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Contents

Editorial

Articles

The free movement of people in Africa as a human right
and as an economic right: From the African Charter to
the African Economic Community Protocol of 2018
by Konstantinos Magliveras and Gino Naldi 1

Responsiveness of the African Continental Free Trade
Agreement to diet-related non-communicable diseases:
A human rights analysis
by Petronell Kruger and Safura Abdool Karim..... 24

Implications and opportunities of the international
refugee protection regime for national human rights
institutions in Africa
by Vivian Nasaka John-Langba..... 51

Freedom of expression and African elections: Mitigating
the insidious effect of emerging approaches to
addressing the false news threat
by Marystella Auma Simiyu 76

Promoting civic and voter education through the use of
technological systems during the COVID-19 pandemic
in Africa
by Paul Mudau 108

Who votes in Tanzania? An overview of the law and
practices relating to parliamentary elections
by Elia Mwanga 139

Critical reflections on the justiciability of the right to
education in Ghana
*by Francis Kofi Korankye-Sakyi, Solomon Faakyee and
Peter A Atupare*..... 161

Due process or crime control? An examination of the limits to the right to silence in criminal proceedings in Ghana
by Isidore Kwadwo Tufuor 187

Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence
by Perpetua Akoth Adar..... 213

A human rights-based approach to implementing Target 11.6 of Sustainable Development Goal 11 in Zimbabwe
by Liberty Kudzai Masekesa..... 241

Recent developments

The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?
by Hoolo 'Nyane 266

Protected areas, community rights and affirmative action: The plight of Uganda's Batwa people
by Alexander Paterson..... 289

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

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

Editorial

Indexing

Since its first issue appeared in 2000, the *African Human Rights Law Journal* has made great strides. The editors take pride in noting that the *Journal* is now indexed in SCOPUS; the International Bibliography of Social Sciences (IBSS); the Directory of Open Access Journals (DOAJ); the Scientific Electronic Library Online (SCIELO); and is accredited by the South African Department of Higher Education and Training (DHET).

Context

This issue of the *African Human Rights Law Journal* is published just after the African Union (AU) Assembly, on 6 February 2022, has adopted a fourth substantive protocol to the African Charter on Human and Peoples' Rights (African Charter), the Protocol to the African Charter on the Rights of Citizens to Social Protection and Social Security (African Social Security Protocol). Earlier, in 2003, the Assembly adopted the Protocol to the African Charter on the Rights of Women (African Women's Protocol); in 2016 the Assembly adopted the Protocol to the African Charter on the Rights of Older Persons in Africa (African Older Persons Protocol), and in 2018 it adopted the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (African Disability Protocol). Each of these Protocols requires 15 ratifications to ensure its entry into force. The African Women's Protocol reached this milestone and by July 2022 it had been ratified or acceded to by 42 states. By July 2022 the threshold target of 15 ratifying states had not been reached in respect of any of the other three treaties. The Older Persons Protocol received six ratifications, and the Disability Rights Protocol, three (see a graphic representation of status of ratification at <https://www.chr.up.ac.za/dru-news/3089-centre-hosts-high-level-meeting-for-heads-of-missions-in-pretoria-to-encourage-ratification-of-three-au>).

instruments). No record of ratification of the Social Security Protocol is available. A fourth protocol to the Charter – indeed chronologically the first to be adopted – the 1998 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights, entered into force in 2004, and by July 2022 had been ratified by 33 state parties to the African Charter.

To draw further attention to the need for ratification of the African Older Persons Protocol, the African Disability Protocol and the African Social Security Protocol, the *Journal* invites contributions on aspects of these protocols for potential publication in future issues.

Contents overview

This issue of the *Journal* accounts for the human rights implications of a landmark continental treaty, the African Continental Free Trade Agreement (AfCFTA). The AU Assembly adopted the AfCFTA on 21 March 2018, and it entered into force on 30 May 2019. So far, 43 countries on the continent have become party to the Agreement. Magliveras and Naldi trace the historical evolution of the treaty from the adoption of the African Charter in 1981 to the adoption in 2018 of the Protocol to the African Economic Community (AEC) Treaty on the free movement of persons. Against this background, the authors consider the free movement of people in Africa as a human and as an economic right.

Kruger and Abdool Karim consider the responsiveness of the AfCFTA to diet-related non-communicable diseases. They call for a human-rights based approach to trade law, and make an argument for the protection of diets as part of the rights to food and health.

The issue deals with two matters of relevance to Africa as a whole, namely, refugee protection and elections. Of the 55 AU member states, 46 have established national human rights institutions (NHRIs). John-Langba examines the potential and actual role of NHRIs in advancing the refugee protection regime with reference to the United Nations High Commissioner for Refugees and the Global Compacts on Refugees and Migration.

Three articles deal with aspects of elections on the continent. Simiyu addresses the false news threat in African elections, in light of authoritarian regimes adopting practices to suppress critical voices and reduce the transparency and integrity of electoral processes. Calling for a human rights-based approach to addressing the scourge of false news, the article compares and contrasts measures adopted

during elections in South Africa (2019 and 2021) and Tanzania (2020). In his contribution Mudau takes stock of how voter education was achieved during the COVID-19 pandemic in Africa through the use of technology. Mwanga examines laws and practices relating to parliamentary elections in Tanzania and their implications for the right to vote. Mwanga concludes that Tanzania's electoral laws and practices reduce citizens to the role of rubber stamps. The article recalls the decision of the African Court on Human and Peoples' Rights (in *Tanganyika Law Society and the Legal and Human Rights Centre v Tanzania; Christopher R Mtikila v Tanzania*) which ordered Tanzania to implement constitutional, legislative and other measures necessary to undo the constitutional and legislative prohibition on independent candidates in elections. Mwanga notes that, to date, Tanzanian authorities have not given effect to the Court's order.

The last four contributions focus on the domestic level. Two contributions deal with aspects of human rights law in Ghana. Korankye-Sakyi, Faakyee and Atupare provide reflections on the justiciability of the right to universal basic education in Ghana, taking into account the use of the concepts 'feasibility' and 'resource availability' in the Constitution. Tufuor examines the tension between the 'due process' or 'crime control' models in Ghana, with reference to the limits to the right to silence in criminal proceedings and its associated privilege against self-incrimination. Adar discusses the use of strategic litigation to provide redress for gross human rights abuses during sexual and gender-based violence in Kenya's 2007-2008 post-election period. Masekesa adopts a human rights-based approach to implementing Target 11.6 of Sustainable Development Goal 11 in Zimbabwe, which requires local authorities to reduce 'the adverse per capita environmental impact of cities, including by paying special attention to the quality of air and waste management'. The author investigates the implications of the constitutional right to a healthy environment guaranteed under the 2018 Constitution of Zimbabwe for the efforts of local authorities to reduce this adverse impact.

Recent developments

Decisions in two recently-decided cases are discussed in this section. The first is the Lesotho High Court's 2020 decision in *Lesotho Medical Association v Minister of Health*, in which the Court held that the failure by the Ministry of Health to provide personal protective clothing to health workers was a violation of the right to life. This decision prompted 'Nyane to examine the interface between the right to life and the right to health under the law of Lesotho. The

second is the 2021 decision of the Ugandan Constitutional Court in *United Organisation for Batwa Development in Uganda v Attorney-General*. In discussing the decision, Paterson considers the adequacy of affirmative action redress to address the plight of the Batwa indigenous peoples in Uganda.

Appreciation

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 those acting as anonymous reviewers.

We extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights for this particular issue,: Nahaja Adam; Kwadwo Appiagyei-Atua; Evelyne Asaala; Ashwanee Budoo; Annelie de Man; Cristiano D’Orsi; Bonolo Dinokopila; Ebenezer Durojaye; Elvis Fokala; Jonathan Kabre; Ronald Kagungulu; Selemeni Kinyunyu; Trésor Makunya; Michelle Maziwisa; Kasey McCall Smith; Godfrey Musila; Perekeme Mutu; Robert Nanima; Ntandokayise Ndlovu; Tom Nyanduga; Michael Nyarko; Godwin Odo and Ithumeleng Shale.

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The free movement of people in Africa as a human right and as an economic right: From the African Charter to the African Economic Community Protocol of 2018

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Summary: *The right to freedom of movement of persons in a state is recognised by article 12 of the African Charter on Human and Peoples' Rights as a fundamental human right but, more generally, freedom of movement is also exercised in the context of continental economic integration, a crucial norm in economic integration projects. Not long after the entry into force of the African Charter in 1986, the first steps towards economic integration were taken, and the freedom of movement was enshrined in the Treaty Establishing the African Economic Community. As the AEC lost steam, the African Commission*

* LLB (Athens) LLM (Exeter) DPhil (Oxford); kmagliveras@aegean.gr. A version of this article was presented at the Conference on the African Charter on Human and Peoples' Rights @40, Centre for Human Rights, University of Pretoria, in collaboration with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, 2 July 2021.

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on Human and Peoples' Rights upheld the right to unhindered trans-border freedom of human mobility and curtailed attempts by states to interfere with it. In 2018 the adoption of the Protocol to the AEC Treaty on the free movement of persons manifested in an unambiguous manner the economic aspects of this human right. This article reviews the relevant African Union instruments on the free movement of persons and examines the relevant decisions issued by the African Commission. It also explains how the human rights aspects of the freedom of movement closely interact with its economic features and the importance that an expansive and properly drafted prohibition of discrimination has in securing that human mobility on the continent will not be compromised.

Key words: *freedom of movement of persons; article 12 of the African Charter on Human and Peoples' Rights; regional economic integration; Protocol to the African Economic Community Treaty on Free Movement; African Continental Free Trade Area*

1 Introduction

Generally speaking, the freedom of movement of persons, over and above being a fundamental but qualified human right, also entails an aspect of personal economic freedom and development. This has usually been applied in the context of the economic integration pursued by regional international organisations.¹ The amalgamation of the freedom of movement as both a human right and a protected economic freedom finds explicit expression in article 45 of the Charter of Fundamental Rights of the European Union (EU).² In the context of Africa, a right to freedom of movement has been set out in article 12 of the African Charter on Human and Peoples' Rights (African Charter) as the liberty to move within the territory of state parties and as the right of residence therein, which can also be construed as economic freedoms attached to individuals. To that

¹ Specifically for Africa, see African Commission on Human and Peoples' Rights General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (article 12(1)), adopted 10 November 2019, para 61 (General Comment 5) referring to an expansive interpretation of the freedom of movement, which promotes regional integration and trade, while advancing the Agenda 2063 aspirations, to which reference is made later.

² See also the third paragraph of the Preamble, Official Journal of the European Union (OJ), C 326, 26 October 2012 391. See further Caribbean Court of Justice, *Advisory Opinion of the Caribbean Court of Justice in Response to a Request from the Caribbean Community* [2020] CCJ 1 (OJ) (AO), (2020) 59 ILM 708, confirming that the free movement of member states' nationals within the Caribbean Community is both a 'fundamental Community goal' and 'a fundamental principle', a conclusion first reached by the Court of Justice in *Myrie v State of Barbados* [2013] CCJ 3 (OJ) (2013) 83 WIR 1.

extent, they arguably constitute ‘personal economic freedoms’, which in the process intertwine with the principles of regional economic integration.³ These rights were expanded further in the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted in 2018 (2018 Protocol), to expressly include the associated right of establishment.⁴ The rights guaranteed in the two instruments are similar but not identical with the latter addressing issues such as mutual recognition of qualifications and social security benefits.

As will be explained, this development is in line with Agenda 2063, which advocates the free movement of people as part of the continental integration agenda. The right to free movement of persons, which could at the same time be regarded as a human right and as a fundamental economic right, will be safeguarded when the 2018 Protocol enters into force in either or both of these manifestations, depending on the circumstances. Moreover, were the 2018 Protocol to be considered, broadly speaking, as a human rights instrument, it could fall within the competence of the African Court on Human and Peoples’ Rights (African Court).⁵ Consequently, pending the operationalisation of the African Court of Justice and Human Rights, in cases of disputes regarding its interpretation, application and implementation, the African Court should have separate and original jurisdiction to hear interstate disputes and also to give advisory opinions.⁶ However, importantly, article 30(2) of the 2018 Protocol stipulates that the nationals of the African Economic Community (AEC) member states, who claim to have been denied their rights under it, are entitled to complain to the African Commission on Human and Peoples’ Rights (African Commission).

3 Signed 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217; all AU member states except Morocco are parties.

4 Adopted 29 January 2018, not yet in force. The 2018 Protocol requires 15 ratifications to enter into force, art 31(1). The Treaty Establishing the African Economic Community was signed 3 June 1991, entered into force 12 May 1994 (1991) 30 ILM 1241.

5 See arts 3 & 7 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, signed 10 June 1998, entered into force 25 January 2004. In *Actions pour la Protection des Droits de l’Homme (APDH) v Côte d’Ivoire* App 1/2014 (2016) para 57 the African Court laid down a test in order to answer the question of whether a treaty constituted a human rights instrument; it was necessary to consider the purpose of the instrument, reflected either by an express enunciation of rights or by binding obligations on states for the enjoyment of those rights. It would appear that the 2018 Protocol meets this test.

6 Art 4 African Court Protocol (n 5). See art 31(2)(b) 2018 Protocol.

This article is concerned with the right to the free movement of persons and not with the process of migration across Africa.⁷ Even though they share many common characteristics, the former is wider than the latter. In the beginning, the article analyses the right to free movement as was enshrined in the African Charter and clarified/applied through the decisions of the African Commission, while bearing in mind the relevant provisions in the 2018 Protocol. It then explains why, as an economic freedom, the right to the free movement of people is part and parcel of any multilateral economic integration institution. This of course is the case with the AEC, which was established 10 years after the adoption of the African Charter. Thus, the article argues that the freedom of people to move, as described above, could be perceived as a fundamental human right but also as an economic right to be enjoyed by the population of those states partaking in an economic integration project. After observing that the AEC was left to flounder, presumably because African states were not ready to implement its goals and meet the deadlines set, the article examines the main features and provisions of the 2018 Protocol. Thirty-five years after African states decided to embark on economic integration, they finally took the first decisive step to ensure that economically-active Africans will, without discrimination, be guaranteed the right to seek and accept employment in any other AEC state. In that respect, the objective of an African Common Market has started to take shape.

Finally, taking stock from the fact that over time it has become apparent that certain issues in the African Charter require clarification and elaboration, the article addresses the more general question of its amendment, and perhaps revision. When a multilateral instrument covering a subject as topical as human rights was first negotiated and concluded more than 40 years ago, it seems appropriate that its contents and its contemporary relevance are reviewed both from a substantive point of view (namely, the envisaged rights and fundamental freedoms and the extent of the protection offered) and from an institutional point of view (namely, the relationship between the African Commission and the African Court, the ability of alleged victims to petition the African Court without obstacles as a personal right not subject to the discretion of states parties, and so forth). Finally, the question of codification of the African Charter to incorporate the provisions of the three additional Protocols to it (reference to these instruments is made later in the article) is touched upon.

⁷ Therefore, continental instruments such as the AU Revised Migration Policy Framework for Africa and Plan of Action (2018–2030), which was adopted in 2018 (replacing the previous one from 2006) will not be examined.

2 An examination of article 12 of the African Charter in light of the 2018 Protocol and its interpretation by the African Commission

The African Charter is the first continental-wide treaty to address free movement. Article 12 thereof secures various aspects of this right, described by the African Commission as ‘a fundamental human right to all individuals within states’.⁸ It is important to stress this point because the African Charter, unlike the 2018 Protocol, is not designed to secure a general right of migration or to promote cross-border mobility; its principal purpose is to guarantee rights for individuals within the territory of individual state parties. The African Charter, unlike article 6 of the 2018 Protocol, does not guarantee a right of entry and state parties continue to retain the right to regulate the issue of third country nationals entering and leaving their territory as a matter of state sovereignty.⁹ This remains the case under the 2018 Protocol which, it should be observed, as opposed to article 12(2) of the African Charter, makes no explicit provision for a right of exit for participating states’ own nationals. However, such a right must per force be implied because otherwise the freedom of movement would be negated. In particular, the freedom of movement is comprised of several elements, among others, the right of participating states’ nationals to enter, reside and move freely through the host state, as well as their right to exit their home state to exercise their (economic) right of free movement. In its General Comment 5 the African Commission has acknowledged the wider socio-economic dimension of this right.

To what category of persons does the right of free movement apply? Article 12(1) refers to ‘every individual’ (of course, the rights guaranteed by the African Charter, with certain exceptions such as the right to vote, apply equally to non-nationals). In keeping with other international instruments and with international jurisprudence, the right extends to individuals of whatever nationality, and not only a state’s own nationals or nationals of other African countries.¹⁰ According to the African Commission’s General Comment 5, the

8 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 187.

9 As above.

10 According to the African Commission states are obliged to secure the rights protected by the African Charter to all persons within their jurisdiction, nationals and non-nationals alike; *Rencontre Africaine pour la Defense des Droits de l’Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 22. The victim in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) was an US citizen, while in *Kenneth Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) the applicant was an Australian citizen.

definition of 'every individual' extends to those who are in the state irregularly, including 'asylum seekers' and 'undocumented migrants'. The African Commission has held that persons with an irregular status are not without rights and, while it accepts the right of state parties to bring legal action against illegal migrants and to deport them if justified, it asserts that they are entitled to due process of law and the full protection of their fundamental rights, for example, the right to life and the prohibition of torture and degrading behaviour.¹¹ This stance reflects international human rights law according to which states are under an obligation to guarantee, ensure and protect the human rights of all persons within their jurisdiction, regardless of nationality, including migrants and, by necessary implication, those who have exercised their right to free movement to third countries.¹² Interestingly, under article 24(1) of the 2018 Protocol, contracting parties may additionally adopt targeted measures for the movement of 'specific vulnerable groups', including refugees, asylum seekers, victims of trafficking and smuggled migrants. Under the African Charter, the right of free movement, therefore, applies to a broader category of persons than under the 2018 Protocol, since the former is applicable to all individuals, regardless of nationality or economic status, while the latter is essentially limited to nationals of contracting parties that are economically active.

However, it is not merely just a case of nationality: The African Commission has stated in General Comment 5 that the scope of article 12 extends to categories of persons including those classed by, among others, gender, age and health. Older persons, that is, those aged 60 years or above, are thus entitled to this right. The 2018 Protocol does not specifically address the question of age in relation to economic activities. Thus, the non-discrimination clause contained in article 4(1) thereof does not include 'age' as a prohibited ground, neither does article 2 of the African Charter; both provisions are worded identically in all essential respects, unless it can be read into the term 'any status'.¹³ However, the Protocol on

11 *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10) para 31.

12 See, eg, *Judicial Condition and Rights of Undocumented Migrants* Advisory Opinion IACHR (17 September 2003) Ser A 18.

13 The African Commission has stated that the list of specified grounds is neither 'absolute nor comprehensive'; *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights (2015) para 145. It has further stated that the aim of this provision is 'to ensure equality of treatment for individuals irrespective' of the specified grounds; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169. Age discrimination is a prohibited ground under art 21 of the EU Charter of Fundamental Rights. See further Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 2 December 2000; *C-144/04 Werner Mangold v Rüdiger Helm* [2005] ECR 9981 which held that non-discrimination in respect of age is a general principle of EU law.

Older Persons calls for the elimination of discrimination against older persons, including in the workplace.¹⁴ There is no reason why older persons should not be economically active and may wish to exercise their right to work or the right of establishment. For those who are not, article 14(2) of the 2018 Protocol states that a worker may be accompanied by dependents, which may include ageing parents. There is as yet no definition of 'dependents' in Africa Union (AU) law. It bears repetition to stress that much work remains to be done in legislating on the scope and content of free movement rights, but an examination of EU law is interesting as article 2 of Directive 2004/38 refers to 'dependent direct relatives in the ascending line' and not just in the descending line.¹⁵ Some may argue that this right should be limited to the descending line only in keeping with the right to found a family, the protection of which is laid down in articles 18(1) to (2) of the African Charter, and that it would be undesirable to accept both lines as this would multiply the number of protected persons, something to which the drafters of the 2018 Protocol might not have consented. On the other hand, the argument could be made that under articles 27(1) and 29(1) of the African Charter an individual has duties towards his or her family and specifically towards parents so that the latter may per force have to be added to the category of dependents given that their protection is a duty enshrined in it.¹⁶

What other relevant categories are there under article 12 of the African Charter? According to General Comment 5, migrant workers and family members, in keeping with the International Convention on the Protection of the Rights of All Migrant Workers,¹⁷ have the right to move freely within the state of employment. Many of these workers will no doubt be African nationals and thus able to rely on the 2018 Protocol, provided of course that the country of origin and the host country would have ratified it. General Comment 5 calls for domestic laws that restrict the right of free movement of migrant workers to be reviewed. This is also the case with persons living with HIV since there should be no discrimination on grounds of health. Indeed, the African Commission calls for restrictions on the freedom of movement and residence and discriminatory practices relating to such persons to be prohibited. Also, another group identified by

14 Arts 3 and 6 Protocol to the African Charter on Human and Peoples' Rights of Older Persons in Africa, signed 31 January 2016, not yet in force.

15 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of member states, OJ L 158/78, 30 April 2004.

16 K Quashigah 'Scope of individual duties in the African Charter' in M Ssenyonjo (ed) *The African regional human rights system* (2012) 119.

17 Adopted 18 December 1990, entered into force 1 July 2003, 2220 UNTS 3.

the African Commission as enjoying the freedom of movement and residence are persons with disabilities.¹⁸ The African Commission does not mention a right of entry in this context, and it is therefore unclear whether these two categories are able to enjoy cross-border mobility. In principle they should come within the scope of the 2018 Protocol, but the question arises as to whether some contracting parties will seek to invoke the public health exception in article 7(1)(c) thereof to refuse entry to those with health issues and the disabled. The question again arises as to the scope of the 'any status' category in the non-discrimination clauses of the 2018 Protocol and the African Charter.¹⁹ There appears to be no reason why 'any status' should not extend to health or physical attributes as long as there is no threat to public health (pandemics). This is an issue which may have to be clarified in a future amendment of the African Charter and will be analysed further later in the article.

It is interesting to note that all the protocols to the African Charter, on Women,²⁰ Older Persons and Persons with Disabilities, are silent on the issue of freedom of movement. The question arises as to whether this is a deliberate omission or an oversight. Whatever the reason may be, it is true to say that many of the individuals, who are the focus of these treaties, can be economically active and, at any rate, their very status necessitates guaranteeing their freedom of movement. Especially now that the 2018 Protocol has been adopted and with the prospect of the creation of the African Common Market, which fosters and does not thwart human mobility, this is an issue meriting discussion and suitable regulation.

Under article 12 of the African Charter, the individual's right to freedom of movement and residence is guaranteed provided the person 'abides by the law'. This suggests that the continued presence of the individual which, as has been demonstrated, includes both third country nationals and those of other state parties, is contingent on observing domestic laws, a requirement that seems to be wholly legitimate, so that expulsions and deportations may

18 Persons with disabilities have a right to work under art 19 of the Protocol on the Rights of Persons with Disabilities in Africa, signed 29 January 2018, not yet in force, which, however, is silent on a right to freedom of movement. Art 18 of the UN Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3, obliges state parties to recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence, and to leave any country, including their own.

19 Discrimination is prohibited under art 5 of the Protocol on Persons with Disabilities. See also art 4. Discrimination on grounds of disability is prohibited under art 21 of the EU Charter of Fundamental Rights and Directive 2000/78/EC.

20 Signed 1 July 2003, entered into force 25 November 2005.

be appropriate and proportionate responses to those found guilty of serious criminal offences. However, both the African Commission and the African Court have rightly observed that such state measures must be compatible with international human rights standards.²¹ The due process of law, including the elements of the right to a fair trial,²² must be adhered to as required by article 12(4) of the African Charter. Arbitrary expulsions therefore are prohibited under this provision. This is also the position adopted by article 21(1) of the 2018 Protocol.

Article 12(1) of the African Charter diverges from the International Covenant on Civil and Political Rights (ICCPR)²³ in an important respect. Article 12(1) of ICCPR states that '[e]veryone *lawfully* within the territory of a state shall, within that territory, have the right to liberty of movement'.²⁴ The implication of ICCPR is that non-nationals must be lawfully residing within the territory, having complied with immigration requirements. According to the United Nations (UN) Human Rights Committee (HRC), 'the question whether an alien is "lawfully" within the territory of a state is a matter governed by domestic law, which may subject the entry of an alien to the territory of a state to restrictions, provided they are in compliance with the state's international obligations'.²⁵ However, the corresponding provision in the African Charter is worded differently and the phrase 'lawfully within the territory' is omitted. Consequently, as has been indicated above, the African Commission is of the view that the freedom of movement extends to those who are in the state irregularly, including 'undocumented migrants'. This stance is unlikely to be popular with certain African states hosting large numbers of such persons, such as South Africa.²⁶ From the perspective of national authorities it would seem reasonable to impose limits on

21 *Kenneth Good* (n 10) paras 203-204; *Zimbabwe Lawyers for Human Rights* (n 10) para 114; *Union Inter africaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997) para 23; *Anudo Ochieng Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248 para 100.

22 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) paras 63-65; *Organisation Mondiale contre la Torture v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 30; *Union Inter africaine des Droits de l'Homme* (n 21) paras 19-20; *Zimbabwe Lawyers for Human Rights* (n 11) para 116. The Inter-American Court of Human Rights has stated that '[d]ue process of law is a right that must be ensured to all persons, irrespective of their migratory status'; *Juridical Condition and Rights of Undocumented Migrants* (n 12) para 121.

23 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. Most African states are parties to ICCPR.

24 Art 2(1) of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 16 September 1963, entered into force 2 May 1968, CETS 046, is similarly worded (our emphasis).

25 CCPR General Comment 27: Article 12 (Freedom of Movement) para 4.

26 According to the International Organisation for Migration *World Migration Report 2020* (2019) 56, the share of international migrants as a proportion of the population in South Africa has risen from 2,8% in 2005 to 7% in 2019, while in Equatorial Guinea from less than 1% to nearly 17% during the same period.

their freedom of movement. However, for the African Commission restrictions must be the exception.²⁷ Nonetheless, both the African Commission and the HRC are agreed that an alien who has entered the state illegally, but whose status has been regularised, must be considered to be lawfully within the territory for the purposes of article 12.²⁸

Article 12(2) grants the individual the right to leave and return to a state subject to restrictions imposed by law for the protection of national security, law and order, public health or morality.²⁹ In principle, therefore, a person serving a lawful prison sentence would not have this right breached. In General Comment 5 the African Commission has stated that limitations must serve a legitimate aim, must be proportionate with and absolutely necessary for the advantages to be obtained in a free and democratic society.³⁰ This outlook corresponds with the position in other jurisdictions. Moreover, the restrictions must be compatible with the right to equality and non-discrimination; it must not be imposed indiscriminately nor targeted at stigmatising particular groups. This last point is important in relation to those living with HIV, for instance. In *Amnesty International v Zambia* the African Commission held that the respondent state must prove that it is justified in invoking these conditions and that the rules of natural justice must apply.³¹ With specific reference to the limitation on the ground of law and order, the African Commission also stated that the respondent state had to prove that the individuals indeed were a danger to law and order; that they posed a 'likely' danger was too vague.³²

Article 12(4) protects a non-national who is legally within another state from summary expulsion as such sanction can only be legitimate by virtue of a decision taken in accordance with the law. While this provision is broadly worded and fails to stipulate any procedural guarantees, the jurisprudence of the African Commission requires that the provision must be interpreted to prevent arbitrary expulsions.³³ Consequently, expulsions must be consistent with the due process of law;³⁴ states must have laws in place to regulate this area which

27 General Comment 5 para 10.

28 General Comment 5 para 9; CCPR General Comment 27 para 4.

29 *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) para 47.

30 General Comment 5 para 14.

31 (2000) AHRLR 325 (ACHPR 1999) para 42.

32 As above.

33 *Organisation Mondiale contre la Torture* (n 22) para 30.

34 *Institute for Human Rights and Development* (n 22) paras 63–65; *Zimbabwe Lawyers for Human Rights* (n 10) paras 114–115.

must meet international human rights standards.³⁵ Furthermore, if the procedure for expulsion entails arrest, the safeguards relating to deprivation of liberty are applicable, as is the right to have the case reviewed.³⁶

Finally, article 12(5) prohibits the mass expulsion of non-nationals aimed at national, racial, ethnic or religious groups. An identical provision is to be found in article 20 of the 2018 Protocol. Therefore, expulsion based purely on nationality is forbidden.³⁷ A link thus exists between article 12(5) and article 2 of the African Charter which, as has been mentioned, enshrines the principle of non-discrimination.³⁸ The rationale for the proscription contained in article 12(5) was that ‘the drafters of the Charter believed that mass expulsions presented a special threat to human rights’.³⁹ In *Rencontre Africaine pour la Defense des Droits de l’Homme v Zambia*, which concerned the expulsion of over 500 illegal foreign residents, the African Commission stated that, while the African Charter did not prohibit deportations as such, Zambia’s right to deport people did not justify the manner in which it had done so.⁴⁰ Again, the African Commission requires that due process be observed.⁴¹

Given the fundamental role played by the principle of non-discrimination in the context of freedom of movement, some brief words on this principle appear necessary.⁴² Article 2 of the African Charter has been described as a ‘non-derogable’ provision that must be respected in all circumstances.⁴³ The rights guaranteed therein ‘provide the foundation for the enjoyment of all human rights’.⁴⁴ Consequently, article 2 is often considered in conjunction with other provisions of the African Charter, such as article 12.⁴⁵ In substantive terms it ‘guarantees that those in the same circumstances are dealt

35 *Kenneth Good* (n 10) paras 203-204.

36 *Kenneth Good* para 205; *Organisation Mondiale contre la Torture* (n 22) para 34.

37 *Rencontre Africaine pour la Defense des Droits de l’Homme* (n 10); *Organisation Mondiale contre la Torture* (n 22); *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004).

38 On art 2, see *Rencontre Africaine pour la Defense des Droits de l’Homme* (n 10) para 21; *Organisation Mondiale contre la Torture* (n 22) para 32; *African Institute for Human Rights and Development* (n 37) para 69.

39 *Rencontre Africaine pour la Defense des Droits de l’Homme* (n 10) para 20; *Institute for Human Rights and Development* (n 22) para 68.

40 *Rencontre Africaine pour la Defense des Droits de l’Homme* (n 10) para 23. See also *African Institute for Human Rights and Development* (n 37).

41 *Institute for Human Rights and Development* (n 22) para 70.

42 See eg arts 18(1) and 45(2) of the Treaty on the Functioning of the European Union, signed 13 December 2007, entered into force 1 December 2009, OJ C 83/47, 30 March 2010; art 24 Directive 2004/38/EC, OJ L 158/77, 29 April 2004.

43 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49.

44 *Zimbabwe Human Rights NGO Forum* (n 13) para 169.

45 See n 38.

with equally in law and practice'.⁴⁶ Its essential aim is 'to ensure equality of treatment for individuals irrespective' of the specified grounds.⁴⁷ However, it 'does not stipulate a general banning of discrimination; it only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter'.⁴⁸

In relation to remedies, it is well known that individuals subject to the jurisdiction of state parties may lodge a complaint with the African Commission if he or she considers that their rights have been violated. In appropriate circumstances, including if the respondent state has accepted the right of individual petition, the case may be referred to the African Court. Until today this has not happened with any communication directly complaining of an article 12 violation. Interestingly, article 30(2) of the 2018 Protocol specifically states that nationals of contracting parties denied his or her rights may lodge a complaint with the African Commission following the exhaustion of domestic remedies. However, there is no mention of the African Court. This should not be understood as an attempt to oust its jurisdiction. On the contrary, it reflects the reality that individuals do not have direct access to the African Court as they do before the African Commission.

3 Right to freedom of movement in the context of the African Economic Community

3.1 Interaction between the freedom of movement as a fundamental human right and as an economic right to be enjoyed in a common market

The AEC Treaty adopted in 1991 constituted the first step towards creating an economically-integrated continent. The AEC was established as a regional economic integration organisation (REIO) and followed the parameters of the prototype REIO, namely, the European Economic Community (now the EU). Invariably, economic integration projects have led to substantial benefits for the respective regions, and there is nothing to suggest that this will not be the case with Africa. However, there are strings attached. Thus, REIOs expect and demand that all participating states faithfully observe

⁴⁶ *Kenneth Good* (n 10) para 218.

⁴⁷ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63; *Zimbabwe Human Rights NGO Forum* (n 13) para 169.

⁴⁸ *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006) para 69. However, see *Malawi African Association v Mauritania* (2000) 295 AHRLR 149 (ACHPR 2000) para 131.

several fundamental freedoms. This is of paramount importance because REIOs create common markets among their membership, which must operate without obstacles, without restrictions and, very relevant to our discussion, with the absence of discrimination. One constitutive element of common markets is the free movement of people, which takes the form of the unhindered movement of economically-active persons, that is, employed and self-employed persons, entrepreneurs, investors, and so forth. To achieve this freedom, both the member state of origin and the member state where the freedom is exercised ('host country') must fulfil certain obligations, these being mandatory and not discretionary. In particular, the former must allow the persons in question to leave its territory but also to return when they so wish, while the latter must not only admit them but also permit them, without attaching any conditions, to reside and move freely in order to seek or to take up employment, to offer their services, and so forth. Moreover, host countries are obliged not to expel these persons as long as they observe the applicable domestic laws, administrative regulations, and so forth.

It follows that the right of persons to free movement, as a manifestation of a personal economic freedom exercised within and guaranteed by a REIO, has many similarities to the provisions of article 12 of the African Charter. However, the former affords a much wider and intense protection, as explained in the first part of the article. Even though article 12 is more general in scope and in application compared to the right to freedom of movement as will be applied in the African Common Market, they both demand that the states coming under their respective purview observe the fundamental principle of non-discrimination. Based on these considerations, it could be argued that in the specific context of regional economic integration the right to freedom of movement has a content analogous to article 12. However, the former, instead of being exercised and protected within the borders of a single state, as is the case under article 12, will be applied and safeguarded within the territory of the African Common Market. On the other hand, the restrictions to which article 12 is subjected (which derive from the need to protect national security, law and order, public health, and public morality) will also find application to the free movement of persons within the African Common Market. These are areas of regulation coming under the exclusive domain of the participating states and, therefore, should not be regarded as unwarranted intervention in the freedom of movement, provided, of course, that they do not deliberately obstruct its exercise.

At this point a brief reference to the EU should be made. As already mentioned, the amalgamation of the freedom of movement as both a human right and as a protected economic freedom has been expressed in article 45 of the Charter of Fundamental Freedoms. However, even in this very progressive REIO, the content of the freedom of movement has been articulated in a rather restrictive fashion. Indeed, this provision guarantees that EU citizens have the right to move and reside freely within the territory of member states and not within the entire territory of the EU itself. The latter would have been only appropriate considering that all EU member states' citizens are, at the same time, EU citizens as well.⁴⁹ Indeed, article 3(2) of TEU stipulates that the EU shall offer its citizens an area without internal frontiers, in which the free movement of persons shall be ensured.

3.2 Right to free movement of persons under the AEC Treaty; the issue of reciprocity; the principle of non-discrimination and article 12 of the African Charter

Article 4(1) of the AEC Treaty sets out the objectives of the Community. More specifically, it stipulates the formation of a common market, which will require the gradual removal among member states of obstacles relating, among others, to the free movement of persons, the right of residence and the right of establishment. As has been explained, these are considered to be fundamental rights in economic integration projects. According to the timetable for establishing the AEC, which was never followed, the creation of the African Common Market was envisaged in article 6(e) thereof as the fifth stage in the evolutionary process and this stage was meant to take place within a period not exceeding four years. One of the goals to be achieved was the full application of the principle of free movement of persons, which goes hand-in-hand with the right of residence and the right of establishment. Thus, article 43(1) thereof recorded the agreement of member states to approve at three different levels, namely, individually, bilaterally or regionally, the necessary measures, which would have ensured the materialisation of the right to free movement of persons. The adoption of the appropriate action would have allowed the nationals of member states to enjoy the associated rights of residence and establishment throughout the African

⁴⁹ Cf art 9 of the Treaty on European Union (TEU), signed 13 December 2007, entered into force 1 December 2009, OJ C 83/13, 30 March 2010, which states, among others, that '[e]very national of a Member State shall be a citizen of the Union'.

Common Market, which for all purposes and intents coincides with the territory of the individual member states.

As far as regional action is concerned, this was to be pursued through the various African regional economic communities (RECs), some of which had already adopted provisions facilitating the movement of their citizens across borders. Even though the role of the RECs is not considered in this article, suffice to note their considerable contribution for having cemented the principle of free movement of people at the sub-regional level and to mention the following six relevant instruments (in chronological order of adoption).⁵⁰ First, Protocol VII on Free Movement and Rights of Establishment of Nationals of Member States attached to the Treaty establishing the Economic Community of Central African States (ECCAS).⁵¹ Second, the Economic Community of West African States (ECOWAS) Protocol Relating to Free Movement of Persons, Residence and Establishment attached to the ECOWAS Treaty of 1975,⁵² which was revised in 1993.⁵³ Third, the Common Market for Eastern and Southern Africa (COMESA) Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence.⁵⁴ Fourth, the Southern African Development Community

50 Generally, see African Union Guidelines for implementing actors on the AU free movement protocol, 28 March 2019, AU/STC/MRIDP/4(I), <https://www.giz.de/de/downloads/2019%20AU%20Guidelines%20on%20Free%20Movement%20Protocol%20ENG.pdf> (accessed 4 May 2022).

51 Signed 18 October 1983, entered into force 18 December 1984.

52 Signed 29 May 1975, entered into force 20 June 1975, 1010 UNTS 17. At the time the Protocol, the legal basis of which was arts 2(2)(d) and 27(1) of the ECOWAS Treaty, was a very progressive instrument; compare art 27(1) conferring the status of Community citizen on member states' nationals and art 11(1) stipulating that decisions expelling any Community citizen from a member state must be notified to the citizen concerned, to the member state government of which he is a national and to the ECOWAS Secretary-General. Given that the Protocol was concluded before the adoption of the African Charter, art 11 thereof offered member states the right to exercise the so-called diplomatic protection, which can be of immense importance when there is no regional human rights system to protect persons alleging a violation of their fundamental freedoms.

53 See art 4(g) of the revised ECOWAS Treaty, signed 24 July 1993, entered into force 23 August 1995, 2373 UNTS 233, which stipulates that the recognition, promotion, and protection of human and peoples' rights in accordance with the African Charter is a fundamental ECOWAS principle. Therefore, the revised Treaty provisions relating to the free movement of persons, their residence and establishment should be applied together with art 12 of the African Charter. Finally, the Articles of Association for the establishment of an Economic Community of West Africa, adopted 4 May 1967, entered into force on the same day, 595 UNTS 287, contains no provisions on the movement of people.

54 Adopted in 2001, not yet in force. The plan that by 2025 COMESA would become a single economic area with no impediments to the movement of people appears to be unrealistic. Several benefits have been identified as resulting from the implementation of the Protocol, including advancing the cause of pan-Africanism; addressing labour market shortages in the destination countries and labour market surpluses in the countries of origin; supporting the income of individuals and households; and strengthening regional economic

(SADC) Protocol on the Facilitation of Movement of Persons, of which the Preamble expresses member states' eagerness to support and promote AU efforts encouraging free movement of persons in RECs as a 'stepping stone' towards freedom of movement in an eventual AEC.⁵⁵ Fifth, the Protocol on the Establishment of the Common Market of the East African Community (EAC).⁵⁶ Sixth, the Protocol on Free Movement of Persons in the IGAD region attached to the Agreement Establishing the Intergovernmental Authority on Development (IGAD).⁵⁷ Finally, it should be noted that three of these RECs, namely, COMESA, EAC and SADC, have moved forward to create their own free trade area.⁵⁸ While they pledged to 'facilitate the movement of business persons', they did not lay down any rock-solid provisions but only guaranteed temporary entry to business visitors and professionals.⁵⁹ Arguably, this was deliberate and reveals the difficulties associated with states' acceptance of the obligation to allow their population to exercise the unhindered right of movement and establishment in any of the 26 participating states.

To return to the AEC Treaty, under article 43(2) member states had promised to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment. Without laying down the modalities for implementing this freedom, the AEC Treaty left it to be determined at some undefined future point by concluding a protocol. One can certainly realise that, at the time, African states were not ready to commit themselves to permitting nationals of other states to take up employment freely or to offer their services or to establish undertakings in their territory. It is well known that state sovereignty is highly valued in Africa.⁶⁰ On the other hand, any economic integration project necessitates the creation of a common market, where freedom of movement is one of the constituent rights and the unhindered ability to practise it a *conditio sine qua non*. Moreover, within a common market it is

integration. See M Olivier *Free movement of persons in the common market for Eastern and Southern Africa – Trainers' manual* (2017) 75.

- 55 The Protocol of which the legal basis is arts 5(2)(d) and 10(3) of the SADC Treaty, was signed on 18 August 2005, not yet in force.
- 56 Signed 20 November 2009, entered into force 1 July 2010; under art 5(2) thereof, state parties promised to, *inter alia*, remove restrictions on the right of establishment and residence of other parties' nationals in their territory. See K Gastorn & W Masinde 'The EAC common market' in E Ugirashebuja et al (eds) *East African Community law: Institutional, substantive and comparative EU aspects* (2017) 285.
- 57 Signed 24 June 2021, not yet in force.
- 58 See Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC, signed 10 June 2015, not yet in force.
- 59 Agreement (n 58) art 29 and Annex 10, Annex on Movement of Businesspersons, <https://www.eac.int/documents/category/comesa-eac-sadc-tripartite> (accessed 4 May 2022).
- 60 See W Brown 'Sovereignty matters: Africa, donors, and the aid relationship' (2013) 112 *African Affairs* 262.

imperative that all participating states apply the exact same rules and treat one another's nationals in the same way as their own citizens. To put it otherwise, the basic rule of the law of human rights, which prescribes that all rights and all freedoms must be enjoyed by all without discrimination on any ground (*in casu*, on the ground of nationality) also finds application in relation to the economic right embodying the freedom of movement.

Over the years the case for the revision of the African Charter has been made, for instance, to fully reflect its interpretation by the African Commission,⁶¹ or in light of other regional human rights conventions' practice and experience,⁶² or to expand its normative content.⁶³ Based on the above observations and comments, it will be submitted that in any future amendment the content of the African Charter's clause prohibiting discrimination should be extended to include specifically the economic rights of African peoples, as to be derived from the African Common Market. Thus, the reference to 'any status' in the wording of article 2 thereof should no longer be regarded as adequate, especially given the development of the African Common Market. For this reason it should be augmented, if not re-drafted, to encompass evolving economic rights. Two considerations should be mentioned here. The first is that a contemporarily-worded article 2 would be in line with the emerging legal system of the AU, human rights being a constituent part of it.⁶⁴ The second relates to the risks associated with attempting to amend or revise the African Charter. The late Professor Heyns warned about these risks 20 years ago:⁶⁵

Any attempt to amend the [African] Charter and Protocol [on the African Court of Human and Peoples' Rights] depends on political will. If the political will of a substantial number of states is not available, it might be better to struggle on with a flawed system and engage in *ad hoc* reform, than to have the whole system fall apart, no matter how appealing some of the pieces might be.

No doubt he was right. Often, it is better not to stir a situation even if you are aware of its problems and limitations than try to mend it and

61 See C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Dickinson Law Review* 691.

62 W Benedek 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25.

63 VO Nmehielle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 7.

64 G Naldi 'The contribution of AU human rights agreements to an emergent AU law' in F Amao, M Olivier & K Magliveras (eds) *The emergent African Union law: Conceptualisation, delimitation, and application* (2021) 319.

65 C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155 173.

cause even bigger troubles in the process. Similar arguments can be adduced in relation to the UN human rights system.⁶⁶ Notwithstanding this argument, there would be clear advantages in overhauling the African human rights system. However, the initiative should originate from the AU and its member states, and not be superimposed by other states and/or third international organisations. Unlike 20 years ago, today the AU has an organ of which the mandate, among others, is the progressive development and codification of African treaties, namely, the African Union Commission on International Law.⁶⁷ Therefore, any future process of revising the African Charter should be elaborated within this Commission which, it will be also argued, should incorporate the dimension of the emerging African Common Market.

As explained, in the AEC the regulation of the free movement of people was left to be regulated in a future protocol. This had certain advantages (for instance, no pressure on states to agree on binding rules there and then) but also a serious disadvantage: Even if the protocol were concluded and signed, one would have to wait for it to enter into force. Consistent practice from other OAU/AU treaties and protocols shows that it could be a very long time before the required number of ratifications is attained, and by then their provisions may need revision. However, even if the 2018 Protocol were promptly to come into force,⁶⁸ unless and until all AEC states have ratified it, it would not be possible for the African Common Market to function properly, always in relation to the free movement of persons. This because, as explained, economic integration projects are not piecemeal schemes, where participating states choose in which areas or activities to participate and from which to desist. On the contrary, they operate on the strict principle of reciprocity which, in turn, is closely associated to the prohibition of discrimination *vis-à-vis* protected rights and freedoms. Thus, if member state A has ratified the 2018 Protocol, but member state B has not, the former would hardly be prepared to allow the latter's nationals to exercise the right of movement, the right of establishment, and so forth, since its own nationals could be discriminated against by member state B, given that it is not a contracting party to the Protocol and has not assumed the corresponding obligations.

66 Generally, see K Magliveras 'The case for a comprehensive global human rights treaty under UN auspices' in J Wouters et al (eds) *Can we still afford human rights? Critical reflections on universality, costs and proliferation* (2020) 47.

67 See art 4 of the Statute, EX.CL/478 (XIV) a (2009); K Magliveras & G Naldi *The African Union* (2018) 215 ff.

68 It requires 15 ratifications, which is the standard number required for AU treaties to enter into force.

In this scenario, were nationals of member state A residing in member state B to regard that it had breached article 12 of the African Charter and provided that the conditions for complaining before the African Commission or the African Court were met, one cannot be certain that these two organs would apply it in the context of the unhindered exercise of the economic right of free movement of people, as mandated under the AEC Treaty as well as under the 2018 Protocol. Article 12 certainly is associated with state sovereignty: When its fourth paragraph refers to 'a non-national legally admitted in a territory of a state party to the present Charter', what in essence it means are 'foreigners who have been allowed by a state party to the African Charter to reside in its territory'. However, if this provision is projected to the African Common Market, it would not be a question of 'non-nationals' being admitted because the host state party has approved it. On the contrary, it would be the result because of these 'non-nationals' having exercised their right to move to another state party and to reside and/or to establish themselves in its territory.

4 Resurrection of the AEC and the 2018 Protocol

As argued above, African states were rather unprepared to engage in the very demanding process of creating a REIO and operationalising a continental common market, even though in the beginning they appeared to have been enthusiastic. Indeed, the AEC Treaty was signed by all (except two) OAU members on the same day (3 June 1991) and came into force in just under three years, rather promptly by OAU standards.⁶⁹ However, it is one thing to agree to establish a REIO and a completely different thing to get it operationalised. The AU's advent in the early 2000s could have added much needed impetus,⁷⁰ but at the time the emphasis was on a modern political organisation with a strong peace and security dimension, the economic integration project being relegated to secondary status. However, in the process there was a degree of amalgamation between the AEC and the AU.⁷¹ Suffice to give the example of the Protocol on the Pan-African Parliament (PAP), of which the conclusion was

69 Presently 50 AU states are AEC members; the remaining five (Djibouti, Eritrea, Madagascar, Somalia and South Sudan) are probably prevented from joining it due to domestic politico-economic problems.

70 Compare also the Algiers Declaration of 14 July 1999 where the OAU Declaration reaffirmed its faith in the AEC, AHG/Decl1 (XXXV).

71 The exact legal relationship between the two organisations is not absolutely clear: While the AEC Treaty said that it was an integral part of the OAU, and art 33(1) of the AU Constitutive Act stipulated that the OAU/AEC will 'devolve its assets and liabilities to the Union', it appears that the AEC still exists as a legal entity separate from the AU.

stipulated in article 17(2) of the Constitutive Act, but in reality it was adopted as a Protocol to the AEC Treaty.⁷² This is a matter of significance for three reasons: first, because articles 7 and 14 of the AEC Treaty had already established PAP; second, because article 3(2) of the PAP Protocol stipulates that the promotion of human rights and democracy is one of its core objectives, allowing an important link to be developed between the goal of economic integration and the need to safeguard fundamental freedoms; third, because under the revised PAP Protocol, which regrettably has no chances of coming into force any time soon, it can submit or recommend draft model laws on its own to the AU Assembly for approval.⁷³ It follows that the impact of PAP on the fundamental freedoms' aspects of economic integration can potentially be high or even very high.⁷⁴

In the early 2010s the AEC was an inactive continental organisation, which continued to exist *de jure* as it was never officially abolished.⁷⁵ At a policy level, the economic integration project re-surfaced in the Solemn Declaration on the 50th Anniversary of the OAU/AU adopted in 2013, where it was agreed to speed up attaining the AEC objectives without, however, setting any specific dates.⁷⁶ The free movement of people was mentioned, but only in the context, on the one hand, of an African citizenship, a rather vague notion lacking substance, and, on the other, the gradual removal of visa requirements. The goals of the Solemn Declaration were to be articulated in the Continental Agenda 2063, which was approved the following year. In a nutshell, it (a) promised a continental union and integration under a federal/confederate United Africa; (b) guaranteed, *inter alia*, the free movement of people; and (c) created a continental free trade area.⁷⁷ As regards the latter, from the second half of the 2010s onwards, developments have been overwhelming but principally outside the context of the AEC. The principal achievement has been the conclusion of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) where human rights

72 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted 2 March 2001, entered into force 14 December 2003. It is instructive to recall that the Constitutive Act was adopted on 7 November 2000 and entered into force on 26 May 2001, 2158 UNTS 3.

73 See art 8(1)(b) of the Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament, adopted 27 June 2014, not yet in force.

74 Generally, see KG Adar et al (eds) *Building regionalism from below: The role of parliaments and civil society in regional integration in Africa* (2018).

75 See art 105 of the AEC Treaty on dissolution.

76 Adopted by the 21st ordinary session of the AU Assembly, Addis Ababa, Ethiopia, 25 May 2013.

77 See AU Agenda 2063, Aspiration 2 titled 'An integrated continent, politically united and based on the ideals of pan-Africanism and the vision of Africa's Renaissance'.

are recognised as important for the advancement of international trade and for economic cooperation.⁷⁸ Regarding the movement of people, article 3 of the Agreement says that among AfCFTA's objectives is the creation of a single market for goods, services, and movement of persons and the contribution to the movement of natural persons. This is a rather meaningless provision because it is stating the obvious while staying silent *vis-à-vis* the existence of a right to free movement. This is strange considering the adoption two months earlier of the 2018 Protocol, a fact seemingly ignored in the AfCFTA Agreement. As the latter came into force within 14 months of its adoption, whereas the 2018 Protocol has still not secured the necessary number of ratifications to become operative, it could be argued that, despite the AU's attempts to eliminate restrictions on Africans' ability to travel, work and reside in countries other than their own, African states are not following suit.

However, at the end of the day it may not be what African states (or leaders for that matter) want because, as stated in the 2018 Protocol's Preamble, the right of individuals to freedom of movement and residence is guaranteed by the Universal Declaration of Human Rights as well as by the African Charter. This confirms the argument made earlier, namely, that free movement in Africa has economic dimensions and that it is a fundamental freedom simultaneously applied as a right of those individuals partaking in economic integration and those who choose to exercise it. In this specific context, the strong nexus between the 2018 Protocol and the African Charter is revealed in the mutual prohibition of discrimination: Article 4(1) of the 2018 Protocol stipulates that parties are barred from discriminating against nationals of another party entering, residing or establishing themselves in their territory on the basis of any status, a prohibition deriving from article 2 of the African Charter.

Even though it took almost 35 years to adopt the 2018 Protocol, African states were still not ready to accept an accelerated materialisation of the unhindered movement of persons, opting instead for a three-phase progressive realisation, which is detailed in article 5 thereof. This should be contrasted to the far more progressive nature of the AfCFTA Agreement which, after all, promotes another economic right, that of the free movement of goods. While the 2018 Protocol lingers unratified, the AfCFTA Agreement's implementation has been swift and continental free trading officially commenced on

⁷⁸ Adopted 21 March 2018, entered into force 30 May 2019 (2019) 58 ILM 1028, Preamble para 6.

1 January 2021. For our purposes, the central provision in the 2018 Protocol is article 14, the clause regulating the free movement of workers. It stipulates that nationals of AU member states shall have the right to seek and accept employment without discrimination in any other state and that they may be accompanied by spouses and dependents when accepting and taking up employment in the host country. Article 14 contains a worrisome provision: While in other regional integration projects (for example, in the EU) the rules and procedures for effecting this right are common to all participating states, here it is made subject to the laws and policies of the host country. It follows that the 2018 Protocol does not preclude the possibility of divergent national legislations. The obvious risk is that member states may use their domestic laws to place obstacles to free movement.

Given the preference to domestic over uniform regulation, the importance to be attached to the prohibition of discrimination in exercising the right to free movement is immense. Host countries are barred not only from discriminating in favour of their own nationals and against the nationals coming from other member states, but also from discriminating among the nationals of third member states. This dual application of the principle of non-discrimination is characteristic of economic integration projects and augments the scope of article 2 of the African Charter.

5 Conclusion

Human mobility has always been a multi-faceted phenomenon and its regulation not only as a general right but also as a human right is a very important development. The protection of the freedom of movement of persons has been addressed in the African Charter coherently and in some detail. Regional realities, such as mass expulsions, have also been considered. This article has dealt especially with the economic aspects of this freedom, as manifested with the creation of the AEC. It was argued that African states have not been very forthcoming with continental economic integration, of which the free movement of people is one of its cornerstones. While there has been considerable enthusiasm for the AfCFTA, it should be remembered that (a) free trade is only one aspect of economic integration, *in casu* the African Common Market; and (b) that presently one-fourth of the AU membership does not participate in it.⁷⁹

⁷⁹ See Tralac Status of AfCFTA Ratification, 22 April 2022, <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 8 May

The affinity between human rights, fundamental freedoms and economic rights can also be manifested in the context of the right to development. The African Charter was, globally, the first human rights treaty to stipulate it in rather express terms. Indeed, as the right to development is formulated in article 22(2) thereof, African countries are under the duty to ensure that it is exercised individually or collectively. Since a tested way to achieve development is through participation in economic integration projects, it is submitted that, in order to observe the article 22(2) duty, African states should actively and consistently participate in institutional vehicles leading to continental integration, in our case the AEC. Moreover, for those African states partaking in the League of Arab States, the rights of people to freely pursue their economic development has been laid down in article 2(1) of the Arab Charter on Human Rights,⁸⁰ and for those participating in the Organisation of Islamic Cooperation (OIC) an identically-worded clause has been inserted in article 9(a) of the revised Cairo Declaration on Human Rights, which was approved in November 2020.⁸¹

After decades of inactivity, the adoption of the 2018 Protocol no doubt has rejuvenated the AEC and brought to the fore the ever-crucial question of human mobility in Africa. When the 2018 Protocol enters into force, in conjunction with article 12 of the African Charter, it will offer a protective environment to those exercising the freedom of movement. If the African Charter were amended as suggested in this article, the protection would be further reinforced. However, the AU has chosen to advance the freedom of movement of persons in a piecemeal fashion, which is regrettable. Lessons could have been learnt from the experience of the EU and a more coherent, integrated approach would no doubt have strengthened this very important freedom and its human rights ramifications. In the months to come, an extraordinary AU Assembly meeting dedicated to AfCFTA is expected.⁸² This is a unique opportunity to advance the interrelation between economic rights and fundamental human rights and freedoms as well as to adopt commitments promoting a continental freedom of movement of persons.

2022).

80 Adopted 15 September 1994, entered into force 15 March 2008.

81 OIC Council of Foreign Ministers, 47th session, Resolution 63/47-POL, https://www.oic-oci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf (accessed 8 May 2022).

82 It was approved under Assembly, Decision on the African Continental Free Trade Area (AfCFTA), Assembly/AU/Dec. 831(XXXV), 6 February 2022.

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Responsiveness of the African Continental Free Trade Agreement to diet-related non-communicable diseases: A human rights analysis

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Summary: *Non-communicable diseases are the leading cause of death world-wide and have increased significantly on the African continent. Changing diets are a significant contributor where people are given more access to unhealthy foods. Trade liberalisation has been revealed as a structural driver of the so-called 'nutrition transition'. There have been calls to take a human-rights based approach to trade law, and specifically in the context of food, to protect diets under the rights to food and health. In 2008 the Special Rapporteur on the Right to Food proposed practical steps to introduce a human rights lens to trade law*

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which can protect food environments. This article measures the African Continental Free Trade Agreement against these proposed measures. It focuses on AfCFTA due to its potential to impact on inter and intra-regional trade. AfCFTA also recognises the importance of human rights in a trade law context as part of the text of its establishing agreement. an obligation indeed rests on the South African legislature urgently to implement similar laws to save the lives and protect the various other rights of unsafely abandoned infants. It is proposed that 'baby savers' and 'baby safe haven laws' urgently should be introduced in South Africa to prevent further deaths through the unsafe abandonment of infants in places such as toilets, pit latrines and open fields.

Key words: *public health; non-communicable diseases; trade law; African Continental Free Trade Agreement; right to food*

1 Introduction

The trade landscape has grown significantly since the creation of the General Agreement on Tariffs and Trade (GATT) in 1948 which was a multilateral instrument aimed at reducing trade barriers and eliminating trade preferences.¹ In 1995 the World Trade Organisation (WTO) was created,² forming the largest multilateral trading regime in the world and consisting of over 60 agreements, annexures, decisions and understandings.³ However, the WTO regime allows for the creation of certain preferential trade agreements (which prescribe preferential tariffs) and free trade agreements (which aim to eliminate tariffs).⁴ There has also been an explosion of regional trade agreements (RTAs) – reciprocal preferential trade agreements and free trade agreements within specified geographic areas – with 342 RTAs in force as of 14 March 2021.⁵ Perhaps the most exciting and ambitious development in the international trade architecture is the 2018 launch of the African Continental Free Trade Area (AfCFTA) which will partner all the member states of the African Union (AU) (although Eritrea has not yet signed the establishing agreement).⁶

1 General Agreement on Tariffs and Trade 1948 (GATT).

2 Agreement Establishing the World Trade Organisation 1994 (Marrakesh Agreement).

3 WTO 'Understanding the WTO: The Agreements' (n/d), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (accessed 30 July 2021).

4 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, 28 November 1979 (L/4903, BISD 26S/203).

5 WTO 'Regional trade agreements database' 15 March 2021, <http://rtais.wto.org/UI/Public-MaintainRTAHome.asp> (accessed 16 August 2021).

6 African Union 'List of countries which have signed, ratified/acceded to the Agreement Establishing the African Continental Free Trade Area' 8 October

This project is aimed at significantly increasing intra-African trade, which has developed at a much slower pace than trade between African and external trade partners, or external trade partners *inter se*.⁷

However, it is not only the trade landscape that has changed. A global recognition of a 'nutrition transition' in low and middle-income countries has been noted.⁸ Diets in low and middle-income countries have changed and become increasingly energy dense, leading to nutrition-related non-communicable diseases such as cancer, hypertension, cardiovascular disease and diabetes mellitus.⁹ This is particularly concerning in the context of the growing amount of non-communicable disease-related deaths – 70 per cent of all deaths worldwide,¹⁰ of which an increase in the prevalence of non-communicable diseases in sub-Saharan Africa of 11 per cent has been noted between 1990 and 2017.¹¹ During the same period the average caloric intake of persons living in Africa has increased by 16 per cent with the most significant increases in the intake of free sugars and fats – known indicators for nutrition-related non-communicable diseases.¹² Commentators do not regard trade liberalisation (the removal of trade barriers) and the growth in nutrition-related non-communicable diseases as unrelated. There have been several academic studies that show trade agreements as structural drivers for nutrition-related non-communicable diseases and link these agreements to the decreased ability of governments to implement public health policies to counteract this trend.¹³

As international trade law falls within the broader scheme of international law, there has been a growing call to rely on the human rights obligations of states to intervene in unbridled trade

2019, <https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%20%282%29.pdf> (accessed 14 March 2021).

- 7 P Osakwe, J Nkurunziza & B Bolaky 'Economic development in Africa report 2013: Intra-African trade – Unlocking the private sector' (2013) 19.
- 8 BM Popkin 'The nutrition transition: An overview of world patterns of change' (2004) 62 *Nutrition Review* 140-143.
- 9 As above.
- 10 World Health Organisation Regional Office for Africa 'Non-communicable disease' (n/d), <https://www.afro.who.int/health-topics/noncommunicable-diseases> (accessed 16 August 2021).
- 11 HN Gouda et al 'Burden of non-communicable diseases in sub-Saharan Africa, 1990-2017: Results from the Global Burden of Disease Study' (2017) 7 *Lancet* e1375-e1387.
- 12 S Gebremedhin & T Bekele 'Evaluating the African food supply against the nutrient intake goals set for preventing diet-related non-communicable diseases: 1990 to 2017 trend analysis' (2021) 16 *PLoS* e0245241.
- 13 Eg, A Schram et al 'A conceptual framework for investigating the impacts of international trade and investment agreements on non-communicable disease risk factors' (2018) 33 *Health Policy and Planning* 123; see part 6 below for further discussion on this.

liberalisation by framing the issue as a rights-issue: invoking the rights to life, health and food (among others). This can lead to formulating, interpreting and implementing trade agreements in a fashion that can be more responsive to the change in the food landscape and concurrent growth in nutrition-related non-communicable diseases. This article explores the way in which the use of international human rights law can assist in preventing, or at least reducing, the negative impact of trade agreements on the African continent. It specifically focuses on the potential role of the AfCFTA due to its scope, novelty and its interaction with other RTAs on the continent to impact the food landscape in Africa. The article will sketch the background of trade in Africa to assist readers in understanding the role of AfCFTA and its potential scale, along with highlighting the nutrition transition in Africa. The article then anchors the discussion of the prevention of nutrition-related non-communicable diseases in the interplay between human rights and trade law, by highlighting the rights that are impacted when adequate prevention of nutrition-related non-communicable diseases is not present, and reviewing the arguments from commentators as to why and how trade law should be responsive to human rights. Finally, the article considers recommendations for making trade agreements more human rights-responsive in the context of the right to food, and assesses the AfCFTA at the hand of these recommendations.

2 Background: African regional trade law and the introduction of AfCFTA

Historically, African countries have experienced little trade among themselves, while trade with partners outside of the region has increased significantly.¹⁴ Even the infrastructure reflects this tendency, with railways being built from the interior of the continent to the coast, rather than between borders that otherwise are difficult to traverse.¹⁵ A mechanism to address this deficit is the introduction of regional economic communities (RECs), usually through the creation of a RTA.¹⁶ There are several RECs on the continent, of which the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern

14 Osakwe, Nkurunziza & Bolaky (n 7) 19.

15 SE Barnekow & KG Kulkarni 'Why regionalism? A look at the costs and benefits of regional trade in Africa' (2017) 18 *Global Business Review* 105; C Mutume 'How to boost trade in Africa' *African Renewal* September 2002, <https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa> (accessed 16 August 2021).

16 As above.

and Southern Africa (COMESA) arguably are the largest, covering significant territory in Africa.

ECOWAS was established in 1975 through the Treaty of Lagos.¹⁷ It is composed of 15 countries with over 300 million people in its joint territories.¹⁸ ECOWAS transcended to that of a trade community, but also seeks to achieve broader economic and political integration. For example, ECOWAS members signed a mutual defence pact that created a regional armed force.¹⁹ Eight of the members of ECOWAS are also part of a joint customs union (West African Economic and Monetary Union (UEMOA)) which has adopted certain common external tariffs and contains combined indirect taxation regulations.²⁰ ECOWAS members enjoy preferential trade.²¹ Shortly after the establishment of ECOWAS the Southern African Development Coordinating Conference was established in 1980, and then converted into SADC in 1992. It joins 15 Southern African states (with an estimated 257 million people) together in an organisation aimed at facilitating trade and other broader integration goals.²² In 2005 parties signed the Protocol on Trade which established a Free Trade Area (for 13 of the 15 members). EAC was first founded in 1967 but later collapsed. It was revived in 2000 with original membership being Kenya, Tanzania and Uganda, but with Burundi and Rwanda joining in 2007, and South Sudan joining in 2016.²³ In 2005 the EAC Customs Union became operational;²⁴ in 2010 a Common Market was launched;²⁵ and in 2013 EAC members signed a protocol to establish a monetary union before 2023.²⁶ COMESA started in 1994 and was established 'as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people'.²⁷ It is a free trade area with 21 members and roughly overlaps with the

17 Economic Community of West African States 'History' (n/d), <https://www.ecowas.int/about-ecowas/history/> (accessed 16 August 2021).

18 As above.

19 African Union Profile 'Economic Community of West African States' (n/d) 6, <https://web.archive.org/web/20110626213148/http://www.africa-union.org/Recs/ECOWASProfile.pdf> (accessed 16 August 2021). at 6

20 As above.

21 Barnekow and Kulkarni (n 15) 110.

22 South African Development Community 'History' (n/d), <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 16 August 2021).

23 East African Community 'History of the EAC' (n/d), <https://www.eac.int/eac-history> (accessed 16 August 2021).

24 As above.

25 East African Community 'Common Market' (n/d), <https://www.eac.int/common-market> (accessed 16 August 2021).

26 East African Community 'Monetary Union' (n/d), <https://www.eac.int/monetary-union> (accessed 16 August 2021).

27 Common Market for Eastern and Southern Africa (COMESA) 'What is COMESA' (n/d), <https://www.comesa.int/what-is-comesa/> (accessed 16 August 2021).

geography of SADC and EAC.²⁸ It also established a customs union.²⁹ While these RECs created the framework for enhanced regional trade, it did not meet the ultimate pan-African vision of promoting trade throughout the entire continent.

In 2013 member states of the AU agreed on a joint growth and development plan for the continent titled Agenda 2063.³⁰ Agenda 2063 will be implemented through five 10-year implementation plans.³¹ The RECs are identified as key stakeholders for coordinating the implementation of the relevant 10-year plans among members and broadly monitoring and evaluating the implementation at a regional level. Agenda 2063 identified 12 flagship initiatives, including the creation of a Continental Free Trade Area which aims to accelerate growth of intra-African trade (specifically to double trade by 2022) and to use trade as a mechanism for rapid sustainable growth and development throughout the entire continent.³² Negotiations of this initiative among member states were launched in 2015.³³ Finally, the Agreement Establishing the African Continental Free Trade Area (Establishing Agreement) entered into force in May 2019.³⁴ It built on negotiations of the Tripartite Free Trade Area, which comprises the Southern African Development Community, The East African Community and the Common Market for Eastern and Southern Africa,³⁵ but recognises several additional RECs: Arab Maghreb Union (UMA); the Community of Sahel-Saharan States (CEN-SAD); the Economic Community of Central African States (ECCAS); and the Intergovernmental Authority on Development (IGAD) and, of course, ECOWAS.³⁶

According to its Preamble, it is a mechanism to fulfil the aspirations of a 'continental market with the free movement of persons, capital, goods and services, which are crucial for deepening economic integration, and promoting agricultural development, food security,

28 As above.

29 Treaty Establishing the Common Market for Eastern and Southern Africa 1994, arts 63-66.

30 African Union 'Agenda 2063: Background Note' 13 October 2015 2, https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf. (accessed 16 August 2021).

31 COMESA (n 27) 3.

32 COMESA (n 27) 12.

33 African Union 'Decision on the Launch of Continental Free Trade Area Negotiations' 14 June 2015, Assembly/AU/Dec. 569 (XXV).

34 Trade Law Centre 'The African Continental Free Trade Area: A TRALAC guide' August 2020, <https://www.tralac.org/documents/resources/booklets/4062-afcfta-a-tralac-guide-7th-edition-august-2020/file.html> (accessed 16 August 2021).

35 L Abrego et al 'The African Continental Free Trade Agreement: Welfare gains estimates from a general equilibrium model' (2019) 4.

36 African Continental Free Trade Agreement (2018) (AfCFTA) Preamble read with art 1.

industrialisation and structural economic transformation'.³⁷ It is the second-largest trade agreement since the creation of the WTO.³⁸ Its implementation is to occur over two phases: Phase 1 marks the liberalisation of goods and services and dispute settlement.³⁹ Phase 2 will relate to competition, investment and intellectual property policy.⁴⁰

3 Nutrition landscape and the commercial determinants of health in Africa

Research by the WHO in 2015 estimated that non-communicable disease-related deaths account for 70 per cent of deaths worldwide.⁴¹ The rate of non-communicable disease-related deaths is also estimated to increase by 17 per cent globally, and 27 per cent in the African region before 2030.⁴² Several African states already report that more than 50 per cent of their domestic deaths are caused by non-communicable diseases.⁴³ In sub-Saharan Africa the rate of non-communicable diseases increased from 18,6 per cent to 29,8 per cent between 1990 and 2017.⁴⁴ More than 40 per cent of deaths in East Africa are attributable to non-communicable diseases.⁴⁵ In North Africa statistics on overweight and obesity, specifically, reveal an increase in over-nutrition in the region, with Egyptian adults showing the most concerning rates of obesity at an estimated 46,6 per cent.⁴⁶ WHO AFRO estimated that by 2030 non-communicable diseases would become the leading cause of death in sub-Saharan Africa.⁴⁷

This increasing prevalence of non-communicable diseases coincides with major changes in the economies, diets and activity levels of people in sub-Saharan African countries.⁴⁸ Over the past

37 As above.

38 RY Simo 'Trade in services in the African Continental Free Trade Area: Prospects, challenges and WTO compatibility' (2020) 23 *Journal of International Economic Law* 66.

39 AfCFTA (n 36) art 4.

40 AfCFTA (n 36) art 7.

41 World Health Organisation Regional Office for Africa (n 10).

42 As above.

43 As above – Mauritius, Namibia and Seychelles.

44 Gouda et al (n 10)

45 T Siddharthan et al 'Non-communicable diseases in East Africa: Assessing the gaps in care and identifying opportunities for improvement' (2015) 34 *Health Affairs* 1508.

46 S Toselli et al 'Prevalence of overweight and obesity in adults from North Africa' (2014) 24 *European Journal of Public Health* 32.

47 Jj Bigna & Jj Noubiap 'The rising burden of non-communicable diseases in sub-Saharan Africa' (2019) 10 *The Lancet Global Health* e1295-6.

48 T Reardon et al 'The processed food revolution in African food systems and the double burden of malnutrition' (2021) 28 *Global Food Security* 100466. driving them to buy processed food and food prepared away from home to save

five decades there has been an increasing proliferation of ultra-processed foods and a shift to Western diets in sub-Saharan Africa.⁴⁹ This has led to a nutrition transition and a growing double burden of malnutrition in African states where there simultaneously is a burden of undernutrition, stunting and wasting alongside increasing levels of obesity.⁵⁰ This increase in obesity is linked to higher rates of consumption of pre-packaged and lower quality foods in East Africa,⁵¹ which in turn is linked to increased access to foreign staple foods, the availability of processed foods and the marketing of unhealthy products.⁵² A review of non-communicable diseases in North Africa and the Middle East shows significant increases in the average degree of energy consumed per person in North African countries, for instance. Algeria's average calorie intake per person per day increased from 1 820 to 3 094 between 1969 and 2005.⁵³ The Global Nutrition Report indicates that 52 per cent of African adolescents have a sugar-sweetened beverage daily, while only 70 per cent have a fruit daily or 78 per cent have a vegetable daily.⁵⁴ In addition, the consumption of packaged food per capita per year has grown from 54 to 71 kilograms in 2017, while trends in North and Latin America show a reduction in packaged food consumption.⁵⁵ A study in West Africa shows high rates of daily consumption of snack foods: 25,7 per cent of children in Niger up to 45,5 per cent in Côte d'Ivoire.⁵⁶ A trend analysis of Cameroon, Kenya, Nigeria and South Africa revealed that 'global economic integration (trade and investment), beyond the pure generation of wealth (GDP), is linked to intermediate (overweight and obesity) and distal (CVD death) health outcomes'.⁵⁷ The analysis showed that all countries increased

arduous home-processing and preparation labor. In the past several decades, this trend has accelerated with a surge on the supply side of the processing sector and small and medium enterprises (SMEs).

- 49 NP Steyn & ZJ Mchiza 'Obesity and the nutrition transition in sub-Saharan Africa' (2014) 311 *Annals of the New York Academy of Sciences* 89-90.
- 50 Reardon et al (n 48) 100466.driving them to buy processed food and food prepared away from home to save arduous home-processing and preparation labor. In the past several decades, this trend has accelerated with a surge on the supply side of the processing sector and small and medium enterprises (SMEs).
- 51 Siddharthan et al (n 45) 1508.
- 52 V Raschke & B Cheema 'Colonisation, the New World Order, and the eradication of traditional food habits in East Africa: Historical perspective on the nutrition transition' (2008) 11 *Public Health Nutrition* 669.
- 53 AM Sibai et al 'Nutrition transition and cardiovascular disease risk factors in Middle East and North Africa countries: Reviewing the evidence' (2010) 57 *Annals of Nutrition and Metabolism* 198.
- 54 Development Initiatives '2018 Global Nutrition Report: Shining A light to spur action on nutrition' (2018) 83, <https://globalnutritionreport.org/reports/global-nutrition-report-2018/> (accessed 16 August 2021).
- 55 Development Initiatives (n 54) 90.
- 56 S Nordhagen, AM Pries & R Dissieka 'Commercial snack food and beverage consumption prevalence among children 6-59 months in West Africa' (2019) 11 *Nutrients* 2715.
- 57 A Schram, R Labonté & D Sanders 'Urbanisation and international trade and investment policies as determinants of non-communicable diseases in sub-

their imports of cereal and cereal products as well as sweeteners such as sugar, honey and sugar products.⁵⁸ Disturbingly, this trend existed alongside persistent rates of food insecurity.⁵⁹ This perhaps is not unsurprising given the lessons from history that showed the impact of new trade paradigms on the impact of indigenous diets: For example, the introduction of trade with South-East Asia in the 1500s led to the assimilation of foreign ingredients into local diets.⁶⁰ Despite the increasing prevalence in obesity, many countries in sub-Saharan Africa remain in the early stages of nutrition transition and, for this reason, it remains possible to reverse the trajectory of the non-communicable disease epidemic.⁶¹

The role of trade agreements in this transition is often referred to as a commercial determinant of health. Broadly speaking, the commercial determinants of health is a term that refers to ‘factors that influence health which stem from the profit motive’.⁶² An important sub-set of these factors is what is termed the commercial determinants of non-communicable diseases, which links the rise of transnational food and drink companies and the growing trend of consumption of ultra-processed food and drinks with the increase in the burden of non-communicable diseases.⁶³ The role of trade agreements as commercial determinant for non-communicable diseases is discussed in more detail below.⁶⁴

4 NCD prevention: ‘Protecting’ the rights to food, health, and life of the person

The scholarship and legal position on a human rights-based approach to non-communicable disease prevention are relatively new and continue to develop. Non-communicable diseases, and particularly nutrition-related non-communicable diseases, as well as preventative

Saharan Africa’ (2013) 56 *Progress in Cardiovascular Disease* 297.

58 As above.

59 As above.

60 Raschke & Cheema (n 52) 664.

61 Z Abrahams, Z Mchiza & NP Steyn ‘Diet and mortality rates in sub-Saharan Africa: Stages in the nutrition transition’ (2011) 11 *BMC Public Health* 11.

62 R West & T Marteau ‘Commentary on Casswell (2013): The commercial determinants of health’ (2013) 108 *Addiction* 686-687, although a recent systematic study showed no uniform definition and identified several definitions with different focal points: C de Lacy-Vawdon & C Livingstone ‘Defining the commercial determinants of health: A systematic review’ (2020) 20 *BMC Public Health* 1022.

63 K Buse, S Tanaka & S Hawkes ‘Healthy people and healthy profits? Elaborating a conceptual framework for governing the commercial determinants of non-communicable diseases and identifying options for reducing risk exposure’ (2017) 13 *Global Health* 34.

64 K Buse & M Mialon ‘An overview of the commercial determinants of health’ (2020) 16 *Global Health* 74.

interventions, implicate a broad array of human rights. Patterson et al suggest that a state's response to obesity can implicate a wide array of social, cultural and political rights including (non-exhaustively) the rights to life, health, food, education, freedom of association, freedom of speech, privacy, information and non-discrimination.⁶⁵ However, this part will focus on the relationship between non-communicable diseases, and the rights to health, life and food.

The Preamble to the Constitution of the World Health Organisation (1946) was the first recognition of a right to health and included a definition that included 'complete physical, mental and social well-being', not merely the absence of disease. This right to health was further recognised in article 25 of the United Nations Declaration of Human Rights, which states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right to health was further expanded in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁶ read with General Comment 14 which outlined the right to health as including both a right to access health care as well as addressing the underlying determinants of health including 'access to safe and potable water and adequate sanitation, an adequate supply of safe food, *nutrition* and housing, healthy occupational and environmental conditions'.⁶⁷

Whether these rights encompassed the prevention of nutrition-related non-communicable diseases was initially not clear. General Comment 14 limited a state's obligations in respect of genetic and life style-related diseases.⁶⁸ However, in both the General Comment

65 D Patterson et al 'Identifying a human rights-based approach to obesity for states and civil society' (2019) 20 *Obesity Reviews* 48-50.

66 International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
67 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (art 12) E/C.12/2000/4 (2000) para 11 (our emphasis).

68 General Comment (n 67) para 9: 'The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services

and other statements on the right to health, there has been a growing recognition that nutrition-related non-communicable diseases are not a result of individual behaviour and choices but, in many respects, are a result of environments and exposure to risk factors. This is reflected in the increasing number of statements recognising the obligations under the rights to food and health in preventing nutrition-related non-communicable diseases.

The 2011 Moscow Declaration acknowledged that ‘the right of everyone to the enjoyment of the highest attainable standards of physical and mental health cannot be achieved without greater measures at global and national levels to prevent and control NCDs’. At a high-level meeting of the General Assembly on the prevention and control of NCDs in 2018, member states explicitly adopted a rights-based approach to non-communicable disease prevention and affirmed that

the primary role and responsibility of governments at all levels in responding to the challenge of non-communicable diseases by developing adequate national multisectoral responses for their prevention and control, and promoting and protecting the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and underscore the importance of pursuing whole-of-government and whole-of-society approaches, as well as health-in-all-policies approaches, equity-based approaches and life-course approaches.⁶⁹

The 2014 UN Special Rapporteur on the Right to Health’s report on unhealthy foods, non-communicable diseases and the right to health expressly outlined the state’s duties to prevent nutrition-related non-communicable diseases as part of the state’s obligations to respect, protect and fulfil the right to health.⁷⁰ In this report the Special Rapporteur also discussed the aspects of human rights related to the responsibility of the food and beverage industry and recognised that the right to health requires that industry to ‘refrain from engaging in activities that negatively impact the right of people to the highest attainable standard of health’.⁷¹ This report mirrored the report of the 2011 UN Special Rapporteur on the Right to Food (De Schutter) to the Human Rights Council where he discussed the right to food and the ‘triple challenge’ of food security, adequate nutrition and

and conditions necessary for the realisation of the highest attainable standard of health’ (our emphasis).

69 United Nations General Assembly, 17 October 2018, A/RES/73/2, <https://undocs.org/en/A/RES/73/2> (accessed 16 August 2021).

70 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, 1 April 2014 (A-HRC-26-31).

71 Report of Special Rapporteur (n 70) 12.

overweight and obesity.⁷² One of the most notable aspects of the report is the discussion of poverty and its links to non-communicable diseases. De Schutter outlines how poorer households may be less educated about unhealthy diets but also may lack the resources to improve their diets.⁷³ De Schutter posited that the role of a human rights framework is two-fold, namely, the protection of the right to an adequate diet and ensuring a transition to more sustainable diets.⁷⁴

At a regional level, the African Charter on Human and Peoples' Rights (African Charter) recognises the right to health as the right of every individual 'to enjoy the best attainable state of physical and mental health'.⁷⁵ In *SERAC*⁷⁶ the African Commission on Human and Peoples' Rights (African Commission) developed the right to life and the right to health under articles 4 and 16 of the African Charter respectively as including a right to food.⁷⁷ The Commission explicitly recognised the link between the right to food and other guaranteed rights:⁷⁸

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.

The African Commission goes further in its 2019 Resolution where it links the right to food to the requirement of nutritional quality, and mandates states to strictly regulate the marketing of industrialised and highly-processed food – categories of food items regarded as non-nutritious and unhealthy.⁷⁹

Consequently, both at regional and international level there appears to be a human rights imperative for states to take action to prevent and control non-communicable diseases.

72 Report submitted by the Special Rapporteur on the Right to Food, Oliver de Schutter, 26 December 2011 (A/HRC/19/59).

73 Report of Special Rapporteur (n 72) para 8.

74 Report of Special Rapporteur (n 72) para 20.

75 African Charter on Human and Peoples' Rights (1981) art 16.

76 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC).

77 *SERAC* (n 76) para 64-65.

78 As above.

79 Resolution on the Right to Food and Nutrition in Africa, 10 November 2019, ACHPR/RES.431(LXV)2019, <https://www.achpr.org/sessions/resolutions?id=462> (accessed 11 May 2022).

5 Growing recognition of human rights in trade law

The start of modern international trade and investment law did not incorporate human rights concerns. The Bretton Woods Agreements – which established the now-World Bank and International Monetary Fund – and the General Agreement on Tariffs and Trade (GATT) – the predecessor to the WTO, the provisions of which were adopted by the WTO – made no mention of human rights.⁸⁰ This is not surprising given that the Universal Declaration of Human Rights was adopted in 1948, while the Bretton Woods Agreements were concluded in 1944 and the GATT in 1947.⁸¹ However, to view these multilateral trade treaties and human rights treaties as completely removed from one another is not accurate. Their origins can both be traced back to post-World War II measures to increase prosperity, stability and international cooperation.⁸²

Commentaries on international trade agreements have increasingly started to consider its human rights impact. The Office of the High Commissioner for Human Rights has prepared a number of reports on human rights, globalisation, trade and investment.⁸³ Trade agreements have also been increasingly recognising human rights objectives, albeit not always expressly. For instance, relevant to the topic of this article, we note that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that member states may ‘adopt measures necessary to protect public health

80 P Alston ‘Resisting the merger and acquisition of human rights by trade law: A reply to Petersmann’ (2002) 13 *European Journal of International Law* 820.

81 As above.

82 H Lim ‘Trade and human rights: What’s at issue?’ (2001) 35 *Journal of World Trade* 276; see art 55 of the United Nations Charter which provides, among others, that the United Nations shall promote ‘higher standards of living’ amongst the backdrop of creating ‘conditions of stability and well-being which are necessary for peaceful and friendly relations among nations’; and the Marrakesh Agreement (n 2) which provided that contracting parties should conduct endeavours with the view to raising standards of living.

83 Commission of Human Rights ‘The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights’ E/CN.4/Sub.2/2001/13; Commission of Human Rights ‘Globalisation and its impact on the full enjoyment of human rights’ E/CN.4/2002/54; Commission of Human Rights ‘Liberalisation of trade in services and human rights’ E/CN.4/Sub.2/2002/9; Commission of Human Rights ‘Human rights, trade and investment’ E/CN.4/Sub.2/2003/9; Commission of Human Rights ‘Human rights and trade’ Submission to the 5th WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003; Commission of Human Rights ‘Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalisation’ E/CN.4/2004/40; Commission of Human Rights ‘The right of everyone to the enjoyment of the highest attainable standard of physical and mental health – Mission to the World Trade Organisation’ E/CN.4/2004/49/Add.1; Commission of Human Rights ‘Mainstreaming the right to development into international trade law and policy at the World Trade Organisation’ E/CN.4/Sub.2/2004/17; Commission of Human Rights ‘Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalisation’ (E/CN.4/2005/41).

and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement'.⁸⁴ This recognition does not automatically amount to a human rights-based approach to applying its provisions,⁸⁵ but laid the foundation for instruments such as the DOHA declaration, which called for a reading of TRIPS that aligns with a state's duties to promote public health.⁸⁶

African RECs have a more express incorporation of human rights concerns: The EAC Treaty prescribed the protection and promotion of rights under the African Charter as a fundamental principle and even ties the qualification of membership to the observation of human rights, and the treaties establishing ECOWAS and SADC commit members to the protection and promotion of 'fundamental rights'.⁸⁷ Closely linked to this is the incorporation of human rights as guiding principles in economic initiatives both regionally, such as the New Partnership for Africa's Development (NEPAD), and from possible donor countries, such as the African Growth and Opportunity Act in the United States (AGOA).⁸⁸

Petersmann argues for three reasons why developing and giving clarity to the relationship between human rights and trade law is increasingly becoming necessary.⁸⁹ First, human rights might be an important legal context for the interpretation of trade agreements. For example, article 3(3) of the Dispute Settlement Understanding (DSU) of the WTO provides that customary rules of interpretation of international law is a mechanism to preserve the rights and obligations of members under covered agreements (agreements specifically listed in the DSU).⁹⁰ In turn, the Vienna Convention on

84 Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (2005) art 8.

85 Commissioner for Human Rights 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' E/CN.4/Sub.2/2001/13 para 21.

86 DOHA Declaration on the TRIPS Agreement and Public Health, 20 November 2001 WT/MIN(01)/DEC/2.

87 SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 92.

88 Musungu (n 87) 93. However, these initiatives should not be regarded without criticism. Eg, AGOA mandates the protection of private property rights, which is a subject of debate in the region, and could pose some very direct conflicts such as when intellectual property rights such as patents over medicine clash with the right to health of persons protected under the African Charter.

89 E Petersmann 'The "human rights approach" advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is it relevant for WTO law and policy?' (2004) 7 *Journal of International Economic Law* 608-613.

90 Annex 2 of the Marrakesh Agreement (n 2), and Appendix 1 thereof which sets out the covered agreements for the DSU.

the Law of Treaties – which generally is considered to contain several important rules of customary international law – provides that when interpreting treaties '[t]here shall be taken into account ... any relevant rules of international law applicable in the relations between the parties'.⁹¹ Second, the perception that trade liberalisation leads to the improved 'total welfare' of the state has been challenged, and trade liberalisation is increasingly being understood to disproportionately benefit producers, and to omit the protection of the interests of the vulnerable.⁹² Third, trade rules and the protection of human rights serve complementary functions which would benefit from a reconciliatory approach.⁹³ Economic welfare is a key component to realising human rights, and human rights protection promotes economic welfare. For example, one cannot enjoy the realisation of socio-economic rights such as access to health, food, housing and social security in a state of poverty. Equally, without the protection of non-discrimination, wealth might only be enjoyed by an elite few in a country.

The Special Rapporteur on the Right to Food has also made an argument that allowing trade law to be self-contained from other international obligations is problematic: First, human rights law occupies a hierarchically superior normative position.⁹⁴ The United Nations Charter provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.⁹⁵ Article 55(c) of the Charter provides that the UN shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all', while article 56 provides that '[m]embers pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'. Attempting to view trade law and human rights law separately can lead to a reality in which states can undermine their human rights obligations.⁹⁶

Perhaps a clear example can be found in the protection and promotion of children's rights – which Cathaoir and Hartley

91 Vienna Convention on the Law of treaties (1969) art 31(3)(c).

92 Petersmann (n 89) 611.

93 Petersmann 612.

94 O de Schutter 'A human rights approach to trade and investment policies' (2008) Conference Paper: Confronting the global food challenge: Finding new approaches to trade and investment that support the right to food 3.

95 Charter of the United Nations (1945) art 103.

96 De Schutter (n 94) 14.

considered central in addressing obesity.⁹⁷ The United Nations Convention on the Rights of the Child (CRC) enjoys almost universal recognition: Every member of the UN is a party to CRC except the United States which is a signatory.⁹⁸ For example, CRC provides that the ‘best interests of the child shall be the primary consideration’ in all actions concerning children.⁹⁹ It also recognises the right of the child to enjoy the highest attainable standard of health and that states shall take appropriate measures to combat malnutrition and provide adequate food.¹⁰⁰ It is difficult to imagine how trade disputes under the DSU, at least, cannot consider the provisions of CRC as ‘relevant rules ... in the relations between parties’, and consider the best interests of the child and the child’s health as factors when determining trade disputes.

6 Potential impact of trade agreements on the nutrition landscape of a country

Friel et al identify the following three pathways to how trade agreements can influence the nutrition landscape of a country: the impact of the removal of tariff and non-tariff barriers on imports; the impact of tariff reduction on government spending; and the promotion of foreign direct investment as a door for increased unhealthy food producers to enter local markets.¹⁰¹ The Special Rapporteur on the Right to Food mentions the impact of the mandatory removal of barriers in the context of ‘regulatory chill’ – where states are unwilling to intervene in markets to promote certain objectives (such as promoting health concerns) for fear of being sanctioned under trade agreements.¹⁰² The Special Rapporteur also echoes the concern about the reduction in government income.¹⁰³ In addition to these concerns, the impact of trade agreements on the ability to levy excise taxes or use custom tariffs as a way to influence consumer behaviour is also of importance.

97 KÓ Cathaoir & M Hartley ‘The child’s right to health as a tool to end childhood obesity’ in A Garde, J Curtis & O de Schutter (eds) *Ending childhood obesity: A challenge at the crossroads of international economic and human rights law* (2020) 57.

98 United Nations Convention on the Rights of the Child (1989) (CRC).

99 Art 3(1) CRC.

100 Arts 24(1) & 2(c) CRC.

101 S Friel et al ‘A new generation of trade policy: Potential risks to diet-related health from the Trans-Pacific partnership agreement’ (2013) 9 *Global Health* 46.

102 De Schutter (n 94) 14; see also S Friel & D Gleeson ‘Emerging threats to public health from regional trade agreements’ (2013) 381 *Lancet* 1507.

103 As above.

6.1 Increased imports of unhealthy commodities

The ascension to trade agreements are correlated to increased imports of unhealthy commodities.¹⁰⁴ A systematic review of 17 quantitative studies on the impact of implementing trade agreements revealed an increase in the import of unhealthy food products after import tariffs were reduced, including an increase in processed food: in India after local liberalisation reforms in the 1990s; in Central America after the introduction of the US-Central American Free Trade Agreement (CAFTA) and prior bilateral agreements between the United States and Central American countries; in Fiji and Samoa after implementing several trade liberalisation policies driven by accession to the WTO and in response to local environmental and political factors.¹⁰⁵ With the introduction of the Central America-Dominican Republic-Free Trade Agreement (CAFTA-DR) several countries announced removing tariffs on cookies, frozen pizza, corn chips, baked crackers, potato chips and sugar confectionary.¹⁰⁶ Following the signature of the North American Free Trade Agreement (NAFTA) imports of, among others, corn, high-fructose corn syrup, and snack foods from the United States to Mexico increased.¹⁰⁷ Shockingly, in an attempt to protect their processed food industry, the United States attempted to negotiate an explicit ban on front-of-pack-nutrition labelling – a policy viewed as a measure to promote healthy consumer choices.¹⁰⁸ A study of the relationship between increased foreign direct investment (FDI) associated with trade openness in Cameroon, Kenya, Nigeria and South Africa, and dietary habits reveals a disproportionate increase in the import of sugar and sugar products, with a growing rate of daily caloric intake of the population (with the exception of Kenya).¹⁰⁹ The rates of undernourishment remained stagnant.¹¹⁰

¹⁰⁴ B Townsend & A Schram 'Trade and investment agreement as structural drivers for NCDs: The new public health frontier' (2020) 44 *Australian and New Zealand Journal of Public Health* 92.

¹⁰⁵ P Barlow et al 'The health impact of trade and investment agreements: A quantitative systematic review and network co-citation analysis' (2017) 13 *Global Health* 5; AM Thow & C Hawkes 'The implications of trade liberalisation for diet and health: A case study from Central America' (2009) 5 *Global Health* 11; AM Thow et al 'Trade and the nutrition transition: Strengthening policy for health in the Pacific' (2011) 50 *Ecology of Food and Nutrition* 33.

¹⁰⁶ Thow & Hawkes (n 105) 11.

¹⁰⁷ SE Clark et al 'Exporting obesity: US farm and trade policy and the transformation of the Mexican consumer food environment' (2012) 18 *International Journal of Occupational Environmental Health* 54 61.

¹⁰⁸ R Labonté 'Trade, investment and public health: Compiling the evidence, assembling the arguments' (2019) 15 *Global Health* 4.

¹⁰⁹ Schram (n 57).

¹¹⁰ As above.

6.2 Increased foreign direct investment

The impacts of NAFTA on the Mexican food landscape also show the impact of increased foreign direct investment. Increased FDI often is a goal of trade liberalisation and the resulting trade agreements created to facilitate the goal. FDI allows transnational food corporations to extend their production, distribution and marketing channels.¹¹¹ The largest portion of US investment in the Mexican food industry is in soft drinks and malt beverages and highly-processed food.¹¹² Fast food companies such as McDonald's, KFC, Pizza Hut and Taco Bell have rapidly proliferated across Mexico.¹¹³ Piercing of local markets is also accompanied by aggressive marketing techniques. For example, in the late 1990s sugar-sweetened beverage (SSB) producers used child-directed marketing in schools in Mexico and Columbia which led to a 50 per cent increase in SSB consumption among children.¹¹⁴ Hints of FDI negatively impacting the food systems between African states among themselves are already evident in the growing dominance of South African supermarket chains in neighbouring countries: Botswana, Egypt, Lesotho, Malawi, Mauritius, Madagascar, Mozambique, Namibia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.¹¹⁵ Research suggests that supermarkets increase access to unhealthy foods by pricing such items at rates of between 30 per cent and a 110 per cent lower than healthy alternatives.¹¹⁶ Another example of the possible skewing of increased FDI in the food sector is the investment under the New Alliance for Food Security and Nutrition in Africa, which was launched under the auspices of the G8 and is aimed at investing in the agri-food sector in Burkina Faso, Benin, Côte d'Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria, Senegal and Tanzania.¹¹⁷ Five of the top six investors are producers of SSBs or alcoholic beverages and their total investment between 2012 and 2017 amounts to US \$1 890 800.¹¹⁸ This dovetails with the broader trend of agricultural FDI in sub-Saharan Africa, where

111 Friel (n 101).

112 Clark et al (n 107) 60.

113 As above.

114 C Hawkes, M Chopra & S Friel 'Globalisation, trade, and the nutrition transition' in R Labonté et al (eds) *Globalisation and health: Pathways, evidence and policy* (2009) 254-255.

115 Schram (n 57).

116 D Sanders et al 'Public health and processed food imports in South Africa' (2011) Report prepared for the Department of Trade and Industry South Africa.

117 Directorate-General for External Policies, European Parliament 'New Alliance for Food Security and Nutrition in Africa' (2015) 4, [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535010/-EXPO_STU\(2015\)535010_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535010/-EXPO_STU(2015)535010_EN.pdf) (accessed 20 August 2021)

118 C Husmann & Z Kubik 'Foreign direct investment in the African food and agriculture sector: Trends, determinants and impacts' (2019) 12, <https://www.econstor.eu/bitstream/10419/204641/1/1663183198.pdf> (accessed 20 August 2021).

investment in breweries and distilleries (8 per cent), sugar and confectionary (8 per cent) and the soft drink sector (4,6 per cent) is noteworthy.¹¹⁹

6.3 Reduction in tariff revenue

African countries have a higher reliance on trade taxes than other regions, which can be ascribed to difficulties in domestic tax administration which tend to lead to a concentration on 'easy' taxes.¹²⁰ The impact of tariff reductions thus could disrupt the available income to governments. Kassim compares several studies on trade liberalisation and trade tax revenues and found an inconsistent narrative: Depending on the subject of the study, trade liberalisation could either lead to a reduction in revenue, or an overall improvement due to increased total trade.¹²¹ The United Nations Conference on Trade and Development (UNCTAD) estimates that short-term loss of government revenue due to AfCFTA implementation can cause a revenue shock (an estimate of up to US \$4,1 billion) but estimates that longer-term economic growth will counteract this effect.¹²² A modelling of East African countries and the implementation of AfCFTA paints a different picture: There is a revenue loss in Kenya (US \$14,2 million); Uganda (US \$13,5 million); Tanzania (US \$5,3 million); Burundi (US \$4,3 million); and Rwanda (US \$3,9 million). While Kenya, Uganda and Burundi will experience a longer-term positive trade effect, Rwanda and Tanzania are likely to not see the revenue loss offset.¹²³

6.4 Regulatory chill

Trade agreements can also be used to challenge public health policy initiatives. We have already seen several instances where

¹¹⁹ Husmann & Kubik (n 118) 13.

¹²⁰ African Trade Policy Centre 'Fiscal implications of trade liberalisation on African Countries' (2004) ATPC Work in Progress 5, <https://repository.uneca.org/handle/10855/5551> (accessed 20 August 2021).

¹²¹ L Kassim 'The revenue implication of trade liberalisation in sub-Saharan Africa: Some new evidence' (2016) University of Kent 5, <https://www.kent.ac.uk/economics/repec/1605.pdf> (accessed 20 August 2021).

¹²² M Saygili, R Peters & C Knebel 'African Continental Free Trade Area: Challenges and opportunities of tariff reductions' (2017) UNCTAD Research Paper 15, 8, 12, <https://unctad.org/webflyer/african-continental-free-trade-area-challenges-and-opportunities-tariff-reductions> (accessed 20 August 2021).

¹²³ IMB Shinyekwa, ENW Bulime & AK Naittibi 'African Continental Free Trade Area: The potential revenue, trade and welfare effects for the East African Community' (2020) Economic Policy Research Centre Paper 153, 24, <https://www.africaportal.org/publications/african-continental-free-trade-area-potential-revenue-trade-and-welfare-effects-east-african-community/> (accessed 20 August 2020).

trade concerns were used to challenge tobacco control measures and nutrition labelling that would assist in identifying unhealthy foods.¹²⁴ For example, despite legal analysis indicating that the plain packaging for tobacco labelling would be compliant with trade obligations in Australia, the WTO dispute settlement machinery was still invoked.¹²⁵ Nutrition labelling is even more vulnerable to these trade challenges as there is no international standard or convention regarding nutrition labelling.¹²⁶ A systematic review of statements made in the WTO TBT Committee between 2010 and 2020 found that commercial actors managed to positively sway Committee discussions on ten alcohol policies, including challenges to South African and Kenyan local policies.¹²⁷ For example, a proposed policy to include stricter health warnings on alcohol products in Kenya was challenged based on a perceived lack of evidence and was asked to reconsider a health warning label by the European Union in favour of non-restrictive policies such as public education.¹²⁸

The use of investor-state dispute settlement regimes in free trade agreements allows foreign private investors to directly bring forward trade concerns and even claim financial compensation from states.¹²⁹ An explosion of these claims against states have been noted where commercial entities challenge regulations that impact the value of their local investments and are perceived to amount to expropriation.¹³⁰ These claims have increased in number and claim value.¹³¹ For example, in 2015 the WTO Technical Barriers to Trade Committee received 54 trade concerns, of which one in every three related to public health issues.¹³² Even where governments have been successful in defending trade challenges against non-communicable disease prevention measures, the litigation has been costly and results in 'regulatory chill', something to which sub-Saharan countries are particularly susceptible.¹³³

124 AM Thow et al 'Nutrition labelling is a trade policy issue: Lessons from an analysis of specific trade concerns at the World Trade Organisation' (2018) 33 *Health Promotion International* 564-568.

125 H Jarman 'Attack on Australia: Tobacco industry challenges to plain packaging' (2013) 34 *Journal of Public Health Policy* 375.

126 Thow et al (n 124) 569.

127 Barlow et al 'Industry influence over global alcohol policy via the World Trade Organisation: A qualitative analysis of discussions on alcohol warning labelling, 2010-19' (2022) 10 *Lancet* e429-e437.

128 As above.

129 CL McNamara et al 'Glossary on free trade agreements and health part 1: The shift from multilateralism and the rise of "WTO-Plus" provisions' (2021) *Journal of Epidemiology and Community Health* Jan 5: jech-2020-215104.

130 Labonté (n 108) 2.

131 As above.

132 P Barlow 'Trade and investment agreements: Implications for health protection' (2017) 51 *Journal of World Trade* 160.

133 A Garde & J Zrilić 'International investment law and non-communicable diseases prevention: An introduction' (2020) 21 *Journal of World Investment and Trade*

7 Opportunities to improve the human rights responsiveness of trade agreements

During his tenure as the United Nations Special Rapporteur on the right to food De Schutter offered a detailed framework through which to consider the interaction of international trade and investment law and human rights.¹³⁴ This framework is one of the first attempts to understand the interaction of these two fields and offers four practical ways in which to make trade agreements more human rights-responsive.¹³⁵ The framework is also developed with a unique understanding of food systems, which is key in the discussion on nutrition-related non-communicable diseases, and trade and investment issues.¹³⁶

First, De Schutter argues for the inclusion of general exception clauses and flexibilities in trade agreements that allows states to escape certain obligations under trade agreements without fearing sanctions (the aforementioned 'regulatory chill'). For example, article XX of GATT provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health ...

Similar wording is found in the General Agreement on Trade in Services, other RTAs or even built upon as in the EU-Mercosur Association Agreement, which provides that '[a]rticle XX of the GATT 1994 ... is incorporated into and made part of [this] Chapter' and that article XX(b) of GATT 'includes environmental measures, such as measures taken to implement multilateral environmental agreements'.¹³⁷ These exceptions as formulated in GATT has been interpreted by the UN Secretary-General to be reflected on and linked to the protection of several human rights, including the right to food and health.¹³⁸ However, in practice these provisions in the GATT have

668.

134 De Schutter (n 94) 15.

135 As above.

136 De Schutter (n 94) 6.

137 Trade part of the EU-Mercosur Association Agreement (2019) art 13; the Trans-Pacific Partnership Agreement uses a similar formulation.

138 United Nations Secretary-General 'Globalisation and its impact on the full enjoyment of all human rights' A/55/342 para 17.

not led to a decision based on human rights concerns before the Dispute Settlement Panel or Appellate Body.¹³⁹ In addition, the Office of the High Commissioner for Human Rights makes the point that formulating the mechanisms to promote human rights as exceptions rather than guiding principles already creates an impression of subordination of human rights.¹⁴⁰

Second, the use of an *ex ante* human rights assessment is encouraged.¹⁴¹ Similar calls to conduct a human rights impact assessment (HRIA) of trade agreements have been frequent from a range of other actors:¹⁴² several United Nations Treaty Committees¹⁴³ and the Office of the High Commissioner for Human Rights.¹⁴⁴ On a national level, the Canadian Parliament called for a HRIA of the Canada-Columbia Free Trade Agreement.¹⁴⁵ The purpose of the HRIA is to evaluate the potential impact of negotiated provisions on human rights, specifically in the food environment. This evaluation occurs on several levels: The substance of the treaty is probed to consider the availability, accessibility, acceptability and adaptability of the provision of socio-economic rights; the procedures in the treaty are probed to consider which oversight structures exist within the treaty to monitor for human rights violations; and, finally, the HRIA can act as the basis for claims of human rights violations in future.¹⁴⁶ The European Commission has extended its sustainability impact assessment process to evaluate the human rights responsiveness of all proposed trade agreements.¹⁴⁷ Several HRIAs in various forms, scopes and complexities have been undertaken: The National Human Rights

139 Lim (n 82) 284.

140 United Nation High Commissioner of Human Rights 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' E/CN.4/Sub.2/2001/13 para 22.

141 De Schutter (n 94) 17.

142 J Harrison & A Goller 'Trade and human rights: What does "impact assessment" have to offer?' (2008) 8 *Human Rights Law Review* 589.

143 ESCR Committee 'Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant' E/C.12/1/Add.100; CEDAW Committee 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Colombia' CEDAW/C/COL/CO/6; CRC Committee 'Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations El Salvador' CRC/C/15/Add.232.

144 United Nations High Commissioner for Human Rights 'Report of the High Commissioner on Human Rights, Trade and Investment' E/CN.4/Sub.2/2003/9 para 2.

145 Report of the Standing Committee on International Trade, Human Rights, the Environment and Free Trade with Colombia (2008) Ottawa: Communication Canada para 44, <https://www.ourcommons.ca/Content/-Committee/392/CIIT/Reports/RP3580301/ciitp05/ciitp05-e.pdf> (accessed 20 August 2021).

146 De Schutter (n 94) 18.

147 J Zerk 'Human rights impact assessment of trade agreements' (2019) 9, <https://www.chathamhouse.org/sites/default/files/2019-02-18Human-RightsTradeAgreements.pdf> (accessed 20 August 2021).

Commission of Thailand assessed the Thailand-US FTA, the CAFTA-DR and Pacific Agreement on Closer Economic Relations.¹⁴⁸

Third, De Schutter – alive to the criticism of some of the shortcomings of *ex ante* assessments – also advocates the inclusion of sunset or *rendez-vous* clauses. This clause allows for *ex post facto* HRIAs to be conducted and then allows revision of the original agreement to correct aspects that have resulted in negative outcomes.¹⁴⁹

Fourth, using the same reasoning as Petersmann above in ‘importing’ human rights obligations as part of the interpretation of trade agreements, and relying on arguments of the normative superiority of human rights obligations in the hierarchy of international law, De Schutter argues that where trade agreements and human rights obligations cannot be reconciled, the trade agreement must be set aside and disapplied.¹⁵⁰

8 How does AfCFTA measure up?

Using the four mechanisms proposed by De Schutter, the AfCFTA is measured for its human rights responsiveness.

First, AfCFTA employs a general exception clause (as has become practice). The AfCFTA Protocol on Trade in Goods provides in article 26:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between State Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Protocol shall be construed as preventing the adoption or enforcement of measures by any State Party that are:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health ...

The Protocol on the Trade in Services provides the same exceptions.¹⁵¹ AfCFTA also contains a waiver clause that permits a state party to request a waiver of any obligation under the Agreement and which can be granted by a decision of three-fourths of the state parties.¹⁵² The waiver is subject to annual review.¹⁵³ The inclusion of these

148 As above.

149 De Schutter (n 94) 20.

150 De Schutter 19.

151 AfCFTA Agreement (n 34) art 15, Protocol.

152 Art 15(1) AfCFTA Agreement.

153 Art 15(2) AfCFTA Agreement.

clauses nominally checks De Schutter's requirement but is likely to face the same obstacles that the previous interpretation of similarly-worded clauses in other trade agreements suffered.

In terms of the use of *ex ante* human rights impact assessment, a HRIA was conducted jointly by the Economic Commission for Africa, the Friedrich-Ebert-Stiftung and the Office of the United Nations High Commissioner for Human Rights.¹⁵⁴ The HRIA made several relevant recommendations in relation to ensuring that AfCFTA is alive to challenges to domestic food environments: Members of AfCFTA should maintain an exclusion list of tariff lines to be temporarily excluded from tariff liberalisation to protect vulnerable groups (such as food insecure groups);¹⁵⁵ it is necessary to negotiate the maintenance of policy space in the final treaty, that is, to keep open the ability to implement measures in certain areas such as the food environment;¹⁵⁶ the treaty should establish a mechanism to monitor and evaluate the human rights compliance of eliminating non-tariff barriers;¹⁵⁷ and, finally, ongoing data collection before and after the adoption of AfCFTA is important for accurate assessments of the impacts of the implementation of AfCFTA on vulnerable groups.¹⁵⁸

In June 2019 AfCFTA published Annex 5 to the agreement relating to non-tariff barriers which creates several bodies responsible for monitoring, coordinating and implementing the elimination of non-tariff barriers.¹⁵⁹ There is nothing in the annex to indicate that these bodies would concern themselves with any possible human rights implications of eliminated barriers but, rather, the bodies seem to be structured to promote consistent, clear and rapid elimination instead. These bodies are also to interact with REC Non-Tariff Barrier (NTB) Monitoring mechanisms where the use of REC NTB mechanisms are encouraged as a first remedy.¹⁶⁰ COMESA and ECOWAS have established such NTB mechanisms which really act as a mechanism to complain about the failure to eliminate a non-tariff barrier practically instead of providing a platform to advocate the continued existence or reintroduction on a NTB.¹⁶¹ The schedule of tariff concessions are still outstanding, with the result that it is not possible to comment on

154 FES 'Report: The Continental Free Trade Area (CFTA) in Africa – A human rights perspective' (2017), https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssess-ment.pdf (accessed 20 August 2021).

155 FES (n 155) 16.

156 FES 17.

157 FES 18.

158 FES 14.

159 AfCFTA (n 34) Annexure 5, arts 6-9.

160 Art 12(2) AfCFTA (n 34).

161 Borderless Alliance 'Register a complaint', http://www.tradebarrierswa.org/register_complaint; trade-barriers.org/register-_complaint (accessed 20 August 2021).

products that are on or excluded from the exclusion list.¹⁶² However, it seems that an exclusion list will be issued, but no more than 3 per cent of tariff lines may be included in this list.¹⁶³

In terms of the inclusion of a *rendez-vous* clause, a similar clause is present in article 28 of the Establishing Agreement which provides that the '[Establishing] Agreement shall be subject to review every five (5) years after its entry into force, by State Parties, to ensure effectiveness, achieve deeper integration, and adapt to evolving regional and international developments'. No reference is made to a HRIA being required as part of this process. The responsiveness of AfCFTA to human rights will be dependent upon how this review process occurs practically and if a HRIA forms an integral part of this process.

In terms of using human rights as an interpretative tool, conceptually, AfCFTA is already more responsive to human rights in so far as actually recognising human rights as part of the text of its Establishing Agreement. AfCFTA specifically recognises the importance of human rights for the development of international trade and economic cooperation, and reaffirms the rights and duties of member states in terms of other agreements to which they are party.¹⁶⁴ Under article 3 it provides as one of its objectives to promote sustainable and inclusive socio-economic development.¹⁶⁵ However, this is not surprising given the express recognition the RECs have given human rights. In addition, similar to the DSU, the Protocol on Rules and Procedures on the Settlement of Disputes provides that the Dispute Settlement Panel and the Appellate Body 'shall interpret the provisions of the Agreement in accordance with the customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties, 1969'.¹⁶⁶ Thus, the text of the Establishing Agreement can be used to motivate the use of human rights obligations in other treaties to guide disputes or general interpretation of the Establishing Agreement.

162 G Erasmus 'When will trade under AfCFTA preferences become a reality' (2019), <https://www.tralac.org/documents/events/tralac/2741-tralac-brief-when-will-trade-under-afcfta-preferences-become-a-reality-march-2019/file.html> (accessed 20 August 2021).

163 AfCFTA Secretariat 'The schedules of tariff concessions', <https://afcfta.au.int/en/schedules-tariff-concessions> (accessed 20 August 2021).

164 AfCFTA (n 36) Preamble.

165 Art 3(e) AfCFTA (n 36).

166 Art 30 AfCFTA (n 36).

9 Steps forward

In terms of possible avenues for the AfCFTA to be responsive to food environments and counter-act (or at least not contribute to) the growing burden of non-communicable diseases moving forward, there are a few possible steps. The tariff schedules were still to be finalised¹⁶⁷ and, therefore, it is not possible for state parties to negotiate for higher tariffs for energy-dense and ultra-processed foods, or even place such items on the exclusion list. The renegotiation of treaty provisions can be accompanied by a detailed *ex post facto* HRIA of the impact of AfCFTA across its member states to ensure that no unintended negative human rights consequences ensue. This renegotiation could also be the mechanism to introduce oversight and control bodies responsible for monitoring human rights compliance in a clear manner. Finally, the interpretation of the Agreement and the determination of disputes ultimately is in the hand of member parties. Being guided in the realities of what is required to realise the right to food is a powerful tool which can be easily accommodated under the text of the Agreement and can be employed flexibly. This will require appropriate national action, which will most likely be couched in broader national non-communicable disease policies and legislation that consider food systems holistically.

10 Conclusion

AfCFTA is a major development in the global trade architecture and has the ability to reshape and reinvigorate trade among African states. At the time of its implementation and negotiation of further phases in its development, the member states of AfCFTA have the benefit of a comprehensive and growing body of evidence on the potential role of trade agreements in changing food environments, as well as the benefit of the development of international trade law to increasingly acknowledge the role of international human rights law. While it is not possible at this early stage to assess whether or not the implementation of AfCFTA marks a new era of human rights responsive trade agreements, it is possible to note some encouraging developments. Ultimately, the individual member states have the duty to ensure that the future development and interpretation of AfCFTA is human rights-responsive, and in particular responsive to the rights to food, health and life. This should be done not only at implementation phase, but during further negotiations relating to AfCFTA instruments. A failure to take up this call will likely result in

¹⁶⁷ At the time of submission.

states violating treaty obligations in terms of international human rights law.

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Implications and opportunities of the international refugee protection regime for national human rights institutions in Africa

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Summary: *The upsurge in the global numbers of refugees and asylum seekers since 2015 and the resultant protection failures witnessed particularly in Europe led to renewed debates on the need to reform the refugee protection regime to identify pathways that would enhance protection. Key in these debates was the need to identify actors that could enhance the refugee protection regime, including accountability for failures to protect. Among such actors identified are national human rights institutions. This article situates NHRIs within the nexus between international human rights law and international refugee law to frame an understanding of their role in the refugee protection regime. It then considers the evolution of the international refugee protection regime in light of the emergence of NHRIs and critically reviews their positioning with reference to the mandate of the United Nations High Commissioner for Refugees and the Global Compacts on Refugees and Migration. Specific opportunities at the African regional level are subsequently discussed to support the assertion that NHRIs can perform a specific role in promoting the effective implementation of refugee rights, including as avenues for state accountability.*

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Key words: *national human rights institutions; refugee protection; refugees; human rights*

1 Introduction

The international refugee protection regime has evolved to include a myriad of legal instruments, institutions and mechanisms. In its infancy it merely was a series of agreements, which confirmed states' acceptance to cooperate to deal with refugees.¹ The regime has evolved to include binding obligations on states to protect refugees and guarantee them specific rights. The United Nations (UN) through the United Nations High Commissioner for Refugees (UNHCR) has been the lead actor in promoting refugee protection through encouraging the implementation of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol,² and by leading and coordinating international refugee protection and response.³ However, the process of implementation of its key refugee-related legal instruments has laid bare the normative and implementation gaps that hamper the effective protection of refugee rights.⁴ This has resulted in calls for the revitalisation of the protection regime.⁵ It is in this context of a pursuit for an effective protection regime that a role for national human rights institutions (NHRIs) is considered.

National human rights institutions are public institutions created to promote and protect human rights.⁶ They usually derive their mandates from legislation or a constitution.⁷ NHRIs have distinct characteristics in that, while being state institutions, they are

1 G Jaeger 'On the history of the international protection of refugees' 2001) 83 *International Review of the Red Cross* 727-736.

2 UN General Assembly 'Convention relating to the status of refugees' 28 July 1951 United Nations Treaty Series vol 189 137, <https://www.refworld.org/docid/3be01b964.html> accessed 7 May 2022); UN General Assembly 'Protocol relating to the status of refugees' 31 January 1967 United Nations Treaty Series vol 606 267, <https://www.refworld.org/docid/3ae6b3ae4.html> (accessed 7 May 2022).

3 S Collinson & E Schenkenberg *UNHCR's leadership and coordination role in refugee response settings: Desk review* (2019).

4 VN John-Langba 'The role of national human rights institutions in promoting and protecting the rights of refugees: The case of South Africa and Kenya' PhD thesis, University of Cape Town, 2020 88-101.

5 See eg K Koser 'Reforming the international protection regime: Responsibilities, roles and policy options for Australia' (2016) 3.

6 UN General Assembly 'Principles relating to the status of national institutions' Paris Principles (1993) para 1, <https://www.un.org/ruleoflaw/blog/document/principles-relating-to-the-status-of-national-institutions-paris-principles/> (accessed 29 April 2021).

7 Paris Principles (n 6) para 2.

required to be independent in form and function.⁸ They also have broad human rights mandates that serve both a promotional and protection function.⁹ They have evolved in the human rights system from peripheral actors to ones that have legal standing in UN processes and have had a normative effect in recent international law developments with respect to directly monitoring the implementation of certain human rights.¹⁰

While the trajectory of NHRIs in the international human rights system can be easily mapped, their role in the international refugee protection regime is not immediately apparent. One reason for this is the nature of the development of the two branches of international law. International human rights law and international refugee law have evolved as distinct branches of international law and the view that refugee law is a sub-set of international human rights law has been contested.¹¹ It was not until the 1980s when legal scholars such as Hathaway argued about the need to view these branches of public international law as complementary or others who viewed international refugee law as a specialised branch of international human rights law.¹² However, the trajectories had been set and the actors in the two fields of international law more or less determined. For international refugee law, the UNHCR as the custodian,¹³ and by virtue of implementing its mandate, demarcated the boundaries for formal engagement with carefully-chosen implementing and operational partners, whose activities focused on refugee rights and not human rights.¹⁴

8 Paris Principles (n 6) 'Composition and guarantees of independence and pluralism'.

9 Paris Principles (n 6) para 2.

10 See eg UN General Assembly (2015) 'Resolution adopted by the General Assembly on 17 December 2015 (on the report of the Third Committee A/70/489/Add.2)) 70/163. 'National institutions for the promotion and protection of human rights A/RES/70/163 Resolution A/RES/70/163', <https://undocs.org/en/A/RES/70/163> (accessed 17 May 2021); see also art 184 of the Optional Protocol to the Convention against Torture (OPCAT) and art 332 of the Convention on the Rights of Persons with Disabilities (CRPD).

11 V Chetail 'Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law' in R Rubio-Marín (ed) *Human rights and immigration* (2014) 19.

12 JC Hathaway 'Reconceiving refugee law as human rights protection' (1991) 42 *Journal of Refugee Studies* 113; JC Hathaway *The rights of refugees under international law* (2005) 1-14; Chetail (n 11).

13 UNHCR 'The 1951 Refugee Convention' (2022), <https://www.unhcr.org/1951-refugee-convention.html> (accessed 7 May 2022).

14 The UNHCR Statute states that the UNHCR shall undertake its protection mandate by: 'keeping in close touch with the governments and inter-governmental organisations concerned' (para 8(g)); 'Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees' (para 8(i)); and 'The High Commissioner may invite the co-operation of the various specialised agencies' (para 12); see also UNHCR 'UNHCR and human rights: A policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection' 1: UNHCR notes in the introductory part that 'extreme caution traditionally marked UNHCR's

International human rights law, on the other hand, did not evolve with such rigidity and thus there are more actors including a prominent role for non-state actors, for instance in the field of business and human rights. NHRIs therefore found a natural home in the 'traditional' international human rights system given their definition as institutions created to promote and protect *human rights*¹⁵ and not specifically refugee rights. Indeed, it is quite rare that a NHRI has a definitive legislative mandate to address refugee rights. This function generally is taken as implied, although there are significant implementation and operational challenges that arise in the absence of such an explicit mandate.¹⁶

Thus, the pattern of NHRI engagement with the promotion and protection of refugee rights varies widely, from some NHRIs actively engaged in such matters, such as the Uganda Human Rights Commission and the Kenya National Commission on Human Rights, to others having minimal, non-existent or *ad hoc* engagement, for example the Malawi Human Rights Commission.¹⁷ The limited engagement with refugee issues can be attributed to the NHRIs' structure (with implications for access both physical and informational) and the prioritisation of limited resources to address broader human rights concerns.¹⁸ For instance, in terms of structure, refugees and other non-citizens are unlikely to be aware of or to have access to the complaints-handling function, common among NHRIs.¹⁹ Refugee protection also tends to be highly politicised at the domestic level, and NHRIs may be reluctant to engage substantially on such matters.²⁰

A review of the global refugee protection regime indicates that there are significant opportunities for NHRI engagement with refugee rights promotion and protection in a manner that would significantly impact the realisation of refugee rights. First, considering the complementarity of the two international law regimes and the need to forge linkages between the two fields in the application and effective implementation of refugee law, naturally leads to the

approach to any suggestion that it should cooperate and collaborate with established mechanisms for the promotion and protection of general human rights principles', <https://www.refworld.org/pdfid/3ae6b332c.pdf> (accessed 9 May 2022).

15 My emphasis.

16 John-Langba (n 4) 179.

17 A Kämpf *National human rights institutions and their work on migrants: Results from a survey among NHRIs* (2016) 25; Network of African NHRIs (NANHRI) *Study on the state of African NHRIs* (2016).

18 R Carver 'Refugees and national human rights institutions: A growing engagement: Opinion piece' (2017) 9 *Journal of Human Rights Practice* 219.

19 As above.

20 As above.

determination of actors that 'serve' both fields. NHRIs are such actors and, therefore, can be located within the nexus between international human rights law and international refugee law. As such, they could provide a reimagined avenue for advancing refugee rights. Second, effective implementation requires specificity, for instance in the identification of the role that needs to be played, or the presence or acquisition of the requisite skills required for such an endeavour. Therefore, the identification of NHRIs as critical actors is not sufficient. Such a process requires that a defined role for NHRIs is determined and specific avenues for engagement created. In addition, NHRIs would need to acquire specialised skills in refugee law or bolster existing skills.

This article situates NHRIs within the nexus between international human rights law and international refugee law to frame an understanding of their role in the refugee protection regime. It then considers the evolution of the international refugee protection regime in light of the emergence of NHRIs and critically reviews their positioning with reference to the UNHCR's mandate and the Global Compacts on Refugees and Migration. Specific opportunities, including at the African regional level, are then discussed to support the assertion that NHRIs can perform a specific role in promoting the effective implementation of refugee rights, including as avenues for state accountability.

2 Situating national human rights institutions within the international refugee protection regime

National human rights institutions are considered a bridge between the international and domestic human rights systems because they facilitate the diffusion of international human rights norms and standards, including those with respect to refugee rights, into national spheres. NHRIs are increasingly considered critical actors, separate and distinct from non-governmental organisations (NGOs) and other civil society actors, with respect to the promotion and protection of human rights in general,²¹ but remain at the periphery of the refugee protection regime.

21 Paris Principles (n 6); Office of the High Commissioner for Human Rights (OHCHR) *National human rights institutions: History, principles, roles and responsibilities* (2010) 13; E Ferris 'Protracted refugee situations, human rights and civil society' in G Loescher et al (eds) *Protracted refugee situations: Political, human rights and security implications* (2008) 93.

However, the expansion of the understanding of refugee rights to include those derived from human rights instruments provides a basis for NHRIs to interpret their human rights mandates to include refugee rights and, even broadly, migrants' rights, thereby carving out a place within the nexus of international human rights law and international refugee law. Indeed, evidence from NHRI practice indicates that NHRIs across Africa are promoting and protecting migrants' rights primarily through the interpretation of their mandates broadly to encompass rights of all persons in a given state's territory.²² However, evidence also indicates that the focus is broad with few having systems in place to address refugee rights as distinct from other categories of migrants' rights²³ – a critical issue in the promotion and protection of refugee rights as the conflation of refugees and asylum seekers with other migrants hinders their access to protection, reinforces the notions of securitisation of asylum and focuses attention on border security.²⁴ This lack of demarcation of refugee rights from general migrants rights perhaps is reflective of the limited specialist expertise on forced migration or refugee law in NHRI structures.

The second aspect of the discussion on the nexus between refugee law and human rights law and its implications for NHRIs is with respect to the grounds for persecution contained in the refugee definition. In terms of the refugee definition, the 1951 Refugee Convention in article 2 does not ascribe meaning to the content of the term 'membership of a particular social group'.²⁵ However, human rights law has influenced the development of the term to include gender and sexual orientation as encapsulating membership of a particular social group and, therefore, grounds for a refugee status claim.²⁶

22 Kämpf (n 17) 25.

23 Kämpf (n 17) 27-30.

24 See eg K Moyo & F Zanker 'No hope for the "foreigners": The conflation of refugees and migrants in South Africa' (2022) *Journal of Immigrant and Refugee Studies*, DOI: 10.1080/15562948.2021.2007318; M Deridder, L Pelckmans & E Ward 'Reversing the gaze: West Africa performing the EU migration-development-security nexus (2020) *Anthropology and Development* 9-32; Mixed Migration Centre 'The ever-rising securitisation of mixed migration' 17 December 2019, <https://mixedmigration.org/articles/the-ever-rising-securitisation-of-mixed-migration/> (accessed 10 May 2022); LB Landau & C Kihato 'Securitising Africa's borders is bad for migrants, democracy, and development' *The New Humanitarian* (Johannesburg) 5 July 2017; A Ilgit & A Klotz 'How far does "societal security" travel? Securitisation in South African immigration policies' (2014) 452 *Security Dialogue* 137.

25 Neither does the 1951 Refugee Convention define the term 'persecution'. The meaning of persecution derives from human rights law. Hathaway and Forster define it as 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'. JC Hathaway & M Forster *The law of refugee status* (2014) 104-105.

26 Chetail (n 11) 27-28. There is a large body of literature on gender-related asylum law. See eg M Dustin & N Ferreira 'Improving SOGI asylum adjudication: Putting persecution ahead of identity' (2021) 40 *Refugee Survey Quarterly* 315, <https://>

It has also facilitated the consideration of the specific protection needs for women refugees and asylum seekers.²⁷ Furthermore, states have applied human rights norms to determine that certain forms of violence against women, such as rape, other forms of sexual violence and female genital mutilation, constitute serious harm in the scope of persecution.²⁸

For NHRIs, especially those with a specialised mandate to promote and protect gender equality, this evolution of international refugee law to include a gendered view of the refugee experience and the persecutions that may arise on the basis of gender provides a strong basis to advance the rights of refugee and asylum-seeking women, girls and sexual minorities. Specialised NHRIs such as gender commissions already have a legal mandate to promote and protect gender equality, for example the South African Commission on Gender Equality and the Kenyan National Gender and Equality Commission. Their role in ensuring that asylum systems integrate a gendered approach and in particular take cognisance of the rights of those who either claim asylum on the basis of gender or face particularly discrimination due to their gender or perceived gender, ideally, should occur naturally.

3 The international refugee protection regime and the emergence of national human rights institutions

The foundations of the contemporary international refugee protection regime can be traced back to the League of Nations (League).²⁹ The League's legal and institutional actions with respect to refugees initially focused on Russian and Armenian refugees, but broadened with the emergence of other refugee categories in the 1920s and 1930s.³⁰ The League's work predates any informal or formal discussions on the influence that national institutions may have on the promotion and protection of the rights of refugees. However, there were hints that states needed to consider the role of

doi.org/10.1093/rsq/hdab005; M Kapron & N LaViolette 'Refugee claims based on sexual orientation and gender identity: An annotated bibliography' (2014), <https://www.oramrefugee.org/wp-content/uploads/2016/05/SOGI-Refugees-Annotated-Bibliography.pdf> (accessed 5 June 2020).

27 UNHCR 'Refugee women and international protection No 64 XLI – 1990'.

28 DE Anker 'Refugee law, gender, and the human rights paradigm' (2002) 15 *Harvard Human Rights Journal* 138-149, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:11357476> = (accessed 5 June 2020).

29 Hathaway (n 12) 75-147.

30 Hathaway (n 12) 83.

other state organs, other than foreign ministries, in advancing the League's overall goals.

As elucidated by Dubin, the idea was to decentralise the League, by transferring much of the engagement and popularisation of its ideals at the national level with the League serving a coordinating role.³¹ This would have been achieved through the creation of national offices for purposes of liaising directly with the League.³² However, it was a highly-contested issue and fell away in favour of the creation of a secretariat, staffed and run by persons independent of national processes or having direct ties to national governments.³³ The idea of the national offices gives an inkling of the views on the influence that national actors or institutions with direct ties to the international processes and mechanisms could have in advancing global ideals domestically.

This idea was taken up by the UN Economic and Social Council (ECOSOC) when in 1946 it adopted a resolution that encouraged states to establish local human rights committees to promote human rights norms domestically.³⁴ At that time, however, there was reluctance among the member states to establish such institutions as many considered human rights concerns domestic and at the states' discretion,³⁵ echoing the sentiments that led to the death of the idea of the creation of national offices directly linked to the League.

Thus, when the UN replaced the League in 1945 and took over refugee protection, there was no consideration of a role for national institutions in protecting refugees. Rather, the UN General Assembly (UNGA) resolved to establish UNHCR and tasked it with protecting refugees and overseeing the implementation of the 1951 Refugee Convention and its 1967 Protocol.³⁶ As the UNHCR's role grew, so did the notion of the importance of national human rights institutions though these trajectories run in parallel, with the UN human rights processes pushing for the recognition of these institutions, while the UNHCR trudged on independently.

Three important milestones mark the NHRI trajectory of significance in the field of international human rights. The first was in 1962 when

31 MD Dubin 'Transgovernmental processes in the League of Nations' (1983) 373 *International Organisation* 469.

32 Dubin (n 29) 471.

33 Dubin (n 29) 487-489.

34 UN ECOSOC 'ECOSOC Resolution 9 (II), 21 June 1946'.

35 S Cardenas *Chains of justice: The global rise of state institutions for human rights* (2014) 28.

36 D Kennedy 'International refugee protection' (1986) 81 *Human Rights Quarterly* 3.

the UN Commission on Human Rights (Commission) adopted a resolution that recommended the establishment of national human rights bodies by states.³⁷ These institutions would take the form of a national advisory body or local committees tasked with addressing human rights concerns and would examine the human rights situation in their respective states, offer advice to the government, and promote a culture of human rights.³⁸ This resolution built on ECOSOC's 1946 resolution, mentioned above, which sought to encourage states to establish local human rights entities tasked with promoting human rights domestically.

The second milestone was in 1978 when the Commission adopted a resolution on 'national institutions in the field of human rights' that would provide states with a reference on the basic structure and minimum functions of NHRIs.³⁹ In the subsequent decade, following the adoption of the 1978 resolution, the UN prepared a series of reports on the viability of national institutions as mechanisms for the promotion and protection of human rights.⁴⁰ The findings from these reports formed the basis for the 1991 UN International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris, France, and marks the third milestone.⁴¹ This workshop led to the drafting of guiding principles on national institutions for the promotion and protection of human rights, which were eventually adopted and endorsed by the UN as the Paris Principles in 1993.⁴²

Thus, the 1990s proved seminal for NHRIs. The idea of setting up NHRIs as an essential component of the domestic human rights system became widely accepted, including in Africa, where between

37 CHR Res 9 (XVIII) of 27 March 1962, https://digitallibrary.un.org/record/220223/files/E_3616_Rev.1_E_CN.4_832_Rev.1-EN.pdf (accessed 9 May 2022); see also A Pohjola *The evolution of national human rights institutions: The role of United Nations* (2006).

38 UN Commission on Human Rights, Report of the 18th session 19 March – 14 April 1962/ ECOSOC official records 34th session supplement (1962) 43, https://digitallibrary.un.org/record/220223/files/E_3616_Rev.1_E_CN.4_832_Rev.1-EN.pdf (accessed 9 May 2022).

39 UN Commission on Human Rights 'Resolution on national institutions in the field of human rights'; Annex: Some possible functions which could be performed by national institutions in the field of human rights, if so decided by the government concerned, CHR Res 23 (XXXIV) of 8 March 1978 131, <https://digitallibrary.un.org/record/220211?ln=en> (accessed 9 May 2022). See also GA Res 46, 83, UN GAOR, 33rd sess, UN Doc. A/RES/33/46 (1978)

40 UN Seminar on national and local institutions for the promotion and protection of human rights organised by the United Nations Division of Human Rights, Geneva, 18-29 September 1978, <https://digitallibrary.un.org/record/731550?ln=en> (accessed 9 May 2022); A/36/440 (1981); A/38/416 (1983); A/39/556 (1984); E/CN.4/1987/37; E/CN.4/1989/47.

41 GANHRI '25th anniversary of the Paris Principles', <https://nhri.ohchr.org/EN/Pages/25thAnniversary.aspx> (accessed 9 February 2021).

42 Paris Principles (n 6).

1990 and 2010 over 25 NHRIs were established,⁴³ although this proliferation was closely linked with political reform rather than the idea that NHRIs could promote specific rights or group rights.⁴⁴ As such, there was no formal agreement on the definition of a NHRI or a standard model for the design of such institutions resulting in variation in legal frameworks and methods of operation. For instance, among African NHRIs, establishment occurred through legislation, constitution, by decree or a combination of these legal bases.⁴⁵ In addition, these considerations of the nature and status of NHRIs did not include a specific role for such institutions in the realm of refugee rights, reflecting the divergence between the two fields of international law with implications on the extent to which NHRIs could draw support in engaging with the UNHCR and in turn with refugee protection.

4 The United Nations High Commissioner for Refugees, its mandate and the implications for national human rights institutions

The UNHCR is described as the guardian of the 1951 Refugee Convention and its 1967 Protocol.⁴⁶ It is tasked mainly with providing international protection to refugees and other persons within its competence and to seek permanent solutions to their problems.⁴⁷ The UNHCR has both direct and indirect mandates. Its direct mandate stems primarily from its statute and from resolutions of the General Assembly or ECOSOC. It should be noted that while these resolutions extend the UNHCR's functional responsibilities, they do not directly impose obligations on states as state obligations derive from the relevant treaties.⁴⁸

43 T Pegram 'Diffusion across political systems: The global spread of national human rights institutions' (2010) 323 *Human Rights Quarterly* 738, DOI: 10.1353/hrq.2010.0005.

44 Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001), <https://www.hrw.org/reports/2001/africa/overview/record.html> (accessed 18 April 2021).

45 NANHRI (n 17) 14.

46 UNHCR, <http://www.unhcr.org/1951-refugee-convention.html> (accessed 18 April 2021).

47 These categories of persons that fall within its mandate are provided in the UNHCR Statute paras 1, 8, 9 and 10 and in subsequent General Assembly or ECOSOC resolutions. These are refugees and asylum seekers; stateless persons; returnees; the internally-displaced and persons threatened with displacement or otherwise at risk; UN, Statute of the Office of the High Commissioner for Refugees, UN General Assembly Resolution 428 (V) 14 December 1950 art 8.

48 Hathaway (n 12) 94; GS Goodwin-Gill & J McAdam *The refugee in international law* (2007) 428.

The UNHCR also derives its mandate from international refugee law and international human rights law. For instance, article 35 of the 1951 Refugee Convention and article 2 of its 1967 Protocol define a supervisory role for the UNHCR.⁴⁹ At the African regional level, the UNHCR derives this role through article 8 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Refugee Convention) which recognises the Convention's complementary nature to the 1951 Refugee Convention (article 8(2)) and requires member states to cooperate with the UNHCR (article 8(1)).⁵⁰ From international human rights law, Türk⁵¹ notes that it derives an indirect mandate from provisions such as articles 22 and 45 of the 1989 Convention on the Rights of the Child (CRC)⁵² and article 11 of the 1961 Convention on the Reduction of Statelessness.⁵³ It thus straddles both branches of international law, but has played a minimal role as an actor in the international human rights law sphere.

The UNHCR plays an important role in international refugee protection. It operates in a complex and dynamic context that is heavily influenced by states and limited in resources, which has resulted in implementation challenges. Yet, it has made important strides towards advancing refugee protection. For example, the UNHCR promoted the understanding of refugee protection through a human rights-based approach, for instance by encouraging the notion that human rights law can reinforce and supplement existing refugee law.⁵⁴ This has opened up avenues for the protection of refugees (and other forcibly-displaced persons) beyond the traditional refugee framework.⁵⁵ Notwithstanding this, there is limited evidence, both in terms of research and practice, that the UNHCR has engaged with NHRIs as key actors in advancing refugee protection. This may be viewed as surprising given that the UNHCR

49 Art 35 of the 1951 Refugee Convention; art 2 of the 1967 Protocol to the 1951 Refugee Convention.

50 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 10 September 1969, 1001 UNTS 45, <https://www.refworld.org/docid/3ae6b36018.html> (accessed 7 May 2022).

51 V Türk 'The role of UNHCR in the development of international refugee law' in F Nicholson & P Twomey (eds) *Refugee rights and realities: Evolving international concepts and regimes* (1999) 155.

52 UN Commission on Human Rights Convention on the Rights of the Child 7 March 1990, E/CN.4/RES/1990/74, <https://www.refworld.org/docid/3b00f03d30.html> (accessed 7 May 2022).

53 UN General Assembly Convention on the Reduction of Statelessness 30 August 1961 United Nations Treaty Series 989 175, <https://www.refworld.org/docid/3ae6b39620.html> (accessed 7 May 2022).

54 Türk (n 51) 153-174; UNHCR 'Human rights and refugee protection' (1995), <https://www.unhcr.org/3ae6bd900.pdf> (accessed 9 May 2022).

55 Türk (n 51).

also derives its mandate from international human rights law and has promoted the understanding of refugee rights as human rights.

National human rights institutions have been identified as key in the domestication of human rights norms and standards and exert significant influence in some of the UN processes that directly relate to human rights and, in turn, state accountability for poor human rights implementation and violations. Recent developments in international human rights law, such as the drafting of the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention against Torture (OPCAT), were heavily influenced by contributions by NHRIs.⁵⁶ The inclusion of accountability mechanisms that comply with the UN Paris Principles in both treaties is evidence of their influence. In addition, African NHRIs participated in the commemoration of the Robben Island Guidelines for the Prohibition and Prevention of Torture of the African Commission on Human and Peoples' Rights (African Commission) in 2012, in collaboration with the South African Human Rights Commission.⁵⁷ Furthermore, the Network of African National Human Rights Institutions (NANHRI), the regional grouping of African NHRIs, has identified torture prevention as a thematic area and has developed close working relationships with expert organisations in the field such as the Association for the Prevention of Torture (APT) to build the capacity of African NHRIs in the prevention of torture.⁵⁸ The continued reference to NHRIs in other important agreements, such as the Global Compact on the Safe, Orderly and Regular Migration (Global Compact on Migration)⁵⁹ points to their growing influence in the development of norms in the international system.

On the other hand, the near complete absence of NHRIs in the processes related to refugee protection until recently may be due to several factors. As discussed above, NHRIs, traditionally viewed as functioning in the traditional human rights context and evolved as such, did not receive substantive consideration in the UN processes until the 1970s, that is, almost two decades after the signing of the

⁵⁶ An NHRI working group participated in the OPCAT drafting process.

⁵⁷ SAHRC '10th anniversary of the Robben Island Guidelines: Putting an end to torture in Africa' (2012), <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/163-10th-anniversary-of-the-robben-island-guidelines> (accessed 9 May 2022).

⁵⁸ See eg NANHRI, APT 'Preventing torture in Africa: Lessons and experiences from national human rights institutions' (2016).

⁵⁹ UN General Assembly 'UN global compact on safe, orderly and regular migration' A/RES/73/195 paras 15(j), 18(c), 27(c), 28(c), 31(d), 33(d) & 44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement> (accessed 9 May 2022).

1951 Refugee Convention and a few years after the conclusion of its 1967 Protocol.

In addition, in the UN architecture NHRIs' guardianship rests with the OHCHR through its National Institutions and Regional Mechanisms section.⁶⁰ This positioning of NHRIs under the auspices of the OHCHR may have influenced the focus on issues traditionally viewed to fall within the scope of international human rights law rather than broadly to also include the UNHCR's work. This is also reflected by the fact that the UNHCR's annual consultations have been held for over three decades with NGOs and civil society, but not with NHRIs.⁶¹

The result is that NHRIs are peripheral actors in the international refugee protection regime and their engagement with the UNHCR at global and country levels is not systematic and might not yield the optimal results to ensure effective promotion and protection of refugee rights. For instance, the UNHCR's governing body, the Executive Committee, holds annual meetings that precede the UNHCR's annual consultations with partners.⁶² The Executive Committee, which comprises states, not only discusses budgetary and organisational matters, but also prevailing refugee protection concerns.⁶³ In terms of the latter, the Executive Committee adopts Conclusions on International Protection which, while not binding, have persuasive authority and can be the basis for NHRIs to leverage positive state behaviour with respect to refugee protection including compliance with reporting on domestic progress made with respect to meeting obligations towards refugees and asylum seekers.⁶⁴

NHRIs may also occupy a peripheral role, as they might be viewed as lacking the specialist expertise on refugee rights characteristic of the organisations with which the UNHCR works.⁶⁵ The UNHCR is also categorical in its requirement to work with organisations or institutions that address refugee rights either in part or wholly and

60 OHCHR 'OHCHR and NHRIs', <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> (accessed 30 May 2020).

61 Based on a review conducted up to May 2020 of information on consultative meetings as available on UNHCR's website.

62 Established by ECOSOC Resolution 672(XXV) in 1958, came into existence on 1 January 1959; UNHCR 'Executive committee's origins and mandate', <https://www.unhcr.org/executive-committee.html> (accessed 17 April 2021).

63 As above.

64 As above.

65 Recognition of partnership with UNHCR includes a 'demonstrated interest in refugee matters'. See UNHCR 'A guide for participants: Annual consultations with NGOs', <https://www.unhcr.org/afr/events/conferences/5aa7e1377/2018-unhcr-annual-consultations-ngos-guide-participants.html> (accessed 30 May 2020).

are not merely human rights organisations. This is reflected in the UNHCR's guide for participants for the annual consultations which sets out the strict criteria that participants must meet in order to participate in the consultations.⁶⁶ Thus, for instance, a NHRI must either be a member of the International Council of Voluntary Agencies; have a consultative status with ECOSOC *with a demonstrated interest in refugee matters*; or be a *UNHCR implementing or operational partner*, which has received a *formal letter of recommendation from a UNHCR official* to participate.⁶⁷ Given their distinct characteristic as legislative institutions established by states and the need to reinforce their difference from civil society organisations, NHRIs coalesce through an independent network, the Global Alliance of National Human Rights Institutions (GANHRI).⁶⁸ It would thus be logical for NHRIs to rather influence participation independently through GANHRI rather than through membership of the International Council of Voluntary Agencies, a civil society organisation-based network.

However, GANHRI, being constituted of only NHRIs, has not garnered the refugee rights expertise profile necessary to demand such recognition in the UNHCR's processes. The latter two criteria point to the need for specialist skills relevant to UNHCR's mandate. Few NHRIs have the express mandate to address refugee rights. In Africa only two NHRIs have a specific role in refugee protection that is defined by their establishing legislation. These are the Rwandan National Commission for Human Rights⁶⁹ and the Zimbabwean Human Rights Commission.⁷⁰ Some NHRIs, such as the South African Human Rights Commission and the Kenya National Commission

66 As above.

67 UNHCR (n 66) (my emphasis).

68 GANHRI, <https://ganhri.org/> (accessed 4 August 2021).

69 This explicit function was included following an amendment to its establishing legislation done initially in 2013 and expounded upon in 2018: Law 61/2018 of 24/08/2018 Modifying Law 19/2013 of 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018. Art 1: Special responsibilities of the Commission as regards the protection of human rights; art 6 of Law 19/2013 of 25 March 2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows: Regarding the protection of human rights, the Commission has the following special responsibilities: (1) to monitor the compliance with the human rights, in particular with the rights of the child, woman, persons with disabilities, people living with HIV/AIDS, *refugees*, migrant workers and members of their families and elderly's rights. Law 61/2018 of 24 August 2018 Modifying Law 19/2013 of 25 March 2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018.

70 The Zimbabwe Human Rights Commission is constitutionally entrenched in ch 12, secs 232-244 of the Constitution. It provides as follows: '243 Functions of Zimbabwe Human Rights Commission (1) The Zimbabwe Human Rights Commission has the following functions ... (k) to visit and inspect (i) prisons, places of detention, refugee camps and related facilities'. Zimbabwe Constitution ch 12 secs 232-244 of the Constitution.

on Human Rights, have created what is termed as a focus area on migrants.⁷¹ This is based on an assessment of pertinent human rights concerns in their respective countries that have been identified as requiring focused attention – usually as a result of higher levels of rights violations experienced by the category of persons.⁷² Surveys conducted by NHRIs have also determined that there is a general lack of expertise among NHRI staff to effectively address such rights, a low level of interest or a legal requirement not to deal with the rights of non-nationals.⁷³ This would mean that participation would be on a case-by-case basis limiting the potential for the development of a coherent process through which NHRIs can engage with the UNHCR's processes.

However, the UNHCR recently developed guidelines for engagement with NHRIs through a process that the UNHCR described as 'widely consultative and supported by comprehensive desk research'.⁷⁴ This is a commendable step as erstwhile there was little if any formal collaboration with NHRIs at the global level.⁷⁵ Where collaboration existed, it appeared *ad hoc*. For instance, in Kenya the UNHCR collaborated with the Kenya National Commission on Human Rights on the constitutionality of the decision of the Kenyan government to summarily close refugee camps but not as part of a long-term strategic collaboration on addressing protection challenges faced in the Kenyan context.⁷⁶ In South Africa the UNHCR developed and implemented a comprehensive national anti-xenophobia campaign in collaboration with the South African Human Rights Commission,⁷⁷ but this did not result in the development of a long-term collaborative intervention strategy to address xenophobia and xenophobic violence against refugees and asylum seekers.⁷⁸ The guide thus provides a good starting point for a coherent and perhaps strategic engagement with NHRIs. Crucially, the development of this guide points to the recognition of the importance that actors such as NHRIs can play in the refugee protection regime. It may

71 John-Langba (n 4) 226.

72 John-Langba (n 4) 180.

73 Kämpf (n 17); NANHRI (n 17).

74 UNHCR *Guide on UNHCR's engagement with national human rights institutions* (2020), <https://www.unhcr.org/protection/operations/5f92a5604/guidance-unhcrs-engagement-national-human-rights-institutions.html> (accessed 3 May 2021).

75 John-Langba (n 4).

76 *Kituo Cha Sheria & 8 Others v Attorney-General* [2013] eKLR 2.

77 J Parsley "'We are not treated like people": The roll-back xenophobia campaign in South Africa' (2003), <https://odihpn.org/magazine/we-are-not-treated-like-people-the-roll-back-xenophobia-campaign-in-south-africa/> (accessed 9 August 2019).

78 UNHCR *Protection from xenophobia: An evaluation of UNHCR's regional office for Southern Africa's xenophobia related programmes* (2015) 25; John-Langba (n 4) 211.

also serve as a catalyst to address some of the implementation and accountability gaps that exist in the refugee protection regime, ultimately relocating NHRIs from the periphery of the international refugee protection regime to a defined place within it. This would be especially important for African NHRIs, given that Africa hosts some of the largest refugee and asylum-seeker populations on the globe.⁷⁹

The guide as is merely seeks to explain what NHRIs are and are not and simply recommends possible ways for working with NHRIs and lists some of these without exploring the possible challenges that may be faced in partnering with these institutions and recommending ways to navigate these challenges.⁸⁰ It also is not a document that proposes to grant NHRIs formal recognition in the UNHCR's work in a similar manner to the guidelines that several treaty bodies have developed which formally grant NHRIs *locus standi* resulting in more robust engagement.⁸¹

Despite the absence of explicit mandates for refugee rights promotion and protection, several NHRIs have formally designated either 'refugees' or 'migrants' as a thematic area of work or have undertaken activities with respect to these categories of persons and others such as 'asylum seekers' and 'stateless persons'. These include the South African Human Rights Commission; the Uganda Human Rights Commission; the Mauritius National Human Rights Commission; the Commission for Human Rights and Good Governance of Tanzania; and the Kenya National Commission on Human Rights.⁸² The Malawi Human Rights Commission has also

79 UNHCR 'Africa' (2022), <https://www.unhcr.org/africa.html> (accessed 9 May 2022).

80 UNHCR (2020) (n 75) 63-64; see John-Langba (n 4) for challenges encountered by NHRIs in the context of refugee protection.

81 Besides a number of resolutions on NHRIs that the General Assembly adopts, the Human Rights Committee (HRC) and the following treaty bodies have formally recognised NHRIs in their working methods: the Committee Against Torture (CAT); the Committee on Migrant Workers (CMW); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Rights of Persons with Disabilities (CRPD); the Committee on Enforced Disappearances (CED); and the Committee on the Elimination of Discrimination against Women (CEDAW). See eg CEDAW (2008) 'Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions' E/CN.6/2008/CRP.1, <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/StatementOnNHRIs.pdf> (accessed 27 February, 2021); HRC (2012) 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session 15 October–2 November 2012, CCPR/C/106/3', http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f106%2f3&Lang=en (accessed 27 February 2021); and CED (2014) 'The relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6, 28 October 2014'.

82 See CM Fombad (ed) *Compendium of documents on NHRIs* (2019).

extended its role in torture prevention to include monitoring refugee camps.⁸³

5 The global compacts on refugees and migration – Missed opportunities for national human rights institutions?

The Global Compact on Refugees (GCR)⁸⁴ and the Global Compact for the Safe, Orderly and Regular Migration (Global Compact for Migration)⁸⁵ are the outcomes of a UN-led process to determine avenues for the international community to effectively respond to migration, whether forced or voluntary. The two compacts are complementary but non-binding and their implementation relies on global consensus through a multi-stakeholder approach.⁸⁶ The Global Compact on Refugees, which is the blueprint for states' responsibility sharing for refugees and asylum seekers, is silent on NHRIs. In contrast, the Global Compact for Migration includes NHRIs as key partners in its implementation.⁸⁷

The Global Compact for Migration adopts the emerging normative trend to promote independent human rights institutions such as NHRIs as a monitoring mechanism.⁸⁸ For example, it proposes that NHRIs would monitor migrants' access to basic services and that they would play a vital role in preventing, detecting and responding to racial, ethnic and religious profiling of migrants by state authorities.⁸⁹ It also envisages a key role for NHRIs in addressing systemic challenges related to intolerance, xenophobia, racism and all other multiple and intersecting forms of discrimination.⁹⁰ While the compacts have been conceived as complementary, with the assumption that their implementation would draw from both processes where overlaps occurred,⁹¹ in the context of this article the challenge identified is linked to the inclusion of NHRIs in one process and the absence of

83 Fombad (n 83) 510.

84 UNHCR Global compact on refugees, A/73/12 (Part II) affirmed by UN General Assembly Resolution A/RES/73/151.

85 UN General Assembly (n 60).

86 UNHCR (n 85) B5 Guiding Principles 3; UN The Global Compact for Migration (n 60) paras 15 & 44.

87 UN (n 60) paras 15, 18(c), 27(c), 28(c), 31(d), 33(d) & 44; a NHRI task force was set up to lead NHRI engagement with the global consultative process for the Global Compact for Safe, Orderly and Regular Migration (GCM) and its implementation, which resulted in the inclusion of NHRIs in its implementation. Kämpf (n13) 17.

88 See art 33 CRPD and art 182 OPCAT.

89 UN (n 87) para 31(d).

90 UN (n 87) para 33(d).

91 V Türk 'The promise and potential of the global compact on refugees' (2018) 304 *International Journal of Refugee Law* 577-578.

a defined role for NHRIs in the other process. As such, would this influence the NHRIs focus on migration rights broadly at the expense of refugee rights?

The reported NHRI activities seem to indicate that this is the case. GANHRI and NHRIs across the globe have embarked on the process of operationalising their role with respect to the compact on migration at the expense of that on refugees – in other words, the rights of migrants and not the rights of refugees. For instance, GANHRI conducted a baseline survey to determine the extent to which NHRIs worked on migration issues.⁹² While the survey provided specific examples of the work of NHRIs with respect to refugees and asylum seekers, these activities fell within the broader migrants' rights theme and there was no specific delineation of refugee rights given their distinct legal status. According to GANHRI, the focus of the survey was on human rights issues of migration and not specifically on asylum and refugee-related aspects as these fell within the purview of another compact (that is, the Global Compact on Refugees).⁹³ However, this survey would have served as an important basis to determine the extent to which NHRIs specifically addressed refugee rights and, in turn, inform a strategic approach for implementing the compacts as complementary rather than parallel processes.

At the African regional level the Network of African National Human Rights Institutions (NANHRI) is implementing a migration programme that focuses on the role of NHRIs in addressing irregular migration in the context of the compact on migration. NANHRI comprises 46 NHRIs and is mandated, among others, to coordinate NHRI activities, to support their establishment and to build NHRIs' capacity to discharge their mandates.⁹⁴ The inclusion of the objective on monitoring refugee rights was a compromise and the agreed intervention with respect to refugee rights was only with respect to immigration detention.⁹⁵ This compromise was directly influenced by the political context within which the programme was conceived – the European migrant crisis and the role that frontier African countries such as Morocco and Tunisia could play in stemming the flow of irregular migrants and asylum seekers into Europe.⁹⁶ Therefore, while the specific areas noted for NHRI responsibility in the Global Compact for Migration apply equally to refugees and asylum

92 Kämpf (n 17).

93 Kämpf (n 17) 17.

94 NANHRI 'Our members' (2022), <https://www.nanhri.org/members/> (accessed 9 May 2022).

95 John-Langba (n 4) 70; see NANHRI 'Migration in Africa: Promoting respect of fundamental rights for refugees and migrants in transit camps' (2018) 3 5.

96 John-Langba (n 4) 70.

seekers, the subsequent NHRI practice reinforces a separation rather than synergising efforts to address migrants' rights and refugee rights.

6 Refugee protection in Africa: Opportunities for national human rights institutions

In the African region the refugee rights regime is governed primarily by the 1969 OAU Refugee Convention. The OAU Refugee Convention is silent about the role of national institutions in the promotion and protection of refugee rights. However, in the African context the entity tasked with the promotion and protection of human rights is the African Commission on Human and Peoples' Rights (African Commission). The African Commission was created under article 30 of the African Charter on Human and Peoples' Rights (African Charter) and plays an oversight role in the implementation, interpretation and application of all other human rights treaties, including the OAU Refugee Convention.⁹⁷ In article 26 the African Charter requires states to establish and improve national institutions mandated to promote and protect human rights.⁹⁸

Thus, the African Charter formally recognises a role for institutions such as NHRIs and provides a legal basis for the African Commission to formally work with NHRIs, including in the context of the promotion and protection of refugee rights. This is by virtue of its function to oversee the implementation and interpretation of the African Charter and its protocols, including with respect to those articles that specifically relate to refugee rights, and the promotion of the implementation of the 1969 Refugee Convention. While the regional framework locates NHRIs clearly within the human rights regime, there is limited evidence of substantive engagement between the African Commission and NHRIs either with respect to the promotion and protection of human rights, broadly, or specifically with respect to refugee rights.⁹⁹

Other regional mechanisms that could provide opportunities for NHRIs to promote and protect refugee rights are the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the new merged court (through the amalgamation of the African Court on Human and Peoples' Rights

97 Art 30.

98 Art 26.

99 John-Langba (n 4) 74-80.

(African Court) and the African Court of Justice).¹⁰⁰ The African Commission, the African Children's Committee and the African Court have all addressed refugee rights matters.¹⁰¹ However, it is the African Commission that has engaged more frequently and substantively on refugee-related matters, including through the creation of the mandate of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons (Special Rapporteur) and signing a memorandum of understanding with the UNHCR to facilitate the promotion of refugee rights in the region.¹⁰²

There are other entities within the African Union (AU) that have a mandate for refugee rights promotion and protection, but these operate distinctly from the African Commission and this has led to an incoherent approach for advancing refugee rights at the regional level.¹⁰³ However, this part will focus on the African Commission and its mechanisms with respect to refugee rights given its formal recognition of NHRIs.

The relationship between the African Commission and African NHRIs is facilitated primarily through the regional NHRI network – NANHRI. For instance, it is through NANHRI that NHRIs have negotiated their recognition before the African Commission. It is also through NANHRI that NHRIs coordinate their participation at the African Commission's public sessions. NANHRI has also developed guidelines for NHRIs to support their engagement with the regional mechanisms.¹⁰⁴ While the guidelines do not specifically address engagement in terms of refugee rights promotion and protection, they provide a succinct approach which, if implemented by NHRIs, would result in an enhanced engagement between them and the regional mechanisms and processes.

¹⁰⁰ See also M Sharpe *The regional law of refugee protection in Africa* (2018) 155-188, 205, 218.

¹⁰¹ G Bekker 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 9; Sharpe n (100) 192-218.

¹⁰² African Commission 'Resolution on the renewal of the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa' 61st ordinary session 1-15 November 2017 ACHPR/Res.379.

¹⁰³ Sharpe (n 100) notes that the African Commission's work on refugee issues occurs largely in isolation of AU's efforts and that it has failed to collaborate with other AU refugee-related entities (156-219). These include the Specialised Technical Committee (STC) on Migration, Refugees and IDPs; the Permanent Representatives' Committee (PRC) Sub-Committee on Refugees, Returnees and IDPs; the Coordinating Committee on Forced Displacement and Humanitarian Action; and the Divisions of Humanitarian Affairs, Refugees and Displaced Persons.

¹⁰⁴ Eg NANHRI *Guidelines on the role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples' Rights and judgments of the African Court on Human and Peoples' Rights* (2016).

The African Commission offers specific avenues for engagement through its public sessions and special mechanisms, but these remain substantially underexplored by African NHRIs.¹⁰⁵ The interaction between the African Commission and the NHRIs is governed by the resolution on the granting of affiliate status to NHRIs and its rules of procedure as revised in 2020.¹⁰⁶ The resolution affords NHRIs legal standing before the African Commission. It sets out the criteria for granting the status and the responsibilities that arise for NHRIs once accorded the affiliate status.¹⁰⁷ It is through this affiliate status that NHRIs can participate in the work of the African Commission and its mechanisms, including attendance at its public sessions.

During the African Commission's public sessions NHRIs with an affiliate status can address any human rights issue of concern, including demanding state accountability for violations of refugee rights.¹⁰⁸ The NHRIs can also propose items for the agenda (subject to the Commission's Bureau's final approval) and address those issues during the public sessions.¹⁰⁹ NHRIs are also required to report on their activities and can utilise this function to raise issues of concern to the African Commission. Crucially, both the updated affiliate status resolution and the rules of procedure have widened the scope of human rights institutions recognised by the African Commission to include specialised human rights institutions.¹¹⁰ This would include institutions such as the gender commissions and ombudsman that are generally left out where UN processes are concerned because of the strict gatekeeping role that GANHRI implements which limits formal engagement with those that have an accredited status based on the Paris Principles.

Of note, the African Commission adopts country-specific as well as thematic resolutions specifically on refugees and displaced persons during its sessions that require follow up in terms of implementation

105 BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 41-43; NANHRI (n 84) 7. See also RD Nanima 'The ACHPR and ACERWC on ending child marriage: Revisiting the prohibition as a legislative measure' (2019) 203 *Economic and Social Rights Review* 12; John-Langba (n 4) 243-244, 287, 303.

106 The Resolution on Granting Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa (ACHPR NHRI Resolution) ACHPR/Res.370LX(2017) replaced the 1998 Resolution on Granting Observer Status to National Human Rights Institutions in Africa ACHPR/Res.31.

107 ACHPR NHRI Resolution (n 106) paras 1-5.

108 Sharpe n (100) 198: The African Commission has interpreted its mandate to encompass the other African human rights treaties other than the African Charter.

109 Centre for Human Rights (CHR) *A guide to the African human rights system* (2016) 14.

110 ACHPR NHRI Resolution (n 106) paras 1-5.

– a role that fits within NHRIs’ mandates.¹¹¹ The Commission has also made Concluding Observations about areas of concern as well as the need for action in respect of the protection of refugee rights.¹¹² The Commission also develops interpretative guidance on the content of certain rights, which may have implications for the rights of refugees and asylum seekers. For instance, General Comment 5 on article 12(1) of the African Charter on the right to freedom of movement and residence provides detailed guidance on the situation of refugees, asylum seekers, internally-displaced persons and migrants.¹¹³ NHRIs, for example, can participate in the development of such General Comments and advocate state consideration of the General Comment with respect to the realisation of the relevant right. However, the African Commission lacks a mechanism to follow up on its recommendations and Concluding Observations. NHRIs can bridge this identified gap given that they perform a similar function within the UN mechanisms and processes, with respect to state reporting and follow up on recommendations or Concluding Observations. Importantly, the African Commission revised its Rules of Procedure at its twenty-seventh extraordinary session to require the transmission of its Concluding Observations on state reports to NHRIs of which the states were under review.¹¹⁴ This amendment to the Rules of Procedure was done precisely to enhance the role of NHRIs in following up with the African Commission’s recommendations.¹¹⁵

The African Commission also has a special procedure, namely, the Special Rapporteur. The creation of this mandate has contributed to the Commission’s promotional activities with respect to refugee rights and those of internally-displaced persons in the region.¹¹⁶ There have been various critiques related to the value of the mandate. For instance, Naldi and D’Orsi conclude that the mandate has had limited

111 Bekker (n 101) 20-25.

112 As above.

113 African Commission General Comment 5 on the African Charter on Human and Peoples’ Rights: The right to freedom of movement and residence (art 121), <https://www.achpr.org/legalinstruments/detail?id=74> (accessed 9 May 2022).

114 African Commission Rules of Procedure of the African Commission on Human and Peoples’ Rights 2020, adopted by the African Commission on Human and Peoples’ Rights during its 27th extraordinary session held in Banjul, The Gambia, 19 February-4 March 2020, https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf (accessed 9 May 2022).

115 Ch XV Rules of Procedure of the African Commission 2020. The African Commission notes: ‘In order to enhance the role of national human rights institutions (NHRIs) in follow-up on recommendations of the Commission, provides that the Concluding Observations on State Reports would be transmitted to the NHRIs in addition to the government.’ African Commission ‘Press release on publication of new rules of procedure of the African Commission on Human and Peoples’ Rights, 2020’, *ACHPR* 7 July 2020, <https://www.achpr.org/pressrelease/detail?id=518> (accessed 12 July 2020).

116 Sharpe (n 100) 24.

effect and that the African Commission should reconsider its role.¹¹⁷ Viljoen argues that the special procedure mandates, in general, take away from the Commission's limited resources and detract from its core protective function.¹¹⁸ In addition, Sharpe found that the current focus was not on refugees and asylum seekers, but rather on internally-displaced persons, nationality and statelessness, noting here that the mandate as provided for in its enabling resolution refers only to activities with respect to 'refugees, asylum seekers and internally-displaced persons'.¹¹⁹ The UNHCR's relationship with the mandate has also evolved to focus entirely on issues related to nationality and statelessness and not on refugees and asylum seekers, as had been indicated in its memorandum of understanding with the African Commission.¹²⁰

With respect to NHRIs, the Special Rapporteur has a comprehensive mandate that includes the requirement to 'cooperate and engage in dialogue with member states, *National Human Rights Institutions*¹²¹ ... in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons'.¹²² Thus, NHRIs can engage directly with the Special Rapporteur. Notwithstanding this, a review of the Special Rapporteurs' activity reports revealed scant reference, if at all, to NHRIs. Of the nine publicly-available reports, only two Special Rapporteur's activity reports make any specific recommendations to NHRIs.¹²³ The Special Rapporteur's report presented in 2012 to the fifty-second ordinary session refers to the mandate holder's participation in only one event organised by NHRIs, that is, a conference in 2007, and offers general recommendations to NHRIs.¹²⁴ The Special Rapporteur's report to the forty-sixth ordinary session makes recommendations to NHRIs to promote the ratification

117 GJ Naldi & C d'Orsi 'The role of the African human rights system with reference to asylum seekers' in A Abass & F Ippolito (eds) *Regional approaches to the protection of asylum seekers: An international perspective* (2014) 40, cited in Sharpe (n 100) 209.

118 F Viljoen *International human rights law in Africa* (2012) 296-297.

119 African Commission 'Resolution on the renewal of the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internationally Displaced Persons in Africa' 61st ordinary session, 1-15 November 2017 ACHPR/Res.379.

120 Sharpe (n 100) 209.

121 My emphasis.

122 African Commission (n 115).

123 Based on a review of the reports conducted in 2020 by the author of reports available on the African Commission's website. These are the report presented to the 52nd ordinary session in October 2012 and the report presented to the 46th ordinary session in November 2009.

124 M Sahli-Fadel 'Report of the mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced and Migrants in Africa since its creation, 52nd ordinary session of the African Commission on Human and Peoples' rights, Yamoussoukro, Cote d'Ivoire, from 9 to 22 October 2012' paras 46 & 61, <https://www.achpr.org/sessions/intersession?id=142> (accessed 4 August 2021).

of the Kampala Convention.¹²⁵ There is no specific reference or indication that the Special Rapporteurs have engaged substantively with NHRIs with respect to refugee rights promotion and protection. From the reports it appears that the relationship with NHRIs is not necessarily deemed distinct from that with civil society organisations.

As indicated earlier, there are challenges that hamper the constructive engagement between the African Commission as the custodian of the African human rights treaties and NHRIs as one of the implementation conduits. Nonetheless, the discussion above highlights important ways through which NHRIs can engage substantively with the mechanisms and processes in place. Also, the African Commission has displayed goodwill towards working with NHRIs. Beyond adopting the NHRI resolutions and incorporating these in its Rules of Procedure, the African Commission has also contributed to the development of some modalities for engagement with NHRIs in various thematic areas. These include in the prevention of torture, in the follow up with implementation of its recommendations and access to information for Africa.¹²⁶

In addition, numerous former NHRI commissioners have served or currently serve as commissioners in the African Commission, thereby precluding notions that NHRIs may be unfamiliar actors for human rights promotion and protection in Africa.¹²⁷ Should further clarity on the modalities for substantive engagement be determined, especially with the Special Rapporteur on Refugees, NHRIs could make important contributions to the promotion and protection of refugee rights. In turn, this would influence the development of clearer channels for engagement between the domestic and regional levels with respect to the realisation of refugee rights and contribute to the development of norms for African NHRIs' engagement with refugee rights.

Unlike international human rights law, the regional human rights law in Africa has codified NHRIs as constituent elements of an effective human rights framework. Their inclusion within the

125 BTM Nyanduga 'Report of activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the intersession period between May and November 2009' para 13, <https://www.achpr.org/sessions/intersession?id=131> (accessed 4 August 2021).

126 NANHRI coordinated NHRI involvement in these processes. The author was involved in the launch of the Robben Island Guidelines for the Prohibition and Prevention of Torture while working for the SAHRC and several SAHRC employees were included in the consultation process during the development of the guidelines. In addition, several SAHRC staff members were also involved in the development of the Model Law on Access to Information for Africa through the SAHRC's Access to Information Unit.

127 CHR (n 109) 13.

regional human rights and processes has both legal and political support. However, what is lacking is the uptake of the opportunities for engagement to enhance the realisation of refugee rights due to operational challenges and institutional weaknesses faced by the African Commission and the NHRIs.

7 Conclusion

The evolution of the international refugee protection regime has occurred to the exclusion of some key actors, namely, NHRIs. From its infancy, the refugee protection regime has been characterised by the pursuit of national interests and a reluctance by states to fully commit to the responsibility of effectively resolving forced displacement. States have shifted their consideration of refugee protection from a humanitarian and protection character to that of national interest, which has little regard for complying with international legal obligations. Therefore, a reconceptualisation of refugee protection in human rights terms presents practical opportunities to remedy both the normative and implementation gaps that exist. It is in such a reconceptualisation that NHRIs may have a pivotal role.

Crucially, is the task of determining whether having an explicit refugee rights mandate has a direct impact on a NHRI's effectiveness on promoting and protecting these rights. In this regard, the first hurdle that would need to be overcome would be measuring the impact that NHRIs have on the realisation of any human right in the first place. Therefore, while it is encouraging that there are NHRIs in Africa with explicit mandates for the promotion and protection of refugee rights, it is difficult to determine whether this has a higher degree of impact on the realisation of refugee rights without conducting an empirical evaluation. However, one can assume that an explicit mandate for refugee rights promotion and protection allows for better allocation of scarce resources to the promotion and protection of these rights. Assuming also that the operational context allows the NHRI to engage with refugee rights, there is a higher likelihood that these rights would have a prominent place on the NHRI's agenda. In turn, this may determine the extent to which the NHRI engages with these rights at the domestic, regional and international levels to influence positive outcomes for refugees and asylum seekers.

Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat

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Summary: *African governments are increasingly enacting laws that criminalise false news or adopting practices such as internet shutdowns as strategies to address the spread of online false news during elections. These approaches have an adverse effect on the way in which citizens exercise their freedom of expression and access information necessary to develop an informed electorate that can meaningfully participate in elections. Electoral authoritarian regimes also adopt such practices to suppress critical voices and reduce the transparency and integrity of electoral processes that have been tilted in their favour. Admittedly, false news poses a threat to the quality of information in the public sphere, particularly when deployed to manipulate the decisions of voters. This article calls for more proactive and human rights-based approaches to addressing the scourge of false news. In doing so, the article juxtaposes the measures adopted by South Africa (2019 and 2021) and Tanzania (2020) in their elections. It recommends that states and other stakeholders implement media and information literacy measures and ensure that owners of digital technologies apply human*

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rights-based approaches in their policies and practices as opposed to punitive measures and internet shutdowns. This reflects a democratic culture that is more in alignment with international laws and standards on promoting and protecting freedom of expression during elections.

Key words: *democratic elections; digital age; election integrity; false news; freedom of expression; political participation*

1 Introduction

Characterised as a fundamental freedom as well as an enabler of other rights, freedom of expression is indispensable in a free, fair, credible and transparent election process.¹ For the electorate to meaningfully exercise their right to political participation, they need to freely engage in public debate, and access accurate, relevant and credible information that guides their voting decisions. This provides further legitimacy to the electoral process.² The advancement of the internet has provided a wide spectrum of opportunities for the exercise of freedom of expression.³ It has also allowed for greater interaction between the electorate and electoral stakeholders, including political candidates and parties, election management bodies, relevant civil society organisations, election observers and even other voters. By shattering barriers of content creation and distribution, the internet has allowed for the inclusion and participation of a wider section of the polity in public debate.⁴

However, the other side of the coin reveals the dangers posed by this proliferation of online content and interaction to the democratic makeup of a country. Concerns around the quality of information online gained more prominence following the Cambridge Analytica scandal and upsurge of online false news in the 2016 United States (US) elections and Brexit vote.⁵ Closer to home, the influence of

1 W Benedek & MC Kettemann 'Freedom of expression online' in M Susi (ed) *Human rights, digital society and the law: A research companion* (2019); ACE Project 'Media and elections' (2012), <http://aceproject.org/ace-en/topics/me/introduction/me10/me10d> (accessed 14 January 2021).

2 As above.

3 JM Balkin 'Digital speech and democratic culture: A theory of freedom of expression for the information society' (2004) 79 *NYU Law Review* 4-5.

4 As above.

5 N Cheeseman & B Klaas *How to rig an election* (2018) 133; H Allcott & M Gentzkow 'Social media and fake news in the 2016 election' (2017) 31 *Journal of Economic Perspectives* 211-212; J Doward & A Gibb 'Did Cambridge Analytica influence the Brexit vote and the US election?' *The Guardian* 4 March 2017, <https://www.theguardian.com/politics/2017/mar/04/nigel-oakes-cambridge-analytica-what-role-brexit-trump> (accessed 14 January 2021).

Cambridge Analytica and the consequences of online false news were evident in the 2017 elections in Kenya and Nigeria's 2015 elections.⁶ This insidious threat has had a snowball effect, with scholars and experts warning against the risk posed by false news, and manipulated and targeted harmful online content on voter behaviour and the integrity of election processes.⁷ While the trading in lies and propaganda during elections is not a new phenomenon, the ease with which it can be accessed and shared, gaining virality in the digital age, increases its potential to distort democratic processes.⁸

In the wake of these concerns, stakeholders have looked to the law for solutions. The information ecosystem of the digital age with its multiple players, including state and non-state actors, requires a multi-stakeholder approach to regulating online speech and interrelated rights.⁹ The involvement of the private sector in this endeavour, however, has elicited various concerns with the former United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Prof David Kaye, stating: 'The rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight.'¹⁰

However, given the influence of the private sector actors, such as online media platforms, on how people exercise their freedom of expression, their inclusion is inevitable. It has been posited that the optimum traffic and advertisement-driven business model of social media companies thrives in a context of widespread false information.¹¹ Online media platforms are well aware of this, thus motivating their initial inaction and reluctance to implement appropriate policies

6 B Ekdale & M Tully 'African elections as a testing ground: Comparing coverage of Cambridge Analytica in Nigerian and Kenyan newspapers' (2019) 40 *African Journalism Studies* 27.

7 K Jones *Online disinformation and political discourse: Applying a human rights framework* (2019) 10.

8 JB Whitton 'Hostile international propaganda and international law' (1971) 398 *Propaganda in International Affairs* 14-15; Jones (n 7) 4; B Mutsvairo & B Seba 'Journalism educators, regulatory realities, and pedagogical predicaments of the "fake news" era: A comparative perspective of the Middle East and Africa' (2019) 74 *Journalism and Mass Communication Educator* 143.

9 JM Balkin 'Free speech is a triangle' (2018) 118 *Columbia Law Review* 2011.

10 D Kaye *Speech police: The global struggle to govern the internet* (2019) 112.

11 S Joseph 'Why the business model of social media giants like Facebook is incompatible with human rights' *The Conversation* 2 April 2018, <https://theconversation.com/why-the-business-model-of-social-media-giants-like-facebook-is-incompatible-with-human-rights-94016> (accessed 21 October 2021); C Pennycook 'Shifting attention to accuracy can reduce misinformation online' (2021) *Nature*; A Ohlheiser 'This is how Facebook's fake-news writers make money' *Washington Post* 18 November 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/> (accessed 20 October 2021).

for content regulation on their platforms.¹² A favoured defence was reflected in their insistence that they are not arbiters of truth.¹³ It is only recently that social media companies have sought to slightly depart from their capitalistic mind-set, taking action to address the harms propagated by online false news and other harmful content on their platforms following increasing calls for self-regulation, oversight and accountability.¹⁴ This has seen the implementation of measures such as content reduction, content removal, warning labels, disinformation and misinformation education campaigns, and collaboration with fact-checking organisations.¹⁵ A hybrid model of self-regulation and co-regulation, therefore, is crucial for the exercise of freedom of expression on these platforms, particularly around areas that affect democracy and elections.¹⁶

The discussion on approaches to addressing harmful online speech such as false news has gained traction in the global sphere. The point of departure for this discourse is the acceptance that while freedom of expression is a fundamental freedom, it is not an absolute right and is subject to limitations. The three-part test of limitations to rights requires that the restriction be provided by law, serve a legitimate aim, and be necessary and proportionate in a democratic society.¹⁷ Further emphasising protections of these rights is the existing framework on human rights both at the international and regional level. In its 2018 Resolution the UN Human Rights Council stated that '[t]he same rights that people have offline must also be protected online'.¹⁸ From this statement, it can be logically construed

12 As above.

13 T McCarthy 'Zuckerberg says Facebook won't be "arbiters of truth" after Trump threat' *The Guardian* 28 May 2020, <https://www.theguardian.com/technology/2020/may/28/zuckerberg-facebook-police-online-speech-trump> (accessed 21 October 2021).

14 R Stengel *Information wars: How we lost the global battle against disinformation and what we can do about it* (2019); S Zuboff *The age of surveillance capitalism: The fight for a human future at the new frontier of power* (2019).

15 'Civic integrity policy' Twitter January 2021, <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (accessed 26 January 2021); 'Our approach to policy development and enforcement philosophy' Twitter, <https://help.twitter.com/en/rules-and-policies/enforcement-philosophy> (accessed 26 January 2021); 'Coordinating harm and publicising crime' Facebook, https://www.facebook.com/communitystandards/coordinating_harm_publicizing_crime/ (accessed 26 January 2021); NM Krause et al 'Fact checking as risk communication: The multi-layered risk of misinformation in times of COVID-19' (2020) 23 *Journal of Risk Research* 1-8; L Graves *Deciding what's true: The rise of political fact-checking in American journalism* (2016); L Bode & EK Vraga 'In related news, that was wrong: The correction of misinformation through related stories functionality in social media' (2015) 65 *Journal of Communication* 619.

16 SG Verhulst 'The regulation of digital content' in LA Lievrouw & S Livingstone (eds) *Handbook of new media: Social shaping and social consequences of ICTs, updated student edition* (2010) 330.

17 Human Rights Committee General Comment 34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 22 January 2021).

18 HRC 'The promotion, protection and enjoyment of human rights on the internet' (4 July 2018) A/HRC/38/L.10/Rev.1, <https://documents-dds-ny.un.org/>

that the existing human rights framework applies to rights in the digital age, and serves as a guide for enactment and amendment of laws to cater to the unique developments of the digital age.

However, a critical examination of the emerging laws and practices to address online false news, such as increased criminalisation of false news and internet shutdowns, belies a commitment to protecting freedom of expression and related rights. At least 39 countries in Africa have adopted laws on internet governance, cybercrime and cybersecurity with sanctions against the publication of false news.¹⁹ This article is not anti-regulation and it acknowledges that managing the spread of online false news and mitigating its effect on elections is crucial. However, adopted approaches should be guided by international law, and should not illegally and disproportionately curtail freedom of expression. A careful balance is necessary to ensure that online media platforms offer reliable alternative platforms of information and legitimate expression, especially in contexts where mainstream media is vulnerable to government and economic control.

This article therefore explores the protection of freedom of expression during elections in Africa, with a focus on managing the increasing threat of false news on elections without compromising freedom of expression. Part 1 is this introduction. Part 2 is a conceptual framework on freedom of expression and the developing lexicon around false news in the digital age. Part 3 discusses the UN and African human rights framework on the protection of freedom of expression and links it with the right to political participation. It also explores the tensions in norms calling for decriminalisation of false news against situations where significant harms arise. Part 4 explores the challenge of disinformation in Africa, especially in the context of elections. It examines the approaches adopted by South Africa and Tanzania in managing false news in their most recent elections and the implications of these measures on freedom of expression. This part also discusses relevant case law by African regional and national courts that are developing jurisprudence on freedom of expression in the digital age. Part 5 is the conclusion and contains recommendations.

doc/UNDOC/LTD/G18/203/73/PDF/G1820373.pdf?OpenElement (accessed 22 January 2021).

19 UNCTAD 'Cybercrime legislation worldwide', https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Cybercrime-Laws.aspx (accessed 26 January 2021).

2 Freedom of expression and false news in the digital age: A conceptual framework

The protection of freedom of expression has historically elicited scholarly debate, which has taken different dimensions given the social, political, economic and technological developments of the day. It is trite law that freedom of expression is a basic right and essential to the functioning of a democracy. This conceptual framework is guided by four arguments for the protection of freedom of expression, namely, to reveal the truth; for self-development and fulfilment; for participation in a democracy; and suspicion of government.²⁰

The third and fourth arguments, participation in a democracy and suspicion of government, are particularly relevant to this article. Participation in a democracy, as a justification for the protection of freedom of expression, posits that democracies are anchored in the development of an active citizenry that is exposed to diverse ideas and information. This enhances their ability to hold their leaders accountable, and to participate more meaningfully in the democratic process.²¹ To this end, governments should facilitate public discourse including that which is critical of government.²² When an informed electorate actively participates in public discourse, and allows this acquisition and exchange of ideas to inform their voting choices, it helps transform the voting exercise from a passive to an active one. Moreover, given the fact that elections are often branded as the hallmark of democracy, the participation of an informed electorate, as opposed to an electorate solely motivated by bribery, ethnic, tribal, or religious leanings or manipulation, is essential in holding a truly free, fair and credible process.

On suspicion of government, further reference can be made to a quotation by Schauer:²³

Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a general sense.

20 E Barendt *Freedom of speech* (1985) 7-23. Prof Eric Barendt is the Goodman Professor of Media Law at University College London.

21 Barendt (n 20) 18.

22 Barendt (n 20) 20; DAJ Richards *Free speech and the politics of identity* (1999) 22-35.

23 F Schauer *Free speech: A philosophical inquiry* (1982) 86.

This public distrust extends to government approaches to regulation of basic rights, including freedom of expression. Public suspicion of government is a long-standing phenomenon.²⁴ Authoritarian and undemocratic governments have historically misused their powers to clamp down on certain rights such as freedom of expression. This suppression of targeted human rights is especially rife and, more so, detrimental when done in the context of an electoral process. Such measures are often implemented in order to control information, avoid accountability and advance certain agendas that might not be motivated by the public good.²⁵

In the digital age, the increasing influence of the internet on the exercise of human rights, including freedom of expression, is undeniable. The recognition of the internet as a platform for the exercise of freedom of expression within internationally-recognised limitations is increasingly reiterated in international case law.²⁶ Governments, the private sector, civil society organisations and other stakeholders have found it necessary to re-examine approaches to regulating freedom of expression in such a way as to ensure its protection and promotion but still safeguarding it against emergent harms.²⁷

A resounding question that has similarly mutated in the different ages remains: Which expression should be regulated, and which tolerated? When examined under the prism of international law, expression that disrespects the rights or reputations of others, and endangers national security, public health or morals, can be interpreted as propaganda for war, or promotes hatred on grounds of nationality, race or religion and further incites discrimination, hostility or violence, falls under prohibited speech and requires some form of regulation and accountability.²⁸ An element of harm is evident across the spectrum of prohibited speech. The harm principle, as discussed by John Mills, remains as true today as it did in the 1970s: 'The only purpose for which power can be rightfully exercised over

24 As above.

25 Barendt (n 20) 21.

26 *Delfi AS v Estonia* [GC] Application 64569/09, ECHR, judgment, 2015; *Times Newspapers Ltd v The United Kingdom* Application 3002/03 & 23676/03, ECHR, judgment, 2009; *Cengiz & Others v Turkey* Application 48226/10 & 14027/11, ECHR, judgment, 2015; *Yildirim v Turkey* Application 3111/10, ECHR, judgment, 2012. See also HRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank la Rue: A/ HRC/17/27' (16 May 2011) para 19; W Benedek & MC Kettemann *Freedom of expression and the internet* (2020).

27 Balkin (n 9).

28 Arts 19 & 20 ICCPR.

any member of a civilised community, against his will, is to prevent harm to others.²⁹

Disinformation, by its very definition, contains an element of harm. It is a category of false news under the composite term ‘information disorder’, which Wardle and Derakhshan categorise as the three types of false news:³⁰

- misinformation – this is information that is false but shared with no intention of causing harm;
- disinformation – this is information that is false and is created and disseminated with the intention of resorting to harm; and
- mal-information – this is information that may be true or false but is intended to be privately consumed but is publicly exposed to cause harm.

Disinformation has become a concerning harm in democratic processes given the fact that it is conceived, designed and disseminated with a particular harm in mind. In achieving this harm, the creators of disinformation often seek to exploit divisive factors in society such as ethnicity, race, class or religion.³¹ Unfortunately, societal divisions are most magnified during emotive processes such as elections.

Although the ease and speed at which information spreads on the internet, as well as its amplification capabilities, which has been touted as revolutionary to modern-day communication, it offers a corresponding disadvantage in the context of false news.³² Further aggravating this situation is the absence of journalistic standards of integrity in social media platforms to serve as a restraining factor.³³ These very elements make social media a choice platform for malicious persons and entities to disseminate disinformation.³⁴ In the context of elections, the harm engendered by false news such as disinformation may be voter suppression; voter confusion; undermining credible electoral information sources; distorting public discourse; discrediting the integrity of election results; and fomenting election conflict.³⁵ The weaponisation of false news to

29 JS Mill *On liberty* (1978) 9.

30 Scholars and pundits have encouraged the use of the term information disorder or information pollution over fake news, which has increasingly been distorted in political conversations to discredit what could be accurate but critical news, and has been wielded as a tool to undermine media. See C Wardle & H Derakhshan ‘Information disorder: Toward an interdisciplinary framework for research and policymaking’ Council of Europe Report (2017) 5.

31 Wardle & Derakhshan (n 30) 4.

32 Wardle & Derakhshan (n 30) 11-12.

33 C Ireton & J Posetti *Journalism, fake news and disinformation: Handbook for journalism education and training* (2018) 15.

34 Allcott & Gentzkow (n 5); Ireton & Posetti (n 33) 15.

35 Ireton & Posetti (n 33) 17.

advance political agendas by varied actors, including governments, and politicians and their agents, is a phenomenon that has added to the challenges facing electoral democracy in Africa.³⁶ In light of this, stakeholders have examined the role the law can play in protecting freedom of expression in the digital age within agreed limitations.

3 Legal framework for freedom of expression in the context of elections

Both the UN and African human rights systems protect freedom of expression and have made efforts to reinforce its protection in the digital age. Strengthening the protections for freedom of expression in the digital age draws from existing frameworks articulated in seminal human rights instruments. Given the fact that this article examines freedom of expression in the context of elections, it will also touch on the framework for protecting political participation.

3.1 UN human rights framework on freedom of expression and elections

Freedom of expression is guaranteed under articles 19 of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration).³⁷ Article 19(2) of ICCPR and article 19 of the Universal Declaration provide the link between freedom of expression, the right of access to information, and media freedom, and serve as an apt example of the interdependence, indivisibility and interrelatedness of human rights.³⁸ While freedom of expression enjoys a symbiotic relationship with the right of access to information and media freedom, it has also been described as an enabler of other human rights, including

36 H Wasserman et al 'Audience motivations for sharing dis- and misinformation: A comparative study in five sub-Saharan African countries', <https://cyber.harvard.edu/sites/default/files/2019-12/%20Audience%20Motivations%20for%20Sharing%20Dis-%20and%20Misinformation.pdf> (accessed 22 January 2021).

37 OHCHR 'ICCPR', <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 22 January 2021); UN 'Universal Declaration of Human Rights', <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 22 January 2021).

38 UNFPA 'Human rights principles', <https://www.unfpa.org/resources/human-rights-principles> (accessed 22 January 2021). Also see OHCHR 'Vienna Declaration and Programme of Action', <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 22 January 2021); T McGonagle 'The development of freedom of expression and information within the UN: Leaps and bounds or fits and starts?' in T McGonagle & Y Donders (eds) *The United Nations and freedom of expression and information* (2015) 1; DJ Whelan *Indivisible human rights: A history* (2011); D Weissbrodt (ed) *The development of international human rights law* (2017).

the right to political participation.³⁹ For meaningful political participation, it is imperative that the electorate has avenues to express themselves and exchange ideas allowing for meaningful debate on the democratic process. Freedom of expression is greatly enabled by an independent and impartial media, which also serves as a campaign platform, and a watchdog on the electoral process, thereby promoting accountability and transparency.⁴⁰

It is worth noting that articles 19 of the Universal Declaration and ICCPR were forward-looking by providing for the exercise of the right of freedom of expression ‘through any other media of choice’, which provided the space for the protection of this right in light of future technological advancements such as the internet.⁴¹ Developing norms, including the Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda⁴² and the Joint Declaration on Freedom of Expression and Elections in the Digital Age,⁴³ have specific provisions on addressing the harms propagated by online false news in a democracy. These soft law instruments require that regulations on false news should align with international laws and standards.⁴⁴ State and non-state actors such as online media are obligated to adopt positive measures, such as fact-checking and media and information literacy, to combat false news.⁴⁵

The limitations on freedom of expression are articulated in article 19(3) of ICCPR and include the following: to ensure the respect of the rights or reputations of others and to protect national security, public order, public health or public morals. Under article 20 of ICCPR, the Convention requires states to legally restrict propaganda for war and speech that advocates hatred on grounds of nationality, race or religion that incites discrimination, hostility or violence.

39 Mcgonagle (n 38) 3 40; I Chen *Government internet censorship measures and international law* (2020) 88; HRC (n 26) para 22. Art 25 of ICCPR guarantees the right to political participation.

40 Human Rights Committee General Comment 25, ‘The right to participate in public affairs, voting rights and the right of equal access to public service’ paras 11 & 12; ACE Project ‘Media and elections’, <https://aceproject.org/ace-en/topics/me/onePage> (accessed 22 January 2021).

41 HRC A/HRC/17/27 (n 26) para 21.

42 OHCHR ‘Freedom of expression monitors issue joint declaration on “fake news”, disinformation and propaganda’, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E> (accessed 22 January 2021).

43 OHCHR ‘Joint declaration on freedom of expression and elections in the digital age’, https://www.ohchr.org/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf (accessed 22 January 2021).

44 Recommendation 1 Joint Declaration Joint Declaration on Freedom of Expression and Elections in the Digital Age; Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda.

45 As above; OHCHR (n 43).

The limitations are expounded under General Comment 34 which provides a three-part test for limitations of freedom of expression, which it describes as uninhibited expression. The limitation shall⁴⁶

- be provided by law. A law articulating a limitation on freedom of expression must be precisely drafted to guide citizens on their conduct. It should be publicly accessible, clearly articulate the powers of enforcement agencies, and provide reasonable sanctions.⁴⁷
- serve a legitimate aim;⁴⁸
- be necessary and proportionate to achieve that legitimate aim. If the state can implement a less restrictive means to attain a legitimate aim, it should do so. The principle of proportionality is required not only in the formulation of the law but in its enforcement as well.⁴⁹ States are also urged to exercise greater tolerance for other forms of expressions, especially public debate about public officials even when it involves criticism of said officials.⁵⁰ Finally, in justifying the imposition of a restriction on freedom of expression, a state must show the 'direct and immediate' link between the expression and threat.⁵¹

These principles on limitations of rights have been reinforced in case law, including in *Mukong v Cameroon*,⁵² where the Human Rights Committee decried the use of the limitations to obstruct democracy and human rights.

3.2 African human rights framework on freedom of expression and elections

Article 9 of the African Charter on Human and Peoples' Rights (African Charter)⁵³ provides that everyone has the 'right to receive information' and 'the right to express and disseminate his opinions within the law'. The phrasing of article 9(2) as 'within the law' raised concern as adopting a claw-back clause nature. However, in *Constitutional Rights Project & Another v Nigeria*⁵⁴ The African Commission on Human and Peoples' Rights (African Commission) clarified that the limitation of this right was guided by international law as opposed to domestic law. Therefore, governments cannot draft laws that contradict binding international law provisions. This direction is relevant in the

46 General Comment 34 (n 17).

47 General Comment 34 paras 24 & 25.

48 General Comment 34 para 29.

49 General Comment 34 paras 33 & 34.

50 General Comment 34 paras 34, 38 & 43.

51 General Comment 34 para 35.

52 *Womah Mukong v Cameroon*, Communication 458/1991, Human Rights Committee, 21 July 1994 (*Mukong v Cameroon*) para 9.7.

53 African Commission 'African Charter on Human and Peoples' Rights', <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 22 January 2021).

54 (2000) AHRLR 191 (ACHPR 1998).

wake of increasing scenarios where some African governments adopt laws criminalising expression in the digital age under the guise of reining in the spread of false news among other aims that do not meet the legitimacy and proportionality test.

The African Charter on Democracy, Elections and Governance (African Democracy Charter)⁵⁵ emphasises regular, free and fair elections as a basis of legitimacy for government.⁵⁶ The Democracy Charter emphasises the promotion of democracy, the rule of law and human rights, which includes freedom of expression.⁵⁷ Guarantees for freedom of expression are also provided for among the objectives of the African Democracy Charter, which include the promotion of ‘the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs’.⁵⁸

The African Commission has made strides in further protecting freedom of expression in the digital age through soft law instruments such as the Model Law on Access to Information for Africa, the 2019 revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration) and the Guidelines on Access to Information during Elections in Africa.⁵⁹ Although non-binding, these instruments are persuasive in African countries and are necessary in guiding the development of Africa’s democratic culture.

The 2019 revision of the Declaration of Principles on Freedom of Expression and Access to Information in Africa⁶⁰ was progressive in its protection of freedom of expression and information given the advancements of the digital age. State parties are obligated to create an enabling environment for the exercise of freedom of expression and the right of access to information.⁶¹ This includes reviewing

55 AU ‘African Charter on Democracy, Elections and Governance’, <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf> (accessed 22 January 2021). It should be noted that while the African Charter does not expressly provide for the right to vote, it guarantees the right to participate in government either directly or indirectly under art 13.

56 Art 2 African Democracy Charter.

57 Arts 2, 4(1) & 27 African Democracy Charter.

58 Art 2 African Democracy Charter.

59 African Commission ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019’, <https://www.achpr.org/legalinstruments/detail?id=69> (accessed 22 January 2021); African Commission ‘Model Law on Access to Information for Africa 2013’, <https://www.achpr.org/legalinstruments/detail?id=32> (accessed 22 January 2021); African Commission ‘The Guidelines on Access to Information and Elections in Africa’, https://www.achpr.org/public/Document/file/English/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf (accessed 22 January 2021).

60 African Commission Declaration of Principles (n 59).

61 Principle 1 of the Declaration.

criminal restrictions on expression to ensure that they are justified and aligned with international human rights law and standards by, among other things, repealing criminal laws on sedition, insult and the publication of false news.⁶²

These provisions no doubt are commendable given the strong protection they afford to freedom of expression. However, a question arises about the blanket prohibition on criminal sanctions on the publication of false news, say, in the event it is disinformation and it leads to violence with severe injuries and/or loss of life. Disinformation, by its very nature, is deliberate, coordinated and targeted towards achieving a particular harm. Where it causes death or severe injuries, a civil sanction may not be a punishment proportionate to the harm. It appears that the popular opinion under the human rights parlance is the wholesale decriminalisation of false news. Possibly, where disinformation leads to death or severe injuries, authorities may resort to prosecution under criminal laws such as manslaughter.

An examination of national media and internet laws in Africa reveals that criminal sanctions attached to offences on the publication of false news is a common trend.⁶³ Disturbingly, many of these laws are broadly and/or vaguely worded.⁶⁴ Sound interpretation by courts therefore is crucial to provide guidance on a case-by-case basis on whether the sanctions are necessary and proportionate. However, this is a risky gamble in contexts lacking independent judiciaries and where governments and influential personalities use such laws to clamp down on freedom of expression.

With regard to the internet, the Declaration acknowledges the importance of internet access to freedom of expression. It calls on states to take measures to ensure universal, equitable, affordable and meaningful access to the internet as a means of promoting the exercise of freedom of expression and information.⁶⁵ This is important in the African context given the fact that the internet penetration rate in 2020 was 39,3 per cent, lagging behind other continents.⁶⁶

In ensuring internet access, states are obligated to refrain from interfering with access to information by way of communication and digital technologies using measures such as 'removal, blocking

62 Principle 22 of the Declaration.

63 GPD et al 'Disinformation tracker', <https://www.disinformationtracker.org/> (accessed 26 January 2021).

64 As above.

65 Principle 37 of the Declaration.

66 Internet World Stats 'Internet users statistics for Africa', <https://www.internetworldstats.com/stats1.htm> (accessed 22 January 2021).

or filtering of content’ unless such interference is ‘justifiable and compatible with international human rights law and standards’.⁶⁷ Further, states shall refrain from disrupting internet services as well as adopting unjustifiable economic restrictions on access to the internet.⁶⁸ States are obligated to ensure that measures that may be deemed to interfere with internet access comply with the limitations of rights test.⁶⁹

Internet intermediaries are also required to ensure that their services promote and not hinder the exercise of freedom of expression, and promote net neutrality.⁷⁰ In their service provision, they should adopt a human rights-based approach and address human rights violations that occur.⁷¹ The Declaration further provides a criterion that seeks to ensure transparency and fairness in the event of state requests for content removal.⁷² States have a responsibility to ensure that in the development, use and application of digital technologies by internet intermediaries, the process is in line with international human rights law and standards and do not infringe on human rights.⁷³

The Guidelines on Access to Information and Elections in Africa⁷⁴ represent another worthy addition to the normative framework on freedom of expression. The Guidelines were developed with the aim of promoting access to information during the electoral cycle. The Guidelines instruct states on what information should be proactively disclosed during elections to promote free, fair and transparent processes. The cornerstone principle of facilitating access to information is proactive disclosure of information that encourages the custodians of public interest information to readily avail such information to the public without being requested to do so, to promote transparency and accountability in public affairs.⁷⁵

The Guidelines emphasise the importance of ‘access to accurate, credible and reliable information’ throughout the electoral cycle. This aims at ensuring that African democracies develop an informed electorate that can meaningfully exercise their right to vote; an essential element in free, fair and credible elections.⁷⁶ The Guidelines target electoral stakeholders, including appointing authorities of

67 Principle 38 of the Declaration.

68 Principles 38(2) & 38(3) of the Declaration.

69 Principle 38(2) of the Declaration.

70 Principle 39 of the Declaration.

71 Principle 39(3) of the Declaration.

72 Principles 39(3), (4) & 5 of the Declaration.

73 Principle 39(6) of the Declaration.

74 African Commission Guidelines (n 59).

75 Objectives and rationale of the Guidelines.

76 Preface to the Guidelines.

election management bodies; election management bodies, political parties and candidates; law enforcement agencies; election observers and monitors; media and online media platform providers; media regulatory bodies; and civil society organisations. Media and internet regulatory bodies are obligated to enact regulations that ensure 'fair and balanced coverage of the electoral process and transparency about political advertising policy' both offline and online.⁷⁷

As far as internet shutdowns are concerned, which have become a growing democratic concern during electoral processes, the Guidelines call for states to refrain from blocking the internet or restricting media freedom during elections.⁷⁸ Any such measures should be subject to prior judicial review, proactively disclosed, and meet the international standard of legality, legitimacy, and necessity and proportionality for the limitations of rights.⁷⁹ Governments often justify internet shutdowns as a measure to manage the spread of false news online.⁸⁰

4 Emerging approaches to addressing false news in Africa: A reflection or indifference to international norms?

While Africa's internet penetration capacity is still struggling, mobile penetration is fast growing on the continent with a 45 per cent penetration rate, and a social media penetration rate of 11 per cent.⁸¹ Notwithstanding this growth rate in mobile and social media penetration, mobile and internet penetration remains is low.⁸² However, online disinformation remains a concern in African countries. A 2018 study conducted with respondents from Kenya, Nigeria and South Africa⁸³ revealed that 38 per cent of Kenyans, 28 per cent of Nigerians and 35 per cent of South Africans have shared

⁷⁷ Sec 25 of the Guidelines.

⁷⁸ Sec 26 of the Guidelines.

⁷⁹ Secs 27 & 28 of the Guidelines.

⁸⁰ Jigsaw 'The internet shutdown issue' *The Current* 2021 4, <https://jigsaw.google.com/the-current/shutdown/> (accessed 20 October 2021); F Anthonio '#KeepItOn: 2021 elections watch', <https://www.accessnow.org/keepiton-2021-elections-watch/> (accessed 20 October 2021).

⁸¹ GSMA 'Mobile internet connectivity 2020 sub-Saharan Africa factsheet', <https://www.gsma.com/r/wp-content/uploads/2020/09/Mobile-Internet-Connectivity-SSA-Fact-Sheet.pdf> (accessed 21 January 2021); World Bank Group 'An analysis of issues shaping Africa's economic future' (2019) 19 *Africa's Pulse* 49.

⁸² Internet World Stats (n 66).

⁸³ It should be noted that these countries show good stats on mobile and internet penetration. GSMA (n 81).

news that turned out to be false; a higher percentage than a similar study done in the United States.⁸⁴

Beyond poor digital access and connectivity, a *smorgasbord* of other challenges impact production and consumption of news in Africa, including media freedom; digital literacy; poor telecommunication infrastructure; unreliable energy sources; and poverty.⁸⁵ While fact checking is encouraged as a countermeasure to the spread of false news, these preceding challenges together with cost implications of accessing paid content from credible news sources affect the competencies of verifying the accuracy of news before sharing.⁸⁶ Aptly put, the information poverty faced in many African contexts limits the ability of citizens to combat the challenges posed by online misinformation and disinformation and filters the news in their information ecosystem.⁸⁷ Disturbingly, some African states have adopted a heavy-handed approach to managing the scourge of false news with an increase in criminal sanctions for the publication of false news and internet shutdowns.⁸⁸ In practice, the application of these laws has often been in bad faith to silence voices critical of the establishment and other powerful personalities, obstruct transparency and escape accountability.⁸⁹

4.1 Criminalisation of false news

Stakeholder discussion on approaches to addressing disinformation online has been gaining traction worldwide.⁹⁰ While owners of digital technologies such as Google, Facebook and Twitter have terms and conditions, and practices that seek to moderate online content, there has been an increasing push by states to deviate from this self-regulatory practice to a more co-regulatory approach.⁹¹

84 H Wasserman & D Madrid-Morales ‘“Fake news”, disinformation and media trust in Africa: A comparative study of Kenya, Nigeria and South Africa’ 7 November 2018, http://danimadrid.net/research/2018_icafrica_fakenews.pdf (accessed 21 January 2021).

85 A Mare et al ‘“Fake news” and cyber-propaganda in sub-Saharan Africa: Recentring the research agenda’ (2019) 40 *African Journalism Studies* 6; World Bank Group (n 81) 2-3.

86 J Britz ‘To know or not to know: A moral reflection on information poverty’ (2004) 30 *Journal of Information Science* 192.

87 As above; Mare et al (n 85) 6.

88 GDP et al (n 63).

89 As above.

90 D Funke & D Flamini ‘A guide to anti-misinformation actions around the world’ (2018), <https://www.poynter.org/ifcn/anti-misinformation-actions/> (accessed 18 December 2020).

91 E Culloty & J Suiter *Disinformation and manipulation in digital media: Information pathologies* (2020).

In the wake of these challenges, the approaches embraced by many African countries to criminalise false news with attendant harsh sanctions, as well as to implement social media taxes and internet shutdowns, among other restrictive measures, pose a real threat to a democratic and electoral culture in Africa. Several African countries have used various types of legislation to address the spread of false information online. These include existing penal or media laws as well as new cybersecurity and cybercrime laws, or context-specific laws and regulations such as those that have been enacted in the wake of the COVID-19 pandemic.⁹²

However, there has been apprehension that states are increasingly leaning towards criminalisation of false news as the choice approach to regulating false news as opposed to less punitive and penal measures that focus on addressing the root causes of online misinformation and disinformation.⁹³ The adoption of penal actions for managing false news has often been linked to authoritarian governments while democratic governments have sought to lean more towards encouraging responsible action by platforms and their users.⁹⁴ Further, measures to address false news belie more sinister motives to clamp down on critical voices and media freedom.⁹⁵

4.2 Internet shutdowns

The growing wave of digital authoritarianism has seen some states implement total or partial internet shutdowns as a justification for managing the spread of false news online as well as preventing mobilisation during moments of unrest.⁹⁶ Interference with internet connections has persisted despite the absence of or little evidence to support its effectiveness in achieving these aims.⁹⁷ An internet shutdown is defined as ‘an intentional disruption of internet or

92 GDP et al (n 63).

93 Freedom House ‘Freedom of the net 2014: Tightening the net: Governments expand online controls’ (2014), https://freedomhouse.org/sites/default/files/2020-02/FOTN_2014_Summary_Findings.pdf (accessed 22 January 2021). Also see AO Salau ‘Social media and the prohibition of “false news”: Can the free speech jurisprudence of the African Commission on Human and Peoples’ Rights provide a litmus test?’ (2020) 4 *African Human Rights Yearbook* 254.

94 Culloty & Suiter (n 91).

95 As above; MS Simiyu et al ‘Civil society in the digital age in Africa: Identifying threats and mounting pushbacks’ (2020) CHR & CIPESA, https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Civil_society_in_the_digital_age_in_Africa_2020.pdf (accessed 22 January 2021); HRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression A/HRC/35/22’ (2017) para 12.

96 D Flamini ‘The scary trend of internet shutdowns’ (2019), <https://www.poynter.org/reporting-editing/2019/the-scary-trend-of-internet-shutdowns/> (accessed 22 January 2021).

97 As above.

electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information'.⁹⁸

In the absence of communication channels to verify information, internet shutdowns have the ability to breed rumours and further suspicion.⁹⁹ This information blackout may increase as opposed to reducing tensions, especially in countries that have a history of election rigging, election-related violence and public distrust towards governments and public institutions.¹⁰⁰ Reiterating the arguments justifying freedom of expression, internet shutdowns restrict the public's ability to participate in democratic processes and encourage further mistrust towards government. Shutdowns have a high potential of grounding election processes, especially given the increased reliance on election technology in African elections. Processes such as confirmation of voter registration, results transmission and publication of results may rely on network and internet connection.¹⁰¹ According to the information and communications technology and elections database of the International Institute for Democracy and Electoral Assistance (IDEA), election management bodies in at least 41 African countries publish election results online.¹⁰² This process will be crippled during an internet shutdown. Not surprisingly, internet shutdowns also offer a cloak to authoritarian and undemocratic governments to conduct electoral malpractices.¹⁰³ The restrictions engendered by internet shutdowns on media reporting, election monitoring, documentation and reporting on electoral malpractices as well as support mobilisation by opposition severely inhibit accountability.¹⁰⁴

According to Berhan Taye, the head of Access Now's #KeepItOn campaign, governments in 33 of the countries that implemented internet shutdowns in 2018 justified these actions on the basis of addressing fake news and other harmful content.¹⁰⁵ In actuality, these actions were meant to ensure information control during periods of unrest. In 2019 at least 14 African countries shut down their

98 Access Now '#KeepitOn', <https://www.accessnow.org/keepitOn/#campaign> (accessed 22 January 2021).

99 HRC (n 95) para 14.

100 As above.

101 IDEA 'Africa', <https://www.idea.int/data-tools/continent-view/Africa/61> (accessed 22 January 2021).

102 As above.

103 DD Aydin 'Five excuses governments use to justify internet shutdowns', <https://www.accessnow.org/five-excuses-governments-abuse-justify-internet-shutdowns/> (accessed 22 January 2021).

104 As above.

105 B Taye 'Targeted, cut off, and left in the dark: The #KeepItOn report on internet shutdowns in 2019' (2019) 13; Flamini (n 96).

internet, with Benin, the Democratic Republic of the Congo (DRC), Mauritania and Malawi experiencing internet shutdowns during their elections. In 2020 Togo, Burundi and Tanzania implemented internet shutdowns during elections.¹⁰⁶ Most recently, in 2021, Uganda shut down its internet during elections; Niger's shutdown was in response to post-election protests; and DRC shut down the internet just before the presidential election.¹⁰⁷ Encouragingly, targeted lobbying by civil society organisations in Senegal (2019) and Nigeria (2020) influenced their governments to refrain from shutting down the internet during their elections.¹⁰⁸

Beyond activism, courts have also come through to pronounce against internet shutdowns and their effect on fundamental rights and freedoms. In a landmark 2020 judgment the Economic Community of West African States (ECOWAS) Community Court of Justice determined that the Republic of Togo violated the rights to freedom of expression of the applicants following an illegal internet shutdown in September 2017.¹⁰⁹ The government of Togo had previously implemented internet disruptions as well as curfews to curtail protests and prevent mobilisation and protests. The internet shutdown that followed protests limited the ability of journalists and ordinary citizens to report on the continuing harsh response from the state. In its determination the Court stated:¹¹⁰

Access to internet is not *stricto sensu* a fundamental human right but since internet service provides a platform to enhance the exercise of freedom of expression, it then becomes a derivative right that it is a component to the exercise of the right to freedom of expression. It is a vehicle that provides a platform that will enhance the enjoyment

106 F Antonio et al 'How internet shutdowns are threatening 2020 elections, and what you can do about it' 15 October 2020, <https://www.accessnow.org/internet-shutdowns-2020-elections/> (accessed 24 January 2021); F Antonio et al 'Tanzania is weaponizing internet shutdowns. Here's what its people have to say' 16 December 2020, <https://www.accessnow.org/tanzania-internet-shutdowns-victim-stories/> (accessed 24 January 2021); Netblocks 'Post-election internet shutdown in Mauritania following widespread mobile disruptions' 25 June 2019, <https://netblocks.org/reports/post-election-internet-shutdown-in-mauritania-following-widespread-mobile-disruptions-JA6zmeAQ> (accessed 24 January 2021); Netblocks 'Social media and messaging restricted, internet shut down for Uganda elections' 12 January 2021, <https://netblocks.org/reports/social-media-and-messaging-platforms-restricted-in-uganda-ahead-of-general-election-XB7aaO87> (accessed 27 January 2021).

107 MD Hernández et al '#KeepItOn update: Who is shutting down the internet in 2021?' <https://www.accessnow.org/who-is-shutting-down-the-internet-in-2021/> (accessed 20 October 2021).

108 Taye (n 105) 14 15.

109 Amnesty International *Togo v The Togolese Republic* Suit ECW/CCJ/APP/61/18, judgment ECW/CCJ/JUD/09/20, 25 June 2020, http://prod.courtecowas.org/wp-content/uploads/2020/09/JUD_ECW_CCJ_JUD_09_20.pdf (accessed 22 January 2020).

110 Amnesty International *Togo v The Togolese Republic* (n 109) para 38.

of the right to freedom of expression ... Against this background, access to internet should be seen as a right that requires protection of the law and any interference with it has to be provided for by the law specifying the grounds for such interference.

Applauding this jurisprudence from a regional court, it is also encouraging to see national courts make determinations against the implementation of internet shutdowns in Zimbabwe and Sudan.¹¹¹

4.3 Taking the bull by the horns: Lessons from South Africa and Tanzania on combating false news

4.3.1 *Balancing between protection of freedom of expression and managing false news during elections in South Africa: Lessons from the Real411 platform*

4.3.2 *Legislative framework on freedom of expression and elections*

The Constitution of South Africa guarantees freedom of expression with limitations on propaganda for war; incitement of imminent violence; or advocacy of hatred on the basis of race, ethnicity, gender or religion, and that constitutes incitement to cause harm.¹¹² The framing of the scope of freedom of expression resembles that of ICCPR in that it does not guarantee it as an absolute right. South African courts have provided guidance in interpreting the rights contained in its Constitution, as read in *S v Makwanyane*¹¹³ where the Court held that interpretation approaches to the Bill of Rights should be 'generous' and 'purposive' and must 'give ... expression to the underlying values of the Constitution'.¹¹⁴ This interpretation reveals a push for the realisation as opposed to the restriction of human rights.

111 In Zimbabwe, a High Court ruled against an illegal internet shutdown in January 2019 but the case was won on procedural grounds as opposed to merit; MISA Zimbabwe 'High court sets aside internet shutdown directives' 21 January 2019, <https://zimbabwe.misa.org/2019/01/21/high-court-sets-aside-internet-shutdown-directives/> (accessed 27 January 2021). In Sudan's case, the ruling to restore connectivity only benefited the applicant BBC. 'Sudan crisis: Internet restored – but only for lawyer' 24 June 2019, <https://www.bbc.com/news/world-africa-48744853#:~:text=A%20lawyer%20in%20Sudan%20has,ordered%20by%20Sudan's%20military%20rulers.> (accessed 27 January 2021).

112 Sec 16 of the Constitution of South Africa.

113 1995 (3) SA 391 (CC) [9].

114 I Currie & J de Waal *The Bill of Rights handbook* (2017) 339.

It is expected that courts will increasingly face cases on the publication of false news and whether such expression falls within or outside the limitations rule. For example, in the case of defamation through publication of false statements, conventional defences such as truth, public interest, reasonable publication and fair comment remain relevant in assessing whether a person or body is culpable. This is regardless of whether the false and defamatory statement was published on mainstream or online media. Courts are more so acknowledging that online false statements have a unique damaging aspect given the reach of social media, and holding ordinary citizens similarly responsible for online publications. In *Manuel v Economic Freedom Fighters & Others* the Court stated:¹¹⁵

Because of social media platforms like Twitter, Facebook and others, ordinary members of society now have publishing capacities capable of reaching beyond that which the print and broadcast media can ... There is no justification as to why the press should enjoy the privilege of freedom of expression greater than that enjoyed by a private individual. The liberty of the press is no greater than the liberty of any individual. There is, therefore, no justification for limiting the defence of reasonableness as it pertains to both wrongfulness and fault to the media only.

Courts also have more direction from laws on exercising freedom of expression, including in the context of an election.

Section 89(1) of the Electoral Act¹¹⁶ and section 69(1) of the Local Government: Municipal Electoral Act¹¹⁷ prohibit a person from making a statement under the provisions of the Act with the knowledge that it is false or if they do not reasonably believe the information is true.¹¹⁸ Section 89(2) of the Electoral Act and section 69(2) of the Local Government Municipal Electoral Act further prohibit the publication of false information with the intention of (a) disrupting or preventing an election; (b) creating hostility or fear in order to influence the conduct or outcome of an election; or (c) influencing the outcome or conduct of an election.

Conviction under the first sub-section of the laws attracts a fine and an imprisonment term of not more than five years, while the second sub-sections attract a fine and an imprisonment time of not more than 10 years.¹¹⁹

115 (13349/2019) [2019] ZAGPJHC 157 paras 65-67.

116 Act 7 of 1998 (as amended), https://www.gov.za/sites/default/files/gcis_document/201409/act73of1998.pdf (accessed 20 October 2021).

117 Act 27 of 2000, https://www.gov.za/sites/default/files/gcis_document/201409/a27-000.pdf (accessed 20 October 2021).

118 Act 73 of 1998.

119 Sec 98 of the Electoral Act.

Other instruments also contain provisions on publication of false information during elections. Section 9(1)(b) of the Electoral Code of Conduct¹²⁰ prohibits a registered party or candidate from publishing false or defamatory information on elections about a party, its candidates, representatives or members, or a candidate and his or her representatives. Section 3.5 of the Code of Conduct of Accredited Voter Education Providers¹²¹ prohibits accredited voter education providers from publishing, repeating or disseminating false information. The wording of this section is rather broad and can extend to disseminating false information using any form of media during elections.

In the wake of the COVID-19 pandemic, South Africa introduced the criminalisation of false news under the regulations made under section 27(2) of the Disaster Management Act. Regulation 11 criminalised the intentional misrepresentation of COVID-19, any person's COVID-19 infection status, and government measures to address COVID-19.¹²² The offence is punishable by a fine or imprisonment for not more than six months, or both. South Africa held by-elections in 2020 and scheduled local government elections for November 2021. The assessment around the management of the COVID-19 pandemic and its impact on the social and economic lives of South African forms part of the political and electoral discourse. While false news about the government's response to the pandemic may affect a voter's decision-making process, imprisonment for such expression would be a disproportionate sanction. Such punitive measures would also have a chilling effect on freedom of expression. Public debate on management of the pandemic has dominated global conversations. Governments should therefore eschew measures that seek to restrict these conversations. More positive measures should be implemented to ensure that these conversations are guided by accurate, relevant and timely information. The South African government has attempted to implement such measures through its departments and by engaging with other stakeholders.¹²³

120 Schedule 2 of the Electoral Act.

121 Schedule B of the Electoral Act.

122 RSA 'Government Notices', https://www.gov.za/sites/default/files/gcis_document/202003/regulations.pdf (accessed 27 January 2021).

123 NDOH 'Press statements', <https://www.health.gov.za/press-statement/> (accessed 20 October 2021); CovidComms 'Home', <https://covidcomms.org.za/> (accessed 20 October 2021); RSA 'Fake news – Coronavirus COVID-19', <https://www.gov.za/covid-19/resources/fake-news-coronavirus-covid-19?gclid=CjwKCAjw> (accessed 20 October 2021); T Smith & W Bird 'Disinformation in a time of COVID-19: Weekly trends in South Africa' *Daily Maverick* 9 May 2021, <https://www.dailymaverick.co.za/article/2021-05-09-disinformation-in-a-time-of-covid-19-weekly-trends-in-south-africa-30/> (accessed 20 October 2021).

As seen above, the Electoral Act takes a tough stance on dissemination of false news in the context of an election in South Africa, which can attract punishment and in some cases such sanction may include an imprisonment term.¹²⁴ While the criminalisation of expression is discouraged under human rights law, a case-by-case judicial examination is necessary to ascertain whether or not the sanction is disproportionate. For example, disinformation that disrupts or prevents an election, creates hostility or fear in order to influence the conduct or outcome of an election, influences the outcome or conduct of an election or even leads to electoral violence may require more severe punishment, compared to one where the harm does not materialise. The prosecution in such cases is faced with a high burden of proof which is beyond reasonable doubt that the accused person spread false news with the intention of causing a specific harm. Given these consequences, it is important to have avenues that educate citizens on false news and proactively include them in managing the threat of false information. Arguably, the Real411 platform creates this opportunity.

4.3.3 The Real411 platform: Countering digital disinformation

Real411 is the brainchild of the Independent Electoral Commission (IEC) of South Africa and Media Monitoring Africa (MMA), a civil society organisation in South Africa. Real411 was initially conceived as a platform that would enable citizens to report digital disinformation during the 2019 national and provincial elections but has since expanded to include online hate speech, incitement to violence, and harassment of journalists.¹²⁵ This broadening of scope is laudable given their implications on meaningful public participation during elections. The site defines digital disinformation as ‘false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm’.¹²⁶

The digital disinformation complaints process is anchored on promoting free and fair elections in South Africa by addressing the threat posed by disinformation on elections as well as fostering transparency and accountability in the electoral process.¹²⁷ Complaints submitted on the Real411 website or mobile application

¹²⁴ Sec 89 of the Electoral Act.

¹²⁵ Real411 ‘Digital offences’, <https://www.real411.org/digital-offences> (accessed 27 January 2021).

¹²⁶ Real411 ‘Keeping it real in digital media’, <https://elections.real411.org.za/learn> (accessed 26 January 2020).

¹²⁷ Real411 ‘About’, <https://elections.real411.org.za/about> (accessed 26 January 2021).

are received by the IEC's Directorate of Electoral Offences. A complaint can be submitted in any of the 11 official languages of South Africa although the operating language of the Directorate is English. While the process does not allow for anonymous complaints, it guarantees confidentiality of the complainant as well as their personal data.¹²⁸ A panel of experts in the field of media, technology and the law review the complaint as per the guidelines and make the appropriate recommendations to the commissioners who then make a ruling on the complaint and the appropriate action. An aggrieved party has the right to approach the Electoral Court in the event of dissatisfaction with the decision of the commissioners.¹²⁹

In reaching a determination the panel will consider whether the reported information is false, inaccurate or misleading, can reasonably result in public harm, and whether its publication is necessary for the public interest.¹³⁰ Depending on the nature of the complaint, the panel may request online platforms to remove the content, liaise with fact-checking organisations, refer to the appropriate regulatory or public body for action, flag the information as false or misleading content, and issue counter-narratives, among others.¹³¹

Since its conception the platform has received more than 1 800 complaints from the public with an expected increase in reports in the lead-up to the November 2021 local government elections.¹³² Most complaints that have been determined to be misinformation and disinformation have been from posts on Twitter, Facebook and WhatsApp.¹³³ It arguably is an innovative initiative that incorporates the participation of ordinary citizens in addressing the scourge of misinformation and disinformation simply through a mobile app and website. During elections the IEC also engages with stakeholders such as political parties and candidates, and counters narratives through its communication channels to mitigate the spread of digital harms such as disinformation.¹³⁴ As of 2021 the platform has largely issued infographics to counter false and misleading information, but there

128 Real411 'Complaints process', <https://www.real411.org/complaints-process> (accessed 26 January 2021).

129 As above.

130 Real411 (n 125).

131 As above.

132 Real411 'Complaints', <https://www.real411.org/complaints> (accessed 26 January 2021); W Bird & T Smith 'Disinformation in a time of COVID-19: While lying delights in darkness, transparency shines a light' *Daily Maverick* 12 September 2021, <https://www.dailymaverick.co.za/article/2021-09-12-disinformation-in-a-time-of-covid-19-while-lies-delight-in-darkness-transparency-shines-a-light/> (accessed 20 October 2021).

133 Real411 'Trends', <https://www.real411.org/trends> (accessed 26 January 2021).

134 Real411 'Assessing digital disinformation complaints – A guide to the guidelines', <https://news.real411.org.za/assessing-digital-disinformation-complaints-a-guide-to-the-guidelines/> (accessed 20 October 2021).

have been no reports that have led to further action by enforcement agencies such as arrests and prosecutions.¹³⁵ The platform also runs a blog that analyses the weekly trends on disinformation which leads to disinformation education as well as research.¹³⁶ The IEC and MMA, as flag bearers of this initiative, are also working with social media platforms to effectively counter disinformation, with the Real411 initiative as central to this endeavour.¹³⁷

In addition to reporting, flagging and countering false narratives that may interfere with election integrity, there should be more widespread voter and civic education on misinformation and disinformation. Commendably, the IEC's continuous voter education initiatives include multi-lingual fact sheets on electoral offences that include the publication of false news.¹³⁸ The IEC needs to expound this edification and include misinformation and disinformation education in their civic and voter education curricula. Further, the IEC should ensure continued and more dedicated compliance with the Guidelines on Access to Information and Elections in Africa to improve the national information ecosystem.

4.4 Balancing between the protection of freedom of expression and managing false news during elections in Tanzania

4.4.1 *Legislative framework on freedom of expression and elections*

Freedom of expression is guaranteed under the Constitution of Tanzania.¹³⁹ It provides that everyone –

- (a) has a freedom of opinion and expression of his ideas;

¹³⁵ Conversation with William Bird, Director of MMA; Real411 'Complaint ID: #1841', <https://www.real411.org.za/complaints-view/60A921ZC> (accessed 20 October 2021); M Charles & N McCain 'Elections watchdog IEC backtracks on disinformation probe against Zille accreditation' *News24* 5 October 2021, <https://www.news24.com/news24/southafrica/news/elections-watchdog-iec-backtracks-on-disinformation-probe-against-zille-20211005> (accessed 20 October 2021).

¹³⁶ Real411 'Blog', <https://blog.real411.org.za/> (accessed 20 October 2021).

¹³⁷ RSA 'Electoral Commission on multi-stakeholder partnership to combat disinformation in 2021 municipal elections', <https://www.gov.za/speeches/electoral-commission-multi-stakeholder-partnership-combat-disinformation-2021-municipal> (accessed 20 October 2021).

¹³⁸ IEC 'Document library', <https://www.elections.org.za/pw/Downloads/Documents-Municipal-Election-Reports> (accessed 20 October 2021).

¹³⁹ Sec 18 of the Constitution of Tanzania, <https://rsf.org/sites/default/files/constitution.pdf> (accessed 27 January 2021).

- (b) has out right to seek, receive and, or disseminate information, regardless of national boundaries;
- (c) has the freedom to communicate and a freedom with protection from interference from his communication;
- (d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

While freedom of expression and the right of access to information are provided for under this section, sub-sections 18(c) and (d) are unique in their phrasing in the recognition of the principle of non-interference, as well as the emphasis on the right to information of events and other matters of public interest. Free, fair and credible elections are enabled by channels that facilitate public, voter and democracy education.¹⁴⁰ Interestingly, the Constitution does not explicitly provide for media freedom.

Despite the constitutional guarantees of freedom of expression, the provisions on limitation of rights appear to espouse claw-back clauses with a great potential for broad interpretation. Section 30(2) provides that the principles of rights, freedom and duties do not nullify existing law or prohibit the enactment of any law or the doing of any lawful act that seeks to protect the aims outlined under the section. While the section lists legitimate aims, it also proceeds to include other aims that justify the limitation of these rights beyond internationally-recognised legitimate aims such as development planning, mining interests, administration of the 'formation, management and activities of private societies and organisations' and the general promotion and preservation of national interest, among other aims.¹⁴¹ These broad provisions leave a high risk of interference with freedom of expression. It therefore rests with the courts to adopt a purposive approach to interpretation of the Constitution, where the case requires, to protect these human rights and fundamental freedoms.¹⁴²

Provisions on addressing false news in Tanzania are mainly found in its media laws and cybercrime law. The threat to media freedom in Tanzania is concerning, more so when the establishment seeks to further rein this in during elections, as was seen during the 2020

140 Art 21 of the Constitution of Tanzania provides for the right to political participation.

141 Sec 30(2)(f) of the Constitution of Tanzania.

142 *Joseph Warioba v Stephen Wassira & Another* [1997] TLR 272 (CA).

general elections.¹⁴³ Section 16 of the Cybercrimes Act¹⁴⁴ criminalises the deliberate publication of false information with the intention ‘to defame, threaten, abuse, insult, or otherwise deceive or mislead the public’ or to conceal a crime. This offence is punishable by a minimum fine of TZS 5 million (\$2 100) or three years’ imprisonment or both.

Section 118(a) of the Electronic and Postal Communications Act¹⁴⁵ prohibits the publication of information that among other things is false with the intention to ‘annoy, abuse, threaten or harass’ someone else. Phrases such as ‘annoy, abuse, threaten or harass’ are ambiguous and fail to meet the lawful test of limitations of rights.¹⁴⁶ Some elements of this provision require a high standard of proof, for example, the prosecution will face some difficulty proving an intention to annoy another person.¹⁴⁷

Regulation 16 of the Electronic and Postal Communications (Online Content) Regulations 2020¹⁴⁸ restricts the publication of prohibited content, which includes false, untrue or misleading information unless there is an unequivocal caveat that the content is satire, parody, fiction, or not factual.¹⁴⁹ These provisions affect online content producers of platforms such as WhatsApp, Facebook, Twitter, Instagram and YouTube. Under the Regulations, publications on the outbreak of a deadly or contagious disease, in this context, the coronavirus, without the approval of relevant authorities, could also attract sanction.¹⁵⁰ There is a patriarchal undercurrent to this provision in making the publication of an outbreak of a disease the sole prerogative of relevant authorities. This offence attracts a minimum fine of five million shillings (\$2 100) or to imprisonment for a term of not less than 12 months or both.¹⁵¹ The provision of

143 Freedom House ‘Freedom in the world 2020: Tanzania’, <https://freedomhouse.org/country/tanzania/freedom-world/2020> (accessed 19 January 2020).

144 ICT Policy Africa ‘The Cybercrimes Act 2015’, <https://ictpolicyafrica.org/en/document/c2m8s3qnqws?page=1> (accessed 19 January 2020).

145 Research ICT Africa ‘The Electronic and Postal Communications Act’, https://www.researchictafrica.net/countries/tanzania/Electronic_and_Postal_Communications_Act_no_3_2010.pdf (accessed 19 January 2020).

146 GDP et al (n 63).

147 Research ICT Africa (n 145).

148 Under the Electronic and Postal Communications Act Cap 306, <https://crm.misa.org/upload/web/supp-gn-no-133-16-03-2018-epoca-online-content-regulations-2018.pdf> (accessed 19 January 2020).

149 3rd Schedule sec 10 The Electronic and Postal Communications (Online Content) Regulations, 2020, [https://www.tkra.go.tz/document/The%20Electronic%20and%20Postal%20Communications%20\(Online%20Content\)%20Regulations,%202020](https://www.tkra.go.tz/document/The%20Electronic%20and%20Postal%20Communications%20(Online%20Content)%20Regulations,%202020) (accessed 19 January 2020). Under 3rd Schedule sec 8(c) (Online Content) Regulations, 2020 prohibited content also extends to information ‘against the State and public order including content that aims to or publishes information, news, statements or rumours for the purpose of ridicule, abuse or harming the reputation, prestige or status of the United Republic’.

150 Under 3rd Schedule sec 8(c) (Online Content) Regulations, 2020.

151 Sec 21 (Online Content) Regulations, 2020.

an imprisonment term runs the risk of imposing a disproportionate sanction. The broad scope of these provisions is worrying given that it seeks to impose an overarching restriction on freedom of expression that may be misused by enforcement authorities. Parliament should amend or repeal these provisions and align them with international laws and standards.

The Regulations also require that a person who provides online content services¹⁵² must be licensed by the Tanzania Communications Regulatory Authority (TCRA). The high cost of registration and licensing fees of about \$400 to \$900 may likely restrict entry for many producers of online content.¹⁵³ In the event that an online content service provider is found in breach of the Regulations, they may be subject to additional sanctions including a warning, orders to apologise to the public and the victim of complained content, an order for content removal and a fine.¹⁵⁴

Section 50(1)(a) of the Media Services Act 2016¹⁵⁵ makes it an offence to intentionally, recklessly, maliciously, fraudulently or unjustifiably publish false information. Some parts of the section attach the offence to a legitimate aim such as the protection of public defence, safety and order, public morals, public health, as well as the rights, reputation and freedoms of others. However, it also includes the protection of the economic interests of Tanzania, which is not an internationally-recognised legitimate aim and requires a broader interpretation to avoid misuse by enforcement agencies. The section also has broadly-phrased provisions such as the prohibition of dissemination of prohibited content (a phrase that is not further expounded in the Act),¹⁵⁶ and false news, thereby providing enforcement agencies with broad discretion.¹⁵⁷ These offences attract harsh and disproportionate penalties of between TZS 5 million and 20 million (\$2 100 to \$8 600) or three to five years' imprisonment or both.

Section 54 of the Act also criminalises the publication of false information that is likely to cause public fear and alarm or disturb public peace. This is a broadly-phrased provision worsened by its

152 Reg 3 defines online content services to include content broadcasting to the public through internet websites, application software, forums, blogs, weblogs, microblogs, public account, instant messaging tools, online live streaming, aggregators and other related platforms.

153 2nd Schedule (Online Content) Regulations, 2020.

154 Reg 21 (Online Content) Regulations, 2020.

155 ACME 'Media Service Act', <http://acme-ug.org/wp-content/uploads/1481107152-MEDIA-SERVICE-ACT-20161.pdf> (accessed 19 January 2020).

156 Sec 50(1)(f) of the Media Services Act.

157 Sec 50(2) of the Media Services Act.

subjectivity given that various factors can influence fear, alarm and public disturbance. The available defence for the accused is that he or she took reasonable measures to verify the accuracy of the information leading to a reasonable belief of its accuracy.¹⁵⁸ The section attracts a disproportionate sanction of between TZS 10 million and TZS 20 million (\$4 300 to \$8 600) or four to six years' imprisonment or both.

In a 2019 judgment the East African Court of Justice (EACJ) in *Media Council of Tanzania & Others v Attorney-General*¹⁵⁹ found sections of the Media Services Act on criminal defamation, the publication of false news, sedition, a restriction on publication of certain content, limitations to media independence through government control, and onerous requirements for accreditation of journalists, to unjustifiably violate freedom of expression. Resultantly, the Court ordered Tanzania to align it with the Treaty for the Establishment of the East African Community.¹⁶⁰ Tanzania, however, has failed to implement this court order.

The regulatory environment of Tanzania is emblematic of the use of restrictive and punitive laws on false news to unreasonably and unjustifiable limit freedom of expression. Media freedom is under threat in Tanzania given the uncondusive regulatory environment as well as clampdown by authorities.¹⁶¹ The discussed legislation in Tanzania has broadly stretched the scope of limitations on freedom of expression to an extent that gravely threatens the realisation of this right. Further barriers to entry in online and offline media through costly registration and licensing fees further restrict freedom of expression. This legislative landscape has nurtured and enabled an environment that faces increased political intolerance, repression and silencing of critical voices. Unlike South Africa, Tanzania's electoral laws do not specifically provide for the offence of disinformation.¹⁶² However, persons were charged with publication of false news under the laws above during the 2020 elections.

¹⁵⁸ Sec 54(2) of the Media Services Act.

¹⁵⁹ *Media Council of Tanzania & Others v Attorney General* No 2 of 2017, <https://www.eacj.org/wp-content/uploads/2019/03/Referene-No.2-of-2017.pdf> (accessed 19 January 2020).

¹⁶⁰ As above.

¹⁶¹ Freedom House 'Freedom of the world 2021: Tanzania', <https://freedomhouse.org/country/tanzania/freedom-world/2021> (accessed 20 October 2021).

¹⁶² EISA 'Compendium of electoral laws and regulations of Tanzania', <https://www.eisa.org/pdf/CompendiumElectoralLawsandRegulationsTanzania2016.pdf> (accessed 20 January 2021).

4.4.2 *Managing false news during Tanzania's 2020 elections: Of punitive laws and network disruptions*

Tanzania held its general elections on 28 August 2020, one of the few countries in Africa to proceed with scheduled elections amid the COVID-19 pandemic.¹⁶³ However, reports on curtailment of freedom of expression in the lead-up to the elections were among the challenges that marred the credibility of the elections.¹⁶⁴

On 21 October 2020 TCRA issued a directive temporarily suspending bulk short messaging and bulk voice calling services from 24 October to 11 November to prevent their adverse effects on the elections.¹⁶⁵ On the eve of the elections there were reports of widespread network disruption, especially on Twitter, WhatsApp, Instagram and some Google services of users of select internet service providers.¹⁶⁶ The need to address the spread of false information online was raised as a threat to the credibility of the elections.¹⁶⁷ However, these actions contravened section 18(c) of the Tanzanian Constitution on non-interference with communication. These measures further contradicted international and regional laws and standards on freedom of expression. The government should have implemented less restrictive measures given that there were no widespread reports of false news disrupting the elections that would provide a direct link between expression and actual harm on the election process. Therefore, the internet disruption did not serve a legitimate aim, and was not necessary or proportionate in a democratic society.

The chilling effect of laws on false news and, arguably, their real objective, was witnessed in the silencing of dissenting voices. Journalists, media houses and individual persons were penalised and accused of spreading false and misleading information.¹⁶⁸ Journalists and media houses that featured critical news stories on the government response to COVID-19 were accused of violating

163 IDEA 'Global overview of COVID-19 impact on elections', <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (accessed 20 January 2021).

164 Freedom House (n 161).

165 Access Now, <https://www.accessnow.org/cms/assets/uploads/2020/10/TCRA-Directive-to-telcos-in-TZ-to-filter-content.jpeg> (accessed 20 January 2021).

166 Netblocks 'Internet disrupted in Tanzania on eve of general elections', <https://netblocks.org/reports/internet-disrupted-in-tanzania-on-eve-of-presidential-elections-oy9abny3> (accessed 20 January 2021).

167 DW 'Tanzania restricts social media during election', <https://www.dw.com/en/tanzania-restricts-social-media-during-election/a-55433057> (accessed 20 January 2021).

168 HWR 'Tanzania: Freedoms threatened ahead of elections', <https://www.hrw.org/news/2020/09/02/tanzania-freedoms-threatened-ahead-elections> (accessed 2 September 2020); Freedom House (n 161).

the Electronic Communications Act and Regulations and were subject to fines and a suspension of their licences, and required to apologise.¹⁶⁹ The Department of Information of the Ministry of Information, Culture, Arts and Sports also revoked the licence of *Daima* newspaper, which was accused of repeatedly violating media laws, poor journalistic ethics and the spreading of false information. Previously, its journalist had been questioned over a news report that advocated electoral reform.¹⁷⁰

Tanzania is a reflective example of how an electoral authoritarian regime can misuse laws on addressing false news, restrictive media laws and repressive practices such as internet shutdowns to clamp down on critical voices and control the information ecosystem. It goes to the question of free, fair and transparent elections when elections take place in an environment of fear that curtails basic human rights essential to ensuring credible elections. Given the fact that the internet has also been used as a tool of promoting transparency and openness in electoral processes by documenting and publishing electoral malpractices, restricting access to internet services and curtailing media freedom significantly tilts the scales in favour of incumbents who control these systems.

Sadly, apart from punitive legal measures and network disruptions, there is no research to show that the country took other proactive human rights-centred measures to counter the spread of false news during the elections. Voter and civic education on this aspect and generally can be approved.¹⁷¹ More meaningful collaboration with civil society organisations and the media would enhance this process.

169 Amnesty International 'Tanzania: Authorities must end crackdown on journalists reporting on COVID-19' 21 April 2020, <https://www.amnesty.org/en/latest/news/2020/04/tanzania-authorities-must-end-crackdown-on-journalists-reporting-on-covid19/> (accessed 20 January 2021); J Mosenda 'COVID-19: Media fined for broadcasting against Tanzania's stance' *The Citizen* 4 April 2020, <https://www.thecitizen.co.tz/news/Covid-19--Media-fined-for-/1840340-5514540-ojukruz/index.html> (accessed 20 January 2021); J Mosenda 'TCRA suspends Mwananchi's online license for six months' *The Citizen* 17 April 2020, <https://www.thecitizen.co.tz/news/TCRA-suspends-Mwananchi-s-online-license-for-Six-months/1840340-5527310-13ixgsgz/index.html> (accessed 20 January 2021).

170 J Mosenda 'Government revokes "Tanzania Daima" newspaper licence' *The Citizen* 23 June 2020, <https://www.thecitizen.co.tz/news/Government-revokes-Tanzania-Daima--newspaper-license/1840340-5581552-fjs6c8z/index.html> (accessed 20 January 2021); Reuters 'Tanzania arrests opposition party leader, revokes newspaper licence' 23 June 2020, <https://www.reuters.com/article/us-tanzania-politics/tanzania-arrests-opposition-party-leader-revokes-newspaper-licence-idUSKBN23U319> (accessed 20 January 2021).

171 EISA 'EISA pre-election assessment mission report: Tanzania October 2020' 19, <https://www.eisa.org/pdf/tan2020pam.pdf> (accessed 20 October 2021).

5 Conclusion and recommendations

Protecting and promoting freedom of expression both offline and online greatly enable the conduct of free, fair and transparent election processes. Access to platforms that allow for citizens to sample diverse views, and engage with accurate, credible and relevant information ensures the development of an informed electorate. While the spreading of false news threatens election integrity, it is important that in addressing this risk, states do not illegally, unnecessarily and disproportionately jeopardise the exercise of freedom of expression and related rights. This is increasingly seen in laws that criminalise false news as well as internet shutdowns that have been instrumental in fostering a culture of fear and self-censorship. Initiatives such as Real411 in South Africa are more proactive in identifying and countering false news through the participation of the public. More can certainly be done. The empowerment of the masses to identify and counter false narratives is a more rights-promoting approach as opposed to a heavy reliance on punitive measures, as has been the case in countries such as Tanzania. Penal sanctions as a means of managing false news should be relegated to extreme circumstances resulting in severe casualties. States, civil society organisations and other stakeholders should consciously engage on what proportionate actions should address incidences where false news leads to death or severe injuries, and civil sanctions may not afford adequate remedy. This may require the strengthening of criminal laws to meet this exigency.

Measures such as media and information literacy are crucial to reducing the information poverty facing Africa. They will further promote political participation by developing an informed electorate with access to accurate information to guide their political decisions. Media and information literacy should be integrated into civic and voter education curriculums used by election management bodies, civil society organisations and other voter education providers. More broadly, states should incorporate media and information literacy in education curricula to inculcate responsible online practices from early ages. States should also liaise with social media sites and adopt co-regulatory practices given that social media sites may be better placed to adapt their terms and conditions to emergent harms caused by false news on their platforms as compared to a complete reliance on national laws that are susceptible to bureaucracy. However, decisions on content regulation should be open and transparent, preceded by broad public consultation with relevant stakeholders, and subject to administrative and judicial review.

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Promoting civic and voter education through the use of technological systems during the COVID-19 pandemic in Africa

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Summary: *A human rights perspective to this article intertwines the rights to information and political participation. It deals with the intersections between the provision of civic and voter education (CVE), and the opportunities and threats pertaining to the feasibility of finding digital solutions for enhanced voter participation in democratic electoral processes during the coronavirus disease (COVID-19) pandemic in Africa. Under normal circumstances and while conducted through physical contact sessions, CVE is aimed at providing citizens with communication, general and life skills to constructively participate in democratic electoral processes. The greater the attendance in CVE events, the greater the conviction that a significant number of participants have been enlightened and encouraged to fully participate. As a result, electoral democracy becomes enriched and consolidated. However, the impacts of the COVID-19 pandemic render the physical training and dissemination of this crucial CVE information cumbersome, principally when considering the strictly-restricted number of attendants at events,*

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consequently placing in disarray the enhancement of voter participation. Electoral management bodies, which are inherently charged with the responsibility for promoting CVE, confront the challenges for securing meaningful voter participation. Reliance on technological systems in the promotion of a consolidated electoral democracy during the COVID-19 pandemic emerges as a measure of last resort. Cognisant of the numerous developmental challenges encountered by many African countries, the feasibility of digital solutions in this instance could be far-fetched. More so, the digital divide and its impacts militate the empowerment of poor voters in remote rural areas where access to technological infrastructure and equipment is distantly slim.

Key words: Civic and voter education; COVID-19 pandemic; digital rights; electoral democracy; election management body; digital divide; political participation; technological systems

1 Introduction

The holding of competitive, periodic, inclusive and definitive elections is a defining feature of democracy.¹ It is important to note that, in the context of Africa, despite the fact that 'more elections are taking place on the continent than ever before',² a (third) wave of democratic recession is also materialising.³ Part of this slump involves manoeuvres used by incumbents before, during and after elections. These include changing the electoral calendar; the disenfranchisement of voters; decisively controlling communication channels; and interfering with elections in order to defer or prevent losing the grip of political power in the aftermath of credible elections.⁴

1 (a) Competitive: This component of democratic elections entails that political parties are conferred with the freedom to offer to voters, alternative policies and candidates, as well as express their criticisms of the government and other parties openly; (b) Periodic: At fixed intervals, usually for a period of five years, there are elections that oblige the elected officials to fulfil their election promises within that limited period; (c) Inclusive: With application of the universal adult suffrage, all the eligible adult population should be entitled to cast their votes; (d) Definitive: The elections must have a certain and clear outcome that determines the ultimate winner. See JJ Kirkpatrick 'Democratic elections and democratic government' (1984) 146 *World Affairs* 63. See also A Przeworski 'Minimalist conception of democracy: A defence' in I Shapiro & C Hacker-Cordon (eds) *Democracy's Value* (1999) 23.

2 W Gumedé 'Africa: The democracy we want' (2017), <https://allafrica.com/stories/201704030173.html> (accessed 10 September 2021).

3 M Ronceray & B Byiers 'Elections in Africa – Playing the game or bending the rules?' (2019) 7-12, <https://ecdpm.org/wp-content/uploads/Elections-Africa-Playing-Game-Bending-Rules-ECDPM-Discussion-Paper-261.pdf> (accessed 10 September 2021).

4 As above.

Nevertheless, during the occurrence of natural disasters such as pandemics, it is not desirable to hold an election which could possibly threaten human life and security.⁵ In the present juncture, globally in general, and on the African continent in particular, there has been a widespread grappling to control the invasion and the spread of the coronavirus which has profoundly disrupted electoral activities.⁶ The 2020 African election calendar indicates that approximately 23 countries proclaimed presidential, legislative and/or local elections.⁷ However, due to the ravages of the COVID-19 pandemic, a number of these countries postponed the elections, including Angola, Ethiopia, Senegal, Somalia and Sudan.⁸

During health emergencies such as the COVID-19 pandemic, the opportunities for participation and contestation and the quality of election management become severely compromised.⁹ It is important to highlight at the outset that the COVID-19 pandemic has the gravity to tamper with the entire electoral cycle. The electoral cycle comprises an array of integrated building blocks that encompass various role players and stakeholders, with voters included.¹⁰ The ultimate credibility of elections also hinges on the nature of the interdependence between these stakeholders' roles and participation in the fusing and cross-cutting of electoral-related activities.¹¹

A key dimension that forms an integral part of securing meaningful voter participation and the promotion of a fully-fledged electoral democracy is civic and voter education (CVE).¹² Centrally, CVE ensures the readiness, willingness and ability of voters in participating in electoral activities. It imparts basic voter information which enables every voter to arrive well prepared at the correct voting station and to vote on the dedicated voting day(s).¹³ As evidenced by the trend

5 TS James & S Alihodzic 'When is it democratic to postpone an election? Elections during natural disasters, COVID-19, and emergency situations' (2020) 19 *Election Law Journal* 344.

6 MA Simiyu 'Digital solutions for African elections in the time of COVID-19' 22 April 2021, <https://africlaw.com/2020/04/22/digital-solutions-for-african-elections-in-the-time-of-covid-19/#more-1706> (accessed 10 September 2021).

7 Electoral Institute for Sustainable Democracy in Africa '2020 African election calendar' (January 2021), <https://www.eisa.org/calendar2020.php> (accessed 10 October 2021).

8 As above.

9 James & Alihodzic (n 5) 344.

10 ACE Electoral Knowledge Network 'What is the electoral cycle?' (2020), <https://aceproject.org/electoral-advice/electoral-assistance/electoral-cycle> (accessed 10 September 2021).

11 As above.

12 ÖB Yoldaş 'Civic education and learning democracy: Their importance for political participation of young people' (2015) 174 *Procedia – Social and Behavioural Sciences* 545.

13 ACE Electoral Knowledge Network 'CVE' (2020), <https://aceproject.org/ace-en/topics/ve/default> (accessed 10 September 2021).

of its incorporation in most legal frameworks of African countries, such as constitutions¹⁴ and legislation,¹⁵ the role and significance of CVE in the enhancement of voter participation in the democratic electoral processes have increasingly gained prominence on the continent.

During the pre-election period, the preparedness and willingness of voters to participate in the democratic electoral processes are contingent on the nature and level of CVE that is imparted mainly by the election management bodies. This pre-election phase is crucial for encouraging full participation in elections. It consists of the provision and management of CVE, which helps to prevent a declining voter turnout and spoilt votes.¹⁶ The inadequacy of CVE is both directly and indirectly associated with 'poor turnout and participation in voter registration, lack of understanding of voting procedures, underage voting and election violence'.¹⁷ Civic engagement is an imperative building block, given that education for active citizenship is the most effective manner to encourage full participation in the democratic electoral processes.¹⁸

In Africa the election management bodies are often mandated to conduct CVE by constitutions and legislation.¹⁹ When explicitly interpreted, this constitutes a legal power conferred on election management bodies in the sense that they bear the principal legal responsibility to conduct CVE.²⁰ As a consequence, civil rights movements and/or civic society organisations that similarly conduct CVE in collaboration with the election management bodies allow these principal duty bearers to take the lead.²¹ The election management bodies are obliged to ensure that their activities and

14 Ghana (art 45); Eswatini (sec 90); Kenya (art 88(4)(g)); Lesotho (sec 66); Somalia (art 111G); Zimbabwe (sec 61(4)(f)); Uganda (art 61(1)(g)).

15 Eg, Angola (Law 7/04 2004, A91, 155(a), (r)); Burundi (art 5 of Décret 100/125 2018); Liberia (sec 2.9 of New Elections Law); Malawi (sec 8 of Electoral Commission Act); Nigeria (secs 2 and 154 of Electoral Act 2010); South Africa (secs 5(1)(d) and (k) of Electoral Commission Act 51 of 1996); South Sudan (sec 14 of National Elections Act); Tanzania (sec 4 of National Elections Act); Zambia (sec 80 of Electoral Process Act 35 of 2016); sec 80 of The Gambia's 2019 Constitution which failed to be adopted. Art 6 of the Democratic Republic of the Congo Constitution enjoins political parties to participate in the reinforcement of the national conscience and of civic education.

16 O Ibeanu & N Orji (eds) *Approaches to CVE: Nigeria's experience in comparative perspective* (2014) 10.

17 As above.

18 United Nations Development Programme *Enhancing youth political participation throughout the electoral cycle: A good practice guide* (2013) 5.

19 International Institute for Democracy and Electoral Assistance 'Electoral law reform in Africa: Insights into the role of EMBs and approaches to engagement', <https://www.idea.int/sites/default/files/publications/electoral-law-reform-in-africa.pdf> (accessed 10 September 2021).

20 Ibeanu & Orji (n 16) 10.

21 As above.

operations benefit all citizens.²² Generally, this responsibility naturally entails conducting CVE programmes and events that are geared towards empowering target groups.²³ These groups comprise people that ‘traditionally experienced specific and disproportionate difficulties in accessing information and knowledge about their basic democratic rights and freedoms, such as the right to vote and the right to be elected’.²⁴ In many societies, persons with disabilities, women, rural communities, economically disadvantaged persons, racial and ethnic minorities, and elderly persons have traditionally been excluded from participation in elections.²⁵

Under normal circumstances and while conducted through physical contact sessions, CVE is designed to provide citizens with communication, general and life skills to constructively participate in the democratic electoral processes.²⁶ The greater the attendance in CVE events, the greater the conviction that a significant number of participants has been enlightened and encouraged to fully participate in the electoral processes.²⁷ As a result, electoral democracy becomes enriched and consolidated. However, during the COVID-19 epidemic, many countries have introduced extraordinary legal measures, such as regulations and directives specifically dedicated to curb the spread of the pandemic, and imposed nationwide ‘lockdowns’.²⁸ The applicable and binding lockdown regulations and directives prevented mass gatherings, restricted citizens’ movements, and they require hygienic practices (such as cleansing the hands, covering coughs and sneezes, wearing masks), physical and social distancing, quarantine, and isolation measures.²⁹ The imposition and enforcement of these measures render the physical training and dissemination of crucial CVE information difficult, especially when considering the strictly-restricted number of attendants at events; from a quantitative standpoint, the percentage of eligibility of voters in a specific election when weighed against voter turnout

22 ACE Electoral Knowledge Network ‘Election management’, <http://aceproject.org/ace-en/topics/em/emc/emc02d> (accessed 10 September 2021).

23 As above.

24 As above.

25 As above. See also Al Pogson ‘Understanding women, youth and other marginalised groups in political activities in Nigeria’ (2014) 5-6.

26 M Shabane et al ‘2019 National and provincial election: Civic and democracy education training manual – Municipal Outreach Coordinators and Democracy Education Facilitators’ (2016) 21-22.

27 As above.

28 James & Alihodzic (n 5) 351. See also P Mudau ‘Has the COVID-19 pandemic exposed the fragility of South Africa’s constitutional democracy?’ 23 July 2020, <https://africlaw.com/2020/07/23/has-the-covid-19-pandemic-exposed-the-fragility-of-south-africas-constitutional-democracy/#more-1905> (accessed 10 September 2021).

29 As above.

and the number of spoiled ballots.³⁰ It therefore is reasonably concluded that this constitutes a synergy that could be reflective of how a country's level of CVE has flourished during the COVID-19 pandemic. Therefore, the COVID-19 pandemic places in disarray the effectiveness of enhancing active voter participation in promoting consolidated democratic electoral processes.

Against this backdrop, this article is largely concerned with setting the framework of the mandate of election management bodies in the provision of CVE through the lens of technological systems. It assesses the feasibility of digital solutions in enhancing voter participation in democratic electoral processes at the height of the COVID-19 pandemic in Africa. The article commences by establishing a common understanding as to the meaning of CVE as well as its role and significance in consolidating the democratic electoral process. Second, the article outlines the legal framework for CVE. Third, the right to political participation in elections under the relevant international and regional human rights framework is discussed. Fourth, the article links technological systems with CVE. In the fifth place the article traverses to ascertaining whether it is feasible for technological systems to enhance voter participation in democratic electoral processes in Africa. This assessment highlights the possible opportunities of and threats to this quest. The article finally makes an objective determination as to the possibility of finding digital solutions for enhanced voter participation in the democratic electoral processes during the COVID-19 pandemic in Africa.

2 Understanding civic and voter education

2.1 Defining civic and voter education

Ibeanu highlights that CVE emanates from the three conjunctures of society, politics and education.³¹ In this regard, political culture inter-links society and politics; socialisation connects society and education; and political recruitment is the interface of education and politics. Ibeanu further posits that 'civic education and

30 E Viebeck 'More than 500 000 mail ballots were rejected in the primaries. That could make the difference in battleground states this fall' 23 August 2020, https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fbc92-db3d-11ea-809e-b8be57ba616e_story.html (accessed 10 September 2021).

31 O Ibeanu 'Introduction' in Ibeanu & Orji (n 16) 15.

voter education are organically linked and yet distinct'.³² In its broad definition, civic education is the provision of the requisite information and learning experiences that equip and empower citizens to participate in democratic processes.³³ With the aim of imparting knowledge and skills and dispositions that mould the attitudes of citizens, civic education can be in the form of both formal and non-formal education.³⁴ This includes classroom-based learning in educational institutions, and informal training through discussion forums under the auspices of community mobilisation and stakeholder engagement.³⁵ In addition, civic education can be implemented through mass media campaigns, by partnering with public and private broadcasters and community media structures.³⁶

Civic education has three broad goals.³⁷ First, citizens are introduced to the basic rules and institutional features of democratic political systems as well as the knowledge about democratic rights and practices. Second, it imparts a specific set of values that are essential for democratic citizenship, including political tolerance, trust in the democratic process, and respect for the rule of law. Lastly, it encourages responsible and informed political participation.³⁸

Rietbergen-McCracken states that civic education has three main elements, namely, civic knowledge, civic skills and civic disposition. She sums these up as follows:³⁹

Civic knowledge refers to citizens' understanding of the workings of the political system and of their own political and civic rights and responsibilities (eg, the rights to freedom of expression and to vote and run for public office, and the responsibilities to respect the rule of law and the rights and interests of others). Civic skills refer to citizens' ability to analyze, evaluate, take and defend positions on public issues, and to use their knowledge to participate in civic and political processes (eg, to monitor government performance, or mobilize other citizens around particular issues). Civic dispositions are defined as the citizen traits necessary for a democracy (eg, tolerance, public spiritedness, civility, critical mindedness and willingness to listen, negotiate, and compromise).

32 Ibeanu (n 31) 13.

33 As above.

34 'Civics and citizenship education', <https://education.stateuniversity.com/pages/1831/Civics-Citizenship-Education.html> (accessed 11 September 2021).

35 Shabane et al (n 26) 22-26.

36 As above.

37 Ibeanu (n 31) 13.

38 This goal entails ensuring that citizens are informed of important activities such as voting, working in campaigns, contacting officials, lodging complaints, attending meetings, and contributing money; see Ibeanu (n 31) 13.

39 J Rietbergen-McCracken 'Civic education', https://www.civicus.org/documents/toolkits/PGX_B_Civic%20Education.pdf (accessed 10 September 2021).

On the other hand, voter education is regarded as a subset of civil education, specifically focusing on the citizen's role as a voter. Voter education refers to the information, materials and programmes that are used to inform voters about the voting process for a specific election, including details on voter eligibility, voter registration, candidates, how and where to vote, and the mechanisms to lodge electoral complaints or disputes.⁴⁰

Voter education consists of two categories: learning about the voting process, and the contents of the ballot.⁴¹ The imparted knowledge deals with numerous matters, including the voter's civic duties and obligations, the voting process, political parties and candidates, electoral offences, counting procedures, and the responsibilities of the election management bodies.⁴² Thus, voter education equips citizens with knowledge about the entire scope of the electoral process. Additionally, Shabane et al indicate that the combined objectives of CVE are to (a) promote a culture of democracy and human rights by creating and emphasising awareness of civic responsibilities; (b) increase knowledge and understanding of the electoral processes; (c) empower target groups and areas where voter turnout has been historically low, to participate fully in electoral processes; and (d) capacitate the electorate to participate in the voting process resulting in the decrease of the number of spoilt ballots.⁴³

A landmark study on CVE reveals that this form of education matters for voting and participation during election campaigns.⁴⁴ The greater the amount and quality of CVE, the greater the likelihood for voter turnout and participation in campaign activity. In turn, this enhances voter turnout and participation in democratic electoral processes.

2.2 Role of election management bodies

A 1993 Senior Policy Seminar on Strengthening Electoral Administrative in Africa recommends that a credible election management body should derive its mandate from the constitution and should include

40 As above.

41 G Pillsbury 'Voter engagement toolkit for community foundations' (2018) 19, <https://www.cof.org/sites/default/files/documents/files/Community-Foundation-Voter-Engagement-Toolkit.pdf> (accessed 11 September 2021).

42 As above.

43 Shabane et al (n 26) 22.

44 FL Kidwell 'Civic education for a global world' (2013) 13, <http://webcache.googleusercontent.com/search?q=cache:FlkzdmNi6pAJ:www.civiced.org/pdfs/GermanConf/CivicEducationforaGlobalWorld2013Final2.pdf+&cd=11&hl=en&ct=clnk&gl=za> (accessed 11 September 2021).

the method of conducting voter and other education.⁴⁵ Presently, in the context of elections, election management bodies are generally mandated by the constitution and legislation to conduct CVE.⁴⁶ This mandate is given effect through the formulation and implementation of voter education programmes, training programmes, research agenda and policies that promote the participation of marginalised groups.⁴⁷ Valenzuela argues that election management bodies 'do not function in a vacuum – they respond to institutional, legal and political contexts'.⁴⁸ The constitutional and legal dispositions form the basis of the work and behaviour of election management bodies.⁴⁹

CVE should be conducted on a continuous basis in order to develop an active and informed citizenry and to foster meaningful public participation in the democratic process before, during and after elections. The mandate includes developing a network of educational support and liaising with multi-stakeholders across government, civil society and the private sector without compromising the independence of election management bodies.⁵⁰ During the last two decades in Africa constitutional and legislative amendments sought to make election management bodies independent institutions that could deliver free, fair and credible elections.⁵¹ However, the impartiality of these bodies has been a continuous challenge which negatively impacts on democracy.⁵²

A credible election management body has a number of key attributes such as the crucial responsibility of organising and conducting non-partisan and neutral CVE.⁵³ Other attributes include the delimitation of constituencies; the registration of voters, parties

45 Africa Association for Public Administration and Management 'Report of the Senior Policy Seminar on Strengthening Electoral Administration in Africa' (1993) 5, <https://repository.uneca.org/bitstream/handle/10855/3327/Bib-27199.pdf?sequence=1&isAllowed=y> (accessed 11 September 2020).

46 IIDEA (n 19) 20-22. See also Ibeanu (n 31) 19.

47 As above.

48 C Valenzuela 'The impact of EMBs and other electoral stakeholders on the credibility and acceptance of an electoral process' (2014), <https://www.ec-undp-electoralassistance.org/wp-content/uploads/2018/08/ec-undp-jtf-04-our-trainings-2014-dead-sea-day-1-2-carlos-velenzuela.pdf> (accessed 11 September 2020).

49 As above.

50 C Atkinson-Jordan 'Stakeholders in the electoral process: The role of civil society, political parties and the media to support electoral management bodies' 2, http://www.oas.org/sap/docs/DECO/presentaciones_aceo/Charmaine%20Atkinson-Jordan%20Presentation.pdf (accessed 11 September 2021).

51 AB Makulilo et al 'Election management bodies in East Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy' (2015) xvii, <https://reliefweb.int/sites/reliefweb.int/files/resources/AfriMAP%20EMB%20East%20Africa%20Text%20WEB.pdf> (accessed 11 September 2021).

52 As above.

53 MH Lekorwe 'The role and status of the independent electoral commission' (2006) 5 *Journal of African Elections* 67.

and candidates; the formulation of electoral policies and procedures; and the settlement of disputes over electoral matters.⁵⁴ An added key mandate is to organise and conduct periodic free and fair elections.⁵⁵ Hence, the delivery of successful elections heavily depends on the important role of election management bodies in the provision of timely and effective information to the electorate.⁵⁶ With the intent to maximise voter participation, the election management bodies enlighten citizens about the significance of their voting rights and what to do in order to realise these rights.⁵⁷

2.3 Other key actors: Stakeholder engagement and management

Stakeholder engagement and management refer to the establishment of a relationship between the election management bodies and a range of internal and external stakeholder groupings towards the promotion of electoral democracy.⁵⁸ Generally, stakeholders are people or groups with a direct or indirect vested interest in an electoral project or a certain level of performance or compliance from an election management body, and its strategic actions and corresponding activities.⁵⁹ The stakeholders comprise election management bodies, various government institutions, political parties and candidates, civil society organisations (including but not restricted to electoral observer groups), the academic community, the private sector, businesses, organised labour, traditional and religious leadership structures, and the media. The Guidelines on Access to Information and Elections in Africa⁶⁰ officially recognise the following stakeholders: (a) authorities responsible for appointing the election management bodies; (b) election management bodies; (c) political parties and candidates; (d) law enforcement agencies; (e) election observers and monitors; (f) media and online media platform providers; (g) media regulatory bodies; and (h) civil society organisations.

54 AAPAM (n 45) 5.

55 Lektorwe (n 53) 66.

56 S Bibler 'Gender equality and election management bodies: A best practices guide' (2014) 36.

57 As above.

58 Valenzuela (n 48).

59 Bibler (n 56) 4.

60 Guidelines on Access to Information and Elections adopted by the African Commission on Human and Peoples' Rights adopted during its 61st ordinary session in November 2017, http://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf (accessed 29 March 2021).

The stakeholders have the ability to influence the outcome of electoral activities, either positively or negatively. By and large, election management bodies encounter the formidable task of convincing stakeholders to trust the electoral processes and to perceive them as credible institutions.⁶¹ A vast majority of these stakeholders often receive training from the election management bodies in relation to their specific role in the electoral activities and processes. In the fulfilment of their mandate to conduct CVE, election management bodies need to consult, brief and inform these stakeholders about electoral activities and processes.⁶² In this regard, the bodies should promote key civic and voter messages and sensitise stakeholders on the specific needs of a particular target group in the electoral process.⁶³

In conjunction with the election management bodies, these stakeholders assist in conducting a number of CVE activities. However, they must do so in a non-partisan manner and without endorsing or opposing certain political parties or candidates competing in the elections.⁶⁴ As required by law, election management bodies play a leading role, and the other key actors collaboratively adhere to a binding code of conduct to ensure full compliance and uniformity in the implementation of CVE programmes and the intended outreach results.⁶⁵

2.4 Approaches and strategies

CVE is now more important than ever due to its significance of promoting and consolidating electoral democracy in Africa. However, many countries are still struggling to develop teaching methods and educational strategies that effectively fulfil its objectives.⁶⁶ Traditionally, CVE is provided through a range of strategies and complements both formal and informal education. A common project used to conduct CVE is its institutionalisation in the formal curriculum of basic and tertiary institutions of learning.⁶⁷ This method entails strengthening, mainstreaming and infusing its content into the curriculum. The scope involves designing a formal infusion of democracy and human rights into the educational curriculum. The project objectives are to educate learners/students about their civil

61 Valenzuela (n 48).

62 Bibler (n 56) 40-41.

63 As above.

64 Lekorwe (n 53) 66.

65 Shabane et al (n 26) 22.

66 Kidwell (n 44) 17.

67 Shabane et al (n 26) 22.

and political rights and responsibilities; to raise their awareness and consciousness of electoral processes; and to entrench voter registration, voting and active political participation as fundamental civic responsibilities.⁶⁸

The mass CVE campaigns with communities, partners and strategic partners largely assist in the promotion of a sustainable democratic culture. The scope of this activity requires the initiation and maintenance of discussion platforms. The approach is three-pronged.⁶⁹ First, the awareness-raising campaigns include edutainment and arts, linking with the heritage sector; second, community engagement that mobilises and empowers people to exercise their electoral rights. Finally, through stakeholder engagement and management, there are joint programmes that promote and implement CVE.

Multimedia remains one of the dominant approaches and strategies for propagating CVE,⁷⁰ and consists of all mechanisms of communication, including print media, television, radio and the internet.⁷¹ Mass media is important in a democracy,⁷² and Kariithi states that, through collecting, processing and dissemination of daily events, it keeps the society informed of local, national, regional and global issues.⁷³ Through exploring the possibility of enhancing the reach and effectiveness of CVE, election management bodies can collaborate with mass media.⁷⁴ The geographical reach and broad acceptance of education and entertainment among African societies make mass media suitable for education.⁷⁵ Van der Puye indicates that the 'African culture is functionally linked to the popular media forms – radio, TV, and the press'.⁷⁶ More so, digital technology is acclaimed for 'liberating, favouring the striving for equal justice, democracy and human rights'.⁷⁷ Reliance on targeted messages and information communication technology, in particular the use

68 Ibeanu (n 31) 22.

69 As above.

70 Ibeanu (n 31) 23.

71 ACE Electoral Knowledge Network 'CVE' (2020), <https://aceproject.org/ace-en/topics/ve/default> (accessed 10 September 2020).

72 NK Kariithi 'Mass media, state and society in Africa' in Y Seleti *Africa since 1990* (2004) 124.

73 As above.

74 O Ibeanu 'The future of CVE in Nigeria: Some lessons from the study' in Ibeanu & Orji (n 16) 97.

75 As above.

76 F van der Puye 'Media and the preservation of culture in Africa' June 1998, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/media-and-preservation-culture-africa> (accessed 14 October 2021).

77 W Gravett 'Digital neo-colonialism: The Chinese model of internet sovereignty in Africa' (2020) 20 *African Human Rights Law Journal* 126.

particularly of social media platforms such as Facebook, Twitter and SMS, could be effective in disseminating CVE.⁷⁸

Lastly, election management bodies can also build permanent local capacity for CVE, and pursue in-house and sectoral professionalism and capacity building.⁷⁹ They can also make use of expansion staff during heightened electoral activity periods, especially before and during elections.⁸⁰

2.5 Target groups

Election management bodies promote public awareness about electoral activities by conducting CVE, particularly among target groups such as women, the youth, persons with disabilities, the illiterate, voters in rural areas and disadvantaged minorities.⁸¹ Mostly, the voter turnout of these groups often is very low owing to the failure to acknowledge the significance of their participation in the democratic electoral processes.⁸² The goal of CVE is to increase voter registration and to narrow voter participation gaps of these marginalised social groups.⁸³

The development of targeted campaigns that comprise identifying key CVE messages has the potential of encouraging the relevant target group to be interested in actively participating in the electoral processes. For example, where there is a massive lack of women's participation, CVE messages must emphasise the importance of women's right to vote and how their participation can significantly shape electoral processes as voters and candidates, as well as outlining the specific measures that will facilitate their participation.⁸⁴

For the purpose of ensuring the effectiveness of CVE, it is imperative to assess and identify the disconnects between existing intervention strategies and the target groups.⁸⁵ For instance, in Nigeria the CVE programme of the Independent National Electoral Commission (INEC) has been criticised for neglecting four marginalised major groups: voters in remote areas; nomads; refugees and internally-displaced persons; and Nigerians in diaspora.⁸⁶ Hence, the assessments can

78 Gravett (n 77) 98.

79 Shabane et al (n 26) 26.

80 As above.

81 Lekorwe (n 53) 64.

82 Ibeanu (n 31) 20.

83 Pillsbury (n 42) 29.

84 Bibler (n 56) 37.

85 As above.

86 Ibeanu (n 31) 20-21.

include surveys and other information-gathering tools that provide insights about devising revitalised or new strategies that are capable of reaching the targeted voter education outreach.⁸⁷

3 Legal framework for civic and voter education

According to Beeckmans and Matzinger ‘all citizens, including young people, are entitled to the knowledge and information necessary to make well-informed choices and thus to participate in a meaningful way in electoral processes’.⁸⁸ In a transparent and unbiased manner, and while collaborating with stakeholders, particularly the media, election management bodies have the responsibility to ensure that all citizens are kept informed about all stages of the electoral process, including campaigns and voting.⁸⁹

Article 9 of the African Charter on Human and Peoples’ Rights (African Charter)⁹⁰ confers on individuals the right to receive information as well as the right to express and disseminate information. The principles contained in article 9 are established or affirmed by the Declaration of Principles of Freedom of Expression and Access to Information in Africa (Declaration) adopted by the African Commission on Human and Peoples’ Rights (African Commission) at its 65th ordinary session. Principally, Principle 31(1), which deals with the procedure for accessing information, states that ‘access to information shall be granted as expeditiously and inexpensively as possible, and in accessible formats and technologies’.

During its 61st ordinary session in November 2017, the African Commission adopted the Guidelines on Access to Information and Elections in Africa (Guidelines).⁹¹ The Guidelines provide:⁹²

For elections to be free, fair and credible, the electorate must have access to information at all stages of the electoral process. Without access to accurate, credible and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise their right to vote in the manner envisaged by Article 13 of the African Charter.

The Guidelines direct election management bodies to facilitate access to information by creating, keeping, organising and maintaining

87 Bibler (n 56) 36.

88 As above.

89 Bibler (n 56) 76-77.

90 African Charter on Human and Peoples’ Rights, adopted on 27 June 1981, entered into force 21 October 1986.

91 Guidelines (n 60).

92 As above.

records in a manner that facilitates access to information, including for vulnerable and marginalised groups.⁹³ Additionally, during the pre-election period, election management bodies are obliged to disclose the full details of the voter registration process, including criteria, qualifications, requirements and location of voter registration centres.⁹⁴ Civil society organisations are required to also disclose information pertaining to operational plans, methodology, manuals and their implementation of CVE.⁹⁵

The African Charter on Democracy, Elections and Governance (African Democracy Charter)⁹⁶ openly recognises the importance of CVE. As a clear-cut continental legal framework that was promulgated to deepen the inroads of democratic electoral processes, the Democracy Charter contains a number of provisions that link political participation with CVE. As part of its objectives, the Charter aims to 'promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs'.⁹⁷ The Democracy Charter additionally requires that state parties must undertake to implement programmes and carry out activities designed to promote democratic principles.⁹⁸ These undertakings entail the integration of civic education in the educational curricula and appropriate programmes and activities.⁹⁹

Certain target groups, such as women, ethnic minorities, persons with disabilities, displaced persons and other marginalised and vulnerable social groups, have a history of low voter turnout. In order to guarantee their rights to participate in elections, the African Democracy requires its state parties to adopt legislative and administrative measures.¹⁰⁰ Accordingly, this provision is also applicable in terms of adopting legislative and administrative measures that set a conducive framework for the formulation and implementation of CVE programmes that are aimed at empowering these target groups to fully participate in the democratic electoral processes. Due to the fact that stakeholders may also assist the election management bodies in carrying out CVE, the Democracy Charter also recognises the important role of civil society organisations. It

93 Art 13(a) of the Guidelines.

94 Art 17(d) of the Guidelines.

95 Art 30(e) of the Guidelines.

96 African Charter on Democracy, Elections and Governance, the Assembly of Heads of State and Government of the African Union 30 January 2007, entered into force 15 February 2012.

97 Art 2(11).

98 Art 12.

99 Art 12(4).

100 Art 8(2).

requires state parties to legally create conditions conducive to their existence and operation.¹⁰¹ Together with government and other legally-recognised political actors, these stakeholders must adhere to a binding code of conduct.¹⁰² The election management bodies, as envisaged by the Democracy Charter, must be independent and impartial in the management of elections.¹⁰³

4 Human rights legal framework for the right to political participation

4.1 Setting the linkage of human rights and participation

The International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that 'education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms'.¹⁰⁴ Simply put, participation denotes taking matters into one's own hands, and having the ability to influence the way in which the system functions.¹⁰⁵ Central to this participation is the active involvement in the democratic electoral process. The notion of equality of participation is accompanied by the underlying philosophy borrowed from retired Justice Albie Sachs of the South African Constitutional Court who professes that 'everybody counts'.¹⁰⁶

Heyns broadly defines participation as follows:¹⁰⁷

In a democratic process, the basis of the legitimacy of the state and its exercise of power is participatory decision-making. To serve as such a basis, participation must provide real and meaningful opportunities to influence outcomes. Participation must thus be of such a nature that the authority of the state and its exercise of power can truthfully be said to rest in the will of the people on whose behalf the power is exercised and those who are subjected to such exercises of power.

Therefore, CVE plays a pivotal role in capacitating the voter to fully participate in the democratic process. The interface between democracy, participation and civic education has its roots in classical

101 Art 12(3).

102 Art 17(4).

103 Art 17(1).

104 Art 13(1) of the International Covenant on Economic, Social, and Cultural Rights, adopted by United Nations General Assembly on 16 December 1966, entered into force 3 January 1976.

105 C Heyns 'Study on the right to equal participation in political and public affairs in Africa' (2017) 1, <https://www.ohchr.org/Documents/Issues/PublicAffairs/ChristofHeyns.docx> (accessed 11 September 2021).

106 *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC) para 17.

107 As above.

theories of democracy wherein citizen participation and active involvement in the political process promote a culture of democracy, good governance, accountability, participation, the rule of law and constitutionalism.¹⁰⁸ Political participation is multi-faceted and places different demands on citizens.¹⁰⁹ From a human rights standpoint, the culmination of public and political participation through voting requires that citizens have to be sensitised to their electoral rights.¹¹⁰ The scope of the right of political participation is conventionally considered to include the elements of (i) voting and (ii) to be elected.¹¹¹ Heyns observes that the right to political participation is traditionally viewed as an individual rights that can only be realised in conjunction with a range of other rights, including the right to information.¹¹²

Political participation by citizens is a key component of democracy and directly relates to the phenomenon of elections.¹¹³ As Buthelezi argues, elections symbolise ‘popular sovereignty and the expression of the “social pact” between the state and people, which defines the basis of political authority, legitimacy and citizens’ obligations’.¹¹⁴ Electoral democracy advances political rights,¹¹⁵ and takes form through both representative and participatory elements of democracy. A voter’s right to political participation through election entails several key rights. This includes the right to free and genuine elections; the right to vote or to be voted for; and the right to a free choice of party or candidate.¹¹⁶ The right to political participation through electoral processes is a basic human right recognised in international and regional legal instruments. The subjective content of the right to political participation is discussed in the parts below.

4.2 International human rights system

The Universal Declaration of Human Rights (Universal Declaration) states that everyone has the ‘right to take part in the government of

108 M Katusiimeh ‘Civic education and the promotion of participatory democracy in Uganda’, <https://www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=1945> (accessed 11 September 2021).

109 Yoldaş (n 12) 547.

110 A Evrensel ‘Introduction’ in A Evrensel *Voter registration in Africa: A comparative analysis* (2010) 9.

111 Heyns (n 105) 1.

112 As above.

113 S Buthelezi ‘Statehood and citizenship’ in Seleti (n 72) 8.

114 As above.

115 O Edigheji ‘A democratic developmental state in Africa? A concept paper’, <http://www.rrojasdatabank.info/devstate/edigheji.pdf> (accessed 10 September 2020).

116 See also sec 19 read in conjunction with sec 1(d) of the Constitution of the Republic of South Africa.

his country, directly or through freely chosen representatives'.¹¹⁷ In similar fashion, the UN International Covenant on Civil and Political Rights (ICCPR)¹¹⁸ provides that the right to political participation can be manifested through: participation in elections through direct or representative democracy, and voting or being voted. Persons with disabilities form part of the target groups in need of empowerment in order to actively participate in the democratic electoral processes. In this regard, article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD)¹¹⁹ recognises the rights of persons with disabilities in their participation in political life.

Women's participation in electoral processes is on equal footing with men as it amounts to the fulfilment of basic human rights.¹²⁰ However, traditionally women have had diminished participation.¹²¹ Apart from the explicit recognition of everyone's right to political participation and with the complement from interlinked rights as contained in the Universal Declaration, ICCPR and CRPD, the other important international instrument is the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹²² CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in the political life and, in particular, to ensure that women are capable of voting in 'all elections and public referenda and to be eligible for election to all publicly elected bodies'.¹²³

The Convention on the Rights of the Child (CRC)¹²⁴ has set out conditions in which state parties can encourage young people's participation. Nevertheless, with the emphasis on the protection of children, the conditions specifically relate to persons under 18 years of age. The General Comment on the implementation of the rights of the child during adolescence¹²⁵ builds on the definitions outlined in CRC.

117 Art 21 of the Universal Declaration of Human Rights, adopted 10 December 1948.

118 Art 25 of the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976.

119 United Nations Convention on the Rights of Persons with Disabilities, adopted 30 March 2007, entered into force 3 May 2008.

120 Bibler (n 56) 10.

121 Pogson (n 25) 5-6.

122 United Nations Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981.

123 Art 7 CEDAW.

124 United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990.

125 United Nations Committee on the Rights of the Child 'General Comment No 20 (2016) on the implementation of the rights of the child during adolescence'.

4.3 African human rights system

The legitimacy of any state wishing to be democratically functional and successfully upholding its human rights project is based on securing the effective realisation of the right to equal participation in political affairs.¹²⁶ Regional instruments provide a solid foundation for the development of legislation, policies and practices that foster full participation in political and electoral processes. A clear understanding of these legal frameworks offers a high likelihood of election management bodies in ensuring that electoral laws and processes are compliant to international standards and that their strategies and programmes are sensitive to target groups.

The African Charter recognises the right to political participation in article 13(1) which stipulates that '[e]very 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'. Article 3 of the Constitutive Act of the African Union (AU)¹²⁷ provides that the objectives of the AU are to promote, among others, democratic principles and popular participation, and to ensure the effective participation of women in decision making, particularly in the political, economic and socio-cultural areas. In addition, state parties to the African Democracy Charter are also required to implement its objectives in accordance with the principles of effective participation of citizens in democratic processes.¹²⁸ The Democracy Charter further obliges its state parties to recognise 'popular participation through universal suffrage as the inalienable right of the people'.¹²⁹

The rights of women to participation enjoy special protection under the African Charter system. Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),¹³⁰ which supplements the African Charter, provides as follows:

- (1) States parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that
 - (a) women participate without any discrimination in all elections;

¹²⁶ Heyns (n 105) 14.

¹²⁷ Constitutive Act of the African Union, adopted 11 July 2000, entered into force 26 May 2001.

¹²⁸ Art 3(4) African Democracy Charter.

¹²⁹ Art 4(2).

¹³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005.

- (b) women are represented equally at all levels with men in all electoral processes; (c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.
- (2) States parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

The African Charter of the Rights and Welfare of the Child (African Children's' Charter)¹³¹ contains no specific provision dealing with political participation by children. However, the African Youth Charter¹³² does so. Pertinent to youth participation, article 11 of the African Youth Charter stipulates:

- (1) Every young person shall have the right to participate in all spheres of society.
- (2) States parties shall take the following measures to promote active youth participation in society: They shall:
 - (a) guarantee the participation of youth in parliament and other decision-making bodies in accordance with the prescribed laws;
 - (b) facilitate the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance;
 - (c) ensure equal access to young men and young women to participate in decision-making and in fulfilling civic duties.

In one form or another, at least 39 constitutions in Africa recognise the right to political participation.¹³³ The trend of constitutionalising the right to political participation signals the importance of fostering an active citizenry and its involvement in the democratic electoral processes.

¹³¹ African Charter on the Rights and Welfare of the Child, adopted 2 July 2006, entered into force 8 August 2009.

¹³² African Youth Charter, adopted 2 July 2006, entered into force 8 August 2009.

¹³³ Angola (art 28); Benin (art 6); Burkina Faso (art 12); Burundi (arts 8, 86); Cameroon (art 2); Cape Verde (art 54); Central African Republic (art 18); Chad (art 6); Comoros (art 4); Côte d'Ivoire (art 33); Democratic Republic of the Congo (art 5); Djibouti (art 5); Eritrea (arts 20, 30); Ethiopia (art 38); Gabon (art 4); The Gambia (arts 26, 39); Ghana (art 42); Guinea (art 2); Guinea-Bissau (art 47); Kenya (art 38); Lesotho (sec 20); Liberia (art 77(b)); Madagascar (art 15); Malawi (sec 40(3)); Mali (art 27); Mauritius (sec 44); Mozambique (art 73); Namibia (art 17(2)); Niger (art 7); Rwanda (art 8); São Tomé and Príncipe (art 57); Senegal (art 3); Seychelles (arts 24, 113); Sierra Leone (sec 31); South Africa (sec 19(3)); Swaziland (sec 85); Tanzania (sec 5); Togo (sec 5); and Uganda (art 59). See also Heyns (n 105) 13.

5 Linking civic and voter education with technological systems

According to Dubow, Devaux and Manville,¹³⁴ the growth of the internet has ushered in an unprecedented flow of information worldwide, and the rapid spread of social media technologies that enable access to and consummation of information. Equally transformative, when citizens access and interpret information online, their digital skills increase. In the process, technological systems have the potential to contribute to strengthened democratic processes.¹³⁵

Indeed, digital platforms hold significant potential for facilitating more inclusive electoral participation, with particular benefits for the target groups such as the elderly and persons with disabilities.¹³⁶ Political engagement of these groups has traditionally been lower. Digital technologies are capable of mobilising greater participation by these groups and enable more direct participation in democratic electoral decision making. However, Dubow et al argue that '[t]he degree to which digital technologies can strengthen citizen participation in democratic processes was felt to depend on the ability of digital technologies to mobilise higher levels of engagement and action from citizens across a broader spectrum of society'.¹³⁷

CVE is at the centre of the participatory governance process.¹³⁸ The use of the internet as part of multimedia and digital technology can maximise the reach to the general public and to the electorate.¹³⁹ The COVID-19 pandemic has triggered an urgent digital rights crisis.¹⁴⁰ Access to internet facilities and technological equipment such as computers, laptops and smaller devices, such as iPads and smart phones, becomes desirable for the purpose of ensuring that CVE can reach the general public and the electorate. Ibeanu indicates that Canada has profitably used two strategies to conduct CVE, namely, (i) targeted messages; and (ii) information communication

134 T Dubow, A Devaux & C Manville 'Civic engagement: How can digital technology encourage greater engagement in civil society?', https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE253/RAND_PE253.pdf (accessed 29 March 2021).

135 As above.

136 As above.

137 T Dubow et al 'Civic engagement: How can digital technologies underpin citizen-powered democracy?', https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF373/RAND_CF373.pdf (accessed 29 March 2021).

138 National Initiative for Civic Education in Uganda 'A platform for inclusive and values based civic education for sustainable development' (2019) 8.

139 Shabane et al (n 26) 25.

140 Digital Freedom Fund 'Why COVID-19 is a crisis for digital rights' 29 April 2020, <https://edri.org/our-work/why-covid-19-is-a-crisis-for-digital-rights/> (accessed 11 September 2021).

technology.¹⁴¹ In the Canadian context, Ibeanu captures the its success as follows: 'The use of ICT, particularly social media platforms like Facebook, Twitter and SMS has proven to be veritable mechanism for engaging citizens and developing their sense of civic duties and political efficacy.'¹⁴²

A typical example of a case study where CVE was conducted through social media campaigns is derived from the United States. In 2016 a voter outreach and education campaign called 'My Hope. My Voice. My Vote' placed full reliance of social media.¹⁴³ In order to inspire and encourage citizens to vote, the social media campaign used videos and messaging. The videos depicted voters discussing their voting experiences, illustrating 'how participating in the democratic process can hold very different, but positive feelings for each person'.¹⁴⁴ Citizens who participated in the social media campaign shared their personal perspectives on voting, and related their participation in the electoral processes with family connection and community history up to the present landscape. In addition, this campaign provided 'important dates, deadlines, and other useful statewide-voting information in a positive, approachable, consumer-friendly way'.¹⁴⁵ Another element that amplified the potential of this CVE strategy was that '[i]ndividual social media posts and graphics had valuable links to information about how to register to vote, how to receive an absentee ballot, or how to find a poll. One message reminded those who have completed prison sentences and probation of their right to vote.'¹⁴⁶

The results of this social media campaign revealed that there was an increased voter turnout and voter participation in the elections, albeit with a recommendation that this approach for CVE must be planned and conducted earlier.¹⁴⁷ An ideal digital platform geared towards informing and mobilising participation should map civic activity and initiatives that help to share learning and examples of citizens voting and reasons for the voting procedure.¹⁴⁸

141 Ibeanu (n 74) 98.

142 As above.

143 Pillsbury (n 42) 29.

144 As above.

145 As above.

146 As above.

147 As above.

148 Dubow et al (n 137).

6 Feasibility: Opportunities and threats

6.1 Opportunities

Access to the internet is essential to human development, and the UN 2030 Agenda 'recognised the spread of ICTs and global interconnectedness as having great potential to accelerate human progress, reduce inequalities and develop knowledge-based societies'.¹⁴⁹ In order to develop an active and informed citizenry and to foster meaningful political participation in the democratic process before, during and after elections, CVE should be conducted on a continuous basis.¹⁵⁰ Accessibility and the usage of digital devices play an important role in promoting active participation in the democratic process. Hence, the use of digital solutions in the furtherance of information dissemination and outreach ensures that election management bodies can digitally continue with conducting CVE. During heightened electoral activities, election management bodies mostly conduct community engagements and joint programmes with stakeholders around the pre-election period. A proclamation of elections to be held in whatsoever format during the COVID-19 pandemic presents an opportunity to veritably use digital technology to conduct CVE during this pre-election period.

In the era of the COVID-19 pandemic, the right of access to the internet has become more important.¹⁵¹ The general public and the target groups can become informed about political processes through communication tools and platforms such as cellular telephones, YouTube, Facebook and Twitter.¹⁵² Simiyu suggests that governments can collaborate 'with telecommunication companies to facilitate zero rated access to certain public information including government websites as well as that of state institutions such as EMBs'.¹⁵³ In this regard, it is desirable that the relevant websites must contain CVE messages that encourage the intended target groups to actively participate in the electoral processes. The ultimate goal is

149 A Gillwald & O Mothobi 'After access 2018: A demand-side view of mobile internet from 10 African countries' April 2018, https://researchictafrica.net/wp/wp-content/uploads/2019/05/2019_After-Access_Africa-Comparative-report.pdf (accessed 29 March 2021).

150 ACE Electoral Knowledge Network (n 70).

151 E Sarpong 'COVID-19 shows why internet access is a basic right. We must get everyone connected' 15 April 2020, <https://webfoundation.org/2020/04/covid-19-shows-why-internet-access-is-a-basic-right-we-must-get-everyone-connected/> (accessed 11 September 2021).

152 R Beeckmans & M Matzinger *Youth participation in electoral processes: Handbook for electoral management bodies* (2017) 43.

153 Simiyu (n 6).

ensuring that citizens are made aware of these messages and taught how to access them.

The COVID-19 pandemic has the potential to create increased opportunities for digital literacy and the realisation of digital rights in Africa. Digital literacy is 'the ability to use information and communication technologies to find, evaluate, create, and communicate information, requiring both cognitive and technical skills'.¹⁵⁴ Smart phones, laptops and the internet are key digital tools for usage in social engagements, and are very useful for the purpose of information dissemination of CVE. The indispensable digital infrastructure requires governments and the corporate sector to collaborate and devise significant investments and the adoption of policies that effectively create opportunities for digital literacy and the enjoyment of digital rights. For that reason, Turianskyi recommends that 'African governments and the corporate sector should utilise and share information and best practices adopted during the pandemic in their ICT operations'.¹⁵⁵ The pursuit of digital literacy entails the commitment by governments to implement policies that ensure that everyone is connected to the internet.¹⁵⁶ Accordingly, article 37 of the Declaration deals with access to the internet. The provision stipulates:

- (1) States shall facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights.
- (2) States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.
- (3) States shall, in cooperation with all relevant stakeholders, adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination.

6.2 Threats

A major threat to promoting CVE through technological systems is 'digital divide'. This may be defined as any unequal information communication technology access pattern among populations.¹⁵⁷ It

¹⁵⁴ American Library Association 'Digital literacy', <https://literacy.ala.org/digital-literacy/> (accessed 29 March 2021).

¹⁵⁵ Y Turianskyi 'COVID-19: Implications for the "digital divide" in Africa' 14 May 2020, <https://www.africaportal.org/features/covid-19-implications-of-the-pandemic-for-the-digital-divide-in-africa/> (accessed 29 March 2021).

¹⁵⁶ Sarpong (n 151).

¹⁵⁷ T Mayisela 'The potential use of mobile technology: Enhancing accessibility and communication in a blended learning course' (2013) 33 *South African Journal of*

exists in both developed and developing countries, and affects users of information communication technology in urban and rural areas as well those from different socio-economic categories. According to Fink and Kenny, the digital divide may be interpreted as follows:¹⁵⁸

A gap in access to use of ICTs – crudely measured by the number and spread of telephones, [smartphones] or web-enabled computers, for instance; a gap in the ability to use ICTs – measured by the skills base and the presence of numerous complimentary assets; a gap in actual use – the minutes of telecommunications for various purposes, the number and time online of users, the number of Internet hosts, and the level of electronic commerce; a gap in the impact of use – measured by financial and economic returns.

Evidence of the persistent digital divide in Africa treads on historical social inequalities, and it widens the gap between the poor and the rich.¹⁵⁹ While women and the poor form part of the target groups of CVE, digital divide is primarily factored by poverty, with those at the bottom of the pyramid (women and the poor) being the most marginalised.¹⁶⁰

Simiyu has noted that only 28,2 per cent of the African population has access to the internet, meaning that Africa has the lowermost mobile and internet penetration, quality, and affordability in the world.¹⁶¹ At face value, Simiyu's analysis on digital solutions for African elections during the COVID-19 pandemic identifies the need for an information communication technology infrastructure, equal access to electricity, and digital literacy.¹⁶² As a result, digital divide could have a detrimental effect on the feasibility of finding digital solutions for empowering voters in remote rural areas where access to technological infrastructure and equipment is distantly slim. The COVID-19 pandemic has laid bare the nature of digital divide in Africa where millions of people who lack sufficient economic resources are unable to afford the correct technological equipment such as smartphones or laptops.¹⁶³

The challenges to promoting CVE through technological systems are not solely confined to digital divide *per se*. According to Beeckmans

Education 2.

158 C Fink & CJ Kenny 'W(h)ither the digital divide?' (2003) 5 *Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 2.*

159 Gillwald & Mthobi (n 149).

160 As above.

161 Simiyu (n 6). See also E van der Merwe 'Connectivity now: Why internet access in Africa is more vital than ever' 16 July 2020, <https://www.mandelarhodes.org/ideas/connectivity-now-why-internet-access-in-africa-more-vital-than-ever/> (accessed 9 September 2021).

162 As above.

163 Turianskyi (n 155).

and Matzinger, several governments feel threatened by the powerful influence of social media platforms, to the extent that they have occasionally or continuously blocked their access in an effort to prevent the dissemination of information by citizens on electoral processes.¹⁶⁴ In the past five years internet shutdowns occurred in 77 per cent of African countries.¹⁶⁵ This could be labelled as ‘authoritarian surveillance technology’,¹⁶⁶ or digital authoritarianism, which entails ‘the use of digital information technology by authoritarian regimes to surveil, repress, and manipulate domestic and foreign populations’.¹⁶⁷ Even in circumstances where governments are responding to fake news about the COVID-19 pandemic, ‘authoritarian surveillance technology’ is against the ethos, values and principles of democracy.¹⁶⁸

6.3 Case study: Malawi

Articles 75 and 76(4) of the Constitution of the Republic of Malawi established an independent electoral commission, officially referred to as the Malawi Electoral Commission (MEC). The functions and powers of the MEC are stipulated in article 76(2) of the Constitution and section 8 of the Electoral Commission Act¹⁶⁹ respectively. Importantly, section 1(8)(j) confers on the MEC the function ‘to promote public awareness of electoral matters through the media and other appropriate and effective means and to conduct civic and voter education on such matters’. Accordingly, the MEC states that the objectives of CVE are the following:¹⁷⁰

- to increase knowledge, awareness skills and attitudes about the various electoral processes and procedures and the making of informed choices among women and men, young women and young men;
- to encourage public participation in the various electoral processes;
- to promote participation of vulnerable groups such as the rural masses, women, the youth, disabled persons and those affected and infected by HIV/AIDS;
- to engender the right attitudes and behaviour conducive to peaceful elections and the smooth conduct of elections;

164 Beeckmans & Matzinger (n 152) 78.

165 Turianskyi (n 155).

166 Gravett (n 77) 127.

167 S Feldstein ‘When it comes to digital authoritarianism, China is a challenge – but not the only challenge’ 12 February 2020, <https://warontherocks.com/2020/02/when-it-comes-to-digital-authoritarianism-china-is-a-challenge-but-not-the-only-challenge/> (accessed 14 October 2021).

168 Mudau (n 28).

169 Electoral Commission Act (ch 2:03).

170 Malawi Electoral Commission ‘Civic and voter education’, <https://mec.org.mw/civic-and-voter-education/> (accessed 1 March 2021).

- to build confidence and trust in the electoral processes by the electorate; and
- to increase access and quality of C&VE.

While collaborating with accredited stakeholders such as the International Foundation for Electoral Systems and the National Democratic Institute, the common implementation strategy of CVE employed by the MEC includes theatre performances and road shows; traditional authority meetings; faith-based and school outreach programmes; the distribution of CVE materials; radio and television programmes; and the use of loudhailers.¹⁷¹

Malawi held presidential, parliamentary and local government elections in May 2019.¹⁷² However, allegations of electoral irregularities culminated in electoral petitions that challenged the credibility of elections before the High Court and the Supreme Court of Appeal, respectively.¹⁷³ The petitions transpired in the annulment of the presidential elections. The Courts ordered fresh elections through the two-round electoral system,¹⁷⁴ instead of the previous first-past-the-post system used in 2019. The Courts also declared that the MEC had failed to uphold its constitutional obligation to manage free and fair elections. This landmark adjudication of presidential elections resembled a similar occurrence witnessed in the 2017 Kenyan elections, constituting the only two rare cases in Africa. Nevertheless, when the election run-off or double-ballot took place, it was in the midst of the COVID-19 pandemic. The first COVID-19 positive cases in Malawi were confirmed on 2 April 2020,¹⁷⁵ albeit prior to the declaration of a state of disaster and suspension of public gatherings by President Peter Mutharika on 20 March 2020.¹⁷⁶ Factually, the fresh elections were not budgeted for, plunging the MEC in financial

¹⁷¹ As above.

¹⁷² International Foundation for Electoral Systems (IFES) 'Elections in Malawi: 2020 fresh presidential election' 18 July 2020, <https://www.ifes.org/faqs/elections-malawi-2020-fresh-presidential-election> (accessed 1 March 2021).

¹⁷³ J Chunga 'Malawians' voting intentions point to a closely contested presidential election' 20 May 2020, https://media.africaportal.org/documents/ab_r8_dispatchno363_malawian_voting_intentions_point_to_close_contest.pdf (accessed 1 March 2021).

¹⁷⁴ With the two-round system, if no candidate receives more than 50% of votes cast in the first round, or at least some other prescribed percentage, the two leading candidates or all contenders who received above a prescribed proportion of the votes, contest the second round of elections. The candidate who receives the highest number of votes in the second round wins the elections. See A Wall 'Electoral systems briefing paper', <https://aceproject.org/ero-en/topics/electoral-systems/SDOC1584.pdf> (accessed 1 March 2021).

¹⁷⁵ GC Chirwa et al 'Malawi at the crossroads: Does the fear of contracting COVID-19 affect the propensity to vote? (2021) *European Journal of Development Research* 1.

¹⁷⁶ T Mwanyisa 'COVID-19 and the future of Malawi's 2020 presidential election re-run' 20 March 2020, <https://www.dailymaverick.co.za/article/2020-04-20-covid-19-and-the-future-of-malawis-2020-presidential-election-re-run/> (accessed 1 March 2021).

challenges that required ‘the procurement of personal protective equipment, adding further budgetary constraints’.¹⁷⁷ All these factors impacted on human safety and the conducting of CVE.¹⁷⁸

In preparation of the presidential elections, Mwanyisa reveals that there were ‘serious hurdles to overcome, particularly in the areas of voter registration, campaigning, voter education and voting itself’.¹⁷⁹ Owing to the Supreme Court’s decision that re-elections must proceed, the registration of voters at the voter registration centres was inevitable. However, due to the COVID-19 pandemic, the lockdown restrictions obligated citizens to remain at home, and only five people were allowed to congregate at any given time.¹⁸⁰ Such a strictly-restricted number of gatherings negatively affected the traditional CVE events. As result, out of fear of breaching lockdown regulations and contracting the virus, the voter registration process attracted a smaller number of voters.¹⁸¹ Mwanyisa also expressed the concern that limited CVE had a higher likelihood of increasing spoiled ballots ‘among those who lack information about the process’.¹⁸² Consequently, the MEC had to devise alternative strategies for reaching voters without breaching the COVID-19 regulations.

As a measure of last resort, the MEC adopted digital platforms to conduct CVE. While conducting CVE in order to inform voters of the electoral processes and procedures of the approaching 23 June 2020 presidential elections, the MEC, with the support from the International Foundation for Electoral Systems (IFES), produced a series of videos as part of the ‘My Country, My Choice’ campaign.¹⁸³ The video included sign interpretations, and information about MEC measures to mitigate the spread of COVID-19 as well as approaches to enhance the effectiveness of the electoral process.

177 IFES (n 172) 9.

178 As above.

179 Mwanyisa (n 176).

180 As above.

181 As above.

182 As above.

183 Election Access ‘My country, my choice: Voting procedures during COVID-19’ July 2020, <http://www.electionaccess.org/en/resources/voter-education/voter-education/643/> (accessed 1 March 2021).

Official election results released by the MEC were as follows:¹⁸⁴

Figure 1

Total valid votes	4 388 376
Total votes cast	4 445 699
Null and void	57 323
Total registered votes	6 859 570

The opposition candidate in the elections, Lazarus Chakwera, emerged victorious against the incumbent President Peter Mutharika. The voter turnout was 64,8 per cent, with 1,29 per cent of spoilt votes.¹⁸⁵ In contrast, 5 105 983 Malawians voted in 2019, representing 74,4 per cent of registered voters. Chirwa et al¹⁸⁶ state that the voter turnout of the 23 June 2020 presidential elections, which were held when the numbers of COVID-19 cases were increasing rapidly, was 10 per cent lower than in the general elections held a year earlier. A national representative survey of adult Malawians shows that nearly two-thirds of Malawians thought that they were likely to contract COVID-19.¹⁸⁷ However, the perceived risk of contracting COVID-19 impacted on the willingness of voters to participate in the presidential elections.¹⁸⁸

Although Malawi primarily relied on videos to promote CVE in order to encourage voters to participate in the presidential elections, the fear of contracting COVID-19 overwhelmed the willingness of voters to participate in huge numbers. This is evidenced by the fact that the voter turnout in the election re-run were 10 per cent lower than in the general elections held a year earlier. Furthermore, the desirability of using digital platforms to promoting CVE was affected by the digital divide. In 2019 internet penetration in Malawi was reported to be 13,78 per cent of the population.¹⁸⁹ One of the most

¹⁸⁴ Malawi Electoral Commission 'National results' 27 June 2020, <https://www.mec.org.mw/elections2020/> (accessed 1 March 2021).

¹⁸⁵ Electoral Institute for Sustainable Democracy in Africa 'Malawi: 2020 presidential election rerun results', <https://www.eisa.org/wep/mal2020results1.htm> (accessed 10 October 2021).

¹⁸⁶ Chirwa et al (n 175).

¹⁸⁷ As above.

¹⁸⁸ As above.

¹⁸⁹ J Johnson 'Percentage of population using the internet in Malawi from 2000 to 2019' 27 January 2021, <https://www.statista.com/statistics/640140/malawi-internet-penetration/> (accessed 29 May 2021).

significant barriers to internet penetration in Malawi is the high price of access to the internet.¹⁹⁰ In contrast to its regional neighbours, the country 'has one of the lowest and slowest-growing rates of internet access in the world'.¹⁹¹ In addition, there is unreliable electricity provision and a high cost of fuel-generator power which affect the usage of technological systems. World Bank revealed that only 12,7 per cent of the country has access to electricity, causing Malawi to have one of the lowest electrification rates in the world.¹⁹² There is no free internet access in public places in Malawi,¹⁹³ and this aggravates the challenges of promoting CVE through technological systems.

7 Conclusion

The article dealt with the intersections between the provision of CVE and the opportunities and threats pertaining to the feasibility of finding digital solutions for enhanced voter participation in democratic electoral processes during the COVID-19 pandemic in Africa. The election management bodies are legally mandated to conduct CVE in order to promote active citizenry and participation in the electoral processes. The COVID-19 pandemic caused many governments to impose lockdowns with stringent restrictive measures that prevented public gatherings and required hygienic practices as well as physical and social distancing.

Reliance on technological systems to conduct CVE during the COVID-19 pandemic emerges as a measure of last resort. However, due to the digital divide and the numerous developmental challenges encountered by many African countries, the feasibility of using digital solutions for disseminating CVE becomes far-fetched. The case study of Malawi included in the article shows that the combined factors, namely, the lack of use of digital technologies, the fear of contracting COVID-19, and the digital divide, contributed to the decline in voter turnout during the presidential elections held on 23 June 2020.

190 J Kainja 'Digital rights: How accessible is the internet in Malawi?' 15 February 2019, <https://malawi.misa.org/2019/02/15/digital-rights-how-accessible-is-the-internet-in-malawi/> (accessed 29 May 2021).

191 <https://freedomhouse.org/country/malawi/freedom-net/2020> (accessed 29 May 2021).

192 World Bank 'Access to electricity (% of population)' 26 February 2020, <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?locations=MW> (accessed 29 May 2021).

193 T Chirwa-Ndanga 'Malawi's internet shutdown: When the powerful become afraid', <http://www.ngopulse.org/sites/default/files/attachments/Teresa%20Chirwa%20Ndanga%20MALAWI-INTERNET%20ACCESS%20LIMITATION.pdf> (accessed 29 March 2021).

Generally, CVE programmes are conducted through physical meetings. The failure to hold contact sessions for CVE events impacts on the right of access to information of target groups such as women, the youth, persons with disabilities, the illiterate, voters in rural areas and disadvantaged minorities. In addition, insufficient technological infrastructure and equipment aggravate the challenges to information dissemination and outreach during the COVID-19 pandemic.

Governments and other relevant stakeholders such as the private sector should invest in information communication technology infrastructure, particularly in rural areas, and low-cost internet-enabled devices with a view to bridging the digital divide in these societies and encouraging greater access to social media platforms. Governments must desist from authoritarian surveillance technology that is accompanied by assaults on media and internet freedoms. Civil society organisations, election management bodies and other stakeholders involved in CVE activities should prioritise digital literacy in their campaigns to enhance voter participation.

While in concurrence with Simiyu, the article equally further recommends governments' collaboration with 'telecommunication companies to facilitate zero rated access to certain public information including government websites as well as that of state institutions such as EMBs'.¹⁹⁴ Ideally, these websites have to contain CVE messages that encourage the intended target groups to actively participate in the electoral processes. The ultimate goal is ensuring that citizens are made aware of these messages and taught how to access them.

¹⁹⁴ Simiyu (n 6).

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Who votes in Tanzania? An overview of the law and practices relating to parliamentary elections

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Summary: *The right to vote is among the pillars of a representative democracy. The right promotes democracy by ensuring that citizens participate indirectly in the affairs of the government of their country by freely electing the leaders they want. This article examines the theoretical and practical aspects of the right to vote in Tanzania. In particular, the article provides a critical examination of the laws and practices relating to parliamentary elections in Tanzania and their implications for the right to vote. The article argues that the right to vote is not effectively guaranteed in Tanzania, in law or in practice. In particular, the article demonstrates that the electoral laws as well as practices in Tanzania deny the citizens the right to freely elect their representatives/members of parliament. The electoral law and related practices give a mandate to few people who make decisions for the majority. The electoral laws and practices make citizens the rubberstamp of decisions taken by the few instead of their being the key decision makers.*

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Key words: *political rights; right to vote; elections*

1 Introduction

Tanzania claims to be a democratic state with a multiparty system since 1992.¹ The first general election under the multiparty system was conducted in 1995.² Among the key features of any democratic state is the fact that governmental powers are exercised by all adult citizens, either directly (in the case of a direct democracy) or through freely-elected representatives (in the case of an indirect democracy, as is the case in Tanzania).³ A democratic state is further characterised by regular free and fair elections open to all citizens of voting age and the participation of citizens in the political system of the country.⁴

Members of parliament normally are elected during general elections. The general election occurs every five years. The general election also involves election of the President and counsellors. This article focuses on examining the laws that regulate parliamentary elections and related practices. The aim is to establish the extent to which the laws and practices promote the right of citizens to freely choose/decide who should be their representative or member of parliament.

However, before moving to the main discussion, it is important at this juncture to point out that the Constitution of the United Republic of Tanzania of 1977 (Constitution of Tanzania)⁵ creates two governments, namely, the Government of the United Republic (Union Government) and the Revolutionary Government of Zanzibar and two organs with legislative and supervisory powers, namely, the Parliament of the United Republic and the House of Representatives (for Zanzibar).⁶ Matters that are union-related are dealt with by the Government of the United Republic. These union matters are provided for in the First Schedule to the Constitution of Tanzania.⁷

1 The multiparty system was introduced in Tanzania through the Political Parties Act of 1992. See K Tambila 'The transition to multiparty democracy in Tanzania: Some history and missed opportunities' (1995) 28 *Law and Politics in Africa, Asia and Latin America* 482.

2 M Nyirabu 'The multiparty reform process in Tanzania: The dominance of the ruling party' (2002) 7 *African Journal of Political Science* 108.

3 G Clack (ed) *Democracy in brief* 3 https://kr.usembassy.gov/wp-content/uploads/sites/75/2017/04/Democracy-in-Brief_kor-1.pdf (accessed 20 April 2021).

4 As above.

5 As amended from time to time.

6 Art 4(2) Constitution of Tanzania.

7 The union between mainland Tanzania (the then Republic of Tanganyika) and the People's Republic of Zanzibar took place on 26 April 1964. During this time there were 11 union matters, namely, the Constitution of Tanzania and Government of the United Republic; external affairs; defence; police; emergency powers;

On the other hand, matters that are not union-related and concern Zanzibar are dealt with by the Revolutionary Government and non-union matters that concern mainland Tanzania are dealt with by the Union Government. A parliamentary election is not a union-related matter. Therefore, there are different electoral laws and different organs to supervise parliamentary elections for each part of the union. Whereas in mainland Tanzania parliamentary elections are supervised by the National Electoral Commission (NEC), in Zanzibar the Zanzibar Electoral Commission (ZEC) is responsible for supervising parliamentary elections (elections for members of the House of Representatives). This study focuses on the laws of mainland Tanzania and to avoid confusion, the name 'Tanzania' as used in this study, refers to mainland Tanzania.

The study is divided into several parts that entail a detailed discussion on the right to vote in Tanzania. These parts include the introduction followed by a discussion on 'free and fair election' in the context of the Constitution of Tanzania. The article subsequently examines the institutional framework for supervising elections in Tanzania before examining the laws of Tanzania regarding independent candidates. The other parts provide discussions on voter registration; the qualifications of parliamentary candidates; procedures for nominating parliamentary candidates; parliamentary campaigns and general observations. The last part is the conclusion.

2 Free and fair elections: An overview of the Constitution of Tanzania

In a representative democracy citizens participate in the affairs of their country through representatives freely chosen during elections. However, for citizens to be considered as having chosen their representatives freely, the election should be free and fair. In the context of parliamentary elections, a free and fair election is a process that results in representatives or members of parliament being freely elected by the citizens of their own will.

According to the 1994 Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections⁸ government authority derives

citizenship; immigration; external trade and borrowing; the public service of the united republic; taxes such as income tax, corporation tax, customs and excise and harbours; civil aviation; and posts and telegraphs. Currently the number of union matters has increased to 22.

8 The Inter-Parliamentary Union is a global organisation of national parliaments dedicated to promoting peace through parliamentary diplomacy and dialogue. The Declaration on Criteria for Free and Fair Elections was adopted on 26 March 1994 by the Inter-Parliamentary Council at its 154th session held in Paris.

only 'from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage'.⁹ A free and fair election requires every adult citizen to be granted an equal right and opportunity to participate in the election by voting and/or becoming a candidate in the election. States thus have an obligation to take legislative measures that guarantee that free and fair elections are conducted regularly.¹⁰

Furthermore, an election is said to be free and fair if all qualified citizens are registered as voters and every voter can decide whether or not to vote and can freely vote for the candidate or party of their choice.¹¹ A free and fair election also requires all registered political parties to be availed of an equal right to contest the election and persuade voters to vote for them.¹² According to the survey of various international conventions, a free and fair election has the following key elements: genuine elections; universal suffrage; equal suffrage; periodic elections; secret ballots; freedom of assembly; free expression¹³ and freedom from discrimination.

As far as the laws of Tanzania are concerned, articles 5 and 21 of the Constitution of Tanzania are relevant to free and fair elections. Article 5 is specific on the right to vote. The right is guaranteed to every citizen who is above 18 years of age and who is mentally fit. The Constitution further prohibits the imposition of any other ground that disqualifies the citizen from exercising the right to vote, save for the grounds provided for in the Constitution.¹⁴ These grounds are discussed in detail in subsequent parts of the article.

Article 21 relates to public participation in public affairs. The article gives the right to every citizen 'to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people'.¹⁵ Article 21 suggests that a representative of the people in a representative democracy is elected freely by the people. There can be no free will of the people to elect representatives of their choice if there is no free and fair election. Therefore, a free and fair election guarantees the participation of all

9 Inter-Parliamentary Council 'Declaration on Criteria for Free and Fair Elections', <http://archive.ipu.org/cnl-e/154-free.htm> (accessed 8 November 2021).

10 GS Goodwin-Gill *Free and fair elections* (2006) 8-11.

11 Civics Academy 'What are free and fair elections' *Civics Academy* (blog), <https://www.civicsacademy.co.za/video/free-and-fair-elections/> (accessed 20 April 2021).

12 As above.

13 A Kasumov 'International free and fair election instruments developed by UN and OSCE' (2012) 15 *Khazar Journal of Humanities and Social Science* 47, <https://doi.org/10.5782/2223-2621.2012.15.42> (accessed 8 November 2021).

14 Arts 5(1) & (2) Constitution of Tanzania.

15 Art 21(1) Constitution of Tanzania.

citizens in electing members of parliament. Furthermore, a free and fair election gives legitimacy to the chosen members of parliament. In other words, it is the free and fair election that guarantees citizens the right to vote for representatives of their own choice.

3 An institutional framework for the supervision of parliamentary elections

The institution responsible for supervising all parliamentary elections in Tanzania is the National Electoral Commission (NEC). The NEC is established under article 74(1) of the Constitution of Tanzania. It is responsible for the registration of voters and supervising the conduct of presidential, parliamentary and councillor elections. The NEC is composed of a chairperson, a vice-chairperson, one member from the Tanganyika Law Society (TLS) (the Bar association of Tanzania mainland) and four other members with adequate experience in elections.¹⁶ The director of elections is the secretary to the Commission and the chief executive.¹⁷ All the above members are appointees of the President.¹⁸ The President also is vested with powers to remove any member of the NEC from office for reasons of illness, a failure to perform his duties, misconduct or for any other reason.¹⁹ Other staff of the NEC are the returning officers. The law designates all city, municipal, town directors and district executive directors to be returning officers.²⁰ These also are appointees of the President.

The structure and composition of the NEC raises an important question as to its independence and impartiality when performing its functions. Since its establishment in 1993, the debate over the question of the independence of the NEC remains unresolved. Makulilo argues that the NEC 'does not pass the basic tests of an independent institution and hence its credibility is questionable'.²¹ The NEC is accused of being attached to the government and the ruling party and further that it performs its functions in favour of the ruling party.²² The President, who appoints members of the NEC, is affiliated to one of the political parties. In fact, the practice has been that the President, who is the head of state, is also the chairperson of

16 Sec 4(1) National Elections Act 2015.

17 Art 74(7) Constitution of Tanzania.

18 Art 74(1) Constitution of Tanzania; sec 4(4) National Elections Act.

19 Art 74(5) Constitution of Tanzania.

20 Sec 7(2) National Elections Act.

21 AB Makulilo 'Independent electoral commission in Tanzania: A false debate?' (2009) 45 *Representation* 435, <https://doi.org/10.1080/00344890903257409> (accessed 11 November 2021).

22 As above.

the ruling party – Chama cha Mapinduzi (CCM).²³ Further experience shows that most city, municipal, town and district directors who act as returning officers during parliamentary elections are appointed from among members of the ruling party. In fact, some of these are parliamentary contestants that were not elected or that were not nominated by the ruling party.²⁴

In the case of *Attorney General & Others v Bob Chacha Wangwe* the impartiality and independence of the returning officers were questioned before a court of law. The petitioner, Bob Chacha Wange, sought to challenge the constitutionality of the provisions of the Elections Act that designated city, municipal, town and district directors to act as returning officers during elections. Central to the argument of the petitioner was that section 7(1) of the National Elections Act, among other sections, is contrary to article 21 of the Constitution of Tanzania which guarantees, among others, free and fair elections. The petitioner was of the view that it is practically impossible for the returning officers, who are the appointees of the President, to act independently and with impartiality during election supervisions. The High Court of Tanzania accepted the arguments of the petitioner and continued to hold that section 7(1) of the National Elections Act was unconstitutional and thus did not uphold the principles of free and fair elections. The above decision of the High Court was overturned by the Court of Appeal of Tanzania (the final appellate court in Tanzania) which argued that the law put in place safeguards that ensure the independence and impartiality of the returning officers.

Nevertheless, the decision of the Court of Appeal has not settled the debate on the question about the independence of the NEC. Acts such as the unfair removal of opposition candidates from the nomination list²⁵ and the unequal treatment of political parties during the election period²⁶ have caused unopposed candidates and others to continue to raise the alarm about the NEC's independence. The fact that a country holds regular elections is not sufficient to show that the country is democratic if the institution responsible

23 CCM has been the ruling party in Tanzania since it was found on 5 February 1977.

24 See the case of *Attorney General & Others v Bob Chacha Wangwe* Civil Appeal 138 of 2019.

25 Amnesty International 'Lawfare: Repression by law ahead of Tanzania's general elections' (2020) 10, <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFRS630512020ENGLISH.pdf> (accessed 11 November 2020).

26 Tanzania Elections Watch 'Final observation report on the general elections held in Tanzania on October 28, 2020: Not free, not fair' (2021) 16, <https://tanzaniaelectionswatch.org/download/tanzania-elections-watch-final-report/#> (accessed 11 November 2021).

for supervising elections is not 'politically neutral, professional and committed to democratic values'.²⁷ To sum up the discussion, for an election supervisory body to be regarded as independent it should have the following attributes: fiscally autonomous; a durable tenure of office for commissioners that is protected by the Constitution; an autonomous structure that is free from the government of the day or any political party; impartiality; an inclusive appointment procedure for the members of the body after consultation with various stakeholders; professional competence of its staff; transparency in decision-making processes and the capacity to make and enforce decisions by the body.²⁸

4 Independent candidates

The term 'independent candidate' denotes a parliamentary candidate who is not affiliated to any registered political party.²⁹ It refers to a parliamentary candidate whose nomination is not subject to appointment or endorsement by a political party.³⁰ In this study the phrase 'independent candidate' is used to refer to a parliamentary candidate who is not sponsored by any registered political party.

An independent candidate is not only a common phenomenon in democratic elections but also is a recurring expression in the field of human rights. It is well settled that a country that observes democracy as well as human rights will not prohibit its citizens from contesting an election merely on the ground that they are not members of or are not affiliated to a political party. Article 25 of the International Covenant on Civil and Political Rights (ICCPR), to which Tanzania is a party, having ratified it in 1976, protects the right and opportunity of citizens to vote and to be elected. ICCPR further requires citizens to exercise the right to vote 'without any of the distinctions mentioned in article 2 and without unreasonable restrictions'. Requiring a parliamentary contestant to affiliate to a political party is said to be in violation of free and fair elections since it imposes an unreasonable or discriminatory disqualifying factor. As such, state parties to ICCPR are required to discourage

27 N Cheeseman & J Elklit, 'Understanding and assessing electoral commission independence: A new framework' (2020) 6, https://www.wfd.org/wp-content/uploads/2021/03/WFD_A-new-framework-for-understanding-and-assessing-electoral-commission-independence.pdf (accessed 11 November 2021).

28 Makulilo (n 21) 437.

29 D Brancati 'Winning alone: The electoral fate of independent candidates worldwide' (2008) 70 *The Journal of Politics* 650.

30 P Ehin et al 'Independent candidates in national and European elections' (2013) 11, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET\(2013\)493008_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET(2013)493008_EN.pdf) (accessed 9 November 2021).

these discriminatory practices both in their laws and practice. In its General Comment 25 the United Nations Human Rights Committee emphasised that ‘the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties’.³¹ In relation to the right of citizens to vote for a representative of their own choice, the prohibition of an independent candidate denies citizens an opportunity to vote for the person they wish to elect, especially when that person is refused an opportunity by his party to contest a parliamentary election.

The Constitution of Tanzania makes it a mandatory requirement for parliamentary candidates to be a member of a registered political party. The NEC cannot nominate a person to be a parliamentary candidate if that person is not sponsored by a political party.³² In 2005 the provision of the Constitution prohibiting private candidates was successfully challenged in the High Court of Tanzania in the case of *Reverend Christopher Mtikila v Attorney General*.³³ The High Court nullified this provision of the Constitution on the ground that it was unconstitutional. Nevertheless, this decision of the High Court was overruled by the Court of Appeal of Tanzania in 2009.³⁴ Later, in 2011, Reverend Mtikila and two non-governmental organisations brought an application to the African Court on Human and Peoples’ Rights (African Court) to challenge the prohibition of independent candidates.³⁵ The Court held that the prohibition of independent candidates infringes the African Charter, article 13(1), in particular, which protects the right of citizens to participate in the government of their country. The African Court also found that the prohibition prevented Tanzanians from participating in the government of their country through freely-chosen representatives. The Court further found that the prohibition against independent candidates violated the right to freedom of association. To remedy the violations found, the African Court ordered Tanzania to implement constitutional, legislative and other necessary measures within a reasonable time

31 Office of the High Commissioner for Human Rights ‘General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service’ para 17, <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf> (accessed 21 April 2021). Office of the High Commissioner for Human Rights <https://github.com/citation-style-language/schema/raw/master/csl-citation.json> (accessed 21 April 2021).

32 Art 21 of the Constitution subjects the enjoyment of the right to, among others, art 67 of the Constitution. Art 67 requires a person who desires to be elected member of parliament to be a member of a registered political party.

33 Misc Civil Cause 10 of 2005.

34 See *Honourable Attorney General v Reverend Christopher Mtikila* Civil Appeal 45 of 2009 Court of Appeal of Tanzania, Dar es Salaam.

35 See *In the Consolidated Matters of the Tanganyika Law Society and the Legal and Human Rights Centre v the United Republic of Tanzania* Application 9 of 2011; and *Christopher R Mtikila v the United Republic of Tanzania* Application 11 of 2011.

and to report the measures taken to the Court. However, to date the Tanzanian constitutional and legislative framework remains the same. No effort has been put in place to allow independent candidates.

After having been elected, a member of parliament may cease to be a member of a political party to which he belonged when he was elected. Should this happen, article 71(1)(c) of the Constitution of Tanzania is clear that such a member ceases to be the member of parliament and is required to vacate the National Assembly. From past experience a member of parliament normally loses his membership of a political party mainly by being expelled or resigning his membership. Where the person ceases to be a member of parliament, a by-election must be conducted to fill such vacancy.³⁶ In practice, the political party sponsoring the respective member of parliament whose membership has been stripped or has ceased will write officially to the Speaker of the National Assembly to inform him about that fact. Having received the information, the Speaker will notify the NEC to make a formal declaration that there is a vacancy in a seat of the member of parliament.³⁷ Upon such a declaration the NEC then will conduct a by-election to fill the vacancy (in the case of an elected member of parliament). Recent experience suggests that the NEC will not conduct a by-election if the Speaker of the National Assembly acts irresponsibly by not making a formal declaration as required by law. Thus, there can be members of parliament who do not belong to any political party. For instance, the 19 expelled CDM members who are in parliament belong to no party. They are illegal members of parliament or rather, they are in parliament illegally following the Speaker's irresponsible conduct.³⁸

By requiring members of parliament to be members of a political party, the Constitution of Tanzania limits the right of citizens to elect the representatives they want. The Constitution further makes

36 See Art 76(2) Constitution of Tanzania.

37 Sec 37(3) National Elections Act.

38 On May 2020 *Chama cha Demokrasia na Maendeleo* (CHADEMA), the main opposition party in Tanzania, expelled its four members of parliament from the party. The party wrote to the Speaker of the National Assembly informing him of the expulsion. However, the Speaker objected to the expulsion and decided to continue to recognise the expelled members of parliament. The same event occurred in November 2020, when 19 members of parliament from CHADEMA were expelled from the party. The same Speaker who objected to the former expulsion also objected to this latter expulsion. In all incidents the expelled members of the parliament continued to save in their posts contrary to the requirement of the Constitution of Tanzania. See B Kiango & E Msuya 'Chadema expelled MPs saga in new turn' *The Citizen* 20 January 2021, <https://www.thecitizen.co.tz/tanzania/news/-chadema-expelled-mps-saga-in-new-turn-3262894>; Daily News Reporter 'Ndugai slums unwarranted expulsion of MPs' *Daily News* 4 November 2020, <https://dailynews.co.tz/news/2020-05-125eba36b5f2e12.aspx> (accessed 8 November 2021).

members of parliament accountable to their political party rather than to the voters. The prohibition subjects the fate of the member of the parliament in the National Assembly to be in the hands of political parties. It is for this reason that members of parliament in Tanzania hesitate to criticise their party's leaders for fear of being expelled and consequently losing their seat in parliament.³⁹

5 Voter registration

Voter registration is among the important safeguards for ensuring 'equal and universal participation of eligible voters in a given election'.⁴⁰ Voter registration allows the NEC to know the number of registered voters. Knowing the number of registered voters helps in making various important decisions such as the number and location of polling stations as well as polling facilities and materials required.

Voter registration is required to be transparent, accurate and inclusive.⁴¹ Voters should have an opportunity to inspect the voter register, to correct their details prior to the election date and to object to the inclusion of any unqualified voter in the voter register.

In Tanzania a citizen who is allowed to vote is one whose name appears in the Permanent National Voters' Register. Before preparing the final copy of the Permanent National Voters' Register, the NEC will issue a Provisional Voters' Register which gives citizens the opportunity to amend their details, for the inclusion of new voters and objections to the inclusion of ineligible voters.⁴² Electoral laws identify persons who lack qualification to be registered in the Permanent National Voters' Register and consequently are unqualified to vote in that general election. Apart from non-citizens, persons of unsound mind and persons below the age of 18 years on the election date, persons serving imprisonment sentences exceeding six months, detained

39 In all the above incidents of expulsion of members of parliament from CHADEMA, the main reason was the failure on the part of the expelled members of parliament to comply with orders issued by the party. In the former incident where four members of parliament from CDM were expelled from the party, it was due to their attendance of the sessions of the National Assembly, contrary to the order issued by the chairperson of the party requiring all members of parliament from CDM to boycott the sessions of the National Assembly as a way of expressing their dissatisfaction with the way in which the government was handling the COVID-19 pandemic. In the latter incident the reason was that the expelled members agreed to take an appointment for members of parliament through special seats contrary to the order issued by the party not to recognise the 2020 general election results.

40 Conference on Security and Cooperation in Europe (Organisation) (ed) *Handbook for the observation of voter registration* (2012) 6.

41 As above.

42 Sec 11A National Elections Act.

criminal lunatic and persons detained at the pleasure of the President are also excluded from being registered in the Permanent National Voters' Register.⁴³

Unlike Tanzania, many African countries, such as South Africa, Ghana and Kenya, are recognising the right of prisoners to vote.⁴⁴ This movement is in line with various international legal instruments including ICCPR,⁴⁵ and regional human rights instruments, mainly the African Charter.⁴⁶ Taking into consideration the fact that Tanzania is a party to the above legal instruments, it needs to honour its commitments by allowing prisoners to vote during general elections.

6 Constitutional qualifications

A person aspiring to contest the parliamentary election is required to meet the conditions prescribed in article 67 of the Constitution of Tanzania. The parliamentary candidate must be a citizen of the United Republic of Tanzania, who is not younger than 21 years and who is a member of and is a candidate proposed by a registered political party.⁴⁷ As pointed out earlier in the discussion, the laws do not allow a person to contest a parliamentary post as an independent candidate. The reforms that were to be introduced by the Proposed Constitution of the United Republic of Tanzania of 2014 allowed an independent candidate to contest parliamentary elections.⁴⁸ However, the intended constitutional reforms were abandoned by the fifth-phase government.⁴⁹ Moreover, the parliamentary candidate is required to have the ability to read and write in English or Swahili.⁵⁰

A person is disqualified to contest the position of member of parliament if such person is of unsound mind and if the person was previously convicted and sentenced to death or to imprisonment for an offence involving dishonesty or violating laws concerning the ethical conduct of public leaders.⁵¹ Other qualifications for one to contest the position of member of parliament are contained in the

43 Sec 11 National Elections Act.

44 Africa Criminal Justice Reform 'The right of prisoners to vote in Africa: An update' Fact Sheet (2020) 1, <https://acjr.org.za/resource-centre/fact-sheet-17-prisoners-vote.pdf> (accessed 8 November 2021).

45 As above.

46 See art 13(1) of the African Charter on Human and Peoples' Rights.

47 Art 67(1) Constitution of Tanzania.

48 Art 140(1)(c) Proposed Constitution of the United Republic of Tanzania of 2014.

49 The fifth phase government as used in this study refers to the government that was formed by the fifth President of Tanzania; the late Dr John Josphph Pombe Magufuli.

50 Art 67(1)(a) Constitution of Tanzania.

51 Art 67(2) Constitution of Tanzania.

laws providing for the nomination of parliamentary candidates, as discussed earlier.

Save for the requirement that a person contesting parliamentary election should be a member of a registered political party, other qualifications cannot be considered as unreasonable or discriminatory qualifications. No level of education is required. Practically, the National Assembly of Tanzania has been composed of persons with high academic qualifications, such as professors and holders of doctoral degrees, persons with middling academic qualifications and others with very low academic qualifications, for instance, standard seven-leavers.

7 Procedures for nominating parliamentary candidates

The procedures for nominating parliamentary candidates involve three stages, namely, nomination by political parties, nomination by the NEC and the objection stage.

7.1 Nomination by political parties

The procedures for nominating parliamentary candidates start at the party level. A person aspiring to contest parliamentary elections needs be proposed or nominated by his political party. Each political party will propose a person it wishes to be nominated by the NEC as its parliamentary candidate for a particular constituency. There are no uniform regulations or procedures for nominating parliamentary candidates at party level. Each political party has its own regulations providing the procedures for nominating parliamentary candidates. Some political parties use fully participatory methods for nominating parliamentary candidates, whereas others use partially participatory methods. Some parties opt for a top-down method where the nomination of a parliamentary candidate is made by the party leaders.⁵²

In the 2010 general election Chama Cha Mapinduzi (CCM) was one of the parties that exercised a fully participatory method during party nominations. In this type of nomination members of the party are given the opportunity to cast preferential votes for party

52 TEMCO 'The 2010 Tanzania general elections: Report of the Tanzania Election Monitoring Committee (TEMCO)' (2011) 27, http://www.temco.udsm.ac.tz/images/stories/TEMCO_Reports/TEMCO_REPORT_2010_GENERAL_ELECTION_ENGLISH_VERSION.pdf (accessed 10 November 2020).

members who are seeking the endorsement of the party to stand for parliamentary election.⁵³ After the preferential vote, district and regional party committees decide who among the applicants should represent the party in the parliamentary election. The final party decision or nomination is made by the party's National Executive Committee.⁵⁴ The party's National Executive Committee has overall powers as far as the nomination of parliamentary candidates is concerned. The Committee may nominate a candidate other than the candidate proposed by party members during preferential voting or a candidate proposed by the district or regional party committees. The decision of the party's National Executive Committee is final.⁵⁵ However, in the 2020 election CCM abandoned the fully participatory method; instead, a partial participatory approach was adopted.

In a partially participatory method a limited number of members cast preferential votes and the higher party authority makes the final nomination.⁵⁶ CDM is among the parties that often nominate their parliamentary candidates by way of the partially participatory method. In this method the members of the constituency or district meeting cast preferential votes and forward their opinion to the party's National Executive Committee which is responsible for making the final nomination. The members of the constituency or district meeting include the party's ward chairpersons, secretaries, treasurers and others.⁵⁷ To put it simply, not every member of the party is allowed to cast a preferential vote in the partially participatory method.

A brief observation on the procedures for nominating parliamentary candidates at party level is that the political parties are free to choose persons they wish to be their parliamentary candidates. The laws do not prescribe procedures that the parties should follow when nominating their parliamentary candidates. A further observation is that although some political parties have participatory procedures of nominating parliamentary candidates these do not guarantee that

53 As above.

54 CCM *Constitution of Chama Cha Mapinduzi 1977* (Revised 2017, CCM 2017) art 102(10)(g), [https://ccm.or.tz/website/nyaraka/nyaraka_file/2020-12-11%2013:23:48_Katiba%20ya%20CCM%202017%20\(dec%202018\).pdf](https://ccm.or.tz/website/nyaraka/nyaraka_file/2020-12-11%2013:23:48_Katiba%20ya%20CCM%202017%20(dec%202018).pdf) (accessed 9 November 2021).

55 Experience also shows that in some cases some party members who were aggrieved by decisions of the party's National Executive Committee to nominate a person other than the one nominated by members of the party resigned their membership and joined other political parties. Some of these members would contest the same parliamentary elections through their new political parties.

56 TEMCO (n 52) 27.

57 CHADEMA *Constitution of Chama Cha Demokrasia Na Maendeleo* (2016) art 7.4.5, <http://chadema.or.tz/wp-content/uploads/2018/03/KATIBA-YA-CHADEMA-YA-MWAKA-2006-TOLEO-LA-MWAKA-2016.pdf> (accessed 10 November 2021).

the will of the majority will prevail. The reasons are that final decisions are made by a few persons, usually party leaders who have overriding powers over decisions of party members. Moreover, during party nomination candidates are accused of influencing the nomination procedures through corruption and other manipulations.⁵⁸

7.2 Nomination by the National Electoral Commission

Nomination by NEC involves the following steps: First, the NEC will set a nomination date⁵⁹ and specify the date for issuing nomination forms to the candidates nominated by their respective political parties.⁶⁰ The NEC will set a single day for issuing nomination forms, usually from 08:00 to 22:00. If the candidate nominated by its political party fails to obtain nomination forms in that period, he or she forfeits the opportunity to be nominated by the NEC and consequently loses their right to stand for parliamentary election. It means that the political party whose candidate fails to obtain nomination forms will not have a contestant in that constituency.

Before the candidate is issued with nomination forms, he or she will have to provide the returning officers with an introduction letter to prove that the candidate is sponsored by a political party.⁶¹ The candidate then will complete and submit, during the nomination day, four copies of the nomination forms.⁶² The nomination forms require the personal particulars of the proposed candidate; a declaration that the proposed candidate is willing and qualified to contest the parliamentary election; certification by the regional/district secretary of the political party sponsoring the candidate; a declaration by the nominators/supporters nominating the candidate;⁶³ and a statutory declaration that the candidate meets the conditions set under article 67 of the Constitution.⁶⁴ Further, the candidate is required to make

58 TEMCO (n 52) 20.

59 Sec 37(1) Tanzania Elections Act.

60 Reg 24(1) National Elections (Presidential and Parliamentary Election) Regulations of 2020.

61 Regs 24(2) & 7(3) National Elections (Presidential and Parliamentary Election) Regulations.

62 Form 8B; see the first Schedule to the National Elections (Presidential and Parliamentary Election) Regulations.

63 The National Elections Act requires a parliamentary candidate to be nominated/ supported by no fewer than 25 nominators who are registered voters in the district of the constituency where the candidate is contesting is located. See sec 38(1).

64 Reg 31(2) National Elections (Presidential and Parliamentary Election) Regulations, read together with First Schedule to the Regulations Form 10.

a declaration that he or she will abide by the electoral code of conduct.⁶⁵

The date and time for submitting completed nomination forms is set by the NEC.⁶⁶ If the candidate proposed by his political party fails to submit the completed nomination forms plus other attachments during the prescribed time for submitting nomination forms, they forfeit the right to contest that parliamentary election. The completed parliamentary forms are submitted to the returning officers.⁶⁷ Regulation 27 of the National Elections (Presidential and Parliamentary Election) Regulations requires the returning officers or assistant returning officers, 'upon being satisfied that a proposed candidate qualifies to be nominated, certify the nomination in Form No 8B'. However, the decision of returning officers to nominate parliamentary candidates is not final. The nomination can be challenged, as discussed in the next part. If evidence is brought forward to prove the contrary, the nomination will be revoked.

The electoral law addresses the situation where there is only one nominated candidate (unopposed candidate) in a constituency. In particular, the parliamentary election regulations provide that where a single candidate is nominated the nominated candidate will be considered elected and waiting to assume office in the parliament upon taking the oath.⁶⁸ The law requires the NEC to publish in the *Government Gazette* a notice declaring unopposed candidates as being elected.⁶⁹ After such a declaration, citizens do not have an opportunity to cast a vote.

In practice, several circumstances may have an influence on there being an unopposed candidate. These include there being only one candidate nominated to stand for parliamentary election in that constituency; other nominated candidates fail to obtain nomination forms or fail to return completed nomination forms in the prescribed time; the returning officer nominates one candidate on the ground

65 Regs 26(3) & (4) National Elections (Presidential and Parliamentary Election) Regulations.

66 Reg 25(1) National Elections (Presidential and Parliamentary Election) Regulations.

67 The returning officers are vested with powers to oversee parliamentary elections in constituencies. Among other functions, returning officers are responsible to issue and receive nomination forms, to nominate parliamentary candidates in their respective constituencies and to hear and determine objections to the nomination of parliamentary candidates. See sec 7 of the National Elections Act; sec 7 and reg 25(1) National Elections (Presidential and Parliamentary Election) Regulations.

68 Sec 44 National Elections Act and Reg 28 National Elections (Presidential and Parliamentary Election) Regulations.

69 Sec 44 National Elections Act.

that other candidates do not meet the conditions prescribed by the law; and a candidate successfully objects to the nomination of the other candidates that were nominated by the returning officer to contest the same constituency.⁷⁰

The candidate may be elected unopposed because the members of the constituency they represent wish him/her to continue to represent them in parliament or because there is no other person to challenge their candidature, nevertheless, the laws and practices relating to unopposed candidates are questionable. The concept of unopposed candidates has been associated with the deterioration of democracy and an infringement of the right of the citizens to vote and to be elected. Usually, in many constituencies where candidates are elected unopposed, there have been claims by various groups that other candidates have been unfairly removed from the list of nominated candidates.⁷¹

The reactions of human rights and good governance activists to the laws and practices relating to unopposed candidates often are negative. In their 2010 election report the Tanzania Election Monitoring Committee (TEMCO) noted that being elected unopposed is a shortcut to victory and 'clever and unscrupulous politicians' use weaknesses in election laws to maximise the chance of being declared a member of parliament without going to the ballot box.⁷² Circumstances in the manner in which unopposed candidates are passed also are doubtful. Returning officers have been accused of assisting unethical contestants to pass unopposed. For instance, in one constituency, in the 2010 general election a parliamentary candidate who had not been nominated was refused appeal forms by the returning officer.⁷³ Since appeal is a right of a candidate, it may be concluded that the returning officer purposefully refused the appellant appeal forms in order to assist the candidate from another political party to be elected unopposed. In another incident

70 A detailed discussion of the laws and practices relating to the objections against parliamentary candidature is provided in the preceding part.

71 TEMCO (n 35) 36.

72 As above.

73 As above. In the above incident a candidate from CCM for Nyamagana constituency in Mwanza successfully objected to the nomination of the candidate from CHADEMA. The returning officer thus declared CCM candidates to have been elected unopposed. The CDM candidate wished to appeal to the NEC but the returning officer refused to issue him with an appeal form (Form 9B). The CDM candidate must collect the form from NEC headquarters, at Dar es Salaam. During the election the CDM candidate was elected as a member of parliament.

a candidate disappeared on the day of the return of nomination forms. Efforts to locate the candidate were in vain.⁷⁴

Since 2005 the number of parliamentary candidates elected unopposed has increased significantly. The number of candidates who were elected unopposed was eight in 2005, in 2010 this number doubled.⁷⁵ In 2015 the number of candidates declined to one⁷⁶ but in 2020 the number increased to 28 candidates.⁷⁷ Moreover, the trend has been that since 2005, only parliamentary candidates from one political party, CCM, the ruling party, are elected unopposed in general elections. This fact creates the sense that the laws and practices relating to unopposed candidates provide an opportunity for the abuse of the electoral laws by corrupt returning officers and/or government officials.

7.3 Objecting to the nomination of a parliamentary candidate and hearing procedures

Parliamentary electoral laws allow objections against the candidature of any nominated candidate on several grounds. These grounds include that the particulars of the candidate are not sufficient to identify him; that the nomination forms do not comply with the law and that the candidate has not complied with the requirements of the laws.⁷⁸ This last ground focuses on the legal/substantive qualifications of the candidate. In particular, the last ground aims at ensuring that the nominated candidate meets the conditions set by the Constitution of Tanzania and other electoral laws of the country and, generally, the ground is in conformity with the provisions of the Constitution. On the other hand, the first and second grounds do not concern the legal/substantive qualifications of the candidate but are concerned with the way in which the candidate's nomination form is completed. The grounds are more of the nature of procedural requirements than substantive requirements. To be more precise, the grounds focus on minor mistakes that can be corrected, without infringing the provisions of the Constitution, regarding the qualifications for one to stand for parliamentary election.

⁷⁴ TEMCO 'Report on the 2015 election in Tanzania' (May 2016) 91, <http://www.temco.udsm.ac.tz/index.php/publications/reports/reports-2016> (accessed 8 November 2021).

⁷⁵ TEMCO (n 52) 36.

⁷⁶ National Electoral Commission 'Taarifa ya Tume ya Taifa ya Uchaguzi kuhusu uchaguzi wa rais, wabunge na madiwani, 2015' (2016) 47.

⁷⁷ Government Notice 917 of 2020.

⁷⁸ Sec 40(1) National Elections Act.

The returning officers are vested with powers to certify that the nomination forms conform to the requirements of the law, and further to nominate the candidate having certified that the candidate qualifies to be nominated. This means that the returning officers inspect the forms to ensure that the forms are in conformity with the laws. They are able to identify minor errors, including typographical errors, lack of attachments and others. It is the view of the author that since these minor errors do not diminish the constitutional qualifications to be nominated as parliamentary candidate, instead of allowing for objections at a later period, the returning officers could require the candidate to correct the mistakes before they officially receive the candidate's nomination forms. This practice means, when the nomination forms are received by the returning officer, the forms comply with all procedural requirements. There could be an exception where the candidate refuses to correct the errors after being asked to do so by the returning officer.

Not very person can object to the nomination of the parliamentary candidate. Persons with the right to object to the nomination of the parliamentary candidate are the returning officers, the registrar of political parties, the director of elections and parliamentary candidates.⁷⁹ Objections are made in writing and these have to be lodged with the returning officer within 24 hours from the time of nomination.⁸⁰ The above requirement does not apply to objections made by returning officers.⁸¹

The powers to hear and make decisions on the parliamentary nomination objections are vested in the returning officers and the NEC. By vesting the returning officers with the power to decide on objections made, there are two assumptions: first, that the returning officer is vested with powers to revise his or her own decision to nominate a parliamentary candidate and, second, that the nomination by the returning officer is provisional and would be conclusive if no objection is made within time. The latter assumption makes greater sense than the former.

The candidate against whom the objection is made has to be notified of the objection and must be availed of an opportunity

79 Sec 40(20) National Elections Act and Reg 30(1) National Elections (Presidential and Parliamentary Election) Regulations.

80 Reg 30(2) National Elections (Presidential and Parliamentary Election) Regulations.

81 Sec 40(5) National Elections Act. If an objection is made by the returning officer, the officer is required to inform the respective candidate in writing about the objection before making his finding. After making his finding he has to forward same to the NEC.

to reply to the objection before the returning officer makes his or her decision on the objection.⁸² If satisfied with the grounds of the objection, the returning officer can delete the name of the candidate from the list of nominated candidates.⁸³

A parliamentary candidate aggrieved by the decision of the returning officer can appeal to the NEC within 24 hours from the decision of the returning officer.⁸⁴ During appeals determination, the NEC has powers to remove the candidate from the list of nominated candidates or to reinstate the candidate whose name was removed from the list of nominated candidates by the returning officer.⁸⁵ The decision of the NEC can be challenged by way of an election petition after the conclusion of the election.⁸⁶

It is important to note that the NEC does not deal with parliamentary candidates' objection appeals only, but also deals with presidential candidates' objections as well as the counsellorship candidates' objection appeals. Therefore, the process of determining parliamentary objection appeals may take a long time, which may impact the campaign schedules of the reinstated candidates.

8 Parliamentary campaigns

Parliamentary campaigns begin immediately after nomination and end the day preceding election day. The laws do not explicitly state how many days are available to the parliamentary candidate to conduct a campaign, however, reading through the provisions providing for the appointment of the election date, the days available for parliamentary campaigns should be at least 60 days and a maximum of 90 days.⁸⁷ This does not mean that all parliamentary candidates in a constituency or throughout the country should have an equal number of days for campaigning. This is because the period that is set for hearing and determining objections and appeals runs concurrently with the campaign period. Therefore, those parliamentary candidates who appeal against the removal of their names from the list of nominated candidates will have to wait

82 Sec 40(4) National Elections Act.

83 Reg 30(6) National Elections (Presidential and Parliamentary Election) Regulations.

84 Sec 40(6) National Elections (Presidential and Parliamentary Election) Regulations.

85 Reg 32(4) National Elections (Presidential and Parliamentary Election) Regulations.

86 Reg 32(6) National Elections (Presidential and Parliamentary Election) Regulations.

87 Sec 46(1) National Elections Act.

for the final decision of the NEC to learn whether their names have been reinstated. During this period when the appellants are waiting for the final decision, other parliamentary candidates continue with their election campaigns. It follows, therefore, that even if the appellants succeed in their appeal, they will have fewer days for campaigning compared to their fellow parliamentary candidates whose nominations were not challenged.

In the 2020 parliamentary election parliamentary campaigns started on 26 August and ended on 27 October 2020. The NEC started to determine nomination objection appeals on 8 September 2020 and finalised the work on 17 September, 23 days after the start of the campaigns. During the above-mentioned period the NEC determined 160 parliamentary objection appeals out of which 66 appeals succeeded and the candidates whose names were removed from the list of nominated candidates were reinstated.⁸⁸ It should further be noted that the decisions of the NEC are communicated officially by letter addressed to the appellant. Thus, the reinstated candidates had to wait for the official letters from the NEC before starting their campaigns. The waiting period took some days, since there were many objection-appeals. Therefore, some parliamentary candidates found themselves losing up to half of the total period available for campaigns. That being the case, the reinstated parliamentary candidates had to reschedule their campaign timetables and some candidates could not reach all members of the community or areas in their respective constituencies due to a lack of time.

9 General observations

Tanzanian parliamentary election laws and practices contain several weaknesses that deny citizens the right to vote for the members of parliament they wish to elect. Generally, the weaknesses in the laws and practices are a result of vesting powers in the hands of a few people to decide who is to be member of parliament. In the end, citizens become rubberstamps of the decisions of the few. In particular, weaknesses include the lack of democratic and participatory procedures for nominating parliamentary candidates at the party level. Even in the case of some political parties that involve party members at an early stage, the political party leaders have overriding powers to nominate parliamentary candidates who will represent the party in the parliamentary elections.

⁸⁸ <https://www.nec.go.tz/uploads/documents/sw/1600449332-09-18-2020-17.29.31.pdf> (accessed 21 September 2020).

Another notable weakness is the prohibition on private candidates. This prohibition causes members of parliament to be more loyal to their political party and party leaders than to the voters. The prohibition also limits the right of voters to vote for the representatives of their choice. Furthermore, the prohibition contributes to the abuse of powers by party leaders, especially in endorsing their friends to contest parliamentary elections.

The laws and practices for nominating parliamentary candidates by the NEC enable a limited number of people to determine who is to be a member of parliament in a particular constituency. This is true with respect to the laws and practices relating to unopposed candidates. The laws and practices relating to the endorsement of unopposed candidates take away the rights of citizens to elect their own members of parliament by providing an opportunity for the returning officers illegally to remove contestants from parliamentary elections. It is advised that in order to ensure that citizens exercise their rights to vote and, further, in order to reduce the abuse of parliamentary electoral laws, where a single candidate is nominated in the constituency, the candidate should equally be subjected to a vote.⁸⁹

Furthermore, the institution responsible for supervising parliamentary elections is not independent. The President, who is a member of a political party, is vested with powers that give him an opportunity to control the functioning of the NEC. The powers to appoint and discharge members of the NEC have the result that NEC members are accountable to the President. In such a situation it is practically impossible for the NEC to work independently and professionally. Therefore, the NEC needs be reformed in order to guarantee its independence and efficiency.

Weaknesses are revealed in election campaigns where there is not equality among parliamentary contestants due to the period within which objection appeals are heard and the period in which campaigning is to start run concurrently. Therefore, a parliamentary contestant whose candidature is challenged ends up having less time for campaigning compared to the contestant whose candidature is not challenged. The effects of having unequal campaigning time are evident where a parliamentary candidate fails to campaign in all areas of the constituency due to the lack of time.

89 Tanzania Civil Society Consortium for Election Observation and Legal and Human Rights Centre (Tanzania) 'Report on the 2015 general elections of United Republic of Tanzania' (March 2016) 74.

10 Conclusion

The right to vote is at the heart of representative democracy. It provides legitimacy to political leaders including members of parliament. As demonstrated in this article, the right to vote should be guaranteed both in laws and practices. Without guarantees it is practically impossible for citizens to elect or vote for the members of parliament they prefer. The Tanzanian laws and practices relating to the protection and promotion of the right to vote fall short of established international standards. These shortfalls are a result of vesting powers in a few people instead of the citizens to decide who is to be their representative or member of parliament.

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Critical reflections on the justiciability of the right to education in Ghana

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Summary: *Article 38(1) of the 1992 Constitution of Ghana provides that 'the state shall provide educational facilities at all levels and in all the regions of Ghana, and shall to the greatest extent feasible, make those facilities available to all citizens'. 'Feasible' in plain language means 'if possible'. This means that if it not possible, educational facilities would not be made available to all. Article 38(3) also provides that the state shall 'subject to the availability of resources' provide equal and balanced access to secondary education and other pre-tertiary education. The wording of article 38(3) suggests that, in the event of a lack of resources, there would be no equal and balanced access to basic education. Articles 38(1) and 38(3) serve as a constitutional*

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constraint to the Free Compulsory Basic Education in Ghana because, if the provision of educational facilities is subject to 'feasibility' and if its equal and balanced access is subject to resource availability, then free compulsory universal basic education as envisaged under international human rights instruments will be difficult to realise. Through a doctrinal approach to research based on legal literature, this article analyses the issue of whether or not the justiciability of the right to education has been adequately addressed by the legal jurisprudence in Ghana. We conclude that the Constitution, legislation, policy and jurisprudence of the courts acknowledge that the right to education is a right that can be enforced in courts. In this sense, there are many avenues through which one can argue for justiciability of the right in Ghana, including through article 33(5) of the Constitution.

Key words: *Ghana; education; justiciability; human rights; 1992 Constitution of Ghana*

1 Introduction

This article aims to address the issue of whether or not the justiciability of the right to basic education has been adequately addressed by the legal jurisprudence in Ghana. The definitive question to answer in this discussion is whether Ghana provides the milieu to satisfy rights holders to seek redress in its courts on the right to education.

Education surfaces as a critical index to ascertaining the achievement of a human development trajectory any time human development discourse is activated.¹ Education is regarded as a critical priority area for securing the right to sustainable development.² The commitments required in the legal, political and policy framework are non-negotiable to achieving the objectives set under the United Nation (UN) 2030 Agenda for Sustainable Development (Agenda 2030).³ Agenda 2030 spells out the scope of commitments of UN member states to the obligation of 'providing inclusive and equitable quality education at all levels – early childhood, primary, secondary, tertiary, technical and vocational training'.⁴ Agenda 2030 emphasises that

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- 1 See the Transforming the World: The 2030 Agenda for Sustainable Development.
 - 2 RA Ige & CC Ngang 'The right to development: An African feminist view' in CC Ngang, SD Kamga & V Gumede (eds) *Perspectives on the right to development* (2018) 112.
 - 3 'Education', <https://www.right-to-education.org/issue-page/education-2030> (accessed 24 February 2020).
 - 4 Agenda 25, 2030 Agenda for Sustainable Development.

[a]ll people, irrespective of sex, age, race, ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them acquire the knowledge and skills needed to exploit opportunities and to participate fully in society.⁵

The inclusion of the 17 Sustainable Development Goals (SDGs) in Agenda 2030 was a step towards committing all states to specific issues that are pivotal to fighting hunger, poverty, inequality and bad governance in the world. SDG 4, which is dedicated to education, is to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.⁶ This sets the clear basis for the argument that there is a nexus between the right to education and Agenda 2030. The educational goal under the SDGs 'is right-based and seeks to ensure the full enjoyment of human rights as fundamental to achieving sustainable development'.⁷

To this end, the proximate obligation to this goal under international law is for states to provide free, compulsory, and progressive basic education to all.⁸ Ghana has since 2017 reached this target through a deliberate government policy towards free access to secondary education with a commitment to non-discriminatory access to quality pre-school (early childhood care and education which, although regarded as critical, are not seriously attended to under international human rights law)⁹ and primary education.

The educational right under Agenda 2030 only commits countries to implementing mechanisms that ensure a participatory, transparent, accountable and effective framework that secures this right at both the local and national levels.¹⁰ It is argued that accountability as envisaged by Agenda 2030 should incorporate judicial accountability to ensure the effective implementation of its mandate. This will also empower rights holders to seek legal remedies for violations, and hold violators to account for their positive and negative duties.

The duty of the state to safeguard the rights of citizens includes steps to prevent third parties from infringing on the rights of others. It requires that the state provides the environment for the vulnerable, such as children of school-going age, to enjoy such rights. What

5 As above. For further reading, see also 'Human rights guide to the Sustainable Development Goals'.

6 Sustainable Development Goal 4 Agenda 2030.

7 'Education' (n 3).

8 Ghana's obligation to this goal is captured under arts 38(2) & (3)(a)-(c) of the Constitution.

9 'Education' (n 3).

10 As above.

has become the most difficult obligations relating to justiciability are those that concern positive duties, to fulfil the positive duties imposed by the courts and to simultaneously provide the needed resources to meet the conditions of the obligations.¹¹ However, it must be emphasised that the verdicts of the judiciary on issues of justiciability of socio-economic and cultural rights have an enormous impact on the development of justice jurisprudence and the psychology of the ordinary person on access to justice.¹² The courts, therefore, must place at the centre of their reasoning in judgments the importance of the right at stake in cases involving social, economic and cultural issues, to protect and restore the fundamental human rights of plaintiffs.

The article will focus on analysing Ghana's legal obligations under international human rights law *vis-à-vis* justiciability of the right to education under its domestic law, and proffer some recommendations for the way forward.

2 Right to education under international and regional human rights law

In December 1948 in Paris, France, the UN proclaimed through its General Assembly Resolution 217A and adopted the Universal Declaration of Human Rights (Universal Declaration) to work towards achieving the protection of the fundamental human rights of all citizens of the world as a cardinal foundation for equality and world peace. To the extent of fostering development and world peace, the Universal Declaration emphasised education to provide comprehensive and all-embracing access and focus to all. It emboldened the synergies between education, development and peace and provided:¹³

Education shall be directed to the full development of the human personality and [to] the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Particularly noted in its Preamble, the Universal Declaration affirms that 'recognition of the inherent dignity and [of] the equal and inalienable rights of all members of the human family is the

11 See A Nolan, B Porter & M Langford 'The justiciability of social and economic rights: An updated appraisal' (2007) 36.

12 As above.

13 Art 26(2) Universal Declaration.

foundation of freedom, justice and peace in the world'.¹⁴ Giving impetus to this affirmation, the Universal Declaration emphasises in article 1 that '[a]ll human beings are born free and equal in dignity and rights'.¹⁵ It is contended that any deviations from any of the rights set hereafter in the preceding articles of this Declaration (the right to education inclusive) amount to the usurpation and detracting from the dignified life of anyone who suffers such violation(s). Education is a human right. It is right that must be realised, respected and protected by all duty bearers. At the least, this is what the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶ affirm.

Without shades of grey, the Declaration concerning education is that '[e]veryone has the right to education'.¹⁷ Article 13 of ICESCR states that '[e]veryone has the right to education. Primary education should be compulsory and free to all'.¹⁸ The emphasis of these provisions to this end reinforces free and compulsory education at least at the basic level of education.¹⁹ The African Charter on Human and Peoples' Rights (African Charter)²⁰ legitimises the improvement of the well-being of its citizens through the practicalisation of total realisation of the fundamental human rights²¹ proclaimed under ICESCR. Again, the right to education is also guaranteed in the Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (African Children's Charter).²² The challenge again remains with how the ordinary citizen could be informed about these rights. It is also a matter of importance to highlight the relevant avenues to seek enforcement by overcoming the complex legal architecture for justice and equity.²³

14 Preamble to the Universal Declaration para 1.

15 Art 1 Universal Declaration.

16 International Covenant on Economic, Social and Cultural Rights (1966), together with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) make up the International Bill of Human Rights.

17 Art 26 Universal Declaration.

18 International Covenant on Economic, Social and Cultural Rights, <https://www.coe.int/en/web/compass/international-covenant-on-economic-social-and-cultural-rights> (accessed 20 July 2020).

19 As above.

20 Ghana ratified the African Charter in 1989, <https://www.achpr.org/statepartiestotheafricancharter> (accessed 4 August 2020).

21 Preamble to the African Charter on Human and Peoples' Rights (1981/1986).

22 African Charter on the Rights and Welfare of the Child adopted on 11 July 1990, enforced from 29 November 1999.

23 E Durojaye, O Adeniyi & CC Ngang 'Accesses to justice as a mechanism for the enforcement of the right to development in Africa' in Ngang et al (n 2) 47.

3 Nature of article 17 of the African Charter

As indicated above, the provision on the right to education in the African Charter, as it were, was a direct follow-up to article 26(1) of the Universal Declaration and article 13 of ICESCR. The Universal Declaration and ICESCR demand education as a right for every individual. The link between the provisions in the three instruments therefore is obvious. The provisions should be seen in the same context, except for their jurisprudential application. While the Universal Declaration and ICESCR provisions bind all UN member states, the African Charter applies only to African Union (AU) member states.

There is no contestation on the explicit expositions given under article 17(1) concerning the right to education in the African Charter. Deontologically, the right to education imposes an ethical duty on member states of the AU to prioritise education as a moral norm. The full text of article 17 thus states the following:²⁴

- (1) Every individual shall have the right to education.
- (2) Every individual may freely take part in [the] cultural life of his community.
- (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

The duty inherent in article 17(1) enjoins countries, not only out of necessity but as a moral obligation, to structure their legal architecture to prevent the violation of the right espoused therein. The natural flow from the obligation under this article 17(1), therefore, is nothing but a legal and ethical obligation which requires fairness, equity, non-discrimination, responsiveness, equality and accountability. A textual interpretation²⁵ of the article confirms an explicit enunciation of the right to education under 17(1). The obligatory wording of the article leaves no ambiguity in its justiciability and, for that matter, its enforceability.

It should be emphasised to underline that article 17 does not split the components or levels of education to be covered as a right. In its totality and, read in conjunction with the African Children's Charter, it presumably is consistent to underscore that this right contemplates a person up to the age of 18 years,²⁶ at which stage most children in Ghana are undergoing pre-university education.

24 Arts 17(1) to (3) African Charter.

25 For more on what a textualist do, see the case of *Green v Bock Laundry Mach Co* 490 U.S. 504 528 (1989).

26 Art 2 African Children's Charter.

Article 2 of the African Children's Charter states that '[f]or [the purposes of] this Charter, a child means every human being below the age of 18 years'.²⁷ In specificity and consistent with this holding in the foregoing, the Childre's Charter specifies that '[e]very child shall have the right to education'²⁸ and emphasises the provision of free and compulsory basic education²⁹ while encouraging progressively free and accessible secondary education in its different forms to all.³⁰ From the perspective of human rights discourse, article 17(1) presents no scintilla of doubt about the fact that education is a justiciable right under the African Charter.

The normative provisions on which any human being qualifies as a child in the African Charter read in tandem with the African Children's Charter seem conterminous with the constitutional and legislative underpinnings of Ghana's definition of a child.³¹ This therefore resonates with the call to push for more 'complete' justiciable provisions under the laws of Ghana to give meaning to seeking the welfare of the child under the Children's Act 560 of 1998 of Ghana.³²

4 Justiciability of the right to education under international law

Justiciability connotes access to justice. Access to justice is a fundamental credential of any democratic and progressive society.³³ It is critical as an opportunity to seek accountability from violators of the rights of others.³⁴ It deters impunity and discourages trumping on the fundamental human rights of other citizens.³⁵ Justiciability brings out the issue of whether the right holder has access to a structured and existing mechanism to remedy the abuse or to seek restoration. ICESCR defined justiciability as 'those matters which are appropriately resolved by the courts'.³⁶ In the international fora, bodies such as the African Commission on Human and Peoples'

27 As above.

28 Art 11(1) African Children's Charter.

29 Art 11(3)(a) African Children's Charter.

30 Art 11(3)(b) African Children's Charter.

31 Sec 1 Children's Act 560 of 1998; art 28(5) 1992 Constitution.

32 The Preamble to the Children's Act states among the objects to reform and consolidate the law relating to children in order to provide for the rights of the child.

33 FK Korankye-Sakyi 'The civil justice reform debate: An African perspective' in ET Yin & NF Kofie (eds) *Advancing civil justice reform and conflict resolution in Africa and Asia: Comparative analyses and case studies* (2021) 46.

34 'Justiciability', <https://www.right-to-education.org/issue-page/justiciability> (accessed 24 February 2020).

35 As above.

36 Para 10 ICESCR (n 18).

Rights (African Commission), the African Court on Human and Peoples' Rights (African Court),³⁷ the European Court of Human Rights, the European Committee of Social Rights,³⁸ and UN treaty bodies have jurisdictions over such issues of human rights violations.

A quick review of human rights jurisprudence under international law will reveal that there has always been a dichotomy between socio-economic and cultural rights, on the one hand, and civil and political rights, on the other.³⁹ In 1966 two distinct instruments were adopted to clarify this distinction: ICESCR⁴⁰ and the International Covenant on Civil and Political Rights (ICCPR).⁴¹ One argument postulated for the separation of the instruments as against a unified Bill of Rights at that stage was the fact that socio-economic and cultural rights are not justiciable as compared to civil and political rights, which cases go before the courts every time, irrespective of the jurisdiction the latter was occasioned.⁴² Again, socio-economic and cultural rights present varied and complex obligations on the state as compared to civil and political rights. The freedom of association, for instance, as a right under civil and political rights, may only impose a negative responsibility on the state to prevent interferences with the right of a citizen to freely associate. On the other hand, the right to education may demand positive and cumbersome duties that would require the state to provide school buildings, qualified teaching personnel as well as teaching and learning materials as a result of a successful adjudication against the state.

The resistance to incorporating socio-economic and cultural rights into the national legislative framework to make them justiciable stems from the apparent anxiety that when the courts make holdings on these rights, they invariably constitute policy decisions that have binding effects on resource allocations, a situation which often is abhorred by the executive arm of governments, as constituting a violation of the principle of separation of powers under any democratic dispensation.⁴³

37 Established under the auspices of the African Charter on Human and Peoples' Rights in 1998.

38 The ESCR Committee has a very narrow jurisdiction related to 'vocational guidance and vocational training'; see arts 9 and 10 of the Revised Social Charter.

39 KK Mwenda & SG Owusu 'Human rights law in context: The case of Ghana' (1998) 7 *Tilburg Law Review* 263.

40 This instrument guaranteed *inter alia* the rights to education, health and work.

41 This instrument guaranteed *inter alia* the rights to life, freedom of expression and a free trial.

42 'Justiciability' (n 34). See also Nolan et al (n 11).

43 Mwenda & Owusu (n 39); M Langford et al 'Introduction: A new mechanism' in M Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A commentary* (2016) 2; see also 5th session

However, the case for the strict confinement of these rights into categorisations has been whittled down in recent developments, on the basis that human rights generally are a composite phenomenon, indivisible, interconnected and interrelated.⁴⁴ It has been posited that the arbitral classification of these sets of rights puts them out of the purview of the courts, which runs contrarily to the indivisibility tag accorded to these human rights.⁴⁵ Again, the arguments for the dichotomy have been severally debunked as it is now generally accepted that all human rights, whether civil and political rights or socio-economic rights, endanger three forms of obligations – the obligation to respect, protect and fulfil.⁴⁶ To buttress why the dichotomy is wrong, it is instructive to note that even though the right to form or join trade unions is a socio-economic right, it also imposes negative responsibilities on the state as civil and political rights will do. Again, just as the right to education which requires positive responsibilities on the state do, the same can be said about the right to fair trial as a civil and political right which would require a working police and prosecution service, court buildings, personnel and judges and funding for legal aid to the victim.⁴⁷ The position of the UN on this issue is that the distinctions ostensibly created between these rights are needless simply because of the nature of these rights or by the dictates of the provisions of ICESCR.⁴⁸

For instance, both CRC (1989) and the African Children's Charter fuse both civil and political rights and socio-economic and cultural rights. There is stronger evidence to the effect that socio-economic and cultural rights can easily be made justiciable and effectively enforced as seen under regional laws and the complaints procedures for ICESCR and CRC.⁴⁹ There are options to satisfactory justice delivery apart from judicial remedy if administrative options are adequately provided within a jurisdiction of a state party in line with the tenets and procedures established by ICESCR.⁵⁰

(1990) document E/1991/23 General Comment 3: The nature of states parties' obligations (art 2, para 1 of the Covenant).

44 Para 5 of the Vienna Declaration and Programme of Action (1993).

45 Para 10 of ESCR Committee 'General comment No 9: The domestic application of the Covenant' E/C.12/1998/24.

46 D Bilchitz 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12 *International Journal of Constitutional Law* 710.

47 As above; D Robertson 'A dictionary of human rights' (2004); Y Ghai 'Human rights and social development toward democratisation and social justice' United Nations Research Institute for Social Development. Democracy, Governance and Human Rights Programme Paper (5 October 2001) 33-34; TJ Melish 'Protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims' (2002) 36.

48 Bilchitz (n 46).

49 'Justiciability' (n 34). See also Nolan et al (n 11).

50 Para 9 ESCR Committee 'General Comment 9: The domestic application of the Covenant' E/C.12/1998/24.

Under international and the regional bills of human rights, the right to education is guaranteed and universal to every person.⁵¹ In that regard, such right can be actualised through a national legislation. Since Ghana is a common law state that follows a dualist approach to international treaty implementation, it is required of it to nationalise or domesticate any instrument ratified through its Parliament before they become enforceable.⁵²

Again, it has been argued that the mere presence of legal backing for a right does not lend it the potency expected, unless appropriate mechanisms are put in place to enforce it.⁵³ The avenue for legal enforcement and recourse, therefore, is the prescription to make the right to education justiciable in any dispensation.⁵⁴ To consider the right to education as a justiciable right requires that upon its violation, the citizen or the right holder has the avenue to claim an enforceable remedy (including, but not limited to, interlocutory or perpetual injunctions, changes in policy measures, the striking down or amendment of laws, administrative penalties, and criminal punishment) before a properly-constituted fair and unbiased entity.⁵⁵ This also infers that the institutions of the state, such as the courts or administrative bodies, can compel the state as a duty bearer to account for its actions or otherwise in line with its obligations under international, regional and national laws which it has signed, ratified or enacted on its own.

The role of the courts to hold the state and state actors liable for violations of rights and to compel them to appease such victims or the aggrieved (complainants) with commensurable remedies is founded on good tenets of the rule of law under international law. In the event of the failure of a case on merit or on account of technicalities, it is still useful to amplify the tenets of such right and 'attract media attention, which may lead to accountability and change in the future'.⁵⁶ Individuals and groups are allowed under such circumstances where their rights to education are violated to seek redress before the courts for appropriate interventions and protections. By giving the right to education a total justiciable status

51 Art 26 Universal Declaration; art 16 African Charter. See 'Justiciability' (n 34).

52 EK Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37-39; AKP Kludze 'Constitutional rights and their relationship with international human rights in Ghana' (2008) 41 *Israel Law Review* 677-679.

53 'Justiciability' (n 34).

54 As above.

55 International Commission of Jurists (2008) 1.

56 'Justiciability' (n 34).

under the jurisprudence of Ghana reinforces accountability for the economic, social and civil rights of the people.

At the level of international law, the justiciability of the right to education has been explicitly coded, and finds expression, for example, under the complaint's procedures under ICESCR and CRC.⁵⁷ The entry into force of these procedures reflects on the number of case laws that have emerged under the purview of international law.⁵⁸ By reason of this, various dimensions of the right to education have been taken through judicial tests in various international fora with varying outcomes.

Regional level interventions on the justiciability of the right to education are catered for with mechanisms that have proven applicable and accessible. These mechanisms have been well received and passed as accountable, compared to national procedures as pertains in Ghana. For example, in the case of *Free Legal Assistance Group & Others v Zaire*⁵⁹ the African Commission ruled that the closure of universities and senior high schools in Zaire (presently the Democratic Republic of the Congo (DRC)) for about two years on the grounds of mismanagement of public funds was a violation of the provisions of the African Charter.⁶⁰

In most jurisdictions discrimination has been noted as the reason for amenability to their domestic laws for the justiciability of the right to education.⁶¹ Issues on access, quality and educational funding also surface as rampant infractions for litigations at the national level⁶² as well as matters concerning private participation in the provision of educational services in a sovereign nation.⁶³ It has been noted that in some jurisdictions there are clear manifestations of impediments to the justiciability of the right to basic education.⁶⁴

Constraining elements to access to justice in the face of clear legal provisions for the justiciability of the right to education have their effects on the subject matter under discussion. There have been

57 As above.

58 See F Coomans 'Justiciability of the right to education' (2009); K Singh 'Report of the United Nations Special Rapporteur on the Right to Education: Justiciability and the right to education (2012); Interights 'Litigating the right to education in Africa' (2013).

59 (2000) AHRLR 74 (ACHPR 1995).

60 Art 17 African Charter.

61 'Justiciability' (n 34); see the case of *Brown v Board of Education*.

62 *Progressive Peoples Party (PPP) v Attorney General* (J1/8/2014) [2015] GHASC 95. See also *Awuni v West African Examinations Council* [2003-2004] 1SCGLR 471.

63 'Justiciability' (n 34). See *Asare v Attorney General and Ghana Legal Council* (2020) No J1/01/2020.

64 As above.

instances where the General Comments of the ESCR Committee on the right to education has brought to light some factors, such as availability, accessibility, acceptability, adaptability, affordability, and the effectiveness of the judicial forum, that impede rights holders, including marginalised groups, who wish to bring before the courts cases of violations of their rights to education.⁶⁵ These factors have been established as major constraints to the civil justice jurisprudence in Africa generally.⁶⁶

5 Status of education in Ghana

In 1996 the Free, Compulsory and Universal Basic Education (fCUBE) policy was promulgated and launched. The ten-year programme from 1996 to 2005 was to fashion out the policy framework, activities and desired strategies to realise the aims of the fCUBE for all children from the ages of four to 14 who are expected to be in the kindergarten to the junior high school.⁶⁷

The management of education at the pre-tertiary levels is the responsibility of the Ghana Education Service (GES) under the Ministry of Education with the mandate to develop policies and policy implementation strategies at that level.⁶⁸ It is headed by a Director-General and very decentralised at all districts in the 16 regions of the country. The management of education at this level receives support from parent-teacher associations, school management committees, teacher-organised associations and other civil society organisations dedicated to education. It must be pointed out that in Ghana, child welfare, training and education also fall under the scope of mandates of the Ministry of Employment and Social Welfare as well as the Ministry for Gender, Children and Social Protection for the provision of facilities to resource creches, day-care centres, nurseries and kindergartens. However, at the tertiary level the institutions are autonomous and are governed by their respective charters under the supervision of the Ministry in charge of Education.

Pre-school (ages three to five) in Ghana is not nominally compulsory but, as stated earlier, kindergarten education (ages four to five) is compulsory under the fCUBE and regarded as part

65 As above. See ESCR Committee General Comment 3 (1990) paras 5 & 6; ESCR Committee General Comment 9 (1998) paras 9-15.

66 Korankye-Sakyi (n 33).

67 In 2007/2008 kindergarten education was formerly incorporated into the fCUBE.

68 Sec 4 of Act 778. See also Ministry of Education, Ghana 'Education Sector Analysis 2018' (2018) xiv.

of basic education.⁶⁹ Primary education (ages six to 12), which is divided into lower and upper grades, constitutes the second stage of education and is deemed to be compulsory. The 2007 education reform generally divided secondary education into junior and senior high levels, with three years' duration at each level. Vocational and technical education (TVET) is considered analogous with the senior high education and therefore takes the same three years to complete.⁷⁰ Non-formal education and special schools target at improving the literacy levels of people who did not have access to the formal stream of education and/or persons with disabilities, respectively. The tertiary level of education covers traditional universities, technical universities (formerly polytechnics), colleges of education and nursing training institutions and other post-secondary accredited institutions.

The Education Sector Analysis (ESA) report of 2018⁷¹ represents that gross enrolment rates exceeded 100 per cent for kindergarten and primary and had over 85 per cent for junior high school in the past years.⁷² At the senior high school level, the report indicates a significant increase in access from 37 per cent in 2011/2012 to 50 per cent in 2016/2017 in the gross enrolment rates and it is expected to appreciate with the intervention of the Free SHS policy.⁷³ Focus and interest in TVET in Ghana is woefully low. It is estimated that in 2013 only approximately 2,1 per cent of students chose TVET institutions of their own volition through the placement system.⁷⁴ Only about 3 per cent of the total education budget goes to finance that section.⁷⁵

As the tertiary gross enrolment rate for 2014/2015 indicates, even though some improvement was registered for both the numbers of institutions and admissions, it could only manage as low as 14,2 per cent. Remarkably, private tertiary institutions constitute about 50 per cent of the number of tertiary institutions in Ghana, although the enrolment stood at only about 19 per cent.⁷⁶

69 United Nations Education, Scientific and Cultural Organisation 'World data on education – Ghana' 7th edition (2010/11).

70 Ministry of Education, Ghana 'Education Sector Analysis 2018' (2018).

71 This project was developed based on the United Nations Educational, Scientific and Cultural Organisation (UNESCO)/International Institution for Educational Planning (IIEP) guidelines for sector analysis and underscores 'both the strengths and the weaknesses of the current education system to inform and direct necessary changes'.

72 Ministry of Education (n 70) xvi.

73 Ministry of Education (n 70) xvii.

74 Ministry of Education (n 70) xviii.

75 As above.

76 As above.

Over the years, interventions and schemes such as the Capitation Grant (CG), the School Feeding Programme (SFP) and the Free School Uniform Programme (FSUP) have been adopted by different regimes to enhance the access to and quality of education.⁷⁷

Significant funding allocations are annually budgeted for the education sector from the national budget to improve on access, infrastructure, man-power development, compensation, quality, expansion, and so forth. In 2015 it was reported that 78 per cent of the funding for the sector came from central government's coffers while the rest was sourced from the Ghana Education Trust Fund (GETFund) and the Annual Budget Funding Amount (sourced from the oil revenue).⁷⁸ It is also instructive to note that a huge chunk of the budget allocations goes into goods, services and capital expenditures. Significantly, Ghana is singled out among its peers in West Africa as the only country that exceeds its budget allocation to education by international benchmarks of 6 and 20 per cent of a country's gross domestic product (GDP) by UNESCO and Global Partnership for Education (GPE) respectively.⁷⁹

Significant investments and commitments have so far been made to education in Ghana at all levels under different regimes of governments to make the right to education a fulfilled reality.⁸⁰ Despite these strides, it is important to highlight some key challenges in the education sector in Ghana which include, but are not limited to, the lack of resources for teaching and learning; the inadequate supply of trained and qualified teachers which affects the teacher-pupils ratio negatively; and the low enrolment of girl learners.⁸¹ These challenges have informed the introduction of various measures by governments to resolve their impacts on the right to education.⁸²

77 JK Brenyah 'Implementation of social protection interventions in Africa: The trend in the outcomes of free basic education in Ghana, Malawi, Kenya and Uganda' (2018) 6 *Universal Journal of Educational Research* 2822; VE Arkorful et al 'Equitable access and inclusiveness in basic education: Roadblocks to sustainable development goals' (2019) *International Journal of Public Administration* 1; A Abotsi 'Expectation of school feeding programme: Impact on school enrolment, attendance and academic performance in elementary Ghanaian school' (2013) 3 *British Journal of Education, Society and Behavioural Sciences* 76.

78 Ministry of Education (n 70) xiv.

79 Ministry of Education (n 70) 11.

80 Brenyah (n 77).

81 C Aheto-Tsegah 'Education in Ghana: Status and challenges' Commonwealth Education Partnerships 2011, <https://www.cedol.org/wp-content/uploads/2012/02/Charles-Aheto-Tsegah-article.pdf> (accessed 29 October 2021).

82 As above.

6 Justiciability of the right to education in Ghana

The constitutional injunctions that underpin the right to education in Ghana are spelled out in article 25 of the Constitution with clear objectives elaborated in the Directive Principles of State Policy under article 38 of the Constitution.⁸³ Other legislations that serve as enabling instruments for same are Act 560,⁸⁴ Act 778⁸⁵ and Act 718,⁸⁶ which receive more elaboration in previous and subsequent parts. The constraints that inhibit the conformity of legislative underpinnings with the international human rights instruments are those found under articles 38(1) and 38(3)(a), despite the expressed provisions in article 25 of the Constitution. Even though international human rights instruments are aimed at achieving availability, accessibility, acceptability and adaptability, judicial jurisprudence upheld by the courts⁸⁷ has not totally conformed to these expectations as their holdings have yielded to the constraints encumbered on the rights to education under the Constitution.⁸⁸

Education as a right is not an absolute constitutional entitlement in Ghana.⁸⁹ The obligation of the state only goes to the extent of providing 'equal educational facilities and opportunities' at all levels to all citizens as far as practicable.⁹⁰ This position was given a judicial endorsement in *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others*⁹¹ and instructively affirmed in the case of *Progressive Peoples Party (PPP) v Attorney General*,⁹² as will be discussed later.

6.1 Textual constraints to the right to education under the 1992 Constitution

As already noted, the 1992 Constitution of Ghana provides for free compulsory and available basic education for all. In the Ghanaian legal system legislation is recognised as an important tool for constitutional interpretation.⁹³ Free education is defined in section

83 See arts 38(1)-(3)(a) 1992 Constitution.

84 Children's Act 560 of 1988.

85 Education Act 778 of 2008.

86 Council for Technical, Vocational Educational Training Act 718 of 2006.

87 *FEDYAG (No 2)* (n 91) and *Progressive Peoples Party* (n 92).

88 Arts 38(1) & 38(3)(a) 1992 Constitution.

89 See the dichotomy in states' obligations under arts 38(2) and (3) of the Constitution.

90 Art 25(1) read in conjunction with art 38(1) of the Constitution.

91 *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others* [2011] 2 SCGLR 1081.

92 *Progressive Peoples Party* (n 58). See also *Awuni v West African Examinations Council* [2003-2004] 1SCGLR 471.

93 Art 11 1992 Constitution.

30 of the Education Act as 'the provision of teachers and the relevant materials for the quality teaching and learning in basic education by the authority responsible'. The authority responsible for the provision of these materials is the government. Regrettably, as noted, there is a paucity of educational infrastructure to actualise this provision. There is no enforcement mechanism for a clearly-defined remedy in the Constitution nor in the legislation even if the state chose not to provide these materials, unless one relies on the prescriptive provisions in articles 2 and 33.

Section 2 (1) of the Education Act⁹⁴ conveys the intention behind compulsory education. It provides that 'a child who has attained school going age shall attend a course of instruction by the Minister in a school recognised for that purpose by the Minister'. The question arises as to who is responsible to ensure that a child goes to school. From sections 2(4) and 6 of Act 778 it appears that the duty is imposed on parents. The respective provisions require the parent of a child who has refused to go to school to report themselves to the District Assembly Social Welfare Committee. This obligation is practically impossible since most parents will not be willing to undertake this. Thus, some parents even engage the services of children who are not going to school on the farms and trade. In instances where a parent genuinely cannot afford to send their child to school, the district assembly may support such children. The use of the word 'may' does not make the duty imposed on the district assembly mandatory and, hence, the district assembly may exercise a discretion as to whether or not to assist. This renders the enforcement of compulsory education as envisaged under the Constitution and relevant legislation elusive.

The universality of free education is also challenged by the text of article 38 of the Constitution. Article 38(1) of the Constitution 1992 provides that '[t]he state shall provide educational facilities at all levels and in all regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to all citizens'. 'Feasible' in plain language means 'if possible'. This means that if it not possible, educational facilities would not be made available to all. Article 38(3) also provides that the state shall 'subject to the availability of resources' provide equal and balanced access to all levels and forms of pre-university education. The wording of article 38(3) suggests that, in the event of a lack of resources, there would be no equal and balanced access to education. Therefore, articles 38(1) and 38(3) serve as constitutional constraint to the fCUBE in Ghana because, if the provision of educational facilities is subject to 'feasibility' and if

94 Act 778 (n 85).

its equal and balanced access is subject to resource availability, the fCUBE as envisaged under international human rights instruments will be difficult to realise. However, one may argue that unlike article 38, which is part of the Directive Principles of State Policy and sparks the educational objectives of the Constitution, and which is presumed to be justiciable, article 25 as a provision of the Bill of Rights is justiciable as of right.

6.2 Justiciability of the right to education in Ghanaian jurisprudence: Evidence from case law

'The right to education has been a cause for civil rights activis[m] in the history of many nations.'⁹⁵ The legal basis for approaching the courts in Ghana to enforce the right to education finds expression under various constitutional and judicial precedents. Articles 25 and 38(3)(a) are specific to this enunciation; and by alleging that 'a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to [a person], then, without pre-judice to any other action that is lawfully available, that person may apply to the high court for redress'.⁹⁶ Under the exclusive original interpretative and enforcement jurisdiction of the Supreme Court, a person may also seek redress by invoking articles 2(1) and 130(1) of the Constitution on grey areas of the law in pursuit of his right to education for compliance. This invocation must satisfy the prerequisite⁹⁷ set out in

95 Per Adinyira JSC in JSC in *FEDYAG (No 2)* (n 91) 1.

96 Art 33(1) 1992 Constitution.

97 In what has become a *locus classicus* on the subject matter, in *Republic v Special Tribunal; Ex Parte Akosah* [1980] GLR 592, the Court of Appeal (sitting as the Supreme Court) examined the width and ambit of the original jurisdiction of the Court, when determining an issue on the enforcement or interpretation of art 118(1)(a) of the Constitution, 1979, which is *in pari materia* with art 130(1) (a) of the 1992 Constitution. It held as follows: '(1) An issue of enforcement or interpretation of the Constitution, 1979, under article 118 (1) (a) would arise in any of the following eventualities: (a) where the words of the provision were imprecise or unclear or ambiguous. Put in another way, it would arise if one party invited the court to declare that the words of the article had a double meaning or were obscure or else meant something different from or more than what they said; (b) where rival meanings had been placed by the litigants on the words of any provision of the Constitution; (c) where there was a conflict in the meaning and effect of two or more articles of the Constitution and the question was raised as to which provision should prevail; and (d) where on the face of the provisions, there was a conflict between the operations of particular institutions set up under the Constitution. And in the event of the trial court holding that there was no case of 'enforcement or interpretation' because the language of the article of the Constitution was clear, precise and unambiguous, the aggrieved party might appeal in the usual way to a higher court against what he might consider to be an erroneous construction of those words. Also, where the submission made related to no more than a proper application of the provisions of the Constitution to the facts in issue, that was a matter for the trial court to deal with.'

the oft-cited *Republic v Special Tribunal; Ex-parte Akosah* case,⁹⁸ and which has been followed in subsequent holdings of the Court.⁹⁹

How has the Court approached the question of enforcement of the right to education when it is directly in issue? In other words, does the empirical evidence by way of case law suggest that these rights, being of the nature of socio-economic rights, are justiciable? It is to this question that we now turn. The analysis will be based on two overlapping decided cases of the Ghanaian Supreme Court on the right to education. These cases are *Progressive People's Party (PPP) v Attorney General* and *Federation of Youth Association of Ghana and (FEDYAG) v Public Universities of Ghana & Others*.

6.2.1 *Progressive Peoples Party (PPP) v Attorney General (1/8/2014) [2015] GHASC 95*

In this case the plaintiff political party issued a writ in the Supreme Court for the interpretation and enforcement of the Constitution.

The summary of the plaintiff's claims was that because as many as 500 000 children of school-going age were outside school after the ten-year timeline given by the Constitution under article 38(2) as at year 2006, the government's inaction was inconsistent with articles 25(1)(a) and 38(2). The plaintiff counsel further made the argument that the posture of section 2 of the Education Act fails to compel the government to make children of school-going age be in the classroom compulsorily and same is inconsistent with the Constitution.

The defendants for their part stated in their written submissions that the plaintiffs had wrongfully invoked the exclusive original jurisdiction of the court as their complaint did not raise any genuine or real issue of interpretation or enforcement of any provision of the 1992 Constitution. They further contended that there was no constitutional duty on the government of Ghana to forcefully compel children of school-going age to attend school.

In handing down the judgment of the Supreme Court, Akamba JSC granted the defendant's claim that the plaintiff's claim did not raise any genuine or real issue of interpretation or enforcement of any provision of the 1992 Constitution since it did not satisfy the

⁹⁸ *Republic v Special Tribunal; Ex-parte Akosah* [1980] GLR 592 605.

⁹⁹ *Ghana Bar Association v Attorney General & Another (Abban case)* [2003-2004] ISCGLR 250; *Osei Boateng v National Media Commission and Apenteng* [2012] SCGLR 1038; *Bimpong-Buta v General Legal Council* [2003-2004] 2SCGLR 1200.

threshold laid down in the decision of *Osei Boateng v National Media Commission*.¹⁰⁰ By far, the interpretation the plaintiff was searching was deemed to have been rendered in an earlier case of *FEDYAG* and, hence, the interpretative question posed by plaintiff's case was adjudged as having been disposed of by a previous case and as such requiring no interpretation. Curiously, in the case of *FEDYAG* the main question before the Court was whether a policy implemented by higher education institutions in Ghana was constitutional in light of articles 28 and 38. There was no issue raised on primary or basic education.

In providing reasons for not assuming jurisdiction in light of the *FEDYAG* case, the Court made the following observations which have cascading consequences on the right to primary education in Ghana:¹⁰¹

The effect of article 25(1) of the 1992 Constitution was to confer on every Ghanaian the right to have the same or equivalent chance and opportunities for educational advancement; and also the right to the same educational facilities in which to achieve that purpose regardless of his or her social or economic status, place of origin, sex or religion. However, there were inherent limitations, regulating and controlling the enjoyment of the right to equal educational opportunities and facilities. That right was subject to the capacity on the part of the student and the availability of educational facilities to be provided by the State. In the same article 25(1), the right was qualified by clauses (a), (b) and (c) by the controlling words: 'with a view to achieving the full realisation of that right'. Thus, under the following clauses: (a) basic education should be free and compulsory and available to all; (b) generally available and accessible at secondary, technical and vocational level; and (c) in respect to university or higher education, equally accessible to all on the basis of merit of the students and capacity of the institution; and, in particular by progressive introduction of free education at all levels. The ultimate objective of article 25(1) was to make education free by a gradual and progressive introduction to free education at all levels. And since the right to education was for every person, article 25(1)(d) required that functional literacy be encouraged and intensified for those who for one reason or other would be unable to pursue formal education. And under article 25(2), persons had the right to run private schools at all levels but at their own expense. It

¹⁰⁰ Holding 2: 'The requirement of an ambiguity/imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for the exclusive original interpretation jurisdiction under Articles 2(1) and 130 of the 1992 Constitution; that was clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to 6 overwhelm the Supreme Court. Accordingly, where a constitutional provision was clear and unambiguous any court in the hierarchy of courts might enforce it and the Supreme Court's exclusive original jurisdiction would not apply to it.'

¹⁰¹ *FEDYAG* (n 91).

was therefore the duty of the State to formulate and execute policies to achieve that purpose. However, under article 38 of the Constitution those educational objectives could only be implemented by the availability of resource.

To the learned judges, what is left for a party in these circumstances is to seek to enforce the outcome of the Court's interpretation in the *FEDYAG* (No 2) decision or for stated good reasons to call for a departure from that decision and not to call for another interpretation simpliciter, as the plaintiff sought to do by the present writ. In the said case the Court was of the view that a doctrinal approach to the interpretation of the provisions in the Constitution would not do.

Aside the defendant's inability to argue the threshold for bringing an issue of interpretation and enforcement, the reliance of the court on the *FEDYAG* case to arrive at a similar conclusion in the *PPP v AG* raises important questions about the justiciability of the right to basic education. This is because, as already observed, the *FEDYAG* case was brought in respect of higher education as espoused in article 25(1) (c). However, the *PPP v AG* case concerned basic education.

It is prudent to note that despite the fact that the two levels of education are all captured under article 25, the wording for both are different and stated in different paragraphs of clause (1). It must be noted that while the guidelines for achieving primary education are given under article 38(2), those of the other levels of education are given under article 38(3) and both provisions are different in terms of meaning. Although clause (1) of article 25 starts with the introductory sentence '[a]ll persons shall have the right to equal education opportunities and facilities and with a view to achieving the full realisation of that right', it was stated unequivocally in paragraph (a) that basic education shall be free, compulsory and available to all. However, in paragraphs (b) and (c) the means of achieving free education at the secondary and higher level of education is to be progressive.

Further, the wording of article 38(2) gives clear-cut guidelines and timelines as to when the state shall provide free, compulsory and universal basic education. Also, section 2(2) of Act 778 provides that education at the basic level is free and compulsory. However, with regard to the guidelines for achieving the other levels of education as provided for under article 38(3), there is an introductory clause which is to the effect that the provision of the other levels of education is subject to the availability of resources of the state, which is not different from the provisions of ICESCR.

6.2.2 Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others

The jurisprudential efficacy of the right to education at the tertiary came before the highest court of the land in the case of *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others*.¹⁰² This case came before the eminent justices of the Supreme Court of Ghana between 2009 and 2010. In this case the plaintiff, Federation of Youth Association of Ghana (FEDYAG) brought an action against Public Universities of Ghana, the Ministry of Education, the National Council for Tertiary Education, and the Attorney-General as the first, second, third and fourth defendants respectively. The writ invoked the original jurisdiction of the Supreme Court under articles 2(1) and 130 of the Constitution, to seek an interpretation of the enshrined provisions under article 25, the extent of the citizen's right to education in Ghana. Due to the 13 issues presented together from each side of the litigants in their memoranda, the Court merged the issues in two in line with their pleadings as follows:

- (i) whether or not the full fee-paying policy of the first defendant universities is in contravention of the letter and spirit of articles 25(1)(c), 38(1)(3)(a) and (c) of the 1992 Constitution of Ghana;
- (2) whether or not the first defendant's offer of admission spaces not taken up by foreign students to students who qualify but not admitted for lack of government subvention amounts to discrimination, in contravention of articles 17(2), (3) (4)(a) of the 1992 Constitution.

After considering the issues and arguments of the parties, the Court held that

- (i) the fee-paying policy does not contravene the letter and spirit of articles 25(1)(c) and 38(1) (3 (a) and (c) of the Constitution;
- (ii) the full fee-paying policy does not discriminate and does not contravene article 17 of the Constitution.

The Court considered that the plaintiff did not claim for the right to free university education but instead based it on the 'right to equal access to the limited opportunities available to Ghanaian to public universities as required by article 25(1) of the Constitution'.¹⁰³

The Court concluded that the full fee-paying policy was a common phenomenon in Africa and witnessed in other parts of the world.¹⁰⁴

¹⁰² *FEDYAG (No 2)* (n 91).

¹⁰³ *FEDYAG (No 2)* (n 91) per Adinyira JSC 14.

¹⁰⁴ *FEDYAG (No 2)* (n 91) per Adinyira JSC 20.

It further entreated that the fee-paying policy would have to persist to provide wider access to many more qualified students seeking admission into Ghanaian universities until such time that adequate resources are given by the state to provide free education at all levels to all citizens of the country. The Court agreed with the position of the first defendant that the management of the system had mechanisms for transparency and posited that applications must be considered on merit rather than on the ability to afford.

The Court also agreed that article 25 of the Constitution is based on article 26(1) of the Universal Declaration and, by implication, article 13 of ICESCR. By reason of this correlation, we deduce that article 25 is also based on article 17(1) of the African Charter. By a reflection of article 25, the Court observed that the difference in provisions with article 26 (and by extension article 17(1) of the African Charter) lies in the 'national experiences, challenges and weaknesses in our educational system and economic imbalances, which needed to be addressed to prevent the erosion of the gains that have so far been made'.¹⁰⁵ The spirit underpinning the constitutional provision of article 25, therefore, as the Court held is 'to address the imbalances in the infrastructural development of educational facilities in the country and the urgency to improve the quality of education particularly in the field of science and technology; for effective national development'.¹⁰⁶

To clarify this point, whereas the Universal Declaration directly enjoins that everyone has a right to education as required under article 26, the Constitution requires that the state provides equal educational opportunities and facilities to all persons in its jurisdiction. To this end, the limit of the right under article 25(1) on the citizen is the conferment of just the right to same educational opportunities and facilities to achieve his socio-economic advancement irrespective of his status and demographic traits.¹⁰⁷ This brings to the fore an implicit limitation to the enjoyment of these opportunities and facilities attached to the right,¹⁰⁸ subject to the availability of the citizen to take advantage of such, and the capacity of the state to provide same. The Court emphatically proclaimed that the objective of article 25 was to provide free but gradual and progressive education at all levels to all citizens of the country.¹⁰⁹ However, this

¹⁰⁵ *FEDYAG (No 2)* (n 91) per Adinyira JSC 9-10.

¹⁰⁶ *FEDYAG (No 2)* (n 91) per Adinyira JSC 10.

¹⁰⁷ Arts 25(1)(a), (b) and (c) of the Constitution.

¹⁰⁸ *FEDYAG (No 2)* (n 91) per Adinyira JSC 11.

¹⁰⁹ As above.

and other educational objectives are not absolute but can only be implemented on conditions stipulated under the Constitution.¹¹⁰

This case to a large extent settled the question of whether the right to education is a justiciable right under the human rights legal jurisprudence of Ghana. Justiciability only refers to whether one can enforce the right to education in court or other quasi-judicial fora, with which the Court clearly agrees, even though it reaches the conclusion that the fee-paying policy does not infringe on the right to education guaranteed in article 25.

The analysis of the two cases above indicates that it was an error to interpret the obligations on the state in relation to primary education in the same manner as higher education. Also, the treatment of the constitutional provision on basic education by the courts, just like that of higher education, supports the notion about the classical economic social and cultural rights that hitherto were deemed to be non-justiciable because of the fact that it is capital-intensive. This is because, in respect of the state's obligations under education, there is a clear dichotomy between basic, secondary and tertiary levels in Ghana under articles 38(2)¹¹¹ and 38(3)¹¹² of the Constitution respectively. This is despite the generic provision under article 38 which, in our view, contemplates the provision of educational facilities 'at all levels and in all the regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to *all* citizens'.¹¹³

7 Impact of international human rights law in the justiciability debate in Ghana

This part particularly looks at how article 33(5) can be used as a means of enforcing the international human rights law in Ghanaian courts. It discusses how the African Charter may be used to ground a claim for justiciability of the right to education in Ghana. It has been observed that not many cases have come before the courts of Ghana where the courts have been invited to apply the international human rights instruments as foundations for adjudications.¹¹⁴ It must be

110 Art 38 1992 Constitution.

111 This provision sets a definite time line on the implementation of the mandate of achieving free, compulsory and universal basic education by the state.

112 Contrary to art 38(2) above, this provision is not time bound and open to discretionary actions of the state.

113 Art 38(1) 1992 Constitution (our emphasis).

114 MG Nyarko 'The impact of the African Charter and Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 85.

reiterated that the principle of justiciability of the right to education under the African Charter is a settled reality.

Not all rights are envisaged to be covered under constitutionalism, and it is always expected to encompass those not specifically mentioned but inherent in any democratic dispensation¹¹⁵ and 'intended to secure the freedom and dignity of man'.¹¹⁶ The Supreme Court in the past had held that 'such rights may include those guaranteed in treaties, conventions, international or regional accords, norms and usages'.¹¹⁷ These rights have been held to include 'provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states'.¹¹⁸ The holdings in *Adjei-Ampofo*¹¹⁹ and *Ghana Lotto Operators Association & Others*¹²⁰ have the effect that article 33(5) can be used as a means of enforcing the international human rights law in Ghanaian courts. It is welcoming in this debate to note that the Supreme Court of Ghana has moved from a position of strict interpretation of the laws to a more liberal approach in enforcing international human rights treaties by holding that the non-domestication of international treaties does not preclude the courts from regarding these in their jurisdictions.¹²¹ The Supreme Court in its previous positions had intimated that even though Ghana had not domesticated the African Charter, it did not prevent it from applying the Charter because the non-exclusion clause under article 33(5) makes it possible for international human rights provisions and their practices to be relied upon where express provisions have not been made under the Constitution.¹²² Consequently, in the case of *FEDYAG (No 2)* the Supreme Court confirmed that article 25 of the Constitution conformed to article 26(1) of the Universal Declaration.¹²³

The right to appear before the African Commission¹²⁴ by any state of the AU to seek redress is guaranteed under the African Charter as follows: 'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been

115 Art 33(5) 1992 Constitution.

116 As above.

117 *Adjei-Ampofo v Attorney General* [2003-2004] SCGLR 418.

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

119 *Adjei-Ampofo* (n 117).

120 *Ghana Lotto Operators Association & Others* (n 118).

121 *New Patriotic Party v Inspector-General of Police* [1993-94] 459 482.

122 See *Adjei-Ampofo* (n 117); *Ghana Lotto Operators Association & Others* (n 118); *NPP v Inspector General of Police* (n 121).

123 *FEDYAG (No 2)* (n 91).

124 A commission established art 30 of ch II of the African Charter to promote human and peoples' rights and ensure their protection in Africa.

exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.¹²⁵

The condition precedent to activating this provision is that all available local remedies are exhausted within the jurisdiction of the complainant before he can be entertained by the Commission. Where a state intentionally and unconventionally places impediments in the way of the right holder to seek justice, it is also gratifying to note that the African Commission, on the merit of the complaint, may grant audience to the plaintiff to be heard. This reinforces the point that there exists a forum to seek redress outside the jurisdiction of Ghana on matters pertaining to the justiciability of the right to education. It does appear quite clear that state parties to the African Charter are under an unequivocal duty to adjust to the provision of the Charter in respect of legislating 'to giving effect to the rights and freedoms recognised by the Charter'.¹²⁶

The African Charter requires that '[e]ach party [shall] undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'.¹²⁷

It is clear that the legal framework in Ghana which has been given judicial pronouncements endorses the position of article 62 of the African Charter, as produced in the *dictum* of the provision above. The right to education may also be enforced by the African Court and the African Committee of Experts on the Rights and Welfare of the Child.

8 Conclusion

The justiciability of the legal provisions of the right to education in the Constitution of Ghana has sufficiently been assessed and established in the jurisdiction. In Ghana the Constitution, legislation, policy and jurisprudence of the courts acknowledge that the right to education is a right that can be enforced in courts. There are many avenues through which one can argue for justiciability in Ghana, including through article 33(5) of the Constitution. Again, Ghana's membership of international bodies such as the UN and AU enjoins it to abide by all treaties, protocols, conventions and

125 Art 50 African Charter.

126 Art 62 African Charter.

127 As above.

laws it has voluntarily ratified as dictated by international human rights jurisprudence.¹²⁸ We have emphasised in this article that even though the right to education is not 'absolute' in the judicial realms of the jurisdiction of Ghana, a right holder who has the conviction to litigate further for any violation or contest the action(s) or inaction(s) of the state or its agents may have solace in the quasi-judicial systems or under the jurisdiction of the African Commission as provided for under the African Charter.

In compliance with Ghana's obligations towards ensuring respect for the fundamental human rights of its citizens under all the numerous international treaties¹²⁹ it has ratified, and of its own constitutional provisions, it is our respectful contention that it is about time an amendment is done to all constitutional bottlenecks and further enabling legislation is enacted to remove all bottlenecks to the full enjoyment of the right to education. This will require political will and an extra advocacy campaign from civil society organisations in the education sector. The African Commission and the new African Court would be required to make a clear case in defining its jurisdiction to reach its membership to enforce compliance with its protocols on human rights violations.

¹²⁸ Art 2 Vienna Convention on the Law of Treaties.

¹²⁹ Ghana is obligated under various protocols including, but not limited to, the provisions of art 28(1) of the Convention on the Rights of the Child; art 13(1) of the International Covenant on Economic, Social and Cultural Rights, to ensure compliance with and respect for the right to education.

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Due process or crime control? An examination of the limits to the right to silence in criminal proceedings in Ghana

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Summary: *This article examines the extent of participation of accused persons in criminal proceedings in Ghana, particularly in the context of the procedural limits to the right to silence and its associated privilege against self-incrimination. Though normatively set along a libertarian theory that largely insulates the accused from matters of proof, the article finds that the legal regime of the right to silence not only admits of several procedural burden-shifting mechanisms that enjoin accused persons to speak and participate in the proof process, it also permits the drawing of adverse inferences against the accused's exercise of the right to silence in several instances. The analysis extends to a critical evaluation of the benefits of silence in the operational design of the adversarial trial. In that context, it discusses the extent of the accused's beneficial use of the right to silence and finds it an imprudent and legally-uninformed exercise that may deprive the accused person of their right to aggressively partake in the search of facts and evidence and thus of their right to adversarial trial. The article is relevant as it constitutes the first attempt at defining the criminal justice policies underlying the limitations*

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to the right to silence in Ghana. It adds to the existing knowledge on the right to silence in criminal proceedings as it delves into the philosophical underpinnings of the criminal procedure which is increasingly leaning towards a truth-finding and utilitarian ideology away from the core due process theory that generally defines the adversarial criminal procedure.

Key words: *right to silence; adversarial system; criminal proceedings; pre-trial; due process; crime control*

1 Introduction

The enforcement of criminal law in every society is crucial and the pursuit of this political objective is guided by certain procedural values that bar overzealous prosecutorial interferences with accused persons' autonomy. In that regard, the position of the accused person in criminal proceedings in Ghana, as in the case of many common law countries and liberal democracies, has been largely defined by the protection afforded under the due process right to silence and its associated privilege against self-incrimination.¹ The accused generally is protected from compulsion to either answer police interrogations during investigations or to testify in their own proceedings at trial.² It behooves the state to justify every decision to prosecute without compelling the accused to assist in establishing their guilt.³ Despite these procedural benefits of the right to silence, its application in the Ghanaian adversarial criminal proceedings is subject to several procedural limitations, which impose on the accused a number of participatory requirements in the criminal process, both at the trial and pre-trial stages of the proceedings.

This article examines the right to silence in criminal proceedings in Ghana and discusses the various burden-shifting mechanisms that enjoin accused persons' participation in the proof process and also justify the drawing of adverse inferences from the exercise of the right. It hints on the extent to which an unguarded exercise of the right to silence may result in the accused not only failing to zealously partake in the search of facts and evidence but also losing the full benefits of

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- 1 In this article reference to the expression 'accused person' implies 'suspect of crime' in pre-trial proceedings unless otherwise specified in a particular context. Also, reference to the feminine gender implies the masculine.
 - 2 Secs 96 & 97 Evidence Act, NRCDC 323 of 1975; art 19(10) Constitution of Ghana, 1992.
 - 3 HH Lai 'Liberalism and the criminal trial' (2010) 1 *Singapore Journal of Legal Studies* at 89, quoting MP Zuckert 'The virtuous polity, the accountable polity: Liberty and responsibility in the federalist' (1992) 22 *Publius* 123 124.

their right to adversarial trial. After this introduction, part 2 examines the nature and substance of the right to silence as an expression of the privilege against self-incrimination, through an evaluation of its origins in English legal history and also in the human rights context. While part 3 is an analysis of the normative framework of the right to silence in Ghana, part 4 discusses the application of the right to silence at the pre-trial stage of criminal proceedings in Ghana. Part 5 presents the normative statement and application of the right to silence at trial and assesses the various burden-shifting mechanisms and scope of permissible adverse inferences that underlie the utilitarian character of the right at the trial. Part 6 provides a critical assessment of the beneficial use of the right to silence, particularly in the context of the partisan control of proceedings as a feature of the adversarial operational design. It emphasises the need to shift the focus of the accused from an overreliance on the right to silence towards a more aggressive involvement in the development of facts to enhance the truth-finding objective of the adversarial trial. Part 7 is a conclusion and presents a summary of the discussions.

2 Origins and nature of the right to silence in adversarial criminal proceedings

There is no clear conception of the nature and substantive value of the right to silence in Ghanaian criminal jurisprudence but most of its traits are moulded along its values as it pertains in the history of development of the adversarial criminal trial and influenced by modern human rights law.

Beginning from its common law roots, the right to silence evolved out of the concern that evidence of guilt should be obtained from sources other than the mouth of the accused.⁴ Its origins are embedded in the historical roots of the privilege against self-incrimination, and they are both treated together as guaranteeing the due process protection which insulates the accused or suspect from matters of proof.⁵ The privilege against self-incrimination developed in reaction to the inquisitorial methods of interrogation of accused persons that evolved in the continental system, and which were later

4 This is expressed in the Latin maxim *nemo tenetur prodere seipsum*, which provides that a person is not required to betray themselves.

5 These two procedural guarantees are the two faces of the same concept and are both concerned with the legal significance of silence. See generally S Leshem 'The benefits of a right to silence for the innocent' (2010) 41 *Rand Journal of Economics* 398. The right against self-incrimination is seen as affording the accused a right to silence. See AW Alschuler 'A peculiar privilege in historical perspective: The right to remain silent' (1995) 94 *Michigan Law Review* 2625.

adopted into the English criminal procedure.⁶ Here, we refer to the *ex officio* oath procedure in continental Europe which served to compel accused persons, particularly political dissidents, to take an oath to answer all questions and to testify against themselves.⁷ The refusal to take the oath attracted a jail term for contempt. Alternatively, the accused could be found guilty *pro confesso* or could suffer an adverse inference of guilt.⁸ This oath procedure was subsequently introduced into the practices of the Star Chamber in England in 1236. However, with the abolition of the Chamber in 1641 following the English revolutions, the *ex officio* procedure fell into desuetude in England. A protectionist ideology arose which established the first principle of English liberty, namely, that no person shall be required to accuse themselves.⁹ Resulting therefrom, it has since behooved the state, in seeking to convict an accused person, to produce the evidence against them by its own independent efforts and without compelling it from their mouth.¹⁰

Today the right to silence is considered under human rights law an essential due process element in criminal proceedings. It must be noted that the criminal trial is the pinnacle of constitutional due process guaranteed through a human rights regime of fair trial rights under article 19 of the Ghanaian Constitution, and required to adjudicate the guilt or innocence of the accused. In that context, a dynamic relationship is established between human rights and criminal law. While the traditional role of human rights is to afford protection from an authoritarian use of the criminal law¹¹ by providing protections against abuses of state power in criminal proceedings which affect the life, liberty, and physical integrity of individuals,¹² criminal trials have progressively become the pivotal

6 CE Moylan & JO Sonsteng 'The privilege against compelled self-incrimination' (1990) 16 *William Mitchell Law Review* 249; FE Inbau 'Self-incrimination – What can an accused person be compelled to do?' (1937) 28 *Journal of Criminal Law and Criminology* 261.

7 See generally Moylan & Sonsteng (n 6); S Greer 'The right to silence: A review of the current debate' (1990) *Modern Law Review* 710; JH Langbein 'The historical origins of the privilege against self-incrimination at common law' (1993-1994) 92 *Michigan Law Review* 1047.

8 NH Alford 'The right to silence' (1970) 79 *Yale Law Journal* 1619-1620. It was a tool in the hands of Inquisitors to deal with heretics and root out religious dissidence.

9 Moylan & Sonsteng (n 6) 257.

10 *Miranda v Arizona* 384 US 460 (1966).

11 F Tulkens 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 579.

12 MC Bassiouni 'Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 326; CJM Safferling 'Can criminal prosecution be the answer to massive human rights violations?' (2004) 5 *German Law Journal* 1472.

place in which to protect human rights.¹³ In that balance, one fundamental principle of the modern criminal trial is to regulate and minimise the pervasive power of the state in prosecution and protect accused persons from abuses of that power through a host of due process guarantees.¹⁴ In that regard, the state's overriding powers of investigation, prosecution and punishment are gauged by the competing autonomy of the accused person through respect for their freedom of choice to participate in the trial especially in matters of proof. As a result, the right to silence becomes the backbone of the adversarial system and reinforces the central notion of a fair trial, not only by giving effect to the presumption of innocence of the accused but also by establishing a proper balance between the individual accused and the state-accuser in the adversarial trial model.¹⁵

Although not expressly set out under international human rights law and, in particular, the International Covenant on Civil and Political Rights (ICCPR),¹⁶ the right to silence is recognised as an expression of the right against self-incrimination which guarantees for every accused a right '[n]ot to be compelled to testify against himself or to confess guilt'.¹⁷ It aims at protecting the accused person against forced admissions and confessions induced by state investigative agencies.¹⁸ It also applies as an evidentiary rule aimed at preserving the truth-finding function of the criminal process.¹⁹ Under international law, it is the European Court of Human Rights that has significantly contributed to the consolidation of the jurisprudence on the modern right to silence.²⁰ Although the European Convention on Human Rights makes no explicit reference to the right to silence, the Court has drawn its distinctive characterisation and substance from the privilege against self-incrimination and set its standard of application under international law.²¹ The European Court has defined

13 Tulkens (n 11) 582; M Pinto 'Awakening the Leviathan through human rights law - How human rights bodies trigger the application of criminal law' (2018) 34 *Utrecht Journal of International and European Law* 164.

14 IH Dennis *The law of evidence* (2010) 198.

15 See, eg, C Theophilopoulos 'The so-called right to silence and the privilege against self-incrimination: Constitutional principle in search of cogent reasons' (2002) 18 *South African Journal on Human Rights* 505.

16 Resolution 2200A (XXI) of 1966.

17 Art 14(3)(g). It is also not expressly provided for under the African Charter on Human and Peoples' Rights but it is expressly set out in Guidelines 4(c) and 9(b) of the Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (2016). See also para N(6)(d) of the Principles and Guidelines on the Right to Fair Trial in Africa on the right against self-incrimination (2003).

18 See General Comment 32 para 41.

19 C Theophilopoulos 'The evidentiary value of adverse inferences from the accused's right to silence' (2002) 15 *South African Journal of Criminal Justice* 321.

20 Its jurisprudence is of a supranational order and has provided authoritative statements on fair trial rights in the human rights context.

21 In the opinion of the Court the privilege against self-incrimination 'is primarily concerned with respecting the will of an accused person to remain silent'. See *Saunders v UK* ECHR (29 November 1996) 69.

the essence of the right as insulating the accused from abusive and coercive inquiries by state authorities and also as defending their choice to decide whether to speak or remain silent during police questioning.²² In a much broader scope than its common law antecedents, the right has been described as consisting of a 'bundle of rights' available to a person being questioned or prosecuted for an alleged crime. It is framed in the nature of immunities from interference with the accused's autonomy both at the trial and pre-trial stages.²³ At pre-trial the right to silence implies that a suspect or a person accused of criminal wrongdoing is under no obligation to account for allegations or respond to police questioning.²⁴ At trial the right to silence shields the accused from all obligations to testify on their own account and prevents the prosecution from having adverse comments made against them for refusing to answer questions and testifying at the trial.²⁵ It reinforces the accused's ability to choose whether to participate in the criminal process and underlies the principle that the suspect or accused has no direct duty to speak.²⁶

The Human Rights Council has recommended the enforcement of this right through the exclusion of evidence improperly or unlawfully obtained in violation of the silence protection.²⁷ Overall, the right to silence as a fair trial guarantee has assumed a critical status as a strategic shield that generally insulates accused persons from all primary obligations of proof.²⁸ It is for the state to secure all relevant evidence by its independent efforts rather than through a forced process of eliciting it from an unwilling accused.²⁹ Within a libertarian ideology that recognises the personal autonomy of citizens and protects them from unjustified interference with their rights by the state,³⁰ the right to remain silent resists any logic that makes 'state control of prosecution synonymous with reliance on the accused as the principal source of the evidence against himself'.³¹

22 *Allan v UK* ECHR (5 February 2003) 44.

23 Lord Mustill in *R v Director of the Serious Fraud Office; Ex Parte Smith* [1993] AC 30. Note that prior to this legal innovation, the United States Supreme Court, USA blazed the trail in its seminal Supreme Court decision in *Miranda v Arizona* (n 10) which held that the 5th amendment privilege against self-incrimination applied to both trial and pre-trial proceedings. Before then, the exclusionary rules for failure to comply with interrogation procedures had not been applied.

24 *Ex Parte Smith* (n 23) 30-32.

25 As above.

26 *Murray v UK* [1996] 22 EHRR 29 [48], *Condrón v UK* (2001) 31 EHRR 31 EHRR 1 [59].

27 General Comment 32 para 41.

28 See, eg, T van der Walt 'The right to pre-trial silence as part of the right to a free and fair trial. An overview' (2005) 5 *African Human Rights Law Journal* 71; See *Murray v UK* (n 26) 29.

29 *Miranda* (n 10) 460; *Chambers v Florida* 309 US 235-238 (1940).

30 Lai (n 3) 89.

31 A Goldstein 'The state and the accused: Balance of advantage in criminal procedure' (1960) 69 *Yale Law Journal* 1150.

In this context, it accords with and reinforces the accused's right to be presumed innocent.³² This is the nature of the right to silence as recognised and applied in criminal proceedings in Ghana.

3 Normative framework of the accused's silence rights in Ghana

In Ghana the accused's right to remain silent is a binary proposition of law that combines a right against forced testimony and a privilege not to self-incriminate. The Constitution guarantees for every accused person a right not to be compelled to give evidence at the trial, whether incriminating or not, and thus to remain silent unless they otherwise decide.³³ This constitutional right is further re-enacted as an evidentiary rule governing the procedure of the trial.³⁴ The privilege not to self-incriminate, on the other hand, remains an evidentiary rule that in its normative context guarantees for an accused a right to refuse to disclose any matter or to produce any object or writing capable of incriminating them in any offence, in respect of any proceedings whether criminal or civil.³⁵ The jurisprudential distinction between these two guarantees often is blurred due to the overlapping nature of their operations.³⁶ They have been construed as establishing the two sides of the principle of silence as a procedural right of the accused. They strike at testimonial compulsion by reinforcing the criminal justice system's aversion to processes that either expressly or insidiously compel suspects and accused persons to speak to facts intended to be used against them in the course of the proceedings.³⁷ They provide a distancing mechanism that allows suspects and accused persons to disassociate themselves from prosecution.³⁸ Along a largely normative libertarian ideology, the combined effect of the right to silence and its attendant privilege against self-incrimination is that the prosecution is chiefly obligated to account for the conviction and punishment of the accused who, on the contrary, is shielded from all obligations to assist the state in justifying its allegations or proving guilt against

32 *Woolmington v DPP* (1935) AC 462 481, stating that it is 'like a golden thread through the fabric of the criminal law'.

33 Art 19(10) Constitution of Ghana: 'No person who is tried for a criminal offence shall be compelled to give evidence at the trial.'

34 Evidence Act sec 96(1): 'The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on the application of the accused.'

35 Sec 97(1) Evidence Act.

36 Theophilopoulos (n 15) 507.

37 ANE Amissah 'Police and the courts' (1969) *Review of Ghana Law* 31.

38 M Redmayne 'Rethinking the privilege against self-incrimination' (2007) 7 *Oxford Journal of Legal Studies* 209; ANE Amissah *Criminal procedure in Ghana* (1982) 31.

them.³⁹ They have no legal obligation to answer any interrogatories or give any statement to the police or prosecuting authority or to make a particular statement in court that will attest to their guilt.⁴⁰

Despite these procedural benefits for the accused, the protectionary value of silence is not absolute and is balanced against other competing interests of the criminal proceedings, including truth discovery. In that regard, it admits of several penalties and negative inferences that chip away at the intended protection guaranteed for accused persons who exercise their right to silence. In balancing the competing public interests of the criminal proceedings against the due process rights of the accused at trial, the country has adopted standards for determining the extent of a beneficial invocation of the right to silence during the trial. Generally, the jurisprudential value of the right to silence exhibits a mixed ideological approach that fundamentally is dependent on the stage of the criminal proceedings, moving from a full and absolute protection at the pre-trial stage to a limited protection during the trial.

4 Right to silence at the pre-trial stage of the criminal proceedings

The pre-trial stage of criminal proceedings in Ghana follows a largely libertarian philosophy and insulates the accused from all obligations to prove facts and evidence and to cooperate with state agencies in an investigative procedure.⁴¹ Unlike in Nigeria and South Africa, where the right to silence is constitutionally guaranteed in express terms, there are no statutory or constitutional provisions on the pre-trial right to silence in Ghana and there been no clear conception of its sources.⁴² The situation in effect is no different under international

39 See *Phillip Assibit Akpeena v The Republic* [2020] H2/23/2018 (13 February 2020); *Republic v Derrick Armah Kwantreng & Others* [2011] DLHC 7954; *Republic v Appiah Yaw & 2 Others* [17/10/2012] Suit B IND 1/2010, stating that it 'must here be noted that under our law, an accused person is not obliged to testify in his defence. He has the option to remain silent. Now, since the standard of proof required of the prosecution is beyond reasonable doubt, the accused is not supposed to assist the prosecution by filling in the missing gaps in the evidence led by the prosecution.' *Gyabaah v The Republic* [1984-1986] 2 GLR 461; *Patterson Ahenkang & 2 Others v The Republic* [2014] DLCA 4949.

40 See Evidence Act secs 96(3) & 97(2).

41 *R v Derrick Armah Kwantreng & Others* (n 39) referring to *Gyabaah v Republic* (n 39); *R v Iddrisu Iddi v Mbadugu & Others* [2011] DLHC 7951; *Nyarko v the State* [1963] 2 GLR 59.

42 Constitution of the Republic of South Africa, 1996, sec 35(1)(a) expressly provides among the scope of procedural protection that 'everyone who is arrested for allegedly committing an offence has the right to remain silent'. Again, the Constitution of the Federal Republic of Nigeria, 1999, sec 35(2): 'Any person who is arrested or detained shall have the right to remain silent and avoid answering any question until after consultation with a legal practitioner or any person of his choice.'

law where the right to silence is conspicuously missing from the scope of pre-trial protections of the accused. The United Nations (UN) Human Rights Committee, however, has affirmed the application of the right to silence at the pre-trial stage, particularly during police interrogations.⁴³ The Committee in that regard has called on member states of the UN to enact the right to do so among the scope of due process guarantees and ensure that it is respected in practice.⁴⁴

However, in Ghana the process of the recognition of the right is consolidated from a number of judicial and interpretational sources. The first roots of the pre-trial right to silence are traceable to the 'Judges' Rules' of England. These were juridical practices that sought to protect suspects and accused persons from incriminating themselves in the hands of state investigators in pre-trial proceedings at common law. Its 1964 version was adopted and applied by the Ghanaian courts. According to Amissah, there is no legal basis for the practice of these rules in Ghana, '[b]ut they seem to have been accepted by our judges as applicable without much question'.⁴⁵ These rules in essence are a set of guiding principles relating to the admissibility of investigative statements of suspects and accused persons at trial. They allow police interrogation in custody to the extent that the procedure for questioning is devoid of the use of force or inducement by way of oppression, threat, fear of prejudice or hope of advantage as a means to obtain a confession from a suspect or accused person.⁴⁶ The rules more specifically direct the procedure of pre-trial police interrogations and specify the manner of conduct that would cause judges to exercise their discretion to exclude otherwise relevant evidence in the interests of a fair trial.⁴⁷ They primarily stand

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- 43 Concluding Observations: France, UN Doc CCPR/C/FRA/CO/4, Human Rights Committee (2008) para 14; Guideline 5 on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (2016); Principle 8, para 29 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012); in *Imbrioscia v Switzerland* ECHR (24 November 1993) (No 13972/88) para 36. Note, however, that scholars are careful not to announce that the full panoply of right applies to pre-trial proceedings. See W Wu 'Interrogational fairness under the European Convention on Human Rights' (2011) 39 *International Journal of Law, Crime and Justice* 37, referring to S Summers *Fair trials: The European criminal procedural tradition and the European Court of Human Rights* (2007); J Jackson 'Reconceptualizing the right to silence as an effective fair trial standard' (2009) 58 *International and Comparative Law Quarterly* 835.
- 44 Concluding Observations: Algeria, UN Doc CCPR/C/DZA/CO/3, Human Rights Committee (2007) para 18; Concluding Observations: Nepal, UN Doc CCPR/C/NPL/CO/2, Human Rights Committee (2014) para 16.
- 45 Amissah (n 37). See also Taylor JSC in *Bilson v Apaloo* (1981) GLR 89. This may be contrasted with the position in South Africa that expressly transplanted the Judges' Rules from England into the South African legal system. See LH Hoffman & DT Zeffert *South African law of evidence* (1988) 221.
- 46 D McBarnet 'The Royal Commission and the judges' rules' (1981) 8 *British Journal of Law and Society* 109.
- 47 See, eg, TE St Johnson 'Judges' rules and police interrogation in England today' (1966) 57 *Journal of Criminal Law and Criminology and Police Science* 85. See also

for the position that a statement extracted from an accused person by the police may only be admissible at trial if voluntarily given by the accused, without inducement, threat, tricks or force.⁴⁸ They essentially protect suspects and accused persons, in their dealings with state investigative agencies, from forced confessions and from being used as an 'informational resource'. In the manner in which they apply in Ghana, the rules operate on the principle that where a police officer or state investigative agent has reasonable cause or evidence that would justify the arrest and subsequent charging of a suspect with an offence for purposes of prosecution, the accusatory process begins. In that regard, the officer is automatically mandated to caution the suspect that they have an absolute right to remain silent and that they are 'not obliged to say anything in answer to the charge' before questioning them.⁴⁹

Aside its root in English juridical practices, it is the American jurisprudence that has been relied upon to shape the content and application of the pre-trial right to silence in Ghana. The Court of Appeal, then operating as the highest court of the land,⁵⁰ in the landmark case of *Okorie alias Ozuzu v the Republic*⁵¹ persuasively relied on the American case of *Miranda v Arizona*⁵² to consolidate the parameters of the exercise of the pre-trial right to silence in Ghanaian law. The courts in Ghana have since adopted the *Miranda* rules, rights and warnings in the domestic operations of the criminal law.⁵³ Like the Judges' Rules, the *Miranda* rules also prescribe the requirements for custodial interrogation of suspects. They mandate, among others, the issuance of a caution to the suspect at the time of arrest, which informs them of their right to silence and to refuse to answer any questions put during interrogation.⁵⁴

Today the pre-trial right to silence in Ghana has been given constitutional imprimatur as it has been judicially inferred from the

Amissah (n 37). The Rules are directly incorporated into the guidelines for police interrogation in Ghana. See, eg, Rule 2(1)(C) of the *Ghana Police Handbook* (2010).

48 See St Johnson (n 47) 85.

49 See Rules 2 & 3, Judges' Rules (1964). See also Rule 1 of the Police Standing Order 184, Voluntary Statement: Procedure.

50 The Court (Amendment) Decree, NRCD 101 of 1972 abolished the Supreme Court established under the 1969 Constitution. The Supreme Court was only restored as the highest court of the land with the entry into force of the Constitution of Ghana, 1979. See Amissah (n 37) 7.

51 (1974) 2 GLR 278.

52 *Miranda v Arizona* (n 10). This American case largely influenced the position of the Ghanaian law on the right to silence at pre-trial. See *Okorie alias Ozuzu v The Republic* (n 51).

53 *Republic v Akosa* (1975) 2 GLR 406.

54 See *Okorie* (n 51) 278, referring to Chief Justice Warren in *Miranda v Arizona* (n 10) 444 445.

provision of article 19(10) of the Constitution which guarantees for every person undergoing a criminal trial a right not to 'be compelled to give evidence at the trial' whether incriminating or non-incriminating. Though couched in a language that particularly refers to the trial stage of the proceedings, this right against forced testimony has been judicially interpreted to apply during pre-trial custodial interrogation. In *Edmund Addo v The Attorney-General and Inspector-General of Police*⁵⁵ the Court defines the pretrial protection of suspects in police interrogation as follows:

In other words, the presumption of innocence enjoyed by a suspect or accused person coupled with the right not to testify or self-incriminate are some of the essential foundations of fair trial ... in other words, if the suspect or accused would be presumed innocent at trial, then she must equally be presumed innocent at the criminal investigation, if the suspect or accused cannot be compelled to testify at the trial, then she ought not to be compelled to give any statement or information at the criminal investigation (and this is what the caution that is administered to a suspect or accused is about) and if the suspect or accused is not compelled to self-incriminate, then she should not be compelled to disclose any information that she does not voluntarily wish or consent to disclose. It follows in my respectful view that any conduct of the police investigator that has the tendency to undermine the intended and constitutionally required fair trial of the suspect or accused ought not to be countenanced as it amounts to inchoate infringement of the right to fair trial, particularly the presumption of innocence and the right not to self-incriminate.

It is also important to state that the pre-trial right to silence admits of no adverse inference whatsoever from a suspect's failure or refusal to answer questions.⁵⁶ Thus, where a person is suspected of having committed an offence, silence in the face of accusations cannot warrant an imputation of guilt or adverse inference. This position is in line with the legal position advocated by the African Commission on Human and Peoples' Rights (African Commission) on an accused's fair trial rights.⁵⁷ The Ghanaian position, as affirmed by Amissah along the line of this international standard also is to the effect that '[n]o man, innocent or guilty, need reproach himself for keeping silent, for that is what the police have just told him he may do'.⁵⁸ In the terms of this right, it has therefore been held that 'a statement

55 Suit HR/0080/2017 [2017] DLHC 3835 delivered on 30 March 2017 per Anthony K Yeboah J.

56 This common law rule adopted in Ghana originates from the English decision in *R v Lekey* (1943) All ER 665, Tindall JA. See also Viscount Caldecote CJ in *R v Lekey* (1944) KB 86; *Commissioner of Police v Donkor* (1961) GLR 6, per Van Lare JSC.

57 Sec N(6)(d)(ii) of the Principles on the Right to Fair Trial and Legal Assistance in Africa (2003).

58 Amissah (n 37).

made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated'.⁵⁹ A number of court decisions have sought to protect this benefit of the aforementioned right to suspects and accused persons at the pre-trial stage. In *Teye alias Bardjo v The Republic*,⁶⁰ where an accused person in a joint criminal venture refused to give a statement when charged with conspiracy to commit murder, the Court of Appeal did not hesitate to set aside his conviction and sentence for invoking his right to silence. The Court reiterated the legal principle that the silence of an accused cannot be regarded and considered a fact inconsistent with their innocence.⁶¹ The only instance in which an adverse inference may be drawn from the accused's silence is where, after the close of the case of the prosecution, a *prima facie* case has been established against the accused. In such a case the conviction of the accused will be grounded on the un rebutted evidence of the prosecution which establishes the guilt of the accused beyond reasonable doubt.⁶²

In *Moro v The Republic*⁶³ the accused was charged with possession of Indian hemp contrary to section 47(1) of the Pharmacy and Drugs Act.⁶⁴ In an appeal following his conviction by the trial court for failure to give his statement to the police, Korsah J emphasised the principle that it is not the law that an accused person ought to put his version of the case to the police during interrogation. Where the accused is not represented by counsel, the exercise of the right to silence rather triggers a procedural obligation for the trial judge to thoroughly investigate the matters and allegations raised against the accused at trial. Again, in *Nsor Ayine v The Republic*⁶⁵ the accused person was charged with the offences of unlawful entry, unlawful damage and stealing contrary to sections 152, 172(1) and 124(1) respectively of the Criminal Offences Act.⁶⁶ The accused gave no incriminating or confession statements and no responses to the charges against him both during police interrogation and in court. On appeal from his conviction by the trial court, Richardson J held that no presumption of guilt could be deduced from the accused's silence. The judge developed the proposition that where the self-represented accused

59 *R v Christie* (1914) AC 545 554 (House of Lords), cited in *Moro v The Republic* (1979) GLR 256 258.

60 1974 2 GLR 438-444.

61 *Teje* (n 60) 444.

62 *Moro* (n 59) 261.

63 As above.

64 Act 64 of 1961.

65 [7/05/2010] Case D15/10/2010, High Court, Richardson J (unreported).

66 Act 29 of 1960.

invokes their right to silence, the duty arose for the trial judge to construe the pre-trial silence as a non-admission of facts. It then behooved the trial judge to rather enquire about the material facts and matters in respect of which the accused person remained silent and to prise the accused's position out of them during the trial.⁶⁷

Again, as far as pre-trial investigations are concerned, police questioning as an aid to law enforcement is considered with critical interest because this is the stage of the proceedings where the suspect is most vulnerable.⁶⁸ Obviously, the passiveness of a suspect in adversarial police questioning fully excludes the possibility of confessions altogether. However, where the suspect offers to speak up, as they commonly do, questions about the adequacy of the procedural safeguards in pre-trial interrogation arise, particularly where claims of involuntary confessions are made. So far, the admissibility of confession statements made by suspects in custodial police interrogations is determined by a 'voluntariness' test which simply validates a confession by reference to the attestation of an independent witness appointed to be present at the time of the confession.⁶⁹ However, the dimensions of a voluntary confession are always difficult to assess especially in an inherently coercive custodial environment. For a lay accused person, an uncoerced interrogation may still be burdensome, mentally exhausting, intimidating and even without the needed understanding of its purpose. Generally, these suspects in an adversarial context are under pressure to speak out of concern that their silence may be considered an act of non-cooperation with state investigative authorities.⁷⁰ In such cases, the use of an independent witness as a means to ascertain the voluntariness or otherwise of a confession appears problematic, and this approach in Ghana needs to be reconsidered. There is no doubt that in this vulnerable state, it is only with the assistance of a lawyer that a suspect can properly assess the consequences of a decision whether or not to answer police interrogation questions. This is the standard approach adopted under the jurisprudence of the European Court of Human Rights, which relies on the presence of a lawyer to ensure not only that the suspect is not coerced into making a confession, but also that their choice to either speak or

67 [7/05/2010] Case D15/10/2010, High Court, Richardson J (unreported).

68 See a similar observation under international law in *Salduz v Turkey* (2008) ECHR 54.

69 Sec 120 (2) Evidence Act. She must be someone who understands the language of the accused and read and understand the language in which the statement is made.

70 This is particularly characteristic in most adversarial jurisdictions. See, eg, D Dixon 'Politics, research and symbolism in criminal justice: The right of silence and the Police and Criminal Evidence Act 1984' (1991) 20 *Anglo-American Law Review* 27; Jackson (n 45).

remain silent is legally and reasonably informed by the advice of counsel.⁷¹

Legal assistance during pre-trial interrogation in this regard may not be mandatory. However, a suspect who desires to voluntarily relinquish the benefit of this guarantee must do so through a knowing and intelligent waiver. Thus, the records must show that the suspect was informed of the dangers and disadvantages of refusing counsel's assistance before proceeding to waive their right to remain silent.⁷² However, in all cases where the suspect invokes their right to counsel before responding to questions, they should not be subject to further questioning until they have been provided with counsel or unless they voluntarily initiate further communication, exchanges, or conversations with the police.⁷³

It is important to also note that despite its protective attributes, the right to silence at the pre-trial stage is subject to one key constitutional limitation informed by the need to protect the overarching public interest.⁷⁴ Parliament has vested the Attorney-General with authority to withdraw suspects' right to silence by subjecting them to forced interrogation in regard to offences affecting the security of the state, such as treason, misprision of treason, treason felony.⁷⁵ Here, the failure to disclose information or produce documents becomes a separate offence, a misdemeanour punishable by a term of imprisonment of up to three years.⁷⁶ The imposition of this requirement upon a suspect aims at obtaining from them information and evidence which for all intents and purposes are intended to be used against them. The constitutional validity as well as the limits of application of this provision in criminal proceedings have not been judicially tested. There is no doubt that this legal provision vests wide inquisitorial powers in the state against the accused throughout the course of the proceedings. Its effects, however, are worrying, and the provision needs to be reconsidered to avoid exposing suspects to unlawful state interference with their rights and autonomy in a liberal state.

⁷¹ See *Murray v UK* (n 26) 23; *Salduz v Turkey* (n 68) 54; *Pishchalnikov v Russia* (2009) ECHR 84.

⁷² This is the standard of waiver of procedural rights as adopted in *Faretta v California* 422 US 835.

⁷³ *Edwards v Arizona* 451 US 477 (1981); *Arizona v Roberson* 486 US 675 (1988).

⁷⁴ Art 12(2) Constitution of Ghana.

⁷⁵ Sec 50 Criminal and Other Offences (Procedure) Act 30 of 1960 (COPA).

⁷⁶ Act 30 sec 53.

5 Silence at the trial stage: Burden-shifting mechanisms and adverse inference

The trial stage of the criminal proceedings is where the constitutional right to silence under article 19(10) asserts its full import as a guarantor of the accused's right not to be compelled to participate in the proceedings or to give evidence at the trial, whether incriminating or not. Even though insulating the accused from the obligation to assist the state in proving guilt in the courtroom,⁷⁷ the procedural model at the trial stage is not purely libertarian. There are a number of procedural burden-shifting mechanisms that require the accused to provide explanations or answers to questions, or to participate in matters of proof and disclose primary facts, either towards assisting the court to discover the factual truth or in a manner that relies on the accused's side of the story or to displace guilt.⁷⁸ The law in that regard expressly permits potentially adverse inferences and comments to be drawn from an accused's refusal to testify.⁷⁹ A fair and objective evaluation of the limits of silence at the trial stage requires a deeper appreciation of these limitations to the right to silence, which largely aim at enhancing the truth-finding objective of the criminal process.

5.1 Limit to silence upon prosecution's establishment of a *prima facie* case

As far as the trial stage is concerned, the accused enjoys a full privilege to refuse to disclose a matter or to produce any object or writing that will incriminate them in any offence.⁸⁰ They also have a privilege not to be compelled to testify at the trial unless they voluntarily wish to do so.⁸¹ From a libertarian perspective, there is no law that mandates the accused person to make a defence and give evidence. Section 171 of the Criminal and Other Offences (Procedure) Act (COPA)⁸² mandates the trial judge to call upon the accused to open their defence if at the close of the prosecution a case is made against them

⁷⁷ *Republic v Appiah Yaw & 2 Others* [17/10/2012] Suit B IND 1/2010. See also *Patterson Ahenkang & 2 Others v The Republic* (n 9): '[T]he accused is not obliged to prove his innocence and naturally he will not assist the prosecution to prove his guilt.' See also *Gyabaah v The Republic* (n 39).

⁷⁸ See *Commissioner of Police v Antwi* [1961] GLR 408, adopted in line with *Woolmington v DPP* (n 32).

⁷⁹ Sec 96(4) Evidence Act.

⁸⁰ Sec 97(1) Evidence Act. Sec 97(4): 'A matter, object or writing will incriminate a person within the meaning of this Decree if it (a) constitutes or (b) forms an essential part of or (c) is taken in connection with other matters already disclosed is a basis for a reasonable inference of a violation of the criminal laws of Ghana.'

⁸¹ Sec 96(1) Evidence Act.

⁸² Act 30 of 1960.

sufficiently to require them to make a defence. The opening of a defence, however, is not obligatory in summary trials as the accused may give evidence or make a statement from the dock only if they so desire.⁸³ This procedure certainly exhibits the extent and significance of the accused's right to silence. In trials on indictment, the right to silence is differently implied. Where the prosecution establishes a case against the accused person to answer, the judge is mandated to inform the accused of their right to give evidence on their own behalf or to make an unsworn statement and to call witnesses in their defence.⁸⁴ Where the accused opts not to call witnesses, the court is directed to call upon them to either give evidence on oath from the witness box or make a statement from the dock, or to simply remain silent.⁸⁵

The right to silence in these cases may entice an accused person into a false sense of security. The evidentiary and procedural regimes of the criminal proceeding allow the court and the prosecution to comment on and draw an adverse inference from an accused's refusal to testify in their own trial,⁸⁶ particularly in instances where the prosecution establishes a *prima facie* case against them. In such cases the accused faces a potential conviction if they fail to open and make a defence to the prosecution's case.⁸⁷ The precise ambit of legitimate judicial comments and adverse inferences from the accused's refusal to testify at trial has not been generally determined. Suffice it to note that an adverse comment is not a gratuitous judicial statement and mere silence is not evidence of culpability.⁸⁸ Guilt is built on the strength of the incriminating evidence on record and on the quality and persuasiveness of the prosecution's arguments. It has thus been judicially held that where an accused in their answer fails to raise a reasonable doubt as to prosecution's case, which is all that the law required of them, or where they exercise their right to remain silent for fear of self-incrimination, the court can go ahead and convict them on the evidence on the basis of the convincing

83 Sec 171(1).

84 Sec 272.

85 Sec 273(1).

86 As above.

87 COPA secs 174(1) & 271 as applicable to summary trials and trials on indictment respectively. At the close of the evidence in support of the charge, if it appears to the court that a case has been made out against the accused sufficiently to require the accused to make a defence, the court shall call on the accused to make a defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement. See also *State v Ali Kassena* [1962] 1 GLR 148; *Moshie v The Republic* [1977] 1 GLR 290; *Asamoah & Another v Republic* Suit J3/4/2017 (unreported).

88 See *Teye alias Bardjo v The Republic* (n 60).

arguments and evidence of the prosecution only.⁸⁹ It is also worth noting in this regard that silence is never the sole decisive factor. The prosecution's case should be strong enough to meet the statutory evidentiary and persuasive requirements for the finding of guilt so as to call for an answer from the accused.⁹⁰ To that end, even in the silence of the accused, the court is bound to raise and consider all possible defences in favour of the silent accused person before convicting them.⁹¹

5.2 Limit to silence in committal proceedings

The right of the accused person to remain silent bears a distinct connotation in pre-trial committal proceedings in the criminal justice system. A committal proceeding is in the nature of a preliminary hearing before the district magistrate's court and constitutes the first stage of the adjudicatory process in respect of all serious felony trials before the High Court or Circuit Court in Ghana.⁹² The process involves the production of the accused person before the district magistrate whose duty is to conduct an initial factual and evidentiary inquiry into the case.⁹³ The magistrate's role is to determine whether or not the prosecution has a case for which the accused must be made to stand trial before a higher court, particularly the High Court.⁹⁴ The procedure for committal proceedings primarily focuses on a waiver of the accused person's right to silence by getting them to disclose material information and facts in support of their actual and potential defences in a statutory statement. Before taking the statement, the magistrate is enjoined under section 187 of COPA to administer a caution to the accused directed at persuading them to speak up, disclose facts and put forward their version of the story.⁹⁵ The provision underscores the need for the accused person to waive their right to silence and infers potentially negative comments and adverse findings where the accused person opts to remain silent.⁹⁶ It

89 *Moro v The Republic* (n 59) 261; *Republic v Iddrisu Iddi v Mbadugu & 14 Others* (n 41).

90 *R v Petkar and Farquhar* [2003] EWCA Crim 2668; *Murray v DPP* [1994] 1 WLR 1; K Greenawalt 'Silence as a moral and constitutional right' (1981) 23 *William and Mary Law Review* 15 43.

91 See *Lutterodt v Commissioner of Police* [1963] 2 GLR 429 439.

92 See COPA secs 181 & 44(1); MK Amidu 'The right to state-appointed counsel in criminal justice under the Constitution' (1992) *Review of Ghana Law* 166. See COPA sec 2(2).

93 Secs 181 & 44(1) COPA; see Amissah (n 37) 98.

94 Sec 184(4) COPA.

95 COPA Sixth Schedule, Rule 3 (Rules as to Taking of Statement of Accused Person); COPA sec 187.

96 The provision states in material part that 'you are not obliged to say anything but if you have an explanation, it may be in your interest to give it now ... If you do not give an explanation your failure to do so may be the subject of comment by the judge, the prosecution or the defence'.

must also be noted that silence at the committal proceedings removes the consideration of possible defences before the magistrate.

The precise extent of legitimate adverse comment or inference by the judge is unclear. Be that as it may, there may be a procedural advantage in this form of defence disclosure in committal proceedings for the accused. Where in this preliminary hearing the statements or defences of the accused person water down the substance of the prosecution's case as to make it weak in the eyes of the magistrate, they may call for a reconsideration of the decision to prosecute or even simply discharge the accused as there being no case to answer.⁹⁷ In any case, this limit to the right to silence also targets a more utilitarian approach to crime control where the public interest in promoting greater accountability for serious crimes trumps the individual's right to autonomy. Thus, a pre-trial disclosure of all potential defences appears to be a more useful and beneficial requirement for the accused in assessing the overall need for a fair trial.

5.3 Limit to silence in proof of an alibi

By the accused's right to silence and privilege against self-incrimination, they are under no legal obligation to cooperate with or assist the prosecution by announcing any special defence. However, the accused has little option where their defence rests on a plea of alibi. Where an accused relies on an alibi defence, they seek to raise a reasonable doubt on the basis that they were not present at the crime scene when the crime was committed and, therefore, could not have committed the crime. Where an alibi is accepted, the accused is acquitted. It is not the duty of the accused to prove their alibi. It is the prosecution that bears the burden to disprove same when advanced by the accused. However, before the prosecution can be called upon to disprove a defence of alibi, that defence must be properly brought to the notice of the prosecution or there must be evidence of it before the trial court.⁹⁸ The failure to disclose an alibi defence in the prescribed nature and in a timely manner may affect the validity and weight of the defence. The notice should contain such particulars as would enable the prosecution to conduct a proper investigation into the movements of the accused.⁹⁹ These disclosures, however, exclude the full statements that the witnesses

97 COPA Sixth Schedule, Rule 4 (Rules as to Taking of Statement of Accused Person).

98 *Bediako v The Republic* [1976] 1 GLR 43. See COPA sec 131.

99 As above.

are to give.¹⁰⁰ The silence of the accused on a defence of alibi simply translates into its forfeiture. An accused who opts to remain silent and fails to furnish the particulars in the manner required by law stands to lose the benefits of the defence and shall be prevented from adducing evidence thereon at trial.¹⁰¹ Since by its very nature a defence of alibi is especially easy to fabricate, section 131 of COPA requires an accused person to give notice of the defence at the earliest opportunity. It is the accepted position in Ghana that the credibility of an alibi was greatly enhanced or strengthened if it was set up at the moment the accusation was made, and if it was consistently maintained throughout the subsequent proceedings, but if it was raised belatedly during the trial, that was a potential circumstance to lessen the weight and force of the defence.¹⁰² In that regard, the court may draw an adverse inference from the accused's pre-trial silence. A delay in serving the required notice and the inadequate particulars belatedly given are circumstances that are capable of denying the alibi evidence of any reliability or cogency.¹⁰³

5.4 Limit to silence in reverse burden of proof

The common law fiercely resists a burden of proof being placed on the accused person.¹⁰⁴ The citizen is entitled to be presumed innocent until their guilt is proved beyond reasonable doubt by the prosecution.¹⁰⁵ The right to the presumption of innocence remains an inherent part of the rule of law and lies at the heart of the Ghanaian criminal jurisprudence.¹⁰⁶ It reflects society's faith in its people by assuming that they are upright citizens unless proven to be otherwise.¹⁰⁷ It places the burden of proving the guilt of the accused person primarily on the prosecution giving due consideration to all elements of defence.¹⁰⁸ It is worth noting that the presumption of

¹⁰⁰ See *Republic v Eugene Baffoe-Bonni & Others* [2018] DLSC 73.

¹⁰¹ Sec 131(4) COPA; see *Christian Asem Darkeh Alias Sherif v The Republic* [2019] DLCA 8831.

¹⁰² *Forkuo & Others v The Republic* [1997-98] 1 GLR 3.

¹⁰³ *Forkuo* (n 102) 13.

¹⁰⁴ Lord Woolf C] in *R v Ali & Others* *The Times* 5 September 2000.

¹⁰⁵ See Constitution of Ghana art 19(2)(c). See the English principle in *Woolmington v DPP* (n 32) as adopted and applied in Ghana, per Viscount Sankey LC: 'It is the duty of the prosecution to prove the prisoner's guilt ... If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given ... the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. It is adopted in Ghana.' See *COP v Antwi* (n 78).

¹⁰⁶ See Constitution of Ghana art 19(2)(c).

¹⁰⁷ *Daniel Boateng v The Republic* [2017] referring to *Okeke v The Republic* (2012) 41 MLRG 61-62. It is generally said that the presumption reflects a society's faith in its citizens that it should assume that they were decent and law-abiding citizens, unless proven to be otherwise. See *R v Oakes* [1986] 11 SR 119-120.

¹⁰⁸ Eg *COP v Antwi* (n 78).

innocence does not imply an absolute duty of the prosecution to prove all matters at all times. Parliament's assessment of the need for heightened factual inquiry for the purpose of effective law enforcement accounts for an imposition of a persuasive burden of proof on the accused to adduce evidence and disclose facts in proof of certain legal issues in respect of a number of criminal offences.¹⁰⁹ In such cases, rather than the prosecution proving guilt beyond reasonable doubt, a reverse persuasive burden applies and requires the accused to prove their innocence on the balance of probabilities.¹¹⁰

The reverse burden of proof has received constitutional imprimatur in Ghana under article 19(16) of the Constitution and validates proceedings where the burden to prove particular facts is on the accused. The general principle is that where information or a fact is specifically within the knowledge of the accused person, a negative averment is not to be proved by the prosecution but, on the contrary, the affirmative must be proved by the accused as a matter of defence.¹¹¹ In such instances a paradigmatic shift occurs which moves the accused from their protective shield to a more utilitarian objective enjoining them to disclose their facts or the version of the case as known to them. The scope of application of the reverse burden of proof is not clearly delimited. However, in connection with serious crimes that pose an exigent threat to the state, such as money laundering, the state emphatically puts the burden on the accused to justify the legitimacy of the sources of income and wealth.¹¹²

109 See, eg, Criminal Offences Act 29 of 1960 sec 148(1) on the offence of dishonestly receiving under the doctrine of recent possession. It provides as follows: 'A person is charged with dishonest receiving and is proved to have had in his possession or under his control, anything which is reasonably suspected of having been stolen or unlawfully obtained and he does not give an account, to the satisfaction of the Court, as to how he came by it the property may be presumed to have been stolen or unlawfully obtained and the accused may be presumed guilty of dishonest receiving in the absence of evidence to the contrary.'

110 D Hamer 'The presumption of innocence and reverse burdens: A balancing act' (2007) 66 *Cambridge Law Journal* 142. See also G Williams 'The logic of exceptions' (1988) 47 *Cambridge Law Journal* 264-265; secs 11 & 12 Evidence Act.

111 See also *Salifu & Another v Republic* [1974] 2 GLR 291, quoted by Tank J in *Philip Assibit Akpeena v The Republic* (n 39); *Boakye v Asamoah & Another* [1974] 1 GLR 38; P Huxley 'Reverse proof burdens in criminal proceedings' (2000) 9 *Nottingham Law Journal* 69.

112 Sec 46(2) Anti-Money Laundering Act 749 of 2007: 'In a trial for an offence under this Act, the accused person may be presumed to have unlawfully obtained pecuniary resources or property in the absence of evidence to the contrary if the accused person (a) is in possession of pecuniary resources or a property for which the accused cannot account and which is disproportionate to the accused person's known sources of income; or (b) had at the time of the alleged offence obtained access to personal pecuniary resources or property for which the accused cannot satisfactorily account.'

It is beyond a doubt that the reverse burden is a direct affront to the procedural safeguards of presumption of innocence and privilege against self-incrimination.¹¹³ However, in this case the greater focus lies in promoting the overarching objective of the criminal trial, notably, the need to achieve a fair balance of prosecution between the general interests of the community and the personal rights of the accused.¹¹⁴ Unfortunately, the essence of this principle has been largely misunderstood and the court has been swayed by the due process argument to declare the reverse burden of proof as being unlawful and in violation of the presumption of innocence and attendant burden of proof.¹¹⁵

A fair consideration of the competing interests at the trial between the general public interest and the due process protection of the accused requires a reconsideration of the true value of the reverse burden of proof. Be that as it may, the effect of the reverse burden of proof on the accused in practice is mitigated by the standard of proof, which is lighter than the prosecution's burden¹¹⁶ and requires the accused to establish the key facts of defence on the balance of probabilities by advancing a probable explanation as to their actions in order to establish doubt and escape conviction.¹¹⁷ The validity of the reverse burden in this sense is supported by the primary obligation to prove the ingredients of the offence which continue to fall on the prosecution.¹¹⁸

5.5 The 2018 Practice Direction on disclosures and its effect on the right to silence

In 2018 the then chief Justice of the Republic of Ghana, Sophia Akuffo, introduced a practice direction which for the first time instituted a case management practice in criminal cases for the purpose of achieving trial efficiency.¹¹⁹ While its purpose is to guide the adjudication of criminal cases, with a more active involvement of the judge in managing the pretrial stage of the proceedings, the Practice

113 Hamer (n 110) 142.

114 Hamer (n 110) 147, quoting *Brown v Stott* [2003] 1 AC 704.

115 *The Republic v John Cobbina & Another* (2018) GM 127. The judge accepted a submission that the burden cast onto the accused infringed upon the right to the presumed innocent.

116 Sec 11(2) Evidence Act. The prosecution must prove guilt beyond all reasonable doubt.

117 *Asare v The Republic* [1978] GLR 193; *Osaе v The Republic* [1980] GLR 446.

118 *R v Lambert Ali and Jordan* *The Times* 5 September 2000.

119 Practice Direction (Disclosure and Case Management in Criminal Proceedings) (2018). It took effect on 1 November 2018. See Judicial Secretary Circular SCR/209 dated 30 October 2018. It must be noted that this Practice Direction is a stopgap measure introduced by the judiciary to last until a more formal prescription is made by the legislature on the matter.

Direction ushered in a requirement for mutual pretrial disclosures that essentially wears down the core foundation of the accused's right to silence. In addition to saddling the prosecution with the burden to disclose to the accused, it enjoins the accused to participate in the construction of the case against them in furtherance of a wider goal of trial efficiency. More specifically, it requires the accused person to make certain reciprocal pretrial disclosures to the prosecution in a manner that dips the effect of the conventional due rights of the accused, particularly the right to silence. First, the accused person assumes the obligation to disclose, before the commencement of the trial, material information about the witnesses they intend to call by providing their names and addresses for the purposes of case management. This is a mere pre-emptive exercise aimed at putting the court in readiness to proceed with the trial at any time, should the court call upon the accused to open their defence at the close of the prosecution's case.¹²⁰

The accused person in principle stands to be convicted of the offences charged if they fail to disclose the required particulars to the prosecution in furtherance of their right to silence. Even more profoundly, the accused person is enjoined to file their witness statements and disclose all documents or materials in their possession and within their knowledge which they intend to use for their defence. These disclosures in respect of the defence are to be made and served on the prosecution before the commencement of trial, at least two clear days before the date fixed for the case management conference.¹²¹ All courts across the country have been mandated by the Chief Justice, under whose hand this direction is issued, to duly comply with the Practice Direction.¹²²

However, it must be noted that the implementation of the defence disclosure requirement under the Practice Direction has not been without controversy. While the move towards an accused's pre-trial disclosure obligation essentially aligns with a policy change from a core adversarial and due process theory to a managerialist ideology, in practice it is denounced as being at odds with the procedural due process values that guarantee total insulation of the accused from matters of proof and the right to silence. Many legal practitioners and members of the bench have pointed to the unconstitutionality of this new policy on an accused's pre-trial disclosure obligations as cutting through the basic constitutional protection rights, particularly

120 Practice Direction (n 119) part 2(3)(b).

121 Practice Direction (n 119) 6.

122 See Circular SCR/209 dated 30 October 2018 from the office of the judicial secretary to all judges and magistrates.

the presumption against self-incrimination, the presumption of innocence and the burden of the prosecution to prove the guilt of the accused beyond all reasonable doubt. It is evident that the new policy on an accused's disclosure was implanted in the Ghanaian criminal procedural regime without the necessary policy foundation. Consequently, the legal effect of the Practice Direction in respect of the defence disclosure has been attenuated in favour of the conventional procedural policy that guarantees the due process rights of the accused, in particular, their right to silence.

6 Rethinking the use of silence in adversarial pre-trial proceedings

It must be noted that despite the protective character of the right to silence to the accused, its value in the context of the procedural safeguards at the pre-trial investigation stage remains somewhat doubtful, particularly when analysed within the operational design of the adversarial criminal trial. It is recalled that as part of its operational assumption, the adversarial system relies on partisan control of investigations and presentation of evidence before a neutral adjudicator.¹²³ Its underlining theory is that truth is best determined, and justice best delivered, through a clash of opposing arguments by the prosecution and the defence.¹²⁴ The prosecution and the accused are equally responsible for the development the facts and for giving shape to their evidence.¹²⁵ Each party also is required to vigorously defend its position from their assumed equal positions.¹²⁶ They are both expected to make their own statements, protect their procedural rights, freedoms and pre-trial legitimate interests. The essence of this right must be properly contextualised as a default makeshift rather than a cure to a gap in procedure. It must be noted that unlike the trial stage that involves a structured procedure dominated by a bundle of fair trial rights, the pre-trial stage

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- 123 Secs 11(3) & 13(2) Evidence Act. See, eg, A Goldstein 'Reflections on two models: Inquisitorial themes in American criminal procedure' (1974) 26 *Stanford Law Review* 1009; WV Caenegem 'Advantages and disadvantages of the adversarial system in criminal proceedings' (1999) 69-70. On the contrary, the inquisitorial system places more emphasis on the pre-trial phase than on the trial and vests the responsibility for the investigations in a neutral figure, usually a judge. See JS Hodgson 'The future of adversarial criminal justice in 21st century Britain' (2009) 35 *North Carolina Journal of International and Commercial Regulation* 321.
- 124 EE Sward 'Values, ideologies and evolution of the adversary system' (1989) 64 *Indiana Law Journal* 311, noting that this is opposed to the 'communitarian ideal' which is built on the theory of 'cooperation rather than confrontation in resolving society's problems, including disputes among its members'.
- 125 C Roodt 'A historical perspective on the accusatory and inquisitorial systems' (2004) 10 *Fundamina* 139; Hodgson (n 123) 320.
- 126 Caenegem (n 123) 79.

of the criminal investigations remains largely under-regulated.¹²⁷ This situation has accounted for the trial system's reliance on the right to silence as the most reliable alternative to avoiding not only the need to develop a full regulatory structure for the investigative phase, but also to police every step of the investigative process to ensure compliance with pre-trial administrative safeguards, particularly the prohibition of the use of force or torture to secure unlawful confessions.¹²⁸ To that end, the tendency of the law has been to balance the rights of the accused against the adverse interests of the investigations led by the prosecution by relieving the accused of any obligations to assist the prosecution in the development of the facts and evidence at the pre-trial stage.¹²⁹ This approach, however, shifts the focus of the investigation from affording the accused a true adversarial role in also developing their own facts and evidence and challenging the prosecution at the pre-trial stage to permitting the accused to remain silent and allowing the prosecution to dominantly marshal all forms of evidence at the trial against them. Securing the accused's silence at the pre-trial stage not only weakens the institutional position of the defence during the investigative stage of the proceedings, which becomes merely reactive at the trial, but also deprives the court of the benefits of a balanced preliminary assessment of the facts at the pre-trial. It is this defect of silence in the adversarial process that today justifies the imposition under the Practice Direction (Disclosures and Case Management in Criminal Proceedings) of an obligation on the accused person to investigate and disclose its facts and evidence during case management conference in a manner that puts all the facts of the case before the court prior to the commencement of the trial.¹³⁰ This new development in the Ghanaian criminal process underlies a call to a zealous participation of the accused in the fact-finding process. The common law development that the prosecution can no longer use the accused as an informational resource imposes an adversarial obligation on the latter to also investigate for themselves the facts of the case in order to enhance their chances of raising doubts in the case of the prosecution. Again, doubt, as far as the burden of the accused in criminal trials is concerned, is not always raised through mere

127 The only pre-trial guarantees relate to the right to be informed of the reason of arrest and of the right to a lawyer of choice (art 14(2)); the right to be brought before court within 48 hours when not released (art 14(3)); and the right to bail when trial cannot be conducted within reasonable time (art 14(4)). The trial stage applies the full scope of art 19.

128 Sec 120 Evidence Act.

129 See similar comments under international criminal courts, S Summers *The European criminal procedural tradition and the European Court of Human Rights* (2007) 161.

130 Practice Direction (n 119) 6.

cross-examination by way of punching holes in prosecution's case.¹³¹ It sometimes requires the accused to investigate the case to discover adverse evidence to the prosecution's case. It thus is paradoxical to insist on the importance of adversarial proceedings and boast of its application while at the same time eulogising the benefits of the right to silence in a way that undermines the participatory role of the accused in an adversarial setting.¹³² In so far as the principle of fair trial is based on institutional adversity between the prosecution and the accused, strict insistence of the right to silence and privilege against self-incrimination inevitably undermines the truth-finding objective and fairness of the proceedings. In as much as the procedural safeguard of silence should not be eliminated to place the accused in a vulnerable position, it is equally important to redress the balance of adversariness in the pre-trial proceedings through the postulation of procedural rules to guide the investigative phase of the proceedings beginning from the stages of arrest and detention until the start of the trial.

7 Conclusion

The right to silence and its corollary privilege against self-incrimination guarantee a good measure of protection for accused persons, as they play a crucial role in protecting the accused from the manipulative hands of an overzealous prosecution. Jointly, these guarantees isolate the accused from all primary obligations to assist the prosecution in establishing guilt and from any form of compulsion seeking to induce to speak or give any type of evidence at the trial, whether incriminating or not. However, the protection afforded under the right to silence is not absolute and, at the trial stage, leans towards a more utilitarian approach which justifies a number of limitations on the scope of application of the right. Despite these benefits of the right for accused persons, the intriguing question remains as to how to align the right to silence with the foundational values of the Ghanaian adversarial system, which primarily relies on aggressive partisan development and control of the facts. The spirit of the adversarial trial right deserves a practical engagement of the accused in the pre-trial stage of investigations and the new approach to managerialism in criminal proceedings which requires an early disclosure of facts and a pre-trial confrontation of evidence as between the accused and the prosecution is a welcome approach. Today, the need to enhance the truth-finding values of the adversarial trial requires a more participatory approach of the accused in fact-

¹³¹ Sec 11(3) NRCDC 323.

¹³² Summers (n 129) 163 citing J Vargha *Die Verteidigung in Strafsachen* (1879) 395.

finding and evidence establishment and, thus, a reconsideration of the operational framework of the right to silence.

Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence

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Summary: *There are a range of impediments in the pursuit of redress and reparations for sexual violence, more so in conflict and post-conflict situations. Often if accountability is sought through judicial institutions, it is through criminal proceedings. However, another option available is to file, simultaneously or alternatively, a civil and/or constitutional proceeding. In February 2013 six women and two men who were sexual and gender-based violence survivors of Kenya's 2007-8 post-election violence filed a constitutional petition. On 10 December 2020 the Kenyan High Court awarded four survivors Kes 4 million (approximately US \$36 513) as general damages for the violation of their constitutional rights. This article, which is anchored on Kenya's human rights obligations, uses Kenya as a case study to examine the*

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pursuit of domestic accountability through strategic litigation and the contribution made towards redress and reparation for survivors of sexual and gender-based violence from post-election violence. First, the author argues that the transitional justice approach in Kenya provided the foundation for the strategic litigation case. Therefore, the article provides an overview of key aspects of Kenya's transitional justice approach. Second, the author argues that to understand the significance of the strategic litigation, an understanding of the sexual and gender-based violence which necessitated the strategic litigation case is necessary. The article therefore examines Kenya's legacy of historical injustice and gross human rights abuses which played a role in the sexual and gender-based violence during post-election violence. Third, the author analyses the strategic litigation case, considering the key claims by the petitioners and the decision of the Court. Finally, the article discusses the lessons learnt and contribution made by this case. The author submits that, although imperfect, this strategic litigation was a valuable recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence, contributed to reparation access and had an impact on domestic accountability as an option for redress and reparation.

Key words: *Kenya; redress; reparations; sexual and gender-based violence; strategic litigation*

1 Introduction

Criminal prosecution is the most pursued form of accountability in transitional justice. However, civil and constitutional litigation can also contribute to the pursuit of truth and justice and, in some ways, the battle against impunity. Kenya serves as a significant case study in this regard: While almost all scholarly discourse on transitional justice in Kenya focuses on the International Criminal Court (ICC) intervention in the situation in Kenya, this article seeks to contribute to the accountability discourse by considering strategic litigation as an avenue for redress and reparations for gross human rights abuse, specifically, strategic litigation for sexual and gender-based violence in conflict and post-conflict situations. Strategic litigation refers to litigation that is in the interests of the public with the aim of achieving protection and the enjoyment of human rights as well as obtaining justice and redress.¹ Therefore, the article considers the strategic

¹ Office of the High Commissioner for Human Rights (OHCHR) 'Strategic litigation for sexual and gender-based violence: Lessons learned' (2019), <https://www.ohchr.org/en/press-releases/2019/09/strategic-litigation-for-sexual-and-gender-based-violence-lessons-learned>.

litigation case filed by sexual and gender-based violence survivors of the 2007-8 post-election violence. The landmark judgment in this case was delivered on 10 December 2020 and is the first civil or constitutional law judgment in relation to post-election violence in Kenya.²

The premise of the article is that Kenya's transitional justice processes prepared the ground for the strategic litigation by sexual and gender-based violence survivors of post-election violence. The first part of the article discusses the significance of the Commission of Inquiry on Post-Election Violence (CIPEV), the Truth, Justice, and Reconciliation Commission (TJRC), constitutional and institutional reform, and ICC intervention, in providing a foundation for the strategic litigation case. The article argues that an understanding of Kenya's history is important to appreciate the systemic recurrence of sexual and gender-based violence, particularly in the context of election-related violence. The second part of the article contextualises the legacy of ethnic, political and election-related violence that fostered the environment in which sexual and gender-based violence occurred during post-election violence. This background is an important framing to understand the post-election violence as more than a singular crisis event in Kenya's history and instead as part of a continuing cycle of widespread sexual and gender-based violence that occurs with impunity during every general election. It also is an important lens through which to consider the contribution of the strategic litigation case. Third, the article discusses key aspects of the case and the decision of the Court. Finally, the article considers the lessons and contribution that the case has made to the pursuit of redress and reparations for sexual and gender-based violence survivors of post-election violence.

The article contends that although imperfect, this strategic litigation case was a valuable acknowledgment of sexual and gender-based violence survivors of post-election violence, impacted perceptions on domestic accountability, and created an option for accessing reparations. In conclusion, the article considers potential areas of research in the pursuit of accountability for sexual and gender-based violence survivors in conflict and post-conflict societies.

ohchr.org/Documents/Issues/Women/WRGS/OHCHR-StrategicLitigationforSV-workshopreport-web.pdf (accessed 29 April 2021).

2 *Coalition on Violence Against Women (COVAW) & 11 Others v Attorney-General of the Republic of Kenya & 5 Others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 Others (Amicus Curiae)* [2020] eKLR.

2 Transitional justice in Kenya

The article considers colonialism and the African post-colonial state as an important lens through which to view transitional justice.³ Notably, the varied history of Africa means that the time periods of transition vary from state to state and depend on the 'different political upheavals, struggles for liberation and socio-economic transformations experienced'.⁴ Rather than referencing a particular time period, the article considers transitional justice a journey of societies 'with legacies of violent conflicts, systemic or gross violations of human and peoples' rights towards a state of sustainable peace, justice and democratic order'.⁵

In late 2007 the violent events during post-election violence raised concerns that Kenya, a country that had long been a beacon of stability, was headed for civil war. Between December 2007 and February 2008 it was estimated that at least 1 133 people were killed, thousands sexually assaulted and mutilated, and at least 600 000 displaced.⁶ The violence began when the incumbent, President Mwai Kibaki of the Party for National Unity (PNU), was declared victor and hastily sworn in despite early results showing that the opposition leader, Mr Raila Odinga of the Orange Democratic Movement (ODM), was in the lead. The Panel of Eminent African Personalities of the African Union (AU) (composed of the former UN Secretary-General, Mr Kofi Annan, Mr Benjamin Mkapa, former President of Tanzania, and Mrs Graça Machel of Mozambique) was able to engage the two parties in a mediation process which brought an end to the violence. The two parties committed, in the Kenya National Dialogues and Reconciliation (KNDR) agreement, to end the violence and to address the long-term issues that caused the violence and continued to plague Kenyan politics. The agreement sought to ensure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.⁷ The National Accord and Reconciliation Act⁸ marked the end to the violence,

3 M Mutua 'A critique of rights in transitional justice: The African experience' in GO Aguilar & FG Isa (eds) *Rethinking transitions: Equality and social justice in societies emerging from conflict* (2011) 31.

4 African Union (AU) *Transitional Justice Policy Framework* (2019) vi.

5 AU (n 4) 4.

6 Commission of Inquiry into Post-Election Violence (CIPEV) 'The Commission of Inquiry into Post-Election Violence Report' (2008), <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> (accessed 31 January 2021).

7 Office of the AU Panel of Eminent African Personalities *The 2008 mediation process and reforms in Kenya* (2014).

8 National Accord and Reconciliation Act 4 of 2008.

created a framework for the power-sharing coalition government and a roadmap to address the crisis.⁹

The KNDR agreement provided the means for a multi-faceted transitional justice approach that sought to address the cause of Kenya's recurrent periods of violence. It is the unaddressed long-term issues that were believed to be the root cause of violence that erupted during post-election violence. While there are several processes and mechanisms that played significant roles in Kenya's transitional justice approach, this article will focus on four that had an impact and provided a foundation for the strategic litigation case.

2.1 Commission of Inquiry into post-election violence

The CIPEV began its work on 3 June 2008,¹⁰ chaired by Justice Philip Waki, a judge of Kenya's Court of Appeal.¹¹ The mandate of the CIPEV included the investigation of the facts and surrounding circumstances related to the violence that followed the 2007 presidential election and the making of recommendations for legal, political, and administrative measures considering its findings.¹² It was gazetted to operate for three months and was only able to obtain a 30-day extension to fulfil its mandate. This meant that the CIPEV was unable to conduct public hearings and investigations in all the key regions that were part of the original plan.¹³ Nevertheless, the CIPEV report recorded 3 561 injuries, 1 133 deaths and heard key testimony that there were at least 900 cases of sexual and gender-based violence.¹⁴ The testimony was provided by Dr Sam Thenya, chief executive officer of Nairobi Women's Hospital, during which he noted that the figure was 'just the tip of the iceberg' given that it was based on those who received 72-hour emergency treatment, as many did not get to hospitals for treatment.¹⁵

There are three key outcomes in the CIPEV report relevant to this article. First, the CIPEV provided an indication of the scale of sexual and gender-based violence and the nature of the violence as not only being directed at women and girls but also at men and boys.

9 KG Adar 'The GNU legal framework and the doctrine of the separation of powers: Implications on Kenya's National Legislative Assembly' (2008) 7 *Journal of African Election* 52.

10 CIPEV (n 6).

11 Other commissioners were Gavin McFadyen (New Zealand), Pacal Kambale (Democratic Republic of the Congo), David Majanja (Kenya) and George Kegoro (Kenya).

12 CIPEV (n 6).

13 As above.

14 As above.

15 CIPEV (n 6) 248.

Second, the CIPEV made recommendations regarding institutional and legislative reform. Third, the CIPEV called for the pursuit of accountability. The CIPEV report also added to the calls by Kenya's leadership for the establishment of a commission to examine the negative practices of the past.¹⁶ It became apparent that the country remained deeply divided since independence from British colonial rule which, according to the CIPEV report, contributed significantly to the widespread violence of post-election violence.¹⁷

2.2 Truth, Justice and Reconciliation Commission

Shortly after the report of the CIPEV, Parliament legislated on the establishment of a truth commission.¹⁸ The TJRC operated from 2009 to 2013 with the mandate to inquire into the gross human rights and historical injustices that had occurred since independence (12 December 1963) until the KNDR agreement was signed (28 February 2008). At the end of the process the TJRC produced volumes of detailed reports with recommendations for a reparation framework and for an implementation mechanism for its findings.¹⁹ The TJRC cited the findings of CIPEV but also provided findings on sexual violence in other periods before the post-election violence. The report detailed sexual violence in conflicts and violent episodes in Kenya's history, including the 'struggle for independence, cattle rustling, conflict over resources, ethnic and politically-instigated violence, and conflict arising from militia activities'.²⁰ According to the TJRC report, sexual violence was 'one of the methods employed by the colonial government to not only to discipline and humiliate dissidents, but also to instil fear in would-be dissidents'.²¹ Witnesses testified to a similar pattern in the context of ethnic and political violence where sexual violence was 'used to intimidate, degrade, humiliate, discriminate against and control those belonging to particular ethnic communities perceived to be in support of the "wrong" side of the political divide'.²²

16 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 1' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/7> (accessed 31 January 2021).

17 As above.

18 Truth, Justice and Reconciliation (TJR) Act 6 of 2008.

19 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 4' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/2> (accessed 31 January 2021).

20 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 2A' (2013) 707, <https://digitalcommons.law.seattleu.edu/tjrc-core/6> (accessed 31 January 2021).

21 TJRC (n 20) 721.

22 TJRC (n 20) 736.

In addition to the periods in which sexual violence occurred, the TJRC report also analysed the impact of sexual violence on survivors and their families. The issues covered included the psycho-social impact, social stigma, mental and physical scars. Notably, the TJRC report included recommendations such as the need for the government to establish a reparations fund for victims of gross human rights violations and historical injustice. Furthermore, a reparations framework and implementation matrix were developed to operationalise the fund.²³ On 21 May 2013 the TJRC presented its report to President Uhuru Kenyatta²⁴ and was immediately required to publish the report in the Kenya Government Gazette.²⁵ However, the publication of the TJRC report in the Gazette omitted volumes IIA and IIC that provided details on sexual violence incidents.²⁶ According to the TJRC Act the implementation of the report should have commenced within six months after the National Assembly considered the report.²⁷ After six months this did not take place.

On 26 March 2015 during the state of the nation address President Uhuru Kenyatta issued a public apology for past wrongs in which he recognised other violence that occurred during post-election violence but did not mention the occurrence of sexual violence.²⁸ In the address President Kenyatta announced the establishment of a Kes 10 billion (approximately US \$30 million) Restorative Justice Fund. Later in 2017 the Kenya National Commission on Human Rights (KNCHR) together with the office of the Attorney-General and the Department of Justice led a multi-sectoral consultation to develop a framework for reparations through the Restorative Justice Fund. Two documents were developed following the consultations, namely, the Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017 which is anchored to the Public Finance Management Act,²⁹ and the Reparations for Historical Injustices Fund Policy. Despite several calls to make the Restorative Justice Fund

23 TJRC (n 19).

24 P Seils 'Integrity of Kenya's Truth Commission Report must be restored' 9 June 2013, <https://www.aljazeera.com/opinions/2013/6/9/integrity-of-kenyas-truth-commission-report-must-be-restored> (accessed 12 June 2021).

25 Sec 48(3) TJRC Act.

26 OHCHR et al 'Breaking cycles of violence: Gaps in prevention of and response to electoral-related sexual violence', <https://phr.org/wp-content/uploads/2019/12/OHCHR-PHR-UN-WOMEN-Kenya-Gap-Analysis-Dec-2019-1.pdf> (accessed 31 March 2021).

27 Sec 49(3) TJRC Act.

28 Office of the President of the Republic of Kenya 'Speech by His Excellency Hon Uhuru Kenyatta, CGH, President and Commander in Chief of the Forces of the Republic of Kenya during the State of the Nation Address at Parliament' 26 March 2015, <https://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/> (accessed 1 June 2021).

29 Public Finance Management (PFM) Act 18 of 2012.

operational, including by the United Nations (UN) Human Rights Committee in 2021, the documents developed to operationalise the Restorative Justice Fund remain at the consultative stage.³⁰ Notably, President Kenyatta highlighted in the state of the nation address that the TJRC report was before Parliament and urged that it be processed without delay. Among other calls, civil society actors and survivors have petitioned the National Assembly³¹ and Senate³² to process the TJRC report, but at the time of writing in 2021 the TJRC had not been debated.

2.3 Constitutional and institutional reform

Agenda item 4 of the KNDR agreement was an undertaking to address long-term issues, including a commitment to constitutional, legal, and institutional reforms.³³ The new Constitution of the Republic of Kenya³⁴ was passed through a peaceful referendum, marking an important milestone for the political history of Kenya. Two important aspects are relevant to the sexual and gender-based violence case. First, under the old Constitution Kenyan courts relied on a rule of standing or *locus standi* that 'barred private individuals from litigating the rights of the public in courts'.³⁵ However, this did not mean that cases involving human rights and constitutional issues did not find their way into Kenyan courts. Rather, it meant that where there were cases in the public interest, a technicality such as *locus standi* was one of the methods used to frustrate litigation of constitutional and human rights issues.³⁶ For example, in the case of *Wangaari Mathai v Kenya Times Media Trust Ltd*³⁷ the plaintiff sought to protect Uhuru Park which had been identified as the site for the

30 Human Rights Committee 'Concluding Observations on the fourth periodic report of Kenya' 11 May 2021 UN Doc CCPR/C/KEN/CO/4.

31 Journalists for Justice 'Parliament to debate the TJRC report after petition from victims is tabled' 4 December 2015, <https://jjustice.net/parliament-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled/> (accessed 16 May 2021).

32 National Victims and Survivors Network (NVSN) 'NVSN public petition to establish measures towards rehabilitation services to victims of past gross human rights violations as identified through the TJRC process', <http://parliament.go.ke/sites/default/files/2020-10/Petition%20concerning%20establishing%20measures%20towards%20rehabilitation%20services%20to%20victims%20of%20past%20HR%20violations%20as%20identified%20through%20TJRC.pdf> (accessed 15 June 2021).

33 South Consulting 'The Kenya national dialogue and reconciliation: Building a progressive Kenya' (2011), <https://reliefweb.int/sites/reliefweb.int/files/resources/Background-Note.pdf> (accessed 22 April 2021).

34 Constitution of Kenya 2010.

35 Kenyans for Peace with Truth and Justice (KPTJ) et al 'A guide to public interest litigation in Kenya' (2010), <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> (accessed 26 April 2021).

36 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *George Washington International Law Review* 763.

37 (1989) Civ Case 5403.

construction of a multi-story building. In the ruling it was held by the judge that matters of public interest could only be litigated by the Attorney-General.³⁸ Later, some judges attempted to establish the 'minimal personal interest' to allow for a more relaxed rule of standing.³⁹ After the promulgation of the Constitution the issue was settled, allowing for standing on matters related to human rights⁴⁰ and other violations of the Constitution.⁴¹ These provisions in the Constitution allowed for the survivors of sexual and gender-based violence during post-election violence and civil society organisations (CSOs) to institute proceedings on their behalf, on behalf of other survivors and in the public interest.

The second important aspect introduced by the Constitution is the reform of the judiciary. Public confidence in the judiciary was marred by corruption, a lack of transparency in the recruitment process and independence from other branches of government. With the new Constitution the judiciary made progress towards transformative reforms that helped to increase public confidence in the growing independence of the judiciary.⁴² Whereas in the past the appointment of judges was entirely within the purview of the President, the Constitution limited the appointments to the recommendations by the Judicial Service Committee.⁴³ The implications of a growing independent judiciary opened the possibility of strategic litigation to advance the cause of justice, such as in the case of sexual and gender-based violence.⁴⁴ This is particularly important given who were the accused at the ICC.

2.4 International Criminal Court

The ICC Prosecutor opened a *proprio motu*⁴⁵ investigation on Kenya focusing on 'alleged crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008'.⁴⁶

38 Oloka-Onyango (n 36).

39 KPTJ (n 35).

40 Art 22 Constitution.

41 Art 258 Constitution.

42 M Gainer 'Transforming the courts: Judicial sector reforms in Kenya, 2011-2015', https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG_OGP_Kenya.pdf (accessed 17 July 2021).

43 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 6.

44 Arts 22 & 258 Constitution.

45 Latin for 'on one's own initiative'. See the Rome Statute of the International Criminal Court adopted 17 July 1998, entered into force 1 July 2002 2187 UNTS 3 art 15(1).

46 International Criminal Court (ICC) 'ICC judges grant the prosecutor's request to launch an investigation on crimes against humanity with regard to the situation in Kenya' (2010), <https://www.icc-cpi.int/news/icc-judges-grant-prosecutors->

Thereafter, on 23 January 2012, charges were confirmed against Uhuru Muigai Kenyatta (President of Kenya since 2013), William Samoei Ruto (Deputy President of Kenya since 2013) and Joshua Arap Sang (radio presenter). Noteworthy, the Kenyatta case was the only one that included charges of rape and other forms of sexual violence, such as forcible circumcision and penile amputation in the acts constituting crimes against humanity.⁴⁷ On 5 December 2014 the Prosecutor withdrew the charges against Kenyatta, citing witness interference and state obstruction to access to evidence.⁴⁸ On 5 April 2016 the charges against Ruto and Sang were vacated, also without prejudice to a fresh prosecution in the future.⁴⁹ It was believed that the Kenyatta case was the 'only credible effort to provide justice to the survivors of rape and sexual violence during the [post-election violence]'.⁵⁰ Nevertheless, the ICC process had a positive impact, encouraging strategic litigation cases against the Kenyan government regarding post-election violence.⁵¹ Victims who had been used to being unheard and silenced felt empowered by the Legal Representative for Victims countering arguments put forward by Mr Kenyatta and his government.⁵² The victims' participation in the ICC case 'allowed survivors to find their voices and to demand truth and accountability'.⁵³

In sum, this article argues that the CIPEV, TJRC, constitutional and institutional reform and ICC intervention provided a foundation for the strategic litigation case. Furthermore, were it not for some of these processes, the strategic litigation would not have been possible, nor would it have provided an avenue for redress and reparations. It is important to understand the circumstances that necessitated Kenya's transitional justice process and its significance in cases of

request-launch-investigation-crimes-against-humanity-regard (accessed 12 March 2021).

- 47 ICC 'Decision of the confirmation of charges pursuant to article 61(7)(a) and (b) of the Rome Statute in the case of *The Prosecutor v Uhuru Muigai Kenyatta*' (2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF (accessed 14 April 2021).
- 48 ICC 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta' (2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> (accessed 9 March 2021).
- 49 ICC 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future' (2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406> (accessed 10 March 2021).
- 50 ICC 'Victims' response to the prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta' (2014), https://www.icc-cpi.int/CourtRecords/CR2014_09983.PDF (accessed 26 April 2021).
- 51 A Sehmi 'Now that we have no voice, what will happen to us?' (2018) 16 *Journal of International Criminal Justice* 571.
- 52 Sehmi (n 51).
- 53 Sehmi (n 51) 590.

sexual and gender-based violence that occurred during post-election violence. Therefore, the next part provides a historical context.

3 Legacy of historical injustice and gross human rights abuse

The premise of this article is that a historical context is an important framework to understand post-election violence, not as an event, but due to long-term historical injustices and human rights abuses that went unaddressed. This lens is also important for an understanding of the sexual and gender-based violence during post-election violence as part of a recurrent cycle of violence. First, this part provides an overview of Kenya's legacy of ethnic, political and election-related violence. With an understanding of the cycles of violence, this part next considers the nature and scope of sexual and gender-based violence that occurred during post-election violence.

3.1 Ethnic, political and election-related violence

On 12 December 1963, after 68 years of anti-colonial struggles against domination, oppression and exploitation, British colonial rule in Kenya came to an end.⁵⁴ However, colonial practices had already become institutionalised, and independence merely changed who the perpetrators of systemic violations of human rights were.⁵⁵ The colonial era fostered inequality and ethnic conflict through the practices of the administrative system. Specifically, the distribution of wealth, representation in local administration and choice of labourers, among other policies, were decided along ethnic lines. Land was central to fostering ethnic conflict, as there was bitterness on the part of those displaced from their land and superiority among those allowed to live on fertile land, within proximity to new infrastructure and opportunities. Post-independent Kenya maintained the *status quo* of privilege along ethnic lines, and political leadership instrumentalised this colonial practice and used the state to amass wealth and institutionalise ethnic politics.⁵⁶

The Kenyan government did very little after independence to confront the wrongdoings and rehabilitate the nation after generations of atrocities that had occurred during colonisation.

54 TJRC (n 20).

55 As above.

56 KG Adar 'Ethnicity and ethnic kings: The enduring dual constraints in Kenya's multi-ethnic democratic electoral experiment' (1998) 5 *Journal of the Third World Spectrum* 71.

When Kenya's first head of state, Jomo Kenyatta, came into power, his independence speech did not suggest any substantial change to colonial structures and, further, asked the people to 'forgive and forget' the atrocities of the past.⁵⁷ Furthermore, Kenyatta introduced the land policy of 'willing seller, willing buyer' which required people to buy back their land.⁵⁸ The result was that only those 'who had worked closely with the British and earned an income had the necessary resources to buy land or secure bank loans'.⁵⁹ Kenyatta ruled Kenya as a *de facto* one-party state for 15 years (1963 to 1978) during which there was land grabbing, political patronage, ethnic violence and marginalisation at various economic and social levels.⁶⁰

After the death of Kenyatta, Daniel Arap Moi, who had served as his Vice-President from 1966-1978, succeeded as President in 1978. It was hoped that Moi would 'steer the country towards a more accommodating human rights era, without ethnic dominance'.⁶¹ Instead, out of his 24-year rule, 13 were under *de facto* and *de jure* one-party systems. The 'detentions and political trials, torture, arbitrary arrests and police brutality reminiscent of the colonial era' became a common feature of Moi's reign.⁶² In 1991, after significant local and international pressure, Moi's government finally allowed the establishment of a multi-party system, with elections held in December 1992.⁶³ Moi won the election in 1992 and 1997, but 'before and after the elections, there was widespread politically-motivated ethnic violence'.⁶⁴ When President Moi finally stepped down, he gave way to Mwai Kibaki in 2002, his former Vice-President. There was far less violence in 2002 than there had been in 1992 and 1997.⁶⁵

In sum, since 1963 Kenya experienced episodes of ethnic, political and election-related violence. The root causes of the violence include unresolved grievances over land, corruption, internal regional inequality, and inequitable distribution of resources along ethnic lines. These features were identified as some of the underlying issues

57 TJRC (n 20) 17.

58 TJRC (n 20) 19.

59 KM Clarke 'Refiguring the perpetrator: Culpability, history and international criminal law's impunity gap' (2015) 19 *International Journal of Human Rights* 597.

60 KG Adar & IM Munyae 'Human rights abuse in Kenya under Daniel Arap Moi, 1978-2001' (2001) 5 *African Studies Quarterly* 1.

61 Adar & Munyae (n 60) 2.

62 KG Adar 'The internal and external contexts of human rights practice in Kenya: Daniel Arap Moi's operational code' (2000) 4 *African Sociological Review* 74 76.

63 Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

64 Human Rights Watch (HRW) 'Kenya's unfinished democracy: A human rights agenda for the new government' (2002), <http://hrw.org/reports/2002/kenya2/kenya1202.pdf> (accessed 20 April 2021).

65 As above.

that led to the widespread post-election violence. Noteworthy, the pattern of election-related violence continues to be a feature of every Kenyan election cycle to date, with varying degrees of severity. This pattern was documented in the CIPEV and TJRC reports. Also noteworthy, the violence is accompanied with a pattern of widespread sexual violence, which was documented as recently as during the 2017 election.⁶⁶

3.2 Sexual and gender-based violence during post-election violence

While CIPEV estimated 900 cases of sexual and gender-based violence during post-election violence, some estimates are as high as 40 000 incidents of sexual and gender-based violence.⁶⁷ The CIPEV reported that during post-election violence the nature of sexual violence included 'rape, defilement, sodomy, gang rape, sexual mutilation (including forced circumcision and genital violence) and loss of body parts'.⁶⁸ There were reports of traumatic incidents such as being forced to watch or take part in sexual violence against family members.⁶⁹ The TJRC acknowledged in its report that 'due to shame and stigma associated with sexual violence, many victims of sexual violence did not report sexual violence to the Commission'.⁷⁰ Also noted in the report of the TJRC was that, contrary to the traditional belief that women and girls were the sole victims of sexual violence, men and boys were also targeted.

In the report from the Office of the High Commissioner for Human Rights (OHCHR) which deployed a fact-finding mission in February 2008, it was reported that sexual and gender-based violence was 'opportunistic' with groups taking advantage of the chaotic and violent situation to target ethnic groups.⁷¹ Furthermore, the OHCHR reported that there was little evidence that sexual and gender-based violence had been widespread and systemic or used as a tool of intimidation against ethnic groups.⁷² This assessment was called

66 OHCHR (n 26).

67 Amnesty International *Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya* (2014).

68 CIPEV (n 6) 237.

69 CIPEV (n 6).

70 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report (Newspaper Supplement)' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/1> (accessed 31 January 2021).

71 OHCHR 'Report from OHCHR fact-finding mission to Kenya, 6-28 February 2008' (2008), https://reliefweb.int/sites/reliefweb.int/files/resources/DC21F9DFDB550A45C1257411003A9006-Full_Report.pdf (accessed 20 March 2021).

72 As above.

into question by other reports, for example, the International Centre for Transitional Justice (ICTJ) which reported that the incidents of sexual and gender-based violence were widespread and severe, and particularly prevalent in Nairobi, Nyanza, Rift Valley, Coast and Western provinces.⁷³ The Kenya National Commission on Human Rights (KNCHR) reported that women and children were specifically targeted for rape on account of their ethnicity and political affiliation.⁷⁴ Men and boys were similarly targeted. For example, the Luo community were forcibly circumcised by Mungiki⁷⁵ members with some victims reported to have bled to death.⁷⁶ Human Rights Watch reported that several survivors and witnesses described perpetrators inserting 'guns, sticks, bottles and other objects into women's vaginas' or beating their genitals with objects.⁷⁷ Notably, the widespread and systemic nature of the sexual violence was cited in the ICC confirmation of charges.⁷⁸

It was concluded that the patterns of sexual violence during post-election violence, particularly gang rape, were consistent with patterns of mass rape documented in conflict settings elsewhere in the world.⁷⁹ This is an important conclusion as in recent years the international community has been increasing efforts to address conflict-related sexual violence.⁸⁰ In June 2008 the UN Security Council (UNSC) recognised for the first time that conflict-related sexual violence is 'used or commissioned as a tactic of war to target civilians or as part of widespread or systemic attack against civilian populations'.⁸¹ Conflict-related sexual violence refers to 'incidents or patterns of sexual violence against women, men, girls, or boys occurring in a conflict or post-conflict setting that have direct or indirect links with the conflict itself or that occur in other situations of concern such as in the context of political repression'.⁸²

73 International Centre for Transitional Justice (ICTJ) 'The accountability gap on sexual violence in Kenya: Reforms and initiatives since the post-election crisis' (2014), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-SGBVAccountability-2014.pdf> (accessed 20 February 2021).

74 Kenya National Commission on Human Rights (KNCHR) *On the brink of the precipice: A human rights account of Kenya's post-2007 election violence* (2008).

75 Mungiki is a movement of mostly Kikuyu men that has been variously defined as a cultural-religious group, a political movement and criminal organisation; see KNCHR (n 74).

76 KNCHR (n 74) 128.

77 Human Rights Watch (HRW) *I just sit and wait to die: Reparations for survivors of Kenya's 2007-2008 post-election sexual violence* (2016).

78 ICC (n 46).

79 HRW (n 77).

80 Conflict-related sexual violence report 2020, UN Secretary-General 20 March 2021 UN Doc S/2021/312 (2021).

81 Resolution 1820, UN Security Council 19 June 2008 UN Doc S/RES/1820 (2008) para 1.

82 UN 'Guidance note of the secretary-general on reparations for conflict-related sexual violence' (2014), <https://www.unwomen.org/-/media/headquarters/>

With the above context of the sexual and gender-based violence that occurred during post-election violence, an analysis of the strategic litigation case can be better understood.

4 Strategic litigation by the sexual and gender-based violence survivors during post-election violence

Sexual violence, including in conflict-related situations, is prohibited in international law. The prohibition can be found in customary international law as well as several instruments in international humanitarian law, human rights law and criminal law. Similarly, the obligation to prosecute perpetrators and provide reparation to survivors of sexual violence can be found in international law. The options for redress and reparations for sexual violence depend, in part, on the legal framework applicable at the domestic level. According to the Kenyan Constitution the general rules of international law and any treaty or convention ratified by Kenya form part of the laws of Kenya.⁸³ Some of the international instruments that are relevant to sexual violence, which create obligations that bind Kenya, include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); the Rome Statute of the International Criminal Court (Rome Statute); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the African Charter on Human and Peoples' Rights (African Commission); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The strategic litigation case by the sexual and gender-based violence survivors during post-election violence was based on these obligations that bind Kenya.

4.1 The parties in the case

In February 2013 six women and two men who were survivors of sexual and gender-based violence during post-election violence filed a constitutional petition at the High Court of Kenya, Constitutional and Human Rights Division. The eight survivor-petitioners were representative of different types of sexual violence that occurred

attachments/sections/docs/2014/unsg-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf (accessed 2 May 2021).

83 Arts 2(5) & 6 Constitution.

during post-election violence. They identified a variety of perpetrators, some police officers, and others private citizens. Given the nature of the case, and the potential danger and stigma the survivors could face, their identities were not made public. However, the four CSOs that joined the case as co-petitioners were known: the Coalition on Violence against Women (COVAW); Physicians for Human Rights (PHR); the International Commission of Jurists-Kenya (ICJ-Kenya Section); and the Independent Medico-Legal Unit (IMLU). These CSOs joined the case to represent the interests of other sexual and gender-based violence survivors not represented in the case, as well as the interests of the public. As discussed in part 2.3, the provisions of the new Constitution helped settle the issue of *locus standi* of the co-petitioners.

There were six respondents in this case. The first respondent was the Attorney-General who has the constitutional duty to represent the national government.⁸⁴ The second respondent was the Director of Public Prosecutions with the constitutional authority to direct the Inspector-General of the National Police Service to investigate allegations of criminal conduct.⁸⁵ The third respondent was the Independent Policing Oversight Authority established with the objective of holding the police accountable to the public and giving effect to the Constitution.⁸⁶ The Inspector-General of the National Police Service was the fourth respondent with the duty to investigate offences and enforce the law.⁸⁷ The fifth respondent, the Minister for Medical Services and sixth, the Minister for Public Health and Sanitation were merged but at the time of the petition were mandated to provide health services.⁸⁸

After the petition was filed, the Court granted leave for other parties to join the petition. The Kenya Human Rights Commission joined as an interested party and the Kenya National Commission on Human Rights, Katiba Institute, Constitution and Reform Education Consortium and Redress Trust were each admitted as *amicus curiae* or 'friend of the court'.

84 Art 156(4) Constitution.

85 Art 157(4) Constitution.

86 Art 244 Constitution.

87 Art 245(1) Constitution.

88 COVAW (n 2).

4.2 Petitioners' claims

The survivor-petitioners claimed that during the post-election violence, the forms of violence committed against them included 'rape, attempted rape, defilement, attempted defilement, gang rape, forced pregnancy, deliberate transmission of HIV or any other life threatening sexually transmitted diseases, sexual assault, indecent acts, and other gender-based physical violence'.⁸⁹ The sexual and gender-based violence strategic litigation sought, among other issues, to hold the Kenyan government accountable for its failure to

prevent the violence and resulting [sexual and gender-based violence]; protect the general population, including the survivors from sexual assault; investigate and prosecute perpetrators of [sexual and gender-based violence]; and provide prompt, adequate, appropriate, and effective reparations to survivors.⁹⁰

The petitioners claimed that the respondents caused or contributed to the sexual and gender-based violence violations suffered due to numerous failures. Some of these failures included a failure to train and control police in lawful methods of law enforcement operations during civil unrest to prevent sexual crimes; a failure to plan, prepare and take adequate measures for proper policing and protection of citizens; and a failure to intervene to protect victims when the police were aware of the threat or commission of crimes involving sexual and gender-based violence.

Moreover, the petitioners claimed that the respondents were liable for the failure to investigate and prosecute those responsible for the violations against the survivor-petitioners and other sexual and gender-based violence survivors during the post-election violence. The petitioners also claimed that 'the government denied emergency medical services to victims and failed to provide the necessary care and compensation to address their suffering' and, therefore, that the respondents were liable.⁹¹ Notably, the petitioners claimed that the respondents were liable for sexual and gender-based violence committed by both state actors and non-state actors. In the case of liability for the sexual and gender-based violence committed by non-state actors, the petitioners argued, for example, that the first and fourth respondents failed to protect victims of sexual and gender-

89 Physicians for Human Rights (PHR) 'Constitutional petition 122 of 2013', <https://phr.org/wp-content/uploads/2019/09/petition-122of2013.pdf> (accessed 12 December 2020).

90 Physicians for Human Rights (PHR) 'Public interest litigation fact sheet' (2019), <https://phr.org/wp-content/uploads/2019/11/PHR-PIL-Advocacy-Factsheet-2019.pdf> (accessed 29 April 2021).

91 As above.

based violence when they were aware of the commission or threats of this type of violence against victims. Therefore, through their acts and/or omissions, they caused the sexual and gender-based violence violations against the survivor-petitioners and other sexual and gender-based violence survivors during the post-election violence.⁹²

The petitioners also claimed that various constitutional and international law rights had been violated. The rights alleged to have been violated included the 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 before the law and freedom from discrimination; the right to information; and the right to a remedy.⁹³

4.3 Relief sought by petitioners

The relief sought in this strategic litigation petition was extensive with the petitioners asking the Court to decide on 22 requests or prayers. Four of these are noteworthy in the context of redress and reparations. First, the petitioners sought a declaratory order to the effect that the constitutional and international law rights they alleged to have been violated were violated during post-election violence due to the failure of the government of Kenya to protect those rights. Second, the petitioners sought a declaratory order to the effect that Kenya has a 'positive obligation to investigate and prosecute violations of the right to life, prohibition from torture, inhuman and degrading treatment; and the security of the person'.⁹⁴ Third, the petitioners sought an order compelling the respondents to 'collaborate to create a database of victims to ensure that all such victims are provided with appropriate, ongoing medical and psychosocial care, legal and social services'.⁹⁵ Fourth, the petitioners sought various forms of damages, including punitive damages for the failure to provide emergency medical services and documentation to victims, exemplary damages to acknowledge the involvement of the police as perpetrators and general damages.

4.4 Decision of the Court

In a landmark judgment, on 10 December 2020 the High Court ruled in favour of four of the eight survivor-petitioners. The Court awarded

92 As above.

93 COVAW (n 2).

94 PHR (n 90) 12.

95 PHR 14.

each of the four survivor-petitioners Kes 4 million (approximately US \$36 513) as general damages for the violation of their constitutional rights.⁹⁶ Of the four successful survivor-petitioners, three were attacked by police officers (the fifth, sixth and ninth petitioners) and one was attacked by private citizens (the eighth petitioner). The unsuccessful four survivor-petitioners (seventh, tenth, eleventh and twelfth) were attacked by private individuals. Korir J, the High Court judge before whom this case was heard, held that there was no evidence to show that the crimes against the unsuccessful four took place at the 'instigation, consent or acquiescence of a public official or other person acting in an official capacity'.⁹⁷ Furthermore, Korir J did not consider it a failure of the respondents and, by extension, the Kenyan government, to investigate and prosecute these cases since they were not initially reported by the survivor-petitioners.

Korir J only granted two of the eight declaratory orders. The Court declared that Kenya indeed had a positive obligation to investigate and prosecute sexual and gender-based violence-related crimes in relation to the post-election violence. According to Korir J, the state owed a duty to refrain from causing harm and to pursue those whose acts caused harm to the three survivor-petitioners attacked by police officers. Although the eighth survivor-petitioner was attacked by private actors, the state did not investigate or follow up with arrest of the perpetrators despite the survivor-petitioner naming the attackers and providing information as to where they could be found.⁹⁸ Consequently, declaratory orders were issued that the right to life, prohibition from torture, inhuman and degrading treatment, and security of the person of the fifth, sixth, eighth and ninth survivor-petitioners had been violated.⁹⁹

The second declaratory order that was granted was to the effect that the right to life, security, remedy, equality and freedom from discrimination as well as the prohibition of torture, inhuman and degrading treatment had been violated, as a result of the failure of the state to protect the rights of the fifth, sixth, eighth and ninth survivor-petitioners.¹⁰⁰ These declaratory orders reflect an important recognition that sexual violence, including rape and forced circumcision, constitutes forms of torture.¹⁰¹ Noteworthy, both the declaratory orders issued were only in respect of the four survivor-

96 COVAW (n 2) para 172(c).

97 COVAW para 119.

98 COVAW para 120.

99 COVAW para 172(a).

100 COVAW para 172(b).

101 Telephone interview with L Muthiani on 5 May 2021.

petitioners and not broadly of other sexual and gender-based violence survivors of the post-election violence.¹⁰²

The Court granted no orders compelling the state to act in any way by reasoning in a variety of ways. For example, Korir J held that the petitioners failed to prove that the sexual and gender-based violence survivor-petitioners had been denied or precluded from accessing medical and psychological rehabilitative services provided by the state.¹⁰³ In the analysis and determination, Korir J referenced a survivor-petitioner who was denied treatment in one public hospital finding treatment in another public hospital. Korir J concluded that 'I am therefore unconvinced that the Government failed to provide the appropriate medical and psychological services to the petitioners'.¹⁰⁴ However, the question has been raised as to whether Korir J conflated the services that the survivor-petitioners received from CSOs and international partners, who happened to be providing care to victims at public health facilities, with government-provided services.¹⁰⁵

5 Contributions and lessons learnt

This article proposes that this strategic litigation by sexual and gender-based violence survivors of post-election violence is a significant contribution not only to Kenya's pursuit of domestic accountability, but potentially towards the pursuit of domestic accountability for conflict-related sexual violence in jurisdictions outside of Kenya. Bearing this in mind, three aspects are of importance, namely, the recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence; reparation access for sexual and gender-based violence survivors; and impact on the option of domestic accountability.

5.1 Recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence

Strategic litigation provides an opportunity to raise community consciousness and promote dialogue on human rights issues. One of the issues raised by sexual and gender-based violence survivors of post-election violence is that they have gone unrecognised by the

102 COVAW (n 2) para 165.

103 COVAW para 131.

104 COVAW (n 2).

105 Interview (n 101).

government and by society at large.¹⁰⁶ The former head of office for Physicians for Human Rights stated that the government has yet to acknowledge the violations and take any responsibility for the harm suffered by sexual and gender-based violence survivors of post-election violence.¹⁰⁷ Furthermore, when the government was giving monetary compensation to survivors of the post-election violence, sexual and gender-based violence survivors were not included.¹⁰⁸

There are two key events that were a missed opportunity by the government to counter the perception held by sexual and gender-based violence survivors of post-election violence, in that the government neither recognises nor acknowledges them. First, after the TJRC completed its mandate, the government gazetted the TJRC report. However, the TJRC report excluded volumes IIA and IIC which provide lists and details of incidents of sexual violence as gross human rights violations.¹⁰⁹ Second, when President Uhuru Kenya apologised for historical injustices, the apology rightly referenced post-election violence. However, President Kenyatta recalled the 1 300 dead and more than 650 000 displaced by post-election violence but there was no mention of sexual and gender-based violence survivors of the post-election violence. Beyond missed opportunities, these events fall short of the principles of effective reparation for gross human rights violations, which include 'acknowledgment of the facts and acceptance of responsibility'.¹¹⁰

From the time the sexual and gender-based violence strategic litigation case was filed, the CSOs in the case and their partners implemented a communication and advocacy strategy alongside the case. The strategy aimed to engage the media and, by extension, the public, to attract international¹¹¹ and national¹¹² attention to the case. With sexual and gender-based violence strategic litigation, an effective communication and advocacy strategy is an important measure to 'anticipate, address and counterbalance possible narratives that perpetuate stigma, gender stereotypes and gender-

106 HRW (n 77).

107 Telephone interview with C Alai on 30 April 2021.

108 As above.

109 OHCHR (n 26).

110 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly 21 March 2006 UN Doc A/RES/60/147 para 22(e).

111 N Kottoor 'Kenya election: Rape victim fears repeat of 2007 ordeal' (2013), <https://www.bbc.co.uk/news/world-africa-21622635> (accessed 3 May 2021).

112 Capital News 'PEV victims file case for compensation' (2013), <https://www.capitalfm.co.ke/news/2013/02/pev-victims-file-case-for-compensation/> (accessed 2 May 2021).

based discrimination'.¹¹³ Although Kenya has a fast news cycle, as elsewhere in the world, this sexual and gender-based violence case contributed to truth telling about sexual and gender-based violence survivors and their reparative needs.

Another significant contribution to discourse is with respect to the needs of children born of post-election violence rape. The children born from post-election violence rape face particular vulnerabilities such as 'stigma and rejection, and physical and verbal abuse by immediate and extended families, as well as in the wider communities'.¹¹⁴ In a Human Rights Watch report where sexual and gender-based violence survivors of post-election violence were interviewed, some of the women who bore children after rape stated that they did not register the births of their children because the registration officers demanded the name of the father that they did not know.¹¹⁵ The human rights violations faced by these children, therefore, can extend to the rights to health, education and identity, among others. On KTN, one of Kenya's local television stations, *KTN News* featured the full story of sexual and gender-based violence survivors, and their children conceived from the 2007-2008 post-election violence.¹¹⁶ The feature described how the 'unwanted pregnancies brought about pain, split families, destroyed peace in homes and wrecked marriages'.¹¹⁷

In March 2020, during the Universal Periodic Review, the Kenyan government supported the recommendation by the UN Human Rights Council to acknowledge the violations of the rights of survivors of electoral-related sexual violence.¹¹⁸ More than a year later, at the time of writing this article in 2021, the Kenyan government has not acknowledged the violations of the rights of survivors of electoral-related sexual violence. After the decision in December 2020, sexual and gender-based violence survivors have expressed appreciation of the acknowledgment and recognition that this case brought to their experiences. One survivor stated that 'the wait has been very long but worth it. We have been recognised as survivors of [sexual and gender-based violence]. No one can ever say that our experiences

113 OHCHR (n 1).

114 HRW (n 77) 59.

115 HRW (n 77).

116 KTN News 'A mother's tale: A story of children born of rape', <https://www.youtube.com/watch?v=DdxCXHlo6OY&t=65s> (accessed 3 May 2021).

117 *The Standard* 'A mother's tale: A story of children born of rape' (2018), <https://www.standardmedia.co.ke/kenya/article/2001306004/mothers-tale-the-story-of-children-born-of-rape> (accessed 3 May 2021).

118 Report of the Working Group on Universal Periodic Review, Human Rights Council 20 March 2020 UN Doc A/HRC/44/9 (2020) (HRC).

were not real. We feel vindicated.¹¹⁹ Another stated, 'we are happy that the court has finally recognised the harm that we suffered as victims. It has been a long journey.'¹²⁰ Could this experience be the same for conflict-related sexual violence survivors outside of Kenya?

5.2 Reparation access for sexual and gender-based violence survivors of post-election violence

The UN General Assembly adopted, by consensus, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).¹²¹ According to the Basic Principles and Guidelines, there are different forms of reparation to redress gross human rights violations, including 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.¹²² Reparation is a right and, therefore, reparation for conflict-related sexual violence should be provided by a state for the acts or omissions that can be attributed to it that are in violation of obligations under international human rights law or international humanitarian law.¹²³ It therefore was a welcome response when the Kenyan government supported the recommendation to design and implement reparation measures and programmes for survivors.¹²⁴

One of the guiding principles is that adequate reparations for conflict-related sexual violence should entail a combination of different forms of reparation. The petitioners in the sexual and gender-based violence strategic litigation sought to address these various forms in submissions, but the decision focused on compensation.¹²⁵ Korir J ruled in favour of four of the eight survivor-petitioners ordering the government to pay general damages. While there was no declaration to the effect that other similarly-affected sexual and gender-based violence survivors would be entitled to the same

119 N Nyamu-Mathenge 'Kenya sexual violence survivors get justice, though imperfect' 25 December 2020, <https://www.aljazeera.com/opinions/2020/12/25/for-kenyas-sexual-violence-survivors-justice-though> (accessed 2 May 2021).

120 PHR 'Court delivers justice for several survivors of post-election sexual violence in Kenya' (2020), <https://phr.org/news/court-delivers-justice-for-several-survivors-of-post-election-sexual-violence-in-kenya/> (accessed 29 April 2021).

121 Basic Principles and Guidelines (n 110).

122 Basic Principles and Guidelines (n 110) para 18.

123 UN 'Guidance note of the secretary-general: Reparations for conflict-related sexual violence' (2014), <https://www.unwomen.org/-/media/headquarters/attachments/sections/news%20and%20events/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.pdf?la=en> (accessed 20 April 2021).

124 HRC (n 118).

125 Interview (n 101).

relief, given the analysis of the Court it is possible for other sexual and gender-based violence survivors with similar circumstances to file their own cases to also obtain general damages. For instance, a sexual and gender-based violence strategic litigation case has already been filed in Kisumu County where there was widespread sexual and gender-based violence during post-election violence, drawing on lessons from this case.¹²⁶ However, litigation is not an avenue open to all sexual and gender-based violence survivors given the time, financial and human resources involved. This case lasted seven years, had numerous delays, and was heard by six different judges due to changes in the judiciary, death or recusal, among other factors.¹²⁷ Furthermore, 'there is considerable strain that this case put on the survivor-petitioners throughout the case that must be considered ahead of any future litigation'.¹²⁸

Consultation with victims is an important part of understanding their priorities and views on a proposed reparation intervention.¹²⁹ The sexual and gender-based violence survivors suffer long-term effects in many ways: physically, mentally and socially. The International Centre for Transitional Justice (ICTJ) conducted studies seeking to understand the reparative needs of survivors. Of the 48 women interviewed, 42 suffered severe psychological disturbances and the six exceptions were women who had undergone continuous trauma counselling for at least three years.¹³⁰ Furthermore, in focus group discussions the sexual and gender-based violence survivors indicated that medical assistance was a priority to treat injuries and other illnesses resulting from their assault, and that the conditions of those who had become HIV positive were exacerbated by their poverty.¹³¹ The social impacts of sexual and gender-based violence survivors referenced included abandonment by their husbands, and rejection by their families and communities. Male sexual and gender-based violence survivors are highly stigmatised and remain largely unseen and unheard in their communities.¹³² Based on the study, the priorities of sexual and gender-based violence survivors included compensation or economic support, medical and psychological assistance. Was the sexual and gender-based violence strategic litigation able to provide this?

126 As above.

127 As above.

128 As above.

129 UN (n 123).

130 ICTJ 'To live as other Kenyans do: An article of the reparative demands of Kenyan victims of human rights violations' (2011), <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed 20 February 2021).

131 As above.

132 As above.

For the four survivor-petitioners, 'what they were awarded was more than they could have hoped for, but it has created a dichotomy between survivors which is problematic'.¹³³ There is a sense that sexual and gender-based violence survivors violated by police officers are classified differently to those violated by private actors, which disenfranchises a large group of survivors.¹³⁴ There is a large proportion of sexual and gender-based violence survivors that report that they were violated by militias or private citizens. For example, in a study by the Kenya National Commission on Human Rights (KNCHR) on the sexual violence that occurred during and after Kenya's 2017 general election, 45,5 per cent identified civilians and 54,6 per cent identified police as perpetrators of sexual violence.¹³⁵ Furthermore, there are no recorded cases of boys and men having been violated by police officers.¹³⁶ This means that 'the already stigmatised boys and men who were violated by private actors in the form of militia or Mungiki, go unrecognised and are disenfranchised'.¹³⁷ Therefore, in terms of the forms of reparation options, this sexual and gender-based violence strategic litigation provided limited compensation as it applied to only the four survivor-petitioners. There is nothing to suggest that other similarly-affected sexual and gender-based violence survivors would not be entitled to the same relief. However, it did not address other forms of reparation and left other categories of survivors disenfranchised. There is an option of appeal which is being pursued as an avenue to address some of the issues in the judgment.¹³⁸

The TJRC report provides a framework for comprehensive reparations which the government has failed to implement. Survivors and CSOs have been advocating the establishment of a programme or mechanism to implement the recommendations of the TJRC report. However, but the government has failed to respond to the calls to action.¹³⁹ Recently, the UN Human Rights Committee urged the Kenyan government to fully implement the recommendations of the TJRC, including operationalising the Restorative Justice Fund.¹⁴⁰ It is the contention in this article that continuing to utilise several mechanisms in addition to strategic litigation, such as advocacy for the adoption of the TJRC report and institutional reforms, will jointly

133 Interview (n 101).

134 Interview (n 101).

135 Kenya National Commission on Human Rights (KNCHR) *Silhouettes of brutality: An account of sexual violence during and after the 2017 general election* (2018) 43.

136 Interview (n 101).

137 Interview (n 101).

138 As above.

139 OHCHR (n 26).

140 Concluding Observations on the fourth periodic report of Kenya, Human Rights Committee 11 May 2021 UN Doc CCPR/C/KEN/CO/4 (2021).

contribute towards adequate and comprehensive redress for sexual and gender-based violence survivors of post-election violence.

5.3 Impact on domestic accountability

At the time this case was filed, ‘there was no other constitutional petition seeking to hold the state liable for [conflict-related sexual violence] perpetrated by both state and private actors in conflict situations’.¹⁴¹ Also, where there has been conflict-related sexual violence strategic litigation at the domestic level, it mostly occurs in military courts or tribunals. An example of a conflict-related sexual violence strategic litigation is the High Risk Tribunal which considered the sexual violence in Sepur Zarco in Guatemala where women were forced to serve soldiers in the military post.¹⁴² Another strategic litigation case is the military court that dealt with the abduction and rape of more than 40 girls in Kavumu village in the Democratic Republic of the Congo (DRC).¹⁴³ There is also the strategic litigation by Valentina Rosendo Cantú which was first before the military justice system in Mexico before the Inter-American Court of Human Rights.¹⁴⁴ However, with a growing number of conflict-related sexual violence strategic litigation cases, this case perhaps can contribute to options for accountability.¹⁴⁵

There is an entrenched culture of impunity connected to violence, including sexual violence, during and after elections in Kenya. In March 2020 the UN Human Rights Council recommended that the Kenyan government intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 presidential election.¹⁴⁶ After almost 14 years there still are calls for the Kenyan government to secure redress for post-election violence survivors. While there are flaws, this sexual and gender-based violence strategic litigation case regarding post-election violence has paved the way for other post-election violence survivors to pursue redress, for example, sexual and gender-based violence survivors of the 2017 post-election violence. The KNCHR, which documented sexual and gender-based violence during post-election violence, noted similar patterns of sexual

¹⁴¹ Interview (n 101).

¹⁴² JM Burt ‘Military officers convicted in landmark Sepur Zarco sexual violence case’ (2016), <https://www.ijmonitor.org/2016/03/military-officers-convicted-in-landmark-sepur-zarco-sexual-violence-case/> (accessed 2 May 2021).

¹⁴³ D Perissi & E Taquet ‘The Kavumu trial: Complementarity in action in the Democratic Republic of Congo’ (2018), <https://www.ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo/> (accessed 2 May 2021).

¹⁴⁴ *Rosendo Cantú et al v Mexico* 31 August 2010 Ser C No 216.

¹⁴⁵ OHCHR (n 1).

¹⁴⁶ HRC (n 118) 9.

violence in 2017.¹⁴⁷ There has been no official acknowledgment, condemnation or investigation of the violence around the 2017 general election by the Inspector-General of Police. Instead, KNCHR reported that 'President Uhuru Kenyatta, through the Director of Police Operations, commended the National Police Service for a job well done during this period'.¹⁴⁸

The decision of the Court in this sexual and gender-based violence case has vindicated, albeit minimally, the ability of the judiciary to adjudicate post-election violence cases. In 2011 the ICTJ reported that, of the victim respondents interviewed, 74 per cent sought ICC involvement in prosecuting perpetrators, and 82 per cent stated that they did not trust Kenya's judicial system.¹⁴⁹ Given what transpired with the involvement of the ICC in Kenya, perhaps an interview with victims may show a different perspective on the Kenyan judicial system. Could this judgment trigger the government's willingness to pursue the investigation and prosecution of sexual violence in relation to post-election violence and even in 2017? At the same time, perhaps domestic accountability through strategic litigation as opposed to criminal litigation could also yield alternative outcomes that benefit survivors of sexual and gender-based violence.

6 Conclusion

In the introduction this article mentioned that when it comes to Kenya's transitional justice process, international criminal accountability dominates discourse. Based on the research undertaken for the article, there are very few domestic strategic litigation cases on conflict-related sexual violence. A comprehensive mapping of these cases as well as the lessons learnt and impact, from both the perspective of survivors and practitioners, would significantly inform future strategic litigation cases. Furthermore, the article indicated that other transitional justice processes contributed to the sexual and gender-based violence strategic litigation case. Perhaps this is the case in other national justice systems. Could research be undertaken to ascertain whether there are a set of bare minimums or components that must be in place to ensure the success of conflict-related sexual violence strategic litigation? In other words, what circumstances are needed to be in place to maximise the transformative potential of conflict-related sexual violence strategic litigation?

147 KNCHR (n 135).

148 KNCHR (n 135) 17.

149 ICTJ (n 130).

This article provided first an overview of transitional justice in Kenya, highlighting the contribution of the CIPEV, TJRC and ICC and constitutional and institutional reform processes in making the strategic litigation possible. Second, the legacy of historical injustice and human rights abuse was discussed to contextualise the occurrence of post-election violence and accompanying pattern of systemic sexual and gender-based violence. Furthermore, the nature and scope of violations experienced by sexual and gender-based violence survivors during post-election violence were provided to appreciate the significance of the strategic litigation case. Third, the article considered the sexual and gender-based violence strategic litigation case and the key aspects of the judgment. Fourth, the contributions and lessons learnt in respect to the recognition and acknowledgment of sexual and gender-based violence survivors during post-election violence, reparation access for these survivors and impact on domestic accountability were examined.

The article concludes with the perspective that, although imperfect, the sexual and gender-based violence strategic litigation regarding post-election violence was a *pièce de résistance* for survivors who continue to struggle almost 14 years later. It made a notable contribution towards the discourse on the pursuit of redress and reparation for conflict-related sexual violence survivors. However, given that the judgment was delivered only nine months ahead of this analysis, the cumulative and long-term value of this strategic litigation is not yet fully evident, and further research would be important.

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A human rights-based approach to implementing Target 11.6 of Sustainable Development Goal 11 in Zimbabwe

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Summary: *In its quest to deal with sustainability challenges continuously posed by rapid urbanisation, the international community reinvigorated the role of local governments as co-global actors in pursuance of the global sustainable development agenda by dedicating to cities Sustainable Development Goal 11 (SDG 11) of the United Nations 2030 Sustainable Development Agenda. SDG 11 is accompanied by ten time-bound targets directed towards making cities and human settlements across the world inclusive, safe, resilient and sustainable by 2030. Reports reveal that Zimbabwe, among other countries, is struggling to give effect to these targets, including Target 11.6 which requires local authorities to contribute towards reducing 'the adverse per capita environmental impact of cities'. Struggling with this target has implications for the enjoyment of environmental rights, among other fundamental rights. As such, using a human rights-based approach, this article explores how the right to a healthy environment entrenched in the 2013 Constitution of Zimbabwe can be used to pursue Target 11.6. Although the huge potential of the human rights-based approach*

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remains untapped in Zimbabwe, the article argues that its adoption in relation to Target 11.6 appears, in theory, to be the most appropriate means for the enjoyment of the right to a healthy environment as local authorities have a shared responsibility to adhere to human rights norms and standards. In light of the commendable precedents set by the judiciary in some cases, local authorities are recommended to consider the implication of legal provisions on the right to a healthy environment in the process of exercising their legislative or executive powers directed towards the realisation of Target 11.6.

Key words: *SDG 11; Target 11.6; local authorities; human rights-based approach; right to a healthy environment; Zimbabwe; Constitution of Zimbabwe*

1 Introduction

Cities¹ are considered powerhouses of economic growth, contributing approximately 60 per cent of global gross domestic product (GDP).² Their significance as drivers of the sustainable development agenda received its strongest recognition at the global level with the adoption in 2015 of, among others, the United Nations (UN) 2030 Agenda for Sustainable Development (UN 2030 Agenda).³ In terms of the UN 2030 Agenda, cities are expected to assist UN member states in the pursuit of the Sustainable Development Goals (SDGs), including SDG 11, which refers to the role of cities (as a metaphor for urban centres).⁴ Framed in broad terms, SDG 11 is accompanied by 10 time-bound targets principally geared towards making cities and human settlements across the world inclusive, safe, resilient and sustainable by 2030. Despite its global adoption, SDG 11 is enunciated in a 'soft law'⁵ document, which is incapable of imposing any binding legal obligations on UN member states that fail to meet it by 2030. However, only moral and political pressure can be brought to bear on UN member states to implement SDG 11.

1 From a legal perspective, cities are government units. They are micro-governments (municipalities or local authorities) overseen by state authorities. A du Plessis 'The readiness of South African law and policy for the global pursuit of the sustainable city' (2017) 21 *Law, Democracy and Development* 243.

2 UN *The Sustainable Development Goals progress report* (2019) 44.

3 UN *Transforming our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 (2015); UN *Habitat III Declaration (New Urban Agenda)* 2016.

4 UN *Transforming our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 (2015) (2030 Agenda).

5 For details on soft laws, see J Dugard *International law. A South African perspective* (2005) 36.

Although the UN member states, with the assistance of local authorities, are making relentless efforts towards the realisation of SDG 11, their progress has been sluggish.⁶ This is true in relation to all the targets, including Target 11.6, which is at the centre of this article, in terms of which local authorities are required to reduce ‘the adverse per capita environmental impact of cities, including by paying special attention to the quality of air and waste management’. Estimates show that cities account for about 60 per cent of global energy consumption and about 70 per cent of global carbon emissions.⁷ Ambient air pollution caused by traffic, industry, power generation, waste burning and residential fuel combustion, combined with household air pollution, poses a major threat to both human health and efforts to address climate change.⁸ It is estimated that more than 90 per cent of air pollution-related deaths occur in low and middle-income countries, mainly in Africa and Asia.⁹ In the same vein, estimates show that only 10 per cent of the municipal solid waste is collected in poor settlements in developing countries.¹⁰ Many municipal solid waste disposal facilities in these countries are open dump sites, which contribute to air, water and soil pollution.¹¹

The government of Zimbabwe is committed to realising SDG 11 and its subsidiary targets, including Target 11.6. Before this goal came into effect the government already understood the significance of a sub-national scale of intervention in environmental matters by local authorities. Through its regulatory powers, the national government enacted the Urban Councils Act,¹² as Zimbabwe’s local government framework legislation, in terms of which local authorities have legislative and executive powers over matters, such as air quality management, solid waste management, the provision of water, the provision of sanitation services, and the provision of drainage services.¹³ The national government fleshed out these powers in terms of the Environmental Management Act (Chapter 20:27) of 2002 (EMA), which is Zimbabwe’s framework environmental legislation.¹⁴ More importantly, section 73 of the 2013 Constitution serves as another source of the mandate of local authorities, in terms of which they have a shared responsibility to give effect to the right to a clean

6 UN *The Sustainable Development Goals progress report* (2020) 15-16.

7 UN (n 2) 44.

8 UN (n 2) 45.

9 As above.

10 UN-Habitat *Tracking progress towards inclusive, safe, resilient and sustainable cities and human settlements* (2018) 77.

11 UN (n 2) 45.

12 Urban Councils Act (Chapter 29.15) of 1996 (UCA).

13 Second and Third schedules to the UCA (n 12).

14 See part 4 below for details.

and healthy environment.¹⁵ Overall, it should be noted that the execution of the powers and mandate of local authorities emanating from Zimbabwe's legal framework happens in a multilevel system of government wherein the national government plays a supervisory role by way of regulating, monitoring, intervening and supporting local authorities.¹⁶

Despite the existence of this legal framework, it is regrettable to note that local authorities in Zimbabwe are struggling with environmental challenges such as environmental pollution, wetlands degradation, and climate change.¹⁷ The challenge of air pollution in cities is compounded by a lack of measurement devices; a lack of ambient air quality data to compare today and previous years; the inefficient use of energy in buildings; the use of biomass for cooking and heating; a lack of or inadequate resources to invest in green technology; and a lack of strong policies to deal with vehicles that do not meet the minimum prescribe emission standards that are environmental friendly.¹⁸ Apart from this, the disposal of solid waste in undesignated points is aggravated by the failure of local authorities to provide essential services to residents.¹⁹ In all of this, the right to a healthy environment entrenched in section 73 of the Declaration of Rights,²⁰ which local authorities have a co-responsibility to realise, has often been an afterthought. As such, using a human rights-based approach,²¹ it is necessary to examine the extent to which giving effect to the right to a healthy environment can contribute towards the reduction of the 'adverse per capita environmental impact of cities' as envisaged in terms of Target 11.6.

To achieve the objective of this article, the remainder of the article is divided as follows: The first part begins by exploring the meaning and vision of SDG 11, with specific emphasis on Target 11.6, to understand what is expected of urban local authorities by 2030. The second part explores the meaning and implications of a

15 See part 4 below for details.

16 For further details on supervision in Zimbabwe, see TC Chigwata & J de Visser 'Local government in the 2013 Constitution of Zimbabwe: Defining the boundaries of local autonomy' (2018) 10 *Hague Journal on the Rule of Law* 154-185; N Machingauta 'Supervision of local government' in J de Visser, N Steytler & N Machingauta (eds) *Local government in Zimbabwe: A policy dialogue* (2010) 139-150.

17 Government of Zimbabwe *National Development Strategy January 2021 – December 2025* (2020) para 812.

18 See generally Government of Zimbabwe *Zimbabwe Environment Outlook 2: A clean, safe and healthy environment: Zimbabwe's Fourth State of the Environment Report* (2019), <https://www.ema.co.zw/agency/state-of-the-environment-report> (accessed 3 May 2022).

19 As above.

20 Ch 4 of the Constitution of Zimbabwe, Amendment (No 20) Act 2013.

21 See part 3 below.

human rights-based approach in order to demonstrate how human rights norms and standards could guide local authorities towards the pursuit of SDG 11. The third part examines the extent to which the applicable legal framework obliges and enables urban local authorities in Zimbabwe to use environmental rights to contribute towards the realisation of Target 11.6. The article ends with a conclusion.

2 Vision and implications of SDG 11

SDG 11 is accompanied by ten time-bound targets directed towards making cities and human settlements across the world inclusive, safe, resilient and sustainable by 2030. Of these targets, the sixth target – Target 11.6 – encourages local governments, to ‘[r]educe the adverse per capita environmental impact of cities, including by paying special attention to the quality of air and waste management’. Progress towards this target is measured by two indicators. First, this target is measured by the ‘proportion of urban solid waste regularly collected and with adequate final discharge out of total urban solid waste generated by cities’.²² Measures directed towards sound waste management must go beyond the mere safe disposal or recovery of waste generated and should seek to address the root cause of the problem by attempting to change unsustainable patterns of production and consumption.²³ The framework for the necessary action should be based on a ‘hierarchy of objectives’ and focused on the following four major waste-related programme areas: minimising waste; maximising environmentally-sound waste reuse and recycling; promoting environmentally sound waste disposal and treatment; and extending the coverage of waste services.²⁴

Second, Target 11.6 is also measured by the ‘annual mean levels of fine particulate matter (eg PM2.5 and PM10) in cities (population weighted)’.²⁵ The ability of local authorities to meet this target depends on strategies directed towards regulating emission and quality standards. Emission standards set maximum levels on the permissible amount of specific air pollutants that can be emitted in discharges from specific sources over specific timeframes.²⁶ In the same vein, air quality standards are legal standards governing

²² SDG (n 4) 11.6.1.

²³ Para 74 of the New Urban Agenda; para 21.4 of *Agenda 21 UN Doc A/Conf151/26* (1992) (Agenda 21).

²⁴ Para 21.5 and also ch 21 of Agenda 21 for further details on these programme areas. See also D Czischke, C Moloney & C Turcu *Sustainable regeneration in urban areas* (2015) 8.

²⁵ SDG (n 4) 11.6.2.

²⁶ D Shelton & A Kiss *Judicial handbook on environmental law* (2005) 35; UN *Glossary of environmental statistics* (1997) 27.

concentrations of both outdoor and indoor pollutants without controlling emissions directly.²⁷ Local authorities can regulate air quality standards by prescribing to its residents minimum emission standards. Such prescription can be done through building regulations, municipal by-laws and strategic plans that are aligned to national and international levels of ambition.²⁸ Other strategies that must be promoted by local governments to deal with air pollution include greening or retrofitting existing infrastructure systems,²⁹ such as transport and energy networks, for example, to be more carbon efficient and less energy intensive.³⁰ In addition, constructing green urban spaces also potentially filters out harmful air pollutants, thus reducing levels of particulate matter and nitrogen dioxide.³¹ Overall, the above strategies need to be strengthened by increasing awareness and education, with the objective of enhancing the capacity of communities to prevent or mitigate the detrimental effects of air pollution.

As is the case with the other targets, Target 11.6 is expected in terms of SDG 11 to contribute towards 'inclusive', 'safe', 'resilient' and 'sustainable' cities in very specific ways. An inclusive city is one in which jurisdiction all residents, including the often marginalised segments of the society, have a representative voice in governance, and fair and equitable access to urban opportunities, infrastructure and resources that cultivate social integration and enable residents to enjoy and fully partake in urban life.³² Inclusion can be promoted in terms of Target 11.6 by giving urban dwellers the opportunity to provide informed, timely and meaningful input and influence decisions on general policies, strategies and plans on individual projects that have a bearing on the environment. Besides this, resilience as envisaged in terms of SDG 11 can broadly be defined as the capacity of a system, including a city, potentially exposed to natural disasters and human-induced crises, to resist or change in order to reach and maintain an acceptable level of functioning and

27 Shelton & Kiss (n 26) 80.

28 See generally World Health Organisation (WHO) *Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulphur dioxide* (2005).

29 SDG (n 4) 11.c The term 'retrofitting' may be defined as the installation of individual or multiple energy efficiency measures to an existing infrastructure. See, eg, VS Rawat, R Divahar & P Kulshrestha 'A review: Impact of retrofitting in term of sustainability development and green building' (2018) 6 *International Research Journal of Engineering and Technology* 813.

30 SDG (n 4) 11.2.

31 Target 11.7; M Giezen, S Balikci & R Arundel 'Using remote sensing to analyse net land-use change from conflicting sustainability policies: The case of Amsterdam' (2018) 7 *International Journal of Geo-Information* 382.

32 UN HABITAT *Habitat III Issue Paper 1: Inclusive cities* (2015) 1-10; F Schreiber & A Carius 'The inclusive city: Urban planning for diversity and social cohesion' in G Gardner, T Prugh & R Renner (eds) *State of the world: Can a city be sustainable?* (2016) 317-335.

structure.³³ Resilience of cities can be promoted in terms of Target 11.6 through air quality (pollution) management which serves as one of the strategies that can be used to mitigate the effects of climate change, for example. It is submitted that strategies directed towards promoting the resilience of cities simultaneously promote safety in cities. This is because safety may be understood as involving protecting residents from the risk and occurrence of human-induced or natural disasters and climate change.³⁴ While sustainability is a broad term, it is understood within the framework of SDG 11 as centred on issues such as housing, cultural and natural resource protection, disaster risk reduction, resilience, service delivery, resource efficiency, mobility and development planning. It is submitted that giving effect to Target 11.6 promotes local sustainability since it underscores the need for local authorities to exploit natural resources and deal with the above-mentioned issues while taking into consideration the need to protect the natural environment at the local level. It goes without saying that there is a direct and indirect relationship between this Target 11.6 and a vast array of other targets and indicators across the SDGs.³⁵ As such, the realisation of each SDG often depends wholly or in part upon the realisation of Target 11.6.

There is no doubt that the extent to which local authorities are able to give effect to Target 11.6 has a bearing on the enjoyment of environmental rights, among other fundamental rights. This is informed by the fact that a clean and healthy environment contributes to the fulfilment of fundamental rights and that the denial of a clean and healthy environment invariably impedes the enjoyment of other rights. Against this background, the following part examines the meaning and implications of a human rights-based approach in order to set the normative basis from which to explore how human rights norms and standards could guide local authorities towards the pursuit of Target 11.6 in Zimbabwe.

33 T Beatley & P Newman 'Biophilic cities are sustainable, resilient cities' in K Etingoff (ed) *Sustainable cities: Urban planning challenges and policy* (2017) 7.

34 See Targets 11.5 and 11.b. See also UN HABITAT *Habitat III Issue Paper 3: Safer Cities* (2015) 1-10.

35 Eg, indicator 2.2.2: Prevalence of Wasting; indicator 3.9.1: Population Exposed to Outdoor Air Pollution; indicator 6.3.2: Water Bodies with Good Ambient Water Quality; indicator 11.1.1: Slum Household; indicator 12.5.1: Solid Waste Recycling Share.

3 Human rights-based approach

3.1 Basis of a human rights-based approach

The human rights-based approach emerged during the 1990s as a viable development framework with the ability to address increasing global poverty.³⁶ Although there is no single definition of a human rights-based approach, it may be defined as ‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights’.³⁷ What this means is that development objectives are supposed to be rooted firmly in standards and principles of human rights, including environmental rights that are generally categorised into substantive environmental rights and procedural environmental rights. A substantive right to the environment for present purposes entails the promotion of a human right to environmental conditions of a specified quality.³⁸ It may mean a right to a safe, healthy, satisfactory, favourable, ecologically sound or unpolluted environment depending on the epithets used in the provision defining this right. This is true in relation to international soft law instruments of which the provisions recognise the substantive right,³⁹ and are believed by some scholars to have crystallised to attain the status of customary international law.⁴⁰ For example, the provisions of national constitutions enacted

36 A de Man ‘Critiques of the human rights framework as the foundation of a human rights-based approach to development’ (2018) 43 *Journal for Juridical Science* 84.

37 United Nations Office of the High Commissioner for Human Rights *Frequently asked questions on a human rights-based approach to development cooperation* (2006) 15.

38 LD Shelton ‘Developing substantive environmental rights’ (2010) 1 *Journal of Human Rights and the Environment* 90. The present study deliberately ignores one of the approaches that formulates substantive environmental rights as an entitlement implied in human rights instruments that do not expressly stipulate it. For details on this approach, see HB Weston & D Bollier *Regenerating the human right to a clean and healthy environment in the commons renaissance* (2011) 13. This is because an explicit free-standing right to a healthy environment exists in Zimbabwe’s legal framework. See part 4 of this study.

39 See Principle 1 to the 1972 Declaration of the United Nations Conference on the Human Environment which states that ‘[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’. Principle 1 of the 1992 Rio Declaration on Environment and Development stipulates that human beings ‘are entitled to a healthy and productive life in harmony with nature’. See also Principle 1 of annexure 1 to the 1987 report of the World Commission on Environment and Development which notes that ‘[a]ll human beings have the fundamental right to an environment adequate for their health and well-being’.

40 L Collins ‘Environmental rights on the wrong side of history: Revisiting Canada’s position on the human right to water’ (2010) 19 *Review of European, Comparative and International Environmental Law* 353; M Soveroski ‘Environment rights versus environmental wrongs: Forum over substance?’ (2007) 16 *Review of European, Comparative and International Environmental Law* 268.

pursuant to a perceived international legal obligation may constitute state practice giving rise to customary international law.

At the regional level, the African Charter on Human and Peoples' Rights (African Charter) was the first binding instrument to explicitly recognise the right to a healthy environment.⁴¹ Article 24 provides that 'all people shall have the right to a generally satisfactory environment favourable to their development'. Although this article has been criticised as vaguely formulated by some scholars,⁴² it was at the centre of the case of *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*⁴³ (SERAC case), which marked a significant moment in regional environmental rights jurisprudence as it was the first time the African Commission on Human and Peoples' Rights (African Commission) expanded on the meaning, interpretation and scope of the right to a satisfactory environment provided in the African Charter.⁴⁴ Interpreting this article, the African Commission held that 'the state is required to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.⁴⁵ Although its decisions have no legal force,⁴⁶ the African Commission advanced several environmental principles of which the promotion has an effect on the realisation of the right to a healthy environment. First, the state is required to promote conservation and ensure the ecologically-sustainable development of its natural resources.⁴⁷ Second, states must take reasonable measures for the prevention of pollution and ecological degradation.⁴⁸

Since the substantive environmental rights discussed above are not self-executing, the African Commission advanced further principles that resonate with procedural environmental rights such as the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice in environmental

41 The African Charter was adopted 1981 and ratified by Zimbabwe in 1986.

42 S Turner *A global environmental right* (2014) 26; AE Boyle 'The role of international human rights law in the protection of the environment' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) 46.

43 (2001) AHRLR 60 (ACHPR 2001). For details of this case, see M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167-187.

44 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 163.

45 SERAC (n 43) para 52.

46 DR Boyd *The environmental rights revolution: A global study of constitutions, human rights, and the environment* (2011) 104; Ebeku (n 44) 163.

47 SERAC (n 43) para 52.

48 As above.

matters.⁴⁹ The right to environmental information denotes the ability of citizens to have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities.⁵⁰ The right to participate in environmental decision making is defined as the opportunity for citizens to provide informed, timely and meaningful input and influence decisions on general policies, strategies and plans at various levels and on individual projects that have an environmental impact.⁵¹ Access to justice denotes the 'rights of individuals and groups to obtain quick, effective and fair responses to protect their rights, prevent or resolve disputes, and check abuse of power through a transparent and efficient process in which mechanisms are available, affordable and accountable'.⁵² Overall, these procedural environmental rights have the potential to assist in ensuring that those who are responsible for environmental damage violating or threatening human health or well-being are held accountable.

Apart from the above, the African Commission established positive and negative obligations related to the realisation of the right to a healthy environment. These obligations are at the crux of the human rights-based approach but generally are addressing national governments that stand as representatives of the states – and, therefore, the primary duty bearers – under international human rights law.⁵³ However, in a multilevel system of government, the national government is expected to play a supervisory role for sub-national levels of government to meaningfully contribute towards the realisation of human rights at the local level. In light of this, the following part examines the implications of these obligations on local authorities.

3.2 Implications of a human rights-based approach for local authorities

All levels of government – inclusive of local authorities – have the obligation to attend to the needs of right holders, which manifest, at least, at four levels, namely, the duty to respect, protect, promote, and

49 *SERAC* (n 43) para 53; Principle 10 of the Rio Declaration; LA Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 263; Boyd (n 46) 31-32.

50 *SERAC* (n 43) para 53; see also Principle 10 of the Rio Declaration.

51 As above. E Petkova (ed) *Closing the gap: Information, participation and justice in decision making for the environment* (2002) 15.

52 See Zimbabwe Human Rights NGO Forum *The State of Human Rights Report Zimbabwe – 2017* (2018) 52. See also principle 10 of the Rio Declaration.

53 Art 26 Vienna Convention on the Law of Treaties (1969).

fulfill the right to a healthy environment.⁵⁴ The obligation to respect human rights generally is considered as imposing a negative duty on local authorities to refrain from interfering directly or indirectly with the enjoyment of any of the human rights and freedoms.⁵⁵ For example, the obligation to respect environmental rights is violated if a local authority permits or fails to challenge developmental projects that adversely interfere with the ecological integrity of a wetland.

The obligation to protect human rights entails the adoption and implementation of positive measures by local authorities to prevent, stop or obtain redress or punishment for third party interference.⁵⁶ For example, local authorities can contribute towards the protection of environmental rights by regulating the conduct of private parties; inspecting and monitoring the compliance level of third parties with environmental standards; and enforcing administrative and judicial sanctions against third parties whose activities violate environmental standards.

The obligation to promote human rights requires local authorities to adopt measures that seek to enhance people's awareness of their rights, and to provide accessible information relating to programmes and institutions put in place to realise these.⁵⁷ Local authorities, for example, can promote environmental rights through environmental education and environmental awareness with the objective of enhancing the capacity of urban dwellers to address environmental issues and to engender values and skills consistent with environmental management.

While the obligation to fulfil human rights requires local authorities to take 'positive steps' or 'all appropriate means' to advance the realisation of human rights,⁵⁸ it is, however, contended that the exact scope and content of this obligation depends on the particular context and the resources available. This obligation suggests that local authorities should adopt appropriate legislative, administrative, educational, financial, social and other measures towards the enjoyment of rights by those who cannot afford it on their own.⁵⁹

54 SERAC (n 43) para 44; N Ndlovu *Protection of socio-economic rights in Zimbabwe. A critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe* (2016) 13-17.

55 Ndlovu (n 54) 13-14; SERAC (n 43) para 45.

56 Ndlovu (n 54) 14-15; SERAC (n 43) para 46.

57 African Commission *Principles and guidelines on the implementation of economic, social and cultural rights* (2010) 11; Ndlovu (n 54) 16-17; A Moyo 'Socio-economic rights under the 2013 Zimbabwean Constitution' in A Moyo (ed) *Selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 171.

58 African Commission (n 57) 12; para 2 of UN General Comment 3 (1990).

59 Moyo (n 57) 171.

When local authorities are discharging their obligations discussed above, they are required in terms of the human rights-based approach to promote the principles of universality and inalienability, indivisibility, interdependence and interrelatedness, non-discrimination and equality, participation and inclusion, and accountability.⁶⁰ With respect to the principle of universality and inalienability, all people everywhere in the world are entitled to human rights.⁶¹ Such rights cannot be taken away from anyone. The principle of interdependence and interrelatedness of human rights highlights the holistic promotion of all rights because the realisation of one right often depends wholly or in part upon the realisation of other rights.⁶² The principle of indivisibility of human rights underlines the fact that human rights, whether civil, economic, social, economic, cultural or environmental, are equal in importance and cannot be ranked in a hierarchical order.⁶³ The principle of equality and non-discrimination underscores the fact that all human beings are entitled to their human rights without discrimination of any kind. In terms of the principle of participation, duty bearers are required to ensure that the public is entitled to meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.⁶⁴ The principle of accountability require local authorities to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.⁶⁵ When all these principles are properly implemented in the context of the human rights-based approach, they potentially enable local authorities to obtain a holistic understanding of rights and understand how best to ensure the fulfilment of development objectives framed in terms of rights.

With the human rights-based approach in mind, the following part examines the extent to which the applicable legal framework in Zimbabwe obliges and enables urban local authorities to use

60 UN 'The human rights-based approach to development cooperation, Towards a common understanding among the United Nations agencies' (2003), https://undg.org/wp-content/uploads/2016/09/6959The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf (accessed 3 May 2022).

61 As above.

62 As above.

63 As above.

64 As above.

65 As above.

environmental rights to contribute towards the realisation of Target 11.6.

4 Environmental legal framework in Zimbabwe

4.1 Right to a healthy environment in the framework environmental law

Zimbabwe's first post-colonial Constitution, commonly referred to as the 1979 Lancaster House Constitution, did not explicitly provide for a free-standing right to a healthy environment.⁶⁶ Nonetheless, the Environmental Management Act (EMA), which is Zimbabwe's framework environmental legislation, provided for this right. Section 4 of EMA provides:

- (1) Every person shall have a right to –
 - (a) a clean environment that is not harmful to health; and
 - (b) access to environmental information, and protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that –
 - (i) prevent pollution and environmental degradation; and
 - (ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

This provision is in tandem with the clarion call made at the international and regional levels for governments to take legislative measures directed towards protecting the right to a healthy environment.⁶⁷ It is couched in almost the same way as the environmental clause in section 73 of the 2013 Constitution. The inference, therefore, is that the meaning and implications of section 73 of the 2013 Constitution explored in part 4.2 below bears squarely on section 4(1) of EMA. However, what is important to note at this stage is that despite the existence of this right under the Lancaster House constitutional order, there was very limited effort at the institutional level to ensure that citizens actually exercised and enjoyed their right to a healthy environment.

This is true in relation to section 4(1)(b) of EMA, which acknowledges that the enforcement of the right to a healthy environment is dependent on access to information. To promote access to information, section 4(2)(d) of EMA goes on to emphasise

⁶⁶ The Declaration of Rights was found in secs 11 to 26.

⁶⁷ See part 3.

the need for environmental education, environmental awareness and the sharing of knowledge so as to increase the capacity of communities, including children, to address environmental issues, attitudes, skills and behaviour consistent with environmental management. However, on the ground it is noted that little was done during the Lancaster House constitutional order to educate citizens on the importance attaching to environmental rights through concerted efforts by the government to meet its positive obligation to ensure that everyone lived in a healthy environment.⁶⁸ As such, citizens did not regard violations of environmental rights as meriting the institution of legal action in the protection of their environmental rights. In addition, section 4(2)(c) of EMA underscores the significance of the participation of all interested and affected parties in environmental governance. It emphasises that the participation of all people must be promoted and that opportunities must be created for them to develop the understanding, skills and capacity necessary for achieving equitable, meaningful and effective participation. However, in practice it is noted that a lack of public participation in environmental decision-making processes during the Lancaster House constitutional order created a situation in which the government did not feel compelled to put in place measures to secure a clean environment for citizens.⁶⁹ Furthermore, little was done to put in place measures to financially assist litigants challenging environmentally-deleterious activities violating or threatening their right to a healthy environment.⁷⁰ With the above in mind, it should be noted that EMA remains operative in Zimbabwe but must be construed in conformity with the 2013 Constitution,⁷¹ which repealed the Lancaster House Constitution.

4.2 Constitutional framework on the right to a healthy environment

As noted above, in Zimbabwe has recently renewed its commitment to environmental protection through the inclusion of a free-standing environmental right in its 2013 Constitution. Section 73 of the Constitution states:

- (1) Every person has the right –
 - (a) to an environment that is not harmful to their health or well-being; and

68 T Madebwe 'A rights-based approach to environmental protection: The Zimbabwean experience' (2015) 15 *African Human Rights Law Journal* 122-123.

69 As above.

70 As above.

71 Para 4 of the Sixth Schedule to the Constitution.

- (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.
- (2) The state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this Section.

It should be noted at the outset that the constitutionalisation of the right to a healthy environment was a bold step taken by Zimbabwe, bridging the historical divide between the so-called generations of rights. In other words, affording environmental rights the same status as other fundamental rights in the Declaration of Rights is a notable development to the extent that it serves as recognition of the potential that such rights have in the realisation of other rights. In this context, the Declaration of Rights echoes the concepts of the interrelatedness, interdependence and indivisibility of human rights.⁷²

Although the Declaration of Rights came into effect before the adoption of the SDGs, it imposes an obligation on all tiers of government – inclusive of local authorities – to respect, protect, promote and fulfil the right to a healthy environment, which resonates directly with Target 11.6. If the meaning and implications of this right are clarified, one would not only be able to ascertain the prospects and potential challenges to its enforcement, but also advance approaches directed towards optimising its effective enforcement in order to meet Target 11.6.

Local authorities have a shared responsibility, with the other tiers of government, to respect, protect, promote and fulfil the right to a healthy environment.⁷³ They have a further co-obligation to adopt and implement ‘reasonable legislative and other measures’ to ensure progressive realisation of the right to a healthy environment contained in section 73 of the Declaration of Rights.⁷⁴ However, such obligations cannot be met at all costs. This is because environmental rights, in a similar vein as other fundamental rights in the Constitution,

⁷² See part 3.

⁷³ Secs 44 & 45(1) of the Constitution.

⁷⁴ See sec 73(2) and also secs 75(4), 76(4) and 77(b) of the Constitution which contain the same qualification.

are not absolute and can be limited⁷⁵ in terms of the special or internal limitation clause and the general limitation clause.⁷⁶ A special limitation clause is one that is provided for under the sections that set out the specific rights.⁷⁷ For example, the right to a healthy environment in section 73 of the Constitution has a special limitation clause as it obliges the state to take reasonable legislative and other measures 'within the limits of resources available' to achieve its 'progressive realisation'.⁷⁸ Citing with approval the decision in the case of *Republic of South Africa & Others v Grootboom & Others*⁷⁹ the Supreme Court in *Zimbabwe Homeless People's Federation & Others v Minister of Local Government and National Housing & Others*⁸⁰ aptly stated that

the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

From this extract it immediately becomes apparent that, when local authorities are faced with a scarcity of resources, as is currently the case in Zimbabwe,⁸¹ they cannot be reasonably expected to instantly provide infrastructure necessary for the realisation of the right to a healthy environment. This speaks to the concept of 'progressive realisation', which entails that this right is not meant for instant realisation but can be realised over a period of time.⁸² As such, in the face of a scarcity of resources, a local authority remains under a continuing duty to move as expeditiously and effectively as possible, and it must take deliberate, concrete and targeted measures⁸³ towards the full realisation of the right to a

75 Secs 86 & 87 of the Constitution. However, sec 86(3) of the Constitution enlists the right to human dignity, freedom from slavery or servitude and right to a fair trial as some of the rights that cannot be limited by any law.

76 Secs 86 and 87 of the Constitution; JA Mavedzenge & DJ Coltart *A constitutional law guide towards understanding Zimbabwe's fundamental socio-economic and cultural human rights* (2014) 79.

77 Mavedzenge & Coltart (n 76) 81.

78 See sec 73(2). See also secs 75(4), 76(4) and 77(b) of the Constitution.

79 2001 (1) SA 46 (CC).

80 46-2018 6; *Zuze v Trustees of Mlambo & Another* SC 69-2019.

81 Government of Zimbabwe (n 17) para 567.

82 UN (n 60) para 9.

83 As above.

healthy environment. However, in order to deal with the scarcity of resources, local authorities can harness financial resources from the international community and the private sector⁸⁴ to complement those obtained from higher tiers of government.⁸⁵ Of course, even if local authorities obtain the financial resources required to deliver, if there is no accountability as envisaged in terms of the human rights-based approach, things will not work. This is because of the levels of corruption, irregular spending and maladministration that are aggravating the scarcity of resources in Zimbabwean local authorities.⁸⁶ To promote accountability,⁸⁷ elected and appointed local officials should take measures aimed at exposing, combating and eradicating all forms of corruption.⁸⁸

The responsibility of local authorities to adopt 'legislative and other measures' can be complied with by developing by-laws and strategic plans within the framework of national environmental standards.⁸⁹ Such by-laws and strategic plans should set strict goals and standards for local air quality, waste management, water pollution, noise, noxious smells, littering and radioactive wastes, for example.⁹⁰ They should seek to urge local companies to invest in more efficient and cleaner technologies such as the use of solar water geysers and the use of passive heating on all new housing developments, for example.⁹¹ In addition, through spatial plans, local authorities can introduce regulations that contribute in promoting the use of non-motorised transport to reduce carbon emissions and make provision for non-motorised transport on existing and new road networks.⁹² Spatial plans should be designed in a way that prioritises non-motorised transport networks (for example, cycling and pedestrian lanes); promotes walking; and includes an interconnected street

84 See SDG 11.3, 11.4 & 11.a.

85 The national government is required to support local authorities with financial resources in terms of secs 9(2), 264(2)(e), 298(1)(b)(ii) and 301(1) of the Constitution.

86 D Muchadenyika & JI Williams 'Politics and the practice of planning: The case of Zimbabwean cities' (2017) 63 *Cities* 38; Auditor-General *Report for the Financial Year Ended December 31, 2018 on Local Authorities* (2019) v.

87 Secs 9 & 265(1)(a) Constitution.

88 Sec 9(1)(b) Constitution.

89 Some standards are set in terms of, among others, the Waste and Solid Waste Disposal Regulations, SI 6 of 2007; Environmental Management (Atmospheric Pollution Control) Regulations, 2009; Environmental Management (Prohibition and Control of Ozone Depleting Substances, Greenhouse Gases, Ozone Depleting Substances and Greenhouse Gases Dependent Equipment) Regulations, 2016; and Environmental Management (Environmental Impact Assessments and Ecosystems Protection) Regulations, SI 7 of 2007.

90 Sec 55-86 EMA.

91 Government of Zimbabwe *National Climate Change Response Strategy* (2014) (NCCRS) 112.

92 NCCRS (n 91) 115.

network. Local authorities can also introduce an effective mass public transport system that includes use of buses and rail transport.⁹³

The duty to ensure that ‘every person’ has an environment that is not harmful to their health or well-being seems to promote the human rights-based approach principle of universality and inalienability.⁹⁴ What this means is that local authorities should execute their powers and mandate in a manner that does not take away this right from any person. In this context, this principle resonates with the principle of equality and non-discrimination which is entrenched as a stand-alone right in terms of section 56 of the Constitution. A combined reading of sections 73 and 56 of the Constitution has the potential to promote the sustainable development principle of intra-generational equity which seeks to address the issue of inequity within one generation.⁹⁵ What this means is that the present-day agricultural, commercial, industrial, technological, social and scientific activities⁹⁶ in cities should be carried out in ways that seriously consider the rights and interests of the often marginalised segments of society, including women, children, the youth, older persons and persons with disabilities. By ensuring that everyone in the present generation, regardless of gender, age, disability, race, ethnicity or religion, enjoys the right to a healthy environment potentially promotes the inclusiveness of cities, as envisaged in SDG 11.

The duty to protect the environment for the benefit of future generations underscores the need for local authorities to promote the sustainable development principle of inter-generational equity,⁹⁷ which was emphasised in the case of *Augar Investments OU v Min of Environment & Another*.⁹⁸ The High Court stated that ‘it is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their [environmental] rights ... lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment’. As such, local authorities need to adopt and implement laws, policies and plans directed towards ensuring that present-day activities in their respective areas of jurisdiction are not carried out in such a way that may disadvantage future

93 NCCRS 49.

94 See part 3.2.

95 For details on this principle, see para 2.1 of the New Delhi Declaration (2002).

96 Sec 13(1) of the 2013 Constitution requires the government, at every level, to facilitate rapid and equitable development. The government is further mandated to foster agricultural, commercial, industrial, technological and scientific development; and to foster the development of industrial and commercial enterprises in order to empower Zimbabweans.

97 R Fambasayi & M Addaney ‘Cascading impacts of climate change and the rights of children in Africa: A reflection on the principle of intergenerational equity’ (2021) 21 *African Human Rights Law Journal* 32-51.

98 HH-278-15.

generations.⁹⁹ In this context, the duty to protect the environment for the benefit of future generations is consistent with the principle of sustainable use of natural resources embedded in section 73(1)(b)(iii) of the Constitution. The principle of sustainable use underscores the responsibility of local authorities to determine the rate of use of natural resources, taking into account the needs of future generations.¹⁰⁰ In order to promote sustainable land use, local authorities can exercise their development control powers¹⁰¹ which enable them to permit, monitor and regulate¹⁰² the acquisition, disposal,¹⁰³ subdivision and consolidation of land.¹⁰⁴ Moreover, by exercising their development control powers, such as evictions and demolitions,¹⁰⁵ local authorities would be able to manage urban development and expansion in a manner that promotes sustainable patterns of consumption and avoids sprawl. Apart from this, local authorities can promote the sustainable use of natural resources by adopting, reviewing or enforcing by-laws and plans, and prohibiting projects that invade environmentally-sensitive areas such as wetlands.¹⁰⁶ By promoting the sustainable use of natural resources, local authorities would be able to contribute towards the reduction of the environmental impact of cities as expected in terms of SDG 11.

Apart from the above, local authorities have the responsibility to take reasonable legislative and other measures that seek to ensure that everyone has the right to an environment that is not harmful to their 'health'.¹⁰⁷ According to the World Health Organisation (WHO), 'health' refers to 'a state of complete physical, mental and social well-being'.¹⁰⁸ Seen from this perspective, it is submitted that section 73 of the Constitution seeks to ensure that the environment is maintained in ways that enable people to live and work under conditions that will not compromise their physical health (or cause physical harm, injury or disease), mental and social well-being. The impression conveyed by section 73 is that the environment of a person or the public would be harmful to health in cases such

99 Secs 13(1) & 73(1)(b) Constitution.

100 Para 1 of the New Delhi Declaration; Principle 8 of the Rio Declaration; P Sands *Principles of international environmental law* (2003) 260.

101 Part V of Regional Town and Country Planning Act (Chapter 29:12) 1976 as amended (RTCPA).

102 Secs 31-33 RTCPA (n 101).

103 Part VII RTCPA.

104 Part VI RTCPA.

105 For details on evictions and demolitions in Zimbabwe, see H Chitimira 'An analysis of socio-economic and cultural rights protection under the Zimbabwe Constitution of 2013' (2017) 61 *Journal of African Law* 178-179; Ndlovu (n 54) 3-4.

106 NCCRS (n 91) 49.

107 Sec 73(1)(a) Constitution.

108 Preamble to the Constitution of WHO (1978); AS Hornsby *Oxford advanced learner's dictionary* (2010) 693.

as exposure to air pollution or hazardous substances, and reliance on polluted water supplies for domestic use. In this context, the right to a healthy environment may be construed as inextricably linked to the provision of basic municipal services, which include the supply of clean potable water and sanitation services,¹⁰⁹ waste management,¹¹⁰ drainage¹¹¹ and roads.¹¹² What local authorities need to do is to adopt, implement and monitor waste management plans dealing with quantity, components, transportation and disposal of the waste.¹¹³ With respect to waste management, for example, local authorities can promote a healthy environment by prioritising the minimisation of the amount of waste that is generated, through resource recovery of reusable and recyclable waste and diversion of bio-degradable waste to energy generation and composting.¹¹⁴ Moreover, local authorities can also promote a healthy environment by enforcing the polluter-pays principle, which denotes that in cases of pollution or environmental degradation, the expenses incurred on remedial measures to prevent, control and minimise further pollution or environmental degradation can be recovered from such person.¹¹⁵ With the above in mind, it is suggested that the ability of local authorities to ensure that their environment (natural and built) as well as the services they provide do not pose a risk to residents' health, would potentially promote 'safe' cities envisioned by SDG 11.

In the same vein, local authorities have the responsibility in terms of section 73(1)(a) to take reasonable legislative and other measures that seek to ensure that everyone has the right to an environment that is not harmful to their 'well-being'.¹¹⁶ Although there is no an agreed-upon definition of the term 'well-being' in literature,¹¹⁷ it may refer to 'general health and happiness'.¹¹⁸ It is submitted that local authorities can promote the 'well-being' of their residents by performing their spatial planning and development control functions emanating from the Regional Town and Country Planning Act¹¹⁹ in a manner that does not adversely affect their 'general health and happiness'. In terms of these functions, local authorities are

109 Sec 77 Constitution.

110 Para 26 of the Second Schedule to the Urban Councils Act (Chapter 29.15) of 1996 (UCA).

111 Sec 161 UCA (n 111).

112 Sec 4 Roads Act (Chapter 13:18) of 2001.

113 Sec 12(2) Statutory Instrument 6 of 2007.

114 NCCRS (n 91) 124.

115 Sec 4(2)(g) EMA.

116 Sec 73(1)(a) Constitution.

117 A du Plessis 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?' (2011) 27 *South African Journal on Human Rights* 295-297.

118 Hornsby (n 108) 1690.

119 Development control powers enable local authorities to permit, monitor and regulate development on the use of land. Part V and secs 31-33 RTCPA (n 102).

expected take all necessary measures to repair, demolish or close buildings, including dwellings, of an unsatisfactory standard;¹²⁰ abate overcrowding of dwellings;¹²¹ and control the harmful use or occupation of premises, and control the undue interference with the rights of residents of a neighbourhood.¹²² There is no doubt that these and other relevant measures have the potential to promote people's 'sense of place' because they afford protection to the quality of the (urban) environment.

The environmental clause in section 73 of the Constitution is negatively couched in that it confers a right 'to an environment that is not harmful to ... health or well-being', instead of simply a right to a healthy environment. This negative formulation seems to acknowledge the unavailability of pollution in Zimbabwe since local authorities have a shared responsibility to facilitate rapid development – by taking measures to foster agricultural, commercial, industrial, technological and scientific development.¹²³ Accordingly, section 73 of the Constitution seems to permit a certain degree of pollution during development processes to the extent that such pollution is not harmful to one's health or well-being. What constitutes a 'harmful' environment needs to be informed by scientific knowledge on acceptable standards of harm and risks in the contamination of ground water or emission of hazardous substances, for example. In the case of *Cosmo Trust & Others v City of Harare & Others*¹²⁴ the Administrative Court considered the scientific evidence presented before it as insufficient to conclude that the massive construction work proposed on the Monavale wetland would not cause irreparable destruction of the bird habitat and disruption of the natural process of water cleansing. In reaching its decision, the Court invoked the precautionary principle of environmental law which underscores that where there are threats of serious or irreversible damage, a lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹²⁵

Local authorities have a duty in terms of section 73 of the Constitution to take reasonable legislative and other measures 'that secure ecologically sustainable development and use of natural resources while promoting economic and social development'.¹²⁶

¹²⁰ Secs 16; 23(b); 88 and the First Schedule to the Housing Standards Control Act [Chapter 29:08] of 1972.

¹²¹ Secs 36; 43; 88 and the Second Schedule to the Housing Standards Control Act.

¹²² Secs 52 and 88 of the Housing Standards Control Act.

¹²³ Sec 13 of the Constitution.

¹²⁴ AC 3/19.

¹²⁵ Principle 15 of the Rio Declaration.

¹²⁶ See also secs 4(1)(ii) and 4(2)(e) of EMA.

This duty requires local authorities to promote the principle of horizontal integration¹²⁷ which requires coordination in policy making and implementation across different sectors/departments of a local authority in order to strike a balance between competing yet interrelated dimensions of sustainable development. In addition, local authorities can give effect to this duty by ensuring that environmental impact assessments (EIAs) precede projects such as housing developments, waste treatment and disposal, and other infrastructure developments¹²⁸ that are critical to the realisation of SDG 11. The EIA process provides an opportunity for local authorities to integrate development planning and decision-making processes with ecological considerations.¹²⁹ The significance of conducting EIAs was emphasised in the case of *Hillside Park Association v Glorious All Time Function (Private) Limited & Others*.¹³⁰ The High Court held that the development of a wetland without going through the EIA process is in violation of section 73 of the Constitution as well as section 77 which guarantees the right to food and potable water.

However, in cases where a local authority fails to adopt legislation and other measures that seek to ensure the realisation of environmental rights,¹³¹ the human rights-based approach necessitates the invocation of procedural environmental rights that could assist aggrieved and/or interested persons to compel the local authority to comply with its obligations. With respect to public participation, the Constitution confers on every Zimbabwean citizen, the right to 'participate, individually or collectively ... in peaceful activities to influence, challenge or support policies of government or any political or whatever cause'.¹³² Although local public officials may represent local communities and make municipal by-laws that govern these, there is an expectation that community participation should be an underlying principle in decision making, implementation and follow-up at the local level. What this means is that local public officials must explore ways that afford everyone an opportunity to meaningfully contribute to and influence the formulation and implementation of general plans, programmes and strategies on individual projects that have an effect on the environment. For example, local public officials may engage civil society organisations¹³³ since they have the

127 C Kanuri et al *Getting started with the SDGs in cities : A guide for stakeholders* (2016) 71.

128 Schedule 1 EMA.

129 Part Three of *Environmental Management Regulations* 7 of 2007 specifies how EIAs are conducted in Zimbabwe.

130 HH-349-2019; *Harare Wetlands Trust & Another v Life Covenant Church & Others* HH-819-19; *The Cosmo Trust & Others v City of Harare & Others* AC 3/2019.

131 See sec 73(2) of the Constitution.

132 Sec 67(2) Constitution.

133 Sec 7(c) Constitution.

potential to mobilise and represent the often marginalised sectors of society. From this perspective, public participation has the potential to promote an 'inclusive city' as envisaged in terms of SDG 11.

Access to information is another procedural right protected in the Constitution which seeks to promote public accountability and to facilitate the enforcement of other rights. First, in terms of section 62(1) of the Constitution, every citizen has the right of access to any information held by local authorities in so far as the information is required in the interests of public accountability. Second, section 62(2) confers on everyone the right to access to information held by any person, including the state, 'in so far as the information is required for the exercise or protection of a right'. Despite the fact that section 62 of the Constitution does not specifically refer to the environment, it impliedly guarantees the right of access to, for example, information about pollution levels, environmental health risks and disaster preparedness plans. Local authorities can give effect to this obligation by promoting environmental education, environmental awareness and sharing of knowledge with the objective of increasing the capacity of communities to address environmental issues and engender values, attitudes, skills and behaviour consistent with environmental management.¹³⁴ These activities have the potential to promote transparency and have the potential to empower urban dwellers to use human rights law to ascertain, claim and assert their rights to a healthy environment during developmental projects that have a bearing on the environment.

The other procedural right, which is at the crux of the Declaration of Rights, is access to justice.¹³⁵ Section 69(3) of the Constitution, which guarantees due process, lays the foundation for section 85 of the Constitution, which impliedly outlaws 'ouster clauses' by local authorities that deny or restrict access to courts to any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests of a group or class of persons; any person acting in the public interest; and any association acting in the interests of its members. The right to access to justice is at the heart of the human rights-based approach and so far has enabled aggrieved and/or interested persons to hold local authorities and other duty bearers accountable, by affording them the opportunity to institute legal proceedings to protect their rights to a healthy environment when

¹³⁴ Sec 4(2)(d) EMA.

¹³⁵ Secs 69(3) & 85 Constitution.

they believed it had been infringed or threatened.¹³⁶ It therefore follows that, since SDG 11 has no legal force, a human rights-based approach enables urban dwellers to approach the courts if what is envisaged in terms of Target 11.6 has not been met in ways that affect the enjoyment of the right to a healthy environment.

5 Conclusion

As co-global actors in pursuance of the global sustainable development agenda, local authorities are expected in terms of SDG 11 to pursue ten time-bound targets primarily directed towards making cities and human settlements across the world inclusive, safe, resilient and sustainable by the year 2030. One of the targets with which Zimbabwe continues to grapple is Target 11.6, which requires local authorities to reduce the adverse per capita environmental impact of cities. The fact that Zimbabwe is lagging behind in terms of the progress towards the realisation of this target has implications for the right to a healthy environment in section 73 of the Constitution of Zimbabwe. As such, using the human rights-based approach, the thrust of this article was to critically interrogate how the right to a healthy environment in section 73 of the Constitution of Zimbabwe could be used by local authorities to give effect to Target 11.6.

It was noted that the constitutionalisation of the right to a healthy environment is a notable development as it affirms the country's acknowledgment of the significance of that right in any environmental regulatory framework. The article further established that affording this right the same status as other rights speaks to the principle of interrelatedness of human rights, and local authorities in Zimbabwe are encouraged not to pursue the right to a healthy environment in isolation in order to ensure effective redress of the environmental impact of cities as expected in terms of Target 11.6. Despite the existence of the right to a healthy environment, the study established that the huge potential of the human rights-based approach remains untapped in Zimbabwe due to practices by some local authorities that do not meet human rights norms and standards. Nonetheless, it was established that the use of a human rights-based approach in the context of Target 11.6 appears to be the most appropriate means for the enjoyment of the right to a healthy environment as

¹³⁶ See eg the case of *Cosmo Trust & Others v City of Harare & Others* AC 3/19; *Harare Wetlands Trust & Another v Life Covenant Church & Others* HH-819-19; *Augar Investments OU v Min of Environment & Another* HH-278-15; *Zimbabwe Environmental Law Association (ZELA) & Others v Anjin Inv (Pvt) Ltd & Others* HH 523/15, [2015] ZWHHC 523 (16 June 2015) (unreported); *Hillside Park Association v Glorious All Time Function (Private) Limited & Others* HH-349-19.

local authorities have a shared responsibility to adhere to human rights norms and standards. The human rights-based approach contributes in remedying some of the weaknesses associated with Target 11.6 in the areas of implementation, participation, monitoring, accountability and policy analysis. The potential of the human rights-based approach is enhanced by the fact that there are procedural rights that can assist aggrieved and/or interested persons to compel the local authority to comply with its obligations, in cases where a local authority fails to adopt legislative and other measures that seek to ensure the realisation of the right to a healthy environment, for example. The potential of the human rights-based approach is further optimised by the fact that it underscores the need to place more emphasis on the distribution and prioritisation of limited resources, considering the local circumstances. Considering that neither the right to a healthy environment and SDG 11 are the sole domain of local authorities, the same can complement their limited resources with those harnessed from stakeholders in and outside government. In light of the commendable precedents set by the judiciary in some cases, local authorities are recommended to consider the implication of legal provisions on the right to a healthy environment in the process of exercising their legislative or executive powers directed towards the realisation of Target 11.6.

The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?

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Summary: *As a liberal constitution, the Constitution of Lesotho maintains a bifurcated human rights framework. Human rights are embodied in two distinct chapters – chapter II and chapter III – with different legal implications. Chapter II contains civil and political rights styled 'fundamental human rights and freedoms' while chapter III embodies socio-economic rights styled 'principles of state policy'. The right to life falls under chapter II, while the right to health is under chapter III. The juridical effect of this division is that socio-economic rights are not judicially enforceable. The courts have been tenacious in maintaining this division. The High Court's recent decision in Lesotho Medical Association v Minister of Health has challenged this prevailing judicial policy. In this case the Court adopted a liberal approach to the right to life in enforcing the right to health. The Court held that the failure by the Ministry of Health to provide personal protective clothing to health workers was a violation of the right to life. The main question for human rights scholarship is whether this decision could signal a change of approach by the judiciary in Lesotho in favour of the liberal approach to the right to life. This article sets out to investigate this question.*

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Key words: *Constitution of Lesotho; right to life; right to health; liberal approach; restrictive approach*

1 Introduction

The enduring feature of liberal constitutions is that their priority is to limit state power.¹ Human rights are a central pillar of this grand scheme – they are used to limit the state’s functional space.² Hence, under the liberal constitutional conception, the most important human rights are negative rights.³ Negative rights pre-eminently *prevent* states from doing, rather than *directing* the state to do.⁴ The development of human rights, to a great extent, is based on this approach.⁵ The notion of human rights has developed through the stages that categorise them; these have been styled ‘generations’.⁶ First generation rights comprise the classical rights that were the first to be accepted as inalienable and innate because of their affinity to liberal thought. These rights came to be known as civil and political rights. The central feature of these rights is that they are negative.⁷ These rights became the chief struts of major revolutions such as the French Revolution and the American Revolution.⁸ The right to life is categorised under this first generation of rights. Second generation rights, which came later in human rights development, comprise

- 1 M Tushnet ‘The dilemmas of liberal constitutionalism’ (1981) 42 *Ohio State Law Journal* 411; J Elster, R Slagstad & G Hernes (eds) *Constitutionalism and democracy* (1988); VJ Vanberg ‘Liberal constitutionalism, constitutional liberalism and democracy’ (2011) 22 *Constitutional Political Economy* 1.
- 2 J Nedelsky ‘Reconceiving rights and constitutionalism’ (2008) 7 *Journal of Human Rights* 139.
- 3 NW Barber ‘Constitutionalism: Negative and positive’ (2015) 38 *Dublin University Law Journal* 249.
- 4 S Barber ‘Fallacies of negative constitutionalism’ (2006) 75 *Fordham Law Review* 651; O Gerstenberg ‘Negative/positive constitutionalism, “fair balance”, and the problem of justiciability’ (2012) 10 *International Journal of Constitutional Law* 904; JM Farinacci-Fernós ‘Looking beyond the negative-positive rights distinction: Analysing constitutional rights according to their nature, effect, and reach’ (2018) 41 *Hastings International and Comparative Law Review* 31.
- 5 JD van der Vyver ‘The doctrine of human rights: Its historical and philosophical foundation’ in D Brand et al (eds) *From human wrongs to human rights – Part IV* (1995) 48; M Ishay ‘What are human rights? Six historical controversies’ (2004) 3 *Journal of Human Rights* 359.
- 6 JC Mubangizi ‘Towards a new approach to the classification of human rights with specific reference to the African context’ (2004) 4 *African Human Rights Law Journal* 93; C Wellman ‘Solidarity, the individual and human rights’ (2000) 22 *Human Rights Quarterly* 639; F Pocar ‘Some thoughts on the Universal Declaration of Human Rights and the generations of human rights’ (2015) 10 *Intercultural Human Rights Law Review* 43.
- 7 Mubangizi (n 6) 95; DD Basu *Human rights in constitutional law* (1994) 82.
- 8 SP Marks ‘From the single confused page to the Decalogue for six billion persons: The roots of the Universal Declaration of Human Rights in the French Revolution’ (1998) 20 *Human Rights Quarterly* 459; J Israel *Democratic enlightenment: Philosophy, revolution, and human rights 1750-1790* (2013); B Bailyn *The ideological origins of the American Revolution* (2017).

social and economic rights. These rights are pre-eminently positive – they impose positive obligations on states.⁹ Along with other rights, such as the rights to housing, a livelihood, work, water and education, the right to health belongs to this generation.¹⁰

Second generation rights have not gained the widespread acceptance enjoyed by civil and political rights. Even where these rights have been included in the same Bill of Rights as civil and political rights, as in South Africa, their enforcement continues to generate much great controversy.¹¹ Although the Universal Declaration of Human Rights (Universal Declaration) treated human rights as indivisible,¹² human rights thus far have been remained primarily bifurcated. This division at the international level is evidenced by the existence of two main international conventions – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – that anchor this duality.¹³

The most recent category of rights, styled ‘the third generation of rights’, comprises collective rights such as the right to peace, the right to development, and the right to a clean environment. According to Mubangizi, ‘[t]he emergence of this category of rights is closely associated with the rise of Third World nationalism and the realisation by developing states that the existing international order is loaded against them’.¹⁴

This traditional categorisation of human rights has largely informed the way in which national constitutions treat human rights.¹⁵ Most liberal constitutions have classified human rights into two main categories – civil and political rights, and social and economic

9 C Heyns & D Brand ‘Introduction to socio-economic rights in the South African Constitution’ (1998) 2 *Law, Democracy and Development* 153.

10 P Alston ‘A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?’ (1982) 29 *Netherlands International Law Review* 307.

11 MS Kende ‘The South African Constitutional Court’s construction of socio-economic rights: A response to critics’ (2003) 19 *Cornell Journal of International Law* 617; EC Christiansen ‘Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court’ (2006) 38 *Columbia Human Rights Law Review* 321; D Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *South African Journal on Human Rights* 301; M Pieterse ‘Coming to terms with judicial enforcement of socio economic rights’ (2004) 20 *South African Journal on Human Rights* 383.

12 JW Nickel ‘Rethinking indivisibility: Towards a theory of supporting relations between human rights’ (2008) 30 *Human Rights Quarterly* 984.

13 UN General Assembly International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations Treaty Series vol 993 3, <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 6 April 2021).

14 Mubangizi (n 6) 96.

15 Mubangizi 93; PS Jaswal *Human rights and the law* (1996).

rights. The former category is judicially enforceable, while the latter category is not.¹⁶ The Constitution of Lesotho is a prototype of these liberal constitutions,¹⁷ providing for a bifurcated human rights framework. Human rights are embodied in two distinct chapters in the Constitution – chapter II and chapter III – with varying legal implications. Chapter II contains civil and political rights styled ‘fundamental human rights and freedoms’,¹⁸ which are enforceable. Section 22(1) of the Constitution provides:

If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

This is in sharp contrast to what the Constitution says about socio-economic rights, which are embodied in chapter III as ‘principles of state policy’. Section 25 of the Constitution provides that these ‘principles’ shall form part of state policy, and they

shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

The right to health falls under chapter III,¹⁹ and it therefore is judicially unenforceable. The superior courts of Lesotho have been very consistent in maintaining the non-enforceability of socio-economic rights.²⁰ It appears that the High Court challenged this prevailing judicial policy in its recent decision in *Lesotho Medical Association v Minister of Health*.²¹ The case arose from an extraordinary situation where health practitioners challenged the government’s short supply of personal protective equipment during the COVID-19 pandemic. The practitioners alleged, among others, that the short supply of protective gear was a violation of their right to life as envisaged under section 5 of the Constitution. Despite the plain language of

16 JC Mubangizi ‘The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation’ (2006) 2 *African Journal of Legal Studies* 1; FI Michelman ‘The constitution, social rights, and liberal political justification’ (2003) 1 *International Journal of Constitutional Law* 13.

17 NL Mahao ‘Judicial independence and the enforcement of the constitution in Lesotho’ (2005) 3 *Journal of Commonwealth Law and Legal Education* 51; H Nyane ‘Development of constitutional democracy: 20 years of the Constitution of Lesotho’ (2014) 21 *Lesotho Law Journal* 59.

18 See Ch II of the Constitution of Lesotho 1993.

19 Sec 27 Constitution 1993.

20 *Khathang Tema Baitsoke v Maseru City Council* LAC (2005-2006) 85.

21 *Lesotho Medical Association v Minister of Health* CC 19/2019.

section 25 of the Constitution – that ‘principles of state policy’ shall not be enforceable in any court – the Court decided that the failure by the Ministry of Health to provide personal protective clothing to health workers was a violation of the right to life.²² The main question for human rights scholarship is whether this decision could signal a change of approach by the judiciary in Lesotho in favour of the liberal approach to the right to life, or whether it simply was a knee-jerk solution to the then prevalent problem of the shortage of protective equipment for frontline health workers.²³ This article seeks to investigate this central question. The article contends that while the decision certainly is welcome, it may not significantly change the entrenched attitude of the superior courts of Lesotho towards social and economic rights. The article uses the content analysis method²⁴ to analyse the Lesotho Constitution, the judicial pronouncements, and the trends at the international level.

2 Conceptual framework: The interface between the right to life and the right to health

2.1 Right to life

The right to life is regarded as the most basic right as it forms the basis of all other human rights.²⁵ It is one of the most primordial human rights. In the Lockean conception the right to life philosophically antedates civil society. Alongside the rights to liberty and property, it forms the basis for the social contract.²⁶ Therefore, philosophically and historically it is the most animating of all human rights. As the South African Constitutional Court instructively observed in *S v Makwanyane*,²⁷ ‘[t]he right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them.’²⁸ Menghistu describes the pre-eminence of the right to life as follows: ‘The right to life is the most basic, the most fundamental, the

22 *Lesotho Medical Association* (n 21) para 2.

23 Lesotho, like the rest of the world, was affected by the coronavirus pandemic. For the country’s legal response to the pandemic, see I Shale ‘Implications of Lesotho’s COVID-19 response framework for the rule of law’ (2020) 20 *African Human Rights Law Journal* 462.

24 K Krippendorff ‘Content analysis’ in E Barnouw et al (eds) *International encyclopaedia of communication* (1989) 403.

25 BG Ramcharan (ed) *The right to life in international law* (1985); *R v Home Secretary, Ex Parte Bugdaycay* [1987] AC 514; AJ Ashworth ‘Self-defence and the right to life’ (1975) *Cambridge Law Journal* 282.

26 S Ratnapala *Jurisprudence* (2017) 121.

27 1995 (3) SA 391 (CC).

28 *Makwanyane* (n 27) para 326.

most primordial and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective.²⁹ The Human Rights Committee's General Comment 6 of 1982 identifies the right to life as 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'.³⁰ The 1982 General Comment has since been replaced by General Comment 36 of 2018.³¹ The 2018 General Comment equally exalts the right to life as a right that should not be interpreted narrowly.³² The General Comment expansively provides that the right to life 'is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation'.³³

The right to life is protected in almost all modern constitutions. At the international level, the right is recognised under article 3 of the Universal Declaration,³⁴ article 6 of ICCPR,³⁵ article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁶ and article 4 of the African Charter on Human and Peoples' Rights (African Charter).³⁷

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- 29 F Menghistu 'The satisfaction of survival requirements' in BG Ramcharan (ed) *The right to life in international law* (1985) 63.
- 30 Human Rights Committee General Comment 6: Article 6 (Right to Life) 30 April 1982. For an analysis of the latest General Comment of 2018 which replaces the 1982 General Comment, see S Joseph 'Extending the right to life under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 *Human Rights Law Review* 347.
- 31 Human Rights Committee General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, adopted by the Committee at its 124th session (8 October to 2 November 2018).
- 32 General Comment 36 (n 31) para 3.
- 33 General Comment 36 para 2.
- 34 UN General Assembly Universal Declaration of Human Rights 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 8 April 2021). Art 3 provides: 'Everyone has the right to life, liberty and security of person.'
- 35 UN General Assembly International Covenant on Civil and Political Rights 16 December 1966, United Nations Treaty Series, vol 999 171, <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 6 April 2021). Art 6(1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'
- 36 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html> (accessed 6 April 2021). Art 2(1) provides: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'
- 37 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html> (accessed 8 April 2021). Art 4 provides: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

Therefore, it is apparent that the right to life is exalted and sanctified within the broader human rights discourse.³⁸ This evident unanimity about the importance of the right to life notwithstanding, there is considerable controversy about its proper contours and purpose. The right continues to divide the scholarship and jurisdictions into two main schools of thought. On the one side are scholars who advocate the restrictive approach, while on the other side there are scholars who support the liberal and much more expansive interpretation of the right. The proponents of the restrictive approach posit that the right to life has the salutary purpose of protecting life; it protects human beings against the arbitrary deprivation of life.³⁹ It does not extend to the right of livelihood. Therefore, it is not a 'positive right' and it belongs to the realm of civil and political rights.

The restrictive approach distinguishes the right to life from what may be styled the 'right to living' which, according to Przetacznik,⁴⁰ means an expanded definition of rights to include an 'appropriate standard of living'.⁴¹ The 'right to living' thus includes other conditions that make life meaningful, such as health, food and water. The right to life exclusively and narrowly signifies every human being's entitlement not to be deprived of his or her life. This formulation follows the strictly dual human rights framework in terms of which the right to life belongs to the realm of civil and political rights, and the 'right to living' belongs 'to the domain of economic, social and cultural rights, which are recognised and affirmed in the International Covenant on Economic, Social and Cultural Rights'.⁴² According to this formulation, the right to health is patently distinguishable from the right to life. The South African Constitutional Court endorsed this approach in *Soobramoney v Minister of Health (KwaZulu-Natal)*.⁴³ In this case a terminally-ill man suffering from renal failure needed dialysis treatment which the state could not provide. He sued the state and based his application on both section 27(3) of the Constitution, which provides that '[n]o one may be refused emergency medical treatment', and section 11, which stipulates that 'everyone has the right to life'.⁴⁴ The Court preferred a restrictive approach to the right to life and ruled as follows:⁴⁵

38 Ramcharan (n 25).

39 Y Dinstein *The right to life, physical integrity, and liberty* (1985); F Przetacznik 'The right to life as a basic human right' (1976) *Revue des droits de l'homme* 585.

40 F Przetacznik 'The right of living as basic human right' (1994) 6 *Sri Lanka Journal of International Law* 203.

41 As above.

42 Przetacznik (n 40) 204.

43 1997 12 BCLR 1695 (CC).

44 *Soobramoney* (n 43) para 7.

45 *Soobramoney* (n 43) para 19.

In our Constitution, the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfil its primary obligations under sections 27(1) and (2) to provide health care services to 'everyone' within its available resources.

However, the Constitution of South Africa must be treated with caution. Unlike the constitutions of which the human rights frameworks are bifurcated, such as those of Lesotho and India, the Constitution of South Africa has one Bill of Rights, which renders both political and socio-economic rights enforceable.⁴⁶ Therefore, there is no desperate need to seek the expansive approach to the right to life to realise socio-economic rights such as the right to health.⁴⁷ Nevertheless, there still are pockets of decisions in South Africa that favour the liberal, rather than the restrictive, approach to the right to life, for example, *S v Makwanyane*,⁴⁸ *Minister of Health v Treatment Action Campaign (No 2)*,⁴⁹ *Hay v B⁵⁰* and *Victoria & Alfred Waterfront v Police Commissioner, Western Cape*.⁵¹

The liberal approach to the right to life, on the other hand, posits that the right to life may not be denied only through the direct termination of life,⁵² but may also be denied by denying the essential conditions of livelihood such as food and health.⁵³ The liberal approach seems to be dominating the contemporary conception of the right to life at the international, regional and domestic levels. The international level is based on article 6(1) of ICCPR, which provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' In interpreting the article, the Human Rights Committee has adopted the liberal rather than the restrictive approach.⁵⁴ The Committee decried the narrow interpretation of the right, observing

46 I Currie & J de Waal *The Bill of Rights handbook* (2013).

47 See *Soobramoney* (n 43).

48 In *S v Makwanyane* O'Regan J stated (para 326) that '[t]he right to life is more than existence, it is a right to be treated as a human being with dignity: Without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

49 2002 (5) SA 721 (CC).

50 2003 (3) SA 492 (W).

51 [2004] 1 All SA 579 (C).

52 The most common way of protecting life is by rendering the arbitrary deprivation of life a crime. The typical crime across jurisdictions is murder. See M Milanovic 'The murder of Jamal Khashoggi: Immunities, inviolability and the human right to life' (2020) 20 *Human Rights Law Review* 1. In Lesotho murder and culpable homicide are crimes in terms of secs 40 and 41 of Penal Code Act 6 of 2010.

53 Menghistu (n 29).

54 General Comment 36 (n 31).

that '[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.'⁵⁵ The Committee's approach is that it should include positive steps 'to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'.⁵⁶

The liberal approach seems to have percolated to the sub-regional level. Article 4 of the African Charter provides that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. The African Commission on Human and Peoples' Rights (African Commission) has taken the liberal approach to article 4. In the case of *Forum of Conscience v Sierra Leone*⁵⁷ the Commission found that the failure to follow due process in the trial that culminated in the death sentence violated article 4 of the African Charter. The case concerned the 24 soldiers who were tried and sentenced to death by a court martial for their alleged roles in the *coup* that overthrew President Tijan Kabah. The Sierra Leonean court martial, which tried and convicted the above-mentioned soldiers, allowed no right of appeal against conviction or sentence to a higher tribunal. The Commission noted that the right to life was the 'fulcrum of all other rights'.⁵⁸ The Commission further noted that the right to life, as envisaged under article 4 of the African Charter, was 'the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life'.⁵⁹ The Commission took a similar approach in *Amnesty International & Others v Sudan*.⁶⁰ It found that death resulting from acts of torture or trials concluded in breach of article 7 due process guarantees also violated the African Charter's prohibition against the arbitrary deprivation of life.⁶¹

The jurisprudence of the Inter-American Court of Human Right is among the most illuminating on the interface between the right to

55 General Comment 36 para 5.

56 General Comment 36 para 5. General Comment 36 para 3 also provides: 'The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'

57 (2000) AHRLR 293 (ACHPR 2000), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2000/22> (accessed 16 May 2022).

58 *Forum of Conscience* (n 57) para 19.

59 *Forum of Conscience* (n 57) para 19.

60 (2000) AHRLR 297 (ACHPR 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11> (accessed 17 May 2022).

61 *Amnesty International* (n 60) para 52. See also NJ Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105.

life and the right to health.⁶² It is based on article 4 of the American Convention on Human Rights,⁶³ which states that '[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' In construing this section, the Court has unequivocally adopted the liberal approach to a wide array of socio-economic rights such as the right to healthcare services, the right to food and the right to water.

On the right to health, in particular, the flagbearer for the jurisprudence is the decision in *Yakye Axa Indigenous Community v Paraguay*.⁶⁴ In this case the Inter-American Commission on Human Rights had approached the Court to decide, *inter alia*, whether Paraguay had breached article 4 (the right to life).⁶⁵ The Commission alleged that the state had not ensured the ancestral property rights of the Yakye Axa indigenous community and its members because although the community's land claim had been processed since 1993, no satisfactory solution had been found. According to the Commission in its application, such delay made it impossible for the community and its members to fully own their land. Such land deprivation kept the community in a vulnerable situation in terms of food, medical care and public health care.⁶⁶ The state argued for a restrictive approach to the right to life and contended that it had not arbitrarily deprived the community members of any life.⁶⁷ The Court rejected the restrictive approach and instead adopted its long-established approach that '[e]ssentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated'.⁶⁸ The Court further reaffirmed that 'one of the obligations that the state must inescapably undertake as guarantor, to protect and ensure the right to life, is that

62 See JM Pasqualucci 'The right to a dignified life (*vida digna*): The integration of economic and social rights with civil and political rights in the Inter-American human rights system' (2008) 31 *Hastings International and Comparative Law Review* 1; FT Monica 'Justiciability of economic, social, and cultural rights in the Inter-American system of protection of human rights: Beyond traditional paradigms and notions' (2007) 29 *Human Rights Quarterly* 431.

63 Organisation of American States American Convention on Human Rights (22 November 1969) art 4.

64 IACTHR, 17 June 2005.

65 Organisation of American States American Convention on Human Rights (22 November 1969), <https://www.refworld.org/docid/3ae6b36510.html> (accessed 9 April 2021). Art 4(1) provides: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.'

66 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 2.

67 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 121.

68 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 161.

of generating minimum living conditions that are compatible with the dignity of the human person'.⁶⁹

At the domestic level, the jurisprudence of the Supreme Court of India arguably is the trailblazer for this approach.⁷⁰ The Constitution of India subscribes to the separation of human rights into two categories – political rights and socio-economic rights.⁷¹ Nevertheless, the Indian Supreme Court has been highly innovative in deriving the realisation of socio-economic rights from civic and political rights, in general,⁷² and the right to life, in particular.⁷³

On the interface between the right to life and the right to health care, the flagbearer of the Court's jurisprudence is its decision in *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal*.⁷⁴ In this case the applicant, who had fallen off a train and suffered severe head injuries and a brain haemorrhage, sued the state for its failure to provide adequate health care. The case was based on article 21 of the Indian Constitution, among others. Article 21 provides that '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law'. The Court took a liberal approach to the right to life and found that in addition to the state's obligation not to arbitrarily deprive people of life, the state also has an obligation to preserve life. The Court decreed that the '[f]ailure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21'.⁷⁵

Hence, it is apparent that at almost all levels – international, regional and domestic – the approach to interpreting the right to life is moving discernibly towards the liberal approach.⁷⁶ The right to life no longer protects life only against arbitrary deprivation. It

69 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 162.

70 JS Muralidhar 'The expectations and challenges of judicial enforcement of social rights' in JS Muralidhar *Social rights jurisprudence: Emerging trends in international and comparative law* (2014) 102.

71 Part III of the Constitution of India provides for what have been styled 'fundamental rights', which are mainly civic and political rights. Art 32(2) provides: 'The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.'

72 R Abeyratne 'Socio-economic rights in the Indian Constitution: Toward a broader conception of legitimacy' (2014) 39 *Brooklyn Journal of International Law* 1; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 (SC) 88; *Tellis v Bombay Municipal Corporation* [1987] LRC 351 (Const); *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCR 594.

73 *Paschim Banga Khet Mazdoor Samity v State of Bengal I* (1996) AIR SC 2426.

74 As above.

75 *Paschim Banga Khet Mazdoor Samity v State of Bengal* (n 73) 5.

76 Ramcharan (n 25).

also protects against the deprivation of life through the denial of the conditions necessary to sustain life.

2.2 Right to health

Unlike the right to life, which is widely accepted and enforceable across jurisdictions, the right to health does not have a very firm grounding in the global human rights discourse.⁷⁷ This precarious position of the right to health in international and domestic rights instruments is a common feature of all social and economic rights.⁷⁸ The recognition of the right to health is a relatively recent phenomenon. It was first recognised only in 1946 as a 'right' in international law by the World Health Organisation (WHO) constitution.⁷⁹ The preamble provided that '[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions'. This formulation inspired the development of the right at the international level. In 1948, when the Universal Declaration of Human Rights (Universal Declaration) was adopted – the norms of which are now generally regarded as principles of international customary law⁸⁰ – the right to health was recognised under article 25, albeit bundled together with other rights such as the rights to food, clothing, housing and medical care.⁸¹ In 1966, when the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted, the right was recognised for the first time in a binding international convention. Article 12(1) provides that the state parties to the Covenant 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Thereafter, the right was recognised in a broad range of international conventions.⁸²

77 EA Friedman & OG Lawrence 'Pillars for progress on the right to health: Harnessing the potential of human rights through a Framework Convention on Global Health' (2012) 14 *Health and Human Rights* 4; CM Vargas-Peláez et al 'Right to health, essential medicines, and lawsuits for access to medicines – A scoping study' (2014) 121 *Social Science and Medicine* 48.

78 C Jung, R Hirschl & E Rosevear 'Economic and social rights in national constitutions' (2014) 62 *American Journal of Comparative Law* 1043.

79 The Constitution was presented at the International Health Conference in New York on 22 July 1946. See FP Grad 'The Preamble of the constitution of the World Health Organisation' (2002) 80 *Bulletin of the World Health Organisation* 981.

80 H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1996) 25 *Georgia Journal of International and Comparative Law* 287.

81 It provides: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and the right to security in the event of sickness, disability.'

82 See, eg, UN General Assembly Convention on the Rights of the Child 20 November 1989, United Nations Treaty Series, vol 1577 3, <https://www.refworld.org/docid/3ae6b38f0.html> (accessed 9 April 2021). Art 24(1) provides: 'States

The way in which the right is formulated in these international instruments confirms that the expression ‘right to health’ is shorthand for different formulations of the right in various instruments. Some scholars have observed that the shorthand formulation is misleading. For instance, Roemer observes that ‘the phrase a *right to health* may be incomplete and conceptually misleading. We suggest that a more correct phraseology would be a right to health protection, including two components, a right to health care and a right to healthy conditions.’⁸³ For convenience, the shorthand formulation is often preferred, as it is in this article.⁸⁴

The content and scope of this right are always dependent on how it is formulated in a particular instrument and how it has been interpreted under that specific instrument. Article 25 of the Universal Declaration recognises the right to a standard of living adequate for health. It seems that the approach of the Universal Declaration is that the right is composite – it includes ‘food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.⁸⁵ Article 12(1) of ICESCR has improved slightly upon the formulation of the Universal Declaration, in that it recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. The jurisprudence about this article demonstrates that the right is not limited to health care, but extends to broader conditions for a healthy life. While this right, like all other socio-economic rights, is progressively enforceable given the available

Parties recognise the right of the child to the enjoyment of the highest attainable standard of health.’ Organisation of African Unity African Charter on Human and Peoples’ Rights 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html> (accessed 9 April 2021). Art 16 provides: ‘Every individual shall have the right to enjoy the best attainable state of physical and mental health.’ UN General Assembly International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965, United Nations Treaty Series, vol 660 195, <https://www.refworld.org/docid/3ae6b3940.html> (accessed 9 April 2021). Art 5(e)(iv) provides that state parties undertake to prohibit and eliminate racial discrimination in the enjoyment of ‘the right to public health, medical care, social security and social services’; 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 9 April 2021). Art 11(l)(f) provides that state parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of ‘the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction’.

83 L Hernan Fuenzalida-Puelma & S Scholle Connor (eds) *The right to health in the Americas* (1989) 600.

84 DM Chirwa ‘The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine’ (2003) 19 *South African Journal on Human Rights* 541.

85 Art 25.

resources, it imposes minimum core obligations on states.⁸⁶ These are the minimum essential levels below which a state may not drop in discharging its obligations under the Convention.

Under the African Charter the right to health is defined as the 'right to enjoy the best attainable state of physical and mental health'.⁸⁷ States have obligations to take the necessary measures to protect their people's 'health and ensure that they receive medical attention when they are sick'.⁸⁸ The African Charter uses the formulation used in article 12 of ICESCR with a slight modification. While the African Charter uses the word 'best', ICESCR uses 'highest'. Perhaps the difference is insignificant. The essence of the formulation is that the right to health, like all socio-economic rights, is progressively realised. The obligations of states differ depending on the available resources, as long as the minimum core obligations are met.⁸⁹

In keeping with the pattern at the international level, the emergent trend in Africa is that the right to health is a necessary component of the right to life. In 2015 the African Commission adopted General Comment 3 on the African Charter on Human and Peoples' Rights.⁹⁰ The Comment demonstrates that article 4 of the African Charter must

86 See para 43 of UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant) 11 August 2000, E/C.12/2000/4, <https://www.refworld.org/docid/4538838d0.html> (accessed 9 April 2021). The minimum core obligations are (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; (b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) to ensure equitable distribution of all health facilities, goods and services; (f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalised groups. See also D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

87 Art 16(1) of the African Charter. See also *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

88 Art 16(2) African Charter.

89 E Durojaye 'The approaches of the African Commission to the right to health under the African Charter' (2013) 17 *Law, Democracy and Development* 393.

90 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Art 4), adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights, 4-18 November 2015, Banjul, The Gambia, <https://www.achpr.org/legalinstruments/detail?id=10#:~:text=Without%20the%20right%20to%20life,to%20focus%20on%20this%20right> (accessed 17 May 2022).

be given a liberal interpretation. In particular, it provides that there is a symbiotic relationship between the right to life and the right to health. According to the General Comment, states' obligations under article 4 include the duty 'to address more chronic yet pervasive threats to life, for example, with respect to preventable maternal mortality, by establishing functioning health systems and eliminating discriminatory laws and practices that impact individuals' and groups' ability to seek healthcare'.⁹¹ The treatment of the right to health as an integral part of the right to life was new to the jurisprudence of the African Commission. In its 2001 decision in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*⁹² the Commission was seized with a complaint, among others, alleging that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards.⁹³ The African Commission found:⁹⁴

The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni community as a whole. They affected the life of the Ogoni society as a whole.

A similar approach – that the right to health is part of the right to life – is preferred at several domestic levels in Africa and beyond. The Constitutional Court of Uganda is one of the flagbearers of this approach. In a landmark decision in *Centre for Health, Human Rights and Development (CEHURD) v Attorney-General*⁹⁵ the Court had to deal with a petition challenging the Ugandan government's failure to provide basic maternal health services in violation of both the right to health and the right to life under the Ugandan Constitution. The Court found, among others, that 'the government's omission to adequately provide basic maternal health care services in public health facilities violates the right to life and is inconsistent with and in contravention of article 22 of the Constitution'.⁹⁶ A similar approach was adopted by the High Court of Kenya in *Patricia Asero Ochieng v*

91 African Commission (n 90) para 42.

92 (2001) AHRLR 60 (ACHPR 2001).

93 *SERAC* (n 92) para 2.

94 *SERAC* (n 92) para 67.

95 Petition 16 of 2011, <https://ulii.org/ug/judgment/constitutional-court-uganda/2020/12> (accessed 17 May 2022).

96 *CEHURD* (n 95) para 10(b).

the Attorney General.⁹⁷ There the Court held that the rights to health, life and human dignity are inextricably bound.

The jurisprudence of the Supreme Court of India remains the trailblazer for domestic courts on this approach. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,⁹⁸ for instance, the Indian Supreme Court found that 'the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter'.⁹⁹ In a much more direct manner, in *Parmanand Katara v Union of India*¹⁰⁰ the same Court decreed:¹⁰¹

Article 21 of the Constitution casts the obligation on the state to preserve life. The provision as explained by this court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. Therefore, a doctor at the government hospital positioned to meet this state obligation is duty-bound to extend medical assistance for preserving life.

In similar manner, in *Consumer Education and Research Centre v Union of India*¹⁰² the Court gave more meaning to the interface between the right to health and the right to life, as follows: 'The right to health to a worker is an integral facet of [the] meaningful right to life to have not only a meaningful existence but also robust health and vigour without which [a] worker would lead [a] life of misery. Lack of health denudes his livelihood.'¹⁰³ India is not the only country where the dilemmas of enforcing the right to health, and other socio-economic rights, have been circumvented by liberalising the interpretation of the right to life. This emergent global pattern is also discernible in the jurisprudence of the Constitutional Court of Colombia.¹⁰⁴

97 Petition 409 of 2009 eKLR. For commentary on the case, see E Durojaye & G Mirugi-Mukundi 'States' obligations in relation to access to medicines: Revisiting the Kenyan High Court decision in *PAO and Others v Attorney-General and Another*' (2013) 17 *Law, Democracy and Development* 24.

98 (1981) 2 SCR 516.

99 *Francis Coralie Mullin* (n 98) para 6.

100 *Parmanand Katara v Union of India* (1989) 4 SCC 286.

101 As above.

102 1995 AIR 922.

103 *Consumer Education and Research Centre* (n 102) para 26. The Court went further and held that 'the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make[s] the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker [and] is a minimum requirement to enable a person to live with human dignity.'

104 AE Yamin & O Parra-Vera 'Judicial protection of the right to health in Colombia: From social demands to individual claims to public debates' (2010) 33 *Hastings International and Comparative Law Review* 431.

3 Constitutional framework in Lesotho and the judicial approach: Is the approach changing?

The Constitution of Lesotho follows a model of negative constitutionalism.¹⁰⁵ Therefore, Chapter II is dedicated to negative rights – otherwise styled as civil and political rights. This is the characteristic feature of liberal constitutions.¹⁰⁶ The right to life is located in Chapter II of the Constitution. Section 5(1) provides that '[e]very human being has an inherent right to life. No one shall be arbitrarily deprived of his life.' The framing of the section already suggests that the drafters had in mind the restrictive conception of the right. The right is couched in a manner that protects life against the arbitrary deprivation of life, and no more. Its draftsmanship is not as open-ended as the similar section in the Constitution of South Africa, which frames the right in a general and all-encompassing manner, as '[e]veryone has the right to life'.¹⁰⁷

In fact, the right to health in Chapter III is envisaged as an unenforceable 'principle of state policy'. Section 27 of the Lesotho Constitution provides that 'Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens'.¹⁰⁸ The formulation of the right to health under Lesotho's Constitution has adopted the approach of both the Universal Declaration and ICESCR. It recognises the right in a composite manner. It imposes duties on the state to provide for the reduction in the rate of stillbirth and infant mortality and the healthy development of the child;¹⁰⁹ to improve environmental and industrial hygiene;¹¹⁰ to provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases;¹¹¹ to create conditions which would provide everyone with medical services and medical attention in the event of sickness;¹¹² and to improve public health.¹¹³ Therefore, it can be safely deduced that the jurisprudence on the right to life, developed under the ICESCR,¹¹⁴ applies to Lesotho's interpretation of the right. The essence of this

¹⁰⁵ See S Barber 'Fallacies of negative constitutionalism' (2006) 75 *Fordham Law Review* 651.

¹⁰⁶ JM Farinacci-Fernós 'Post-liberal constitutionalism' (2018) 54 *Tulsa Law Review* 1.

¹⁰⁷ Sec 11 of the Constitution of South Africa, 1996.

¹⁰⁸ Sec 27 of the Constitution of the Constitution of Lesotho, 1993.

¹⁰⁹ Sec 27(1)(a) Constitution of Lesotho.

¹¹⁰ Sec 27(1)(b) Constitution of Lesotho.

¹¹¹ Sec 27(1)(c) Constitution of Lesotho.

¹¹² Sec 27(1)(d) Constitution of Lesotho.

¹¹³ Sec 27(1)(e) Constitution of Lesotho.

¹¹⁴ ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12) adopted at the Twenty-Second Session of the Committee on Economic, Social and Cultural Rights, 11 August 2000 (contained in Document E/C.12/2000/4).

jurisprudence is that the right not only protects health, but also recognises the conditions necessary to sustain health.

There is a paucity of scholarly commentary and judicial precedent in Lesotho on the right to life, in general, and its interface with the right to health, in particular. The most critical case in which the superior courts – both the High Court and the Court of Appeal – had to deal with the scope of this right in Lesotho was *Khathang Tema Baitsooli v Maseru City Council*.¹¹⁵ The issue did not concern the arbitrary termination of life. Rather, it concerned the question of whether the right, as it is couched under Lesotho's Constitution, can be interpreted to include the right to livelihood. The applicant organisation, in this case, represented the street vendors who were plying their trade along Maseru City's main street, Kingsway. The market along the street is more lucrative. However, the Maseru City Council refused to grant them permits to trade along Kingsway Street and the Council, therefore, removed the vendors from the street. The vendors approached the Court seeking to challenge the decision of the Council to deny them permits.

The mainstay of their case was that their removal from their trading areas along Kingsway Street in Maseru was a violation of their right to life as envisaged under section 5 of the Constitution. Therefore, the Court was confronted with the dilemma of choosing between the restrictive and liberal approaches to the right. The Indian jurisprudence, which favours the liberal approach, was presented to both the High Court and the Court of Appeal to persuade the courts to adopt the liberal approach to the right.¹¹⁶ Both courts declined to do so. The High Court was very forthright about its interpretation of the right, finding:¹¹⁷

A fair reading of section 5 of our Lesotho Constitution gives one an irresistible impression that it is the 'right to life' of the human being and its biological existence as a living organism that is being protected by the Constitution rather than its wellbeing, happiness or welfare. The court comes to this somewhat restrictive interpretation because under section 5, what may be abridged under subsections 2(a), (b), (c) and (d) is not the livelihood but the deprivation of human life itself eg through act of war, lawful execution (ie hanging) or self-defence.

115 *Khathang Tema Baitsooli & Another v Maseru City Council* (CONST/C/1/2004) LSHC 25; *Khathang Tema Baitsooli & Another v Maseru City Council* (n 20).

116 The Indian cases that were presented for the Court's consideration were *Olga Tellis v Bombay Municipal Corporation* AIR 1986 (SC); *Tellis v Bombay Municipal Corporation* [1987] LRC 351 (Const).

117 *Khathang Tema Baitsooli* (n 20) para 15.

The Court adopted this approach despite having praised the Indian jurisprudence, which is liberal. The Court confirmed that ‘the Indian approach to the right to life is indeed very progressive and deserves all laudation’.¹¹⁸ The Court of Appeal vindicated the restrictive approach adopted by the High Court.¹¹⁹ The Court of Appeal took the approach of widening the gulf between Chapter II and Chapter III of the Constitution. The Court stated that

the right to life in section 5 of Lesotho’s Constitution does not encompass a right to a livelihood. That is the subject of specific and separate provision in section 29. The latter derives its status from its inclusion as a principle of state policy.¹²⁰

The Court of Appeal’s disjunctive and restrictive approach made it very difficult for these two generations of rights – political and socio-economic – ever to be treated as interdependent and mutually reinforcing in Lesotho.¹²¹

The innovative approach to the interface between the right to health and the right to life emanated from *Lesotho Medical Association v Minister of Health*.¹²² The case was heard in the early days of the COVID-19 global pandemic in Lesotho. It is imperative to note that Lesotho started introducing measures to combat COVID-19 before the official registration of the first case.¹²³ The first case was recorded in May 2020,¹²⁴ yet the strict measures were pre-emptively instituted in March 2020.¹²⁵ On 19 March 2020 the Government Secretary published a memorandum styled ‘National Emergency Response to the Coronavirus (COVID-19)’.¹²⁶ This memorandum communicated

118 *Khathang Tema Baitsokoli* (n 20) para 30.

119 As above.

120 *Khathang Tema Baitsokoli* (n 20) para 28.

121 In *Lesotho Chamber of Commerce and Industry & Others v Commissioner of Police & Others* (CIV/APN/405/2011) [2011] LSHC 127 para 30 the High Court demonstrated this attitude when it stated: ‘In reality, labour and other socio-economic issues affect the livelihood of many people directly and sometimes touch on very survival of these people. Such delicate issues must always be addressed by the stakeholders in a dispassionate manner, realistically and without prejudice or favour. Whereas the socio-economic rights which are provided for under the Constitution of Lesotho are “not enforceable” in the courts of law, these issues should be addressed “out of court” through bargaining, agreements, negotiation, mediation, reconciliation or arbitration and other lawful measures’ (emphasis in original.)

122 *Lesotho Medical Association v Minister of Health* (n 21).

123 N Ngatane ‘Lesotho declares national emergency over COVID-19 outbreak’ *Eyewitness News*, <https://ewn.co.za/2020/03/19/lesotho-declares-national-emergency-over-covid-19-outbreak> (accessed 12 August 2021).

124 Lesotho recorded the first imported COVID-19 case on 13 May 2020. National Emergency Command Centre ‘Health experts confirm Lesotho’s first COVID-19 case’, <https://www.gov.ls/health-experts-confirm-lesothos-first-covid-19-case/> (accessed 27 July 2021).

125 Shale (n 23).

126 Government Secretary ‘National emergency response to the coronavirus (COVID-19) 19 March 2020, <https://lesotholii.org/ls/Cabinet%20decision.pdf>

the decisions of the Cabinet on measures intended to contain the spread of the virus. These were far-reaching measures such as, but not limited to, limitations on meetings, the closure of schools, the closure of borders and the limitation of working hours. In communicating these measures, the Government Secretary did not refer to any provision of law permitting such drastic human rights derogations. The government departments responded immediately to these Cabinet decisions.

The brief facts of this case are that the applicant association, which represents the healthcare workers, applied to the Court to, among others, declare that the government's failure to provide their members with protective equipment against COVID-19 was a violation of their right to life. The Court's approach was that section 5 of the Constitution, which embodies the right to life, imposes both positive and negative state obligations. The state not only has a duty to respect the right to life (negative), but it also has a duty to fulfil, promote and protect the right to life.¹²⁷

The Court extensively toured the comparative jurisprudence of the European Human Rights Court,¹²⁸ and gleaned five principles that may apply to interpreting the right to life in Lesotho.¹²⁹ The first principle is that the state must discharge its positive obligation to the right to life by putting in place the legal framework for protecting life. A failure by the state to discharge this obligation is a violation of the right. The second principle is that if the state is aware of the threat to the right, it cannot plead lack of resources as justification for not discharging its obligation. The third principle is that the state has a responsibility to take preventive operational measures to protect life. The fourth principle is that the state should preserve life in any context – whether in public or private contexts. The fifth principle, which is derived from the UK Supreme Court's decision in *Smith v Minister of Defence*,¹³⁰ is that the failure to provide equipment to groups such as soldiers, police and doctors who work in risky environments is a violation of the right. The Court observed that '[a]lthough the medical doctors' routine job is inherently risky and carries with it the potential for loss of life from infection with deadly diseases, however, constitutionally they cannot be left to

(accessed 27 July 2021).

127 Government Secretary (n 126) para 32. For this it relied on the decision of the Commission on Human and Peoples' Rights in *SERAC* (n 92).

128 *Osman v United Kingdom* (23452/94) [1998] ECHR 101 28 October 1998; *Oneryildiz v Turkey* (48939/99) [2004] ECHR; *Stoyanovi v Bulgaria* (42980/04) [2010] ECHR 9 February 2011.

129 *Lesotho Medical Association* (n 21) para 39.

130 *Smith & Others v The Ministry of Defence* [2013] 3 WLR 69.

their own devices by the state'.¹³¹ It is intriguing to note that the Court considered the precedent already set by the Court of Appeal in *Khathang Tema Baitsokoli* in which the Court of Appeal categorically refused to liberalise the interpretation of the right to life.¹³² The High Court in *Lesotho Medical Association* sought to distinguish the two cases, perhaps to cleverly avoid any direct contradiction with the apex court.¹³³ However, it is clear that the High Court wanted to chart a new approach to the enforceability of socio-economic rights in Lesotho. To that end, the Court observed:¹³⁴

While I agree that the DPSP [Directive Principles of State Policy] are not justiciable, this should [not] be taken to mean that they are worthless. The DPSPs are not merely decorative of the paper on which they have been crafted, they are relevant as a constitutional guide to the state in formulating policies and, with regard to the courts, as a constitutional interpretative guide in interpreting legislation.

This somewhat progressive view of the Court was influenced by Viljoen's view that, at the very least, Directive Principles of State Policy should work as aides to the interpretation of the Constitution.¹³⁵ In particular, Viljoen criticises the approach of the Court of Appeal in *Khathang Tema Baitsokuli*.¹³⁶ Indeed, the approach of the Court of Appeal to the right to life and its interface with socio-economic rights, in general, and the right to health, in particular, may not stand the test of time as in many respects it is out of step with contemporary developments in the area.¹³⁷

Ultimately, the Court in *Lesotho Medical Association* held in favour of the applicants, finding that the state's failure to provide protective medical gear constituted a violation of the right to life.¹³⁸ It consequently ordered the government to comply with its constitutional obligation in terms of section 5 of the Constitution, within a reasonable time, by providing medical doctors and other

131 *Lesotho Medical Association* (n 21) para 41.

132 KE Mosito 'The enforcement, adjudication and monitoring of social security rights in Lesotho' (2013) 20 *Lesotho Law Journal* 65.

133 Since Lesotho is a common law country, judicial practice is based on the doctrine of judicial precedent. See JW Salmond 'Theory of judicial precedents' (1900) 16 *Law Quarterly Review* 376. Sec 123(1) of the Constitution provides: 'There shall be for Lesotho a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.' For the application of the doctrine of judicial precedent in Lesotho, see *Lepule v Lepule* (C of A (CIV) 34/2014) [2015] LSCA 29 (22 September 2015).

134 *Lesotho Medical Association* (n 21) para 9.

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

136 Viljoen (n 135) 552-553.

137 Ramcharan (n 25); J Tobin *The right to health in international law* (2012).

138 *Lesotho Medical Association* (n 21). At para 44 the Court found that '[i]n the result the following order is made: (a) The failure by the 1st, 2nd and 3rd respondents to provide the doctors with personal protective equipment is declared unconstitutional for violating s 5 of the Constitution.'

health professionals with personal protective equipment.¹³⁹ The Court's finding and order are very innovative given the restrictive approach taken in *Khathang Tema Baitso'okoli*.¹⁴⁰

4 Conclusion

The jurisprudence of the superior courts in Lesotho, as demonstrated in *Khathang Tema Baitso'okoli*,¹⁴¹ is tenaciously in favour of the restrictive approach to the right to life. If this approach were to hold, the glimmer of hope for a liberal approach started by the High Court, exercising its constitutional jurisdiction in *Lesotho Medical Association*,¹⁴² would be extinguished. In any event, the Court of Appeal's decision would still prevail in light of the doctrine of judicial precedent. However, as demonstrated in the foregoing survey of the foreign and international developments on the scope and content of the right to life, the approach of the Court of Appeal to the right to life is not in keeping with the international trends. It is now almost settled that the right to life not only protects the physical existence of a human being, but also covers the conditions necessary to sustain life.¹⁴³ The Indian Supreme Court's jurisprudence is the most persuasive guide for Lesotho's constitutional jurisprudence as the constitutions of both countries maintain bifurcated human rights frameworks that render socio-economic rights unenforceable.

The High Court's approach in *Lesotho Medical Association* is laudable. It may be recommended in future situations where the court is confronted with the interface between the right to life and socio-economic rights, in general, and the right to health, in particular. To that end, the jurisprudence of the Constitutional Court of Colombia may provide some guidance. Its essence is that the right to life is intertwined with the right to health.¹⁴⁴ However, care should be taken to ensure that the liberalisation of the right to life does not blur the boundaries between the right to life and the right to health, because the two rights remain distinct.¹⁴⁵ The part of the right to health that is more intricately related to the right to life has been styled the 'core obligation'.¹⁴⁶ The obligation to ensure the equitable

139 *Lesotho Medical Association* (n 21) para 44.

140 *Khathang Tema Baitso'okoli* (n 20).

141 As above.

142 *Lesotho Medical Association* (n 21).

143 Yamin & Parra-Vera (n 104).

144 As above; KG Young & J Lemaitre 'The comparative fortunes of the right to health: Two tales of justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179.

145 Viljoen (n 135) 552-553.

146 SR Keener & J Vasquez 'A life worth living: Enforcement of the right to health through the right to life in the Inter-American Court of Human Rights' (2008) 40

distribution of all health facilities, goods and services, as the High Court ruled in *Lesotho Medical Association*, is part of the state's core obligation.¹⁴⁷

147 *Columbia Human Rights Law Review* 595.
Lesotho Medical Association (n 21).

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Protected areas, community rights and affirmative action: The plight of Uganda's Batwa people

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Summary: *The intersection between protected areas, community rights, statutory legal frameworks and customary law and practice is complex. Several cases heard by members of the African judiciary over the last decade have dealt with this intersection and provided valuable guidance on forging solutions promoting the contemporary conservation discourse that recognises the role of local communities and indigenous peoples in the governance and management of protected and conserved areas. The recent claim brought by the Batwa people of Uganda to land and resources situated in three protected areas provided the judiciary with another opportunity to draw from and contribute to the emerging relevant jurisprudence. This contribution overviews this jurisprudence and its strong link to the contemporary conservation discourse, and critically reflects on the latest contribution to it. It ultimately concludes that while the Ugandan Constitutional Court in the Batwa case missed a clear opportunity to draw from and develop the existing relevant jurisprudence, it did add a new dimension to it in the form of forging solutions through affirmative action redress.*

Key words: *protected areas; community rights; land claim; affirmative action*

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1 Introduction

Over the past decade some landmark cases brought before the judiciary in Africa have compelled judges to deal with the often complex intersection between protected areas, community rights, statutory legal frameworks and customary law and practice. These highlight the key role of the judiciary in forging solutions and shifting the often rigid domestic legal discourse from the colonial exclusionary fortress approach to conservation, to a more human-centred and inclusive approach recognising both the land and resource rights of indigenous peoples and local communities (IPLCs) in protected areas, and the valuable role played by these IPLCs in conserving these. The number of cases seems to be growing and some of the more important cases are briefly mentioned below.

In *Centre for Minority Rights Development & Others v Kenya*¹ the African Commission on Human and Peoples' Rights (African Commission) held that the Kenyan government had violated the African Charter on Human and Peoples' Rights² (African Charter) by evicting the Endorois community from the Lake Bogoria area to create a game reserve; and ordered the government to recognise the community's rights of ownership, restore the land to them and allow them unrestricted access to it.³ In *Mosetlhanyane v Attorney-General of Botswana*⁴ the Botswanan Court of Appeal brought to a close a protracted dispute concerning the Kalahari Bushmen's struggle to secure, first, their land rights and, second, their water rights in the Central Kalahari Game Reserve, finding in their favour.⁵ In *African*

1 (2009) AHRLR 75 (ACHPR 2009).

2 African Charter on Human and Peoples' Rights (1982) 21 ILM 58.

3 See generally H Smith & W Wicomb 'Customary communities as "peoples" and their customary tenure as "culture": What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422; E Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya: A landmark decision from the African Commission' (2011) 55 *Journal of African Law* 300; L Juma 'Protection of development-induced internally displaced persons under the African Charter: The case of the Endorois community of Northern Kenya' (2013) 46 *Comparative and International Law Journal of Southern Africa* 211.

4 Unreported judgment of Ramodibedi JA in the Court of Appeal of the Republic of Botswana under Case CACLB-074-10 27 January 2011. Two prior cases relating to this matter were *Sesana v Attorney General of Botswana* 2006 (2) BLR 633; *Matsipane Mosetlhanyane v Attorney General of Botswana* (unreported judgment of Walia J in the High Court of Botswana under Case MAHLB-000393-09 21 July 2010).

5 See generally R Hitchcock, M Sapignoli & W Babchuk 'What about our rights? Settlements, subsistence and livelihood security among Central Kalahari San and Bakgalagadi' (2011) 15 *International Journal of Human Rights* 62; A Paterson 'The endless struggle of indigenous peoples in protected areas: Considering the Bushman's struggle for water rights in the Central Kalahari Game Reserve' in A Iza et al (eds) *Water and the law: Towards sustainability* (2014) 349.

*Commission on Human and Peoples' Rights v Republic of Kenya*⁶ the African Court on Human and Peoples' Rights (African Court) ruled that the Kenyan government had violated several articles of the African Charter through the arbitrary forced evictions of the Ogiek community from the Mau forest complex, a formally-gazette forest reserve.⁷ In *Gongqose v Minister of Agriculture, Forestry and Fisheries*⁸ the South African Supreme Court of Appeal set aside the criminal conviction of various members of the local community caught fishing in the Dwesa-Cwebe Marine protected area, on the basis that they were lawfully exercising their customary rights to fish in the area.⁹ Other unresolved cases currently are before the courts, such as the ancestral land rights claim of the Hai||om San to the Etosha National Park in Namibia.¹⁰

These cases have been comprehensively canvassed by academics elsewhere, and it is not the purpose of this contribution to rehash these debates. Similarly, the nature and form of the shift in conservation ideology regarding IPLCs and their key role in managing protected and conserved areas have similarly been discussed extensively elsewhere, and it is not the purpose of this contribution to repeat this discussion.¹¹

6 (2007) 2 AfCLR 9.

7 See generally R Rösch 'Indigenoussness and peoples' rights in the African human rights system: Situating the Ogiek judgment of the African Court on Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in Übersee* 242; L Claridge 'Litigation as a tool for community empowerment: The case of Kenya's Ogiek' (2018) 11 *Erasmus Law Review* 57.

8 2018 (5) SA 104 (SCA). The matter had previously been heard in both the magistrate's court and the High Court: *S v Gongqose* (unreported Case E382/10); *S v Gongqose* 2016 (1) SACR 556 (ECM).

9 See generally K Lehmann 'Fishing in protected waters: Balancing customary rights and conservation imperatives' (2011) 18 *South African Journal of Environmental Law and Policy* 77; L Feris 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' (2013) 16 *Potchefstroom Electronic Law Journal* 555; A Paterson 'The interface between customary rights and environmental legislation: Lessons from *Gongqose & Others v Minister of Agriculture, Forestry and Fisheries & Others* (SCA) 2018' (2020) 26 *South African Journal of Environmental Law and Policy* 134; M Bishop 'Asserting customary fishing rights in South Africa' (2021) 47 *Journal of Southern African Studies* 291.

10 On the status of the court proceedings, see <https://www.lac.org.na/index.php/projects/land-environment-development-lead/indigenous-peoples/> (accessed 1 November 2021). On the history of the community's original occupation and eviction, see U Diekmann 'The impact of nature conservation on the San: A case study of the Etosha National Park' in T Hohmann (ed) *San and the state: Contesting land, development, identity and representation* (2003) 37.

11 For an overview of the shift and the international law, policy and scholarship relevant to the shift, see M Colchester 'Indigenous peoples and protected areas: Rights, principles and practice' (2003) 7 *Nomadic Peoples* 33; S Stevens 'A new protected areas paradigm' in S Stevens (ed) *Indigenous peoples, national parks, and protected areas: A new paradigm linking conservation, culture and rights* (2014) 47; Paterson (n 5) 350-365.

Prior to outlining what the purpose of this contribution is, it is worth noting that the key role of IPLCs in the context of conserving biodiversity, generally, and in managing protected and conserved areas, specifically, continues to attract significant global recognition. The recently published *Local Biodiversity Outlooks 2*,¹² which complements the *Global Biodiversity Outlook 5*,¹³ expressly states that IPLCs are

contributing significantly to the increase in equitable and effective protected and conserved areas, through community-led conservation and innovative collaborative management arrangements, and also by challenging human rights violations in broader conservation practice and promoting equity and justice.¹⁴

However, the publication proceeds to highlight the fact that upscaling these approaches will require further transformation

towards conservation approaches that are positively rights-affirming, going beyond outreach and collaboration towards full recognition of IPLCs' rights and increased support for the huge contribution of sustainably managed lands and territories that protect nature, often more effectively than state-run protected areas.¹⁵

This type of sentiment is echoed in the *Protected Planet Report 2020*,¹⁶ which recognises that 'there remains a need for equitable recognition of the contributions of diverse groups to conservation, notably those of indigenous peoples, local communities and private actors' and that 'the designation and governance of protected areas has sometimes been harmful to indigenous peoples and local communities, including by violating their rights, removing them from their lands, and revoking their access to culturally-important natural resources'.¹⁷

It accordingly is not surprising that the first official draft of the *Post-2020 Global Biodiversity Framework*,¹⁸ prepared under the auspices of the Convention on Biological Diversity¹⁹ and released in June 2021,

12 See generally Forest Peoples Programme et al *Local Biodiversity Outlooks 2: The contributions of indigenous peoples and local communities to the implementation of the Strategic Plan for Biodiversity 2011-2020 and to renewing nature and cultures. A complement to the fifth edition of Global Biodiversity Outlook* (2020).

13 Secretariat of the Convention on Biological Diversity *Global Biodiversity Outlook 5* (2020).

14 Forest Peoples Programme (n 12) 19.

15 As above.

16 UNEP-WCMC, UNEP & IUCN *Protected Planet Report 2020* (May 2021) ch 7, <https://livereport.protectedplanet.net> (accessed 1 November 2021).

17 See further S Stevens et al *Recognising and respecting ICCAs overlapped by protected areas* (2016) 43-47.

18 CBD *First Draft of the Post-2020 Global Biodiversity Framework* (5 July 2021) UN Doc UNEP/CBD/WG2020/3/3.

19 (1992) 31 *ILM* 818.

reaffirms the key role of IPLCs in the context of biodiversity, generally, and protected areas, specifically. It indicates that the successful implementation of what effectively is the next 'global biodiversity plan' requires the 'full and effective participation' of IPLCs,²⁰ and several of its 2030 Action Targets refer directly to IPLCs.²¹ Target 3, referring specifically to protected areas and effectively constituting the replacement for Aichi Target 11 contained in the *Strategic Plan in Biodiversity (2011-2020)*,²² the expired 'global biodiversity plan', ratchets up the coverage commitment for protected and conserved areas to at least 30 per cent and retains reference to the vital role of other effective area-based conservation measures as contributors towards this target. This is of key relevance to IPLCs, as territories and areas conserved by them, otherwise known as indigenous and community conserved areas, constitute good potential candidates for recognition as other effective area-based conservation measures.²³

With this context in mind, this contribution focuses on the latest addition to this trail of cases dealing with the complex intersection between protected areas, community rights, statutory legal frameworks and customary law and practice, namely, *United Organisation for Batwa Development in Uganda v Attorney-General (Batwa case)*.²⁴ This matter dealt with the eviction, exclusion and/or dispossession by the Ugandan government of the Batwa peoples (the Batwa) from their ancestral forest lands, which were subsequently formally proclaimed in three protected areas.

As with prior cases on the trail, this case raised issues of jurisdiction; the interpretation and application of constitutional rights; claims based on aboriginal or native title; attempts to be recognised as indigenous peoples; seeking to found community interests and rights on customary law and practice; and, unique to this case, the use of constitutional provisions providing for affirmative action to provide redress to marginalised communities. The purpose of this contribution is to reflect on the judgment and highlight the extent to which it adds to the existing trail of jurisprudence. It is divided into

20 CBD (n 18) 4, 9 & 12.

21 CBD (n 18) target 9, 20 & 21.

22 CBD *Strategic Plan for Biodiversity 2011-2020* (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/2.

23 C Eghenter 'Indigenous effective area-based conservation measures: Conservation practices among the Dayak Kenyah of North Kalimantan' (2018) 24 *Parks* 69; P Dearden et al 'Biodiversity outcomes of community conservation' in A Charles (ed) *Communities, conservation and livelihoods* (2021) 24-29. See generally on OECMs IUCN-WCPA Task Force on OECMs *Recognising and reporting other effective area-based conservation measures* (2019).

24 Unreported judgment of Elizabeth Musoke JCC in the Constitutional Court of Uganda at Kampala under Constitutional Petition 3 of 2013 19 August 2021 (*Batwa case*).

four main parts. It begins by providing an overview of the factual and legal context. It then focuses on how the Court circumscribed its jurisdiction over constitutional matters. It subsequently proceeds to consider the manner in which the Court addressed the constitutional provision providing for affirmative action, specifically circumscribing its purpose, form and nature; its application to the factual matrix; and available redress measures. Embedded in the above parts is both an overview of and critical reflection on the Court's approach. It concludes by reflecting on the extent to which the case contributes to the growing regional jurisprudence and the possible way forward for the litigants in this matter.

2 Factual and legal context

As a signatory to the Convention on Biological Diversity, the Ugandan government has over the past few decades sought to fulfil its commitments under the Convention, most notably in the context of protected areas, Aichi Target 11. At last count, approximately 18,87 per cent of Uganda's territory fell within formally-gazetted protected areas.²⁵ These include ten national parks, seven wildlife sanctuaries and 13 community wildlife management areas gazetted and currently managed in terms of the Ugandan Wildlife Act,²⁶ and 192 local forest reserves and 506 central forest reserves gazetted and currently managed in terms of the National Forestry and Tree Planting Act.²⁷ Some of the major concerns identified by Uganda's conservation authorities in the context of these protected areas are the reduction of forested areas in national parks, wildlife reserves and central forest reserves,²⁸ and the need to improve connectivity and corridors between protected areas.²⁹ Notwithstanding the global discourse to recognise the vital role of IPLCs in protected areas governance and management, according to the *World Database on Protected Areas*, but for 13 protected areas in respect of which the governance arrangement is not reported, all the other 700 odd protected areas in Uganda are governed by government authorities.³⁰ Central government control of protected areas accordingly would seem to be the dominant protected areas governance paradigm in Uganda, notwithstanding the prevalence of many innovative legal

25 National Environmental Management Authority (NEMA) & Ministry of Water and Environment (MWE) *Sixth national report to the CBD for Uganda* (2019) 77.

26 Act 17 of 2019.

27 Act 8 of 2003.

28 NEMA & MWE (n 25) 78-79.

29 NEMA & MWE (n 25) 80-84.

30 UNEP-WCMC *Protected area profile for Uganda from the World Database of Protected Areas* (2021), <https://www.protectedplanet.net/country/UGA> (accessed 1 November 2021).

mechanisms available in its relevant legislation to facilitate more collaborative and decentralised modes of governance by IPLCs³¹ and the adoption of a Community Conservation Policy³² by the Ugandan Wildlife Authority in 2019.

The recent case involving the Batwa's plight to secure their ancestral lands currently incorporated within three protected areas situated in South-Western Uganda should be considered in the above contemporary conservation context. However, the history of the dispute spans back almost a century and provides a further important context.

The Batwa are commonly characterised as the first peoples (forest peoples) of the Central African Forests spanning the Albertine Rift Valley.³³ Their historic occupation of the area, strong cultural connection to the forests, systematic eviction from the area and subsequent marginalisation have been comprehensively canvassed by many scholars,³⁴ and only the salient components of this history relevant to the dispute are canvassed below.

More than half of the estimated 6 200 Batwa currently situated in Uganda³⁵ reside in the south-western region of the country, bordering Rwanda and the Democratic Republic of the Congo (DRC).³⁶ This area is characterised by rich biodiversity, notably including areas of largely undisturbed Afro-montane forest that form the home for almost half of the world's endangered Mountain Gorillas.³⁷ During pre-colonial

31 See part 5 below.

32 UWA *Community conservation policy* (2019).

33 P Zaninka 'The impact of (forest) nature conservation on indigenous peoples: The Batwa of South-Western Uganda' in J Nelson & L Hossack (eds) *Indigenous peoples and protected areas in Africa: From principles to practice* (2003) 165; C Kidd & P Zaninka *Securing indigenous people's rights in conservation: A review of South-West Uganda* (2008) 3-4; N Mukasa 'The Batwa indigenous people of Uganda and their detachment from forest livelihood: Land eviction and social plight' (2012) 19 *Yearbook of Humanitarian Action and Human Rights* 71; N Mukasa 'The Batwa indigenous people of Uganda and their traditional forest land: Eviction, non-collaboration and unfulfilled needs' (2014) 24 *Indigenous Policy Journal* 1; J Gilbert & K Sena 'Litigating indigenous peoples' cultural rights: Comparative analysis of Kenya and Uganda' (2018) 77 *African Studies* 204; M Twinamatsiko, M Infield & A Mugisha 'Father forest – Batwa culture and the management of national parks in Uganda's Albertine Rift' in B Verschuuren & S Brown (eds) *Cultural and spiritual significance of nature in protected areas: Governance, management and policy* (2020) 238; C Ampumuzu, M Duineveld & R van der Duim 'The most marginalised people in Uganda? Alternative realities of Batwa at Bwindi Impenetrable National Park' (2020) 20 *World Development Perspectives* 1; P Satyal, M Byskov & K Hyams 'Addressing multi-dimensional injustice in indigenous adaptation: The case of Uganda's Batwa community' (2021) 13 *Climate and Development* 529.

34 As above.

35 Uganda Bureau of Statistics *National population and housing census 2014* (2016) 71.

36 P Kakuru *Batwa population census report* (2016) vii.

37 Mukasa (n 33) 74.

times, the Batwa occupied this area as forest-dwelling hunter-gatherers with customary rules and practices regulating hunting, the collection of medicinal plants and other natural resources. The arrival of the British and the subsequent establishment of the Protectorate of Uganda under British administration from 1894 to 1962 had a significant impact on the Batwa. Acting under the Game Ordinance (1926), the British declared the Mgahinga Forest a game sanctuary in 1930. Shortly thereafter, the British declared various forests in the area in which the Batwa resided and/or traversed on their hunting and gathering forays as crown forest reserves in terms of the Forests Ordinance 1913. The Mgahinga Forest was accorded a second designation as the Mgahinga Crown Forest Reserve in 1930. The Bwindi Forest was designated as the Kayonza and Kasatoro Crown Forest Reserves in 1932, which were subsequently amalgamated to form the Bwindi Impenetrable Central Crown Forest in 1942. The Echuya Forest was designated as the Echuya Central Forest Reserve in 1939. While the Forests Ordinance enabled the authorities to strictly regulate activities in forest reserves,³⁸ it appears that the Batwa's access to the forests and the resources situated therein was not significantly restricted.³⁹

Over the forthcoming years the regulation of access to the crown forest reserves tightened somewhat under the Forests Act (enacted in 1947 and amended in 1964) and Game (Preservation and Control) Act (enacted in 1959 and amended in 1964). In 1961 the Bwindi Forest was additionally gazetted as a game reserve under the latter Act, and following the 1964 amendment, the boundaries of the Mgahinga Game Sanctuary were extended and the area was re-gazetted as a game reserve in 1964.⁴⁰ The situation worsened for the Batwa in 1991 when the government, operating under the auspices of the National Parks Act 1952, formally declared the forests around Bwindi and Mgahinga as the Bwindi Impenetrable National Park and the Mgahinga Gorilla National Park respectively. This triggered their eviction from these areas with tight restrictions imposed on their ability to access and use the resources situated in these. The Bwindi Impenetrable National Park and Mgahinga Gorilla National Park currently are regulated in terms of the Uganda Wildlife Act 2019 and managed by the Ugandan Wildlife Authority. The Echuya Central Forest Reserve falls under the administration of the National Forestry Authority (NFA) and currently is regulated under the National Forest

38 N Turyahabwe & A Banana 'An overview of history and development of forest policy and legislation in Uganda' (2008) 10 *International Forestry Review* 644.

39 Mukasa (n 33) 6.

40 W Adams & M Infield *Community conservation research in Africa: Principles and comparative practice* (1998) 7-8.

and Tree-Planting Act 2003, which repealed the Forests Act 1964. There have been recent calls for the Echuya Central Forest Reserve to be formally designated as a national park.⁴¹

The above developments cumulatively led to the eviction of the Batwa from the areas incorporated within the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve (cumulatively referred to as the 'contested land' for the remainder of this article) from the 1990s, without their free, prior and informed consent. While various initiatives have been undertaken by conservation authorities and non-governmental organisations (NGOs) to assist the Batwa over the past two decades, most scholarly commentary reflecting on these initiatives depicts their outcomes as highly inadequate, leaving the Batwa a marginalised, exploited and exceedingly vulnerable community removed from their land to which they have a strong cultural attachment and upon which they historically relied for their livelihoods. The Batwa have been characterised as suffering 'conservation injustice' in both a distributional and procedural sense.⁴² They generally are regarded as having been excluded from any meaningful participation in the governance and management arrangements for these protected areas, with any form of redress, rights of access and benefit sharing regarded as wholly inequitable and insufficient.⁴³ The treatment of the Batwa has also been deemed to illustrate Uganda's failure to promote key relevant decisions and recommendations emerging from the Convention on Biological Diversity and the *International Union for Conservation of Nature* advocating a 'new protected areas paradigm' providing for the recognition and participation of IPLCs in protected areas.⁴⁴

Interestingly, in their recent *Sixth National Report* to the Convention on Biological Diversity, the Ugandan Wildlife Authority itself expressly acknowledged the Batwa as a vulnerable minority group of people residing near the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve, which they regarded as their 'ancestral homes' and to which they had a 'strong attachment'.⁴⁵ It furthermore noted that they 'lost their original home lands' when they were evicted without compensation, but then simultaneously categorises them as having 'no concept of

41 S Amana 'Conservationists want UWA to take over Echuya Forest Reserve' *The Independent* (Kampala) 28 May 2020.

42 Satyal et al (n 33) 533-539.

43 See generally Twinamatsiko et al (n 33) 243-247; Gilbert & Sena (n 33) 213-214; Mukasa (n 33) 73-83; Zaninka (n 33) 173-185.

44 Kidd & Zaninka (n 33) 7-23.

45 NEMA & MWE (n 25) 247.

land ownership because they never stayed in one place for a long time'.⁴⁶

No doubt frustrated by the failure of the Ugandan Constitution to provide recognition and protection to specific groups of indigenous peoples;⁴⁷ thwarted by the failure of the Constitution to provide adequate recourse to those unfairly dispossessed of land rights prior to its adoption in 1995,⁴⁸ buoyed by the success of several IPLCs in neighbouring states in similar matters,⁴⁹ drawing valuable lessons from this jurisprudence on the nuances of bringing claims based on the common law doctrine of indigenous title, on the merits of linking claims to the protection of cultural rights, on how to frame claims to territory originally held by indigenous peoples on the basis of reliance on regional and international human rights instruments and the potential pitfalls of governments not giving domestic effect to decisions emerging from regional courts and tribunals,⁵⁰ facilitated through the formation of the United Organisation for the Batwa Development in Uganda in 2000,⁵¹ and frustrated by the failure of

46 As above.

47 The Constitution of the Republic of Uganda 1995 (Constitution) accords citizenship to an array of people, including those born of a member of the 75 indigenous communities listed in the Third Schedule to the Constitution (art 10). The list of indigenous communities encapsulates all living within Uganda's borders as of February 1926, thereby effectively deeming all non-colonial settlers indigenous peoples, and according no special recognition to any specific group. See further J Gilbert 'Litigating indigenous peoples' rights in Africa: Potentials, challenges and limitations' (2017) 66 *International and Comparative Law Quarterly* 664-665; Gilbert & Sena (n 33) 215.

48 The cumulative effect of the Crown Land Ordinance 1903 and the Land Reform Decree 1975 was that communities occupying land in terms of customary law were effectively regarded as tenants of the land, occupying it at 'sufferance' of the government. The introduction of the Constitution vested all land in the citizens of Uganda and provided four ways in which land could be owned, including under customary land tenure systems through the acquisition of certificates of ownership (art 237(1) read with art 237(3)) acquired in terms of the Land Act 16 of 1998. However, one had to be occupying the land under a customary land tenure system at the time the Constitution entered into force. As the Batwa had been dispossessed of the land prior to the commencement of the Constitution, and owing to the Constitution providing no direct remedies available to those dispossessed of land rights in the past, the Batwa could not avail themselves of any of the property protections accorded to citizens in terms of art 26 read with art 237 of the Constitution. See further on Uganda's land legislation relevant to customary rights: S Coldham 'Land reform and customary rights: The case of Uganda' (2000) 44 *Journal of African Law* 65.

49 See, eg, the cases brought by indigenous communities mentioned in the introduction to this article, most notably the Ogiek, Endorois and Kalahari Bushmen.

50 See generally Gilbert & Sena (n 33) 204-222; Gilbert (n 47) 657-686; K Lehmann 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86; J Gilbert 'Historical indigenous peoples' land claims: A comparative and international approach to the common law doctrine of indigenous title' (2007) 56 *International and Comparative Law Journal* 583; A Barume *Land rights of indigenous peoples in Africa* (2010); V Couillard, J Gilbert & L Tchalenko *Indigenous peoples' land rights in Tanzania and Kenya: The impact of strategic litigation and legal empowerment* (2017).

51 Gilbert & Sena (n 33) 214; Gilbert (n 47) 677-678.

the Ugandan government to address their plight notwithstanding extensive lobbying of international, regional and national institutions,⁵² the United Organisation for the Batwa Development in Uganda, together with 11 members of the Batwa, approached the Constitutional Court for relief in 2013.

The Batwa alleged that the respondents had violated the Constitution in four main respects. These respondents were the Attorney-General (the first respondent and the Cabinet Minister responsible for representing the government in court proceedings), the Ugandan Wildlife Authority (the second respondent and the government authority tasked with administering the Ugandan Wildlife Act) and the National Forestry Authority (the third respondent and responsible for administering the National Forestry and Tree Planting Act). First, the Batwa alleged that the first respondent's failure to recognise the Batwa as 'indigenous peoples' within the meaning of international law and as a 'minority' and 'marginalised group' was inconsistent with or a contravention of various articles of the Constitution⁵³ and several regional and international human rights instruments.⁵⁴ Second, they argued that the actions of the respondents in evicting, excluding and dispossessing them from their ancestral Batwa forest lands compromised their physical and cultural integrity and survival as an indigenous people, and were inconsistent with or a contravention of various articles of the Constitution⁵⁵ and several regional and international human rights and conservation instruments.⁵⁶ Third, they posited that by preventing and denying the Batwa access to the contested land, the respondents had further contravened various articles of the Constitution⁵⁷ and several regional

52 As above.

53 These were art 2(1) (dealing with the supremacy of the Constitution); art 20(2) (dealing generally with human rights and freedoms); art 36 (protection of rights of minorities); art 45 (additional human rights and freedoms); art 287 (international agreements, treaties and conventions).

54 These were 1986 African Charter on Human and Peoples' Rights (arts 19-24); 1966 International Covenant on Civil and Political Rights (ICCPR) (arts 1 & 27); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (art 1); 1965 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (arts 1 & 5); 1989 United Nations Convention on the Rights of the Child (CRC) (arts 8 & 30); 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (arts 2, 3, 8 & 33).

55 These were art 2(1); art 21 (equality and freedom from discrimination); art 22(1) (protection of the right to life); art 25 (protection from slavery, servitude and forced labour); art 26 (protection from the deprivation of property); art 32 (affirmative action in favour of marginalised groups); art 36; art 37 (right to culture); art 45; art 237(2) (land ownership); art 287; objective XXVIII(b) of the National Objectives and Directive Principles of State Policy (respect for international law and treaty obligations).

56 These were African Charter (arts 2, 14 & 19-24); 1966 ICCPR (arts 1, 26 & 27); ICESCR (arts 1, 2 & 15); ICERD (arts 2 & 5); CRC (arts 2, 8 & 30); CBD (arts 8(i) & 10(c)); UNDRIP (arts 3, 4, 7, 8, 19, 20, 26-28, 31 & 32).

57 These were art 2(1); art 29(1)(c) (freedom to practice religion); art 37; art 45; art 287; objective XXVIII(b) of the National Objectives and Directive Principles of

and international human rights and conservation instruments.⁵⁸ Fourth, the Batwa argued that the actions of the respondents that resulted in the widespread displacement, exploitation, exclusion and marginalisation of the Batwa in the communities in which they had subsequently been forced to settle, were also inconsistent with or contravened various articles of the Constitution⁵⁹ and several regional and international human rights and conservation instruments.⁶⁰ The Batwa prayed that they be recognised as the rightful owners of the contested land and that these lands be registered in their name; be paid just and fair compensation within 12 months of the judgment for the material and immaterial damages they had suffered as a result of their eviction, exclusion, dispossession or resultant impoverishment; and that negotiations commence with them within three months of the judgment with a view to concluding a revised regime for the management of the contested land, access to it and the equitable sharing of benefits derived from it, on ‘mutually-acceptable and human rights-compliant’ terms. In the alternative, they prayed for the provision of alternate land of equal size, type and value; the negotiation of a revised management arrangement for the contested land providing for joint collaborative and participatory management; and the negotiation of a fair and equitable access and benefit-sharing arrangement relating to it. These last two components of the alternate prayers were to be finalised within 12 months of the judgment.

3 Jurisdiction of the Constitutional Court

Prior to dealing with the substantive merits of the matter, the Court was tasked with ruling on the preliminary objection raised by the respondents to the effect that the Constitutional Court lacked jurisdiction to hear the matter. Article 50 of the Ugandan Constitution enables any person to approach a ‘competent court’ for redress alleging that a fundamental right or freedom entrenched in the Constitution has been infringed or threatened. The term ‘competent

State Policy.

- 58 These were African Charter (arts 8 & 17); ICCPR (arts 1, 18 & 27); ICESCR (art 15); 1989 CRC (arts 8 & 30); CBD (arts 8(j) & 10(c)); UNDRIP (arts 9, 11-13 & 25).
- 59 These were art 2(1); art 8A (governance based on principles of national interest and common good); art 21; art 30 (education); art 34 (rights of children); art 38 (civic rights); art 40 (economic rights); art 287; objectives II (democratic principles), X (role of people in development), XIV (general social and economic objectives), and XX (medical services) of the National Objectives and Directive Principles of State Policy.
- 60 These were Africa Charter (arts 2, 3, 11, 13-17 & 19-22); ICCPR (arts 6, 12 & 14); ICESCR (arts 1, 2, 5-7 & 11-13); ICERD (arts 2 & 5); CRC (arts 2, 24 & 27-29).

court' is not defined in the Constitution, with it feasibly including the High Court, Court of Appeal, Supreme Court and Constitutional Court. The jurisdiction of each of these courts is further detailed in the Constitution. The High Court has unlimited original jurisdiction in all matters.⁶¹ The Court of Appeal has jurisdiction to hear appeals from the High Court,⁶² with the Supreme Court of Appeal being the final arbiter on appeals from the Court of Appeal.⁶³ The Court of Appeal can also sit as the Constitutional Court and, when it does so, it has original jurisdiction over 'any questions as to the interpretation' of the Constitution.⁶⁴ Article 137 of the Constitution explicitly states that where a person alleges that an Act of Parliament, any other law, anything in or done under the authority of any law or any act or omission by any person or authority is 'inconsistent with or in contravention of a provision of the Constitution', they may petition the Constitutional Court for a 'declaration to that effect, and for redress where appropriate'.⁶⁵

The sum total of what some commentators have characterised as a 'strange'⁶⁶ and 'confusing'⁶⁷ jurisdictional arrangement appears to be that the competent court to enforce the human rights entrenched in the Constitution is the High Court, with the Constitutional Court being limited to deal with matters involving the interpretation of the Constitution, inclusive of these human rights. This has been confirmed in several decisions heard by both the Supreme Court of Appeal and Constitutional Court.⁶⁸ Not all commentators agree with the reasoning underpinning these decisions adopted over the years limiting the Constitutional Court's jurisdiction to interpreting the Constitution or petitions that cannot be resolved without first interpreting the Constitution.⁶⁹ Some commentators have very recently argued that the reasoning is incorrect both on a pure literal interpretation of the relevant provisions and when informed by the drafting history of article 137.⁷⁰ However, at the time the *Batwa*

61 Art 139(1) Constitution.

62 Art 134(2) Constitution.

63 Arts 132(1)-(2) Constitution.

64 Art 137(1) Constitution.

65 Art 137(3) Constitution.

66 J Mubangizi 'The protection of human rights in Uganda: Public awareness and perceptions' (2005) 1 *African Journal of Legal Studies* 175.

67 C Mbazira 'Uganda's hybrid constitutional protection of economic, social and cultural rights' in D Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 459.

68 These cases are discussed directly below and accordingly are not listed here.

69 J Mujuzi 'The Constitutional Court of Uganda: Blurring/misunderstanding its jurisdiction' (2022) 9 *Journal of Comparative Law in Africa* 24.

70 As above.

matter was heard by the Court, the approach to its jurisdiction was very much informed and circumscribed by the prior judicial decisions.

The respondents argued that the matter did not raise any question of constitutional interpretation and, accordingly, that the Constitutional Court had no jurisdiction to hear it.⁷¹ In their opinion, the matter concerned alleged violations of several rights in the Constitution, amounting solely to the enforcement as opposed to the interpretation of these rights, with the High Court and not the Constitutional Court having jurisdiction over the matter.

In contrast, the Batwa argued that the matter did raise questions of constitutional interpretation. Referring to the decision of *Raphal Baku & Another v the Attorney-General*⁷² they posited that an application is deemed to raise questions of constitutional interpretation where it highlights the following three aspects: the acts complained of; the provisions in the Constitution that these acts are alleged to contravene or be inconsistent with; and prayers declaring these acts unconstitutional.⁷³ In their view, the application canvassed all these components. Relying on *Joyce Nakacwa v Attorney-General & Others*⁷⁴ they sought to convince the court that even though the matter could fall within the ambit of article 50, it could simultaneously fall within the ambit of the Constitutional Court's jurisdiction under article 137 where it necessitated constitutional interpretation.⁷⁵ Furthermore, they argued that in determining whether the acts of the respondents contravened the Constitution, the court would be required to 'examine the meaning and the scope' of a number of relevant constitutional rights, with *Alenyo v Attorney-General & Others*⁷⁶ constituting authority for this amounting to constitutional interpretation as envisaged in article 137 of the Constitution.⁷⁷ To substantiate this assertion, the Batwa highlighted an array of issues presented to the Court which they believed required constitutional interpretation, namely, whether the reference in article 26(2) of the Constitution precluding the compulsory deprivation of property 'or any interest in or right over property' included rights and interests derived from the Batwa's possession, occupation and/or customary ownership of their traditional lands over an extended period; whether such possession, occupation and/or customary ownership conferred upon the Batwa a right to sustainable entry, use and occupation of

71 *Batwa* case (n 24) 6-7.

72 Constitutional Appeal 1 of 2003 (unreported).

73 *Batwa* case (n 24) 8.

74 Constitutional Petition 2 of 2001 (unreported).

75 *Batwa* case (n 24) 8.

76 Constitutional Petition 5 of 2000 (unreported).

77 *Batwa* case (n 24) 8.

a protected area established without their prior informed consent; whether the freedom accorded to everyone in terms of article 29(1)(c) of the Constitution to practise any religion and manifest such practice, including the right to belong to and participate in the practices of any religious body or organisation, prohibited the exclusion of the Batwa from their traditional land in respect of which they had a strong spiritual and cultural attachment; whether the right entrenched in article 37 of the Constitution to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others, would similarly prohibit their exclusion; and, finally, whether on the basis of articles 20(2),⁷⁸ 36⁷⁹ and/or 45⁸⁰ of the Constitution the first respondent could be compelled to recognise the Batwa as 'indigenous peoples' within the meaning of international law.⁸¹

Against this context, the Court embarked on a detailed review of article 137 and two seminal Supreme Court of Appeal decisions specifically dealing with the jurisdiction of the Constitutional Court, namely, *Attorney-General v Major General Tinyefuza*⁸² and *Ismail Serugo v Kampala City Council & Another*.⁸³ The Court concluded that to found jurisdiction before the Constitutional Court, the matter must satisfy both components set out in articles 137(1) and (3).⁸⁴ In other words, the petitioners must satisfy the court that an Act of Parliament, any other law, anything in or done under the authority of any law or any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution. In addition, the petitioners must satisfy the court that that the resolution of the matter requires them to engage in constitutional interpretation. Quoting from the judgment in *Charles Kabagambe v Uganda Electricity Board*⁸⁵ the Court confirmed that 'if the matter does not require an interpretation of a provision of the Constitution, then there is no juristic scope for the invocation of the jurisdiction of this Court'.⁸⁶ In other words, matters dealing solely with the enforcement of rights

78 Art 20(2) provides that 'rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons'.

79 Art 36 provides that 'minorities have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes'.

80 Art 45 provides that the 'rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.

81 *Batwa* case (n 24) 8-9.

82 Constitutional Appeal 1 of 1997 (unreported).

83 Constitutional Appeal 2 of 1998 (unreported).

84 *Batwa* case (n 24) 14.

85 Constitutional Petition 2 of 1999 (unreported).

86 *Batwa* case (n 24) 14.

do not fall within the jurisdiction of the Constitutional Court.⁸⁷ It furthermore confirmed that ‘constitutional interpretation is to be understood as distinct from enforcement of the Constitution’, with interpretation meaning ‘to explain or tell the meaning of’.⁸⁸

The Court then turned to consider the nature of the Batwa’s petition. It held that the second, third and fourth components of the petition alleged violations of a number of rights in the Constitution and, accordingly, dealt solely with the enforcement of these rights and not the interpretation thereof.⁸⁹ It acknowledged that the first component of the petition called upon the Court to ‘pronounce itself on aspects of international law concerning the concept of indigenous peoples’ and whether the concept of indigenous peoples could be ‘read into’ various constitutional provisions in the absence of the Constitution expressly referring to it.⁹⁰ While seemingly acknowledging that ‘reading words into a constitutional provision’ is a ‘legitimate method of interpretation’,⁹¹ the Court then sought to draw a distinction between ‘interpretation’, on the one hand, and ‘reading in’, on the other. It explained that the former involved having regard to the ‘plain and ordinary meaning of the words used in the provision’, and that once this exercise was complete, the court’s interpretative function was complete.⁹² It did observe that the court may ‘make reference’ to international law in ‘explicating the import of a constitutional provision’ but could not ‘rely on international law to “read words” into a constitutional provision’.⁹³ Traversing this seemingly fragile line, the Court ruled that the first component of the Batwa’s petition constituted the latter and not the former and, accordingly, similarly fell outside the jurisdiction of the Court.⁹⁴

The Court’s conclusion above seems to re-emphasise the ‘strange’ and ‘confusing’ jurisdictional arrangement in Uganda relating to constitutional matters, which some commentators have indicated has contributed to a ‘paucity’ of human rights litigation in the country.⁹⁵ It is somewhat puzzling why the Court so fleetingly and bluntly characterised the entire second, third and fourth components of the petition as dealing solely with enforcement and not interpretation. The Batwa had specifically identified a range of issues of interpretation relating to these components of

87 *Batwa* case (n 24) 15.

88 *As above*.

89 *Batwa* case (n 24) 15-16.

90 *Batwa* case (n 24) 16.

91 *As above*.

92 *Batwa* case (n 24) 17.

93 *As above*.

94 *As above*.

95 *Mbazira* (n 67) 459 474.

their petition, with which the Court unfortunately largely failed to engage in any detail. Surely each of these alleged examples of issues requiring interpretation warranted individual consideration by the Court, as they were so central to the issue of jurisdiction. Regarding the first component of the claim, having seemingly acknowledged 'reading in' as a form of interpretation, the Court then dismissed it drawing a distinction between 'reading in', on the one hand, and 'interpretation', on the other. Clearly weary of encroaching into the turf of Parliament, the Court drew a distinction between referring to international law to 'explicate the import of' a constitutional provision as opposed to relying on international law to 'read words into' a constitutional provision. Where the line sits between these two 'forms of interpretation' appears to be an uncomfortably fuzzy one, and something probably deserving more precise judicial delineation, given its centrality to issues of jurisdiction. This lack of clarity may further exacerbate the already 'strange' and 'confusing' jurisdictional arrangement. Finally, it is rather quizzical how, when dealing with the affirmative action clause in the Constitution, canvassed in detail below, the Court dealt with some interpretation issues the Batwa had specifically raised in respect of the second, third and fourth components of the petition. Having initially dismissed these as not constituting issues of interpretation in order to preclude the Court having jurisdiction over these components of the petition, it seems strange that the Court was willing then to entertain them as issues of interpretation in another component of the judgment. This may provide evidence of what one commentator recently referred to as the Court on occasion blurring the distinction between its jurisdiction to interpret the Constitution and its mandate to enforce human rights.⁹⁶

4 Application of the affirmative action clause

Having effectively rejected all four components of the Batwa's petition, the Court seemingly did an about-turn. It held that 'implicit' in the petition 'were questions concerning affirmative action' governed by article 32(1) of the Constitution.⁹⁷ Why the Court deemed these questions to be implicit is somewhat puzzling, as the second component of the Batwa's petition made explicit reference to article 32. Nonetheless, the Court held that these questions were 'rightly before' the Court and 'ought to be determined'. These questions related to three main aspects. First, what was the meaning of affirmative action as referred to in article 32(1)? Second, did

⁹⁶ Mujuzi (n 69) 26.

⁹⁷ *Batwa case* (n 24) 17.

affirmative action have any application in the context of the Batwa's petition? Third, if so, what forms of redress measures should be taken in favour of the Batwa?

4.1 What does affirmative action mean?

With the Constitution containing no definition of affirmative action, the Court turned to various dictionary definitions, concluding that the concept could generally be understood as 'remedial action which, in any given circumstances, is required to be done in order to rectify effects of past discrimination or historic injustice'.⁹⁸ The Court confirmed that looking at the wording reflected in article 32(1), two things had to be satisfied in order to trigger affirmative action. First, the group must have been 'marginalised on the basis of gender, age, disability or any other reason created by history, tradition and custom'.⁹⁹ Second, the affirmative action must be for the 'purpose of redressing imbalances' existing against such marginalised groups.¹⁰⁰ In interpreting the meaning of this wording reflected in article 32, the Court emphasised the need to recognise the interests the provision was meant to protect and accord the wording its 'primary, plain or natural meaning' where the wording was 'clear and unambiguous'.¹⁰¹ Again drawing from dictionary definitions, the Court deemed 'marginalise' to mean 'to relegate to an unimportant or powerless position within a society or group'.¹⁰² The Court also confirmed that the need for and form of affirmative action 'depends on the facts of each case'.¹⁰³

This distillation of the thresholds necessary to trigger the Constitution's affirmative action provision no doubt will be of interest to future litigants bringing claims based on alleged violations of constitutional rights before the Constitutional Court. It would seem that many claims of this nature may well fall within the above thresholds. Take, for instance, a future litigant (for argument's sake a community) bringing a petition to court alleging that the actions of the government constituted a violation of, among others, article 21 (equality and freedom from discrimination); article 36 (protection of rights of minorities); and article 37 (right to culture). In the absence of any arguments about the interpretation of these provisions, the Constitutional Court may well dismiss the application on the basis

98 *Batwa case* (n 24) 18.

99 *Batwa case* (n 24) 38-39.

100 *Batwa case* (n 24) 39.

101 *As above*.

102 *As above*.

103 *As above*.

that the matter does not fall within its jurisdiction as it relates to enforcement and not interpretation. However, the potential violation of these rights may well simultaneously 'relegate' the community 'to an unimportant or powerless position within a society or group' on the basis of 'gender, age, disability or any other reason created by history, tradition and custom', thereby triggering the application of article 32(1). Furthermore, the apparent willingness of the Constitutional Court to consider the application of article 32(1) even in the absence of the petition making explicit reference to this article, would appear to indicate the willingness of the Constitutional Court to consider the application of the affirmative action provisions *mero motu*. Do the above provide future petitioners with a potential opportunity to broaden the jurisdiction of the Constitutional Court to hear matters involving rights violations?

Some may argue that as the Constitutional Court has already interpreted these thresholds inherent in article 32(1) in this matter, subsequent courts would simply have to apply and not reinterpret these, thereby effectively precluding this opportunity. However, the Constitutional Court did indicate that the need for and form of affirmative action 'depends on the facts of each case', and does this not involve some interpretation of the precise meaning of these thresholds in so far as they relate to each distinct factual scenario? For example, would a future petition alleging a violation of a community's right to culture constitute 'marginalisation' for 'any other reason created by history, tradition or custom'? Furthermore, do opportunities not exist for the court in the future to further interpret the contents of the complementary provision contained in article 32(2) providing that 'laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'? Does this open up the potential for a future petition to be characterised as one involving both interpretation and enforcement, with the court needing to further interpret the wording and thresholds reflected in articles 32(1) and (2) in order to determine whether or not a specific factual matrix triggers them? The answer to these questions naturally can only be provided by future litigation of this nature.

Some may also argue that the above debate is purely academic as the community in any event could preclude the jurisdictional issue by simply approaching the High Court as opposed to the Constitutional Court as the court of first instance. However, there may well be strategic benefits occasioned by approaching the Constitutional Court directly as the court of first instance. One specific example

of such a strategic advantage would be precluding the need to go through an additional appeal process through the Court of Appeal should the matter be dismissed by the High Court sitting as the court of first instance.¹⁰⁴

4.2 Does affirmative action have application in the current circumstances?

Having outlined the affirmative action thresholds, the Court considered whether the concept of affirmative action had any application in relation to the Batwa, specifically whether the Batwa had been 'marginalised'; and if so, on what basis?

In this context the Court deemed it appropriate to outline, without pronouncing on their validity, a range of arguments that the petitioners had raised in the context of the four main components of their application:¹⁰⁵ first, that the Batwa had been the indigenous people in occupation of the contested land since time immemorial, and that this accorded them an interest in or right to the land protected in terms of article 26 of the Constitution; second, that the Batwa were indigenous peoples within the meaning of international law, and drawing on the outcome in the *Endorois* case, that this gave rise to property rights over the contested land; third, in accordance with the common law doctrine of aboriginal title, the Batwa had an interest in or right to the contested land; fourth, that this interest in or right to the contested land had not been extinguished by legal reform introduced over the last century in Uganda; fifth, drawing from a range of international and regional cases,¹⁰⁶ that the Batwa should not be deemed to constitute trespassers on the contested land they previously occupied; sixth, that their unlawful eviction from the contested land under the guise of safeguarding the public interest (specifically conservation) was unnecessary as the respondents had failed to adduce evidence that the Batwa's continued occupation of the contested land had or would undermine conservation; seventh, that the conservation benefits accrued from evicting the Batwa from the contested land were disproportionate when measured against the associated negative impacts on the community, and that the respondents, in line with the tenets of the Convention on Biological

¹⁰⁴ Appeals from the High Court lie to the Court of Appeal and then to the Supreme Court (art 132(2) read with art 134(2) of the Constitution). Appeals from the Court of Appeal sitting at the Constitutional Court lie directly to the Supreme Court (art 132(3) of the Constitution).

¹⁰⁵ *Batwa* case (n 24) 19-23.

¹⁰⁶ These cases were *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Sesana v The Attorney General* 2006 (2) BLR 633; *Richtersveld Community v Alexkor Ltd* 2003 (12) BCLR 1301 (CC).

Diversity and the principles espoused in the *Ogiek* case, could have adopted far less restrictive measures to conserve the forests situated on the contested land without needing to evict the Batwa; eighth, that the Batwa had not received any or adequate compensation for the contested land following their eviction. Finally, the respondents had never disputed the fact the Batwa were indigenous forest peoples originally inhabiting the contested land in respect of which they had a very strong cultural attachment.

The Court similarly highlighted the main arguments of the respondents to the effect that the government had always considered the contested land to be public land held by it; the Batwa had failed to produce evidence to prove that they owned the contested land and, accordingly, no compensation was due; the constitutional protection accorded to property rights in terms of article 26 did not apply retrospectively, and even if a valid claim did arise in terms of the Limitation Act,¹⁰⁷ it had prescribed.¹⁰⁸

Thereafter, the Court systematically surveyed the evidence tendered by the parties by way of affidavit in support of the above-mentioned arguments. The Court was careful to indicate that the rationale for looking at the evidence relating to whether or not the Batwa had an interest in the contested land, and whether this interest had been unlawfully extinguished, was solely to determine whether the provisions relating to affirmative action enshrined in article 32(1) were applicable to the Batwa.¹⁰⁹ The breadth of issues the Court deemed relevant to take into account in making this determination may again be of key interest to future litigants, spanning arguments relating to all four components of the Batwa's petition. Furthermore, as highlighted above, should these arguments be framed in a manner as relevant to both interpreting the scope and nature of the thresholds embedded in the affirmative action provision, and informing the provision's application to the specific factual matrix, future litigants may preclude potential jurisdictional hurdles.

Evidence for the petitioners took two main forms. First, affidavits deposed to by several of the petitioners whose ancestors had occupied and owned the contested land prior to their eviction.¹¹⁰ These affidavits traced the Batwa's historic occupation of the contested land prior to the establishment of colonial rule in Uganda, chartered how this inhabitation amounted to ownership and possession in

¹⁰⁷ Cap 80 of 1959.

¹⁰⁸ *Batwa* case (n 24) 23-24.

¹⁰⁹ *Batwa* case (n 24) 24.

¹¹⁰ *Batwa* case (n 24) 24-27 & 39-42.

a manner that vested some sort of interest in the Batwa over the contested land; outlined the close link between the contested land, the forests and the livelihoods of the Batwa; emphasised the very strong cultural, spiritual and religious connection between the Batwa, the contested land and the forests; highlighted the events leading to their systematic forced dispossession and eviction from the contested land from 1920 through to 1991; outlined the rather perilous state in which this had placed them currently, existing as a marginalised and vulnerable community very much dependent on others; and linked their current reality to their eviction from the contested land without compensation or, alternatively, without adequate compensation. Second, affidavits from two foreign academic experts who had lived and/or worked in the area, whose evidence confirmed the contentions reflected in the affidavits of members of the Batwa community.¹¹¹

Evidence for the respondents took the form of various affidavits from the principal State Attorney in the Attorney-General's office and various officials working for the second and third respondents.¹¹² The focus of these affidavits mainly was on the era post-1962, when the Public Lands Act¹¹³ vested all public land in the Crown. In the words of the Court, the evidence attempted to 'paint the Batwa as people who merely encroached on' the contested lands always owned by the Crown.¹¹⁴ However, the court seemingly was not impressed with this painting and referred to the evidence of the respondents as 'merely evasive',¹¹⁵ 'not verified at all' in certain respects,¹¹⁶ unduly focussed on the 'situation the Batwa find themselves in the present day'¹¹⁷ and not 'insightful' about the historical connection of the Batwa to the contested land.¹¹⁸

In contrast, the Court found the evidence of the petitioners mutually reinforcing,¹¹⁹ 'cogent' and more accurately and comprehensively 'charting the history of the Batwa people' in respect of the contested land.¹²⁰ Not surprisingly, the Court did not accept the respondents' assertion that the Batwa had not historically occupied the land and had only 'migrated to the land to source fruits and other food' in

111 *Batwa case* (n 24) 27-33.

112 *Batwa case* (n 24) 33-37.

113 Cap 201 of 1962.

114 *Batwa case* (n 24) 35.

115 *Batwa case* (n 24) 33.

116 *Batwa case* (n 24) 35.

117 *Batwa case* (n 24) 37.

118 *As above*.

119 *Batwa case* (n 24) 27.

120 *Batwa case* (n 24) 33.

relatively recent times.¹²¹ The Court seemingly trod another careful line at this point of the judgment when concluding on the veracity of the parties' respective evidence, specifically referring to the Batwa's 'inhabitation' of the contested land as opposed to their 'ownership, rights and interests' to or in the contested land.¹²² It accepted that the Batwa had 'inhabited' the contested land before the process commenced to incorporate it within different forms of protected areas around 1929.¹²³ Continuing to tread on the cautious side of the line, the Court was disinclined to express an opinion on the validity of the petitioners' arguments relating to the application of the common law doctrine of aboriginal title in order to found some right over and/or interest in over the contested land.¹²⁴ It deemed this enquiry to fall outside the remit of the affirmative action enquiry.¹²⁵

This evidence of judicial restraint unfortunately precluded the Court from contributing to the African jurisprudence on the common law doctrine. Perhaps the plight suffered by the Batwa in this matter was so patently clear that it was not necessary for the Court to expressly pronounce, when dealing with the issue of marginalisation, on whether the Batwa had historically inhabited or in fact held rights over and/or an interest in the contested land. However, could questions be raised in the context of future similar litigation relating to how far down the inquiry into land rights and/or interests a court should go when determining the issue of marginalisation? In other words, when looking into the history to determine whether or not a group has been marginalised, could or should a court consider and pronounce on issues of land rights and/or interests when these are raised by petitioners? There may well be instances where this is not necessary, but there equally may be instances where it is necessary for a court to pronounce on issues of land rights and/or interests where historic interference with these constitutes the very reason for the group being relegated 'to an unimportant or powerless' position in society.

Notwithstanding the above, having considered the totality of evidence before it, the Court held that the Batwa had been left marginalised following their eviction from the contested land. As for the basis of this marginalisation, the Court deemed this to have been for 'any other reason created by history', with this history including the fact that the ancestors of the Batwa had 'lived for years, centuries

121 *Batwa* case (n 24) 37.

122 *As above*.

123 *As above*.

124 *Batwa* case (n 24) 38.

125 *As above*.

or even millennia' on the contested land; the Batwa had been evicted from the contested land by 'agents of the government'; and this eviction had occurred without both the consent of the Batwa and the payment of adequate or, alternately, any compensation.¹²⁶

The Court's choice of wording in this part of the judgment is interesting. Having seemingly been so careful up to this point of the judgment not to tread across the line into the realm of land rights and interests, the use of wording such as 'eviction', 'consent' and 'compensation', characteristically used in the context of persons holding rights and/or interests in land, appears to provide some evidence of the Court beginning to straddle the line.

4.3 What forms of redress measures are available?

With both components of the test necessary to trigger the application of the affirmative action clause embedded in article 32(1) of the Constitution having been satisfied, the Court then turned to consider what measures would be appropriate to redress the marginalisation suffered by the Batwa. While acknowledging the prayers of the petitioners, the Court indicated that its remit in the context of determining redress was limited to what measures should be taken to achieve 'substantive equality'.¹²⁷ It emphasised that the purpose of redress measures should be to ensure that the marginalised group 'feel secure and confident in the knowledge that they are recognised in society as human beings equally deserving of concern, respect and consideration'.¹²⁸ The Court further indicated that these redress measures should be tailored to the 'peculiar facts of each case'.¹²⁹ The above would appear to accord courts vast discretion as to the scope and nature of redress measures they can compel the government to implement in fulfilment of article 32.

Looking at possible redress received by the Batwa in the past, the Court was satisfied that while certain amounts may have been paid to the Batwa over the years, this did not constitute compensation for the contested land from which they were evicted.¹³⁰ The Court acknowledged that their eviction had left the Batwa disadvantaged, landless and 'living as squatters in land adjoining the protected area'.¹³¹ The Court indicated that this 'severely affected not only

¹²⁶ *Batwa case* (n 24) 40-41.

¹²⁷ *Batwa case* (n 24) 40-41 & 43-44.

¹²⁸ *Batwa case* (n 24) 41.

¹²⁹ *As above*.

¹³⁰ *Batwa case* (n 24) 41-43.

¹³¹ *Batwa case* (n 24) 46.

their livelihoods' but also 'destroyed their identify, dignity and self-worth as a people and as equal citizens with other Ugandans'.¹³² When considering possible redress measures, the Court indicated that as the petition was dealt with by way of affidavit, there was insufficient information and evidence before it to determine what redress measures should be taken in favour of the Batwa.¹³³ It accordingly referred the matter to the High Court to investigate and determine what would constitute appropriate affirmative action measures for the Batwa, in terms of article 137(4)(b). It indicated that the High Court needed to 'expeditiously' hear evidence and determine the appropriate affirmative action measures,¹³⁴ crucially given the protracted period of almost eight years that it took the Constitutional Court to finalise the matter. The Constitutional Court also provided some guidance to the High Court on what were important considerations for it when framing this redress, specifically that the 'vulnerable and appalling situation' of the Batwa must be improved and be ameliorated.¹³⁵

In concluding its declaration, and in stark contrast to the apparent judicial restraint shown by the Court throughout the preceding parts of the judgment, the Court expressly in closing declared that the ancestors of the current Batwa not only inhabited but also had an 'interest in and/or owned, in accordance with the customs and/or practices' the whole or a part of the contested land.¹³⁶ It further declared that the descendants of these Batwa ancestors had similarly 'so inhabited' the land until about 1991, prior to their eviction without their consent or compensation being paid to them, in order to incorporate the land into these protected areas.¹³⁷

The above declarations, particularly the former component, would appear to provide evidence of the Court clearly stepping over the line it had so carefully held in prior parts of the judgment between inhabitation and/or occupation of the contested land, on the one hand, and the holding of an interest in and/or ownership of the contested land, on the other. Constituting part of the Court's closing declarations, it would appear to indicate the Court's acceptance that the ancestors of the current Batwa held some form of interest over or ownership of the contested land, with their descendants (the current petitioners) having similarly done so prior to their eviction. The precise legal foundation of this interest and/or

132 *Batwa case* (n 24) 43.

133 *Batwa case* (n 24) 45.

134 *Batwa case* (n 24) 47.

135 *Batwa case* (n 24) 45-46.

136 *Batwa case* (n 24) 46.

137 *Batwa case* (n 24) 46-47.

ownership, however, unfortunately was left hanging. The practical legal ramifications of this declaration were similarly left hanging and will hopefully be clarified by the High Court in the context of determining appropriate redress. Seeking to rely on this declaration as a basis on which subsequently to 'convert' it into a realisable and enforceable property right through recourse to potentially relevant provisions in the Constitution may well hit a stumbling block.¹³⁸ The Batwa may accordingly have to rely on the High Court adopting a broad interpretation of redress under the affirmative action clause to restore their legal title to the land. Whether it does so remains to be seen. Some commentators have recently explored potential alternate legal avenues for the Batwa to follow other than the above court process, with their conclusion being that these are 'weak and lack biting teeth' and offer 'only frugal protection of minority rights and indigenous peoples rights'.¹³⁹ Much of the hope for meaningful redress for the Batwa accordingly may be pinned on the judiciary.

5 Conclusion

As evidenced by the extensive academic debate preceding the matter being heard by the Constitutional Court, expectations seemingly were high that the Court would not only rule in favour of the petitioners, but that its judgment would build upon and contribute to the African jurisprudence on the nuances of bringing claims based on the common law doctrine of indigenous title, linking claims to the protection of cultural rights/integrity and on how to frame claims to territory originally held by indigenous peoples on the basis of reliance on regional and international human rights instruments. The judgment clearly did not deliver on these latter expectations and, furthermore, highlighted the ongoing complications associated with the fudgy distinction between interpretation and enforcement when determining the jurisdiction of the Constitutional Court in Uganda.

Nonetheless, the judgment does provide valuable guidance to future litigants in Uganda on the potential of relying on article 32 to achieve substantively equitable redress where they have been relegated to an 'unimportant or powerless position within a society or group' on the basis of 'gender, age, disability or any other reason created by history, tradition and custom'. It highlights the thresholds that need to be met, the breadth of issues the judiciary

¹³⁸ See n 48 above.

¹³⁹ R Kakungulu-Mayambala 'Reinvigorating the struggle for the Batwa in Uganda: A case for the domestication of international indigenous peoples rights and standards' (2014) 20 *East African Journal of Peace and Human Rights* 301.

seem willing to consider when determining 'marginalisation', and the broad discretion the court retains in determining the form of redress. The outcome also highlights the importance for these litigants in tendering specific evidence on possible redress options when bringing the matter to court to stave off further delays when, in its absence, the precise redress options are left for future determination. As highlighted in this article, various issues relating to the interpretation of article 32 seem to remain outstanding, highlighting the potential for future litigants wishing to strategically approach the Constitutional Court as the court of first instance, the possible option to do so.

The outcome of the matter does fortunately provide some potential solace to the Batwa, potential in the sense that they await the determination of the precise nature of the redress measures by the High Court. Whether the High Court exercises its seemingly broad discretion when fashioning these redress measures to return title to the contested land to the Batwa remains to be seen. So too does the extent to which the judiciary, bearing in mind Uganda's international commitments under the Convention on Biological Diversity, outlined at the beginning of this article, and its contemporary domestic policies specifically geared towards promoting community conservation,¹⁴⁰ tailor these measures to promote the effective and equitable participation of the Batwa within the management and governance arrangements for the three protected areas forming the subject of the dispute.

The relevant domestic legislation seemingly is littered with legal mechanisms to promote the contemporary conservation ideology embedded in these international commitments and domestic policies. In the context of the Bwindi Impenetrable National Park and Mgahinga Gorilla National Park, options provided for in the Ugandan Wildlife Act include re-designating the national parks or portions of these as community wildlife areas;¹⁴¹ entering into a suitable commercial or collaborative arrangement with the Batwa to manage the conservation areas or portions of them;¹⁴² recognising the historic rights of the Batwa in respect of the conservation areas;¹⁴³ granting wildlife use rights to the Batwa that permit community resource access;¹⁴⁴ and ensuring the establishment and active

140 The following policies contain many references to the importance of promoting community conservation initiatives: UWA *Community conservation policy* (2019); Ministry of Tourism, Wildlife and Antiquities *Uganda wildlife policy* (2014).

141 Secs 25-26 Ugandan Wildlife Act (n 26).

142 Sec 22 Ugandan Wildlife Act.

143 Sec 32 Ugandan Wildlife Act.

144 Secs 35-50 Ugandan Wildlife Act.

participation of the Batwa within the relevant community wildlife committees.¹⁴⁵ In the context of the Echuya Central Forest Reserve, options provided by the National Forestry and Tree Planting Act include reclassifying the area or a portion of it as a joint management forest reserve with the area jointly managed by the National Forestry Authority and the Batwa;¹⁴⁶ concluding a collaborative forest management arrangement with the Batwa to manage the forest reserve;¹⁴⁷ re-declaring the area or parts of it as a community forest and appointing the Batwa as the responsible authority to manage it;¹⁴⁸ allowing the Batwa to access and use forest produce in the area for domestic purposes;¹⁴⁹ and granting a licence to the Batwa to harvest and remove forest produce from the area or sustainable use and manage it.¹⁵⁰ In the context of the Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Central Forest Reserve, options provided under the National Environmental Act¹⁵¹ include re-gazetting the three protected areas or portions thereof as special conservation areas.¹⁵²

It is fully acknowledged that the viability of these options no doubt will be informed by whether or not title to the contested lands is restored to the Batwa. The viability of each will also need to be informed by careful scoping and detailed planning. It will also need to be informed by the extensive critique levelled against the attempts over the past decade to accord the Batwa limited access, use and benefits associated with the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve.¹⁵³ Several options seemingly are open to the High Court when framing the ultimate redress measures for the Batwa. It is hoped the High Court will fully engage in all options, and perhaps it would be wise for the Batwa in the next leg of their court journey to comprehensively remind the court of the government's international commitments to promote a more inclusive and participatory approach to conservation in the context of protected and conserved areas, the domestic policies advocating this approach and the myriad legal mechanisms available in the relevant domestic laws to give effect to it.

145 Sec 20 Ugandan Wildlife Act.

146 Sec 6(2)(c) read with sec 16 National Forestry and Tree Planting Act (n 27).

147 Sec 15 National Forestry and Tree Planting Act (n 27).

148 Sec 17 National Forestry and Tree Planting Act.

149 Sec 33 National Forestry and Tree Planting Act.

150 Sec 41 National Forestry and Tree Planting Act.

151 Act 5 of 2019.

152 Sec 51 National Environmental Act (n 151).

153 See n 43.

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Position as at 31 December 2021
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Source: <http://www.au.int> (accessed 9 June 2022)

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COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	08/06/21
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				24/04/07
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73		31/01/17	09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08	4/10/21*	19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05	12/10/21		23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
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	
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Tunisia	16/03/83	17/11/89		21/08/07*	23/08/18	
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