tanzania 1977, Cap 2 [RE 2002] art 20.
51 Art 17 Tanzanian Constitution.
52 Art 18 Tanzanian Constitution.
53 Art 19 Tanzanian Constitution.
54 Art 22 Tanzanian Constitution.
55 Art 14 Tanzanian Constitution.
56 Art 13 Tanzanian Constitution.
57 Art 15 Tanzanian Constitution.
58 Art 8 Tanzanian Constitution.
59 Art 24 Tanzanian Constitution.
60 Art 23 Tanzanian Constitution.

it respects, protects, promotes and fulfils those fundamental rights and freedoms to the letter.

The fact that Tanzania has the fundamental rights and freedoms as enshrined in the Bill of Rights is important. However, more important is the enforceability of such rights and freedoms. The enforcement of the Bill of Rights guarantees fundamental rights and freedoms to the citizenry, otherwise no meaningful purpose is served by having a Bill of Rights which is not enforceable.

Arguably, the effective enforcement of fundamental rights and freedoms in Tanzania and elsewhere in the world is meaningless without having effective enforcement procedures in place. A well-articulated mechanism enables any person to have an avenue through which he can demand those rights and freedoms. The Bill of Rights establishes under article 30(3) that the High Court of Tanzania has a role to enforce the fundamental rights and freedoms as enshrined in the Constitution of the United Republic of Tanzania of 1977. It is stated in article 30(3) that any person who alleges that any provision of this part of the Bill of Rights or any other law involving a basic right or duty has been, is being or is likely to be contravened may, without prejudice to any action or remedy lawfully available to him in respect of the same matter institute proceedings to the High Court for redress. The High Court should follow the procedure provided for by the Basic Rights and Duties Enforcement Act 1994,[61] when dealing with matters under the Bill of Rights. The Act was enacted pursuant to the provisions of article 30(4) of the Constitution which provides that: the legislature may enact a law for the purpose of regulating procedure for instituting proceedings on matters pertaining to the Bill of Rights; specifying the powers of the High Court in relation to the hearing of the proceedings instituted pursuant to that effect; and ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with the Constitution. Under the Act, the High Court for purposes of trying human rights cases is composed of three judges of the High Court and every question in a petition should be determined according to the opinion of the majority of the judges hearing the petition.[62]

61 Cap 3 [RE2002].
62 Sec 10 Basic Rights and Duties Enforcement Act (n 61).

4 Illicitly-acquired assets: A violation of the citizenry's human rights

A few individuals who are in a position to divert public funds through corruption or any other malpractices violate the human rights of their fellow citizens. Such individuals and other suspects of such criminal acts, who gang up into organised and networked groups, take advantage of a liberalised market economy together with technological innovations in terms of ease and fast communications to amass huge profits with less risky activities within and across national frontiers. The exact value is difficult to determine with accuracy. However, the United Nations Office on Drugs and Crime (UNODC) has estimated that between $1 trillion and $1,6 trillion is lost each year to various illegal activities in the world.[63]

It is further estimated that corrupt public officials in developing and transition countries loot as much as $40 billion each year, concealing these funds overseas where they are extremely difficult to recover.[64] This figure is equivalent to the annual gross domestic product (GDP) of the world's 12 poorest countries, where 240 million people live.[65] In Nigeria alone, $420 billion has since independence been stolen from state coffers.[66] Persons suspected of committing such criminal acts always ensure that they conceal their profits from crime.[67] One such way of concealment is through channelling those assets into the financial system, either locally or in foreign jurisdictions. Such estimated figures signal a massive cross-border flow of the global proceeds from criminal activities that jeopardise the socio-economic well-being of the citizenry and pose a serious threat to the security and stability of most developing and transition countries.

Tanzania is not spared from what has befallen other countries. Grand corruption and abuse of power that take place in high levels of the political system have recently featured prominently at the

63 UNODC and World Bank *Stolen Asset Recovery (StAR) initiative: Challenges, opportunities, and action plan,* World Bank, Washington DC June 2007 10.

64 JP Brun et al *Asset recovery handbook: A guide for practitioners* (2011).

65 TS Greenberg et al *Stolen asset recovery: A good practices guide for non-conviction based asset forfeiture* Stolen Asset Recovery (StAR) Initiative, The World Bank, Washington DC (2009) 7.

66 S Kingah 'The effectiveness of international and regional measures in recovering assets stolen from poor countries' (2011) 13 *University of Botswana Law Journal* 6, quoting A Bacarese 'Advancing international understanding and cooperation in combating fraud and corruption: Recovering stolen assets – A new issue?' (2009) 10 *Academy of European Law Forum* 422.

67 Lord Steyn notes in one of the of the UK's leading asset recovery cases, *R v Rezvi* [2003] 1 AC 1099, 1146: 'It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential.'

expense of national wealth. Grand corruption is also committed by private individuals in the country. A number of corruption scandals that were reported or unearthed raise eyebrows. It is on record that the country so far has lost billions of shillings through corruption-related scandals. Examples of such scandals abound, including the radar equipment bought from the UK's BAE systems, which occurred in 2008;[68] the external payment arrears (EPA) scandal, which dominated media headlines in 2009; the Richmond saga;[69] Alex Stewart (Assayers) incident;[70] and the BoT Twin Towers situation.[71] The Tegeta Escrow account scandal, which involved the payment of US $122 million should also be reckoned with.[72] In 1995 TANESCO

68 The money used to buy the radar equipment, US $39 970 000, was recovered to the tune of £29,5 million as *ex gratia* for the benefit of the people of Tanzania. This famous radar 'change' was aimed at improving education facilities in terms of buying school desks and books for primary schools. Whether there was proper management of these recovered funds and whether they were put to good use, nobody can tell.

69 See Parliament of Tanzania *Hansards – Parliamentary Debates* 6 February 2008 41-105 and 7 February 2008 43-99. The Richmond scandal concerned fraud and corruption in connection with a contract with the American firm Richmond Department Company to provide for a 1000mw emergency power plant, which would convert gas from Songosongo into electricity. Despite the fact that all the bidding companies were found unsuitable, both in terms of their capabilities and financial surety, former Prime Minister Edward Lowassa intervened and awarded the contract to the Richmond Development Company LLC. Given the energy crisis, the government directly backed Richmond. By the end of 2006 it became evident that the company was not able to deliver, and that there were potential irregularities in the tendering process. Richmond only invested $30 million in generators for a total capacity of 20mw, and tried to obtain more than $115 million. A number of investigations followed: First, the Prevention and Combating of Corruption Bureau found no evidence of corruption. However, the Parliamentary Committee under the chairmanship of Dr Harrison Mwakyembe found evidence of corruption. As a result, in 2008 the Prime Minister Lowassa and a number of ministers involved resigned.

70 *R v Basil Pesambili Mramba & 2 Others,* Court of Resident Magistrates of Dar es Salaam, at Kisutu, Criminal Case 1200 of 2008. In this corruption-related case, former Minister for Finance, Basil Mramba, former Minister for Energy and Minerals, Daniel Yona, and former Permanent Secretary and the Treasury, Gray Mgonja, were taken to court for their involvement in wrongfully granting tax exemptions to the UK gold auditing company Alex Stewart (Assayers) Government Business Corporation, causing a Sh 11,7 billion loss to the government of Tanzania. The trial court found Basil Mramba and Daniel Yona guilty and sentenced them to a three-year prison term. The court, however, did not order the two accused to pay the government Sh 11,7 billion for the loss caused, neither did the High Court order the two accused to pay the government this amount of money as compensation on appeal by both prosecution and defence. (See the case of *Basil Pesambili Mramba & Another v R* Consolidated Criminal Appeals 96 of 2015 and 113 of 2015, High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam (unreported).

71 See the case of *Amatus Joachimu Liyumba v R* High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam, Criminal Appeal 56 of 2010 (unreported), where the appellant, who was the Director of Administration and Personnel in the Bank of Tanzania was charged and convicted by the trial court of two offences, namely, the abuse of office and occasioning loss to a specified authority c/ss 96(1) and 284(A)(1) of the Penal Code, Cap 16 [RE2002], thereby causing the government of Tanzania to suffer a loss of US $153 077 715,71. He appealed to the High Court but his appeal was dismissed in its entirety. However, no compensation order was made against the accused/appellant.

72 See Parliament of Tanzania *Hansards – Parliamentary Debates* 28 November 2014 64-328 and 29 November 2014 2-28.

signed a large and significantly expensive power supply with IPTL. Since then, a number of investigations into the tendering process have been conducted and the case ended in front of the International Centre for Settlement of Investment Disputes (ICSID). The charges of corruption were finally dropped at the level of the ICSID due to the failure of the government to provide evidence in time. However, in 2014 further allegations of corruption involving IPTL and an Escrow account emerged. The scandal raised hot debates in the 2014/2015 parliamentary sessions where members of parliament argued that the payment was shrouded in fraud, corruption and gross negligence.[73] Going by various sources of information, it is apparent that the country lost a large amount of money through criminal activities, including corruption-related scandals, and the possibilities of recovering same were very slim.

Admittedly, transnational criminal organised syndicates are mainly attracted to continue committing crimes because they are able to enjoy the proceeds of their crimes and evade the legal consequences of such crimes either through a lack of jurisdiction, complications involved in investigation or otherwise. This explains why there are continued global efforts to ensure that criminals do not profit from their criminal activities. It is important to note that depriving criminals of their ill-gotten gains is tantamount to disrupting and dismantling their criminal organisations. Indeed, seizing the instrumentalities of crime prevents others from using the infrastructure in place.[74]

In the last analysis, the goal underlying the conduct of most criminals, which is greed for material gain, is frustrated. Hence, the confiscation of the proceeds from crime has a retributive and deterrent effect. That is so because economic gain is the motive behind most criminal offences. These criminals enrich themselves through various means but at the expense of their fellow citizens. Citizens feel the pinch or magnitude of the diverted public funds by the few public officials through corruption or any other malpractices. It is a fact that such funds would be used to provide social services and other developments. But then, the citizens are denied such enjoyment because the funds are no longer in place. This, it is argued, is a violation of fundamental human rights at its best. Moreover, while part of the looted assets remains in the country, a large portion of it crosses the national borders in order to ensure that the chances

73 As above.

74 According to UNODC *Manual on international cooperation for the purposes of confiscation of proceeds of crime* Publishing and Library Section, United Nations Office, Vienna, September 2012 3, the term 'instrumentalities' denotes the assets used to facilitate crime, such as a car or boat used to transport narcotics.

of identifying and tracing the assets remain slim or not possible at all. Obviously, the looting affects the country's economy. As a result, the country's natural resources shrink to the extent of jeopardising good governance and the rule of law. It is obvious that given such a state of affairs, where a few enrich themselves and majorities are impoverished, the citizenry suffers the consequences the most.

The following are some of the human rights that are susceptible to violation, namely, the right to work[75] and the right to life.[76] Where the meagre resources of a country are looted by a few people for their own personal benefit, this may affect economic undertakings, thereby causing the majority of people to fail to meet basic needs and, thus, they are not guaranteed a quality life. Another right which is violated is equality before the law.[77] A fair hearing is the cornerstone of the administration of criminal justice. Illicitly-acquired assets affect the administration of justice where the resources that are allocated to the judicial administration become insufficient, thereby affecting the due process.

The citizenry's fundamental and basic human needs in a broader context are denied due to inadequate resources in place in public coffers. Citizens are essentially denied their fundamental human rights ranging from economic and social to cultural rights, which are guaranteed not only by international human rights instruments of which Tanzania is a state party but also the country's Constitution. Among these is the African Charter on Human and Peoples' Rights of 1981 (African Charter), which establishes a human rights protection system in the African region.[78] The Charter covers civil, political, economic, social and cultural rights. It obligates state parties, Tanzania included, to promote and protect these rights for individuals and also for the peoples.

Another African regional human rights instrument is the African Union (AU) Anti-Corruption Convention,[79] the operation of which covers all member states of the AU. The Convention contains provisions that cover the recovery of corruptly-acquired assets. In

75 Art 22 Constitution of the United Republic of Tanzania 1977.
76 Art 14 Tanzanian Constitution.
77 Art 13 Tanzanian Constitution.
78 The Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Tanzania signed the Charter on 31 May 1982, ratified it on 18 February 1984 and deposited it on 9 March 1984, https://au.int/sites/default/files/treaties/36390 (accessed 1 June 2021).
79 AU Convention Against Corruption was adopted by the AU Assembly in Maputo, Mozambique on 11 July 2003 and entered into force on 5 August 2005. Tanzania signed the Convention on 5 November 2003, ratified it on 22 February 2005 and deposited it on 12 April 2009, https://au.int/sites/default/files/treaties/36382 (accessed 1 June 2021)).

view of its objectives,[80] it is argued that the Convention is aimed to provide a coordinated mechanism to effectively prevent and combat corruption and related offences. In order to ensure that this aim is achieved, it adopts a broader approach to asset recovery.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, which Tanzania has ratified, requires state parties to take steps to progressively achieve the full realisation of economic, social and cultural rights to the maximum of their available resources.[81] It is true that this obligation cannot be met if the assets are diverted or plundered from the public coffers by a few who are in a position that enables them to do so. The most conspicuous rights that are susceptible to violation include the right to adequate food, the right to health and the right to due process. To realise such and other rights, adequate resources are required. Based on what has been stated above, there is reason behind the trend that in recent years law enforcement agencies around the world have become increasingly interested in pursuing property, as opposed to people, associated with criminal activity.[82]

5 A human rights assessment of the asset-recovery process

This part of the discussion ventures, albeit briefly, on the second limb of viewing the human rights context in relation to the asset-recovery process, which is whether the asset-recovery process complies with human rights aspects in respect of persons who are accused of having illegally acquired property and other persons who are involved therein. Those other persons are victims, witnesses, experts and whistleblowers. Are their human rights guaranteed in the course of the asset-recovery process? This is the main question to be addressed.

There is no doubt that asset recovery is intended to prevent criminals from benefiting from their crimes. Thus, criminals are reduced from 'wealthy untouchables' to being highly vulnerable, thereby not only making crime unprofitable but also deterring future

80 Art 2 AU Convention against Corruption.
81 Art 21 ICESCR. Tanzania accessed to the Covenant on 11 June 1976, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN, (accessed 1 June 2021).
82 KE Davis 'The effects of forfeiture on third parties' (2003) 48 *McGill Law Journal* 185.

offenders.[83] Asset recovery has been identified as an important tool to combat international and domestic organised crime.[84]

It is obvious that the asset-recovery process interferes with ownership and possession of property as well as other rights and freedoms, which are protected by the country's Constitution. The Bill of Rights, which is entrenched in the Constitution, is intended to give protection to every person. It means that all Tanzanians, regardless of whether one is innocent or a criminal, are protected by the Constitution. Any limitation to the enjoyment to such rights and freedoms provided for under the Constitution should be prescribed by law, reasonable and necessary for purposes of enhancing public benefit. This means that the state is duty bound to implement appropriate law enforcement measures in the interests of protecting the rights of society.[85] Whatever steps the state takes in the asset-recovery process should therefore have the backing of the law. Moreover, the state must guarantee that the investigative means applied or the decisions taken during the criminal proceedings to seek, seize, forfeit and return the illicitly-acquired assets do not in turn violate other fundamental human rights that are guaranteed to the person being prosecuted.[86] It needs to be underscored that what suspects so far face are mere allegations. According to article 13(6) of the Constitution of the United Republic of 1977,[87] which provides for equality before the law, suspects should be accorded a fair hearing and presumed innocent. Until the prosecution proves beyond a reasonable doubt and courts of law convict them of the charges preferred against them, that is when they are said to have committed the crimes. Thus, when the state engages itself in the asset-recovery process, it should ensure that the fundamental human

83 C Soko 'An evaluation of Zambia's asset recovery laws' LLM dissertation, University of the Western Cape, 2013 69.

84 See the Proceeds of Crime Act, Cap 256 [RE 2019] and the Mutual Assistance in Criminal Matters Act Cap 254 [RE 2002]. These are the main pieces of legislation that govern the asset recovery regime in Tanzania. The objects and reasons for enactment of the Proceeds of Crime Act, as contained in the Bill, *inter alia*, are to enable freezing and confiscation orders made by courts in the United Republic of Tanzania to be enforced abroad, and orders made in foreign countries in relation to foreign offences to be enforced against assets located in Tanzania. The Mutual Assistance in Criminal Matters Act provides mutual assistance between Tanzania and other foreign countries, on a reciprocal basis, to facilitate the provision and obtaining of such assistance by Tanzania and to provide for matters related or incidental to mutual assistance in criminal matters. Assistance is mainly sought in relation to evidence and the identification and forfeiture of property.

85 V Basdeo 'The law and practice of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma' (2014) 17 *Potchefstroom Electronic Law Journal* 1058, http://dx.doi.org/10.4314/pelj.v17i3.06 (accessed 25 March 2017).

86 K Attiso 'The recovery of stolen assets: Seeking to balance fundamental human rights at stake (May 2010) International Centre For Asset Recovery, Basel Institute on Governance, Working Paper Series 8 8.

87 Cap.2 [RE 2002].

rights of its subjects are protected. Procedures and all the processes for asset recovery should observe human rights, which are enshrined in the Tanzanian Constitution. A balance must be struck between the need to curb crime and that of respecting fundamental rights of the individuals accused.[88] The following are the most fundamental human rights the state should observe when dealing with individuals alleged to have illicitly acquired assets:

5.1 Presumption of innocence

The asset-recovery process demands that an administration of criminal justice system should prevail. The rationale behind this is that a person alleged to have illegally acquired assets is deemed innocent until proven otherwise, hence the presumption of innocence. According to the Tanzanian Court of Appeal in the case of *DPP v John Abdul Mwarabu*,[89] an accused is only required to raise a reasonable doubt as to his guilt. The presumption of innocence, as provided for in article 13(6)(b) the Tanzanian Constitution, therefore, sjould be observed. The phrase 'presumption of innocence' has been defined as a conclusion or inference as to the truth of a person being not guilty, harmless, or knowing nothing of evil or wrong.[90] The presumption of innocence in fact is a fundamental principle underlying criminal law and enforceable under the Bill of Rights as enshrined in the Tanzanian Constitution.[91]

Under this basic right, a person is presumed innocent until he is proven guilty by a competent court through due process. The burden of proving guilt rests entirely on the prosecution.[92] The standard of proof is beyond a reasonable doubt. The accused does not have the onus of proving his innocence.[93] This is so because the presumption of innocence always remains with a suspected person until he is proved guilty by a court of law. This legal position has been reiterated by the Tanzanian Court of Appeal in the case of *Jackson Mlonga v R*[94] where it was stated that proof in a criminal case is beyond a reasonable doubt. The Court held in the case of

88 As above.
89 Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal 138 of 2003 (unreported).
90 TR Mnyasenga 'Locating the scope and application of the right to presumption of innocence in Tanzania' (2015) 2 *International Journal of Law, Education, Social and Sports Studies* 74.
91 As above.
92 Evidence Act Cap 6 [RE 2019] sec 3(2)(a).
93 AOJ Kaniki 'Administration of mob justice in Tanzania: Wither the law enforcement machinery?' (2015) 42 *Eastern Africa Law Review* 217.
94 Court of Appeal of Tanzania at Dodoma, Criminal Appeal 200 of 2007 (unreported).

Fadhili Majura v R[95] that a failure by the prosecution to prove the case beyond a reasonable doubt gives the benefit of doubt to the accused.[96] In asset-recovery cases, the prosecution, therefore, has the burden of proving beyond a reasonable doubt that the accused illegally acquired the assets subject to forfeiture. It is on this basis of presumption of innocence that a suspect has the right to own property and the right against the arbitrary deprivation of property. The Tanzanian Constitution states in article 24:

> (1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.
>
> (2) Subject to the provisions of subarticle (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalisation or any other purpose without the authority of law which makes provision for fair and adequate compensation.

From the provisions of the Constitution, property that was acquired lawfully is fully protected and an owner thereof also has the right against arbitrary deprivation of the property. However, the protection envisaged here does not extend to the proceeds and instrumentalities of crime. According to the laws of the land nobody is entitled to profit from unlawfully-acquired property.[97] Such property should be forfeited by the Tanzanian government in line with the point that crime should not pay. That is why the asset-recovery process is accompanied by a fully-fledged investigation and prosecution before a court of law. All this is aimed at ensuring that the convict is denied the enjoyment of the fruits of his criminal acts, serving as a deterrent and an attempt by the state to suppress the conditions that lead to unlawful activities.

5.1.1 Presumption of innocence in relation to provisional measures for securing the assets

Some critics argue that this right, that is the presumption of innocence, is in conflict with provisional measures aimed at securing

95 Court of Appeal of Tanzania at Mtwara, Criminal Appeal 207 of 2007 (unreported).

96 See also cases of *Horombo Elikaria v R*, Court of Appeal of Tanzania at Mtwara, Criminal Appeal 50 of 2005 (unreported); *Bakari Omari @ Lupande*, Court of Appeal of Tanzania at Mtwara, Criminal Appeal 50 of 2005 (unreported) and *Fanuel Kiula v R* (1967) HCD 369.

97 Those laws that contain elaborate provisions regulating the confiscation of criminal proceeds include the Proceeds of Crime Act [Cap 256 [RE 2002]; the Prevention and Combating of Corruption Act 11 of 2007; the Drug Control and Enforcement Act 5 of 2015; the Prevention of Terrorism Act 21 of 2002; the Wildlife Act 2009 Cap 283 [RE 2009]; the Fisheries Act 22 of 2003; the Anti-Trafficking in Persons Act 6 of 2008; and the Anti-Money Laundering Act 12 of 2006.

assets that are involved in the commission of predicate offences. Their arguments hinge on a reasoning that the measures are not against an accused person who is merely a suspect as he has not yet been found guilty of the offence. The following statement has been made:[98]

> This right collides with provisional orders because they are enforced against or in relation to property which is merely suspected to be connected to a criminal offence. This means that a property owner, who in most cases is the suspect under investigation, has his use or enjoyment of his property limited through provisional orders, way before his culpability or the tainted nature of his property is determined by a court of law.

The critics do not pay attention to the reason behind having such provisional measures, which deprive suspects of the enjoyment of rights to own property that is subject to forfeiture. In this case, the freezing and seizure of the assets are provisional measures to preserve assets pending forfeiture. As regards a restraint order, which is also a provisional measure, it has the effect of securing the assets. According to the Proceeds of Crime Act, securing assets is effected through a restraining order issued by court upon an application made by the Director of Public Prosecutions.[99] As noted above, the order is aimed at ensuring that the proceeds and instrumentalities of crime are not dissipated by an accused person before a forfeiture order is made by the court. Ordinarily, applications for restraint orders are made against the property of a person who has not been charged but is expected to be charged,[100] who has been charged but has not yet been convicted[101] or has been convicted of a serious offence.[102] Persons affected by a restraint order are deprived of property rights pertaining to the property to which the restraint order applies.[103] They are prohibited from dealing in any manner with the property.[104] The restraint order issued by a court remains in force until the criminal charge against the person in relation to whom the order was issued is withdrawn or such person is acquitted of the charge.[105] The order also ceases to have effect when the confiscation order is satisfied or discharged.[106]

98 J Phillipo 'The asset forfeiture regime in Malawi and its implications for combating of money laundering' LLD thesis, University of the Western Cape, 2015 212.
99 Cap 256 [RE 2002] sec 38(1).
100 Secs 38(1) & 39(4) Proceeds of Crime Act.
101 Secs 38(1) & 39(3) Proceeds of Crime Act.
102 Secs 38(1), 39(1) & (2) Proceeds of Crime Act. See also BEK Mganga 'Confiscation of proceeds of crime: The law and practice in Tanzania' (2013) *National Prosecutions Service Journal* 14-15.
103 Basdeo (n 85) 1053.
104 As above.
105 Sec 52(1) Proceeds of Crime Act.
106 Sec 52(2) Proceeds of Crime Act.

In essence, all these orders are applied for in order to remove the possibility of the assets being dissipated or transferred in the course of trial before the final determination of the case. It should be appreciated that at times organised crime and an asset-tracing investigation may take a long time to complete. As such, the possibility of assets being dissipated or transferred cannot be ruled out altogether. Criminals normally conceal profits from crime. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. Moreover, these are sure ways of obtaining evidence. The assets serve as exhibits. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. Al this is done to ensure that the assets are available to satisfy a final forfeiture order.[107]

5.2 Rules of natural justice: Guarantee of and respect for the principle of a fair hearing

Rules of natural justice, which advocate a fair trial, need to be observed on the part of persons accused of predicate offences. At the international level, the Universal Declaration of Human Rights (Universal Declaration) states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.[108] Equally important, the International Covenant on Civil and Political Rights (ICCPR) obligates state parties to protect and preserve basic human rights.[109] The rights protected under ICCPR include equality before the courts and tribunals;[110] fair trial and public hearing by a competent, independent and impartial tribunal established by law;[111] the right to be presumed innocent until proved guilty according to law;[112] and the right not to be tried or punished again for an offence for which one has already been finally convicted or acquitted of in accordance with the law and penal procedure of each country.[113] At the regional

107 Adekunle (n 35) 18.
108 See art 10 of the Universal Declaration. The Declaration was adopted by the UN General Assembly on 10 December 1948.
109 The Covenant was adopted by the UN General Assembly in 1966 and came into force 23 March 1976. Tanzania acceded to the Covenant on 11 June, 1976, https://tbinternet.ohchr.org/...layouts/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN (accessed 1 June 2021).
110 Art 14(1) ICCPR.
111 As above.
112 Art 14(2) ICCPR.
113 Art 14(7) ICCPR.

level, the African Charter protects rules of natural justice.[114] The African Charter provides for the right to be heard. This comprises (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial court or tribunal.[115] The Charter also prohibits the application of laws with retrospective effect. That is to say, it provides that no one should be condemned for an act or omission which did not constitute a legally-punishable offence at the time of its commission.[116] The minimum guarantees of a fair trial are emphasised by the AU Convention on Preventing and Combating Corruption.[117] The Convention states in article 14 that any person alleged to have committed acts of corruption and related offences should receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter and any other relevant international human rights instrument recognised by the relevant state parties.

In Tanzania the rules of natural justice are enshrined in article 13 of the Tanzanian Constitution.[118] This means that the right to be heard, the rule against bias and the right to know reasons for the decision should feature in the whole asset-recovery process, as enshrined in the Constitution in the following words:[119]

> To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
>
> (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal

114 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Tanzania signed the Charter on 31 May 1982, ratified it on 18 February 1984 and deposited it on 9 March 1984, https://au.int/sites/default/files/treaties/36390 (accessed 1 June 2021).
115 Art 7(1) African Charter.
116 Art 7(2) African Charter.
117 The AU Convention Against Corruption was adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, Mozambique on 11 July 2003 and entered into force on 5 August 2005. Tanzania signed the Convention on 9 December 2003 and ratified it on 25 May 2005, https://au.int/sites/default/files/treaties/7786slafricanunionconventiononpreventingandcombatingcoruption.pdf (accessed 1 June 2021).
118 Cap 2 [RE 2002].
119 Art 16(6) of the Constitution of the United Republic of Tanzania 1977, Cap 2 [RE 2002].

> remedy against the decision of the court or of the other agency concerned.

Based on what has been stated above, this means that a fair hearing on the part of the individuals accused of acquiring illicit assets should be afforded to them in all stages of the asset-recovery process. This includes applications for provisional orders that involve court processes. All these go hand in hand with the right to legal representation, meaning that the person accused of a predicate offence has the choice of hiring an advocate of his choice or one provided under the legal aid forum as provided by the law upon meeting given conditions.

5.3 Third party rights

The asset recovery legal regime must take into consideration the extent to which provisional and ultimate forfeiture orders can affect third party interests. This is in full appreciation of the fact that any workable forfeiture regime must provide some mechanism for determining how forfeiture will affect the interests of the third parties involved in each of these cases, and no assessment of the merits of any given regime can be complete unless it takes that mechanism into account.[120] The concern here is where there are innocent or *bona fide* third parties, that is to say, those third parties that are not connected in any way to the commission of predicate offences of which the accused stands charged. The question arises as to whether they should be left to suffer the consequences. In Tanzania the asset recovery legal regime provides for the protection of third party interests, not only before or after provisional orders are made, but also when forfeiture orders are made.[121] The starting point is the Constitution. The right to own property as envisaged in article 24(1) of the Constitution accommodates third parties. Moreover, the United Nations Convention against Corruption (UNCAC), of which Tanzania is a state party, provides that procedures for recovering corruption proceeds should not be enforced in such a way that prejudices *bona fide* third parties.[122] In the same vein, Africa as a region has a convention that calls on its member states to cooperate and assist one another in preventing and combating corruption, namely, the African Union Convention on Prevention and Combating

120 Davis (n 82) 185.

121 Proceeds of Crime Act Cap 256 [RE 2002] sec 43(3)(b). See also the case of *Attorney-General v Mugesi Anthony & 2 Others* Court of Appeal of Tanzania, Criminal Appeal 220 of 2011 (unreported).

122 Art 31(9) UNCAC. Tanzania signed the Convention on 9 December 2003 and ratified it on 25 May 2005.

Corruption (AU Convention against Corruption).[123] The Convention, the operation of which covers all member states of the AU, contains provisions that cover the recovery of corruptly-acquired assets.[124]

However, it is fundamentally important that the asset-recovery regime should have provisions that ensure that third parties receive adequate notice of the whole process relating to assets in which they have an interest. Through the formal notice served upon them they will not only know what is going on but will also exercise their rights available under the law regarding the assets under consideration.

5.3.1 Rights of third parties in respect of provisional or preservation orders

The Proceeds of Crime Act requires the Director of Public Prosecutions to give written notice of an application for a restraining order against property to the owner of the property, and any other person whom he has reason to believe may have an interest in the property.[125] This requirement may only be waived and the court may proceed to grant any restraining order notwithstanding that no notice of the application has been given if it is satisfied that circumstances of urgency require the granting of the order, or if it would be contrary to public interest to give notice of the application. The purpose of such notice is to enable such persons, third parties included, who claim any interest in the property subject to the restraining order to adduce evidence at the hearing of the application in court.[126] Even after the order is made, any person having an interest in the property which is the subject of a restraining order may apply to court to exclude such other person's interest in the property from the order.[127]

Similarly, a restraining order against a person's property may be granted subject to such conditions as the court may deem fit and make provisions for meeting out of the property a specified debt incurred by that person in good faith to a third party.[128]

123 AU Convention Against Corruption (n 118).
124 Art 16 AU Convention Against Corruption on confiscation and seizure of the proceeds and instrumentalities of corruption; and art 17 on bank secrecy.
125 Cap 256 [RE 2002] sec 40.
126 Sec 41 Proceeds of Crime Act.
127 Sec 43(3) Proceeds of Crime Act.
128 Sec 38(3) Proceeds of Crime Act.

5.3.2 Rights of third parties in relation to forfeiture orders

Third party rights are observed even at the forfeiture stage. Where the Director of Public Prosecutions makes forfeiture application under POCA upon an accused person following his conviction of a serious or predicate offence against property in respect of accused's conviction, he is mandatorily required by law to give written notice to the accused or to any other person who he has reason to believe may have an interest in the property.[129] The accused, and any other person who claims an interest in the property, may appear and give evidence at the hearing of the application.[130] It is obvious that if the court is satisfied by the evidence adduced by the third party, the forfeiture order will take into consideration the extent of his interest in the property. In fact POCA expressly states that where an application for a forfeiture order is made against property, any person who has an interest in the property may, before the forfeiture is made, apply to the court for an order in respect of his interest in the property against which an application for a forfeiture order or a forfeiture order has been made.[131] However, the court should be satisfied that the applicant was not in any way involved in the commission of the offence concerned or, if the applicant acquired his interest at the time, or after the commission of the offence, the applicant did so for the sufficient value, and without knowing and in the circumstances such as not to arouse reasonable suspicion that the property was, at the time of the acquisition, tainted property.[132]

The asset recovery legal regime in Tanzania is not contained in a single law. There are several statutes that make provision for the recovery of criminally-acquired assets. However, such provisions are ancillary to other matters. As long as the country has a conviction-based forfeiture system, all predicate offences that are subject to freezing and confiscation must first undergo full criminal trials. This explains why various pieces of legislation ranging from substantive to procedural laws are involved. Most of these pieces of legislation create several predicate offences and penalties to be meted out. In addition, however, they have forfeiture provisions to those predicate offences, most of which are covered by the main forfeiture law, namely, the Proceeds of Crime Act.[133]

129 Sec10(1)(a) Proceeds of Crime Act.
130 Sec10(1)(b) Proceeds of Crime Act.
131 Sec 16(1) Proceeds of Crime Act.
132 Sec 16(6) Proceeds of Crime Act.
133 Proceeds of Crime Act Cap 256 [RE 2002].

In view of the above, those other laws also take into consideration third party rights when the issue of forfeiture comes to the fore. Among those laws is the Prevention of Terrorism Act 2002.[134] According to the Act, where a person is convicted of an offence under this Act, the court may order that any property used for, or in connection with, or received as payment or reward for, the commission of that offence, be forfeited to the United Republic of Tanzania.[135] However, before making an order, the court shall give every person appearing to have an interest in the property, in respect of which the order is proposed to be made, an opportunity of being heard.[136] Every person here includes *bona fide* third parties. Similarly, the Wildlife Conservation Act, 2009[137] has forfeiture provisions that protect third party rights. The Act mandatorily requires the court upon convicting a person of an offence under the Act to order the forfeiture to the government of proceeds and instrumentalities of crime of which such person was found in possession.[138] However, the Act states that where assets used as instrumentalities of crime are owned by a person other than the one who was convicted, and where on an application of the owner of the assets, the court is satisfied that the owner did not know and could not by reasonable diligence know that such assets were intended by the accused to be used or employed for any purpose which rendered liability for forfeiture, the court may make no order for the forfeiture of such assets used as instrumentalities of crime.[139] This is why it is well settled that people who invest in property in circumstances where they know or ought to know that it qualifies either as proceeds of crime or as instrumentality of crime have a significantly weaker claim to protection from forfeiture than otherwise.[140]

The Tanzanian Court of Appeal refrained from granting a forfeiture order in the case of *The Attorney-General v Mugesi Anthony & 2 Others*[141] on the ground that the owner of the asset used to commit a predicate offence was not aware that it would be used as such. In this case the Attorney-General filed an application to restrain a property which was used to facilitate the commission of crime. The property involved was a truck of the make Scania, which was used to transport a consignment of 25 bags of *cannabis sativa* (*bhang*) weighing 283 kilogram in Mwanza region. The Court, however, declined to grant a

134 Act 21 of 2002.
135 Sec 36(1) Prevention of Terrorism Act (n 135).
136 Sec 36(2) Prevention of Terrorism Act.
137 Cap 283 [RE 2009].
138 Sec 111(1) Wildlife Conservation Act (n 138).
139 Sec111(2) Wildlife Conservation Act.
140 Davis (n 82) 220.
141 Criminal Appeal 220 of 2011 in the Court of Appeal of Tanzania at Mwanza (unreported).

forfeiture order on the ground that the owner of the truck, the third respondent, was an ignorant, innocent third party owner.

5.4 The protection of victims, witnesses, experts and whistleblowers

One of the challenging factors to most developing countries, including Tanzania, is that they have a cash-based economy where funds do not often flow through the established financial systems.[142] It is estimated that 60 per cent of funds in Tanzania are kept outside banks.[143] This means that most financial transactions are carried out in cash. This poses a huge challenge in the fight against money laundering, terrorist financing and other serious and organised crimes. As a result, it is difficult to realise efforts upon asset recovery. Dealing in cash tends to leave little or no audit trail, and for this reason criminals prefer to deal in cash. Cash transactions leave the law enforcement agencies with disjoint or no information to work with. As such efforts to trace and track suspected financial flows may prove futile. Eventually gathering evidence that links the assets to criminal activities or those assets that are a benefit derived from an offence alleged to have been committed by the offender may at times become a very difficult assignment. This explains why the task of identifying and tracing the proceeds of crime requires a multi-sectored approach. This involves various sources.[144] Such sources may include gathering information from, among others, individual persons (whistleblowers) and other sources such as victims, experts and the like. It is through investigation that proceeds and instrumentalities of crime are revealed, especially when they are concealed with a view to hiding their origins. In addition to often providing evidence of criminal intent and identifying otherwise unknown accomplices, tracing through tracking the ownership trail may also lead to the seizure of property constituting illegal proceeds.[145] It therefore is important to rapidly locate and freeze assets reasonably believed to have been criminally acquired lest they are dissipated.

142 See the United Republic of Tanzania, Ministry of Finance *Financial Intelligence Unit Annual Reports (2011/2012)* 4; *(2012/2013)* 16-17 and *(2013/2014)* 23-24.

143 According to Prof Benno Ndulu, then Governor of the Bank of Tanzania, in his address to the 18th Conference of Financial Institutions delivered on 24 November 2016 in Arusha, six out of ten shillings held in cash is outside the banking system; *Guardian Newspaper* 25 November 2016 1.

144 Law enforcement officers should, therefore, involve various individual persons, sectors and institutions to gather intelligence and evidence that enable the identification and tracing of assets. The identification and tracing of assets involve locating the assets and linking them to the crime and the offender through accessing various sources.

145 P Atkinson 'Introduction' in International Centre for Asset Recovery *Tracing stolen assets: A practitioner's handbook* (2009) 19.

The role played by victims, witnesses, experts and whistleblowers, therefore, cannot be underestimated. As such, these persons need protection. Efforts should be made to make possible to hide their identification lest they may suffer the wrath of reprisal from criminals or their associates. The UNCAC, to which Tanzania is a state party, recognises the protection of witnesses, experts and victims[146] as well as those who give information about cases of corruption and other related offences.[147] UNCAC urges state parties to take appropriate measures to ensure effective protection against any acts of reprisal, intimidation or any unjustified treatment of persons who facilitate the launching of an investigation or who are involved in the proceedings *per se*.[148] Otherwise, such persons will be discouraged from cooperation in investigations. Tanzania has taken an initiative of having enacted a law to provide protection to whistleblowers and witnesses, namely, the Whistleblower and Witness Protection Act, 2015.[149] It must be appreciated that whistleblowers play a fundamental role in exposing criminals who are associated with illicitly-acquired assets. They often provide information, which assists in identifying otherwise unknown accomplices, tracing through tracking the ownership trail that may also lead to the seizure of property constituting illegal proceeds. Therefore, they need adequate legal protection. The enactment of the Whistleblower and Witness Protection Act in Tanzania is a step forward towards achieving not only that goal but also protecting and respecting the basic rights and fundamental freedoms of whistleblowers and witnesses.[150]

5.5 Some limitations in the course of enforcing legal provisions on asset recovery

In view of what has been discussed above regarding the human rights assessment of the asset-recovery process, there are some limitations in the course of enforcing legal provisions on asset recovery. These include:

5.5.1 Inadequate asset management system

Apart from having a law authorising the seizure and forfeiture of illicitly-acquired assets, it is important for jurisdictions to have organisational and administrative infrastructures to preserve,

146 Art 32 UNCAC.
147 Art 33 UNCAC.
148 Attiso (n 86)13.
149 Act 20 of 2015.
150 See secs 9, 10 and 11 of the Whistleblower and Witness Protection Act 20 of 2015.

manage and dispose of forfeited assets in a secure and accountable manner.[151] The asset-recovery process is meaningful if assets that are subject to forfeiture are available, properly managed, and well-kept and maintained. More so, recovered assets are additional resources for development activities. As such any neglect, which depreciates their economic value, diminishes their economic contribution to the nation's prosperity.

However, so far there are some limitations to the effective asset management system. It is apparent that there are some aspects that are not covered in the legal framework but which ought to be in place. The fact that so far there are no provisions that require the proper maintenance of records or statistics of management of assets that are subject to forfeiture or forfeited assets and their use, makes it very difficult to do follow-ups and to make an assessment of how asset management as a whole is faring.

5.5.2 Some gaps in existing laws

Since the early 1990s Tanzania has enacted several laws directly addressing criminal activities that are perpetrated by criminals within national boundaries and across international boundaries with a view to supplementing those that were in place. However, there are still some provisions of the laws that are incompatible with international best practices on dealing with asset recovery issues. Such provisions include those on mutual assistance in criminal matters. Whereas UNCAC mandatorily requires requested state parties to furnish assistance, Tanzania makes it optional.[152]

5.5.3 Failure by some investigators, prosecutors and trial courts to follow laid-down criminal practices and procedures

There are some procedural errors occasioned by some investigators, prosecutors or magistrates in the course of the administration of the criminal justice system. As a result, cases have been failing either at the trial or appellate stages. These errors range from a failure to follow some legal requirements during investigations; a lack of jurisdiction by the trial courts; and irregularities in tendering evidence during the trial to defective charges.

151 P Premabhuti 'Asset management measures in Thailand' in TS Greenberg et al *Stolen asset recovery: A good practices guide for non-conviction bases asset forfeiture* (2009) 175.

152 The Mutual Assistance in Criminal Matters Act Cap 254 [RE 2002] sec 12(2).

5.5.4 Lengthy and cumbersome procedures

Tanzania has a mainly conviction-based forfeiture system, which means that forfeiture orders must be preceded by the conviction of an accused.[153] Such orders are in addition to any punishment the court may impose for an offence. From a practical point of view, criminal investigations and prosecutions take a long time, thereby causing the state to bear the costs of maintaining assets subject to preservation pending applications for forfeiture orders. At times, the state incurs more costs than the value of the asset itself.

6 Conclusion: Is the forfeiture of illegally-acquired property in Tanzania human rights compliant?

In responding to this question, the benchmark is the Constitution, which is the basic law of the land. Other laws should be enacted in such a way that they are not in conflict with any provision of the Constitution. Considering the foregoing discussion, it is apparent that the procedural and substantive laws that are involved in the whole asset-recovery process and mechanisms abide by the Bill of Rights as entrenched in the Constitution. There have been arguments that the asset-recovery process is lengthy and cumbersome. While these arguments may have merit, such long and cumbersome procedure involved therein does not in main defeat the purpose of complying with human rights compliance. Nothing in the discussion goes contrary to the provisions of the Constitution, which insists that all persons are equal before the law and are entitled, without any discrimination, to protection and a fair trial.[154] The Constitution states that no law should have any provision that is discriminatory either of itself or in its effect.[155] There is a just cause to recover the illicitly-acquired assets. This is because of the fact that a few individuals amass wealth but do so at the expense of the majority, which is a violation of the fundamental human rights of those majority people, such as the right to work,[156] the right to life[157] and equality before the law.[158] All in all, it is concluded that the forfeiture of illegally-acquired property in Tanzania is human rights compliant. Much as the enforcement of human rights provisions as enshrined in the Constitution is not always absolute, limitations thereof need to be

153 See secs 9 and 14 of the Proceeds of Crime Act Cap 256 [RE2019] which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.
154 See art 13 of the Constitution.
155 As above.
156 Art 22 Constitution.
157 Art 14 Constitution.
158 Art 13 Constitution.

observed for the public good. Moreover, whoever feels aggrieved, there are several avenues through which their complaints can be entertained. What should be done is to empower the people through raising their awareness so that they can pursue with ease their rights through those avenues, namely, administrative and quasi-judicial bodies and courts of law.

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The protection of individual labour rights in Zimbabwe

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Summary: *The protection of individual labour rights in Zimbabwe is deficient despite the fact that the Constitution protects these rights. In looking to explore how this could be addressed, this article considers the evolution of the state's obligation to protect individual labour rights to this point and relies on individual labour rights protection at a global level with particular insights drawn from the approach taken to the protection of these rights in two jurisdictions, namely, England and South Africa. The approach to the protection of individual labour rights in these two jursidictions has influenced the Zimbabwean approach to highlight that effective protection of individual labour rights is possible only when courts actively look to protect these rights. The article argues that the reason for deficiencies in the Zimbabwean approach is the fact that courts are not doing enough to protect individual labour rights in Zimbabwe. The solution to this issue, therefore, lies in Zimbabwean courts taking a more proactive role in protecting individual labour rights.*

Key words: *labour rights; constitutionalism; individual labour rights; codification; acccess to court*

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1 Introduction

There is some consensus among scholars that not enough is being done to protect individual labour rights in Zimbabwe.[1] This is despite the fact that the Constitution, as amended in 2013, includes a provision dedicated to, *inter alia*, the protection of these rights.[2] As is to be expected, there are calls for the state to act to address this situation. However, the state is yet to do so in any compelling way. Consequently, this article explores why little has seemingly been done to address this issue as a step toward establishing, and recommending, how this situation can be addressed going ahead.

In making this argument, the article begins by placing the discussion in its theoretical context. It does so by exploring the evolution of the state obligation to protect individual labour rights. The article also highlights how, at this point in the evolution of this obligation, individual labour rights are protected at a global level with particular insights drawn from the approach taken to the protection of these rights in two jurisdictions, those of England and South Africa, which have adopted an approach to the protection of individual labour rights that has influenced the Zimbabwean approach to highlight that, regardless of the constitutional instruments in a state that purports to protect individual labour rights, the successful protection of these rights depends on the judiciary being proactive in ensuring that people enjoy the benefits these rights bestow.

Following this, the article turns to an analysis of the approach to the protection of individual labour rights in Zimbabwe and argues that courts are not doing enough to protect individual labour rights. In conclusion, it is argued that successfully protecting individual labour rights in Zimbabwe depends on courts taking a more assertive stance to protecting these rights.

2 Conceptual framework

The approach to the protection of individual labour rights has developed over time and continues to do so. Such evolution is critical to appreciating the current approach to individual labour

1 J Tsabora & TG Kasuso 'Reflections on the constitutionalising of individual labour law and labour rights in Zimbabwe' (2017) 38 *Industrial Law Journal* 43; M Gwisai 'Enshrined labour rights under s 65 (1) of the Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to fair and reasonable wage' (2015) (2) *University of Zimbabwe Student Law Journal* 2.

2 Sec 65 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 (Constitution).

rights generally. In preparing for an ensuing analysis of the approach to the protection of individual labour rights, therefore, this part attempts to establish two issues. First, it explores the evolution of the approach to the protection of these rights. Second, drawing from relevant parts of international law, the English common law, and the approach to the protection of these rights in South African law, the article highlights aspects of the modern approach to the protection of such rights.

2.1 Evolution of the state's role in protecting individual labour rights

Historically, the state was given a limited role in employment matters, especially the protection of individual labour rights. This was because, in liberal states that promoted ideas such as the freedom of contract and equality of employer and employee, individual labour rights were regarded as something of a private law issue based on the fact that, as a rule, employment relationships were created by agreement between parties concerning the conditions under which employees would work.[3] At law, such agreements, based on the mutual free will of the parties, fell under the common law developed by the judiciary.[4] Therefore, the state's role in protecting individual labour rights revolved around ensuring that people would have access to legal remedies when they felt that their rights had been infringed.[5] In time, however, the state's role changed as employees predominantly argued that the power disparity between employees and employers meant that employers could abuse employees in several ways, such as discriminating against disadvantaged groups, underpaying workers, forcing employees to work under the threat of dismissal, dismissing workers unfairly, or failing to insure workers against the risk of death, illness or disability.[6] As a consequence, states extended their obligation insofar as the protection of labour rights was concerned. Specifically, states began to intervene in the employment relationship in order to, *inter alia*, guarantee fair treatment of employees, promote equality,

3 A Trebilcock 'Chapter 21 – Labour resources and human resources management', http://www.ilocis.org/documents/chpt21e.htm (accessed 1 June 2020).

4 G Tavits 'The nature and formation of labour law', https://www.juridicainternational.eu/index.php?id=12453 (accessed 1 June 2020); JC Botero et al *The regulation of labour* (2004).

5 ACL Davies 'Identifying "exploitative compromises": The role of labour law in resolving disputes between workers' (2012) 65 *Current Legal Problems* 269; R Dukes 'A global labour constitution?' http://www.labourlawresearch.net/sites/default/files/papers/Dukes%20Global%20Labour%20Constitution%20-%20final%20WITH%20CORRECTIONS.pdf (accessed 1 June 2020); B Langille 'What is international labour law for?' (2009) 3 *Law and Ethics of Human Rights* 47.

6 Botero et al (n 4); Davies (n 5) 272; Langille (n 5) 47; Dukes (n 5).

and ensure that workers' rights were protected.[7] Such intervention assumed different forms, the most notable interventions being the provision of individual labour rights in national constitutions with complementary legislation being enacted to ensure that people realised the benefits that these rights bestowed on them.[8] The aim was to achieve a fair balance between the interests of employers and employees. Despite some progress across different states, such an approach to individual labour rights was not universally adopted or, where it was adopted, states ensured that their obligation to protect individual labour rights was limited. The result is that the extent of the state's role in protecting individual labour rights, which concern employees' rights at work through the contract for work, remains unclear. This makes it difficult, as several scholars have opined, to identify appropriate interventions when it is apparent that individual labour rights are not adequately protected.[9] The ensuing discussion looks to establish the extent of the state's role in protecting individual labour rights as a precursor to identifying appropriate interventions when it is apparent that individual labour rights are not adequately protected.

In looking to identify the extent of the state's role in protecting individual labour rights, it is useful to begin by considering that state formation theories, which have delved into the function of states, despite being varied, typically converge on the fact that states were formed because people acquiesced to ceding their autonomy to the state. This is an idea that traces back to the social contract theory.[10] It also is an idea that is found under the managerial perspective on state formation, which holds that states were formed when charismatic figures, intent on tending and increasing their possessions, instilled the fear of anarchy that would accompany roving banditry in local populations and in this way got them to accept subservience to state structures.[11] Alternatively, the view is held under the military perspective that states emerged when one power holder opted to have a standing army and moved away from the old militia system.[12] This forced other power holders to do the same. It also scared people

7 Dukes (n 5).
8 Davies (n 5) 272; B Hepple 'Rights at work', https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_079203.pdf (accessed 1 June 2020).
9 Tavits (n 4); Dukes (n 5); Botero (n 4); Davies (n 5) 272; Hepple (n 8).
10 RL Carneiro 'A theory of the origin of the state' (1970) *Science* 733.
11 A Wimmera & Y Feinstein 'The rise of the nation-state across the world, 1816 to 2001' (2010) 7 *American Sociological Review* 764; H Spruyt 'The origins, development, and possible decline of the modern state' (2002) *Annual Review of Political Science* 127; Carneiro (n 10) 733; R Blanco 'The modern state in Western Europe: Three narratives of its formation' (2013) *Revista Debates* 169.
12 G Poggi 'Theories of state formation' in K Nash & A Scott (eds) *The Blackwell companion to political sociology* 95; Blanco (n 11) 169.

and led them to proactively relinquish any claim to autonomy and, instead, align with power brokers. In this context, states emerged as a way in which to put together the fiscal and human capital needed to support military might and, by implication, heighten the likelihood of military success.[13] Quite separately, in what is best described as the economic perspective on state formation, the emergence of states is attributed to the point when property rights became celebrated and the contract was established as the key device for the creation and transmission of rights. This left people with no choice but to cede their former autonomy and pursue salaried work.[14]

In addition to this, across state formation theories it is quite clear that states are championed as having emerged to afford people the opportunity to live peaceful lives where their first-generation rights were well protected. Most notable among these is the contribution of John Locke who, along with other political philosophers, saw free individuals as the basis for a stable society and argued that governments should exist to protect the inherent rights of individuals.[15]

Under the managerial perspective on state formation, for instance, charismatic figures got local populations to accept and value the existence of a centrally-controlled framework of rule and develop a sense of trans-local commonality, then offering these populations the option of ceding their autonomy to a sovereign.[16] This sovereign would then have the obligation to ensure that there was security, order, peace and good quality of life.[17] In order to secure this, however, individuals would need to contribute to the sovereign's capacity to secure order, peace and good quality of life by paying taxes.[18] According to Strayer,[19] the fact that this is how the modern state emerged is apparent from the fact that states have always been focused on internal and not external affairs. To illustrate this point, Strayer highlights that high courts of justice and treasury departments existed long before foreign affairs offices and departments of defence.

13 As above.
14 Poggi (n 12) 102-106; Blanco (n 11) 169.
15 National Democratic Institute for International Affairs 'Manual on political party identity and ideology', https://www.ndi.org/sites/default/files/2321_identitymanual_engpdf_06032008.pdf (accessed 1 June 2020).
16 Poggi (n 12) 97-98.
17 F D'Agostino et al 'Contemporary approaches to the social contract', https://plato.stanford.edu/entries/contractarianism-contemporary/ (accessed 1 June 2020).
18 M Olson *Power and prosperity* (1985).
19 JR Strayer *On the medieval origins of the modern state* (1970) 26.

The same holds true under the military perspective on state formation. In terms of this perspective, the primary purpose of states was to secure peace by crafting a military superior to any aggressor. In order to build such a military, power holders would align with powerful social classes who had a vested interest in securing peace so that their property would be protected. The people making up these powerful social classes would supply credit to the power holders. Working together, power holders and the elites would then tax the common people, thereby raising resources for their military capabilities. In this context, state structures, including those responsible for the provision of welfare, as well as commercialised economies, emerged as secondary products of the power holders' efforts to provide themselves with effective military resources.[20]

Similarly, it is recognised under the economic theory on state formation that exploitation could have resulted in revolt when salaries became the means through which to hold people in subservient roles. In this context, the state emerged to keep the peace and hold the public in check.[21]

Importantly, state formation theories posit that people acquiesced to the turn to states, and that they did so because they saw the state as well suited to protecting them from internal and external threats. Effectively, the function of states was to secure protection from roving banditry, anarchical conditions and to ensure that life was lived in a rewarding manner. The economic perspective, predominantly, and other theories, to a lesser extent, point to the fact that the turn to property rights and reliance on contracts led to paid labour becoming critical to the state's survival. This was because labour and everything around it formed the basis of the generation of revenues through income taxation of individuals and corporations, general sales taxes.[22] Importantly, work became central to self-preservation and self-actualisation.[23] Not surprisingly, then, history shows that people were prepared to revolt when the state did not do enough to protect their individual labour rights. Initially, revolt assumed the form of insurrections, rebellions, revolts, *coups* and wars of independence.[24] In more recent times, however, such revolution has been arrived at in more peaceful ways which secure a

20 P Carroll 'Articulating theories of states and state formation' (2009) *Journal of Historical Sociology* 553.
21 Poggi (n 12) 102-106; Carroll (n 20) 553.
22 Taxation Britannica Online Encyclopaedia 'Income tax', https://www.britannica.com/topic/income-tax (accessed 1 June 2020).
23 Tavits (n 4).
24 M Ryan *Unlocking constitutional and administrative law* (2007) 13; AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 4-5.

change in the dominant values and myths of a society, in its political institutions, social structure, leadership, and government activity and policies.[25] Regardless of the form assumed by revolt, the result of people taking a stand consistently has been to push the state to accept an obligation to intervene in the employment relationship in order to protect individual labour rights.[26] There are variances in the manner in which states have looked to do this but this has most commonly been done through the turn to constitutionalism.

2.1.1 Constitutionalism

Here, it is worth noting that a detailed discussion of constitutionalism falls outside the ambit of this article.[27] In brief, constitutionalism has compellingly been portrayed by Loughlin as a republican or liberal issue. In the former, government action is contained through the creation of institutional arrangements that provide for limited government. The alternative, namely, liberal constitutionalism, casts the constitution as a set of positive laws that are enforced by judicial bodies.[28] For the present purpose, suffice it to note that constitutionalism is what ensures that the state is accountable to the people.[29]

Accountability is most commonly secured through the rule of law.[30] Here, it is worth noting that there are different conceptions of the rule of law. Suffice it to note that, based on the seminal works by Dicey, Raz and Lord Bingham, the rule of law ensures that the state is accountable to the people in three ways. First, the rule of law imposes the obligation that there should be equal treatment before the law. This meant that there was a need for a legislature charged with formulating laws that recognise that all are equal before the law. Second, the rule of law was realised where there were no arbitrary

25 The notable exception of the events of the 'Arab Spring in Tunisia, Libya, and Egypt which, through the collective action of ordinary citizens, ousted the long-lasting authoritarian regimes of Ben Ali, Gadhafi, and Mubarak'. See H Hami 'Government and politics',https://opentextbc.ca/introductiontosociology/chapter/chapter17-government-and-politics/ (accessed 1 June 2020).

26 Dukes (n 5) 9.

27 Bradley (n 24) 4-5; Ryan (n 24) 13; E Petersmann 'How to reform the UN system? Constitutionalism, international law and international organisations' (1997) 10 *Leiden Journal of International Law* 421.

28 M Loughlin 'What is constitutionalisation' in P Dobner & M Loughlin (eds) *The twilight of constitutionalism* (2010) 47; E Tucker 'Labour's many constitutions (and capital's too)' (2012) 33 *Comparative Labour Law and Policy Journal* 103.

29 E Petersmann 'How to constitutionalise international law and foreign policy for the benefit of civil society?' (1998) 20 *Michigan Journal of International Law* 1 13 17.

30 P Craig 'Formal and substantive conceptions of the rule of law: An analytical framework' (1997) *Public Law* 467; J Froneman 'The rule of law, fairness and labour law' (2015) 36 *Industrial Law Journal* 823.

exercises of power. To realise this, it was not ideal to leave policy making to the legislature as this would lead to the pooling of power in a single institution which would lead to arbitrary decision making. Inevitably, then, there was the need for a separate institution, the executive, entrusted with a policy-making function, but expected to not make arbitrary decisions. Third, realising that the rule of law would depend on people having access to the courts in order to hold the state to account in an independent forum where they could not do this elsewhere.[31] In this context, a judicial branch became essential to the realisation of the rule of law. Effectively, practically realising the rule of law would depend on the separation of power among the legislative, executive and judicial branches.[32]

Despite this turn to constitutionalism realised through the rule of law and the separation of powers, however, empirical as well as anecdotal evidence drawn from choices made by states shows that states looked, and continue to look, to limit their obligations under constitutionalism. This was most commonly done through the turn to codified constitutions. These codified constitutions were touted as they lent a certain clarity to the law.[33] What received less attention was the fact that codification also limited the concept of constitutionalism as a tool to protect people. The most important way in which this was done was by creating closed lists of rights that would be included in constitutions. In addition, rights were ranked, with some rights referred to as first-generation or civil and political rights, being regarded as superior to second-generation or socio-economic rights. The effect of this was that, contrary to the position under constitutionalism where the state obligation to protect people was broad, general, and enforceable in court, from that point onwards the obligation on the state centred on the protection of first-generation rights.[34]

31 L Henkin 'Revolutions and constitutions' (1989) 49 *Louisiana Law Review* 1023; VR Johnson 'The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris' (1990) 13 *Boston College International and Comparative Law Review* 1; SB Prakash & JC Yoo 'The origins of judicial review' (2003) 70 *The University of Chicago Law Review* 887.

32 Petersmann (n 27) 426-428.

33 Bradley (n 24) 4-5; Ryan (n 24) 13; Petersmann (n 27) 426-428.

34 Davies (n 5) 272; Hepple (n 8); VA Leary 'The paradox of workers' rights as human rights' in LA Compa & SF Diamond (eds) *Human rights, labour rights and international trade* (1996) 28; H Collins 'Theories of rights as justifications for labour law' in G Davidov & B Langille (eds) *The idea of labour law* (2011) 137; J Fudge 'Constitutionalising labour rights in Europe' in T Campbell et al (eds) *The legal protection of human rights: Sceptical essays* (2011) 1.

2.1.2 Role of the courts

Even as codification became popular, therefore, courts remained particularly important. They could rely on adherence to constitutionalism to protect the person and individual labour rights.[35] In order to do this in practice, courts frequently used the common law to protect individual labour rights by justifying protection on grounds such as fairness, lawfulness and public policy to secure redress for individuals.

Based on this decision by the judiciary, a body of law emerged that was more protective of individual rights. Over time, this body of law has been codified. With codification, however, the old problems have reappeared. Where courts could rely on concepts such as 'unfair labour practice' to advance constitutionalism, when these concepts have been codified, it has become apparent that the laws cannot anticipate the boundaries of fairness or unfairness of labour practices. This is because the complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. If anything, it has become even more apparent that labour law practices draw their strength from the inherent flexibility of the concept of 'fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematised body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid.[36]

The result is that courts, once again, have emerged as the most reliable institution to protect the person and individual labour rights.

2.2 Some comparative perspectives on individual labour rights

Among its several functions, international labour law, the body of international legal norms that regulates issues concerning work, protects individual labour rights. In addition, the International Labour Organisation (ILO) is the dedicated specialised agency of the United Nations (UN) with the mandate to promote social justice and internationally-recognised human and labour rights. This framework has succeeded in encouring states to import individual labour rights into their laws. Experience suggests that in looking to ensure that people enjoy the benefits that these rights bestow, states have adopted different approaches. For instance, some states

35 B Langille 'Labour law's theory of justice' in Davidov & Langille (n 34) 105.
36 T Poolman *Principles of unfair labour practice* (1985) 10.

approach these rights as a freedom of contract issue with employers and employees treated as equals. As a protective measure, legislation often is enacted to protect vulnerable groups. This approach has proven popular to those calling for deregulation and limitation of interventions in the labour market.[37] To ensure some modicum of consistency in how the laws are applied by different states, the ILO has put in place a supervisory mechanism to ensure that states honour their international labour law obligations in real ways.

For all this success and oversight, however, it remains true that across most states, ensuring that people enjoy the benefits that these rights bestow still falls to states.[38] In states, this is a function that has devolved to courts, accounting for an explosion of litigation on individual labour rights in many states.[39] That courts remain pivotal in this way is most apparent when the experiences of England and South Africa, two jurisdictions with advanced labour law regulatory frameworks, are considered.

To this end, England has a long and storied tradition of courts protecting individual labour rights through the common law. However, in more recent years the fascination with the codification of these rights in statutes had led to what Gardner referred to as a 'contractualisation' of labour relationships characterised by the employment relationship increasingly being reduced to a contractual relationship. This evolution was most prominently captured in the Employment Rights Act of 1996 (ERA) which provided that to be an employee or a worker required only that a party should hold a contract. As expected, this model was easily abused by employers trying to exclude their workers from employment protections by manipulating contractual terms to obscure the nature of their working relationship.[40] An opportunity arose for the courts to tackle this issue in 2019 when the Supreme Court heard *Gilham v MoJ*.[41] In this case the claimant argued that she was entitled to whistleblowing protections under the ERA despite the fact that, as a judge, she did not have an 'employer' in the manner defined by the ERA. In order to overcome this, the claimant judge argued that the freedom to blow the whistle was a recognised aspect of the right to freedom of expression under article 10 of the European Convention on Human

37 Hepple (n 8).
38 L Swepston 'International labour law' in R Blanpain (ed) *Comparative labor law and industrial relations in industrialized market economies* (2010) 141.
39 Hepple (n 8).
40 J Gardner 'The contractualisation of labour law' in H Collins, G Lester & V Mantouvalou *Philosophical foundations of labour law* (2018) 33.
41 [2019] UKSC 44.

Rights (European Convention).[42] She further argued that the state's failure to extend whistleblowing protections to judicial office holders violated article 10 in conjunction with article 14 of the Convention. The Supreme Court accepted this argument and, in order to ensure that individual labour rights were protected, relied on section 3 of the Human Rights Act of 1998 to reach a Convention-compliant interpretation by extending whistleblowing rights to judges, thereby affording the claimant judge the protections she sought.[43]

Separately, in South Africa, the Constitution protects individual labour rights.[44] In addition, the Labour Relations Act extends on these protections.[45] Despite this turn to the extensive codification of individual labour rights, South African courts have adopted a generous and purposive interpretation of the constitutional right to fair labour practices. Indeed, South African courts have not hesitated to invoke the right to fair labour practices to invalidate laws, customs, conduct and practices of labour policy that are arbitrary and unfair. For instance, in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*[46] the South African Constitutional Court invoked the right to fair labour practices and rejected the common law reasonable employer test in determining the fairness of a dismissal. In *South Africa National Defence Union v Minister of Defence & Another*[47] legislation prohibiting members of the defence force from joining trade unions was declared unconstitutional based on section 23 of the South African Constitution. The constitutional right to fair labour practices has also been relied upon to extend labour protections to vulnerable employees such as illegal migrant workers,[48] workers engaged in illegal work[49] and employees *in utero*.[50] Without doubt, workers tend to benefit if the judiciary exercises its constitutional jurisdiction in a supervisory manner, intervening only when necessary to fulfil its role as guarantor of constitutional labour rights.[51]

Effectively, between the general analysis and the analyses of the approaches to the protection of individual labour rights in England

42 ETS 5.
43 C Devlin 'From contract to role: Using human rights to widen the personal scope of employment', https://ohrh.law.ox.ac.uk/from-contract-to-role-using-human-rights-to-widen-the-personal-scope-of-employment-protections/protections (accessed 1 April 2021).
44 Sec 23 of the Constitution of South Africa entrenches the broad right to fair labour practices and selected collective labour rights.
45 Act 66 of 1965.
46 [2007] 12 BLLR 1097 (CC).
47 (1999) 20 *ILJ* 2265 (CC).
48 *Discovery Health v CCMA & Others* (2008) 29 *ILJ* 1480 (LC).
49 *Kylie v CCMA & Others* (2010) 31 *ILJ* 1600 (LAC).
50 *Wyeth SA (Pty) Ltd v Manqele* (2005) 6 BLLR 523 (LAC).
51 A Cooper 'Labour relations' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2014) 53-9.

and South Africa, it is quite apparent is that even in those states that tout deregulation, freedom of contract and equality between employees and employers, there is recognition of individual labour rights. There is also an acknowledgment of the fact that the state is under an obligation to ensure that these rights are protected. Where state efforts are deficient in dispensing with this obligation through legislation, it falls to courts to be proactive in ensuring that these rights are effectively protected.

3 Protection of individual labour rights in Zimbabwe

The preceding discussion explored the evolution of protection of individual labour rights up to the modern day and, with the aid of the international law and a look at relevant comparative experiences, established that the protection of individual labour rights has always fallen to, and continues to fall to, the courts. It is through these lenses that the Zimbabwean approach must be assessed.

Consistent with the norm, the employment relationship was always regarded as a private law matter in Zimbabwe, formerly Rhodesia. As such, individual labour rights were protected under the Roman-Dutch common law. However, the protection effort using the common law was deficient in that it drew focus to the lawfulness of employer conduct and did little to protect people from broader forms of unfair labour practices. Not surprisingly, people objected to this position and Rhodesia moved to enact legislation to remedy this. Notable instruments adopted by the state at the time included the Master and Servants Act of 1901, the Industrial Conciliation Act 10 of 1934, Industrial Conciliation Act 21 of 1945 and the Industrial Conciliation Act 29 of 1959. Importantly, though, the legislation was part of a broader effort to foster colonialism and suppress African trade unions. This was apparent from the labour law framework which was fragmented by divisions based on race and gender. It did little to address the majority of people's concerns. Ultimately, along with other issues rooted in the state's discriminatory policies,[52] this prompted a violent revolution which led to the attainment of Zimbabwe's independence in April 1980.[53]

52 Eg, the Indusrtial Conciliation Act 1959 permitted discrimination in wages based on race, sex and age. Further, women could not enter into contracts of employment without the consent of their husbands. Lastly, the right against unfair dismissal was not guaranteed and workers could be summarily dismissed.

53 See M Gwisai *Labour and employment law in Zimbabwe* (2006) 21.

At independence, the new government looked to introduce social reforms to placate the masses who were aggrieved by the debilitating effects of colonialism.[54] Quite expectedly, they looked to achieve this through the turn to constitutionalism. To this end, the early social, economic and political transformation of Zimbabwe was predicated on the turn to the codified Zimbabwean Constitution of 1980. This Constitution was the supreme law of independent Zimbabwe and any other law inconsistent with it was null and void.[55]

Following from the preceding discussion, however, as positive a development as the turn to constitutionalism was, its value to the protection of people's interests generally was diminished by the turn to a codified constitution, which looked to limit the state's commitment to constitutionalism. The Constitution contained a justiciable Declaration of Rights, which did not directly protect these individual labour rights. However, the Constitution did carry rights that impacted indirectly on individual labour rights, such as the rights to freedom from forced labour;[56] protection from discrimination;[57] freedom of assembly and association;[58] equality;[59] and protection from inhuman and degrading treatment.[60] In addition, the Constitution did recognise Roman-Dutch common law as a source of law in Zimbabwe, thus allowing courts to protect individual labour rights based on constitutionalism.[61]

Beyond this, and in what seemed to be acceptance of the fact that the protection of individual labour rights, and all labour rights, was a critical state function, in June 1980 Zimbabwe joined the ILO. Membership meant that the state undertook the obligation to protect all labour rights, including individual labour rights. Indeed, based on these obligations the state enacted several statutes that impacted individual labour rights. Notable among these was the Minimum Wages Act of 1980, which gave the Minister of Labour powers to fix minimum wages.[62] Section 8 of that Act prohibited discrimination in wages based on race, sex and age. This was followed by the Employment Act 13 of 1980. This Act repealed several

54 AP Cheater 'Industrial organisation and the law in the first decade of Zimbabwe's independence' (1991) *Zambezia* 11.
55 Sec 3 1980 Constitution.
56 Sec 14 1980 Constitution.
57 Sec 23 1980 Constitution.
58 Sec 21 1980 Constitution.
59 Sec 18 1980 Constitution.
60 Sec 15 1980 Constitution.
61 Sec 89 1980 Constitution.
62 This was done through the Minimum Wages (Specification of Wages) Notice 37 of 1980.

colonial pieces of legislation[63] and extended the scope of the state's control over the employment relationship. For instance, section 3 of the Employment Act empowered the Minister of Labour to make regulations covering all aspects of employment, including, but not limited to, the following: the rights of employees, both collective and individual rights; deductions from remuneration; leave of absence; provision of benefits and allowances; establishment of pension; holiday and provident insurance; special conditions of women and juvenile employees; employment of the disabled; settlement of labour disputes; and general conditions of employment. The Act also granted female employees full legal capacity to enter into an employment relationship and the right to paid maternity leave.[64] Further, section 8 of the Act prohibited summary dismissal.[65]

For all this progress, however, the fact that these rights were not constitutionally protected and were protected in several statutes resulted in the fragmentation of labour laws, which made it difficult for anyone to effectively protect their individual labour rights. Importantly, courts did not do enough to protect individual labour rights as directed by the international position. Instead, as calls for a better framework rose, the state borrowed over time from the common law cultivated by judges and looked to protect these rights through a turn to a more cohesive body of statutory law headlined by the Labour Relations Act of 1985.[66] Importantly for individual labour rights, section 2 of the Act defined an unfair labour practice as 'an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of the Act'. According to sections 8 and 9 of the Labour Act, which succeeded the Labour Relations Act, unfair labour practices are limited to specific acts or omissions by employers, trade unions or workers' committees. Further, only employees can claim an unfair labour practice and the labour practice in some way must relate to the specific forms of conduct that the Labour Act has designated as an unfair labour practice. In addition to this, section 8 of the Labour Act provides that an employer commits an unfair

63 It repealed the infamous Master and Servants Act, African Juveniles Act, African Labour Regulation Act and the Foreign Migratory Labour Act.

64 Gwisai (n 53) 24.

65 The Emergency Powers (Termination of Employment) Regulations, 1982 also prohibited the summary termination of a contract of employment on notice unless the parties mutually agreed to the termination or the employer obtained ministerial approval. In *Tavengwa v Marine Centre (Pvt) Ltd* 1984 (2) ZLR (H) the High Court held that the Regulations did not cover cases of misconduct. An employer retained the right to summarily dismiss an employee who had committed an act of misconduct.

66 It remains the mainstay of Zimbabwe's labour law and in 2002 was renamed to the Labour Act (Chapter 28:01). Over the years it has been amended by the Labour Relations (Amendment) Act 12 of 1992, Labour Relations (Amendment) Act 17 of 2002, Labour (Amendment) Act 7 of 2005 and the Labour (Amendment) Act 5 of 2015.

labour practice if, by act or omission, she or he prevents employees from exercising any rights conferred on them in terms of Part II of the Act;[67] contravenes any provision of Part II or section 18 of the Act;[68] refuses to negotiate in good faith with a workers' committee or trade union; refuses to co-operate in good faith with an employment council; fails to comply with a collective bargaining agreement, or a decision of an employment council; bargains collectively with an unregistered trade union where a registered trade union exists; demands from any employee or prospective employee any sexual favour and engages in any form of sexual harassment.[69]

The turn to codifying the concept of unfair labour practices certainly made individual labour rights easier to identify and, pooling them under one statute helped to make it easier for any concerned party to protect them. The problem with the approach, however, was that the list of unfair labour practices in the Act was closed and exhaustive. It omitted important unfair labour practices such as transfers of employees, promotions and unilateral changes to terms and conditions of employment by employers.[70] This essentially meant that workers' individual labour rights were not comprehensively protected by statute.

Under the circumstances, and drawing from history, the international law, and comparative experience, the way in which to get around this limitation was through judicial action to protect individual labour rights using the constitutionalism standard which embraced a wider definition of unfair labour practices. This would require a judicial buy-in.[71] As one would expect, different courts adopted different approaches.

67 The rights guaranteed in Part II of the Act include the following: employees' right to membership of trade unions and workers' committees (sec 4); prohibition of forced labour (sec 4A); protection of employees against discrimination (sec 5); protection of employees' right against discrimination (sec 6); and protection of employees' right to democracy in the workplace (sec 7).

68 Sec 18 of the Labour Act protects the right of female employees to paid maternity leave.

69 Secs 8(a)-(h) of the Labour Act. Note that the other unfair labour practices prescribed in sec 9 of the Labour Act fall outside the scope of this discussion as they are committed by trade unions and workers' committees. They are mainly concerned with collective labour rights. Sec 10 of the Labour Act gives the Minister of Labour powers to prescribe by statutory instrument further acts or omissions which constitute unfair labour practices.

70 *Agribank v Machingaifa* SC 61/07; *Air Zimbabwe (Pvt) Ltd v Zendera & Others* 2002 (1) ZLR 132 (S).

71 See M Wallis 'The rule of law and labour relations' (2014) 35 *Industrial Law Journal* 849; J Jowell 'Of *vires* and vacuums: The constitutional context of judicial review' (1999) *Public Law* 448; H Arthurs 'The constitutionalisation of employment relations: Multiple models, pernicious problems' (2010) 19 *Social and Legal Studies* 403.

Some courts opted against relying on constitutionalism, with courts such as the Court deciding *Muwenga v PTC*[72] affirming that specific unfair labour practices mentioned in section 8 and 9 of the Labour Act were a closed list. In that case, the appellant was challenging the decision of the respondent not to promote him in a position in which he had worked in an acting capacity for a long period and had given good service. The appellant argued that the situation surrounding the failure to promote him amounted to an unfair labour practice as defined in the Act. The Supreme Court reasoned that not every labour practice that is unfair is an unfair labour practice under the Act. To be an unfair labour practice, an action or omission must specifically be described as such by the Act. If a practice is not specified as an unfair labour practice by the Act, then it cannot be raised as an unfair labour practice under the Act. Therefore, the Court found that the failure to promote the appellant did not amount to an unfair labour practice as it was not specified as such in the Act.[73]

Conversely, some courts relied on concepts consistent with constitutionalism such as lawfulness, reasonableness and good faith, to go beyond the closed list of unfair labour practices protection proffered in the statute law and protect individual labour rights.[74] A ather interesting example of this was *Guruva v Traffic Council of Zimbabwe*[75] where the respondent notified the appellant that he was to be transferred to another town. The appellant wrote back, making submissions against the transfer, and giving personal reasons for objecting to the transfer. The respondent considered the submissions and advised the appellant that the decision to transfer him stood. Aggrieved by the decision, the appellant approached the Court, arguing that the decision to transfer him was unfair in that the respondent had neither observed the *audi alteram partem* rule, nor had it fulfilled his legitimate expectation of being heard before the transfer. The Supreme Court accepted that transferring an employee without giving him an opportunity to be heard was an unfair practice. Although the employer had a right to transfer an employee from place to place, the employer's discretion is not to be readily interfered with except for good cause. Good cause, while not easy to define, would include the failure to give an employee an

72 1997 (2) ZLR 483 (S).
73 L Madhuku *Labour Law in Zimbabwe* (2015) 78; *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.
74 See *Mudarikwa & Another v Director of Housing and Community Service & Another* 2007 (1) ZLR 41 (S); *City of Gweru v Munyari* SC 15/05. Also see A van Niekerk et al *Law @ work* (2014) 189.
75 2009 (1) ZLR 58 (S).

opportunity to be heard, unfounded allegations, victimisation and any action taken to disadvantage the employee.[76]

As was to be expected, these inconsistencies in courts' approaches to the protection of individual labour rights left people disgruntled. Such disgruntlement was only enhanced when Zimbabwe began to experience a serious economic and political crisis characterised by hyper-inflation, liquidity challenges, political violence and rampant violation of workers' rights. This led to something of a protracted revolution which featured violent and disputed 2008 general elections and the subsequent formation of the 2009 Government of National Unity, culminating in a renewed commitment to constitutionalism celebrated through the turn to the codified 2013 Constitution.[77]

Importantly for the present purpose, the codified Constitution guaranteed several protections for individual labour rights.[78] To this end, section 65(1) of the Constitution entrenched the broad right to fair and safe labour practices. In addition, other individual labour rights, such as the right to be paid a fair and reasonable wage,[79] the right to just, equitable and satisfactory conditions of work,[80] the right to equal remuneration for similar work[81] and the right of female employees to fully paid maternity leave for three months,[82] were also included in the Constitution.[83] Coming from a history where people's individual labour rights had not been comprehensively protected by statute and courts had not been consistent in their approach to protect individual labour rights based on constitutionalism, leaving people disgruntled, the inclusion of these rights in the Constitution was generally hailed as a positive step in the march towards the advancement of social justice in the workplace, improving the quality of life of workers, and balancing the power between labour and capital so that workers would enjoy greater job security, and benefit from basic norms of fairness and proportionality.[84] It was

76 *Taylor v Minister of High Education & Another* 1996 (2) ZLR 772 (S); *Sagandira v Makoni Rural District Council* SC 70/14; *Rainbow Tourism Group v Nkomo* SC 47/15.
77 Art 6 of the Global Political Agreement signed on 15 September 2008. T Madebwe 'Constitutionalism and the new Zimbabwean Constitution' (2014) *Midlands State University Law Review* 6.
78 Tsabora & Kasuso (n 1) 43.
79 Sec 65(1) Constitution.
80 Sec 65(4) Constitution.
81 Sec 65(6) Constitution.
82 Sec 65(7) Constitution.
83 See Madhuku (n 73) 78.
84 D Beatty 'Constitutional labour rights: Pros and cons' (1993) 14 *Industrial Law Journal* 1; I Holloway 'The constitutionalisation of employment rights: A comparative overview' (1993) 14 *Berkeley Journal of Employment and Labour Law*; RJ Grodin 'Constitutional values in the private sector workplace' (1991) 13 *Industrial Relations Law Journal* 1; Collins (n 34) 139; E Reid & D Visser *Private law and human rights: Bringing rights home in Scotland and South Africa* (2014) 391.

problematic, however, that the individual labour rights were based on, and retained, the problematic unfair labour practice approach adopted in statutes that predated the Constitution. Of note, the state has done little to enact legislation giving effect to individual rights. There was some attempt to align existing laws with the Constitution through the Labour (Amendment) Act 5 of 2015.

Drawing on lessons on the implications of codified constitutions, as well as the experiences in comparable states, as well as the Zimbabwean experience to that point, it ought to have been clear that mere codification was not sufficient. Whether the change was coming would depend on the courts. As such, what was more encouraging was that courts were empowered to protect the Constitution, which meant that they could protect individual labour rights based on constitutionalism without being concerned about acting in a manner not consistent with statute law. In hindsight, it appears that, given the judiciary's history in Zimbabwe, scepticism was more appropriate.

In several cases courts have noted that direct reliance on the Constitution to enforce labour rights should be avoided as this would lead to two streams of jurisprudence. By doing so, courts have effectively limited their power to protect individual labour rights by holding that it is not possible to bypass labour legislation by seeking to directly enforce constitutional labour rights.[85]

In addition, courts have maintained the interpretation of the concept of unfair labour practices, which they applied prior to the enactment of the 2013 Constitution which effectively failed to protect individual labour rights.[86] This is best illustrated in *Greatermans Stores (1979) (Pvt) t/a Thomas Miekles Stores & Another v The Minister of Public Service, Labour and Social Welfare*,[87] where the Constitutional Court held that, while the Labour Act limits the extent of the protection of people's individual labour rights as protected under the Constitution, which is the supreme law in the country, such limitation is justifiable. In that case the applicant, an employer, challenged the retrospective application of section 18 of the Labour Amendment Act 5 of 2015. The section required employers to pay every employee whose services were terminated on three months' notice after 17 July 2015 compensation for loss of employment

85 *Magurure & Others v Cargo Carriers International Haulers t/a Sabot* CCZ5/16; *Mushapaidze v St Annes Hospital & Others* CCZ 18/17; *Katsande v IDBZ* CCZ 9/17.
86 See, generally, Wallis (n 71) 849.
87 CCZ 2/18.

equivalent to one month's salary for every two years of service.[88] The applicant argued that the Amendment Act violated its right to fair labour practices in section 65(1) of the Constitution. In delivering judgment, the Constitutional Court held that for a person to allege an unfair labour practice as a violation of the right enshrined in section 65(1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed by the Labour Act as unfair labour practices.

Courts have also insisted on continuing to apply the reasonable employer test. In terms of this common law principle, an employer has the discretion on what penalty may be imposed upon an employee who has been found guilty of misconduct. A court cannot interfere with the exercise of this discretion by the employer unless the employer acted unreasonably in having a serious view of the act of misconduct.[89] This approach has whittled down workers' rights to job security and the right against unfair dismissal to objectionable levels that do not coincide with protections of individual labour rights expected under a constitutional dispensation. This is apparent from *Innscor Africa (Pvt) Ltd v Chimoto*[90] where the respondent was employed by the appellant as a pizza maker. During the course of his employment, he produced a pizza valued at $4 without having received the necessary docket authorising the production of the pizza. He was dismissed from employment on the basis that his misconduct was serious and that it went to the root of the employment relationship. On appeal to the Labour Court, the penalty of dismissal was set aside on the basis that the employer had not taken into account mitigating factors prescribed in section 12B(4) of the Labour Act and section 7(1) of the Labour (National Employment Code of Conduct) Regulations, 2006. Dissatisfied with the ruling the employer appealed to the Supreme Court, which set aside the Labour Court ruling. It held that the discretion to impose a penalty rests with the employer in the first instance and can only be interfered with if there is a clear misdirection. It found that there was no basis by the Labour Court to interfere with the penalty of dismissal. The offence went to the root of the employment relationship and

88 The Labour (Amendment) Act 5 of 2015 was a reaction by the state to the massive terminations on notice that followed the handing down of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15. For a detailed discussion of the case, see TG Kasuso & G Manyatera 'Termination of the contract of employment on notice: A critique of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15' (2015) 2 *Midlands State University Law Review* 88; MG Gwanyanya 'Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in *Nyamande & Another v Zuva Petroleum*' (2016) 16 *African Human Rights Journal* 283.

89 *Zimplats v Godide* SC 2/16; *ZB Bank v Masunda* SC 48/16.

90 SC6/12.

the employer had exercised its discretion reasonably.[91] This approach violates the constitutional right to fair labour practices because it gives preferential status to the employer's view on fairness of a dismissal, thus tilting the balance against employees.

Further, courts have underperformed in their role to protect individual labour rights because, since the onset of the 2013 constitutional era, they have consistently and inexplicably accepted that workers' statutory individual labour rights can be waived. A contract of employment must comply with specific provisions of labour legislation. Any provision in a contract to the contrary would be against the law and a nullity. That statutory provisions override the common law goes without saying. For example, in *Magodora & Others v Care International Zimbabwe*[92] employees signed contracts of employment in terms of which they agreed that the renewal of their fixed-term contracts could not give rise to a legitimate expectation of further renewal based on the right against unfair dismissal in section 12B of the Labour Act. When they claimed an unfair dismissal based on section 12B(3)(b) of the Labour Act, the Supreme Court held that the employees had waived their statutory rights through the common law contract. They could not in the circumstances entertain any legitimate expectation to be re-engaged.[93] Separately, in *Nyamande & Another v Zuva Petroleum (Pvt) Ltd*[94] the Supreme Court exalted the employer's common law right to terminate the contract of employment on notice at the expense of workers' job security, thus tilting the scales of justice in favour of employers.[95] This formalistic approach rooted in the common law has also been maintained in remedies for unlawful dismissal. In Zimbabwe, reinstatement is not a primary remedy and cannot be ordered as the only remedy. It must be accompanied by an alternative order of damages in lieu of reinstatement and the option of whether to reinstate or pay damages lies with the employer and not the employee.[96] Madhuku argues, convincingly, that giving the employer a choice, in every case, to opt for damages as an alternative to reinstatement does not strike the required balance between the employer and employee and is

91 See also *Madzima v Marange Resources (Pvt) Ltd* SC 12/18; *AjasiWala v Freda Rebecca Mine* SC 56/16.
92 SC 24/14.
93 See also *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S).
94 SC 43/15.
95 For a detailed discussion of the case, see Kasuso & Manyatera (n 88) 88-106; Gwanyanya (n 88) 283-299.
96 *Farm Community Trust v Chemhere* SC22/13; *BHP Minerals (Pvt) Ltd v Takawira* 1999 (2) ZLR 77 (S).

contrary to section 65(1) of the Constitution.[97] It is a pursuit of the employer's interests at the expense of the employees.

In sum, quite inconsistent with what has grown to be embraced in international law, and in similarly-placed jurisdictions, Zimbabwean courts have failed to rely on the inclusion of a constitutional right to fair labour practices in the Constitution to protect individual labour rights in a meaningful way. The situation that subsisted before the most recent turn to constitutionalism persists. The reason arguably is attributable to the judiciary being dominated by petite bourgeois elites whose ideology is rooted in ideals of labour market liberalisation consistent with unitarism.[98] It therefore is not surprising that the conservative and formalistic approach to individual labour rights has been maintained by the judiciary.

4 Conclusion

Not enough is being done to protect individual labour rights in Zimbabwe. An analysis of the evolution of these rights leading to the international law position at present, as well as knowledge gleaned from the experiences of similarly-placed jurisdictions, suggests that this failure to protect individual labour rights is rooted in inadequate judicial activity to protect these rights.

In conclusion, therefore, the key to greater protection of individual labour rights lies in the courts, on the basis of cases submitted to them, taking action to protect these rights based on the tenets of constitutionalism, something which the Constitution empowers them to do. What is difficult to achieve in the Zimbabwean context is compelling the courts to embrace this responsibility. Because compulsion would require action from the legislature, or pressure from the public, it probably is not reasonable to expect that this will happen in contemporary Zimbabwe. Therefore, it is left to the judiciary itself to initiatiate change.

97 Madhuku (n 73) 249.
98 Gwisai (n 53) 31.

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Realising the right of access to water for people living on farms: The impact of the KwaZulu-Natal High Court decision in *Mshengu v uMsunduzi Local Municipality*

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Summary: *Access to water is a constitutionally-protected right in South Africa and an energetic flow of laws, policies and programmes have been initiated to address historical inequalities in the supply of water since the dawn of democracy. Yet despite this, millions of people living in South Africa still have inadequate access to water. Access to water is a particular challenge for people living on farms. By providing an analysis of the case of* Mshengu & Others v uMsunduzi Local Municipality & Others*, decided by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, this article seeks to make two key contributions. First, it highlights the challenges experienced by farm dwellers in realising their right to water and locates these challenges within a legal framework which places obligations on both municipalities and private land owners*

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to provide access to water on farms. In particular, the mechanism of water services intermediaries envisaged in the Water Services Act 108 of 1997 is explored as a way to delineate and facilitate the role of private land owners in realising the right to water for farm dwellers. Second, drawing on debates around how the value of public interest litigation can be understood, the article interrogates the value of the litigation in the Mshengu *case.*

Key words: *right to water; water services intermediaries; farm workers; labour tenants; public interest litigation*

1 Introduction

> Water 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.[1]

South Africa's Constitution entrenches a right to water.[2] In the 24 years since the advent of democracy, an energetic flow of laws, policies and programmes have been initiated to address historical inequalities in the supply of water. Despite this, while the privileged (typically white) minority enjoy sufficient access to water, the majority of the population, including the poor, unemployed and marginalised (typically black) continue to struggle to access this basic and fundamental resource.[3] Ensuring equitable and sufficient access to water thus remains one of the most crucial challenges in democratic South Africa.[4]

In 2019 the Minister of Water and Sanitation, Lindiwe Sisulu, conveyed that over three million people lacked access to basic water supply, while only 64 per cent of households have access to a reliable water supply.[5] In May 2020, in a presentation by the Department of

1 *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC) para 1.
2 Sec 27 of the Constitution of the Republic of South Africa, 1996 (Constitution).
3 H Thompson *Water law: A practical approach to resource management and the provision of services'* (2005) 9, discussed in L Kotze 'Phiri, the plight of the poor and the perils of climate change: Time to rethink environmental and socio-economic rights in South Africa?' (2010) 1 *Journal of Human Rights and the Environment* 135 140.
4 B Schreiner & B van Koppen 'Policy and law for addressing poverty, race and gender in the water sector: The case of South Africa' (2003) 5 *Water Policy* 489; K Eales 'Water services in South Africa 1994-2009' in B Schreiner & R Hassan (eds) *Transforming water management in South Africa: Global issues in water policy* (2010) 33.
5 Speaking at the launch of the National Water and Sanitation Master Plan on 28 November 2019.

Water and Sanitation (DWS) concerning its response to COVID-19, DWS shared that 12 per cent of the population do not have access to even a basic water supply.[6] Of great concern is the fact that the National Water and Sanitation Master Plan launched in November 2019 (discussed further below) reports that the current percentage of the population receiving reliable water services is lower than it was in 1994. While more homes in total now have water, as a percentage of all homes, fewer homes have water now than at the end of the apartheid era.[7]

While access to water is a systemic challenge in South Africa, this challenge is particularly acute for people living on farms. These include labour tenants, farm workers and their families, who in this article will be collectively referred to as farm dwellers. Many farm dwellers report deplorable living conditions, including insufficient access to an adequate water supply, sanitation facilities and refuse collection services.[8] Their greatest struggle has been that farm owners claim that the provision of water is a municipal responsibility. Municipalities in turn argue that, even if they wished to, they have no jurisdiction to provide services on privately-owned land.[9] In fact, land owners often refuse to consent to the state providing services on their land because they are afraid of making settlement on their land more permanent.[10] Farm dwellers thus have been stuck between a rock and a hard place.

Farm dwellers include particularly vulnerable groups with the marginalisation of labour tenants dating back to their dispossession under the 1913 Native Land Act. In the words of the Constitutional Court:[11]

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6 'Covid-19: Water and sanitation intervention' Powerpoint presentation by DWS at a Water Research Commission webinar entitled 'Water and Sanitation – Learning and looking beyond the Covid-19 crisis' (26 May 2020).

7 S Kings 'Water services worse than in 1994' *Mail and Guardian* 31 January 2020, https://mg.co.za/environment/2020-01-31-water-services-worse-than-in-1994/?fbclid=IwAR0S9A05mftHTGPAxS9JjHrrZZdYdGvm1jI1f7XpJ8WBm3PkSgrJlhIl8UE (accessed 9 June 2021).

8 Their struggles encompass attempts to improve the living conditions with respect to all of these issues. For the purposes of this article, the focus is on access to water.

9 Interview with Mondli Zondi, Research Assistant at AFRA, held on 3 April 2020 via Skype.

10 A Melsa et al 'Sanitation services for the informal settlements of Cape Town, South Africa' (2009) 248 *Desalination* 330-337.

11 *Mwelase v Director-General of the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) (*Mwelase*) para 5. While the Land Reform (Labour Tenants) Act 3 of 1996 intended to reform this situation by acknowledging the precarious position of labour tenants and improving their security of tenure, this has largely not happened. In fact, the land reform process has been significantly undermined by 'administrative lethargy' in the Department of Rural Development and Land Reform which has meant that thousands of claims from labour tenants have not been processed. The situation became so bad

> Labour tenancy has deep roots in our land's pernicious racial past. A labour tenant provides labour on a farm in exchange for the right to live there and work a portion of the farm for his or her own benefit. It is a precarious state, subject to the will of the land-owner. Historically it has been the more tenuous in South Africa because patterns of racial subordination and exclusion meant that labour tenants were overwhelmingly black, and the land owners on whose favour they depended were overwhelmingly white.

This article examines farm dwellers' access to water in uMgungundlovu District Municipality in KwaZulu-Natal. The Association for Rural Advancement (AFRA) has been working with farm dwellers in this area for many years. After a long journey of engaging with farm owners and several municipalities, AFRA and farm dwellers in the area, assisted by the Legal Resources Centre (LRC), approached the Pietermaritzburg High Court for relief.[12] The resulting judgment, *Mshengu & Others v uMsunduzi Local Municipality & Others*, decided by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, has fundamentally changed the landscape of water services provision on farms in South Africa.

This article is organised into seven parts including this introduction. Part 2 outlines how water services are regulated in South Africa, while part 3 describes the factual background to the case and unpacks some of the key findings of the judgment. Part 4 critiques the Court's findings on the issue of the water services obligations born by local and district municipalities respectively. Part 5 examines the role that farm owners have to play in the provision of water on privately-owned land and interrogates the water services intermediary system established by the Water Services Act 108 of 1997 in this context. Part 6 discusses why the *Mshengu* litigation can be considered valuable, and part 7 provides some concluding remarks. The article has been compiled using desktop analysis of relevant legislation, policy, case law and secondary sources, as well as from information and perspectives provided by a few key informants in interviews conducted by the authors.

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that the Land Claims Court eventually appointed a Special Master to assist the Department, an order that in 2019 was upheld by the Constitutional Court in *Mwelase*.

12 Further information about AFRA and LRC can be found at https://afra.co.za/ and https://lrc.org.za/ respectively (accessed 9 June 2021).

2 Regulation of water services provision in South Africa

Section 27(1)(b) of the Constitution provides that 'everyone has the right to have access to sufficient water', while section 27(2) obliges the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this right. Section 27 expressly stipulates that the right is enjoyed by 'everyone' and thus can be claimed regardless of nationality, race, gender or ability.[13]

Two key pieces of legislation are designed to give effect to the constitutional right to water in South Africa, namely, the National Water Act 36 of 1998 (NWA) and the Water Services Act 108 of 1997 (Services Act). The NWA provides the legal framework for water resource management. As a complement to the NWA, the Services Act facilitates water services delivery. Section 3 of the Services Act confirms a right of access to basic water supply and provides for the establishment of several water services institutions, including water services authorities, water services providers and water services intermediaries.[14] The Services Act is supported by the provisions of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) which governs the provision of water services at the local government level and reinforces the emphasis on equitable access.[15]

As with all rights in the South African Bill of Rights, the state must respect, protect, promote and fulfil the right to water.[16] This places both positive and negative duties on the state. The negative duty, deriving from the state's duty to respect the right to water, translates as an obligation to refrain from interfering with any existing right of access to water, such as by arbitrarily cutting off water supplies.[17]

13 Kotze (n 3) 148 where this and other characteristics of the right to water are discussed.

14 M Kidd (ed) *Environmental law* (2011) 82.

15 Sec 4(2)(j) Systems Act.

16 In terms of sec 7(2) of the Constitution. Sec 8(2) places similar obligations on individuals and the private sector (discussed further below).

17 In the case of *Manqele v Durban Transitional Metropolitan Council* 2001 JOL 8956 (D) the High Court found that the City Council had a right to disconnect the water supply of the applicant because she chose not to limit herself to the water supply provided to her free of charge. However, see J de Visser, E Cottle & J Mettler 'The free basic water supply policy: How effective is it in realising the right?' (2002) *ESR Review* 19 where the authors argue that this is 'constitutionally suspect' in view of the right to a basic level of water supply that exists notwithstanding the ability to pay. See also I Winkler 'Judicial enforcement of the human right to water: Case law from South Africa, Argentina and India' (2008) 11 *Law, Social Justice and Global Development* 2008 1. A less controversial decision was handed down a year later in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) where the High Court held that the obligation to respect entails that the state may not take measures that result in the denial

The duty to protect the right to water encompasses an obligation on the state to take measures to protect vulnerable groups against violations of their rights by more powerful entities.[18] This means that the government is obliged to prevent the discontinuation of water supply by a third party – so if, for example, a farmer unreasonably and arbitrarily cuts off access to water enjoyed by farm dwellers on his property, the state must restore such access.[19]

Regarding positive duties, as part of the mandate to promote and fulfil the right to water, the state must take pro-active legislative, administrative, budgetary and other steps to expand the number of people who have access to water, and to progressively improve what kind of access they have. These duties, however, are subject to a number of internal limitations.[20] First, the right is a right of access to water. Access implies two distinct but related obligations on the state. The state must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for all sections of the population, including vulnerable and marginalised groups.[21] In addition, the state must ensure that all people have economic access to water. This implies that the cost of accessing water should be set at a level that ensures

of access. For this reason disconnecting a pre-existing water supply was found to be a breach of sec 27(1). The Court noted that while the Services Act allows a water services provider to set conditions under which water supply may be discontinued, the procedure to discontinue must be fair, equitable, provide reasonable notice and an opportunity to make representations. Furthermore, where someone proves to the water services provider that they are unable to pay, their water services may not be disconnected. See the discussion of the case in A Kok & M Langford 'The right to water' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 200 204. See further M Kidd 'Not a drop to drink: Disconnection of water services for non-payment and the right of access to water' (2004) 20 *South African Journal on Human Rights* 119.

18 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 163-164.

19 Kok & Langford (n 17) 204.

20 In addition, the right to water is also subject to the limitations clause set out in sec 36 of the Constitution. In terms of sec 36, rights in the Bill of Rights may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It requires taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve that purpose. See *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para 62; *Minister of Justice and Constitutional Development v Prince* 2018 (6) SA 393 (CC) paras 59-60. See further K Iles 'A fresh look at limitations: Unpacking section 36' (2007) 23 *South African Journal on Human Rights* 68.

21 In November 2002 the United Nations Committee on Economic, Social and Cultural Rights issued General Comment 15 (29th Session, 2002, UN Doc E/C 12/2002/11) which provides guidance on issues such as proximity of the water supply, and the special attention that must be paid to vulnerable groups such as women and persons living with disabilities.

that all people are able to gain access to water without having to forgo access to other basic needs.[22]

Second, it is a right of access to sufficient water. In 2001 the then Department of Water Affairs and Forestry (DWAF) introduced the Free Basic Water Policy together with a set of regulations that set the national minimum standard for basic water supply as follows: [23]

A minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.[24]

Whether or not this amounts to 'sufficient' water has been the subject of much controversy, and since its inception the Free Basic Water Policy has been much critiqued.[25] One of the key platforms for this critique was the case of *Mazibuko v City of Johannesburg*[26] where the applicants argued that the free basic water allocation of 25 litres per person per day was unreasonable as it was insufficient to meet basic needs in the context of multi-dwelling households, extreme poverty and waterborne sanitation. Nevertheless, the Constitutional Court upheld the standard, finding the City of Johannesburg's policy to be reasonable.[27]

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22 De Visser et al (n 17) 18. Kok and Langford (n 17) argue that the use of 'access' implies that a state need not provide universal access to free water, but that where people can afford to pay for it, the state obligation is to ensure the conditions and opportunity for them to access water. General Comment 15 para 12.

23 On 8 September 2017 a new set of National Norms and Standards for Domestic Water and Sanitation Provision were published (GN 982 in *GG* 41100). Nevertheless, despite their promulgation, it seems that DWS does not view the 2017 National Norms and Standards as either finalised or binding (email correspondence in the authors' possession from DWS' Policy Directorate dated 13 May 2020).

24 Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in terms of sec 9 of the Services Act.

25 See P Bond & J Dugard 'Water, human rights and social conflict: South African experiences' (2008) 1 *Law, Social Justice and Global Development* 8; Gleick has argued that the minimum standard should be 50 litres per person per day (P Gleick 'Basic water requirements for human activities: Meeting basic needs' (1996) 21 *Water International* 83). In General Comment 15 the ESCR Committee references Gleick's basic water requirement of 50 litres as being the basis for the quantity of water that should be 'available for each person' (para 12 with reference to fn 14); J Dugard 'The right to water in South Africa' in J Dugard et al *Socio-economic rights: Progressive realisation?* (2016) 317; L Mehta 'Do human rights make a difference to poor and vulnerable people? Accountability for the right to water in South Africa' in P Newell J Wheeler (eds) *Rights, resources and the politics of accountability* (2006) 13.

26 *Mazibuko* (n 1).

27 The Court found the City's policy to be reasonable on the basis that it had changed over time in response to the litigation in the sense that when the applicants first went to court, the policy provided a maximum of 6kl of free

Regulation 3(b) was also later enforced by the High Court in both *Nokotyana v Ekurhuleni Metropolitan Municipality*[28] and *Mtungwa v Ekurhuleni Municipality*.[29] In *Nokotyana* the Court ensured that Ekurhuleni Municipality agreed to provide communal taps to the residents of the Harry Gwala informal settlement in compliance with Regulation 3(b), while in *Mtungwa* the Court presided over a court-ordered settlement in which Ekurhuleni agreed to provide sufficient communal taps to the residents of Langaville informal settlement in order to satisfy Regulation 3(b). Essentially, these cases mean that where there are no existing water connections, the state is obliged to ensure access to the minimum regulated amount and, in the context of an informal settlement, these connections are typically provided in the form of communal taps installed at state expense.[30]

The third internal limitation of the right to water is that the right need not be immediately secured but must be progressively realised within the available resources of the state. Progressive realisation implies that the state must both extend water services to those with none, and provide increasingly better levels of service to those with existing access. The Constitutional Court has established that when assessing whether a government policy or programme meets this standard, the test is one of reasonableness. In *Grootboom*,[31] one of South Africa's landmark socio-economic rights cases, the Constitutional Court established that to be reasonable, government programmes must 'respond to the needs of the most desperate' and must ensure that social and economic rights are 'made more accessible not only to a larger number of people but to a wider range of people as time progresses'.[32] Unfortunately, in *Mazibuko* the Constitutional Court adopted an interpretation of section 27(1)(b) that is qualified by section 27(2).[33] This means that neither section 27(1)(b) nor section 27(2) exists as stand-alone entitlements but rather that the content of the right of access to sufficient water is

water per household per month and, by the time the matter was heard in the Constitutional Court, the City had instituted a new policy in terms of which qualifying households could register for substantially more free water. For critiques of this judgment, see J Dugard 'Urban basic services: Rights, reality and resistance' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2013) 275; J Dugard & M Langford 'Art or science: Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *South African Journal on Human Rights* 39.

28 *Nokotyana v Ekurhuleni Metropolitan Municipality*, unreported South Gauteng High Court Case 8/17815 (24 March 2009).

29 *Mtungwa v Ekurhuleni Municipality*, unreported South Gauteng High Court Case 34426/11 (6 December 2011).

30 Dugard (n 25) 11.

31 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

32 *Grootboom* (n 31) paras 44-45.

33 *Mazibuko* (n 1) paras 46-68.

dependent on the reasonableness of the programmes or policies that the state adopts to give effect to the right.[34]

Importantly, the right to water is also inseparable from a range of other human rights.[35] In particular, it is an enabling right for the enjoyment of rights such as dignity,[36] health,[37] food,[38] education[39] and safety,[40] and intersects closely with the environmental right.[41] In addition, the application of the right to equality[42] to water services provision means that no water-related programme or policy may unfairly discriminate against any group of historically-disadvantaged or currently-marginalised people. Because access to safe water within a reasonable distance is fundamental to realising women's sexual and reproductive health rights, as well as their right to be free from violence, the relationship between the right to water and the right to gender equality is also critically important.

The constitutional right to water thus forms part of a suite of justiciable socio-economic rights enshrined in the South African Bill of Rights which aim to achieve the Constitution's vision of a society characterised by equality, dignity and freedom. Although subject to a number of internal limitations, it is a right that places both positive and negative duties on the state and is closely related to a number of other rights in the Bill of Rights. The Constitution, the NWA, the Services Act and the Systems Act work together to place a duty on all spheres of government to collaboratively realise the right of access to water. The NWA provides that national government acts as custodian of the nation's water resources and, therefore, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner for the benefit of all persons.[43] In terms of the Services Act, the DWS is responsible for

34 M Langford et al 'Water' in S Woolman and M Bishop (eds) *Constitutional law of South Africa* (2013 Revision Service 5) 56B-I 56B-24 56B-25.

35 For a discussion on the interdependency of rights, see S Liebenberg 'The interpretation of socio-economic rights' in M Chaskalson et al (eds) *Constitutional law of South Africa* (2003) 33-1. See also 'Water supply and sanitation in South Africa: Environmental rights and municipal accountability' Lawyers for Human Rights publication series (1/2009) 2, https://cer.org.za/wp-content/uploads/2011/11/LHR-DBSA_Water_Report.pdf (accessed 9 June 2021).

36 Sec 10 Constitution.

37 Sec 27(1)(a) Constitution.

38 Sec 27(1)(b) Constitution.

39 Sec 29 Constitution.

40 Sec 12 Constitution.

41 Sec 24 Constitution.

42 Sec 9 Constitution.

43 Sec 3(1) NWA. The Preamble to the NWA outlines that national government bears overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.

setting national policy frameworks and standards for the delivery of water services.

Currently, the DWS is facing a number of challenges. In November 2019 Minister Sisulu revealed a Master Plan that outlines a series of urgent steps to be taken in order to address systematic infrastructural challenges with the aim of securing uninterrupted water supply for both community and business use. It also sets out the critical priorities to be addressed by the water sector over the next 10 years. The Master Plan is estimated to cost R900 billion to implement over the next 10 years. However, Sisulu has inherited a dysfunctional department on the brink of bankruptcy, after widespread corruption had emptied out the departmental coffers.[44] This will make obtaining funds from National Treasury difficult. Nevertheless, Sisulu hopes to secure R565 billion of the R900 billion needed to implement the Master Plan from Treasury over the next decade. The remaining R335 billion will allegedly come from investments and the private sector.[45]

However, while the DWS puts policy frameworks in place and sets standards for water services delivery, it is local government that is given the critical task of ensuring that water actually reaches people.[46] The Local Government: Municipal Structures Act 117 of 1998 (Structures Act) sets out a framework in which local government consists of metropolitan, district and local municipalities. Metropolitan municipalities are large urban agglomerations (such as the City of Johannesburg) and the rest of the country is divided into district municipalities, which are further divided into local municipalities. A district municipality thus is comprised of a number of local municipalities. In relation to service delivery, municipalities

44 See 'Water down the drain: Corruption in South Africa's water sector' report produced by the Water Integrity Network and CorruptionWatch (March 2020), https://www.corruptionwatch.org.za/wp-content/uploads/2020/03/water-report_2020-single-pages-Final.pdf (accessed 9 June 2021).

45 N Shange 'Lindiwe Sisulu unveils Master Plan to tackle water woes in South Africa' *Times Live* 28 November 2019, https://www.timeslive.co.za/news/south-africa/2019-11-28-lindiwe-sisulu-unveils-master-plan-to-tackle-water-woes-in-sa/ (accessed 9 June 2021). The Plan has met with resistance from many in the ANC, as well as from fellow cabinet members, who claim that it was rushed through without adequate consultation. Sisulu refutes this, however, pointing to the fact that the Plan has been several years in the making under the auspices of three different ministers before her, during which time considerable consultation had taken place. It seems that Sisulu's motivation in releasing the Plan when she did may have been to ensure that it could receive a sizeable budgetary allocation in the next financial year which started in April 2020 (S Stone 'Lindiwe Sisulu faces backlash over R900 billion water master plan' *City Press* 9 December 2019, https://city-press.news24.com/News/lindiwe-sisulu-faces-backlash-over-r900bn-water-master-plan-20191209 (accessed 9 June 2021).

46 Part B to Schedule 4 of the Constitution, read with sec 156, confers executive authority on municipalities for the administration of water and sanitation services, limited to potable water supply systems, domestic waste water and sewage disposal systems. See further De Visser et al (n 17) 18.

are required to ensure the provision of services to communities in a sustainable manner and to promote social and economic development.[47] They must also structure and manage their administration, budgeting and planning processes to give priority to the basic needs of the community.[48] Further, municipalities must give members of the local community equitable access to the municipal services to which they are entitled,[49] and ensure that all members of the local community have access to at least the minimum level of basic municipal services.[50]

The Services Act distinguishes between governance functions performed by a water services authority and provision functions performed by a water services provider.[51] Every water services authority has a duty to all consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.[52] Further, a water services authority is required to develop a Water Services Development Plan which must form part of its Integrated Development Plan (IDP) required in terms of the Systems Act.[53] A water services authority may assume operational responsibility for providing water to end users directly, or may enter into a contract with a water services provider to do so (often a municipal entity such as Johannesburg Water (Pty) Ltd).[54] District municipalities are by default deemed to be water services authorities. A local municipality wishing to perform the responsibilities of a water services authority must be specifically designated as such.[55]

In summary, South Africa has a progressive legislative and policy framework for water services, which includes a constitutional right to water, as well as a network of legislation and a national Free Basic Water Policy designed to give effect to this right. Within this framework, water is conceived of as a social good and a vital part of the broader developmental project which continues to respond to

47 Sec 152 Constitution.
48 Sec 153(a) Constitution.
49 Sec 4(2)(f) Systems Act.
50 Sec 73 Systems Act.
51 Regulated in ch 3 and 4 of the Services Act respectively.
52 Sec 11(1) Services Act. This duty is subject to a number of factors including the availability of resources and the need for equitable allocation of resources (sec 11(2) of the Services Act). Importantly, a WSA may not unreasonably refuse or fail to provide access to water services to a consumer within its area of jurisdiction (sec 11(4) of the Services Act).
53 Sec 12 Services Act; sec 25 Systems Act.
54 Sec 80(2) Municipal Systems Act; Dugard (n 25) 7. However, before a municipality enters into a service delivery agreement with an external service provider, it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement.
55 See sec 84 of the Structures Act.

systemic inequality. However, when it comes to the implementation of this framework at local government level – which serves as the frontline for communities seeking access to water – the reality often is quite different.

Yet, despite – or perhaps because of – these challenges, communities and civil society organisations across South Africa continue to mobilise, advocate and litigate in the hopes of realising their water rights. We turn now to examine one of these stories.

3 *Mshengu & Others v uMsunduzi Local Municipality & Others*:[56] Facts and findings

The uMgungundlovu District Municipality is located in KwaZulu-Natal, South Africa. It comprises several local municipalities including uMsunduzi and uMshwathi.[57] The uMgungundlovu region is made up of a mixture of urban and rural areas with the provincial capital Pietermaritzburg falling in uMsunduzi. The StatsSA 2016 Census recorded the population of the uMgungundlovu region as 1 095 865 people comprising 300 953 households. uMgungundlovu is both a water services authority and a water services provider.[58] uMsunduzi has also been designated as a water services authority.[59] Approximately 80 per cent of people in the uMgungundlovu region obtain their water from the municipality or other water services provider, while the remaining 20 per cent use boreholes, rainwater tanks, dams, rivers or water vendors.[60]

Many farm dwellers in this region live in appalling conditions. The living conditions of the first and second applicants in *Mshengu* are painfully captured in the judgment. Zabalaza Mshengu was the first applicant. As with his father before him, Mr Mshengu lived his whole life on Edmore farm as a labour tenant. Sadly, on 13 August 2018, a few months before the court case was heard, Mr Mshengu passed away at age 104.[61] He had lived with his son and two adult grandsons

56 *Mshengu & Others v uMsunduzi Local Municipality & Others* 2019 (4) All SA 469 (KZP) (*Mshengu*).

57 In this article, the municipalities will be referred to as uMgungundlovu, uMsunduzi and uMshwati respectively.

58 Municipalities of South Africa 'uMgungundlovu District Municipality' *Municipalities of South Africa* (2020), https://municipalities.co.za/overview/120/umgungundlovu-district-municipality (accessed 9 June 2021).

59 *Mshengu* (n 56) para 33.

60 Umgungundlovu District Municipality 'Draft Annual Report of the uMgungundlovu District Municipality 2018/2019' *Umgungundlovu District Municipality* (2019) 17, http://www.umdm.gov.za/Official_Site/index.php/access-to-info/reports/annual-reports (accessed 9 June 2021).

61 M Cabe 'Court judgment to restore farm dwellers' dignity' *New Frame* 29 August 2019, https://www.newframe.com/court-judgment-to-restore-farm-dwellers-

in old, dilapidated mud structures on the farm. The nearest water source are shallow pools in a dried-up stream 100 metres from their home, but this water is stagnant and not suitable for consumption or anything else. The family thus relies on water from a communal tap on a neighbouring farm more than 500 metres from their home. This tap is at the bottom of a hill and their home is located on top of the hill, meaning that collecting water involves pushing 25 litre cans down the hill on wheelbarrows, through the bush and then hauling them back up the hill.[62]

Thabisile Ntombifuthi Ngema was the second applicant in the case. She lives on Greenbranch farm in a settlement of 12 households. Their homes, built of blocks and asbestos, are old and dilapidated and the roofs leak when it rains. There are only two communal taps shared by more than 60 people. They therefore have to queue to collect water and sometimes the farm owner switches off the water supply without notice. There are no toilets. When they attempted to create some form of sanitation by digging pit latrines, the farm owner told them that they were not allowed to do this and should instead defecate in the sugar cane plantation as this would act as a form of manure to fertilise his crops. There are no lights in the sugar cane plantation and the open latrines that they are forced to use there are unhygienic, smelly and attract flies and other vermin. Women experience particular humiliation and impairment of their dignity as they have no proper place to dispose of their used sanitary towels. There is also no refuse collection service.[63]

AFRA's work with farm dwellers in the area in response to conditions such as these has involved ongoing interactions with both farm owners and different levels of government. These engagements over time built useful relationships, but nevertheless did not result in the provision of services so desperately sought by farm dwellers. In the resulting court case, AFRA was included as a third, and institutional, applicant. The reason for this was related to the fact that given their precarious employment and tenure, many farm dwellers were nervous about putting their names on paper in a court case with potentially significant ramifications for their employers.[64] Using AFRA as an institutional applicant thus was a way to give farm dwellers a level of protection, while still injecting a sense of the systemic picture into the court case.

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dignity/ (accessed 9 June 2021).

62 *Mshengu* (n 56) paras 2-3.

63 *Mshengu* paras 4-7.

64 Guest lecture by Adv Tembeka Ngcukaitobi SC on 14 May 2020 in the Human Rights Advocacy and Litigation course in the School of Law at the University of the Witwatersrand.

The applicants sought relief consisting of two parts. First, they sought a declaration that the municipalities' failure to provide farm dwellers with access to sufficient water, basic sanitation and refuse collection is inconsistent with sections 9, 10, 24, 27(1)(b), 33, 152, 153, 193 and 237 of the Constitution,[65] and an order directing the municipalities to develop a reasonable plan to provide the farm dwellers with sufficient water, basic sanitation and refuse collection in accordance with national regulations, as well as to prioritise and include them in their Integrated Development Plans.[66] Second, the applicants sought structural relief directing the municipalities to submit plans and reports under oath to the court.[67]

Both uMsunduzi and uMshwathi opposed the application, while uMgungundlovu chose to abide by the Court's decision.[68] uMsunduzi made the familiar argument that because the applicants resided on private land, it would not be possible for the municipality to provide them with access to water without the land owner's consent, and that in any event it did not have sufficient resources to provide all farm dwellers with access to sufficient water.[69] In contrast, uMshwathi laid the responsibility for water services provision firmly at the door of uMgungundlovu which are the water services authority with the authority to provide water to communities within its jurisdiction.[70] At the time the case was launched, neither uMsunduzi nor uMshwathi had Water Services Development Plans which specifically addressed the needs of farm dwellers. uMsunduzi had a generic plan and had promulgated by-laws in terms of which a land owner is obliged to make an application for the connection of water services.[71] For its

65 These sections refer to the rights of everyone to equality (sec 9); human dignity (sec 10); an environment not harmful to health or well-being (sec 24); access to sufficient food and water (sec 27(1)(b)); and just administrative action (sec 33); the objects of local government under ch 7 including to provide democratic and accountable government for local communities, to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, to promote a safe and healthy environment, and to encourage the involvement of communities and community organisations in the matters of local government (sec 152); the developmental duties of local government under ch 7 to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community amongst others (sec 153); the general provisions regarding appointment of state institutions supporting a constitutional democracy in ch 9 (sec 193) and the general provision under ch 14 which states that all constitutional obligations must be performed diligently and without delay (sec 237). See Constitution of the Republic of South Africa.

66 *Mshengu* (n 56) para 12.

67 *Mshengu* para 13.

68 *Mshengu* para 19.

69 *Mshengu* para 36.

70 It argued that sec 41(1)(f) of the Constitution prevents it from assuming any power or function other than those entrusted to it by the Constitution (*Mshengu* (n 75) para 37).

71 *Mshengu* para 60. This approach is suggested in DWAF's model water services by-laws, sec 2(1) of which reads: 'No person shall be provided with access

part, uMshwathi had no Water Services Development Plan because, as mentioned above, it claimed that the responsibility lay with uMgungundlovu as the water services authority.[72]

The case was heard on 2 November 2018, and judgment was delivered on 29 July 2019. The Court held that uMshwathi could not absolve itself of responsibility by passing the buck to uMgungundlovu because of the universal services obligation on all municipalities in section 73(1)(c) of the Systems Act to give effect to the provisions of the Constitution and to ensure that members of the local community have access to at least the minimum level of basic municipal services. The Court appeared to interpret this to mean that a local and district municipality would share this responsibility, regardless of whether or not they were designated water services authorities.[73]

The Court also confirmed that regardless of land ownership, a municipality still has obligations to provide people with access to sufficient water in terms of South Africa's constitutional and legislative system. First, the Court held that a land owner cannot reasonably refuse a municipality access to his land in order to install infrastructure that would facilitate access to water. This is because section 6(2)(1)(e) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) grants farm dwellers the right 'not to be denied or deprived of access to water', making it untenable for a land owner to prevent the municipality from taking steps to provide water on their property, and obliging land owners to act reasonably in reaching agreements with the municipality regarding the provision of services.[74] In addition, the Court held that land owners must accept that they have 'a secondary obligation' under sections 8 and 27 of the Constitution and the water services authority which confirms that land owners cannot refuse a municipality access for the purposes of installing infrastructure.[75]

Second, because uMsunduzi is a water services authority, it – rather than the land owners – bore the obligation to provide water to farm dwellers. The Court held that land owners had no direct

to water services unless application has been made to, and approved by, the municipality on the form prescribed in terms of the municipality's by-laws relating to credit control and debt collection.' In the course of the litigation, it emphasised that the applicants had neither applied for services in terms of the by-laws, nor attacked the validity of the by-laws themselves, and therefore could not take issue with the Municipality's approach to water services provision (*Mshengu* (n 56) para 66).

72 *Mshengu* (n 56) para 57.
73 *Mshengu* para 65.
74 *Mshengu* para 53.
75 *Mshengu* para 63.

statutory obligation to provide water services unless contracted to do so as a water services provider. The Court further held that even in instances where land owners are to provide water services to others in terms of a contract as a water services intermediary, section 26(3) of the Services Act authorises the water services authority, if the intermediary fails to perform its obligations in terms of the agreement, to 'take over the relevant functions of the water services intermediary'.[76] This is one of the most interesting and important aspects of the judgment and is discussed in more detail below.

Ultimately, the Court found that the municipalities' ongoing failure to provide farm dwellers living in their jurisdiction with access to sufficient water constituted a violation of sections 9, 10, 24, 27(1)(b), 33, 152, 153, 195 and 237 of the Constitution. It directed the municipalities to comply with the minimum standards for basic water supply contained in Regulation 3(b) and to prioritise the rights of farm dwellers in their IDPs. The Court further outlined how it would supervise the implementation of its judgment – by requiring the municipalities to file a report with the court within six months, identifying all farm dwellers living in the area, specifying whether they have access to water (including quality, quantity and distance) and what steps the municipality intends to take to ensure that they all have access to water. The applicants (and other interested parties) were given one month to comment on this report. Thereafter the municipalities must submit monthly reports setting out their compliance with their plan, on which the applicants and other interested parties should also be given one month to comment.[77]

Both AFRA and the LRC were subsequently involved in facilitating dialogues to spread awareness of the judgment and its implications.[78] These were reportedly well received and attended by farm dwellers, farm owners, municipalities, the Department of Cooperative Governance and Traditional Affairs (CoGTA) and other government departments – including from regions other than those in which the parties to the litigation live and work.[79] In addition, the LRC has

76 *Mshengu* para 62.

77 *Mshengu* para 86. Interestingly, the parts of the order dealing with the need to survey and assess the numbers of farm dwellers and their respective access to water was advocated as part of water services planning by the then Department of Water Affairs and Forestry (DWAF) as far back as 2005. See Department of Water Affairs and Forestry *Ensuring water services to residents on privately owned land: A guide for municipalities*' (2005) 10-12. See also Department of Water Affairs and Forestry *Water services intermediary explanatory guideline* (2002).

78 Such as those held in Howick in November 2019 and another in Newcastle in March 2020 (interview with Thabiso Mabhense, attorney at the LRC, conducted on 2 April 2020 via Zoom).

79 As above.

received a request from a community in Limpopo to run a similar case there, and were considering this at the time of writing.[80]

The six-month report referred to in the court order was initially due to be filed at the end of January 2020. However,while uMshwathi and uMgungundlovu accepted the outcome of the case, uMsunduzi launched an application to appeal the judgment. In response, the LRC filed an application to require compliance with the judgment while the appeal is pending,[81] as ordinarily the lodging of an appeal suspends the need to comply with the court order being appealed. This application was granted, which means that the municipalities are required to file their reports notwithstanding the pending appeal.[82] Their new deadline for doing so was February 2021. At the time of writing, only uMgungundlovu had filed its report and the applicants were in the process of reviewing it.

The *Mshengu* judgment has far-reaching implications for farm dwellers seeking to claim their water rights, as well as for farm owners and the municipalities in whose jurisdiction they live. The analysis below examines the Court's pronouncements on municipal obligations to provide water on farms. It explores the relationship between local and district municipalities, on the one hand, and between local government and farm owners, on the other.

4 Understanding the water services provisions obligations of local and district municipalities

The involvement of both district and local municipalities is important in *Mshengu*. However, the relationship between them with respect to water services provision is often misunderstood. In terms of the Structures Act, the default position is that a district municipality will be the water services authority, unless a local municipality has been specifically authorised as such. [83] In this case, uMsunduzi (a local municipality) had been designated as a water services authority. This means that the default responsibility of uMgungundlovu (a district municipality) for water services provision in uMsunduzi falls away, although uMgungundlovu retains responsibility for water services provision in all the other local municipalities in its district. uMshwati, on the other hand, had not been designated as a water services authority. This means that uMgungundlovu is responsible for water

80 As above.
81 In terms of the Superior Courts Act 10 of 2013, sec 18.
82 *Mshengu & Others v uMsunduzi Local Municipality & Others* Pietermaritzburg High Court order in Case 11340/17 dated 20 August 2020 (unreported).
83 Secs 83-84 Structures Act.

services provision in uMshwati, although uMshwati retains service delivery obligations with respect to services other than water.

This is not quite the position taken by the Court in *Mshengu*. The judgment finds that all municipalities, regardless of their status as water services authorities, have obligations to deliver services to those living in their jurisdictions, including people living on farms owned by private land owners, and that one municipality cannot try to shift responsibility onto another municipality.

It is possible that what happened is that the particular subtleties of water services provision got lost in broader pronouncements on service delivery in general (as local municipalities do indeed bear service delivery obligations with regard to services other than water). However, bypassing the Services Act framework, which places different responsibilities on municipalities that are water services authorities and those that are not, may ultimately be unhelpful to those seeking to claim their water rights. While at first blush it is tempting to claim the imposition of a universal service obligation on local municipalities regardless of their designation as water services authorities or not as a victory, the risk is that the resulting duplication of functions between district and local municipalities with regard to water services provision might only further frustrate attempts to practically access water.[84]

Interestingly, neither AFRA nor their attorneys seemed particularly concerned about these nuances as their view was that, in practice, the district and local municipalities would work together collaboratively to ensure that services are delivered. Their position was that the far greater need for clarity lay in the distribution of obligations between municipalities and private land owners.[85]

5 What role do private land owners have in providing water on farms?

One of the key issues raised by this case is the role that private land owners play in providing water on farms. Indeed, the need to answer this question was the very reason that the court case was launched.[86]

84 Although the non-compliance by uMshwati and uMsunduzi with the court order arguably validates the court's approach in holding both local and district municipalities accountable for water services provision.

85 Interview with Thabiso Mabhense (n 78); interview with Mondli Zondi (n 9).

86 Note that farm owners were not ultimately the target of the litigation in terms of how the case was framed by the applicants. This is attributable to the inevitable strategic trade-offs inherent in PIL. Initially, the applicants sought clarity about the obligations on both the municipalities and private land owners. The land owners

The need to understand this issue is not unique to the applicants in the case. During the 2014 hearings on the status of water services provision conducted by the South African Human Rights Commission (SAHRC), many people in farming communities raised the concern that they were reliant on the landowner for the provision of basic services, and the resulting SAHRC report highlighted the fact that the main reason that farm dwellers are unable to access water is because they live on privately-owned land.[87]

The *Mshengu* judgment is unequivocal in its dismissal of any attempt by the municipalities to lay the blame at the door of farm owners, and confirms a clear obligation on municipalities to ensure that people living within their jurisdiction have access to sufficient water. However, the picture may not be as simple as that. In order to properly unpack the issues, it is instructive to first consider the human rights obligations attaching to private actors more generally in South Africa.

5.1 Human rights obligations on private actors in South Africa

One of the defining features of the South African Constitution is the way in which it envisages private actors bearing rights obligations. Section 8(2) of the Constitution provides that '[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'. The language of this provision does not impose absolute obligations on private actors. Rather, it indicates that when determining whether section 8(2) is applicable, one must establish whether the section applies in a particular case and, if it does apply, the extent to which it applies. In answering these questions, a court must take into account (a) the nature of the right and (b) the nature of any duty imposed by the right.[88]

initially opposed the application, but offered to withdraw their opposition if the applicants withdrew the relief it sought against them. In order to best serve their clients' interests, the applicants agreed to this. Adv Tembeka Ngcukaitobi SC, one of the advocates representing the applicants, explains that the immediate priority was to get the *Mshengu* judgment enforced in order to get services to farm dwellers as fast as possible. Perhaps the next wave of litigation will be the time to focus on the obligations of land owners (Ngcukaitobi (n 64)).

87 South African Human Rights Commission 'Report of the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014' (2014) 14, https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf (accessed 9 June 2021).

88 For discussion of the operation of sec 8(2), see D Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *South African Law Journal* 754; C Sprigman & M Osborne '*Du Plessis* is not dead: South Africa's 1996 Constitution and the application of the Bill of

The courts have considered this provision in only a limited number of cases[89] and the jurisprudence has offered limited and confusing elaboration on the meaning of section 8(2). In particular, it does not clarify the question of whether private actors bear *positive* obligations to realise rights.[90] We must thus look elsewhere for insight into how the provision works. In her seminal analysis of section 8(2) of the Constitution,[91] Meyersfeld argues that where appropriate, section 8(2) may apply to *any* right in the Bill of Rights, even to socio-economic rights.[92] This would include the right to water. She further argues that the Constitution indeed envisages situations where private actors bear positive obligations to realise rights, and further that in particular circumstances, private actors may even be required to commit financially to the fulfilment of the socioeconomic rights of indigent people.[93]

Whether or not one agrees with the approach adopted by Meyersfeld,[94] it is clear that the South African constitutional framework foresees at least the possibility that obligations to realise rights contained in the Bill of Rights might attach to private actors. While there is contestation around the circumstances in which it might be appropriate to oppose such obligations, in both the courts[95] and among legal scholars,[96] no-one disputes the fact that the Bill of Rights applies horizontally in at least some cases. It is in this context that it is useful to examine the right to water in more detail because the Services Act expressly codifies circumstances in which private

Rights to private disputes' (1999) 15 *South African Journal on Human Rights* 25; H Cheadle & D Davis 'The application of the 1996 Constitution in the private sphere' (1997) 11 *South African Journal on Human Rights* 44.

89 These include *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC), *Daniels v Scribante & Another* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Daniels*) and *AB & Another v Pridwin Preparatory School & Others* 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).

90 Of these cases, *Daniels* goes furthest but even then only states that its previous pronouncements on sec 8(2) had 'not held that under no circumstances may private persons bear positive obligations under the Bill of Rights' (*Daniels* (n 89) para 48).

91 B Meyersfeld 'The South African Constitution and the human rights obligations of juristic persons' (2020) 137 *South African Law Journal* 439.

92 Meyersfeld (n 91) 443. See also M Pieterse 'Indirect horizontal application of the right to have access to health care services' (2007) 23 *South African Journal on Human Rights* 157.

93 Meyersfeld (n 91) 443.

94 Which is persuasive.

95 Eg, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) the Constitutional Court confirmed the obligation on private property owners to allow longterm occupiers to remain on their property, providing water and electricity, until the state finds alternative accommodation for such occupiers.

96 Meyersfeld argues that one of the circumstances in which sec 8(2) will apply is where there is a special relationship between a juristic person and an individual, and the power and capability to fulfil that individual's right rests wholly within the control of the juristic person (Meyersfeld (n 91) 445).

land owners will be responsible for providing water, and thus for realising the right to water for people living on privately-owned land.

5.2 An obligation on farm owners to realise the right to water?

5.2.1 Who bears the obligation to provide water and where is it sourced?

As discussed above, the right to water imposes both positive and negative duties on the state. The question that arises is whether similar obligations attach to private actors in the context of the right to water specifically. The *Mshengu* judgment holds that land owners must accept that they have 'a secondary obligation' under sections 8 and 27 of the Constitution.[97] By holding that a land owner cannot reasonably refuse a municipality access to his land in order to install infrastructure that would facilitate access to water,[98] the Court clearly adopts the position that *negative* duties can attach to private actors. This accords with the Constitutional Court's interpretation to date of section 8(2) of the Constitution.[99] However, this does not resolve the question of whether private actors have *positive* obligations to realise the right to water. A further investigation of the Services Act reveals some interesting possibilities in this regard.

Foreseeing a role for private actors in the realisation of the right to water, when the Services Act was passed in 1997, it introduced the notion of a water services intermediary (an intermediary). An intermediary is someone who has a contract with someone else, which contains an obligation to provide the other party to the contract with water services, and where this obligation is incidental to the main objects of the contract.[100] The key conditions for the existence of a water services intermediary are thus that (a) there must be an obligation to provide services; (b) the obligation must exist in terms of a contract, either written or verbal; and (c) the obligation must not be the main reason for the contract to exist.

97 *Mshengu* (n 56) para 63.
98 On the basis that sec 6(2)(1)(e) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) grants farm dwellers the right 'not to be denied or deprived of access to water' making it untenable for a land owner to prevent the municipality from taking steps to provide water on their property, and obliging land owners to act reasonably in reaching agreements with the municipality regarding the provision of services (*Mshengu* (n 56) para 53).
99 See the cases referred to in n 89.
100 Sec 1(xxii) Services Act.

This is applicable in the scenario where a farm owner has an employment contract with his workers or a lease agreement with a labour tenant. Such contracts often provide for the worker to live on the farm. In such cases, the obligation to provide water can be implied because the worker would not be able to access water other than on the farm. This obligation also is not the main reason for the contractual relationship, which in this scenario would be either employment or tenancy. The farm owner would therefore be an intermediary in terms of the Services Act as the conditions listed above are met.[101]

A farm owner's (positive) obligation to provide water services can thus exist by virtue of a contract between a farm owner and a farm dweller. Nevertheless, the significance of the contract is only that it is what makes the farm owner an intermediary. As soon as that is the case, statutory obligations in terms of the Services Act attach to the intermediary. Moreover, as discussed below, because the obligation is founded in legislation, it can then be enforced by a municipality, notwithstanding the fact that the municipality is not a party to the contract. Importantly, the Services Act further specifies that every water services authority must pass by-laws that cover the conditions for the provision of water services.[102] These by-laws can thus address what level of services must be provided on privately-owned land, the relative rights and responsibilities of the water services authority, the water services provider, if appropriate, water services intermediaries and consumers.

The answer to the question of who bears the obligation to provide water services, therefore, is that the municipality that is designated as a water services authority does, unless the water services authority has entered into a contract with a water services provider, or an intermediary exists.[103]

5.2.2 In what form must water be provided?

Assuming an intermediary does exist, as this will often be the case in relation to farm owners and farm dwellers, in what form is it required to provide water? Section 25(1) of the Services Act provides that '[t]he quality, quantity and sustainability of water services provided a water services intermediary must meet any minimum standards

101 Where a farm owner rents the farm to a tenant who in turn employs workers, the tenant could be the intermediary.
102 Sec 1 Services Act.
103 Interview with Abri Vermeulen, principal at Pegasys and former Director in the Department of Water and Sanitation, conducted on 3 April 2020 via Zoom.

prescribed by the Minister and any additional minimum standards prescribed by the relevant water services authority'. In the case of people who qualify for the minimum basic water supply (as most farm dwellers will) an intermediary must provide a basic water supply in compliance with Regulation 3(b) of the 2001 National Norms and Standards. That is, a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household, and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

In rural areas, water often is sourced from rivers, dams and groundwater rather than municipal supply. During the court case, uMsunduzi argued that a land owner who is liable to provide the basic requirements of occupation to an occupier under ESTA may intend to provide access to water through a source other than a piped water supply system. Their position was that if alternative water sources were envisaged by a land owner (such as a borehole) it would be inconceivable that farm dwellers could insist on the provision of water through a piped water supply system from the municipality where their contractual relationship with the land owner envisaged only the supply of water from a borehole.[104]

However, an intermediary cannot contract out of the statutory obligation laid out in section 25(1) of the Services Act, read with Regulation 3(b). This means that even if a farm owner has agreed to supply workers with less than this (for instance, water from a borehole that is 500 metres away) farm dwellers can insist on the basic water supply standards. uMsunduzi therefore is correct that farm dwellers cannot insist on piped water to their homes, but water provision by the land owner must still meet the quantity, distance, flow rate and consistency required by the national norms and standards.

5.2.3 Who pays?

This level of service is rather much to ask from an intermediary, so who pays the costs of installing and maintaining the infrastructure, and for reticulation? If an intermediary is present, a municipality may want the intermediary to shoulder the costs of water provision. However, it is important to ensure that the implementation of the intermediary system is financially viable. On the issue of how to resource the fulfilment of socio-economic rights, the Constitutional

104 *Mshengu* (n 56) para 61.

Court has indicated that it would be unreasonable to require private persons to bear the exact same obligations under the Bill of Rights as does the state.[105]

Section 25(2) of the Services Act states that an intermediary may not charge for water services at a tariff that does not comply with any norms and standards prescribed under the Services Act and any additional norms and standards set by the relevant water services authority. This suggests that where national regulation requires the provision of a *free* basic water supply, this is what an intermediary must provide, provided that all the usual processes and requirements of the Free Basic Water Policy are met (which, for example, may involve registration on a municipal indigent register).[106]

Municipal by-laws are the instrument through which it is possible to balance the different interests of the various parties. A 2005 DWAF Guide to municipalities on the topic of how to ensure water services to residents on privately-owned land (DWAF Guide) proposes that where private land owners are involved, municipalities should draft a funding framework for the provision of water services, and emphasises that there are various incentives and subsidies for which an intermediary can apply to fund the development of water services infrastructure and improvements in water quality.[107] These include using a portion of a municipality's equitable share to ensure service provision to poor households on privately-owned land,[108] or a municipal infrastructure grant (MIG) which can be used to provide services to households on land that they do not own, provided that the intermediary makes a financial contribution (because the land owner becomes the owner of the infrastructure once it is installed).[109]

However, this is not uncomplicated. Normally, operational and maintenance costs should be paid by water users but subsidised

105 *Daniels* (n 89) para 40. However, but note Meyersfeld's argument that private actors in certain circumstances can be required to commit financial resources towards the realisation of socio-economic rights (Meyersfeld (n 91) 441).

106 The Systems Act requires municipalities to develop indigent policies to facilitate the provision of free basic services to poor households. In developing their own indigent policies, municipalities are guided by the National Indigent Policy Framework and Guidelines developed by CoGTA which ensure some degree of uniformity in municipal indigent policies, while retaining municipal discretion to decide on the details. Most municipalities identify indigent households through means testing and require qualifying households to register as indigent. See further SERI 'Turning off the tap: Discontinuing universal access to free basic water in the City of Johannesburg' Working Paper 3 (March 2018) 4.

107 Department of Water Affairs and Forestry *Ensuring water services to residents on privately owned land: A guide for municipalities*' (2005) 14.

108 The Equitable Share is an unconditional grant designed to supplement municipalities' revenue to deliver services to poor households.

109 An MIG is an infrastructure grant used to expand the delivery of basic services to poor households.

by the equitable share. In relation to the provision of a basic water supply, income from user tariffs obviously is not relevant and the full costs must be sourced elsewhere. The picture is further complicated by the reality that many municipalities are dependent on government grants for their very survival (especially rural municipalities that do not have many consumers that can afford to pay for services). In the absence of tariff income, municipalities under financial strain thus sometimes use their equitable share to pay staff salaries, leaving little left over to actually cover the costs of service provision.[110]

In the end, municipal by-laws are the tool that a municipality can use to regulate exactly what is expected of an intermediary. A municipality can even use its by-laws to specify what types of materials and brands of pipes the intermediary should use when installing infrastructure in order to ensure consistency across all municipal infrastructure within its jurisdiction. If an intermediary cannot afford to pay for what is specified, the municipality can reach an agreement to give the intermediary assistance through subsidies and financial breaks elsewhere.[111] In short, then, the answer to who pays is that it is the intermediary, but there are various avenues available for intermediaries to tap into municipal funding to make this workable in practice.

5.2.4 Municipal oversight of intermediaries

Where an intermediary exists, they may thus bear considerable obligations to provide water services. Nevertheless, as confirmed by the court in *Mshengu*, ultimate accountability still resides with the municipality that is the water services authority for the area. So how can municipalities exercise oversight of intermediaries? Relying again on the by-law-driven approach, municipalities can write oversight mechanisms into their by-laws. Section 27 of the Services Act also requires water services authorities to monitor that intermediaries are complying with any applicable standards. In fact, uMgungundlovu's water services by-laws make provision for individuals and institutions to apply to be registered as intermediaries. Registered intermediaries must submit a quarterly report to the municipality in order to enable

110 Interview with Abri Vermeulen (n 103).

111 Note that although it may be useful to have an intermediary cover these costs, a municipality needs to think long term about what happens when an intermediary ceases to exist (such as when a mine that has been acting as an intermediary by virtue of the employment contracts it has with mineworkers, closes) (interview with Abri Vermeulen (n 103)).

uMgungundlovu to monitor whether the intermediary is operating in accordance with the Services Act.[112]

As a complement to this, using an incentive-based approach, municipalities can also encourage private services provision through subsidies and tax incentives. A combination of approaches can also be used. Typically, a municipality will declare a group of people (such as farm owners) as water services intermediaries, use regulations or directives to set out their rights and responsibilities, and offer a tax rebate if they comply with their obligations within a prescribed time period.

Section 26 of the Services Act, which was highlighted by the Court in *Mshengu*, sets out the action which a water services authority may take should an intermediary fail to fulfil its obligations. Essentially, in such circumstances a water services authority should put the intermediary on terms to rectify the failure (this communication could spell out the nature of the failure, what steps should be taken to rectify it, and set out a reasonable time period within which to comply). If the intermediary continues its non-compliance, then the water services authority is empowered to take over the functions of the intermediary (or appoint another water services institution to do so).[113] Nevertheless, this mechanism for municipal takeover is not popular. Given the number of responsibilities already shouldered by a municipality, it is likely to prefer to take action against the intermediary rather than to take back the responsibilities concerned.[114]

Interestingly, the DWAF Guide mentions that consumers may insist that a water services authority intervene if an intermediary is not up to scratch, including by approaching a court. Again this does not seem to be something that often happens,[115] but it is an avenue open to farm dwellers where a municipality is failing to hold an intermediary to account, as they could use this mechanism to pressurise the municipality into exercising its oversight role.

5.2.5 An analysis of the water services intermediaries system

There is no doubt that the intermediary system provides a useful way to understand water services provision on privately-owned

112 uMgungundlovu District Municipality 'Water Services By-laws' uMgungundlovu District Municipality (2020), clauses 89-93, http://www.umdm.gov.za/Official_Site/index.php/access-to-info/legal-documents/bylaws/water-services-by-laws (accessed 9 June 2021).
113 This approach is echoed in the DWAF Guide. See n 107.
114 Interview with Abri Vermeulen (n 103).
115 As above.

land. Located within a broader constitutional dispensation that makes provision for the horizontal application of the Bill of Rights, by expressly legislating on the intermediary system, the Services Act codifies how rights obligations can be placed on farm owners. Moving beyond legal theory, the intermediary system offers a practical way for municipalities to draw on private resources.

The system, however, not without its challenges. First, placing service provision obligations on farm owners requires some delicate balancing in practice. The more municipalities demand improved service provision from land owners, the greater the incentive for the land owner to scale down the provision of accommodation to workers because it is too much of a bother, and thus the greater the risk of the eviction of workers. This is not only problematic for farm dwellers but also places greater stress on municipal resources. It thus is in the municipality's interests to ensure that accommodation continues to be provided by land owners.[116]

Second, while a municipality is empowered both to pass by-laws and to come to a contractual agreement with a land owner in terms of the installation of and payment for infrastructure, municipal officials often are reluctant to do so. This relates to the occurrence of local government elections every five years. Entering into this kind of an agreement with potentially far-reaching implications for land owners remains unusual at local government level, even though it is envisaged by the regulatory framework. Municipal officials therefore are likely to be hesitant to stick their necks out, as any action on their part which is perceived as 'unusual' makes them politically vulnerable as it provides a possible excuse to remove them.[117]

Perhaps the biggest challenge is that making this system work is quite heavily dependent on the water services authority having passed by-laws regulating intermediaries. Dealing with water services provision on private land in this way thus requires proactive action which, given the extent of demands on municipalities, often just is not a priority.[118] The general consensus in the water sector is that the Services Act should be rewritten because it was enacted before the local government legislation (such as the Systems and Structures Act) was promulgated.[119] If the Act is revised, this would present an opportunity to centralise the regulation of intermediaries

116 DWAF Guide (n 107) 18.
117 Interview with Abri Vermeulen (n 103).
118 As above.
119 No one foresees a departure from the basic principles in the Services Act but rather an alignment with subsequent legislation.

by including a ministerial power to issue regulations governing intermediaries, so that this is not so heavily dependent on individual municipalities pro-actively passing by-laws that do so.[120]

Lastly, by definition, the intermediary system only operates where there is a contract between a farm dweller and farm owner. There thus is a need to address water services provision to people living on private land where there is not an intermediary, particularly where a farm owner is an intermediary with respect to farm workers with whom he has employment contracts, but not with respect to other people who live on the farm but who do not work for him. At first glance this may seem to lead to the rather bizarre result that a farm community may be split such that a farm owner must provide water services to all his contracted employees but the municipality remains responsible for providing water services to those people in relation to whom the farmer is not an intermediary.

The provisions of ESTA may go some way towards addressing this. The Preamble to ESTA states that one of its purposes is to provide for the conditions of residence on certain land, and section 6(2)(e) provides that an occupier[121] has the right not to be denied or deprived of access to water. This protects a farm dweller's rights where an intermediary is not present, but does not answer the question of whether it is the municipality or the land owner who must provide water services in such a scenario.

The *Mshengu* judgment states that land owners have no direct statutory obligation to provide water services unless contracted to do so as a water services provider, although a land owner may acquire obligations as a water services intermediary in terms of a contract. This is not strictly accurate as the contract is important but only because it is what makes the land owner an intermediary. As soon as this happens, statutory obligations in terms of the Services Act attach to the intermediary and, as explained above, this is significant because it gives the municipality tools to exercise oversight over the land owner. The Court in *Mshengu* adopts a narrower view – it does not actually say that farm owners are water services intermediaries. Instead it holds that a farm owner's obligation is merely to allow

120 As above.

121 Defined in ESTA as a person residing on land that belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act 3 of 1996; and (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and (c) a person who has an income in excess of the prescribed amount.

municipal officials access to his land for the purposes of installing or repairing infrastructure.

However, by entrenching the notion of an intermediary in the legislative framework, the Services Act provides a mechanism with which obligations to realise the right to water can attach to private actors. Importantly, the intermediary mechanism is a nuanced one with in-built checks and balances.[122] It is designed to make it practically possible to implement rights obligations on intermediaries.

The *Mshengu* case provides a useful springboard from which to engage in these debates around the obligations of local and district municipalities, and of the respective obligations of private land owners and local government. However, the importance of this litigation extends beyond the content of the judgment. We now turn to consider other ways in which the litigation can be considered valuable.

6 Value of the *Mshengu* judgment

Public interest litigation (PIL) is one of the strategies available to those seeking to enforce their rights in South Africa. Much has been written about the relationship between litigation and other tools of struggle, and it is always useful to reflect on what value a judgment brings to rights-based struggles.

6.1 Typologies of impact

The use of law, in general, and litigation, in particular, to achieve social and economic change has been much debated and critiqued. Many activists and scholars argue that the law is ideologically biased towards the preservation of the *status quo* and that judges tend to favour powerful economic interests.[123] Detractors of PIL highlight that it can be expensive, time-consuming and risky.[124] A key criticism of PIL is that over-reliance on legal strategies can be detrimental to societal transformation as legal strategies can demobilise political ones[125] by

122 Any concerns about opening the floodgates of private sector responsibility should thus be allayed.

123 P Gabel & D Kennedy 'Roll over Beethoven' (1984) 36 *Stanford Law Review* 1.

124 Foreword of Open Society Justice Initiative 'Strategic litigation impacts: Insight from global experience' (2018) 13, https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf (accessed 9 June 2021).

125 SL Cummings & D Rhode 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 604 607; M McCann & H Silverstein 'Rethinking law's "allurements": A relational analysis of social

altering radical aspirations,[126] and deflecting resources and attention away from collective grassroots action.[127] PIL is also critiqued from a decoloniality perspective by scholars who emphasise the need to recognise the ways in which racial identities and hierarchies are embedded in legal systems, in general, and human rights discourses in South Africa, in particular.[128]

In contrast, other commentators urge critics to adopt a bottom-up lens and examine how social movements use litigation despite its limitations, and to acknowledge how the tactical uptake of rights and litigation as part of broader strategies can help social movements. A growing awareness of the political utility of PIL frames it as a means of interrogating, asserting and disrupting power,[129] and acknowledges its potential to catalyse and strengthen social mobilisation. Understood in this way, PIL can help to frame and develop collective identity,[130] foster cohesion between groups that may have had differences in the past[131] and amplify community voices where political avenues have failed.[132] Such an approach views the 'law as politics by another name, and links court-room battles to political mobilization and community organizing'[133] and understands that PIL can disrupt entrenched institutional power if used strategically and in combination with other strategies.[134]

Within the broader contestation around the use of law and PIL, one of the particular challenges is how best to assess whether PIL is achieving the social change it seeks to. There is a rich and growing body of literature – both internationally and in South Africa – that

movement lawyers in the United States' in A Sarat & SA Scheingold (eds) *Cause lawyering: Political commitments and professional responsibilities* (1998) 262-263.

126 W Brown & J Halley *Left legalism/left critique* (2002).

127 McCann & Silverstein (n 125) 262; Cummings & Rhode (n 125) 608.

128 J Modiri 'The colour of law, power and knowledge: Introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123 146.

129 Open Society Justice Initiative *Strategic litigation impacts: Insight from global experience* (2018) 60.

130 M McCann *Rights at work: Pay equity reform and the politics of legal mobilisation* (1994), as discussed in J Dugard & K Drage 'Shields and swords: Legal tools for public water' Occasional Paper 17 (2012) commissioned by the Municipal Services Project 6.

131 'Public interest legal services in South Africa' (November 2015) report prepared by the Socio-Economic Rights Institute of South Africa Executive Summary (PILS Report) 52, https://www.seri-sa.org/images/SERI_PILS_Executive_SUmmary_final_for_web.pdf (accessed 9 June 2021).

132 This is evidenced by the response of one of the applicants in *Mazibuko* (n 1) to the Constitutional Court judgment (discussed in Dugard & Langford (n 27) 58).

133 Cummings & Rhode (n 125) 612-613.

134 Cummings & Rhode (n 125) 610; CF Cabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1015.

examines typologies of impact of PIL.[135] Two approaches have dominated these debates. The materialist approach evaluates the impact of PIL by seeking to identify a linear relationship of cause and effect between a court case and what measurable direct benefits could be attributed to the case.[136] The materialist approach would thus evaluate litigation on water rights by asking, quite practically, whether the claimants were provided with water following the litigation.

However, the materialist approach has been much critiqued for adopting an overly narrow and limited lens in assessing the impact of PIL. A growing recognition that PIL can have value beyond the practical, material impacts of a court order has resulted in the development of the legal mobilisation approach which asserts that litigation can indirectly effect social change through the mobilisation catalysed in preparation for it, and in its aftermath.[137] Legal mobilisation theorists argue that litigation can result in changes in ideas, perceptions and collective social constructs relating to the subject matter of the litigation and that

> even when judges' holdings are contrary to the positions of those promoting social change, judicial [and linked mobilisation] processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organisations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in contexts other than the courtroom.[138]

South Africa has a strong tradition of PIL and, thus, questions about its value have loomed large for everyone involved. Mirroring the

135 See G Marcus & S Budlender 'A Strategic Evaluation of Public Interest Litigation in South Africa' (2008), http://www.atlanticphilanthropies.org/learning/strategic-evaluation-publicinterest-litigation-south-africa (accessed 9 June 2021); Dugard & Langford (n 27); D Cote & J van Garderen 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *South African Journal on Human Rights* 167; G Marcus, S Budlender & N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies*, https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf (accessed 9 June 2021); S Wilson 'Litigating housing rights in Johannesburg's inner city: 2004-2008' (2011) 27 *South African Journal on Human Rights* 127; T Madlingozi 'Post-apartheid social movements and legal mobilisation' in Langford et al (n 27) 92; PILS Report (n 131); J Brickhill 'Introduction: The past, present and promise of public interest litigation in South Africa' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 41.

136 One of the most vocal proponents of the materialist approach internationally has been Gerald Rosenberg. For a discussion of Rosenberg's position and its application (or not) to the South African context, see Wilson (n 135) 127.

137 McCann (n 130).

138 C Rodríguez-Garavito 'Beyond the courtroom: The impact of judicial activism on social and economic rights in Latin America' (2011) 89 *Texas Law Review* 1669.

international trends, the legal mobilisation approach has gained much traction in South Africa where there is a broad consensus that, despite its limitations, in some form and in the right conditions, PIL remains a powerful vehicle to facilitate social change.[139] Wilson reminds us that the important thing is to 'guard against both an over-reductive approach, which posits that litigation can never "ultimately" make a difference, and the over confidence of the intellectually able, but socially dislocated, elite practitioner who equates social change with "good jurisprudence"'.[140]

One of the most seminal contributions on the appropriateness of adopting the broader lens inherent in the legal mobilisation approach is that of Dugard and Langford.[141] In their critique of a 2008 report commissioned by the Atlantic Philanthropies (one of the main funders of human rights organisations at the time), Dugard and Langford question whether PIL is 'a matter of art or science' and conclude that it cannot be considered a science because the causal relationship between PIL and both successful judicial outcome and maximum social impact is too complex. Instead, they propose a more expansive model for analysing the impact and value of PIL which requires one to understand the role of law as a politicising agent in the relationship between structures of power (whether social, political or socio-economic) and the agency of social actors.[142] In the last decade there have been a number of other contributions to the debate around how best to assess the impact of PIL in South Africa.[143]

In the most recent contribution, Brickhill has posited a typology of impact consisting of three categories of impact, namely, legal, material and political (referred to here as the Brickhill typology).[144]

139 PILS Report (n 131) 3. The South African courts have affirmed the value of PIL on a number of occasions. Eg, in *Mazibuko* the Constitutional Court held: 'The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy … Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open' (*Mazibuko* (n 1) paras 159-163). See also *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC); *Company Secretary of Arcelormittal South Africa & Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA); [2015] 1 All SA 261 (SCA).

140 Wilson (n 135).

141 Dugard & Langford (n 27).

142 Dugard & Langford (n 27) 41, as discussed in Brickhill (n 135) 2.

143 See the sources referred to in n 135.

144 Brickhill (n 162) 42. His typology draws on the work of Dugard & Langford (n 27), Langford et al (n 27) and Rodriguez-Garavito (n 138).

In the Brickhill typology, material effects include the provision of social goods or services, the payment of compensation or damages, and compelling or prohibiting specific conduct. Legal effects are defined to include challenges to law or policy.[145] Political impact is concerned with the effect of litigation on power relations, discourse and the 'agenda' in relation to a particular set of issues.[146] Essentially the combination of his material and legal effects represent a generous explanation of traditional materialist approaches, while his understanding of political impact resonates with legal mobilisation approaches discussed above. In the next part we apply Brickhill's typology of impact to the *Mshengu* case.

6.2 Impact of the *Mshengu* litigation

What follows is not an exhaustive analysis of the impact of the *Mshengu* litigation but rather offers some reflections on why the litigation is valuable, located within the framework of Brickhill's typology of impact.

With regard to material effect, the farm dwellers concerned have yet to receive water at their homes. While this might spark a temptation to critique the judgment as lacking any material impact, it probably is too soon to make such a determination. In addition, regard must be had to the remedy that was requested by, and ultimately granted to, the applicants. In PIL, it often is tempting to go for the big win. In this case, the big win would have been the immediate provision of water and other services to all farm dwellers. However, the risk of asking for a far-reaching remedy such as this is that a court might be hesitant to grant it, given, among other things, the resource implications. The strategic approach often is to frame the case in such a way that the resulting judgment might be a slightly smaller win in the short term, but which lays the groundwork for future action.[147]

This is precisely what the applicants did in this case. While a request for immediate water provision may not have been granted (if asked for), their request for the municipalities to develop a plan for the provision of water (and other services) going forward, was granted. In the circumstances, it would be unreasonable to claim that the *Mshengu* judgment lacks material effect as the remedy granted by

145 Brickhill (n 135).
146 Brickhill (n 135) 43.
147 Ngcukaitobi (n 64).

the Court envisages a process culminating in the provision of water to farm dwellers much further down the line, rather than immediately.

A further way in which the litigation can be understood as having value in the form of material effect is that the judgment offers the promise of greater uniformity in water provision on farms. Previously farm dwellers obtained water in a variety of ways. Some of them lived on farms where they were permitted to use existing boreholes or communal stand pipes. However, most were left to fend for themselves, sharing the water supply provided to farm animals, fetching (and buying) water from neighbouring farms, or collecting it from streams and dams. What was striking, however, is that both the availability and quality of water varied greatly from farm to farm and often was heavily dependent on the relationship between an individual farm owner and his workers and tenants. This limited the ability of farm dwellers to claim their water rights, for fear of being deprived of what little access they might have. The judgment changes this, as farm dwellers now have recourse other than to the whims of their employers or landlords. While this still does not mean that the applicants have achieved access to water in practical terms, down the line if – and hopefully when – they do, water will be provided in a more uniform way across farm boundaries.

An assessment of the legal effect requires an examination of whether the judgment has resulted in any changes to law or policy. The judgment has not changed the law, but has provided very useful clarity on the law. This is especially significant because previously, many municipalities and farm owners had been willing to do their part but had been hamstrung by not knowing what they could or should be doing.[148] The judgment has been favourably received by other municipalities that seek to understand its implications for water services provision in their own jurisdictions.[149] Notwithstanding the obligations it places on them, the municipalities that have been attending the dialogues hosted by AFRA are reportedly pleased that the judgment resolves the problem they had been facing of being prevented from accessing farms by farm owners.[150] Nevertheless, the failure of the judgment to engage in more detail with the intermediary system is unfortunate, and qualifies the claim that the judgment has legal effect as it provides greater clarity on existing legal obligations.

In addition to material and legal impact, the *Mshengu* litigation has also had political impact in at least two important ways. First,

148 As above.
149 As above.
150 Interview with Thabiso Mabhense (n 78).

after years of careful engagement with several municipalities and a range of farm owners, AFRA and the farm dwellers with whom they work are now being taken seriously. The litigation has opened doors that were previously closed. For example, throughout the litigation process, AFRA had been collecting data on how many people living on farms were affected, and what kind of services they currently had, if any. They had been trying, unsuccessfully, for some time to inject this data into various municipal processes. However, once the judgment was handed down, and the municipalities began to compile the first report required by the court order, they turned to AFRA requesting the results of their surveys.[151] A further example of this shift in the relationship is that alongside the litigation, AFRA has made submissions to uMgungundlovu on how farm dwellers should be catered for in its IDP. Their suggestions have been taken on board and incorporated into the IDP. It thus is clear that the litigation has shifted the power relations between the parties, one of the hallmarks of the political impact recognised under the legal mobilisation approach.

Second, the case seems to have brought the local and district municipalities closer together (particularly uMshwati and uMgungundlovu). Both the build-up to the litigation and AFRA's work to conscientise various stakeholders about the contents of the judgment have brought the different municipalities into the same room repeatedly. Other local municipalities in the district have also been attending these talks, purportedly because they too want to use the judgment in order to implement services. There appears to be no obvious conflict between the municipalities, but rather the sense that they are taking a collaborative approach to water services provision.[152] This increased collaboration and cohesion also resonates with the kind of litigation value proposed under the legal mobilisation approach.

The *Mshengu* litigation thus has value on each of Brickhill's typologies of impact, namely, material, legal and political.

7 Conclusion

The *Mshengu* case thus illustrates that public interest litigation has value in many ways. While it has not yet procured water for the farm dwellers living in uMgungundlovu, the judgment establishes a process that hopefully should culminate in water services provision,

151 Interview with Mondli Zondi (n 9).
152 As above.

and in a uniform way that is not dependant on the whims of individual farm owners. It has also provided clarity on the legal obligations concerned. Nevertheless, the fact that the farm owners still wait for water, and the absence of any detailed engagement with the intermediary system, result in the conclusion that the value of the litigation in terms of both material and legal effect is present, but only partially. This is not the case in relation to political impact where there is a much stronger case for the value of the *Mshengu* litigation. Here the litigation has disrupted the pre-existing power relations by helping activists to be heard and to get taken seriously. It has also fostered intra-governmental cooperation.

A theme that repeatedly comes up is how the judgment provides clarity on who bears what obligation. It therefore is interesting that clarity is precisely the basis upon which the judgment can be critiqued. While the court cannot be faulted for its zeal in ensuring that the rights of farm dwellers are protected, the devil, as always, is in the detail. Specifically, the judgment appears to conflate the respective responsibilities of district and local municipalities in as far as they operate as water services authorities or not. This kind of boundary blurring may inhibit municipal action and should therefore be avoided.

Second, the judgment lays the obligation for water services provision on farms almost entirely at the door of local government, and thus misses an opportunity to engage with the intermediary system and how private resources can (legitimately in terms of both the broader constitutional framework and the regulatory system governing the right to water specifically) be deployed to further the fulfilment of constitutional rights. This probably is down to the way in which the case was framed by the applicants, which, as described above, resulted from some strategic trade-offs.

The right to water in section 27 of the Constitution, the intermediary system outlined in the Services Act, as well as any relevant provisions of existing municipal by-laws, weave a complex system for water services provision on privately-owned land. At the end of the day, a water services authority remains responsible for water services provision on farms, unless it has contracted a water services provider to do so, or unless an intermediary exists. If a farm owner is an intermediary by virtue of the contract that he has with his workers or labour tenants, then he may bear quite considerable obligations to provide water up to the standard set out in Regulation 3(b).

It is appropriate to conclude this discussion by allowing the activists who have worked to realise farm dwellers' rights to water to have the last word. AFRA have three key pieces of advice for others seeking to claim their water rights: Collating the facts and evidence to support claims is very important; litigation can be useful for many reasons but should always be a means of last resort used when other avenues have been exhausted; and one should spend time building relationships with everyone concerned. By the time the decision was taken to approach the court in this case, many of the municipalities and farm owners concerned supported this move as they understood the litigation as an attempt to get clarity for all of them, rather than as an attack.[153]

Farm dwellers seeking to claim their water rights do well to engage with the municipality, even if that can be a frustrating and resource-intensive exercise. The truth is that municipalities may well share farm dwellers' frustration about how to ensure that water is provided on private land. If a contract exists such that the land owner is an intermediary, then farm dwellers and municipalities can work together to ensure that land owners fulfil their obligations. In turn, the municipality designated as a water services authority can also ensure that intermediaries have the financial support that may be necessary to make it all happen. If all the affected parties work together, the intermediary system thus has the potential to further the realisation of the right to water in South Africa.

153 As above.

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One step forward, two steps back: A review of *Mushoriwa v City of Harare* in view of Zimbabwe's constitutional socio-economic rights

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Summary: *In 2013 Zimbabwe enacted a new Constitution, introducing a raft of new changes, among them, the introduction of constitutional*

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socio-economic rights. Not soon thereafter socio-economic rights were tested in the case of Mushoriwa v City of Harare *in 2014. The High Court made a finding in favour of the applicant, a decision which enforced the right to water in section 77 of the Constitution. The ruling offered the view that the water bylaws used were unconstitutional and contrary to the enabling statute. This judgment was welcomed as a 'first true test' of socio-economic rights under the 2013 Constitution. In* Hove v City of Harare *the High Court judge agreed with the reasoning of the Court in* Mushoriwa v City of Harare *that, in the event of a genuine dispute of a water bill, there should be a recourse to the courts for remedies. In 2018, however, the Supreme Court overturned the decision in the* Mushoriwa *case. It declared that water disconnections in terms of the water bylaw are above board. This raises questions as to the constitutional obligation to protect the right to water imposed upon all organs of the state. It is against this background that this article reviews the case of* Mushoriwa *and makes comments on the effects of this judgment, specifically about the enforcement of socio-economic rights in Zimbabwe.*

Keywords: *constitutionality; right to water; Mushoriwa; socio-economic rights*

1 Introduction

The right to water is entrenched in section 77 of the Zimbabwean Constitution.[1] The Bill of Rights in the Zimbabwean Constitution contains similar obligations to those contained in the South African Constitution.[2] Zimbabwe is one of only three countries in Southern Africa that expressly provide for the right to water (the other two being South Africa and the Democratic Republic of the Congo (DRC)).[3] Section 77 of the Zimbabwean Constitution provides that every person has the right to safe, clean and potable water.[4] Be that as it may, it is important to note that certain positive duties imposed by the right are not immediately enforceable.[5] This is

1 Constitution of Zimbabwe Amendment Act 20 of 2013.
2 T Chivuru 'Socio-economic rights in Zimbabwe's new Constitution' (2014) 36 *Strategic Review for Southern Africa* 127; A Moyo 'Basic tenets of Zimbabwe's new constitutional order' (2019) *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* 10.
3 G Matchaya et al 'Justiciability of the right to water in the SADC region: A critical appraisal' (2018) 7 *Open Access Journal* 1.
4 Sec 77(a) Constitution of Zimbabwe.
5 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development Journal* 134; C Heyns & D Brand (eds) *Socio-economic rights in South Africa* (2005) 309.

because the enforcement of the right, as in the case of most – if not all – socio-economic rights is subject to the availability of resources and progressive realisation.[6] Furthermore, this right is subject to limitation 'in terms of a law of general application and to the extent that such limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'.[7]

Several pieces of legislation regulating the use of and access to water for domestic use were in operation before the enactment of the 2013 Constitution. These include (i) the Water Bylaws 164 of 1913 which in section 8 empower a municipality, with notice in writing, to without compensation and prejudice to its right to obtain payment for the supply of water to the consumer, discontinue supplies to the consumer; and (ii) section 69(2)(e)(i) of Schedule 3 of the Urban Councils Act [chapter 29:15] which expressly empowers the Council to make bylaws that allow it to cut off water supplies. As noted by Muremba J in *Hove v City of Harare*:[8]

> Whilst our Constitution protects the right to water it also empowers local authorities to levy rates and taxes to raise revenue for service provision. This means that costs committed for the purpose of providing a safe water supply must be recovered. I take this to mean that the right to water does not prohibit disconnections of water services for non-payment.

Whether or not such interpretation accords with the Constitution remains disputed. The Community Water Alliance, for instance, argues that section 8 of Statutory Instrument (SI) 164 of 1913 is unconstitutional because of its implications on the right to water.[9] This article reviews the recent case of *City of Harare v Farai Mushoriwa*[10] where the Supreme Court of Appeal (SCA) reversed the decision of the High Court with regard to the legality of water disconnections in Zimbabwe.

2 The right to water under international law

It is important to explore the various international legal instruments that provide for the right to water. This is because the way in which the right to water is interpreted under international law becomes

6 Sec 77 Constitution of Zimbabwe.
7 Sec 86 Constitution of Zimbabwe.
8 HH 205/16.
9 Community Water Alliance 'Supreme Court ruling on arbitrary water disconnections: Implications on the human right to water in Zimbabwe', http://www.kubatana.net.ac.za (accessed 7 November 2019).
10 *City of Harare v Farai Mushoriwa* SC54/2018.

relevant in determining the scope and application of the right in our jurisdiction. Section 46 of the 2013 Constitution enjoins any competent court, tribunal, forum or body to consider international law and all relevant treaties and conventions to which Zimbabwe is a state party.[11]

It should be highlighted at this point that the right to water as contemplated by these international legal instruments has been domesticated into the law of Zimbabwe, culminating in section 77 of the Constitution. Section 327 of the Constitution requires international law to be domesticated under an Act of Parliament for it to be binding. It can therefore be ascertained that section 77 of the Constitution has the effect of domesticating international law on the right to water such that it becomes binding on Zimbabwe.

The convenient starting point to discuss the right to water in the international context is the United Nations Charter of 1945 (UN Charter).[12] The UN Charter is the founding document of the UN and is an instrument of international law. The document codifies the major principles of international relations and is binding on all members. While the UN Charter is not a source of international human rights law, it commits member states to certain values relevant for the attainment of human rights. One of these ideals is the promotion of higher standards of living, full employment, and conditions conducive to economic and social development.[13]

In addition to this, the UN Charter also calls for the identification of solutions to international social, economic and health-related problems.[14] These standards are relevant to the realisation of the right to water. This is because, while they do not expressly refer to the right, the right may be inferred from these provisions. This is because it may be argued that a society with perennial shortages of safe drinking water would certainly be hostile to these set goals. Therefore, an obligation to provide adequate potable water to citizens would be inherent under this Charter.

The second document essential to this debate is the Universal Declaration of Human Rights (Universal Declaration) which was adopted by the UN General Assembly in 1948.[15] From the outset it is important to note that the Universal Declaration is not a

11 Sec 46 as read with secs 326 and 327 of the Constitution of Zimbabwe 2013.
12 Charter of the United Nations.
13 Art 55 UN Charter.
14 Art 55(b) UN Charter.
15 Proclaimed by the United Nations General Assembly in Paris on 10 December 1928 by UNGA 217A.

binding instrument, nor is it a source of law in the strict sense. This notwithstanding, it is paramount to consider this document as it is the basis upon which many international agreements were concluded.[16] Further, the provisions of the Universal Declaration should be considered forceful because many of its contents form part of customary international law,[17] which is considered binding in many countries, including Zimbabwe.[18] Section 326 of the Constitution of Zimbabwe provides that customary international law is binding on Zimbabwe to the extent that it is not inconsistent with the Constitution or any Act of Parliament.

Article 25 of the Universal Declaration provides that everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and health. As is evident, article 25 of this document does not expressly mention the right to water.[19] However, there is a strong argument that this right is implied in this provision. This is because the understanding is that article 25 is not exhaustive but rather provides elements that constitute the right to an adequate standard of living. Moreover, it can further be argued that it was not necessary to expressly include the right to water in this document as one could not discuss the rights to food and health while excluding the right to water which is a prerequisite to the realisation of these rights.[20] This is reinforced by the foundational argument that human rights are interconnected and indivisible.[21]

In 1966 UN member states adopted International Covenant on Economic, Social and Cultural Rights (ICESCR).[22] ICESCR gives effect to the UN Charter and the Universal Declaration in relation to certain fundamental rights and freedoms.[23] It 'provides the legal framework to protect and preserve the most basic economic, social

16 N Silva, G Martins & L Heller 'Human rights interdependence and indivisibility: A glance over the human rights to water and sanitation' (2019) 19 *BMC International Health and Human Rights* 1.
17 H Hannum 'The UDHR in national and international law' (1998) 3 *Health and Human Rights* 145.
18 *France v Turkey* PCIJ 1927, on the application of customary international law. see also *North Sea Continental Shelf* cases; *S v Mann* 2008 (1) ZLR 1 (H).
19 Art 25 provides that everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care, and necessary services.
20 J Scanion et al *Water as a human right?* (2004) 53.
21 I Koch *Human rights and indivisible rights: The protection of socio-economic demands under the European Convention of Human Rights* (2009) 1.
22 International Covenant on Economic, Social and Cultural Rights adopted by the UN General Assembly on 16 December 1966 through GA Resolution 2200A (XXI), entered into force on 3 January 1976.
23 Preamble to ICESCR.

and cultural rights'.[24] Article 11 of ICESCR recognises the rights to an adequate standard of living, including sanitation, food and the continuous improvement of living conditions. In attempting to provide an interpretation of article 11 which considers the right to water, this provision has to be read with article 12 which provides for the right to health. As discussed earlier, the right to water cannot be discussed in isolation to other rights such as those to sanitation, food and health.[25] This stems from the very important debate on the interconnectedness and indivisibility of human rights.[26]

The task of providing an interpretation to this Covenant has been entrusted to the Committee on Economic, Social and Cultural Rights (ESCR Committee). The ESCR Committee is an independent expert body that has been appointed to oversee the implementation of the Covenant by state parties. The ESCR Committee consists of 18 experts that are appointed by way of ballot for four-year terms.[27] The ESCR Committee periodically provides General Comments on a myriad of issues such as the substantive issues arising from ICESCR.[28] General Comment 6 (1995)[29] explored the economic, social and cultural rights of older persons. The ESCR Committee noted concerning article 11 of ICESCR that '[o]lder persons should have access to adequate food, water, shelter, clothing, and health care through the provision of income, family and community support and self-help'.[30] In so doing, the ESCR Committee recognised the right to water via the right to an adequate standard of living.

In 2002 the Committee made available to the public General Comment 15. The General Comment considers substantive issues arising in the implementation of ICESCR. More specifically, it focuses on deciding whether this right is implicit in articles 11 and 12 of ICESCR.[31] The ESCR Committee found in favour of the existence of such a right when a generous interpretation of these provisos was afforded. It found that the legal bases of the right to water were as follows:[32]

24 Women, Peace and Security 'International Covenant on Social and Cultural Rights', https://blogs.lse.ac.uk/vaw/int/treaty-bodies/international-covenant-on-economic-social-and-cultural-rights/ (accessed 9 April 2021).
25 P Hall et al 'The human right to water: The importance of domestic and productive water rights' (2014) *Science and Engineering Ethics* 849.
26 Silva et al (n 16) 1. See also J Bouchard & P Meyer-Bisch 'Intersectionality and interdependence of human rights: Same or different?' (2016) 16 *Equal Rights Review* 186.
27 Women, Peace and Security (n 24).
28 See, eg, ESCR Committee General Comment 9 (1998).
29 ESCR Committee General Comment 6 (1995).
30 ESCR Committee General Comment 6 (n 29) 7.
31 ESCR Committee General Comment 15 (2002) 1.
32 ESCR Committee General Comment 15 (n 31) 2.

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

The ESCR Committee was of the view that the list of rights giving effect to the right to an adequate standard of living was not intended to be exhaustive.[33] This was as a result of the use of the word 'including' which signalled that the drafters intended more rights than simply the stipulated rights (food, clothing and housing) to be covered.[34] A considered interrogation of the right to water would indicate that the right to water was essential to the guarantee of an adequate standard of living as it was vital to the survival of any person.[35]

The right to water was inevitably linked to the right to the highest attainable standard of health in article 12 of ICESCR and other rights in the International Bill of Human rights such as the right to life and human dignity.[36] The ESCR Committee reasoned that in leading a life in human dignity, the right to water was indispensable and was a prerequisite to the realisation of other rights such as the rights to an adequate standard of living, including food, clothing and housing.[37]

The ESCR Committee noted that a major reason for the adoption of such an approach was the fact that the implementation and enforcement of this human right had been challenging in the context of a developing country.[38] At the time of the drafting of the General Comment (in 2003), over 1 billion persons across the globe lacked access to water, while several billions (an estimated 2,3 billion) lacked access to proper sanitation, a major cause of water contamination and water-based diseases.[39]

Instructive for the purposes of this article was the discussion on the normative content of the right to water in the General Comment.[40] It was noted that the right to water contains both freedoms and entitlements. Freedoms, *inter alia*, include 'the right to maintain access to existing water supplies necessary for the right to water,

33 As above.
34 As above.
35 As above.
36 As above.
37 ESCR Committee General Comment 15 1.
38 As above.
39 As above.
40 ESCR Committee General Comment 15 4.

and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.[41] In contradistinction, entitlements include 'the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water'.[42]

The ESCR Committee noted that, in determining whether the provision of water is adequate, it must be noted that the adequacy of the water could not be narrowly interpreted by focusing on volumetric quantities and technologies.[43] Rather, water had to be treated as a social and cultural good as opposed to a social good.[44] This notwithstanding, how this goal is attained had to be done in a manner that was sustainable, to ensure the future attainment of this right.[45] Of key importance was the fact that while what could be considered as an adequate amount of water for the realisation of this right could vary, certain factors had to be present in every scenario.[46] These are availability, quality and accessibility.

First, in terms of availability, the ESCR Committee notes that each person must have access to a sufficient and continuous water supply for personal and domestic use.[47] The amount made available for this purpose should correspond with the World Health Organisation (WHO) guidelines for domestic water quantity. Currently, the WHO provides that each person must be given access to 15 litres per day per person, as soon as possible.[48] It is worth noting that while this estimate is provided as a guide, it is recommended that every person be given access to at least 50 to 60 litres of water every day.[49] In emergencies, this daily limit may be reduced to 7,5 litres per person per day.[50] In this event, untreated water may be used for personal purposes such as laundry and bathing.[51] Importantly, the WHO notes that these amounts should be provided even if the quality of the water cannot be guaranteed.

41 As above.
42 As above.
43 As above.
44 As above.
45 As above.
46 ESCR Committee General Comment 15 5.
47 As above.
48 World Health Organisation 'Water, sanitation and health', https://www.who.int/teams/environment-climate-change-and-health/water-sanitation-and-health/environmental-health-in-emergencies/humanitarian-emergencies (accessed 30 March 2021).
49 M Gorsboth & E Wolf *Identifying and addressing violations of the human right to work: Applying the human rights approach* (2008) 8.
50 World Health Organisation (n 48).
51 As above.

Second, in terms of quality, the ESCR Committee notes that the water should be safe, meaning that it must be free of any micro-organisms, chemical substances, or radiological substances that could pose a danger to a person's health.[52] In other words, the water must have an acceptable colour, odour and taste necessary for personal and domestic use.[53] Finally, in terms of accessibility, four overlapping dimensions were identified. These were (i) physical accessibility – focusing on the fact that adequate water facilities had to be close to all sections of the population; (ii) economic accessibility – this entails that water, and water facilities and services must be affordable for all; (iii) non-discrimination – this entails that water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population; and (iv) information accessibility – this includes the right to seek, receive and impart information concerning water issues.[54]

Another critical aspect of General Comment 15 was that involving the general legal obligations of state parties.[55] The ESCR Committee observed that, while ICESCR provided for progressive realisation, in acknowledgment of the critical challenge of available resources, state parties have immediate obligations concerning the right to water.[56] These include the guarantee to dispense the right to water without discrimination and the obligation to take deliberate, concrete and targeted steps to realise articles 11(1) and 12 of ICESCR in as far as they relate to the right to water.[57] The ESCR Committee stated:[58]

> State parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realisation of the right to water. The realisation of the right should be feasible and practicable, since all states parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.

This requires, as with all other rights, that states respect, promote and fulfil this right.[59] The obligation to 'respect' includes the fact that states must refrain from engaging in any practice or activity that results in the limitation of equal access to water or arbitrarily interfering with traditional or customary arrangements for water

52 ESCR Committee General Comment 15 5.
53 As above.
54 ESCR Committee General Comment 15 6.
55 ESCR Committee General Comment 15 8.
56 As above.
57 As above.
58 As above.
59 ESCR Committee General Comment 15 (2002) 9.

allocations.[60] This includes 'disconnecting any person's water supply arbitrarily, without notice, consultation or reasonable opportunity for redress or in any situation where the person genuinely cannot afford water'.[61] The obligation to 'protect' requires the state to take all measures necessary to ensure that third parties do not interfere with the enjoyment of the right to water. This includes putting in place measures to ensure that any agents (individuals, groups, corporations and other entities) acting under their authority observe this obligation.[62] The obligation to 'fulfil' requires states to facilitate, promote and provide.[63] The obligation to promote dictates that the state must take positive measures to ensure the enjoyment of the right, while the obligation to provide entails that the state must assist individuals or groups that are unable to realise this right through their own means.[64]

Subsequent conventions became explicitly clear in recognising the right to water. Examples are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which in article 14(2)(h) entitles women to enjoy adequate living conditions, which include the right to water.[65] As far as children's rights are concerned, the Convention on the Rights of the Child (CRC) in article 23 provides for 'the right of a child to enjoy the highest standards of life, to combat diseases and malnutrition ... [provision] of adequate nutritious food and clean drinking water'.[66] Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) binds state parties to take measures to ensure the provision of adequate nutrition and safe drinking water.[67]

Given these developments, on 28 July 2010 the United Nations (UN) General Assembly adopted Resolution 64/292 which recognises the human rights to water and sanitation, acknowledging the centrality of these rights in the realisation of all human rights.[68] In terms of this resolution, states and international organisations are encouraged to provide financial resources for the purpose of building

60 As above.
61 Right to Water and Sanitation *Programme legal resources for the right to water and sanitation: International and national standards* (2008) 13.
62 ESCR Committee General Comment 15 9.
63 As above.
64 ESCR Committee General Comment 15 10.
65 Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981.
66 Convention on the Rights of Children, adopted 20 November 1989, entered into force 2 September 1990.
67 African Charter on the Rights and Welfare of Children CAB/LEG/24.9/49 (1990).
68 General Assembly Resolution 64/292 of 28 July 2010. See also United Nations 'International Decade for Action 'Water for life' 2005-2015', https://www.un.org/waterforlifedecade/human_right_to_water.shtml (accessed 30 March 2021).

capacity to realise the rights to water and sanitation.[69] The Resolution also welcomes the decision by the Human Rights Council that the independent expert on human rights obligations related to access to safe drinking water and sanitation must submit an annual report to the General Assembly.[70] This is built upon earlier resolutions of the Human Rights Council on human rights, specifically the rights to water and sanitation, such as Council Resolutions 7/22 of 28 March 2008 and 12/8 of 1 October 2009 as well as General Comment 15 by the ESCR Committee.[71]

It has been a decade since the recognition of water and sanitation as human rights by the UN General Assembly. The Special Rapporteur[72] on the Human Rights to Safe Drinking Water and Sanitation,[73] Léo Heller, released a statement to mark the occasion.[74] He was of the view that the adoption of the General Assembly Resolution on the rights to water and sanitation had positively influenced other decisions.[75] He cited three specific examples for this purpose. First, the Human Rights Council in September 2010 adopted Resolution 15/9 which affirmed the recognition of the rights to water and sanitation by the General Assembly. The Resolution clarified the legal recognition of these rights, observing that the rights were derivatives of the right to an adequate standard of living, which is considered a binding human right in most states.

Second, in May 2011 the WHO passed Resolution 64/24. This Resolution calls upon member states to ensure that their national health strategies promote the rights to water and sanitation as well as the Millennium Development Goals (MDGs) in so far as they relate to water and sanitation.[76] Finally, the UN General Assembly in December 2015 adopted Resolution 70/169 which acknowledges

69 As above.
70 General Assembly Resolution 64/292 of 28 July 2010.
71 As above.
72 A Special Rapporteur is an investigator who, within special procedure mechanisms, reports on a specific country perspective or a thematic issue to the UN Human Rights Council. They are appointed on a three-year basis without remuneration. By September 2020, there were 44 thematic and 11 country mandates. See United Nations Human Rights Office of the High Commissioner 'Special procedures of the Human Rights Council', https://www.ohchr.org (accessed 31 March 2021).
73 The function of a Special Rapporteur on the Right to Water and Sanitation had been there since 2008. Back then, the expert was called an independent expert on water and sanitation. The title changed in 2010 to Special Rapporteur on the Human Rights to Water and Sanitation when the UN General Assembly Resolution was passed.
74 United Nations Human Rights Office of the High Commissioner '10th anniversary of the recognition of water and sanitation as a human right by the General Assembly', https://www.ohchr.org (accessed 30 March 2021).
75 As above.
76 See World Health Organisation Resolution 64/24.

that the rights to water and sanitation are separate and distinct rights, which require different treatment to avoid possible implementation challenges and the possible neglect of sanitation as a result of it being treated as a secondary right.

The Special Rapporteur also noted that an important and critical achievement with regard to the rights to water and sanitation was the increased recognition of the links between the rights to water and sanitation and other human rights.[77] This accounts for a very important consideration in the human rights framework, that is, the interdependence and indivisibility of human rights. This work, in the opinion of the Special Rapporteur, has been supported the development of the domestic framework as well as the improved roles of various institutions and stakeholders.

For instance, the Special Rapporteur notes the refreshment of various legal frameworks since 2010 in countries such as Costa Rica, Egypt, Fiji, Kenya, Mexico, Morocco, Niger, Slovenia, Somalia, Tunisia and Zimbabwe, which now provide for express rights in this regard. He further observed that other countries that already afforded constitutional protection to these rights, such as Australia, Nepal and Togo, had gone a step further by developing subordinate legislation to enunciate the scope and limitations of these rights.

Concerning the institutional framework, the Special Rapporteur noted the importance of the roles of players such as autonomous water bodies and civil society organisations. More importantly, he observed the special role played by the courts. Many jurisdictions had passed judgments that reflected the UN General Assembly's decision to extend protection to these rights. For example, the Court of Appeal in Botswana, in the matter of *Mosetlhanyane & Others v Attorney-General*,[78] affirmed the rights to water and sanitation. In coming to its decision, the Appeal Court cited UN General Assembly Resolution 64/292.[79] It further observed the interdependence of the rights to water and sanitation to the rights to health and life.

The analysis of the Special Rapporteur concerning the rights to water and sanitation is critical but fair. Developments on the international front around these rights have been slow but steady. Over time, these developments have placed many governments in

77 'Water and sanitation as a human right by the General Assembly', https://www.ohchr.org (accessed 30 March 2021).
78 (2011) CACLB-074-10.
79 See, eg, *Mosetlhanyane & Others v Attorney-General of Botswana* (2011) CACLB-074-10 16.

a better position in which they can promote, protect and fulfil these rights as a result of the enhanced legal standing these particular rights now enjoy through interpretation and recognition (for example, via the various Resolutions discussed above).

3 Right to water as a constitutional right

Section 77 of the Constitution of Zimbabwe provides that every person has the right to safe, clean and potable water.[80] An obligation is placed upon the state to take legislative and other measures within the resources available to ensure the progressive realisation of this right.[81] The first point to note is that, unlike other rights that apply to citizens or persons who are ordinarily resident in Zimbabwe, the right to water is a right afforded to every person.[82] This means that any person who is within the boundaries of Zimbabwe has a right to water regardless of their status, the legality of their presence in Zimbabwe, or the period of their stay therein. Once a person finds themselves within the boundaries of Zimbabwe, section 77 begins to operate in their favour.[83] The second point is that the right to water is narrowed down to the right to potable, clean and safe water.[84] This must be distinguished from the right to have access to water bodies, the right to irrigation water, or the right to water in general as these fall in the ambit of environmental rights.[85] The Zimbabwean Constitution specifically provides for the right to safe, clean and potable water.

The question that arises at this juncture is what safe, clean and potable water is. What is the benchmark or, rather, the standard against which to measure whether water is safe, potable and clean? These questions are answered by General Comment 15 of the ESCR Committee.[86] It provides that water, as contemplated by section 77 of the 2013 Constitution, must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. A further qualification was

80 Sec 77 Constitution of Zimbabwe.
81 Sec 77(b) Constitution of Zimbabwe.
82 As above.
83 For an understanding of the meaning of the phrase 'every person', see A Magaisa 'Property rights in Zimbabwe's draft Constitution: Zimbabwe Briefing' *Issue 86*.
84 The rationale behind expressly providing for the right to potable, clean and safe drinking water is the need to preserve life in conformity with the obligation placed on the state.
85 Sec 73 Constitution of Zimbabwe 2013.
86 PH Gleick 'Basic water requirements for human activities: meeting basic needs' (1996) 21 *Water International Journal* 83.

that the water must be of acceptable colour, odour and taste for personal domestic use.[87]

4 Mushoriwa case

4.1 Facts of the case

The case revolved around the issue of water disconnections in Harare as empowered under the Urban Councils Act and the Water Bylaws. Specifically, in May 2013 the applicant received a water account of US $1 700.[88] The applicant disputed the contents of the bill, claiming that it belonged to a bulk water meter not connected to his leased premises.[89] On 31 May 2013 the respondent unilaterally and arbitrarily disconnected the applicant's water supply.[90] The applicant then filed an urgent chamber application.[91] Specifically, he sought a spoliation order directing the respondent to restore water services pending resolution of the dispute by the courts.[92]

Noting the urgency of the matter, and the importance and centrality of the provision of water, Bhunu J, with the consent of the parties, ordered that water services be immediately restored pending the determination of the application.[93] The rationale was that for the applicant to remain without water would be a 'catastrophe'.[94] The interim order, therefore, was aimed at ameliorating the situation.[95] Notwithstanding this lawful consent order prohibiting the respondent from disconnecting the water services of the applicant until the finalisation of the application, the respondent disconnected water services from the applicant's premises without a lawful court order.[96] For the respondent to restore water services at the applicant's property, it required threats of imprisonment for contempt of a valid court order.[97]

87 Safe drinking water is water that can be delivered to the user and is safe for drinking or food preparation, personal hygiene and washing. The quality is relative and depends on the standards of each country: MO Dinka 'Safe drinking water: Concepts, benefits, principles and standards' (2018) *Water Challenges of an Urbanising World, Intech Open.*
88 *City of Harare v Farai Mushoriwa* (n 10).
89 As above.
90 As above.
91 As above.
92 *Farai Mushoriwa v City of Harare* HC 4266/13 HC ZWHHC 195.
93 As above.
94 As above.
95 As above.
96 As above.
97 As above.

It was argued by the applicant that the termination of water supplies by the respondent without a court order amounted to unlawful self-help.[98] Moreover, it was the dispossession of the applicant's peaceful and undisturbed possession of water.[99] The High Court then issued a judgment granting a provisional order in favour of the applicant.[100] The matter, in this case, is now an appeal of this High Court decision by the City of Harare. At the time of this appeal, the respondent (applicant in the High Court) had already vacated the premises in question.[101]

4.2 High Court decision

In analysing the matter, the Court first examined the context of the matter. The Court noted that the matter was one falling squarely within the rights and obligations of the water service provider and the consumer.[102] Thereafter, the Court noted that the question to be answered was whether in the case of a disputed payment the appellant was entitled to self-help and unilaterally terminate water supplies to a citizen without recourse to law and become a law unto itself.[103] From the pleadings, it appears that there was an agreement that there was an obligation on the respondent to provide water to the applicant and a concomitant duty on the latter to pay. The dispute was squarely on the different approaches taken by the parties on what happens if there is disagreement in reading payment. The argument by the Harare City Council was that the bylaws give it an unfettered discretion to discontinue water without recourse to the law. The applicant countered the argument by pointing out that such an interpretation would be *ultra vires* section 198 as read with section 69(2) of the Third Schedule to the Water Act.

The Court found that in terms of the Act, the Council could only disconnect the water supply when it has sufficient proof that the amount claimed is due and after giving 24 hours' notice. Although the dispute could be resolved through the interpretation of the bylaws and the enabling Act, it would have been undesirable to ignore the Constitution owing to the implications that the judgment would have on the Bill of Rights. The Court then considered section 77 of the Constitution and concluded that as a public body, the Council is mandated by section 44 of the same to refrain from denying a citizen

98 As above.
99 As above.
100 *City of Harare v Farai Mushoriwa* (n 10).
101 As above.
102 *Farai Mushoriwa v City of Harare* (n 92) 195.
103 As above.

water without just cause. It appears from a reading of the judgment that 24 hours' notice and evidence of non-payment suffice as just cause to deny access to water. The Court further opined that where there is a dispute, it must be resolved by the court. Section 8 of the bylaw, therefore, was *ultra vires* the enabling Act and Constitution to the extent that it allows arbitrary disconnections.

4.3 Supreme Court decision[104]

Eight grounds of appeal were raised by the appellants in the Supreme Court, but these were narrowed down by the Court as relating to (i) the relief granted by the court *a quo*; and (ii) the legality of the appellant's actions of disconnecting water generally.[105] The second ground of appeal is relevant to this article. The appellant argued that the finding of the High Court that the bylaw which allows the City Council to disconnect water supply without recourse to the courts is both unconstitutional and *ultra vires* the enabling Act.[106] It was further argued that the right to water is not absolute, but subject to limitations necessary for regional and town planning.[107]

In the context of the above grounds of appeal the Supreme Court was called upon to make two determinations, namely, first, whether clause 8(a) of the Standard Contract (scheduled to the 1913 bylaws)[108] is inconsistent with the Third Schedule of the Urban Councils Act in so much as it allows the disconnection of water for non-payment by giving 24 hours' notice and without compensation. The second issue was the determination of the constitutionality of the bylaws. With regard to the first issue, the respondents argued that section 198(3), which contains the phrase 'in the opinion of the council', is subject to the Third Schedule of the Act which omits the phrase, therefore prohibiting the council from acting arbitrarily.[109] The Supreme Court found this conclusion to be 'somewhat narrow and unilineal'.[110] It held that the broad enabling provision empowers every urban council to do whatever it deems necessary to administer or effectuate its bylaws.[111] On the strength of this reasoning, it declared that the bylaws are *intra vires* the enabling provisions of the Act. The Court concluded that 'the 1913 bylaws regarded as a

104 As above.
105 *City of Harare v Farai Mushoriwa* (n 10).
106 As above.
107 As above.
108 General Notice 164 of 1913 titled bylaws for Regulations the Supply and Use of Water within the Municipality of Salisbury.
109 *City of Harare v Farai Mushoriwa* (n 10).
110 As above.
111 As above.

whole, are not only compliant and *intra vires* the enabling provisions of the Urban Councils Act, but also perfectly concordant with the overreaching notions of reasonableness'.[112]

The second issue for determination was whether the bylaws were constitutional in allowing the disconnection of water for non-payment by giving 24 hours' notice and without compensation. The Court referred to Gabru's work on the right to water in South Africa[113] in holding that the obligation imposed on the state is not unqualified to impose a duty on the state to provide water upon demand.[114] It noted that the reference to access rather than the right to the water means that the state only has an obligation towards those without means to ensure access to water.[115] More fundamentally it held that 'the availability of access to food and water depends upon the availability of the resources at the disposal of the state'.[116] The Court associated itself with the reasoning of Gabru[117] 'that fundamental rights and freedoms are not absolute, their boundaries being demarcated by the rights of others and by legitimate needs of society'.[118]

4.3.1 Implications of Supreme Court decision in the Mushoriwa *case*

The decision by the Supreme Court in the *Mushoriwa* case has a significant impact not only on the realisation of the right to water as a constitutional right, but also has a bearing on the social context. The Supreme Court established that the relationship between the state and a citizen about the right to water is the same as that between a service provider and a consumer. Properly understood, this means that, whereas the state must provide safe water to its citizens, there is a concomitant duty placed on the recipients to pay for the water they consume.[119] Accordingly, it is permissible and constitutional for water to be disconnected on 24 hours' notice and for non-payment. In this regard, the Court summarised as follows:[120]

> Bearing in mind the enormous economic and budgetary considerations that would ordinarily arise in the provision of safe and clean water to

112 As above.
113 N Gabru 'Some comments on water rights in South Africa' (2005) 8 *Potchefstroom Electronic Law Journal* 12.
114 *City of Harare v Farai Mushoriwa* (n 10).
115 As above.
116 As above.
117 As above.
118 As above.
119 As above.
120 As above.

> a large populace, it cannot be said that the disconnection of water supply because of non-payment for water consumed in any specific instance constitutes an infringement of the constitutional right to water. Indeed, it may be necessary to do so to ensure that the majority of non-defaulting consumers continue to enjoy their respective rights to water. This approach accords squarely with the dictates of section 86(1) of the Constitution, to wit, that fundamental rights and freedoms must be exercised reasonably and with due regard to the rights and freedoms of others.

The other implication of this decision is that it makes no provision for those who are not in a financial position to pay for the water they consume. The assumption is that every person can pay for water provision rendered by the state and that, therefore, those who do not pay must have their water supply disconnected to compel them to pay since they have capacity. In reaction to the *Mazibuko* judgment, which essentially is similar to the one under review, Rothmyr remarked that the Court approached the issue of disconnections based on an assumption that people do not pay because they are bad and are unwilling to settle their obligations.[121]

On the social sphere, the *Mushoriwa* judgment leaves the poor and the vulnerable exposed to the risks associated with a lack of access to clean, safe and potable water. With the legal obligation placed on the state to ensure the progressive realisation of the right to water diluted by the concomitant obligation placed on the recipient to pay for the water, there is no legal recourse for the poor. If the City Council decides to follow the letter of the law and proceed to disconnect the water supply to everyone who fails to pay for the service on the strength of this judgment, the result would be a social catastrophe.[122]

5 Critique of the Supreme Court of Appeal decision in the *Mushoriwa* case

As can be gleaned from the previous part, the reasoning and judgment of the Supreme Court in the *Mushoriwa* case presents us with several problems as far as the realisation of the right to water is concerned. Since the right to water is located within the social context, the decision has the potential of having a detrimental effect on the social well-being of the populace. It is submitted, with respect, that the Court failed to take into consideration the social impact the

121 2010 CCR 317.
122 *Farai Mushoriwa v City of Harare* (n 92) 195.

decision bore which, had they so considered, would have led the Court to a different conclusion.

First, the right to water is unique in its character and substance, thus it should not be analysed in isolation. An analysis of the right to water lays bare the interconnectedness and interdependence of universal human rights. The right to water, therefore, is inherent in other human rights, the most important being the right to life. Section 48 of the Constitution provides for the right to life,[123] as does article 6(1) of the International Convention on Civil and Political Rights (ICCPR).[124] Section 86(3)(a) of the Constitution makes the right to life absolute except in terms where the death penalty is imposed by a court of law in limited circumstances. It has been argued that the right to life requires a broader and extensive interpretation which imposes both a negative and positive obligation on the state in ensuring that the right is fully enjoyed. In the General Comment on the Right to Life, the Human Rights Council observed that '[t]he right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the expression of this right requires that states adopt positive measures.'[125]

Taking this interpretation about the right to water, a synergy between the two rights was established. It was well put in the following manner:[126]

> Disregarding this new development in the understanding of article 6 of ICCPR and assuming a narrow interpretation of such a right will nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water because this is one of the most fundamental resources necessary to sustain life.

Put differently, the right to water gives life to the right to life, for no person can survive without access to clean water. It follows that, even if the argument that the right to water is not absolute and can therefore be limited in terms of section 86 of the Constitution, such an argument would eventually not stand if this submission is anything to go by. Limiting the right to water essentially is tantamount to limiting the right to life and, therefore, it becomes unconstitutional even though this can be a far- reaching argument, and unlawful. The same argument will apply *mutatis mutandis* concerning the right to water and the right to human dignity which is also an absolute

123 *S v Makwanyane* 1995 (3) SA 391 (CC).
124 International Convention on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1973.
125 General Comment 6.
126 J Scanion et al *Water as a human right?* (2004) 53.

right.[127] It warrants no argument to say that a person's dignity is violated when they are denied access to clean water regardless of the intelligence of the grounds.

This argument is also sustained by the jurisprudence developed by the Inter-American Court of Human Rights on the right to water. It has been said that since the right to water is not included in the International Bill of Rights, its recognition has been achieved in two ways: first, as a subordinate right necessary for the realisation of other recognised rights whether civil and political rights or social economic, and cultural rights (derivative right); second, the right to water can be recognised as a stand-alone, new right (stand-alone right).[128] Proceeding from this standpoint, and assuming the argument that the right to water as provided for by the Constitution of Zimbabwe can be limited, it creates an absurdity when the right of water is derived from the right(s) to life and human dignity and, therefore, cannot be limited in terms of section 86 of the Constitution.

In other words, the effect of finding that the right to water can be limited may be summarised as follows: When the right to water is derivative from the right to life, it is absolute, but when it is provided as a stand-alone right, it can be limited in terms of section 86. The logical impurity of such a scenario is that the right to water will be afforded more and stronger protection in countries that do not explicitly provide for it in their constitutions, and weaker and less pronounced protection in countries that explicitly recognise the right.

The Court's finding in *Mushoriwa* that the right to water as enshrined in the Constitution places a concomitant obligation on the right holder to pay for the service is also problematic. The juridical impurity of such a finding is twofold, namely, (a) it neglects to canvass the issue of affordability; and (b) it significantly limits the obligation of the state to ensure that there is sufficiently clean, potable water for its people. These two issues will be dealt with in turn.

5.1 Affordability

Paragraph 12(c)(ii) of General Comment 15[129] reads that water and water facilities and services must be affordable for all. The direct

127 Sec 51 Constitution of Zimbabwe.
128 JM Chávarro 'The right to water in the case-law of the Inter-American Court of Human Rights' in R Abello-Galvis (ed) *Annuario Colombiano Derecho Internacional* (2014) 39.
129 As above.

and indirect costs and charges associated with securing water must be affordable. The issue of affordability ought to be canvassed sufficiently to establish what it contemplates as it is a relative concept that depends on the status and income of an individual. To some, affordability means parting with a few dollars while to others affordability may mean not paying anything at all. It is this latter class of people that are especially sought to be protected when the application of the right to water is analysed.

Section 56 of the Constitution prohibits, among other things, discrimination based on economic status.[130] Paragraph 13 of General Comment 15 recognises that vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes. Hence, there cannot be a blanket application of measures, but such should be targeted and specifically chosen to have regard to the income and economic status of each community. That there is a state obligation to provide water for free to people who cannot pay for the water was put beyond doubt by the General Comment.[131] The societal and economic situation of Zimbabwe ought to be taken into consideration when determining the issue of affordability, where over 90 per cent of the population is not formally employed. The Court should have concluded that a considerable portion of the population would not have the means to pay their water bills. Even Gabru, on whose work the Court relied, insinuated that 'the state's duty is only limited to those sections of the population without the means to ensure access to health care, food, water, and social security'.[132] Commenting on the South African case of *Mazibuko*, Kidd observed that the inability to pay for prepaid water would mean spending a considerable time without not only sufficient water but without water completely.[133] This highlights the adverse social impact of the lack of access to safe drinking water.

5.2 Obligation of the state

In addition to the international obligation of the state to ensure access to clean drinking water, section 77 of the Constitution also imposes an obligation on the state to take legislative and other measures, within the resources available to it, to ensure the progressive realisation of this right. A narrow interpretation of this phrase, as adopted by the Supreme Court in the *Mushoriwa* case, will effectively

130 Sec 56(3) Constitution of Zimbabwe.
131 United Nations Human Rights Office of the High Commissioner (n 74).
132 Gabru (n 93) 12.
133 M Kidd *Environmental law* (2008) 92.

lift this responsibility from the state to the citizens. This provision requires the state to be innovative, creative and to take positive steps to ensure that everyone – the 'haves' as well as the 'have-nots' – has access to clean and adequate water. Once the state relies solely on the purportedly concomitant obligation to pay for water, it has abdicated its obligation.

This approach is not congruent with the constitutional obligation inherent in the right to water. The state should find ways to protect those who cannot afford it, for they are also entitled to the enjoyment of the right. Such an obligation was placed on the state in the full realisation that 'all state parties exercise control over a broad range of resources including water, technology, financial resources, and, international assistance'.[134] Perhaps the Zimbabwean government can take lessons from South Africa, which provides a limited amount of potable water free of charge to poor households.[135] It is also estimated that at least 7,5 million (13 per cent) South Africans access no-cost drinking water through communal taps provided by municipalities.[136] Worth noting is the fact that the free basic water made accessible to these households through public taps can easily surpass the 6m3 per month per household that is prescribed by law.[137] It appears more encompassing and progressive, and a considerable fulfilment of the state's obligation.

The other ground for disagreeing with the decision of the Court is that it failed to apply its mind on the social implications of its judgment, particularly on women and children. It has already been highlighted that women and children, as vulnerable groups, have their right to water that is recognised under international law. When water is disconnected from a household, it is the women and children that suffer the most among other vulnerable groups, such as persons with disabilities. For women and children, the water crisis is personal. They are responsible for finding a resource their families need to survive for drinking, cooking, sanitation and hygiene.

Scanion[138] noted that the right to water provided in CEDAW[139] was a realisation of the traditional burden placed upon women in

134 Para 18 General Comment 15.
135 *City of Harare v Farai Mushoriwa* (n 10).
136 KW Scheihing et al 'A strategy to enhance management of free basic water via communal taps in South Africa' (2020) 64 *Utilities Policy* 1043.
137 Free Basic Water Implementation Strategy Version 2, now superseded by Free Basic Water Implementation Strategy 2007. See further *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC) paras 167-169 where the Court upheld the free basic water policy.
138 As above.
139 As above.

developing countries go long distances to fetch water. The plight of children is far worse. Being children, they do not have money to pay for the water and rely on the ability of their parents to do so, failing which they are exposed to a lack of access to water, diseases, and general traumatic conditions. A household is a composite unit, which often includes women and children not disregarding the ever-evolving composition of families, and if the Court had considered their welfare, it probably would have arrived at a different conclusion.

In any event, section 81(2) of the Zimbabwean Constitution unequivocally states that in any matter that may involve a child, the best interests of the child are the paramount consideration. Although this was not a matter brought before the Court, it would have been prudent to consider the implications of the Supreme Court of Appeal's judgment in later matters, and how this ruling could effectively limit the rights of vulnerable groups such as women and children. In this case, the interests of the child were not even considered, let alone given significant consideration. It was incumbent upon the Court to consider such interests, but the Court failed the child. According to section 81(2) it is unconstitutional for a court to give a judgment that is averse to the welfare of the child. The lack of clean, sufficient water is an antithesis to the best interests of the child.

5.3 Comparative law

Recent jurisprudential developments regarding the right to water have added another requirement that must be present for disconnections to be justified. Where both substantive and procedural requirements as discussed above have been met to warrant legal water disconnections, water authorities must ensure the provision of basic minimum amounts of water and sanitation to the person faced with disconnection, in order to preserve life.[140] Disconnections, therefore, must only affect the individual to the extent that he is deprived of access to water which is beyond that which is necessary for his basic well-being and survival. The underlying argument here is that access to a basic minimum amount of water has nothing to do with the ability to pay, but has everything to do with dignity, health, and the realisation of other rights, even where disconnection is allowed.

140 C de Albuquerque 'On the right track: Good practices in realising the right to water and sanitation' United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Lisbon 2012.

In South Africa, the Constitution[141] which also enshrines the right to sufficient water in section 27, mirroring section 77 of the Constitution, the courts have had to rule on the issue. In the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*[142] the Court held that the disconnection of water supply must not result in the denial of basic water supply for non-payment where the person proves, to the satisfaction of the authorities, that they are not able to pay for basic water services. In finding against the Council, the Court established that the respondent had neither proved that the disconnections were carried out on valid grounds, nor did it show that due process was followed in effecting the disconnections. This is an approach that has been recommended for adoption in Indian jurisprudence on the right to water.[143]

However, some countries have gone a step further by expressly prohibiting the disconnection of water for domestic use. The United Kingdom government in 1999 amended its Water Industry Act to the effect that disconnections of water and sewage services for reasons of non-payment by domestic consumers became illegal. In New Zealand the Local Governance Act prohibits the disconnection of water and sanitation services except in the interests of public health. The approach that was taken by the court here is progressive. It only requires those affected by the disconnection to allege that there indeed was a disconnection.

The onus will fall on the authority carrying out the disconnection to prove that the disconnection was done according to valid grounds and that due process was followed. It is not for the affected persons to prove that the disconnections were done on invalid grounds and that due process was not followed. In *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*,[144] for example, the Superior Tribunal de Justiça in Brazil dismissed an appeal by the State Water Utility after it had shut down the water supply to a resident who was experiencing financial difficulties as a result of the accidental burning down of the resident's dwelling (a wooden shack). The Superior Tribunal found that water was an essential public service that could not be interrupted based on non-payment, in the event of a lack of means. Such disconnections were found to be inhumane illegal acts. The Superior Tribunal Reasoned as follows:

141 The Constitution of the Republic of South Africa, 1996.
142 2002 (6) BCLR 625 (W).
143 J Kothari 'The right to water: A constitutional perspective' (2005) 8 *Potchefstroom Electronic Law Journal* 1.
144 *Superior Tribunal de Justiça Resp* [1999] 201 112.

> The water company must use the appropriate legal means available and it cannot take justice in its own hands as we live in the rule of law and disputes are decided by the judiciary and not by individuals. It further emphasised that '[w]ater is an essential and indispensable good for the health and hygiene of the population. Its supply is an indispensable public service, which is subordinated to the principle of continuity, making impossible its interruption especially due to late payment.'

It referred to its own earlier judgment in case 8.915 – MA, DJ of 17 August 1998 where it was ruled that

> water supply, because it is a fundamental public service, essential and vital for human beings, cannot be suspended for late payment of respective fees, as the public administration has reasonable means to recover user debts. Moreover, if the public services are provided on behalf of all the community, it is an illegal measure to deny it to a consumer merely for late payment.[145]

Another interesting case in South Africa was *City of Cape Town v Strümpher*.[146] As opposed to the approach of the Superior Tribunal, particularly about the issue of the disconnection of water services for non-payment, *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, which approached the matter of disconnections from a public service public good perspective, the Supreme Court of Appeal approached the issue of disconnection of water supply over non-payment as not only a right to water violation, but also a fairness and equity violation. The thinking in this regard was that '[t]he 'right to the supply of water cannot be construed as only resulting from contractual obligations without giving any consideration to the principles of fairness and equity which apply in case of disconnection of water supply under South African law'.[147]

In *Quevedo, Miguel* Ángel *y Otros c/Aguas Cordobesas SA*[148] the Juez Sustituta de Primera Instancia Civil y Comercial in Argentina adopted a similar approach to *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, identifying the public service nature of the water provision. However, the two cases differ on whether or not disconnections should be permissible. It was held in *Quevedo* that if private water companies (under a public concession contract) sought to disconnect water over non-payment, they must provide a minimum daily amount of 200 litres of water per household, if the

145 As above.
146 2012 54 (ZASCA).
147 As above.
148 *Quevedo, Miguel* Ángel *y Otros c/ Aguas Cordobesas SA* (2002) Juez Sustituta de Primera Instancia Civil y Comercial (Ciudad de Córdoba).

reason for the disconnection of the water supply was non-payment due to a lack of means.

From these cases it is clear that there is no one approach to dealing with the issue of disconnections across jurisdictions. However, the preferred approach is that disconnections for non-payment are lawful only on the condition that they are not arbitrary and that the person facing disconnections is left with access to a basic minimum amount of water necessary for their well-being.

6 The missed opportunity

The *Mushoriwa* case presented the judiciary with the opportunity to pronounce itself on the scope of the obligation of the state to ensure the realisation of socio-economic and cultural rights. It should be noted that the decision in *Mushoriwa* transcends beyond the right to water, to include most socio-economic rights. Unfortunately, the effect of the judgment was that there is no distinction between the right to water before the enactment of the 2013 Constitution and after its enactment, although the 2013 Constitution introduces third-generation rights in Zimbabwe's constitutional dispensation. There was an expectation that the Court would use the Constitution as a transformative tool, in transforming the society following the emerging notions of social justice. A comment on the role of the South African Constitution in transforming society is instructive:[149]

> At the same time, the Constitution could not only look into the past but also needed to provide some kind of vision of the future society South Africa would become. There are elements of the Constitution which we classify under the heading 'reform' that are not backward-looking but seek to provide a blueprint for a future just society: the socio-economic rights in the Constitution, we argue, fall under this heading, although they are also partly justified by the redress component.

The narrative of the transformative nature of the Constitution was outlined by Klare who distinguishes a constitutional order that seeks to retain and maintain the *status quo* from the one that seeks to transform it. He theorises the latter as transformative constitutionalism which he describes as 'a long-term project of constitutional enactment, interpretation, and enforcement … committed to transforming a country's political and social institutions'.[150]

149 D Bilchitz *International Institute for Democracy and Electoral Assistance (International IDES): Assessing the performance of the South African Constitution* (2016).

150 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

The Constitution of Zimbabwe is transformative having been a product of over a decade of lobbying for a new constitution. It marks a break with the past and also sets goals for the future and the new trajectory on which the country shall traverse. The concept of transformative constitutionalism was not only negated but the Court saw a 1913 bylaw which related to access to water compliant with a constitution enacted in 2013, 100 years later.

7 Conclusion

The *Mushoriwa v City of Harare* judgment, with respect, fundamentally limits the realisation of not only the right to water but to socio-economic rights in the broader sense. It therefore is impugned on the grounds canvassed herein. It is based on a narrow and isolated appreciation of the declaration of rights, generally, and the right to water, in particular. Disconnections of water supplies for domestic use where access pre-exists is lawful only under very limited circumstances. It is submitted that the disconnection of water supply for non-payment should be in strict adherence to due process so that it does not become arbitrary and, therefore, unconstitutional.

Foreign jurisprudence discussed in this article, especially in the case of *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, demonstrates that the disconnection of water services for non-payment should be deemed an inhuman and illegal act which should not be given space in our societies. This is particularly because of the impact of water disconnections on health and hygiene, as well as on other inter-related human rights such as life and dignity. While such foreign jurisprudence only has a persuasive value in our jurisdiction, it is instructive in demonstrating the availability of much bolder approaches in the recognition, application and enforcement of the right to water.

The substance of the right to water and how it is inherent in some of the non-derogable rights in the Constitution must compel us to lean towards outlawing disconnections rather than legalising them. The importance of access to water was even noticed in the High Court in the *Mushoriwa* case where the judge had to order that pending the determination of the case, water access had to be restored immediately. The judge stated:[151]

151 *Mushoriwa v City of Harare* HH-195-14 (our emphasis).

> Having regard to the urgency of the case when seized with the matter I immediately ordered by consent of the parties restoration of the water services forthwith pending the determination of this application to avert a catastrophe as one cannot survive without water. The respondent duly complied thereby ameliorating the urgency of the matter.

It therefore is an affront of logic to assume that there will be no catastrophe if water disconnections stemming from non-payment take place.

However, if the thinking is that non-payment is a legitimate ground for disconnections, on the basis that citizens would not be compelled to pay their water bills if there are no serious consequences in the case of non-payment (such as disconnections), there must still be a rights-based approach to this. The UN Human Rights Council Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in 2010 identified an approach that could be useful for this purpose. The expert noted:[152]

> When water disconnections are carried out due to defaulting payment, due process must be followed before disconnection and it must be ensured that individuals still have at least access to a minimum essential level of water. Likewise, when water-borne sanitation is used, water disconnections must not result in denying access to sanitation.

Therefore, if water disconnections take place, the minimum core obligations concerning this right must still be realised. This having been said, it may be soundly concluded that, while including the right to water in the Declaration of Rights was one step forward, the restrictive interpretation of the right by the courts and the pursuance of cost recovery measures by the state effectively make the right redundant and makes a mockery of the Declaration of Rights in totality.

152 Cited in W United & W Lex *The human rights to water and sanitation worldwide: A selection of national, regional and international case law* (2014) 28. See also UNHRC Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation 'Good practices related to access to safe drinking water and sanitation: Questionnaire' (2010) [Question 3].

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- 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 2020
Compiled by: I de Meyer
Source: http//www.au.int (accessed 1 June 2021)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99*	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**54**	**46**	**49**	**30**	**42**	**34**

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid.