# AFRICAN HUMAN RIGHTS LAW JOURNAL

**THIS JOURNAL SHOULD BE CITED AS (2025) 25 *AHRLJ***

The *African Human Rights Law Journal* publishes contributions dealing with human rights, with a special focus on topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in June and December.

The *African Human Rights Law Journal* is indexed in SCOPUS; the International Bibliography of Social Sciences (IBSS); the Directory of Open Access Journals (DOAJ); the Scientific Electronic Library Online (SCIELO); and is accredited by the South African Department of Higher Education and Training (DHET).

The *Journal* is a non-commercial ('diamond') open access online publication; see www.ahrlj.up.ac.za

# AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 25 No 1 2025

Pretoria University Law Press
PULP
publishing African scholarship that matters
www.pulp.up.ac.za

2025

*African Human Rights Law Journal* **Volume 25 No 1 2025**

**Published by:**
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

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

**Printed and bound by:**
Pinetown Printers, South Africa

**To order, contact:**
PULP
Faculty of Law
University of Pretoria
South Africa
0002
pulp@up.ac.za
www.pulp.up.ac.za

**Cover:**
Lizette Hermann, Centre for Human Rights, University of Pretoria

**ISSN:** 1609-073X
**EISSN:** 1996-2096

Co-funded by the European Union

The financial assistance of the European Union is gratefully acknowledged.

# Contents

**Recent developments**



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

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

AFRICAN HUMAN RIGHTS LAW JOURNAL

http://dx.doi.org/10.17159/1996-2096/2025/v25n1a17

# Editorial

This issue of the *African Human Rights Law Journal* marks 25 years since its first issue appeared in June 2001. The *Journal* was launched in the wake of the establishment of the African Union (AU), with the adoption of the AU Constitutive Act on 11 July 2000 and its entry into force on 26 May 2001.

Since 2001, the AU human rights landscape has changed dramatically. The African Commission on Human and Peoples' Rights (African Commission) has come to greater maturity. A continental human rights court came into being and has dealt with some 350 contentious cases. The African Charter on Human and Peoples' Rights (African Charter) has been complemented by a number of Protocols, two of which entered into force during this period. A separate treaty for children, adopted as far back as 1990, and which entered into force in 1999, started operating in 2001. Over the 25 years of its existence, the *AHRLJ* has been privileged to provide critical yet constructive scholarly perspectives on this unfolding landscape.

Two issues of the *Journal* appeared annually since 2001, making this the *Journal*'s forty-ninth issue. With the December 2025 issue the significant figure of 50 issues will have been reached. Consistent high-quality support from the *Journal*'s editorial assistant (Isabeau de Meyer), the manager of the Pretoria University Law Press (PULP) (Lizette Hermann) and the editorial team made this consistency possible.

The *Journal* sets itself the goal of contributing to scholarship on the African human rights system. Looking back at the journey from this milestone, the *Journal* can be viewed as a primary knowledge generator of scholarly discourse on, in and for the African regional human rights system specifically, and human rights in Africa, more generally. With this issue, a total of 634 articles (as well as 93 'recent developments' and case discussions) on these topics have appeared in the *Journal*. With a total of 727 published contributions over 49 issues, the *Journal* maintained an average of 14,8 contributions per

issue. Over the years the *Journal* developed the practice of including in some of its issues a 'special focus' (themes related to human rights in Africa). Themes to which 'special focus' issues were devoted include 'The foundations and future of law, religion and human rights in Africa' (2008); '30 years of the African Charter on Human and Peoples' Rights: Looking forward while looking back' (2011); and 'The African Children's Charter at 30: Reflections on its past and future contribution to the rights of children in Africa' (2021).

Initially, the *Journal* was published by JUTA, in Cape Town, South Africa. The *Journal* in 2013 migrated to PULP. Importantly, at that moment the *Journal* became a fully open-access journal – one of the first to make the leap to 'diamond' open access.

Recognising its record of consistency and quality, the *AHRLJ* has been indexed on the following databased and indexes: South African Department of Higher Education and Training (DHET); Scientific Electronic Library Online (SciELO) SA; Directory of Open Access Journals (DOAJ); International Bibliography of the Social Sciences (IBSS); and Scopus.

The *AHRLJ* has contributed to scholarship on human rights. The article from the *Journal* most cited (according to Google Scholar) is T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 African Human Rights Law *Journal* 532-559, which was cited 709 times. The second-most cited article is that by Tamale (S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150-177, with 235 citations).

**Articles with a continental focus**

Seven articles tackle issues that have relevance to Africa as a whole, or to sub-regions on the continent.

In the first two articles, the authors adopt different yet complementary approaches to the intractable problem of unconstitutional changes of government in Africa. This indeed is a timely discussion. The formation of the Alliance of Sahel States, a novel sub-regional grouping of states (Burkina Faso, Mali, Niger) that have all undergone such changes of government, has placed the issue squarely on the agenda. Odinkalu examines the scope and meaning of the norm prohibiting *coups* and unconstitutional changes of government in Africa in light of its evolution and history. He demonstrates that the norm supports democratic elections, is against

interminable rule, and for the protection of legitimate mandates. The article argues that popular uprisings are insurrectionary reactions to the failure of Africa's continental and regional institutions to respect this package, and calls for African states and institutions to return the norm to its original design. Also addressing the persistence of unconstitutional changes of government on the continent, Mhlanga examines how the African Continental Free Trade Area (AfCFTA) agreement's legally binding trade architecture and reciprocal market-access commitments can introduce material accountability into Africa's human rights ecosystem. The article proposes mechanisms for integrating democratic conditionalities into AfCFTA's implementation, with the aim of shifting the cost-benefit calculus for *coup* perpetrators and enabling a rules-based order that strengthens constitutional governance across the continent.

*Implications of the role of vigilante groups in curbing Boko Haram in Lake Chad Basin*: Since 2009, Boko Haram insurgency has become a serious challenge to security and safety in the Lake Chad Basin (Nigeria, Cameroon, Niger and Chad). Due to the inadequacies of security responses, vigilante groups have emerged to protect their communities through combating Boko Haram. Kilonzo discusses security concerns about the future of vigilante groups, and examines rights-based disarmament, demobilisation and reintegration of vigilante groups as a potentially valuable measure to address the security risks posed by the vigilantes to their communities.

*The African Charter requires state parties to ban 'conversion therapy'*: 'Conversion therapy' is a practice that seeks to change an individual's sexual orientation or gender identity. Mugerwa-Sekawabe contends that state parties to the African Charter are required to ban 'conversion therapy' as it violates the right to dignity and the prohibition against degrading treatment of LGBTQIA+ persons.

*The African Women's Protocol requires states to address the causes of gender inequality*: The resocialisation obligation contained in global and African regional human rights law and, in particular, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) requires states to address and modify the underlying socio-cultural norms and practices that form the root causes of gender inequality. Using a feminist lens, Mahmoudi highlights that this obligation requires states to modify the underlying socio-cultural determinants to effectively address root causes of gender inequality, violence and discrimination against women.

*Soft law solutions for children displaced by climate change in Africa*: To address the exclusion of climate-displaced children from the protective scope of international law, Fox explores the potential of United Nations (UN) and regional soft law instruments to serve to protect the rights of climate-displaced children.

*Malabo Protocol and African refusal to extradite ICC suspects*: Khamala considers the circumstances under which South Africa and Kenya refused to extradite Sudanese President Al-Bashir to the International Criminal Court (ICC). He evaluates political influences on the international mutual legal assistance obligation reminiscent of the Malabo Protocol's immunity provision. He also notes that the Russian President, against whom the ICC had issued an arrest warrant, did not attend a South African BRICS summit. The author draws attention to the UN Hague Convention on International Cooperation in the Investigation and Prosecution of International Crimes, and calls for its ratification to combat atrocity crimes.

**Articles with a country-specific focus**

Eight articles interrogate aspects of the relationship between international law (including AU human rights law) and domestic law. In these articles, a variety of international law frameworks come into play: international labour law (Ghana); the African Women's Protocol and CEDAW (Lesotho); the Optional Protocol to the Convention against Torture (Nigeria); the UN Universal Periodic Review (Somalia); the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (South Africa); and the International Covenant on Economic, Social and Cultural Rights (South Africa).

*Legal framework on child labour in Ghana*: Child labour persists in Ghana despite a range of policy and legal measures implemented by the government and other development partners. Hammond and Dowuona-Hammond review Ghana's legal, policy and institutional framework on child labour to determine whether it meets international labour and human rights norms. The article notes that domestic legislation is not sufficiently detailed on what constitutes the worst forms of child labour, and on other forms of child labour, such as the use of children in mining and the illicit production of drugs. The article proposes the expansion of the hazardous work list, and the introduction of minimum conditions for light work.

*The role of social workers in the fight against child marriage in Lesotho should be enhanced*: Although Lesotho promulgated the Children's Protection and Welfare Act 2011 to address child marriage, the level of child marriage in Lesotho remains alarming. Kelepa discusses the UN, AU and Southern African Development Community (SADC) legal frameworks available to address the challenges arising from child marriage. Adopting a multidisciplinary approach, the article suggests roles that social workers, as professionals who are equipped with the skills to handle children's issues, may play in addressing the causes of child marriage. It concludes with recommendations to enhance social workers' role in addressing this intractable social dilemma.

*Nigeria's implementation of OPCAT*: By ratifying the Optional Protocol to the Convention against Torture (OPCAT), Nigeria signalled its intention to establish and operate a national preventive mechanism (NPM) that aligns with OPCAT. In its 2021 Concluding Observations, the UN Convention against Torture (CAT) Committee determined that Nigeria had not met this requirement. Ibe examines Nigeria's compliance in light of four requirements of NPMs drawn from a review of OPCAT and the literature on NPMs. He argues that although Nigeria has taken some positive steps, it still falls short, and offers recommendations that would ensure Nigeria's greater compliance with OPCAT.

*Work as a fundamental right in Nigeria, Belarus and India*: Adopting a comparative analysis, Eyongndi, Okwori, Nnawulezi and Adedeji examine the legal framework on the right to work in the Constitution of the Federal Republic of Nigeria, 1999, using the concept of interrelatedness, interdependence and indivisibility of human rights in advancing the imperativeness of the institutionalisation of work as a justiciable right in Nigeria. Drawing on the jurisprudential practices on the right to work in India and Belarus, the article recommends that the right to work should be viewed and used as a justiciable right to address the high levels of unemployment in Nigeria.

*The value of civil society recommendations in UPR in Somalia*: Using the prism of female genital mutilation (FGM) in Somalia, which has the highest global prevalence of FGM, Storey examines the value of the involvement of civil society organisations (CSOs) in the UPR process. On the strength of this analysis, she makes proposals to be used by CSOs and states when preparing for Somalia's fourth cycle UPR review scheduled for 2026.

*A call for South Africa to ratify Optional Protocol to the CRC*: The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) allows for individual communications by children, groups of children or their representatives to be submitted to the UN Committee on the Rights of the Child. South Africa has not ratified the Optional Protocol, nor has Australia. Greeff considers the reasons for non-ratification by these two states, and makes an argument for their accession to OPIC.

*Right to adequate housing against local government in South Africa*: Mudau examines the judicial enforcement of the right to adequate housing against local government in South Africa. The article focuses on how courts hold local government accountable in fulfilling the right measured against the baseline factors outlined in General Comment 4 of the UN Committee on Economic, Social and Cultural Rights. The article concludes that, despite courts not explicitly referencing General Comment 4, judicial enforcement of the right is consistent with the baseline factors set out in General Comment 4.

*Tension in international law-friendly 2013 Zimbabwean Constitution*: Moyo considers the place of international law under Zimbabwe's 2013 Constitution against the background of the country's attempt to strike a balance between sovereignty and global cooperation. Noting that the Constitution contains generous provisions entrenching a place for the reception of international law norms in the domestic legal order, Moyo analyses the normative framework for the domestication of treaties, the reception of customary international law and the role of international law as an interpretative guide to domestic law. He concludes that the complex interaction between the international and national legal orders raises tensions between international obligations and national interests.

## Recent developments

*South African Equality Court decision related to 'black hair'*: Munyai discusses *Baba & Others v Clicks Group Limited & Another*, a 2022 decision of the High Court of South Africa, Western Cape Division, Cape Town, sitting as an Equality Court. The case deals with an image of four women on social media, which caused an outcry on the premise that the image perpetuated racial stereotyping of black hair. While the Court dismissed the matter, the discussion of the case provides an opportunity for reflection on beauty hierarchies traced to Eurocentrism and the re-engineering of acceptable beauty aesthetics.

**The editors**
June 2025

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: CA Odinkalu 'A ruler's shield? Re-evaluating the norm against unconstitutional change of government in Africa' (2025) 25 *African Human Rights Law Journal* 1-36
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a1

# A ruler's shield? Re-evaluating the norm against unconstitutional change of government in Africa

*Chidi Anselm Odinkalu**
Professor of Practice of International Human Rights Law, Fletcher School of Law and Diplomacy, Tufts University, Medford MA, United States of America; Chairperson, Governing Council, Chukwuemeka Odumegwu-Ojukwu University, Anambra State, Nigeria
https://orcid.org/0009-0008-2408-4946

**Summary**: *The broad contours of Africa's inter-state system were configured in the murderous overthrow of the continent's governance systems in the aftermath of the Berlin (West) Africa Conference in 1885. A strain of violent authoritarianism that did not care for bases in popular legitimacy established thereafter around the continent was resilient even into the age of post-colony. Following independence, African states retreated behind a carapace of domestic jurisdiction and it was understood that how government acquired its mandate to rule was not the concern of other states. Constitutional instability ensued, mostly characterised by an epidemic of coups and conflict. By the last decade of the twentieth century, this understanding had begun to erode, and at the turn of the millennium, the continent had instituted a new normative order establishing democratic elections as the basis of the mandate to rule, and prohibiting coups and unconstitutional changes in government (UCG). However, the meaning of the UCG was largely left to be determined and, in turn, the content and application of the norm prohibiting it came to be defined by an appearance of inconsistency.*

* BL (Hons) (Nigerian Law School) LLB (Hons) (Imo State) LLM (Lagos) PhD (London-LSE); chidiao@hotmail.com. The author expresses appreciation to the anonymous reviewers as well as to Chepkorir Sambu of the Faculty of Law, Kabarak University, Nakuru, Kenya, whose kind and thoughtful comments assisted in bringing greater clarity to the article.

*Over time, a norm designed to defeat authoritarianism appeared instead to have become appropriated or instrumentalised for the exact opposite, triggering a self-inflicted crisis. This article examines the scope and meaning of the norm against UCGs in Africa in light of its evolution and history. It shows that far from being a shield for interminable rulers, the norm embodies three propositions in support respectively of democratic elections, against interminable rule, and for the protection of legitimate mandates. It argues that popular uprisings are insurrectionary reactions to the failure of Africa's continental and regional institutions to respect this package, and calls for African states and institutions to return the norm to its original design.*

**Key words:** *coups; norm; unconstitutional change of government; popular uprising; Africa*

## 1 Introduction

The subject matter of unconstitutional change of government (UCG) has risen in international priority and global attention in recent years. At the turn of the millennium, African Heads of State and Government in the Organisation of African Union (OAU) expressed 'grave concern about the resurgence of *coups d'état* in Africa',[1] while also recognising that *coups* 'are a threat to peace and security of the continent and they constitute a very disturbing trend and serious setback to the on-going process of democratisation in the continent'.[2] Nearly one decade later, the Assembly of Heads of State and Government of the African Union (AU) complained of a 'resurgence' of UCGs on the continent.[3] In January 2022 the Peace and Security Council of the AU once again expressed 'deep concern over the resurgence of military *coups d'état*', concerned that these 'undermined democracy, peace, security and stability in the continent'.[4] Drawing upon the public health metaphor of a contagion in October 2021, the Secretary-

1 OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government, AHG/Decl.5 (XXXVI), adopted at Lomé, Togo, 10-12 July 2000, Preamble para 2, https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf (accessed 4 March 2025) (Lomé Declaration).

2 As above.

3 African Union 'Decision on the Resurgence of *coups d'état* in Africa' Assembly/AU/Dec.220(XII) February 2009, https://www.peaceau.org/uploads/assembly-au-dec-220-xii-e.pdf (accessed 3 March 2025).

4 African Union Peace and Security Council Communiqué PSC/PR/COMM.1/1062, para 1 (2022), https://www.peaceau.org/uploads/eng-communique-1062nd-psc-meeting-on-burkina-faso-31-jan-2022.pdf (accessed 2 March 2025). See also *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 74, where the African Commission on Human and Peoples' Rights held that the military *coup* that deposed an elected government in Burundi in 1997

General of the United Nations (UN), Antonio Guterres, complained of 'an epidemic of *coup d'états*' [*sic*], calling on the UN Security Council to take urgent steps to arrest what he identified as a global trend.[5] More recently, then judge-president of the Court of Justice of the Economic Community of West African States (ECOWAS), Edward Amoako Asante, has equally described UCGs in the states of the Community as a 'grave danger to West Africa's march towards the consolidation of democratic governance in the region'.[6]

This recent rise in UCGs in Africa appears impervious to more than three decades of intense normative innovation on governance within the institutional mechanisms of regional governance in Africa, including the AU, its predecessor, the OAU, as well as the continent's regional economic communities, especially ECOWAS.[7] The idea of a resurgence in UCGs in the midst of this norm inflation is itself reason

---

constituted a threat to 'and (was) indeed a breach of, the peace in Burundi and the [East African] region'.

5 M Nichols '"An epidemic of coups", UN chief laments, urging Security Council to act' *Reuters* 26 October 2021, https://www.reuters.com/world/an-epidemic-coups-un-chief-laments-urging-security-council-act-2021-10-26/ (accessed 12 March 2025). On 15 April 2024 another *coup* attempt in Sudan led to the outbreak of a non-international armed conflict in Khartoum, the capital of Sudan. See J Pejic 'The fighting in Sudan is an armed conflict: Here is what law applies' *Just Security* 20 April 2024, https://www.justsecurity.org/86058/the-fighting-in-sudan-is-an-armed-conflict-heres-what-law-applies/ (accessed 3 March 2024); M Bishara 'Sudan's tragedy: Rogue generals and failed coups' *Aljazeera* 18 April 2024, https://www.aljazeera.com/opinions/2024/4/18/sudans-tragedy-rogue-generals-and-failed-coups (accessed 3 March 2025); N Elbagir and others 'Sudan military ruler accused rival of "attempted coup" as vicious fighting grips capital' *CNN* 17 April 2024, https://www.cnn.com/2024/04/17/africa/sudan-fighting-evacuation-suspension-intl-hnk/index.html (accessed 3 March 2025).

6 'ECOWAS Court president warns of dangers of recent political developments in the region' *ECOWAS Court Blog*, http://www.courtecowas.org/2021/09/16/ecowas-court-president-warns-of-dangers-of-recent-political-developments-in-the-region/ (accessed 19 February 2025).

7 For some of these, see OAU Report of the OAU Central Organ Sub-Committee on the Preparation of a Blue Print for Dealing with Unconstitutional Changes of Government in Africa, Sub-committee/Central Organ/Report (III) (1996); OAU Ass, Decision on Unconstitutional Changes of Government, 35th session, Doc AHG/Dec.142 (XXXV), 1 (12-14 July 1999), https://archives.au.int/handle/123456789/517 (accessed 12 March 2025); Lomé Declaration (n 1); Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, CAB/LEG/23.15, entered into force 26 May 2001 (Constitutive Act) art 4; African Charter on Democracy, Elections, and Governance, adopted 30 January 2007, entered into force 15 February 2012, art 23(5), https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf (accessed 4 March 2025); ECOWAS Supplementary Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol Relating to Conflict Prevention, Management, Resolution, Peacekeeping, and Security, adopted December 2001, https://www.eisa.org/pdf/ecowas2001protocol.pdf (accessed 2 March 2025) (ECOWAS Supplementary Protocol on Good Governance). See, generally, M Wiebusch 'Africanization of constitutional law' in R Dixon, T Ginsburg, & AK Abebe (eds) *Comparative constitutional law in Africa* (2022) 361; A Basiru and others 'The 2001 ECOWAS Supplementary Protocol on Democracy in light of recent developments in the sub-region of Africa' (2019) 95 *International Social Science Review* 1.

for a re-evaluation of both the efficacy of the norm and of the gap between norm inflation and reality.

Powell and Thyne argue that any computation of UCG incidents would be dependent upon how the concept is defined or operationalised.[8] West Africa arguably is at the epicentre of what the UN and the AU have respectively called a 'global epidemic' or a regional 'resurgence' in UCGs.[9] The AU 'has declared a total of fourteen (14) instances of UCG since 9 July 2002 when it was established: three in North Africa, seven in West Africa, one in East Africa, one in Southern Africa and two in Central Africa'.[10] In West Africa, this recent raft of supposed UCGs has included three in Mali,[11] two in Guinea,[12] as well as one popular uprising,[13] and two *coups* in Burkina Faso.[14] McGowan, for instance, reports 169 'military interventions of some type' in 16 West African countries (including

8 J Powell & C Thyne 'Global instances of coups from 1950 to 2010: A new dataset' (2011) 48 *Journal of Peace Research* 253.

9 See nn 5-6.

10 African Union Africa Governance Report 2024: Unconstitutional changes in government in Africa – Final key highlights, Assembly/AU/7(XXXVI), 36th ordinary session of the Assembly of Heads of State and Government, Addis Ababa, Ethiopia, 18-19 February 2024 para 25 (ACG-23).

11 Mali experienced three *coups* respectively in March 2012, August 2020 and May 2021. See A Cascais 'Mali's crisis hits 10-year mark' *Deutsche Welle* 3 March 2022, https://www.dw.com/en/malis-crisis-hits-10-year-mark/a-61302175 (accessed 3 March 2025); see also S Alozieuwa 'The March 22, 2012 coup in Mali: Lessons and implications for democracy in the West Africa sub-region in the wave of transnational terrorism' (2013) 9 *Democracy and Security* 383.

12 The latest *coups* in Guinea were in December 2008 and in September 2021. See E Schmidt 'The historical roots of Guinea's latest coup' *Washington Post* 21 September 2021, https://www.washingtonpost.com/outlook/2021/09/21/historical-roots-guineas-latest-coup/ (accessed 3 March 2025); J Siegle & D Eizanga 'Walking back the coup in Guinea' African Centre for Strategic Studies 17 September 2021, https://africacenter.org/spotlight/guinea-coup-has-left-west-africas-regional-body-with-limited-options-but-there-are-some/ (accessed 3 March 2025).

13 'Burkina Faso: From popular uprising to military coup' *France 24* 25 January 2022, https://www.france24.com/en/live-news/20220125-burkina-faso-from-popular-uprising-to-military-coup (accessed 3 March 2024); L Brooke-Holland 'Burkina Faso: Second coup of 2022' UK House of Commons Library, https://commonslibrary.parliament.uk/research-briefings/cbp-9633/ (accessed 3 March 2025).

14 See Congressional Research Service 'An "epidemic of coups" in Africa? Issues for Congress' *CRS Insight* 11 February 2022, https://crsreports.congress.gov/product/pdf/IN/IN11854 (accessed 1 March 2025); E Akinwotu 'Contagious coups: What is fuelling military take-overs across West Africa' *The Guardian* 7 February 2022, https://www.theguardian.com/world/2022/feb/07/contagious-coups-what-is-fuelling-military-takeovers-across-west-africa (accessed 3 March 2025); T Lowe 'Bracing against the tide: ECOWAS and recent military coups in West Africa' *Yale Review of International Studies* March 2022, http://yris.yira.org/comments/africa-comments/5657 (accessed 3 March 2025). There were two *coup* incidents in Guinea Bissau in August 2008 and December 2012 and a *coup* in Niger Republic in February 2010. See H Ben Barka & M Ncube 'Political fragility in Africa: Are military *coups d'etat* a never-ending phenomenon?' African Development Bank, Occasional Paper 1 (September 2012), https://www.afdb.org/sites/default/files/documents/publications/economic_brief_-_political_fragility_in_africa_are_military_coups_detat_a_never_ending_phenomenon.pdf (accessed 1 March 2025).

Mauritania) in the half century from 1 January 1955 to 31 December 2004, with Cape Verde being the only country in the region to not have reported a significant *coup* incident.[15] This list excludes the more problematic category of attempted *coups*,[16] the most recent claims in the sub-region of which were reported in Guinea-Bissau,[17] The Gambia[18] and in Sierra Leone.[19]

This study grapples with this problem by exploring the normative scope of the UCG through an examination of the institutional practice of Africa's regional institutions. As a convenience of usage, it employs the word '*coup'* as illustrative shorthand for the UCG. In reality, the two are not necessarily coterminous. A *coup* is a form of a UCG but, as will be evident later, it does not necessarily exhaust the concept.

The persistence of the UCG in Africa, despite the appearance of an established norm against it, calls for a reappraisal of the norm that seeks its prohibition. The AU Peace and Security Council had in fact suggested the need for such a reappraisal in 2021.[20] Inspired by that, this study examines the evolution and continuing relevance of the norm against UCGs in Africa. It argues that this norm emerged in response to a particular history of interminable political rulership and denial of effective rights of participation around the continent and that it is a composite norm that embodies three propositions, not one, including norms concerning credible elections and legitimate access to political power; on executive term limits; and against unconstitutional changes to legitimate governments. An

15 P McGowan 'Coups and conflict in West Africa, 1955-2004' (2006) 32 *Armed Forces and Society* 236. Dersso counts 91 successful *coups* in Africa from 1952 to 2014; S Dersso 'Unconstitutional changes of government and unconstitutional practices in Africa' World Peace Foundation, Occasional Paper 2, https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf (accessed 4 March 2025). Powell and Clyne contest aspects of this count; see Powell & Clyne (n 8) 53.

16 See L Abolade 'Africa records 21 coup attempts in eight years' International Centre for Investigative Reporting (ICIR) 4 February 2022, https://www.icirnigeria.org/africa-records-21-coup-attempts-in-eight-years/ (accessed 4 March 2025). For the problems with defining and computing attempted *coups*, see Powell & Thyne (n 8) 253.

17 See E Akinwotu 'Guinea-Bissau under control, President says, after feared coup attempt' *The Guardian* 1 February 2022, https://www.theguardian.com/world/2022/feb/01/fears-of-guinea-bissau-coup-attempt-amid-gunfire-in-capital (accessed 3 March 2025).

18 'Gambia foils alleged coup attempt, arrests four soldiers' *Reuters* 21 December 2022, https://www.reuters.com/world/africa/gambia-foils-military-coup-arrests-four-soldiers-govt-2022-12-21/ (accessed 3 March 2025).

19 'Sierra Leone attacks were a failed coup attempt, officials say' *AlJazeera* 28 November 2023, https://perma.cc/2L8D-BCUA (accessed 4 March 2025).

20 AU Peace and Security Council Communiqué PSC/PR/COMM.1/1062 (n 5) para 10. See also AU Peace and Security Council Communiqué PSC/PR/COMM.(1030(2021), which originally requested the AU Commission to 'undertake a comprehensive and objective analysis focusing on the root causes and impact of the unconstitutional change of government arising from non-consensual and/or politically manipulated democratic processes'.

investigation of its evolution, it is argued, will show that far from a shield for those in power, which it appears to have become, the norm against UCG evolved from a concern for the protection of the right to participation in government in the African inter-governmental and human rights system.

In effect, the norm against UCG evolved as part of an implicit bargain that created guardrails for political contestation on the understanding that those who seek political office would abide by the rules governing access to power and not convert incumbency into interminable rulership. However, the scope of the norm appears to be at odds with the narrative around it. This has fostered perceptions of dissonance between intimations of a rule, on the one hand, and folklore around it, on the other, turning the norm into a tool for the protection of what Omorogbe has called 'a club of incumbents'.[21] In particular, it would appear that those dimensions of the norm concerning both term limits and credible elections have suffered retrenchment in favour of turning the norm against UCGs, arguably into a shield for interminable rule.[22] Nantulya observes that one consequence of this tendency has been to turn elections in Africa into 'perfunctory formalities' with mostly predetermined outcomes in many places.[23] In reaction to this trend, Afrobarometer's most recent surveys have found a co-incidence of statistically significant fall of confidence in elections, rising levels of openness to military rule (as the only effective tool to remove indispensable rulers) and even higher levels of support for presidential term limits.[24]

This situation calls for an urgent re-examination of the normative package as well as a strengthening of its regional implementation.[25] The norm on UCGs itself does not make sense outside the context that necessitated its evolution. The argument in this study will seek an equal balance between narrative reconstruction of the norm and an exploration of its conceptual scope. Accordingly, it begins with an exploration of the scope and meaning of the UCG and the norm

21 See E Omorogbe 'A club of incumbents? The African Union and *coups d'état*' (2011) 44 *Vanderbilt Journal of International Law* 123.

22 T Ginsburg, AK Abebe & R Wilson 'Constitutional amendment and term limit evasion in Africa' in Dixon and others (n 7) 49.

23 P Nantulya 'Regime capture of the courts in Africa' *Africa Centre for Strategic Studies Blog* 27 February 2024, https://africacenter.org/spotlight/regime-capture-courts-africa/ (accessed 2 March 2025).

24 Afrobarometer, 'Africans want more democracy but their leaders still aren't listening' Afrobarometer Policy Paper 25 January 2024, https://www.afrobarometer.org/wp-content/uploads/2024/01/PP85-PAP20-Africans-want-more-democracy-but-leaders-arent-listening-Afrobarometer-Pan-Africa-Profile-18jan23.pdf (accessed 2 March 2025).

25 EY Omorogbe 'Introductory note to Communiqués 1001 (2021), 1030 (2021) and 1062 (2022) regarding the re-emergence of coups d'etat in West Africa (African Union)' 61 ILM 980.

against it. As part of this, it also examines the subject of popular uprisings, illustrating an important conceptual distinction between unconstitutional and extra-constitutional changes in government. Thereafter, it considers the context that necessitated a continental response to UCGs in Africa. Before concluding, it highlights some of the challenges associated with the implementation and application of the regional norm against UCGs in Africa.

This study is informed by a concern that a narrow focus on the supposed norm against UCGs in Africa without equal attention to the norms against executive tenure indeterminacy and on credible elections, creates an increased risk of what has variously been called 'the totalitarian type of democracy'[26] or, at best, of 'competitive authoritarianism',[27] both of which endanger government founded on popular legitimacy and pose adverse consequences for development in Africa. It is also inspired by a realisation of the normative and practical significance of participation in government as a legal and civic entitlement that anchors the legitimacy of political power, whose frustration, as the AU has acknowledged,[28] is conducive to a contagion of constitutional instability which the continent cannot afford.

## 2 An elusive concept: The unconstitutional change of government

Although supposedly at the heart of a path-breaking norm of continental significance, Africa's institutions left the meaning of the UCG undefined, ostensibly allowing it to evolve from the practice of African states. The UCG in Africa was for a long time mostly associated with the capture of political power by soldiers outside the bounds of constitutional channels. This kind of event was classically called a *coup d'état*, and Welch famously said of it that it was a 'clear event, easy to date and (if successful) possible to document'.[29] Powell and Clyne dismiss any such hope of clarity in the definition or understanding of *coups* and UCGs as 'too optimistic'.[30] This elusiveness of the concept of the UCG may explain the challenge that African institutions have had in operationalising an effective continental norm concerning it.

26 JL Talmon *The origins of totalitarian democracy* (1961) 1.
27 S Levitsky & L Way 'The new competitive authoritarianism' (2020) 31 *Journal of Democracy* 51.
28 See n 5.
29 C Welch *Soldiers and state in Africa* (1970) 1.
30 Powell & Clyne (n 8) 249.

The African Union High Level Panel on Egypt acknowledged this in 2014 when it complained about 'difficulties encountered in applying the AU norms on unconstitutional changes of government'.[31] A year earlier, on the fiftieth anniversary of the establishment of the OAU in 2013, the AU had adopted a 'Solemn Declaration', which reaffirmed its commitment against UCGs, but also 'recognise[d] the right of our people to peacefully express their will against oppressive systems'.[32] This affirmation left it unclear what cognitive or evidentiary thresholds were required to be crossed in order for a system to be recognised as oppressive for this purpose; how such peaceful expression of the will of the people against an oppressive system was to be treated, or what 'peaceful' indeed meant in this context. It is, therefore, essential to unbundle the elements of the UCG as a concept.

## 2.1 Conceptual elements of the unconstitutional change of government

Two dimensions of the norm concerning UCG specifically are worth distinguishing here. One is how to access legitimate power, and the other is how to end an incumbent's term in office. In chronological terms, the latter precedes the former by creating the vacancy to be filled with access to power. A *coup d'état* brings down a government with a view to replacing it, but it is not always that the deposition of a government is procured by people who set out with a desire or plan to usurp it. The AU has established the popular will through elections as the preferred basis for access to or retention of power,[33] but seems ambivalent on the question of whether elections are the sole means for bringing the legitimate exercise of political power to an end. In this connection, the AU's own Africa Governance Report 2024 complains about 'situations of "popular uprisings" that lead to UCGs', implying that there may be popular uprisings resulting in the overthrow of governments which may not, however, be described as UCGs.[34] This leads to some uncertainty as to the scope of the prohibition against UCG in the African inter-state system.

31 African Union Peace and Security Council, Final Report of the African Union High-Level Panel for Egypt, SC/AHG/4 (CDXVI) 31 (2014).

32 African Union 50th Anniversary Solemn Declaration, adopted by the 21st ordinary session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 26 May 2013 para F(ii), https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf (accessed 4 March 2025).

33 African Charter on Democracy, Elections and Governance, adopted in Addis Ababa, Ethiopia, on 30 January 2007, entered into force on 15 February 2012 art 3(2), https://au.int/en/treaties/african-charter-democracy-elections-and-governance (accessed 3 March 2025) (African Democracy Charter); see also African Charter on Human and Peoples' Rights, adopted 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 art 13 (African Charter).

34 ACG-23 (n 10) para 68.

Three constitutive elements of the norm concerning UCGs are discernible. The first dimension concerns the legitimate assumption of power. In the AU, it is now clear that the preferred and primary mechanism of acquiring legitimate power is through credible elections. The Preamble to the African Charter on Democracy, Elections and Governance (African Democracy Charter) declares the explicit goal of entrenching 'in the continent a political culture of change of power based on the holding of regular, free, fair and transparent elections'.[35] The Charter also contains extensive provisions concerning the standards of elections on the continent and extending to the observation of elections by the AU.[36] Separately, the Constitutive Act of the African Union prioritises, among other things, 'respect for democratic principles, human rights, the rule of law and good governance',[37] and condemns and rejects unconstitutional changes of governments.[38] In particular, article 30 of the Constitutive Act makes it clear that 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.[39] These commitments have been described as both 'quite far reaching and long overdue',[40] crystallising decades of normative evolution in Africa concerning norms for access to legitimate power.

Second, as will be shown below, there is within the composite of the norm against UCGs a prohibition against executive tenure indeterminacy. Pointing to the intensity and frequency of the removal of term limits around the continent for illustration, Omorogbe acknowledges that 'one key driver of coups is the difficulty of democratic change in Africa'.[41] Siegle and Cook record a correlation between the lifting of term limits and the return of UCGs in Africa, noting that in nearly two decades, from 2002 to 2020, incumbents in 18 African states lifted or altered term limits 24 times.[42] In approximately the same period, the continent recorded an escalation in UCGs, with 21 successful *coups*.[43] Underscoring the normative implications of this correlation, the AU has clarified

35 Preamble, para 7 African Democracy Charter (n 33).
36 Arts 17-21 African Democracy Charter.
37 Art 4(m) Constitutive Act (n 7).
38 Art 4(p) Constitutive Act (n 7).
39 Art 30 Constitutive Act (n 7).
40 CA Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 14.
41 Omorogbe (n 25).
42 J Siegle & C Cook 'Circumvention of term limits weakens governance in Africa' Africa Centre for Strategic Studies, https://africacenter.org/spotlight/circumvention-of-term-limits-weakens-governance-in-africa/ (accessed 5 March 2025).
43 J Powell, A Reynolds & M Chacha 'A new coup era for Africa?' *Accord Conflict Trends* 15 March 2022, https://www.accord.org.za/conflict-trends/a-new-coup-era-for-africa/ (accessed 3 March 2025).

that 'constitutions shall not be manipulated in order to hold on to power against the will of the people'.[44] The AU Peace and Security Council implicitly acknowledged this as a problem when it requested the AU Commission, following a military *coup* in Guinea in 2020, to investigate the 'root causes and impact of the unconstitutional change of government arising from non-consensual and/or politically manipulated democratic processes'.[45]

The idea that a politically manipulated process can nevertheless be democratic as implied in this formulation lends credence to the suggestion that the AU remains uncertain as to the exact scope and meaning of UCG. It is even less clear when what is manipulated is not the constitution as such but institutional processes thereunder, such as the judicial process for the certification of eligibility of an incumbent for an election. In *EACSOF v Attorney-General of Burundi* the Appellate Chamber of the East African Court of Justice considered the case initiated against the tenure elongation by Burundi's President, Pierre Nkurunziza. On 5 May 2015 Burundi's Constitutional Court had dismissed an application by some senators seeking a declaration that a third term by President Nkurunziza was incompatible with both Burundi's Constitution and the Arusha Peace Accord on which it was based and a violation, therefore, of the rule of law. The First Instance Chamber of the East African Court of Appeal dismissed the case on the jurisdictional ground that the Court did not sit on appeal against decisions of national courts. On appeal, the Appellate Chamber affirmed jurisdiction and remitted the case to the First Instance Chamber for determination on its merits.[46] In December 2019 the First Instance Chamber again dismissed the case on the merits, a decision which triggered another appeal. While the case was pending on appeal, President Nkurunziza died in June 2020. In its decision in November 2021, the Appellate Chamber determined that the remedies sought had become moot in light of the death of President Nkurunziza and the succession that occurred shortly thereafter. Crucially, however, it held that the decision by the Constitutional Court offering him a third term in 2015 violated

44 African Union 'Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa', adopted in Ezulwini, Kingdom of Swaziland, 17-19 December 2009 para 4(vi), https://www.peaceau.org/uploads/ezulwini-framework-english.pdf (accessed 3 March 2025).

45 AU Peace and Security Council Communiqué (n 20).

46 *EACSOF v Attorney-General, Burundi* Appeal 4 of 2016, judgment of the East African Court of Justice, Appellate Division 24 May 2018, https://africanlii.org/sites/default/files/judgment/east-african-court-justice/1970-eacj-48/Uann%20Mokone%20-%20EA%20Civil%20Society%20Organizations%20Forum%20v%20AGof%20Republic%20of%20Burundi%20Appeal-no-4-of-2016.pdf (accessed 28 March 2025).

the East African Community Treaty.[47] This decision suggests that the question of tenure extension could increasingly become a matter for review by the judicial organs of regional institutions in Africa.

When the mandate to rule has been acquired legitimately through elections and the person holding it substantially respects applicable guardrails against tenure indeterminacy, normative and logical coherence dictates that the third element of the norm against UCG in Africa would prohibit the unconstitutional removal of that person during the pendency of their tenure. This third element builds on the first two elements and is contingent on both. The practice of the AU and African states, however, has mostly valorised this third element but without acknowledging that it is contingent on the first two. In other words, the AU and African states and institutions have used the norm against UCGs in Africa to protect incumbency with little care for how power is retained. Yet, it is the case that a norm against UCGs would be unnecessary and self-defeating if it existed to protect power that itself was procured by force of arms or in favour of elections that are perennially manipulated to keep a despot in power. Such arrangements would fall into the class of what the Peace and Security Council of the AU has described as 'non-consensual and/or politically manipulated democratic processes'.[48] Where there is a failure to firmly police the first two elements of this norm, therefore, the third element breaks down. This also implies that power originally legitimately acquired could itself subsequently cease to be so exercised if the foundation in the contingent legitimacy of elections is broken.[49]

## 2.2 Non-interference and the beginnings of a norm against unconstitutional change of government in Africa

The emergence of the UCG as the dominant method for changing or instituting government in the immediate aftermath of decolonisation in Africa took place in the shadows of a doctrinal disposition in regionalism in Africa that valorised self-regarding sovereignty over democratic pluralism. This history deserves attention. What is now called UCG has manifested itself in Africa mostly in the form of the *coup d'état* and the continent has experienced a lot of it. At the beginning of 2022, it was said that 'of 486 attempted or successful *coups* carried out around the world since 1950, Africa has seen 214,

47 *EACSOF v Attorney-General of Burundi & Others* Appeal 1 of 2020 [2021] EACJ 34 para 97.
48 AU Peace and Security Council Communiqué (n 20).
49 T Flores & I Nooruddin *Elections in hard times: Building stronger democracies in the 21st century* (2016) 81ff.

the most of any region, with 106 of them successful'.[50] This means that at least 108 were unsuccessful. The continent accounted for 44,03 per cent of the global epidemiology of *coups*, including 43,8 per cent of the successful ones and 44,26 per cent of the unsuccessful ones. While Sudan accounts for the highest number of attempts (both successful and unsuccessful), with 18, Burkina Faso, with eight successful *coups* out of nine attempts, accounts for the highest success rate.[51] Of the top ten countries in Africa in the league table of *coups*, only three – Comoros with nine (four successful); Burundi with 11 (five successful); and Sudan with 17 (six successful) – are not in West Africa. Of the remainder, Ghana and Sierra Leone have had ten *coup* attempts each, resulting in five changes of government in each; Benin, Guinea-Bissau, Mali and Nigeria have each had eight *coup* attempts with success rates of six, four, five and six respectively. Togo has reported three successful *coups* from seven attempts.[52]

The above trend is evidence for the proposition that in the immediate aftermath of the age of independence in Africa in the decade of the 1960s, a contagion of constitutional instability appears to have beset the continent with both domestic and regional dimensions.[53] The result was that the egalitarian promise of independence and liberation around the continent was quickly followed by what has been described as a 'proliferation of authoritarian regimes in newly independent African countries',[54] which institutionalised in many countries the phenomenon of interminable or life presidencies.[55] Regionally, the countries of post-colonial Africa quickly retreated behind a curtain of domestic jurisdiction, which was crystallised in the prohibition in the Charter of the Organisation of African Unity against 'interference in the internal affairs of states'.[56] For much of the first three decades of post-colonial Africa, two complementary principles defined the continent's attitude to *coups*. First, the question of how a government came to power was regarded as essentially within the

50 M Duzor & B Williamson 'By the numbers: Coups in Africa' *VOA News* 2 February 2022, https://projects.voanews.com/african-coups/ (accessed 12 March 2025); Powell & Thyne (n 8) 249; Sudan's latest attempted *coup* occurred on or about 18 April 2024.
51 Duzor & Williamson (n 50).
52 As above.
53 A Adepoju 'The dimension of the refugee problem in Africa' (1982) 81 *African Affairs* 21-22.
54 B Ibhawoh *Human rights in Africa: New approaches to African history* (2018) 175.
55 SKB Asante 'Nation building and human rights in emergent African nations' (1969) 2 *Cornell International Law Journal* 47; V Nmehielle *The African human rights system: Its laws, practice, and institutions* (2001) 17-29; Y Akinseye-George 'New trends in African human rights law: Prospects of an African Court of Human Rights' (2002) 10 *University of Miami International and Comparative Law Review* 159.
56 Charter of the Organisation of African Unity, OAU, 25 May 1963, 479 UNTS 39 (OAU Charter) art III(2).

domestic jurisdiction of African states and not a matter for external or continental oversight.[57] Second, *coups* or UCGs were said to be 'the most frequently attempted method of changing government' and, for the most part, the most successful.[58]

When 15 member states of the OAU created ECOWAS in 1975, they effectively set up a pioneering African model of regional integration as an exception to the rule in the OAU Charter on sovereignty and non-interference.[59] The only question became how deep or extensive the scope of this exception would be to the habits of somewhat anarchical sovereignty then existing within the OAU. It is ironic that the founding treaty of ECOWAS was the first breach in the armour of the OAU's absolutism on domestic jurisdiction, ultimately inspiring the developments that led to the emergence of the prohibition against UCG in Africa, because seven of the 15 original signatories to the treaty were military rulers.[60] The second chink in this armour was the adoption in 1981 of the African Charter on Human and Peoples' Rights (African Charter) finalised in Banjul, The Gambia.[61]

The onset of the Liberian civil war, almost contemporaneously with the collapse of the Berlin Wall in 1989, eventually triggered an overdue re-evaluation of the doctrinal foundations of Africa's

57 Omorogbe (n 25).

58 F Ikome *Good coups and bad coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa* (2007) 9.

59 Treaty Establishing the Economic Community of West African States (ECOWAS), 28 May 28 1975; UN Treaty Series 1010 17; reprinted in 14 ILM 1200 (1975). The member states at inception were Benin Republic, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde joined the Community in 1976 while Mauritania denounced the treaty, leading it to leave the Community in 2000. For a history of the formation of ECOWAS, see https://ecowas.int/history-2/#:~:text=In%201976%2C%20Cape%20Verde%2C%20one,2000%2C%20Mauritania%20withdrew%20its%20membership (accessed 3 March 2025).

60 Of the 15 original signatories to the ECOWAS Treaty in 1975, Lt-Col Mathieu Kérékou (Benin); Gen Ignatius Acheampong (Ghana, represented by Lt-Col RJA Falli, Minister for Economic Planning); Col Moussa Traoré (Mali, represented by Major Baba Diarra, Vice-Chairperson of the Military Committee of National Liberation); Lt-Col Seyni Kountché (Niger); Gen Yakubu Gowon (Nigeria); Gen Gnassingbe Eyadema (Togo); and Gen Aboubakar Sangoulé Lamizana (Upper Volta, now Burkina Faso) were ruled by the military. Of the remainder, Presidents Dawda Jawara (The Gambia); Sekou Toure (Guinea); Luiz Cabral (Guinea Bissau); William Tolbert (Liberia); Moktar Ould Daddah (Mauritania); and Siaka Stevens (Sierra Leone) were all succeeded by soldiers. President Felix Houphöuet-Boigny of Côte d'Ivoire was the only President as such among the original signatories who was neither a soldier nor directly succeeded by one. Abdou Diouf who represented Senegal at the adoption of the treaty was then Prime Minister to President Leopold Senghor, whom he later succeeded as President on 1 April 1981.

61 African Charter (n 33). Fourteen years after the adoption of the African Charter, the government that hosted its negotiation was overthrown in a *coup* in April 1994. See A Saine 'The *coup d'état* in The Gambia, 1994: The end of the First Republic' (1996) 23 *Armed Forces and Society* 97.

inter-state system. At its summit in Addis-Ababa, Ethiopia, in July 1990, the Assembly of Heads of State and Government of the OAU adopted the Declaration of the Assembly of Heads of State and Government of the Organisation of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, in which they declared themselves to be 'fully aware that in order to facilitate this process of socio-economic transformation and integration, it is necessary to promote popular participation of our peoples in the processes of government and development',[62] committing themselves to both democratisation and 'to the consolidation of democratic institutions in our countries'.[63]

Very importantly, the heads also affirmed that 'democracy and development should go together and should be mutually reinforcing'.[64] This represented a major shift in the doctrines of the OAU and its member states. In the same year, ECOWAS established a plurinational Ceasefire Monitoring Group (ECOMOG) to intervene in Liberia, marking the first time a regional institution in Africa would undertake intervention in this way.[65] One year later, the Assembly of Heads of State and Government of ECOWAS followed suite with the adoption of the Declaration of Political Principles, in which they undertook, among other things, to 'respect and promote human rights and fundamental freedoms in all their plentitude including in particular freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed',[66] and to 'strive to encourage and promote in each our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage'.[67]

Contemporaneously, in 1991, Uganda's President Yoweri Museveni, who was then the Chairperson of the Assembly of Heads of State and Government of the OAU, together with Nigeria's then former military head of state, Olusegun Obasanjo, co-convened a high-level Conference on Security, Stability, Development and Co-Operation in Africa (CSSDCA), resulting in the Kampala Document, which declared that '[t]here should be periodic renewal of the mandate of political leaders. At the same time, the tenure of elected

62 AHG/Decl.1 (XXVI) para 10.
63 As above.
64 As above.
65 The ECOMOG became a standing regional mechanism under the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999) art 17.
66 A/DCL.1/7/91) adopted in Abuja, Nigeria, 4-6 July 1991 paras 4-6.
67 As above.

leaders in various branches of government should be constitutionally limited to a given number of years.'[68]

A mere four years following the Kampala Document of the CSSDCA, up to '37 African states had revised their constitutions and all but four of them inserted presidential term limits'.[69] This narrative reinforces the conclusion that the norm against UCG in Africa evolved as part of a composite continental deal to address instability traceable to authoritarian rule and its manifestation in the phenomenon of the interminable or life presidency. Any fruitful examination of pathologies of governance and development in Africa must take account of the two dimensions to the issue: UCGs, on the one hand, and the phenomenon of the interminable presidency, on the other.

Siegle and Cook point out that a 'lack of effective term limits has resulted in Africa having 10 leaders who have ruled for over 20 years and two family dynasties that have been in power for more than 50 years'.[70] The sense of correlation between authoritarian or interminable rule, on the one hand, and the phenomenon of the UCG, on the other, appears inescapable. The implication of this is that a focus on UCGs may be fruitless without an effort to effectively address interminable rule. They are interdependent, and it has in fact been argued that the manipulation of national constitutions to extend presidential tenure is itself a UCG.[71] Against this background, Manirakiza distinguishes between military and 'constitutional' *coups*, with the latter referring to the manipulation of constitutions for the purpose of extending presidential tenure.[72]

### 2.3 Emergence of a prohibition on unconstitutional change of government as continental norm

At the beginning of the 1990s, therefore, it appeared that a broad continental consensus was emerging with three elements. The first was the recognition of an organic nexus between democracy and

68 'Africa moves to launch a conference on security, stability, development and cooperation in Africa (CSSDCA)', Kampala Document 5, http://www.au2002.gov.za/docs/key_oau/cssdca.pdf (accessed 4 March 2024).

69 CA Odinkalu & A Osori *Too good to die: Third term and the myth of the indispensable man in Africa* (2018) 95; A LeBas 'Term limits and beyond: Africa's democratic hurdles' *Current History* May 2016 170.

70 Siegle & Cook (n 42); see also T Ginsburg, AK Abebe & R Wilson 'Constitutional amendment and term limit evasion in Africa' in Dixon and others (n 7) 40.

71 M Wiebusch & C Murray 'Presidential term limits and the African Union' (2019) 63 *Journal of African Law* 131.

72 P Manirakiza 'Insecurity implications of unconstitutional changes of government in Africa: From military to constitutional coups' (2016) 17 *Journal of Military and Strategic Studies* 86.

development. The second was a recognition that government had to be founded on popular will grounded broadly in the effective exercise of the right to democratic participation. The third element of this consensus was an affirmation of a commitment to presidential term limits. If they held firm, these elements together could disincentivise the tendency towards *coups* around the continent and potentially outlaw them. However, there was still some way to go before this outcome could be realised or guaranteed.

By 1995, the OAU had evolved the outlines of a norm against UCG but failed to assign any meaning thereto. These norms were first deployed by the OAU in response to the 1997 *coup d'état* in the West African state of Sierra Leone.[73] In its Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, the member states of the OAU

> agreed on the following definition of situations that could be considered as situations of unconstitutional change of government:
>
> (i) military *coup d'état* against a democratically elected government;
>
> (ii) intervention by mercenaries to replace a democratically elected government;
>
> (iii) replacement of democratically elected governments by armed dissident groups and rebel movements;
>
> (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.[74]

This definition was a partial adoption of a much wider-ranging recommendation by a Sub-Committee of the Central Organ (of the OAU Conflict Resolution Mechanism), which was constituted in 1995 and reported in 2000. The typologies of unconstitutional change of government recommended by the Sub-Committee, included, in addition to the four adopted eventually by the Assembly:[75]

> (a) the refusal by a government to call for general elections at the end of its term of office;
>
> (b) any manipulation of the Constitution aimed at preventing a democratic change of government;

73 Dersso (n 19).
74 AHG/Decl.5(XXXVI), adopted by the 36th ordinary session of the Assembly of Heads of State and Government of the OAU, Lomé, Togo, 2000.
75 See OAU 'Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa' 25 (2000). Also 'Report of the OAU Central Organ Sub-Committee on the Preparation of a Blueprint for Dealing Unconstitutional Changes of Government in Africa', Sub-Cttee/Central Sub-Cttee/Central Organ/Rpt. (III) 1996.

(c) any form of election rigging and electoral malpractice, duly established by the OAU or ascertained by an independent and credible body established for that purpose;

(d) systematic and persistent violation of the common values and principles of democratic governance referred to above; and

(e) any other form of unconstitutional change as may be defined by the OAU policy.

The omission of these from the initial definition by the OAU implied, first, that the concept of the UCG was contested and, second, that the organisation perhaps agreed to the lowest common denominator among its members. On the margins of the Lomé Summit of the OAU at the turn of the millennium, a consensus position was issued in the form of the Lomé Solemn Declaration on the CSSDCA, based on the principles in the Kampala Document from nearly one decade earlier in 1991, wherein the African Heads of State merely undertook to 'adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies' and to 'respect their national constitutions and adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies'.[76] This was an implicit climb-down from the high ambitions of the Kampala Document and a clear claw-back on the elaborations thereafter.

## 2.4 The African Commission on Human and Peoples' Rights and the evolution of the norm against unconstitutional changes in government in Africa

The African Commission on Human and Peoples' Rights (African Commission) played a defining role in underscoring the urgency of a norm against UCGs in Africa, clarifying essential aspects of its scope and calling attention to its relationship to the right to participation in government in article 13 of the African Charter. In particular, the African Commission established that the UCG had ceased to be a matter essentially within the domestic jurisdiction of affected states and had become a matter of regional and continental salience. Three cases decided by the Commission deserve attention in this respect. The assumption of jurisdiction over these cases by the Commission was an implicit indication that the age of tolerance of *coups* by continental institutions was at an end.

76 African Union, CSSDCA Solemn Declaration, para 11(a), AHG/Decl 4 (XXXVI), http://www.peaceau.org/uploads/ahg-decl-4-xxxvi-e.pdf (accessed 4 March 2025).

After one decade of military rule, the soldiers in Nigeria on 12 June 1993 organised a presidential election to return the country to civil rule. Ten days after the vote, with the results about to be declared, the military regime casually issued an announcement nullifying the ballot. They also precluded any legal challenge to that decision domestically. A group of Nigerian advocacy organisations approached the African Commission, claiming that the nullification of the election violated the African Charter. The African Commission upheld their claims and held that the nullification by Nigeria's military violated the rights to participation and self-determination respectively in articles 13 and 20(1) of the African Charter.[77] This established an important principle about upholding the sanctity of elections.

Four years after the developments in Nigeria, the military in 1997 overthrew the elected civilian government of Burundi. To bring pressure on the usurper regime, the neighbouring states of East and Central Africa decided to impose a regional blockade on Burundi, a land-locked country. The *Association pour la Sauvegarde de la Paix au Burundi*, a non-governmental organisation, initiated proceedings ultimately to the African Commission against the blockading neighbours, claiming various violations of the African Charter. If they succeeded, it would have reinforced the previous doctrine that regarded *coups* as matters essentially within the domestic jurisdiction of affected countries. Departing from this tendency, however, the African Commission affirmed the need for regional action against UCGs in Africa and upheld the regional blockade implemented by Burundi's neighbours against the usurper regime as 'legitimate interventions in international law'.[78] The Commission explained that 'the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of the peace in Burundi and the region'.[79] In effect, this decision explicitly confirmed that the UCG was no longer a matter essentially within the domestic jurisdiction of the affected state and had become a legitimate matter of regional attention.

Following his ouster from power by soldiers in 1994, The Gambia's former President, Dauda Jawara, initiated proceedings before the African Commission questioning the powers of the military government to take certain decisions including the exclusion of members of his government from rights of participation in

77 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) 198 paras 50-53.
78 *Association pour la Sauvegarde de la Paix* (n 4) para 70.
79 *Association pour la Sauvegarde de la Paix* (n 4) para 74.

government. In deciding on this complaint, the Commission for the first time addressed the question of the compatibility of UCGs with the African Charter, declaring that the military *coup* in The Gambia in 1994 was 'a grave violation of the right of Gambian people to freely choose their government as entrenched in article 20(1) of the Charter'.[80] In principle, the overthrow of Dauda Jawara by the military was a *coup* but it was difficult to see how the people of The Gambia could lawfully bring an end to his tenure. Dauda Jawara's presidency began in April 1970. At the time of his ouster in July 1994, he had been in power for over two decades. In determining this communication in the way it did, the African Commission focused its condemnation against military rule as a violation of the right to participation in government, leaving aside questions as to how power was retained or for how long.

## 2.5 A millennial norm

By the turn of the millennium, therefore, a combination of diplomatic and jurisprudential developments had crystallised the need for a norm against UCG in the OAU as well as rationales for it, but the full scope of this norm was far from entirely clear. Over time, different elements of this norm were discernible addressing three related dimensions, namely, whether the question of the mandate to govern essentially is within the domestic jurisdiction of the state affected; how to establish legitimate government; and how to preclude government from overstaying its legitimacy.

With reference to the first, the African Commission established in *Association pour la Sauvegarde de la Paix au Burundi* that the UCG was a fit subject of regional oversight and action. Concerning the second, the African Commission was able to establish in *Jawara* that the continent would no longer tolerate the phenomenon of arbitrary termination and replacement of legitimate government by soldiers, mercenaries or armed dissidents. The Nigerian cases laid the foundations for addressing the sanctity of elections and the obligation of incumbents to respect the will of the people expressed through them. Concerning the third, however, there appears to be a failure of clear direction from the continental institutions. These institutions subsequently established that a government could no longer be allowed to stay in power after losing elections.[81] The African

80 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 73, https://achpr.au.int/en/decisions-communications/sir-dawda-k-jawara-gambia-14795-14996 (accessed 4 March 2025).

81 See X Rice 'Conflict looms over Ivory Coast while poll-loser, Gbagbo, refuses to cede control' *The Guardian* 6 December 2010, https://www.theguardian.com/

Democracy Charter promulgates these into a definition of UCGs, together with a prohibition against 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'.[82] The same Charter also seeks to prohibit the perpetrators of UCG from participating in elections for the restoration of democratic form of government and criminalises the act of perpetrating UCG.[83]

In 2014 the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which formally creates the crime of UCG in Africa to mean 'committing or ordering to be committed' acts with the aim of illegally accessing or maintaining power through:[84]

> (a) a putsch or *coup d'état* against a democratically elected government;
>
> (b) an intervention by mercenaries to replace a democratically elected government;
>
> (c) any replacement of a democratically elected government by the use of armed dissidents or rebels through political assassination;
>
> (d) any refusal by an incumbent government to relinquish power to the winning party or a candidate after free, fair and regular elections;
>
> (e) any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government or is inconsistent with the constitution;

world/2010/dec/06/ivory-coast-election-stalemate-gbagbo (accessed 3 May 2024); P Rao 'Gambia's democracy survives political turbulence' *Africa Renewal* May-July 2017, https://www.un.org/africarenewal/magazine/may-july-2017/gambia%E2%80%99s-democracy-survives-political-turbulence (accessed 3 May 2024).

82 Art 23(5) African Democracy Charter, https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf (accessed 4 March 2024).

83 Arts 25(4)-(5) African Democracy Charter. In Egypt, however, the perpetrators of a UCG were allowed to contest in transitional elections that they supervised in May 2014, thereby conferring electoral legitimacy on a *coup* that overthrew a government that itself had democratic legitimacy. See 'Sisi elected Egypt President by landslide' *Aljazeera* 30 May 2014, https://www.aljazeera.com/news/2014/5/30/sisi-elected-egypt-president-by-landslide (accessed 3 March 2024).

84 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 7 June 2014 art 14, https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 4 March 2025). This provision introduces the crime of UCG as art 28A(1)(4) of the Protocol to what will be known as the African Court of Justice and Human and Peoples' Rights.

(f) any substantial modification of the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.[85]

There are legitimate questions as to whether these provisions provide sufficient clarity to define the elements of a crime, but an answer to those questions must await a time when the court has the opportunity to determine those issues. For now, however, three points may be made. First, it seems quite clear that an institutional consensus was crystallised around the need for and existence of a norm prohibiting UCGs in Africa. Second, former judge president of the ECOWAS Court of Justice, Edward Amoako, calls attention to the multiple dimensions of the norm concerning UCGs in Africa 'such as zero tolerance for unconstitutional change of government, abolition of tenure elongation beyond the two terms of office, the conduct of free, fair and credible elections, as well as the scrupulous adherence to the separation of powers'.[86] Third, that said, the scope of this norm remains far from fully evolved. This last point is demonstrated by the uncertainties as to whether the concept of 'popular uprising' is or is not part of the norm against UCGs.

## 3 'Popular uprising': An extra-constitutional phenomenon

The uprisings in the countries of North Africa, now widely described as the Arab Spring, presented the AU with an opportunity to address an issue that was not before foreseen in the annals of the organisation.[87] Since 2011, the continent has witnessed at least seven situations where widespread protests eventually led to the ouster of a government.[88] At the AU Summit in July 2011, then Chairperson of the African Union Commission, Jean Ping, characterised these events as 'popular uprisings',[89] although some others persisted in describing the events in Tunisia leading to the sack of the regime of President Zine Abdine Ben Ali in 2011 as a *coup d'état*.[90] The Africa Governance Report 2024 notes 'a trend towards popular uprisings

85 Art. 28E Protocol (n 84).
86 *ECOWAS Court Blog* (n 5).
87 See J Shola Omotosho 'Legitimacy crisis and "popular uprisings" in North Africa' (2012) 36 *Strategic Analysis* 713.
88 The affected countries include Algeria, Burkina Faso, Egypt, Libya, Tunisia, Sudan and Zimbabwe. See N Ani 'Coup or not coup: The African Union and the dilemma of "popular uprisings" in Africa' (2021) 17 *Democracy and Security* 258.
89 E Harsch '"Arab Spring" stirs African hopes and anxieties' *Africa Renewal* August 2011, https://www.un.org/africarenewal/magazine/august-2011/%E2%80%98arab-spring%E2%80%99-stirs-african-hopes-and-anxieties (accessed 3 March 2025).
90 See S Ramani *Russia in Africa: Resurgent great power or bellicose pretender?* (2022) 93.

in Africa',[91] suggesting that this implies 'profound state or nation-building challenges in the countries concerned'.[92]

The concept of popular uprising has never quite been coherently defined or operationalised in the practice of the AU or any of the continent's regional economic communities (RECs). In August 2019, the Peace and Security Council of the AU cautioned that 'the concept is not provided [for] in any of the existing AU normative frameworks, in this regard, it is an invention that needs to be interrogated and reflected upon before it is embraced by the Union',[93] describing it as 'complex, contested and controversial'.[94] At least two issues arise with reference to the subject of popular uprisings. One is the substantive scope or elements of the concept. The second is whether this concept is itself embodied within the meaning of UCG or whether it is beyond the scope of the UCG.

With reference to the former, the High-Level Panel on Egypt in 2014 proposed some elements as guidelines in framing the concept of popular uprising. These include:[95]

(a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy;

(b) the absence or total ineffectiveness of constitutional processes for effecting change of government;

(c) popularity of the uprisings in the sense of attracting significant portion of the population and involving people from all walks of life and ideological persuasions;

(d) the absence of involvement of the military in removing the government; and

(e) peacefulness of the popular protests.

These criteria do not lend themselves to easy application or evaluation. For example, the distinction implied in this between total

91 ACG-23 (n 10) para. 62.
92 As above.
93 AU Peace and Security Council 871st Meeting 22 August 2019, Press Release, PSC/PR/BR.(DCCCLXXI) 2, https://www.peaceau.org/uploads/psc.871.press.statement.popular.uprisings.22.08.2019.pdf (accessed 4 March 2025).
94 As above.
95 The AU did not define what it meant by descent into 'total authoritarianism' or 'total ineffectiveness of constitutional processes' and it is unnecessary to parse this for meaning as to what degree of authoritarianism is tolerable. However, it is arguable that this is a reaffirmation of the content of its 2013 Solemn Declaration against oppressive government. See African Union 50th Anniversary Solemn Declaration, adopted by the 21st ordinary session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 26 May 2013 para F(ii), https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf (accessed 4 March 2025).

and partial authoritarianism is at best unsafe and could be dangerous to the extent that it could suggest comfort with undefined forms of authoritarianism. There may also be questions as to who assesses or determines the 'absence or total ineffectiveness' of lawful mechanisms for change of government or acquisition or renewal of the mandate to rule. The descent of a member state into that kind of situation arguably is impossible to envisage without an implicit admission of gross failure or complicity of the AU's own mechanisms for oversight of elections under the African Democracy Charter. It may even be impossible to determine what constitutes military involvement in an uprising. Would forbearance of the military from taking action against widespread disorder against an elected government constitute involvement? Additionally, some of the requirements in the above criteria are somewhat fanciful. It is difficult, for instance, to see how a protest that is 'peaceful' can force out a government described as 'total authoritarianism'. The Africa Governance Report 2024 appears to engage with the subject in this spirit, proposing four different scenarios:[96]

(a) a popular civilian uprising resulting in the resignation of an incumbent government;

(b) the military stepping into a power vacuum created by the resignation of an incumbent government;

(c) the military takes over a civilian mass movement's demand for resignation of an incumbent government, leading to the resignation of an elected leader;

(d) a popular uprising leads to an armed conflict or a civil war.

In terms of the report, the first scenario will not be treated as a UCG. The second scenario would be addressed by issuing the military with a deadline to return to constitutional normalcy. The third would be a UCG, while the fourth would be treated as an armed conflict.[97] According to the report, therefore, a popular uprising could be characterised as

> the collective actions of a variety of non-collective actors from a broad section of society, which embody shared concerns of large numbers of ordinary people, whose fragmented but concerted activities trigger socio-political change, irrespective of whether the concerns are guided by an ideology or recognisable leadership. The definition will also include 'popular military coup' which refers to a situation in which

96 AGR-23 (n 10) para 72.
97 As above.

> large numbers of ordinary people publicly support a UCG undertaken by the military.[98]

This definition does not necessarily bring much clarity to the concept besides making it clear that a 'popular uprising' is the result of an irretrievable breakdown in the legitimacy and authority of government. Rather, this definition confuses the concept. The essential proposal in the report is that a popular uprising may or may not be classed as a UCG depending on the facts of each case. This suggestion of a fact-specific determination, which appears to be the favoured practice of regional institutions at the moment, achieves an outcome that appears on its face appealing but ends up in fact conflating regime termination with regime replacement. Even more importantly, this also avoids a fundamental conceptual distinction between 'unconstitutional' change in government and 'extra-constitutional' end to government. The former relates to a means of taking power while the latter addresses the means of losing it. Chronologically, these are two separate occurrences and the termination of a regime can be envisaged without being accompanied by a plan or even capacity to replace it.

A *coup d'état* engineers the termination of power in order to usurp those who exercise it, but there is no reason why both need to be engineered by the same people or to occur contemporaneously. They are thus severable. The entire point of a popular uprising in fact is to terminate power, but not necessarily for those who bring this about to themselves capture it or replace those whom they remove from office. The AU definition of the popular uprising concedes this point through its recognition of the possibility that the actors in a popular uprising may be 'fragmented' and may, in fact, lack a shared ideology or coherent or recognisable leadership. Such a collective may be able to bring down a government but is unlikely to be configured to replace it.

A popular uprising does not necessarily establish a government; it only terminates one. If and when that happens, the likelihood of a power vacuum is high, as is the possibility of an outbreak of a contest among diverse actors to replace the ousted regime. By contrast, a *coup d'état* does not just stop at terminating a government; it engineers regime change in order to deliberately install another. A popular uprising that is faithful to the characteristics outlined in the AU's attempted definition would not be a UCG because it is complete upon the downfall of the regime against which it takes place. The

98 AGR-23 (n 10) para. 71.

character of any government that results thereafter and the manner of diplomatic or other response that should follow in its wake is liable to be calibrated to the facts and evidence available.

The attempt at a definition by the AU at the moment appears, therefore, to conflate a popular uprising with the resulting regime. While convenient, this is flawed. As a strict matter of chronology and definition, a popular uprising cannot on its own be a UCG because the replacement of a government in the aftermath of a popular uprising could be a necessity of circumstance but not a design of an uprising. An event or undertaking that sets out to replace a legitimately elected government before the expiration of its lawful tenure would not qualify as a popular uprising. Whether what follows in the wake of an uprising can justifiably be called a UCG may be open to debate. In the absence of a constitutive intent to remove the preceding regime, it is difficult to see how a successor in such circumstances can with justification be called a UCG. The one thing that may be said with certainty, however, is that a popular uprising is itself evidence of the failure of both national governments and regional institutions in Africa to hold states accountable to the standards of good government set up in regional treaties and other relevant laws.

## 4 Governance, participation and development: Three dimensions of the unconstitutional change of government

The subject matter of UCGs in Africa has a rich and complex history connected with the crisis of state legitimacy on the continent, which predates decolonisation. It is also a matter of high salience for the continent's development and, not unsurprisingly, a priority for Africa's inter-state system and institutions. The history of the African continent in the aftermath of decolonisation was dominated by UCGs, sometimes accompanied by political assassinations.[99] Mazrui explains that African states at independence confronted the two major challenges of civic integration and achieving political legitimacy. Integration, on the one hand, was a problem of hewing together diverse peoples into mutual coexistence and shared recognition of common citizenship. The challenge of legitimacy, on the other hand, concerned the acceptance by the peoples and citizens of the new countries of the authority to rule of the post-colonial political

99 A Mazrui 'Thoughts on assassination in Africa' (1968) 83 *Political Science Quarterly* 40.

leadership.[100] Neither integration nor political legitimacy could be taken for granted at the formal end of colonialism and both challenges were conducive to a rise in what has been called 'post-formation instability'.[101]

This context of post-colonial instability had its origins in an underlying crisis of illegitimacy that afflicted the post-colonial African state as well as the regimes established thereby.[102] UCGs in Africa do not merely pre-date decolonisation, they created the original sin of illegitimacies at the root of Africa's crisis of statehood. The invasion of Ethiopia and the overthrow of the government of Emperor Haile Selassie by Benito Mussolini in 1935 was an early example of a UCG on the continent.[103] Going further back in time, the same could be said of the Berlin Africa Conference whose adoption of the General Act of Berlin in January 1885 destroyed the pre-colonial governance systems in Africa, sundering the continent into territories under European occupation.[104] It thus is arguable that to the extent that its political geography is ultimately traceable to the foundations laid in the General Act of the Berlin Conference, the African inter-state system was the product of a UCG with its origins in Europe.[105]

To appreciate the need for the norm against UCGs in Africa, it is essential to highlight some beacons in the continent's history of the phenomenon. On 23 July 1952, army officers known as the Free Officers Movement, led by Muhammad Naguib, an army general, and Gamal Abdel Nasser, a colonel, overthrew the monarchy of King Farouk I, in what would become known as the Egyptian Revolution.[106] Six years later, on 17 November 1958, the government in neighbouring Sudan collapsed, a mere 34 months after independence, handing the reins of power to Ibrahim Abboud, a general who at the time was the army chief of staff.[107] These two early examples presaged the emergence of a pattern that would

100 Mazrui (n 99) 45-47.
101 M Marshall *Conflict trends In Africa, 1946-2004* (2006) 15 ff.
102 Ikome (n 58) 15 ff; O Mazadou 'Democracy in post-colonial Africa: Imitation, adaptation and re-creation' (2022) 12 *Open Journal of Philosophy* 1.
103 See A Sbacchi 'Italian colonisation in Ethiopia: Plans and projects 1936-1940' (1977) 32 *Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente* 503; see also R Pankhurst 'Italian fascist war crimes in Ethiopia: A history of their discussion, from the League of Nations to the United Nations (1936-1949)' (1999) 6 *Northeast African Studies* 83.
104 General Act of the Berlin Conference on West Africa, adopted 26 February 1885, reprinted in (1909) 3 (Supp) *American Journal of International Law* 9.
105 See P Gathara 'In the Image of Europe's imagining: How Berlin re-made Africa' *African Arguments* 13 February 2025, https://africanarguments.org/2025/02/in-the-image-of-europes-imagining-how-berlin-remade-africa/ (accessed 3 March 2025).
106 See G Abdel Nasser 'The Egyptian revolution' (1955) 33 *Foreign Affairs* 199.
107 H Kitchen 'The Sudan in transition' (1959) 37 *Current History* 35.

largely define access to power in Africa over the next four decades. These developments were to trigger a cascade with far-reaching normative, functional and instrumental consequences for the continent.

### 4.1 Unconstitutional change of government and the right to participation in government

It is clear from the account in the earlier parts herein that there has been a normative shift in the acceptability of *coups d'état* or UCGs, globally, and in Africa, particularly. In their Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government adopted at the Lomé Summit in 2000, the Heads of State and Government of the OAU claimed that 'the phenomenon of *coup d'état* has resulted in flagrant violations of the basic principles of our continental Organisation and of the United Nations',[108] and that 'coups are sad and unacceptable developments in our continent, coming at a time when our people have committed themselves to respect of the rule of law based on peoples' will expressed through the ballot and not the bullet'.[109] This was a significant normative evolution from the orthodoxy of the OAU member states. Indeed, for much of its life, the position of the OAU was the exact opposite. West Africa exemplified this trend. Of the 15 Heads of State and Government present at the adoption of the ECOWAS Treaty in May 1975, seven were military rulers and another six were succeeded by soldiers.[110]

In his foreword to the 1978 revision of Edward Luttwak's widely acclaimed *Coup d'état: A practical handbook*, Walter Laqueur declared as a matter of fact that 'the *coup d'état* is now the normal mode of political change in most member states of the United Nations'.[111] For long, the regime change imperative inherent in the *coup d'état* was considered by some countries an instrument of foreign policy.[112] In the immediate aftermath of decolonisation following the end of World War II, some imperial powers switched from direct colonialism to the UCG as means of retaining power and influence in foreign

108 OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government', AHG/Decl.5 (XXXVI), adopted Lomé, Togo, 10-12 July 2000, Preamble para 3.

109 As above.

110 Treaty of the Economic Community of West African States (ECOWAS) adopted in Lagos, 28 May 1975, entered into force provisionally 28 May 1975 and definitively on 20 June 1975, UNTS Vol 1010.1-14843.

111 'Foreword by Walter Laqueur (1978)' in E Luttwak *Coup d'état: A practical handbook* (2016) xxxiii.

112 See, generally, S Kinzer *Overthrow: American century of regime change from Hawaii to Iraq* (2006).

affairs, especially affecting their former colonies or spheres of influence.[113]

Following decolonisation around Africa, military law and rule emerged as an accepted norm, legitimised by jurisprudence and legal doctrine across the continent, and taken for granted as an essential rampart of public and constitutional law.[114] Outstanding judicial and legal careers were even built on it.[115] However, by the turn of the millennium in Africa, Roth felt confident to assert the emergence of a norm to the effect that 'governments violate international law where they do not predicate their rule on popular will'.[116] Contemporaneously in Africa, Cheeseman felt able to affirm a similar normative shift that military rule by men (they were all men) in fatigues had become by and large discredited, such that 'in the 2000s, elections and term limits replaced death and *coup d'état* as the most common ways in which African presidents and prime ministers left office'.[117] The implication of this was that the manner by which government acquired its mandate to rule could no longer be regarded as exclusively within the domestic jurisdiction of African states.[118] It also meant that the right to participation had become established as the foundational anchor for the mandate of government to rule in the African system. Put differently, the legitimacy of the claim of government to political power in Africa had become both a human rights issue and a subject for continental or regional oversight.

### 4.2 Unconstitutional change of government, despotism and instability

Functionally, the UCG is anchored on a philosophy that splinters political power, on the one hand, from ownership by or legitimacy in the will of the people, on the other. In doing so, it licenses despotism by definition. It was perhaps the pioneering anarchist thinker, William Godwin, who put the functional consequences of constitutional instability into perspective, even if inadvertently, when he juxtaposed

113 M Curtis 'Britain's 42 coups since 1945' *Declassified UK* 12 January 2024, https://declassifieduk.org/britains-42-coups-since-1945/ (accessed 3 March 2025).
114 See *Lakanmi v Attorney-General, Western Region* (1970) SC.58/69; *cf Sallah v Attorney-General*, [1970] *Ghana Law Rep* 55. See, generally, T Ogowewo & J Hatchard *Tackling the unconstitutional overthrow of democracies: Emerging trends in the Commonwealth* (2003).
115 See, eg, O Achike *Groundwork of military law and military rule in Nigeria* (1980).
116 B Roth *Governmental illegitimacy in international law* (2000) 37-38.
117 N Cheeseman *Democracy in Africa: Successes, failures and the struggle for political reform* (2015),3. See also N Udombana *Human rights and contemporary issues in Africa* (2003) 92.
118 *Association pour la Sauvegarde de la Paix* (n 4).

despotism with anarchy and came away choosing the latter over the former. He reasoned that '[a]narchy is a horrible calamity, but it is no less horrible than despotism. Where an anarchy has slain its hundreds, despotism has sacrificed millions upon millions, with this only effect: to perpetuate the ignorance, the vices, and the misery of mankind. Anarchy is a short-lived mischief, while despotism is all but immortal.'[119]

The logic of regional or continental action against the UCG, therefore, is not difficult to see or justify, and the African Commission did in fact provide the legal justification for that in *Association pour la Sauvegarde de la Paix au Burundi.*[120] It is not illogical that the instability inherent in UCGs should be a major determinant of development and its outcomes. Acemoglu and Robinson illustrate this point with the example of Mexico:[121]

> Between 1824 and 1867, there were fifty-two presidents in Mexico, few of whom assumed power according to any constitutionally sanctioned procedure. The consequence of this unprecedented political instability for economic institutions and incentives should be obvious. Such instability led to highly insecure property rights. It also led to a severe weakening of the Mexican state, which now had little authority and little ability to raise taxes or provide public services.

### 4.3 Unconstitutional change of government and development

The instrumental effect of the constitutional instability of the UCG in (West) Africa on the continent's development has been no different. The concern with UCGs in the region, therefore, acknowledges the 'blight that political instability has visited on the continent generally and on its individual citizens and inhabitants in particular'.[122] Hopkins similarly underscores the relationship between constitutional and governance instability, impoverishment and misery around Africa, describing it as 'a moral reproach on a scale even greater than that represented by the slave trade in the 19th century'.[123] He summarised these consequences in graphic numbers on a continental scale:[124]

119 W Godwin *An enquiry concerning political justice and its influence on general virtue and happiness* (1793) 548; P Eltzbacher *Anarchism: Seven exponents of the anarchist philosophy* (1960) 25.
120 *Association pour la Sauvegarde de la Paix* (n 4).
121 D Acemoglu & J Robinson *Why nations fail: The origins of power, prosperity, and poverty* (2012) 31-32.
122 Odinkalu (n 40).
123 A Hopkins 'A new economic history of Africa' (2010) 50 *Journal of African History* 158.
124 Hopkins (n 123) 157.

> Much of Africa has failed to achieve any growth in *per capita* incomes since 1960; some countries have seen incomes decline. At the close of the twentieth century, the average life expectancy of a child born in sub-Saharan Africa in 1980 was only 48 years; a typical African mother had only a 30 per cent chance of seeing all her children survive to the age of five; daily calorie intake was only 70 per cent of that of Latin America and East Asia.

This underscores the organic relationship between UCG and development in Africa. Development remains one of the major preoccupations of the international settlement that evolved at the end of World War II, and decolonisation in Africa was a central reason for this.[125] Conceptually, however, it is also both complex and slippery. Opinions diverge as to what its most pressing priorities should be from a selection that includes a focus on advancing economic progress, enhancing the frontiers of human agency, growing the institutional capacities of the state, the quality of leadership, or a synthesis of all these factors.[126] One basic agreement in this debate is around the centrality of the state in the project of development. This makes state building essential in development.[127]

The idea of sustainable development is reasonably well established in international law.[128] It was first fully articulated in the report of the World Commission on Environment and Development, better known as the Brundtland Commission Report.[129] Inter-generational equity and effective participation of citizens are both inherent in this conceptualisation of sustainable development. These, in turn, imply

125 See P Jackson 'A pre-history of the Millennium Development Goals: Four decades of the struggle for development in the United Nations' (2007) 44 *UN Chronicle* 6, https://www.un.org/en/chronicle/article/prehistory-millennium-development-goals-four-decades-struggle-development-united-nations (accessed 3 March 2025); DI Ajaegbo 'The United Nations development decade in Africa, 1960-1970: A political and socio-cultural analysis' (1984) 14 *Journal of Eastern African Research and Development* 1.

126 See HW Arndt 'Economic development: A semantic history' (1981) 29 *Economic Development and Cultural Change* 457; K Ohmae *End of the nation state: The rise of regional economies* (1986) 21; H de Soto *The mystery of capital: Why capitalism triumphs in the west and fails everywhere else* (2000) 5; A Sen *Development as freedom* (1999) 36; D Acemoglu & J Robinson *Why nations fail: The origins of power, prosperity, and poverty* (2012) 41-44; S Dercon *Gambling on development: Why some countries win and others lose* (2022) 32; S Pahuja *Decolonising international law: Development, economic growth and the politics of universality* (2011) 241.

127 Declaration on the Right to Development UNGA Res 41/128 of 4 December 1986 art 3(1).

128 See *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1997 7, Separate Opinion of Judge Vice-President Weeramantry 88-98; *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of The Netherlands*, 27 RIAA 35 para 59 (2005); See, generally, V Barral 'Sustainable development in international law: Nature and operation of an evolutive legal norm' (2012) 23 *European Journal of International Law* 386-388.

129 Our Common Future: Report of the World Commission on Environment and Development 1987 ch 2 paras 1-3 (Brundtland Commission Report).

a government founded on popular legitimacy, which alone is the kind of government liable to be held to account by the people for in the event of failure to address or meet the needs of the people. This cannot be the case where government derives its power from anything other than the will of the people democratically expressed.

It is no accident, therefore, that the UN's 2030 Agenda for Sustainable Development proclaims that 'good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger'.[130] At the national level, this requires a government that is founded on and able to guarantee 'just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions'.[131] As the African Commission in *Jawara v The Gambia,* these are not guarantees that come naturally from a government which comes to power by way of an UCG.[132]

Mirroring these issues, the African Union's Africa Governance Report 2024 identifies five factors that predispose countries to UCGs. These include integrity of elections; diversity management and human rights; constitutional order and state legitimacy; economic governance; public sector accountability; popular uprising; militarization; and terrorism.[133] It concludes that when elections are not considered credible or if the will of the people is subverted by the incumbent administration, instability results.[134] A government founded on UCG denies the rule of law, popular legitimacy and participation, and in this way precludes a state that is stable and development that is sustainable. Participation is itself a human right guaranteed by the African Charter,[135] which is violated when a government is established by UCG.[136]

130 United Nations 'Transforming Our World: The 2030 Agenda for Sustainable Development' A/Res/70/1 (2015) para 9.
131 United Nations (n 130) para 35.
132 *Jawara v The Gambia* (n 80) para 74.
133 ACG-23 (n 10) 4.
134 ACG-23 (n 10) para 30.
135 Art 13 African Charter.
136 *Jawara v The Gambia* (n 80).

## 5 Conclusion

The emergence of a norm against UCGs in Africa is evidence of the exponential change that has occurred in the landscape of regional norms in Africa since the independence of African states in the 1960s. From behind the veil of the doctrine of sovereignty and non-interference, this norm emerged to outlaw the UCG as a basis for access to political power, reaching into the very core of domestic jurisdiction. It has an affirmative element in the proposition that elections are the normative ideal for accession to power. It also embodies a prohibition against the overthrow of an elected government. In cases where elections prove to be chronically ineffective or manipulated, popular uprisings can terminate governments that have spent their legitimacy and authority. When that happens, how that government is replaced can also fall within the purview of the norm.

In practice, the implementation of the norm has not been without challenges. First, coordination between regional institutions has sometimes proved problematic. For example, the AU complains about 'a strong suggestion of an overlap of mandates between the AU and ECOWAS in responding to military *coups'*,[137] expressing the hope that 'the two institutions must thus coordinate their efforts'.[138] There are a similar overlaps and contradictions between regional institutions in West Africa. For instance, in connection with the measures imposed following successive *coups* in Mali in 2020 and 2021, the Court of Justice of the Economic and Monetary Union of West Africa (UEMOA) lifted the sanctions imposed by the ECOWAS.[139] With eight of the 15 member states of ECOWAS also party to and bound by the orders of the UEMOA Court of Justice, the regional sanctions regime against Mali effectively collapsed.

A second issue is the effect of the sanctions levied by regional institutions on states that experience UCGs. Again, with reference to Burkina Faso, Mali and Guinea, the ECOWAS Court of Justice on 30 September 2021, acting under Rule 78 of its Rules of Procedure, suspended cases from countries under sanctions from the Community as a consequence of respective cases of UCG. Some groups criticised this at the time as an act of 'obstruction of justice for victims of human

137 ACG-23 (n 10) para 64.
138 As above.
139 'West African court orders lifting of some sanctions against Mali' *Reuters* 24 March 2022, https://www.reuters.com/world/africa/w-african-court-orders-suspension-some-sanctions-against-mali-2022-03-24/ (accessed 4 March 2025).

rights violations'.[140] This suspension lasted for nearly 14 months until 22 November 2022, when the Court lifted it.[141] This was odd at best because the ECOWAS Supplementary Protocol on Good Governance makes it clear, among other things, that while states are under sanctions for UCG, 'ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended member state to return to normalcy and constitutional order'.[142] The effect must be that the ECOWAS Court should retain jurisdiction over the country for the purpose of supervising return to Community law and standards, including standards of compliance with human rights, in particular, during the period of the suspension. The Court cannot afford to yield up jurisdiction over violations alleged to have taken place prior to the suspension, including, in fact, over the legality of the UCG.

Third, an appearance of inconsistency in the implementation of the norm against UCG around the continent could also feed regional contagion. The AU and ECOWAS, for instance, sanctioned as UCGs military takeovers in Burkina Faso, Guinea and Mali, but failed to do so in Chad where the military clearly bypassed constitutional mechanisms after the killing of the incumbent President in April 2021, claiming that Chad was responding to a security imperative imposed by attack from foreign mercenaries.[143] This exemption was not deemed available to Burkina Faso which the AU suspended in January 2022 after a military *coup*,[144] despite the fact that the country had been under a prolonged assault from foreign Jihadists.[145]

140 FIDH 'All proceedings concerning Mali and Guinea suspended: An act of obstruction of justice for victims of human rights violations' Press Release 3 December 2021, https://www.fidh.org/en/region/Africa/mali/all-proceedings-concerning-mali-and-guinea-suspended-an-obstruction (accessed 5 March 2025).

141 J Odeyemi 'ECOWAS Court lifts suspension on Mali, Guinea, Burkina Faso's cases' *Daily Trust* 25 November 2022, https://dailytrust.com/ecowas-court-lifts-suspension-on-mali-guinea-burkina-fasos-cases/ (accessed 5 March 2025).

142 Art 45(3) ECOWAS Supplementary Protocol on Good Governance.

143 Communiqué of the 966th meeting of the Peace and Security Council of the African Union on the Consideration of the Report of the Fact-Finding Mission to the Republic of Chad, 14 May 2021, https://www.peaceau.org/en/article/communique-of-the-996th-meeting-of-the-peace-and-security-council-of-the-african-union-on-the-consideration-of-the-report-of-the-fact-finding-mission-to-the-republic-of-chad-14-may-2021 (accessed 3 March 2025); P-S Handy & F Djilo 'AU's balancing act on Chad's coup sets a disturbing precedent' *ISS Today* 2 June 2021, https://issafrica.org/iss-today/au-balancing-act-on-chads-coup-sets-a-disturbing-precedent (accessed 3 March 2025).

144 T Ndiaga & E McAllister 'African Union suspends Burkina Faso after military coup' *Reuters* 1 February 2022, https://www.reuters.com/world/africa/african-union-suspends-burkina-faso-after-military-coup-2022-01-31/#:~:text=OUAGADOUGOU%2C%20Jan%2031%20(Reuters),the%20AU%20said%20on%20Monday (accessed 3 March 2025).

145 See D Eizenga & W Williams 'The puzzle of JNIM and militant Islamist groups in the Sahel' (2020) 38 *Africa Security Brief* 1-3, https://africacenter.org/wp-content/uploads/2020/11/ASB-38-EN.pdf (accessed 3 March 2025).

Fourth, there are considerable uncertainties as to the meaning of the UCG itself arising from or connected with the idea of popular uprising. The popular uprising in many cases is an extraordinary last resort that ensues when all lawful options for removing an ineffective, unpopular or illegitimate government have failed. This calls attention to the need for a prophylactic approach to the phenomenon of UCGs in the form of consistent application and implementation of regional norms governing elections and good governance. It is often because the implementation of these norms is uneven and patchy that UCGs and popular uprisings ensue. This subject may be suitable for the exercise of the advisory jurisdiction of regional courts and tribunals in Africa, including the African Court on Human and Peoples' Rights.

These inconsistencies have both substantive and spatial dimensions. As to the latter, the overlaps between the spatial scope of regional institutions complicates any effort to determine the precise geographical reach of the applicable norms. The AU, ECOWAS and the UEMOA are separate institutions with distinct geographical reach but all member states of the UEMOA are in ECOWAS; and all member states of ECOWAS are in the AU. This spatial incoherence, in turn, has substantive implications, suggesting that the norm against UCG in Africa is either still inchoate or in the process of fuller crystallisation.

Fifth, in the face of this appearance of inconsistent application of the norm, it is no accident that there are complaints that the efficacy of the prohibition against UCGs in Africa 'seems to be waning'.[146] In the nature of the original formulation and evolution of the norm, the prohibition against the UCG as a *coup* against an incumbent was contingent on both legitimate elections and the absence of tenure indeterminacy. In its practice, the AU casualised the latter two and only emphasised the protection of tenure with no acknowledgment of its contingent character. This fission of the norm was both convenient and unprincipled and had the effect of placing it at the feet of incumbents to be instrumentalised. By turning the norm into a shield for the protection of the 'club of incumbents' in the AU rather than an affirmation of the foundation of the mandate to govern in popular legitimacy and the right to participation, the regional institutions created a crisis of sustainability for the norm. In effect, the current crisis afflicting the norm against UGCs in Africa, therefore, is entirely self-inflicted at the instance of the self-same regional institutions that instituted it. One piece of good news inherent in this is that they also have the capacity to bring the crisis to an end.

146 Omorogbe (n 25) 980.

The concept of popular uprising itself proves the limits of the norm on UCGs as well as the flaws in the implementation of regional norms on good governance. If these norms were applied or implemented consistently and effectively, countries would be able to lawfully change governments that have spent their contingent legitimacy or which prove to no longer be fit for purpose. However, when governments can perform badly, afflict their people with manifestly malign outcomes, or manipulate elections chronically in order to retain power without consequences, they make popular uprisings inevitable. Collier points out, additionally, that this compromises development because 'crooks will replace the honest as candidates'.[147]

This argues for clarity in the norm against UCGs and consistency in its implementation. Neither of these can presently be said about the norm. When regional institutions consistently certify crooked elections or ballots that are manifestly lacking in credibility, they lose standing as credible arbiters on questions of UCGs. This calls for greater clarity concerning the applicable standards to govern the credibility of elections. The African Court on Human and Peoples' Rights offered an example of what is possible in this direction with its 2021 advisory opinion on elections and COVID-19.[148] Regional courts of justice can complement this role.[149]

UCGs in many ways are both cause and consequence of the unravelling of governance and development on the continent. It is clear that the UCG undoubtedly causes a setback to the pursuit of development. The UCG could also be a consequence or evidence of the failure of regional compliance with standards of good governance. Returning to the language of public health with which this study began in the description of UCGs as a regional 'epidemic', it seems clear that an effective approach to addressing this problem requires both prophylactic and therapeutic dimensions. By way of prophylaxes, regional supervision of elections must be returned to a place of credibility, which is not the case presently. That would make it possible to assert and implement the sanctions against UCGs much more firmly. Absent a credible prophylactic programme, it will be difficult for the region to fully preclude the opportunism of

147 P Collier *Wars, guns and votes: Democracy in dangerous places* (2009) 27.

148 *The Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic, Such as the COVID-19 Crisis* Advisory Opinion 1/2020, African Court on Human and Peoples' Rights 16 July 2022, https://www.african-court.org/cpmt/storage/app/uploads/public/60f/574/3a6/60f5743a61e75369142990.pdf (accessed 3 March 2025).

149 Protocol A/P.1/7/91 on the Community Court of Justice, adopted 6 July 1991 art 10, http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf (accessed 3 March 2025).

UCGs or the desperation of popular uprisings. In acknowledgment of this fact, the Peace and Security Council of the AU has called for an investigation into the resilience of the pathology of UCGs in Africa. This study has sought to offer a diagnosis to aid this process.

Just as important as prevention, if not more important, is the need for effective accountability as a deterrent to would-be UCGs. It is surprising that nearly one decade after its adoption, no African state has ratified the Malabo Protocol, which makes the UCG an international crime in Africa. This fact calls into question the commitment of African states to rooting out the phenomenon of UCGs on the continent. This sense of equivocation may itself be evidence of a lack of commitment to the kinds of governance habits that the norm against UCGs requires. The entry into force of the Malabo Protocol will ultimately provide the best metric of the preparedness of the continent to match its declamations with requisite tools of accountability.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: L Mhlanga 'The African Continental Free Trade Area agreement: A catalyst for human rights' (2025) 25 *African Human Rights Law Journal* 37-58
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a2

# The African Continental Free Trade Area agreement: A catalyst for human rights

*Lindani Mhlanga**
Post-doctoral Researcher: Free State Centre for Human Rights, University of the Free State, South Africa
https://orcid.org/0009-0001-3376-8804

**Summary:** *The African Continental Free Trade Area agreement marks a transformative step in Africa's pursuit of economic integration. While primarily an economic instrument, this article argues that AfCFTA holds underutilised potential as a tool for reinforcing democratic governance, particularly in addressing the persistent problem of unconstitutional changes of government. The article examines how AfCFTA's legally binding trade architecture and reciprocal market-access commitments can introduce material accountability into Africa's human rights ecosystem, where the enforcement of anti-coup norms has often been undermined by political pragmatism and geopolitical interests. Drawing on the African Union's existing but inconsistently enforced legal framework – including the African Charter on Democracy, Elections and Governance – and lessons from other regional bodies such as the European Union, the article contends that AfCFTA can be strategically aligned to incentivise compliance with democratic norms. It concludes by proposing mechanisms for integrating democratic conditionalities into the implementation of AfCFTA, with the aim of shifting the cost-benefit calculus for coup perpetrators and enabling a rules-based order that strengthens constitutional governance across the continent.*

**Key words:** *AfCFTA; economics; integration; human rights; trade*

* BA LLB LLM(Pretoria) LLD (Free State); lindani.mhlanga@gmail.com

## 1 Introduction

The African Continental Free Trade Area (AfCFTA), though principally an economic integration initiative, holds underappreciated potential as a mechanism for enforcing key human rights norms – most critically, the prohibition on unconstitutional changes of government, including military *coups*.[1] Despite near-universal ratification of the African Charter on Human and Peoples' Rights (African Charter),[2] the continent continues to witness recurrent *coups* and the erosion of democratic norms, exposing the limits of current human rights enforcement mechanisms.[3] This article contends that AfCFTA, by virtue of its economic leverage and potential for rule-based governance, can serve as a catalytic force in promoting compliance with democratic norms, particularly by creating material consequences for states that come to power through unconstitutional means.

The foundational stance of the African Union (AU) against unconstitutional changes of government, articulated through commendable instruments such as the Lomé Declaration 2000[4] and the African Charter on Democracy, Elections and Governance 2007 (African Democracy Charter),[5] reflects a clear normative commitment to democratic governance.[6] However, despite their aspirational value, these instruments face significant challenges in practice. Compliance remains largely voluntary, and enforcement mechanisms are weak. Institutions charged with upholding these norms – such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) – while normatively robust, are constrained by limited jurisdiction, political resistance and a lack of binding authority, undermining their ability to effect meaningful accountability.[7]

---

1 YA Debrah and others 'The African Continental Free Trade Area (AfCFTA): Taking stock and looking ahead for international business research' (2024) 30 *Journal of International Management* 101120.

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

3 C Heyns 'The African regional human rights system: In need of reform?' (2004) 4 *African Human Rights Law Journal* 155; CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

4 African Union Declaration AHG/Decl.2 (XXXVI), http://archives.au.int/handle/123456789/571 (accessed 15 April 2025) (Lomé Declaration).

5 African Union African Charter on Democracy, Elections and Governance https://au.int/en/treaties/african-charter-democracy-elections-and-governance (accessed 15 April 2025) (African Democracy Charter).

6 M Ndulo 'The prohibition of unconstitutional change of government' in A Yusuf & F Ouguergouz (eds) *The African Union legal and institutional framework: A manual on the Pan-African Organisation* (2014) 251-274.

7 C Nyinevi & R Fosu 'The African Union's prohibition of unconstitutional changes of government: An uneasy choice between fidelity to principle and pragmatism' (2023) 16 *African Security* 95-119.

This article contends that AfCFTA, though not conceived as a human rights instrument, offers a novel and underexploited avenue for operationalising human rights enforcement through economic integration. By establishing a binding regime of reciprocal trade obligations among states, AfCFTA generates a framework of economic interdependence that can be tactically leveraged to promote compliance with fundamental democratic norms – particularly the prohibition on unconstitutional changes of government. In a context where traditional enforcement mechanisms under the African Charter system have been normatively robust but materially ineffectual, AfCFTA introduces the possibility of embedding conditionalities with tangible economic consequences. This potential is not merely theoretical. Comparative examples – particularly the European Union (EU)'s application of human rights conditionalities toward both external partners and internal member states – demonstrate that embedding such obligations in trade frameworks can shift compliance from a moral imperative to a strategic necessity.[8]

The article unfolds in three parts. First, it interrogates the nexus between unconstitutional changes of government and systemic human rights violations, arguing that *coups* are both symptomatic of governance failure and catalytic of widespread abuse. Second, it critiques the structural and legal limitations of Africa's current human rights machinery, particularly its inability to deter or redress *coups* in a consistent and effective manner. Third, it explores how AfCFTA can serve as a complementary enforcement mechanism – specifically by integrating human rights compliance into its trade governance regime.

In doing so, the article reconceptualises AfCFTA not as a panacea, but as a critical – if currently overlooked – instrument in Africa's evolving governance infrastructure. Its real promise lies not merely in trade liberalisation, but in the potential to construct an enforceable, rule-based continental order where economic integration serves as a vehicle for democratic consolidation and human rights accountability.

## 2 Human rights challenges in Africa

Africa's post-independence human rights landscape continues to be destabilised by unconstitutional changes of government, particularly military *coups*, which represent both a breakdown of democratic

8 L Bartels *Human rights conditionality in the EU's international agreements* (2005).

order and a recurrent trigger for systemic rights violations.[9] Between the 1960s and 2012, African states experienced over 200 military *coups*.[10] While the frequency of military *coups* in Africa appeared to decline in the early 2000s, with some analysts suggesting that *coups* were going out of fashion, recent years have witnessed a troubling resurgence of this phenomenon.[11] Since 2012, several African countries, including Mali, Guinea, Burkina Faso, Sudan and Chad, have experienced military takeovers, underscoring the persistent failure of regional enforcement mechanisms to stem this tide.[12]

The recent upsurge in *coups* can be attributed to a combination of structural factors, many of which echo the causes of earlier *coups*. Persistent economic challenges, including unemployment, poverty and inequality, have fuelled public discontent with civilian governments, which are often perceived as corrupt and ineffective.[13] Additionally, in some cases the military has stepped in during periods of political deadlock or to depose leaders who are seen as clinging to power through undemocratic means, such as the manipulation of electoral processes or the extension of presidential term limits.[14] Yet, these rationalisations frequently mask power grabs that exacerbate instability and suppress accountability.[15]

Moreover, the AU's inconsistent responses to *coups* may have encouraged some military leaders. While there have been strong condemnations and sanctions in some instances, in other cases the responses have been more muted, particularly when the new military rulers have promised to restore civilian rule through elections.[16] Evidence reveals that military regimes, once in power,

9 See African Union Peace and Security Council Communiqués 2001–2025, http://www.peaceau.org/en/resource/90-organ-peace-security-council (accessed 15 April 2025).

10 See H Barka & M Ncube 'Political fragility in Africa: Are military *coups d'état* a never ending phenomenon?' 2012, https://www.afdb.org/sites/default/files/documents/publications/economic_briefpolitical_fragility_in_africa_are_military_coups_detat_a_never_ending_phenomenon.pdf (accessed 9 September 2024); H Onapajo & D Babalola 'ECOWAS and the challenge of preventing a resurgence of *coups d'état* in West Africa: An assessment of the "zero tolerance" policy' (2024) 31 *South African Journal of International Affairs* 23.

11 See M Duzor & B Williamson '*Coups* in Africa' *Voice of America* 2 February 2022.

12 Onapajo & Babalola (n 10).

13 See MD Suleiman 'Towards a better understanding of the underlying conditions of *coups* in Africa' E-International Relations 2021, https://www.e-ir.info/2021/09/24/towards-a-better-understanding-of-the-underlying-conditions-of-coups-in-africa/ (accessed 9 September 2024).

14 See S Wiking *Military coups in sub-Saharan Africa: How to justify illegal assumptions of power* (1983); S Decalo 'Military *coups* and military regimes in Africa' (1973) 11 *Journal of Modern African Studies* 105.

15 FN Ikome 'Good *coups* and bad *coups*: The limits of the African Union's injunction on unconstitutional changes of power in Africa' Occasional Paper 55, Institute for Global Dialogue 2007 5-7.

16 PS Handy & F Djilo 'AU balancing act on Chad's *coup* sets a disturbing precedent' ISS 2 June 2021, https://issafrica.org/iss-today/au-balancing-act-on-

tend to dismantle democratic safeguards and consolidate authority through coercion rather than reform.[17] One of the most egregious violations is the arbitrary detention of political opponents, activists, and ordinary citizens, who are often arrested without due process.[18] These unlawful detentions serve as a tool for regimes to silence dissent and eliminate perceived threats. Additionally, extrajudicial killings are a frequent and alarming consequence, where military or rebel forces execute individuals without legal justification or trial.[19] Those targeted are typically seen as threats to the new regime, including dissidents, opposition leaders and activists.

Furthermore, *coups* typically result in a systematic suppression of fundamental freedoms.[20] Freedoms of speech, assembly and the press are severely curtailed as the new rulers seek to stifle opposition.[21] Media outlets are often shut down or taken over, while journalists and human rights defenders face harassment, imprisonment, or worse.[22] Public protests are violently suppressed, with security forces using excessive force to disperse gatherings. In many instances, regimes impose internet blackouts and restrict communications to prevent the organisation of resistance and limit the spread of dissenting information.

The societal costs of *coups* extend beyond civil and political rights. The disruption of governance leads to a collapse in the delivery of essential services, such as health care, education and public welfare.[23] Vulnerable groups, especially women and children, face increased risks: Women experience heightened levels of gender-based violence and exclusion from public life, while children are often displaced, deprived of education or conscripted into armed conflict.[24] *Coups*,

---

chads-coup-sets-a-disturbing-precedent (accessed 14 August 2024); PS Handy & F Djilo 'Niger: Another symptom of Africa's weak crisis-response capacity' 2023, https://issafrica.org/iss-today/niger-another-symptom-of-africas-weak-crisis-response-capacity (accessed 28 Augustus 2024).

17 Human Rights Watch Report 2015, https://www.hrw.org/report/2015/09/17/state-fear/arbitrary-arrests-torture-and-killings (accessed 10 August 2024); Human Rights Watch Report 2024, https://www.hrw.org/report/2024/05/09/massalit-will-not-come-home/ethnic-cleansing-and-crimes-against-humanity-el (accessed 10 August 2024).

18 US Embassy Conakry Report on Human Rights in Guinea 2023, https://gn.usembassy.gov/2023-report-on-human-rights-in-guinea/ (accessed 15 August 2024).

19 I Ngima & K Kasambala *A surge of military coups in Africa threatens human rights and the rule of law* (2023).

20 As above.

21 As above.

22 J Conroy-Krutz 'The squeeze on African media freedom' (2020) 31 *Journal of Democracy* 96.

23 MO Oduoye and others 'Humanitarian crisis amid the military *coup* in Niger republic: What went wrong?' (2024) 12 *Health Science Reports* e2180.

24 Oduoye (n 23).

therefore, entrench multidimensional harm – legal, economic and social – which collectively degrade human security.[25]

These contemporary challenges cannot be divorced from Africa's historical context. The arbitrary borders imposed during colonial partition continue to fuel internal divisions and contestations over identity, power and resource distribution.[26] The absence of a shared national identity and the elite-driven nature of post-colonial state building have hindered the development of inclusive, resilient political communities.[27] Qobo notes that Africa's colonial disintegration obstructed the evolution of regionalism by comparison to Europe, where national identity consolidated integration efforts.[28] This fragmentation not only weakens internal cohesion but also provides fertile ground for military opportunism.[29]

The persistence of *coups* – and the ease with which military regimes often evade meaningful accountability – exposes the chronic enforcement deficits of Africa's normative human rights architecture. This article does not suggest that AfCFTA is a panacea for the enforcement of human rights in Africa, particularly in the context of unconstitutional changes of government. Rather, it explores the ways in which AfCFTA, as an economic integration mechanism with binding obligations, might serve as a complementary tool to Africa's existing human rights and governance architecture – one that is normatively rich but structurally and institutionally fragile. Any discussion of AfCFTA's potential, therefore, must begin with a critical assessment of the legal and institutional structures already in place for addressing human rights violations, particularly those linked to *coups* and other undemocratic seizures of power. The next part critically evaluates this normative architecture – its core instruments, institutional capacity and enforcement limitations – to determine whether it can effectively anchor, and be reinforced by, AfCFTA's trade-based mechanisms.

25 As above.
26 See C Ake *Democracy and development in Africa* (2003); P Collier *Wars, guns, and votes, democracy in dangerous places* (2009); J Nwanegbo & J Odigbo 'Appraisal of the Arab Spring and democratisation project in the North Africa' (2012) 1 *ANSU Journal of Peace and Development Studies* 130.
27 Nwanegbo & Odigbo (n 26).
28 M Qobo 'The challenges of regional integration in Africa: In the context of globalisation and the prospects for a United States of Africa' (2007) 145 *ISS Paper*; F Fanon 'The trials and tribulations of national consciousness' (2017) 66 *New Agenda: South African Journal of Social and Economic Policy* 36.
29 See Ake (n 26); Collier (n 26); Nwanegbo & Odigbo (n 26).

## 3 Established structures for addressing human rights in Africa

Africa's human rights system is anchored in a broad constellation of instruments, institutions and principles. The African Charter on Human and Peoples' Rights (African Charter), established in 1981, is the foundational normative instrument for human rights protection in Africa.[30] The Charter is widely acknowledged for its distinctive and holistic approach to human rights, integrating civil and political rights, socio-economic and cultural rights, as well as collective rights and duties – an innovative 'three-in-one' model that has been celebrated as a pioneering framework within international human rights law.[31]

Articles 2 and 3 of the African Charter enshrine the principles of non-discrimination and equality before the law, ensuring that the rights and freedoms recognised in the document apply universally to all individuals, irrespective of distinctions such as race, ethnicity, gender, religion, political beliefs, social origin or other statuses.[32] The inclusion of 'other status' in these articles extends protections against discrimination to a wide array of marginalised groups, including those based on age, disability or sexual orientation.

The African Charter also enshrines fundamental rights such as the rights to life and personal integrity (article 4); dignity and freedom from slavery and torture (article 5); liberty and security of the person (article 6); the right to a fair trial (article 7); and freedoms of conscience, religion, expression and association (articles 8, 9 and 12).[33] The overarching objective of these guarantees is to safeguard

30 First Organisation of African Unity Ministerial Conference on Human Rights in Africa, 12-16 April 1999, Grand Bay, Mauritius, Grand Bay Declaration and Plan of Action, para 8 identifies the following as the causes of violations of human rights in Africa: (a) contemporary forms of slavery; (b) neo-colonialism, racism and religious intolerance; (c) poverty, disease, ignorance and illiteracy; (d) conflicts leading to refugee outflows and internal population displacement; (e) social dislocations which may arise from the implementation of certain aspects of structural adjustment programmes; (f) the debt problem; (g) mismanagement, bad governance and corruption; (h) lack of accountability in the management of public affairs; (i) monopoly in the exercise of power; (j) harmful traditional practices; (k) lack of independence of the judiciary; (l) lack of independent human rights institutions; (m) lack of freedom of the press and association; (n) environmental degradation; (o) non-compliance with the provisions of the OAU Charter on territorial integrity and inviolability of colonial borders and the right to self-determination; (p) unconstitutional changes of governments; (q) terrorism; (r) nepotism; and (s) exploitation of ethnicity.

31 C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986–2000* (2002) 137.

32 Art 2 & 3 African Charter.

33 African Charter on Human and Peoples' Rights.

individuals in Africa from institutional, political and social conditions that threaten their liberties, physical integrity and fundamental freedoms. These protections extend to safeguarding individuals from extrajudicial and arbitrary killings, unlawful detention, torture and other forms of physical or psychological abuse that compromise human security. These violations have frequently been both the cause and consequence of *coups*, highlighting the urgent need for a legal framework that protects citizens from such abuses.[34]

Moreover, the African Charter's establishment of a normative and institutional framework for human rights protection aims to promote peace and security across the continent. It upholds due process, democratic principles and the active participation of citizens in political processes – cornerstones for addressing Africa's historical challenges regarding governance and human rights. By reinforcing these principles, the African Charter provides a critical foundation for ending human rights violations and building a more just and equitable society.[35] Yet, despite this expansive normative content, implementation of the Charter has been inconsistent.[36] The African Commission is the treaty body responsible for monitoring the implementation of the African Charter. Established in 1987, the African Commission is mandated to oversee states' compliance with the African Charter and to ensure the protection of human and peoples' rights across the continent.[37] Despite its efforts, the African Commission has faced significant challenges.[38]

One of the key issues with the African Charter is the presence of 'claw-back clauses', which allow states to limit the exercise of certain rights based on national law.[39] These clauses have been widely criticised for undermining the effectiveness of the African Charter and providing states with broad discretion to restrict fundamental rights.[40] The African Commission has attempted to address these issues through its interpretation of the Charter, emphasising that national laws must not contravene international human rights standards. Despite this, the African Commission's lack of binding enforcement power and

34 See K Kufuor *The African human rights system: Origin and evolution* (2010).
35 S Adejumobi 'Citizenship, rights, and the problem of conflicts and civil wars in Africa' (2001) 23 *Human Rights Quarterly* 148.
36 R Murray 'The African Charter on Human and People's Rights 1987-2000: An overview of its prospects and problems' (2001) 1 *African Human Rights Law Journal* 1.
37 Art 45 of the African Charter states the mandate of the African Commission.
38 Murray (n 36).
39 See E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996); R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1981-1982) 22 *Virginia Journal of International Law* 667-714.
40 As above.

reliance on the goodwill of member states limit its effectiveness in addressing human rights violations.[41] Furthermore, the Commission is frequently under-resourced, impacting its ability to conduct thorough investigations and deliver timely decisions.[42]

The African Court, established to uphold the African Charter, continues to face structural and political obstacles.[43] As of 2024, only 34 AU member states have accepted its jurisdiction, and several states – such as Tanzania and Côte d'Ivoire – have withdrawn individual access after adverse rulings.[44] This reflects a persistent tension between sovereignty and regional accountability. Compounding this challenge is the widespread reluctance to ratify the Malabo Protocol (2014),[45] which seeks to transform the Court by adding an international criminal chamber with jurisdiction over serious crimes, including unconstitutional changes of government. Backed by a dedicated Office of the Prosecutor, the restructured Court – if operationalised – would represent a major step forward in addressing impunity and entrenching democratic norms across the continent.[46]

In parallel with its broader human rights enforcement framework, the AU has developed a robust normative and institutional regime specifically aimed at prohibiting unconstitutional changes of government.[47] Central to this architecture are the Lomé Declaration (2000)[48] and the African Democracy Charter (2007),[49] both of which give practical effect to article 30 of the AU Constitutive Act (2000) – the foundational provision that mandates the exclusion of any government that assumes power through unconstitutional means

41 See GL Neuman 'Bi-level remedies for human rights violations' (2014) 55 *Harvard International Law Journal* 323.
42 See RC Liwanga 'From commitment to compliance: Enforceability of remedial orders of African human rights bodies' (2015) 41 *Brooklyn Journal of International Law* 99; F Mattheis 'How to wield regional power from afar: A conceptual discussion illustrated by the case of France in Central Africa' (2022) 61 *International Politics* 145; F Söderbaum *Rethinking regionalism* (2016).
43 African Court on Human and Peoples' Rights *Welcome to the African Court*, https://www.african-court.org/wpafc/welcome-to-the-african-court/ (accessed 15 April 2025).
44 As above.
45 African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 15 April 2025).
46 As above.
47 For full discussion, see Nyinevi & Fosu (n 7).
48 Lomé Declaration (n 4). The Lomé Declaration elaborated this by identifying military *coups*, mercenary interventions, armed rebellion and refusal to cede power after losing elections as forms of UCG.
49 Art 25(5) African Democracy Charter (n 5).The African Democracy Charter extended this definition to include 'constitutional *coups*', such as the manipulation of term limits – recognising subtler forms of authoritarian entrenchment.

from participating in AU activities.[50] These instruments not only affirm the AU's commitment to democratic governance but also provide a legal and institutional framework for sanctioning and deterring unconstitutional changes of government across the continent.

The African Democracy Charter strengthens enforcement by mandating the African Union Peace and Security Council (AUPSC)[51] to investigate unconstitutional changes of government and impose immediate suspension on offending states.[52] Importantly, such suspension does not relieve the state of its ongoing human rights obligations under AU law. The African Democracy Charter goes further by barring perpetrators from contesting transitional elections or holding public office – closing a common pathway to post-*coup* legitimisation.[53] The Charter empowers the AU Assembly to impose targeted sanctions, including personal and economic penalties.[54]

Crucially, the African Democracy Charter introduces the possibility of criminal accountability before a competent AU court.[55] The Charter also imposes binding duties on all AU member states to deny the recognition to governments formed through unconstitutional changes of government, to refuse sanctuary to perpetrators, and to ensure their prosecution or extradition.[56] If a member state is found to have supported or instigated an unconstitutional change of government in another, the AU Assembly is obligated under article 23 of the AU Constitutive Act to impose sanctions.[57]

Together, the AU Constitutive Act, the Lomé Declaration, the African Democracy Charter, the AUPSC Protocol and the Malabo Protocol form a normatively rich and legally integrated regime that aims to criminalise and deter unconstitutional changes of government. These instruments mark a decisive shift from the Organisation of African Unity (OAU)'s doctrine of non-interference toward a continental order based on democratic legitimacy and enforceable accountability.

50 African Union Constitutive Act of the African Union (2000), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 15 April 2025).
51 African Union Peace and Security Council, https://au.int/en/psc (accessed 15 April 2025).
52 Art 25 African Democracy Charter.
53 Art 25(4) African Democracy Charter.
54 Art 25(7) African Democracy Charter.
55 Art 25(5) African Democracy Charter.
56 Art 25(8) African Democracy Charter.
57 Art 25(6) African Democracy Charter read with art 23 AU Constitutive Act (n 50).

In practice, the enforcement of the AU's anti-unconstitutional change of government framework has been marred by selective application and strategic ambiguity.[58] These inconsistencies are not merely the result of legal vagueness of what constitutes an unconstitutional change of government, but reflect a strategic calculus driven by regime stability and, critically, external economic and geopolitical interests.[59]

Egypt's 2014 election under Abdel Fattah el-Sisi, following a military *coup*, illustrates this.[60] Despite clear obligations under the AU Constitutive Act and the 2010 Assembly decision on unconstitutional changes of government, Egypt faced no sanctions – its backing by powerful external actors likely insulating it from censure.[61] Similar dynamics were at play in Zimbabwe (2017), where the military's removal of Robert Mugabe was not classified as a *coup*, allowing Emmerson Mnangagwa to assume power through a civilian transition.[62] In this instance, the AU's cautious response was shaped not only by broader regional dynamics but also by the acquiescence of South Africa – a dominant economic and political actor within both the Southern African Development Community (SADC) and the AU, and a longstanding ally of the ruling ZANU-PF.[63] While other geopolitical considerations played a role, South Africa's influential position and strategic interest in Zimbabwe were key in tempering the AU's stance.[64] In Chad (2021), following the death of President Idriss Déby, the AU endorsed a military-led transitional government, largely in deference to France's security interests in the Sahel.[65]

58 See Nyinevi & Fosu (n 7).

59 L Nathan 'A survey of mediation in African *coups*' African Peacebuilding Network Working Paper 15 Social Science Research Council 2017, https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/a-survey-of-mediation-in-african-coups.pdf (accessed 15 April 2025).

60 R Bush & E Greco 'Egypt under military rule' (2019) 46 *Review of African Political Economy* 529-534.

61 African Union AU High-Level Panel for Egypt Report 16 June 2014, https://www.peaceau.org/uploads/auhpe-report-egypt-16-06-2014.pdf (accessed 15 April 2025).

62 J Burke 'Zimbabwe's strange crisis is a very modern kind of *coup*' *The Guardian* 21 November 2017, https://www.theguardian.com/world/2017/nov/21/zimbabwes-strange-crisis-is-a-very-modern-kind-of-coup (accessed 15 April 2025); M Phakathi 'An analysis of the responses of the African Union to the *coup* in Burkina Faso (2015) and Zimbabwe (2017)' (2018) 7 *Journal of African Union Studies* 129-145, https://www.jstor.org/stable/26890368 (accessed 15 April 2025).

63 LE Asuelime 'A *coup* or not a *coup*: That is the question in Zimbabwe' (2018) 5 *Journal of African Foreign Affairs* 5-24, https://www.jstor.org/stable/26664049 (accessed 16 April 2025); BM Tendi *The overthrow of Robert Mugabe: Gender, coups, and diplomats* (2025).

64 African Union 'Statement by the Chairperson of the African Union Commission on the situation in Zimbabwe', https://www.peaceau.org/uploads/statement-by-the-chairperson-of-auc-on-zimbabwe-ff.pdf (accessed 16 April 2025).

65 African Union Peace and Security Council Communiqué of the 993rd PSC Meeting on Chad 22 April 2021, https://www.peaceau.org/uploads/eng-

These cases reveal a consistent pattern of pragmatic exceptionalism, where the AU's enforcement of its anti-unconstitutional change of government framework is routinely subordinated to political and economic considerations.[66] This selective application not only undermines the AU's normative credibility but also lays bare the structural fragility of its human rights enforcement framework – one increasingly shaped not by the nature of the violation, but by the identity and influence of the violator. Susceptible to both internal and external leverage, the system often reflects political expediency rather than principled accountability, weakening its ability to deter or redress unconstitutional governance. As this article argues, closing the enforcement gap requires embedding democratic conditionalities into binding and significant economic instruments such as AfCFTA – where continued access to trade benefits is explicitly tied to a state's adherence to constitutional norms and democratic legitimacy.

However, impunity for unconstitutional changes of government is not driven solely by global geopolitical interests, but is deeply entrenched in the political economy of African regionalism. Powerful states within the AU, particularly those with substantial economic or diplomatic influence, frequently shape institutional responses to shield allies and maintain regional order on their own terms. These intra-African asymmetries complicate the narrative of 'external interference' and reveal that enforcement failures often stem from internal political bargains.

This has critical implications for AfCFTA's potential as an accountability mechanism. While it introduces the prospect of material consequences through trade-based conditionalities, it is not immune to the same political distortions that have undermined other AU instruments. The influence of dominant economies – such as South Africa – within AfCFTA could similarly skew enforcement in favour of strategic interests, diluting its integrity.[67]

Compounding these challenges is the AU Peace and Security Council's compromised legitimacy, often populated by states with poor democratic records.[68] Its decisions are shaped less by principled enforcement than by political bargaining, favour-trading and alliance

communique-993rd-psc-meeting-on-chad-22-april-2021-2.pdf (accessed 16 April 2025); Handy & Djilo (n 16).

66 A Mangu 'The role of the African Union and regional economic communities in the implementation of the African Charter on Democracy, Elections and Governance' (2018) 5 *African Journal of Democracy and Governance* 125, 126.

67 C Alden & G le Pere 'South Africa in Africa: Bound to lead?' (2009) 36 *Politikon: South African Journal of Political Studies* 145-169.

68 See Nyinevi & Fosu (n 7).

banking, thus undermining its credibility. The persistent failure to ratify the Malabo Protocol, which would enable individual criminal accountability for *coup* leaders, reflects this deeper moral vacuum and entrenched resistance to any consequential oversight.

In sum, while the AU's normative framework on unconstitutional changes of government is legally sophisticated, it is functionally constrained by internal power dynamics, vague standards and selective enforcement. Unless these structural distortions are addressed, the regime will remain ill-equipped to deter democratic backsliding or uphold constitutional rule.

As the following parts will illustrate, AfCFTA's legally binding economic framework presents a promising, though largely untapped, opportunity to embed accountability into Africa's governance landscape by imposing tangible economic consequences for democratic violations, particularly where political mechanisms have proven ineffective. While the idea of leveraging regional integration to uphold democratic norms is not unprecedented, past efforts by other African regional blocs have been hampered by deep structural and political challenges. The next part critically examines these historical shortcomings to assess the locality of the failures.

## 4 Challenges and historical shortcomings of African regional integration mechanisms

The vision for regional integration in Africa dates back to the formation of the OAU in 1963, with the goal of fostering unity and cooperation among newly independent African states. However, it was not until the early 1980s that this vision gained meaningful momentum. A significant milestone occurred in July 1991 with the adoption of the Abuja Treaty, which proposed a phased approach to achieving regional integration through the creation of regional economic communities (RECs).[69] The RECs were tasked with facilitating the gradual integration of their respective regions through the establishment of free trade areas (FTAs), customs unions, common markets and, eventually, monetary unions. By the early 2000s, eight major RECs were actively pursuing these objectives: SADC; East African Community (EAC); the Common Market for Eastern and Southern Africa (COMESA); the Economic Community

69 See E Aniche 'Pan-Africanism and regionalism in Africa: The journey so far' in S Oloruntoba (ed) *Pan-Africanism, regional integration and development in Africa* (2020) 6-19; Y Tandon 'Reflections on African renaissance and the Lagos Plan of Action' Paper presented at a conference held in Oxford, 8 February 2016.

of West African States (ECOWAS); the Economic Community of Central African States (ECCAS); the Intergovernmental Authority on Development (IGAD); the Arab Maghreb Union (AMU); and the Community of Sahel-Saharan States (CEN-SAD).[70]

Despite some progress, Africa's regional integration efforts have encountered several critical challenges. The first significant issue is the overlap of REC memberships. Many countries belong to multiple RECs, which has led to conflicting commitments, particularly in the formation of customs unions.[71] This has resulted in a complex web of overlapping regional agreements, often referred to as a 'spaghetti bowl' of integration efforts.[72] These overlaps have made it difficult for member states to fully commit to any single integration framework, undermining the effectiveness of trade liberalisation and economic cooperation in Africa.[73]

Moreover, the impact of the RECs on intra-African trade has been limited. Africa continues to trade very little with itself due to differences in trade regimes, restrictive customs procedures, administrative and bureaucratic barriers, limited productive capacity and inadequate trade-related infrastructure. These factors have significantly hindered the potential for regional integration to drive economic growth and development.[74]

To address some of these challenges, there have been efforts to consolidate RECs into larger, more cohesive entities.[75] A notable example is the Tri-Partite Free Trade Agreement (TFTA), which was

70 See S Karingi & W Davis *Towards a transformative African integration process: Rethinking the conventional approaches* (2016); E Aniche & V Ukaegbu 'Structural dependence, vertical integration and regional economic cooperation in Africa: A study of Southern African Development Community' (2016) 8 *Africa Review* 108.

71 E Aniche 'The "calculus" of integration or differentiation in Africa: Post-neo-functionalism and the future of African regional economic communities (RECs)' (2015) 36 *International Affairs and Global Strategy* 41.

72 ET Aniche 'From pan-Africanism to African regionalism: A chronicle' (2020) 79 *African Studies* 70.

73 D Luke & Z Mabuza 'State of play in the Tripartite Free Trade Area Negotiations' Paper prepared for presentation at a regional forum on Developmental Regionalism, Peace and Economic Transformation in Southern Africa, organised by ECA-SRO-SA and APN-SSRC in collaboration with the SADC Secretariat and hosted by the government of the Kingdom of Swaziland from 28 to 30 September 2016, Ezulwini, Swaziland, 2016; B Vickers 'Towards a trade policy for development: The political economy of South Africa's external trade, 1994-2014' (2015) 36 *Strategic Review for Southern Africa* 57.

74 See African Development Bank Group *Addressing regional integration challenges in Africa: Learning from the past* (2019).

75 See African Union 'Agenda 2063. The Africa we want' Final Edition April 2015, http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf (accessed 10 July 2024); a vision for Africa's intra-African trade levels growing from less than 12% to 50% by 2045.

negotiated by SADC, EAC and COMESA, and signed in 2015.[76] This agreement, covering 26 member states with a combined population of over 600 million and a gross domestic product (GDP) of $1 trillion, laid the groundwork for the broader AfCFTA.[77] However, while the TFTA represents an important precursor to AfCFTA and has only recently come into force, its early implementation has encountered the same old challenges that will serve to delay the realisation of its full objectives.

In addition to economic integration, African regional bodies have faced political and security challenges. For example, ECOWAS, initially established as an economic project, gradually expanded its mandate into political and security affairs by the 1990s.[78] In response to the political and security crises in West Africa, ECOWAS became the first African regional organisation to abandon the principle of non-interference in member states' domestic affairs. This shift allowed ECOWAS to play a more active role in conflict resolution and democracy promotion, notably through the creation of the ECOWAS Monitoring Group (ECOMOG), which was instrumental in stabilising countries such as Liberia and Sierra Leone.[79]

Despite these efforts, the enforcement of political standards, including democracy and good governance, has been inconsistent.[80] While ECOWAS has a record of supporting democratic developments and sanctioning authoritarian backsliding, its ability to enforce these standards has been heavily reliant on the contributions of Nigeria, which has shouldered the bulk of the financial and military burden.[81] Moreover, the region has struggled with enforcing sanctions on non-compliant countries, limiting the effectiveness of its democracy and governance protocols.

One key initiative to address political instability was the establishment of the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security in 1999, followed by the 2001 supplementary Protocol on Democracy and

76 Vickers (n 73).
77 As above.
78 See M Hulse 'Actorness beyond the European Union: Comparing the international trade actorness of SADC and ECOWAS' (2014) 52 *Journal of Common Market Studies* 547.
79 See SO Olaruntoba 'ECOWAS and regional integration in West Africa' (2016) 14 *History Compass* 295.
80 See V Adetula 'ECOWAS and the challenge of integration in West Africa' in J Ogwu & W Alli (eds) *ECOWAS: Milestones in regional integration* (2009) 15.
81 See O Ogunnubi & U Okeke-Uzodike 'Can Nigeria be Africa's hegemon?' (2016) 25 *African Security Review* 110; E Lopez-Lucia 'Regional powers and regional security governance: An interpretive perspective on the policies of Nigeria and Brazil' (2015) 29 *International Relations* 348.

Good Governance.[82] This Protocol explicitly declared 'zero tolerance for power obtained or maintained by unconstitutional means', giving ECOWAS the authority to impose sanctions on member states that violate democratic principles.[83] However, the enforcement of these measures has been inconsistent, and the regional organisation continues to face challenges in maintaining democratic stability across its member states. Without sufficient resources and political will from member states, the Court's ability to hold governments accountable for human rights abuses has been restricted.

In summary, while African regional mechanisms, such as RECs and ECOWAS, have made some progress toward economic and political integration, they continue to face significant challenges. Overlapping memberships, limited trade integration, inconsistent enforcement of political standards and resource constraints have all contributed to the limited effectiveness of these mechanisms. Brown and Harman sum up African agency, or rather the lack thereof in this context, as

> the ways in which Africa's political, economic, social and security actors can and do exert influence both on the continent and in global politics, as opposed to simply being passive targets or victims of other actions, is an effect not only of the continent's regional powers but also of its developing state and non-state network.[84]

In this context, AfCFTA stands as one of the most ambitious initiatives undertaken by the AU, aiming to create the largest free trade area in the world by the number of participating countries. AfCFTA was established, with 49 out of 55 African states signing the framework during the thirty-first AU summit in 2018.[85] In 2022 the AfCFTA Secretariat launched the AfCFTA Guided Trade Initiative (GTI), enabling commercially meaningful trade for eight participating countries as a pilot to test the operational, institutional, legal and trade policy framework of AfCFTA.[86] As of January 2024, 12 state parties have finalised the necessary legal modalities to commence trade under the GTI.[87]

82 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

83 See C Hartmann 'Governance transfer by the Economic Community of West African States (ECOWAS). A B2 case study repor', SFB-Governance Working Paper Series 47, Collaborati.

84 See W Brown & S Harman (eds) *African agency in international politics* (2013) 1-3.

85 Africa Renewal 'Africa has phenomenal potential for intra-continental trade' United Nations: New York 2018, https://www.un.org/africarenewal/magazine/august-november-2018/africa-has-phenomenal-potential-intra-continental-trade (accessed 17 August 2024).

86 See 'Status of AfCFTA ratification' TRALAC, https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (accessed 30 August 2024).

87 As above.

Through the GTI, AfCTA seeks to address the historical challenges of overlapping regional agreements by gradually harmonising trade liberalisation efforts and improving competition, market access and resource allocation across Africa. As the continent deepens its integration through AfCFTA, overcoming these historical shortcomings will be crucial to unlocking its potential as a catalyst for human rights enforcement. The next part explores how AfCFTA can play this catalytic role in advancing human rights across Africa.

## 5 AfCFTA as a catalyst for human rights enforcement

While conceived primarily as a vehicle for economic integration, AfCTA holds significant – albeit underexplored – potential as a mechanism for human rights enforcement in Africa. Unlike traditional normative frameworks such as the African Charter and the African Democracy Charter – which rely on political will and lack binding enforcement mechanisms – AfCFTA establishes reciprocal economic obligations subject to legally enforceable dispute resolution. This institutional framework introduces a unique avenue to condition access to economic benefits on adherence to democratic norms and human rights standards, thereby infusing Africa's governance regime with tangible, enforceable incentives.

Smaller RECs in Africa have struggled to leverage trade to uphold governance standards, largely due to their limited market size and geopolitical weight. They often are too fragmented to influence state behaviour in Africa, let alone command attention globally. AfCFTA, by contrast, brings together 55 AU member states into a single market of over 1,2 billion people, with a combined GDP estimated at $2,5 trillion.[88] This initiative is vital, given Africa's historically fragmented markets and low levels of intra-regional trade, with the continent's share of global GDP and exports consistently below 3 per cent.[89] Projections suggest that by 2030 it could boost intra-African trade by over 50 per cent, leading to significant industrial growth, poverty reduction and increased employment opportunities, especially in sectors such as manufacturing and services.[90] Its primary objectives include eliminating tariffs on 90 per cent of goods, reducing non-tariff barriers and facilitating the free movement of goods, services

88 D Luke & L Sommer 'The AfCFTA: Opportunities for industrialisation in the digital age' (2018) 4 *Contemporary Issues in African Trade and Trade Finance* 26.

89 Global Economic Outlook *External Economic Relations Division* (2018); World Trade Organisation 2018. World Trade Organisation *WTO trade profiles* (2018).

90 World Bank *The African Continental Free Trade Area economic and distributional effects* (2020).

and investments.[91] This level of interdependence gives AfCFTA the potential to act as a powerful instrument for shaping state behaviour.

Although the AfCFTA agreement does not contain specific provisions dedicated to human rights enforcement, its Preamble affirms the importance of human rights, good governance and the rule of law. This symbolic inclusion, while not in itself operative, offers a legitimate interpretive basis for integrating human rights conditionalities into its implementation. This model of trade-based conditionality is not without precedent.

Since the early 1990s, the EU has systematically included human rights clauses in its trade agreements, making respect for human rights a fundamental condition of its trade partnerships.[92] These clauses allow the EU to suspend or terminate agreements in cases of serious human rights violations, providing a strong incentive for partner countries to adhere to human rights norms.[93]

The EU's Generalised Scheme of Preferences (GSP), for instance, offers developing countries reduced tariffs on exports to the EU, contingent on compliance with international conventions on human rights, labour rights, environmental protection and good governance.[94] Internally, these conditionalities aim to induce structural reforms in partner states by tying economic access to demonstrable improvements in governance and rights protections. Externally, they signal the EU's normative posture, asserting that trade partnerships are contingent upon adherence to foundational principles such as the rule of law, democratic accountability and

91 African Union Commission 'Agreement Establishing the African Continental Free Trade Area' 2019, https://au.int/en/treaties/agreement-establishing-african-continental-free-tradearea#:~:text=Agreement%20Establishing%20the%20African%20Continental%20Free%20Trade%20Area%20%7C%20African%20Union (accessed 3 August 2024).

92 European Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries COM(1995) 216 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553006867419&uri=CELEX:51995DC0216 (accessed 16 April 2025); L Bartels 'Human rights and sustainable development obligations in EU free trade agreements' (2013) 40 *Legal Issues of Economic Integration* 297; L Bartels 'The European Parliament's role in relation to human rights in trade and investment agreements' *European Union* 2014, http://www.europarl.europa.eu/activities/committees/studies.do?language=EN (accessed 12 August 2024).

93 Bartels (n 8).

94 See Regulation (EU) 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) 732/2008 [2008] OJ L211/1; S Velluti 'The legal framework of the common commercial policy after the entry into force of the Treaty of Lisbon' in S Velluti & F Martines *The role of the EU in the promotion of human rights and international labour standards in its external relations* (2020) 39.

respect for fundamental freedoms. This strategy has produced mixed but instructive results.

The EU's suspension of Sri Lanka's GSP+ status in 2010 due to failures to uphold conventions against torture and violations of press freedom had immediate economic repercussions, particularly for the country's garment sector.[95] Similarly, the withdrawal of preferences from Myanmar in 1997 following forced labour abuses signalled the EU's willingness to use economic leverage to promote rights compliance.[96]

When Poland's Law and Justice (PiS) government established a disciplinary chamber that undermined judicial independence, the European Court of Justice imposed daily fines of €1 million in 2021.[97] After Warsaw refused to comply, the Commission activated its 'offset mechanism', deducting €320 million from Poland's share of the EU budget.[98] The General Court upheld this action in 2024, and it was only after Donald Tusk's new government pledged to restore judicial independence that the EU unfroze €137 billion in cohesion and recovery funds.[99] This case illustrates how trading blocs can leverage access to internal funding and trade preferences to enforce compliance – even among member states – demonstrating that economic integration can support democratic accountability.

In this context, AfCFTA's relevance is not incidental – it is strategic. AfCFTA's framework of economic interdependence offers a concrete mechanism to recalibrate the cost-benefit analysis that currently enables impunity for unconstitutional changes of government. *Coups* tend to thrive in contexts of institutional weakness, elite capture and economic marginalisation – conditions that persist in part because

95 See I Zamfir 'Human rights in EU trade agreements' July 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf (accessed 6 September 2024); T Kiyoyasu & T Kudo 'No 813 Re-instating the European Union's generalised system of preferences for Myanmar' (2021) *Institute of Developing Economies*, http://hdl.handle.net/2344/00052052 (accessed 8 September 2024).

96 As above.

97 Case C-204/21 *Commission v Poland (Independence and Private Life of Judges)*, C-204/21; Order of the Vice-President of the Court of 14 July 2021 in Case C-204/21 R (see also Press Release 127/21); Order of the Vice-President of the Court of 27 October 2021 in Case C-204/21 R (see also Press Release 192/21) in *Judgment of the Court* (5 June 2023), https://curia.europa.eu/jcms/upload/docs/application/pdf/2025-02/cp250012en.pdf (accessed 16 April 2025).

98 Court of Justice of the European Union (n 97).

99 Human Rights Watch 'European Commission prematurely ends rule of law scrutiny of Poland' 30 May 2024, https://www.hrw.org/news/2024/05/30/european-commission-prematurely-ends-rule-law-scrutiny-poland (accessed 16 April 2025); European Commission 'Rule of law: Commission closes procedure under article 7(1) TEU for Poland' Press release 6 March 2024, https://ec.europa.eu/commission/presscorner/detail/en/mex_24_2986 (accessed 16 April 2025).

violating democratic norms rarely incurs meaningful consequences. AfCFTA, by contrast, provides a legally binding trade architecture that can introduce such consequences in direct, measurable ways.

This can be achieved by conditioning access to key AfCFTA benefits – such as preferential tariffs, participation in the Guided Trade Initiative or access to investment facilitation mechanisms – upon compliance with democratic governance standards.[100] Member states that unconstitutionally seize power could face suspension from certain trade privileges, or targeted restrictions on economic cooperation under AfCFTA protocols. These trade-based penalties would have both symbolic and material impact, increasing the cost of political illegitimacy.

In addition to providing economic incentives, AfCFTA has the potential to strengthen the broader institutional ecosystem that supports human rights enforcement in Africa. Although the African Court operates independently of AfCFTA and is limited by the small number of states that have accepted its jurisdiction under article 34(6), AfCFTA can nonetheless enhance the Court's relevance and impact.[101] Integrating the African Court's jurisprudence into AfCFTA's compliance and enforcement mechanisms would significantly enhance the practical impact of its rulings. This kind of institutional alignment would mirror the EU's approach, where human rights obligations are embedded within broader architecture that also governs participation to ensure that legal and economic frameworks operate in tandem.[102] By linking adherence to judicial decisions with access to trade benefits, AfCFTA could transform the Court's authority into concrete leverage – reinforcing accountability and embedding rule of law compliance at the core of Africa's economic integration.

For AfCFTA, the implications are clear. By conditioning access to key trade benefits – such as preferential tariffs, participation in the Guided Trade Initiative and investment facilitation – upon compliance with democratic governance and human rights obligations, the agreement can serve as a meaningful deterrent against *coups* and authoritarian entrenchment. States that violate these norms could

100 See United Nations Economic Commission for Africa (UNECA) 'The guided trade initiative: Documenting and assessing the early experiences of trading under the AfCFTA, https://www.uneca.org/the-guided-trade-initiative-documenting-and-assessing-the-early-experiences-of-trading-under-the (accessed 16 April 2025).

101 See Resolution on a Human Rights-Based Approach to the Implementation and Monitoring of the African Continental Free Trade Area Agreement – ACHPR/Res.551 (LXXIV) (2023); Resolution ACHPR/Res 148(XLVI) (2009) and Resolution ACHPR/Res 367(LX) (2017).

102 See European Union Treaty on European Union art 7, http://data.europa.eu/eli/treaty/teu_2012/art_7/oj (accessed 16 April 2025).

face suspension from specific trade privileges or targeted economic restrictions under AfCFTA protocols. Such penalties would carry both symbolic and material consequences, recalibrating the cost of political illegitimacy.

While this article advances the conditionality model as a promising mechanism to uphold human rights, it also recognises its potential for disproportionate and unintended consequences.[103] That is, disparities in state capacity, economic resilience and political will among African states may result in uneven implementation and enforcement, potentially exacerbating regional inequalities. Moreover, the uneven distribution of economic power among African states presents both a challenge and a risk to AfCFTA's broader viability,[104] as seen in the suspension of GSP benefits for Zimbabwe in 2002, following allegations of human rights abuses under President Robert Mugabe. This had devastating economic effects – not on the political elite, but on small-scale farmers and vulnerable communities whose livelihoods depended on exports to the EU.[105] Similarly, the EU's conditionalities on Sudan in the early 2000s, ostensibly to pressure the government on human rights grounds, contributed to economic hardships that disproportionately impacted the civilian population rather than the political elite.[106] These examples illustrate the pitfalls of using economic leverage against human rights violators without sufficient regard for structural vulnerabilities. While the goal is to promote accountability, such measures can inadvertently harm the very populations they are meant to protect.[107]

For AfCFTA, these examples offer an important cautionary lesson. If trade-based conditionalities are to function as effective enforcement tools, they must be crafted with sensitivity to the economic and institutional fragility of member states. Without this, such measures risk deepening the very inequalities they aim to address – particularly on a continent marked by significant disparities in state capacity, economic resilience and political will.

103 S Velluti 'The promotion and integration of human rights in EU external trade relations' (2016) 32 *Utrecht Journal of International and European Law* 41.

104 CH Vhumbunu 'The African Continental Free Trade Area. A new era for African integration or another grandiose razzmatazz?' (2020) 50 *Africa Insight* 134.

105 See J Grebe 'And they are still targeting: Assessing the effectiveness of targeted sanctions against Zimbabwe ' (2010) 45 *Africa Spectrum* 3; Council Regulation (EC) 310/2002 of 18 February 2002 concerning certain restrictive measures in respect of Zimbabwe.

106 Human Rights Watch Human Rights Watch World Report 2000 – Sudan 1 December 1999, https://www.refworld.org/reference/annualreport/hrw/1999/en/23061 (accessed 18 August 2024).

107 See A Douhan Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights in Zimbabwe United Nations 2022, https://reliefweb.int/attachments/50c9b44b-201d-4527-943f-31e7b5f1577d/G2243707.pdf (accessed 20 August 2024).

Therefore, for AfCFTA to advance human rights without reinforcing inequality, its conditionality framework must be not only principled and enforceable, but also equitable and context-sensitive. It must strike a balance between accountability and inclusion, ensuring that efforts to uphold democratic norms do not inadvertently marginalise the very populations they are meant to protect or entrench regional economic asymmetries.

## 6 Conclusion

With its legally binding structure and economic scope, AfCFTA offers a new kind of leverage – one grounded in the shared interest of trade and market access. By tying access to AfCFTA's trade benefits to adherence to democratic norms and human rights obligations, the agreement can help shift the cost-benefit calculation for regimes that seek to unconstitutionally seize or hold power. This approach would not replace existing institutions but would complement them by introducing material consequences for non-compliance, reinforcing the authority of regional courts and governance bodies.

Drawing on lessons from the EU's use of conditionalities, both with external partners and internally – as seen in its enforcement actions against Poland – AfCFTA can embed human rights and democratic governance into Africa's integration agenda. However, this must be done with care. Conditionalities must be equitable, context-sensitive and designed to avoid disproportionate harm to vulnerable populations.

The goal is not to transform AfCFTA into a rights-enforcement mechanism in the judicial sense, but to operationalise the values enshrined in its Preamble, the AU's Agenda 2063 and instruments such as African Commission Resolution 551. If calibrated effectively, AfCFTA can serve as a credible and consequential supplement to Africa's normative architecture – a trade-driven mechanism that deters unconstitutional power grabs, reinforces the rule of law and promotes a more stable, inclusive and rights-respecting continental order.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: M Mugerwa-Sekawabe 'We cannot pray it away: The African Charter on Human and Peoples' Rights requires state parties to ban "conversion therapy"' (2025) 25 *African Human Rights Law Journal* 59-84
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a3

# We cannot pray it away: The African Charter on Human and Peoples' Rights requires state parties to ban 'conversion therapy'

*Muyenga Mugerwa-Sekawabe**
Attorney, Legal Resources Centre, Cape Town, South Africa
https://orcid.org/0000-0001-9723-6316

**Summary:** *'Conversion therapy' is a practice that seeks to change an individual's sexual orientation or gender identity. The practice is not currently banned in any African jurisdiction. This is an alarming state of affairs, as 'conversion therapy' leads to severely negative mental and physical health outcomes; and there is no evidence that 'conversion therapy' attains its desired objectives of making individuals cisgender or heterosexual. This article contends that state parties to the African Charter on Human and Peoples' Rights are required to ban 'conversion therapy' as it violates the right to dignity of LGBTQIA+ individuals under article 5. In addition, all forms of 'conversion therapy' constitute 'torture, cruel, inhuman or degrading punishment' and, therefore, should be prohibited as a violation of article 5 of the African Charter. 'Conversion therapy' is in relevant respects akin to abuse that are recognised as more typical forms of degrading treatment. While the intentions of the agent and the perception of the survivor are not necessary preconditions for degrading treatment, the consequences of ill-treatment for individual interests do play an important role. Applying this account of degrading treatment, the article concludes that 'physical' and forcible forms, as well as 'non-physical' and non-forcible forms of*

* BSocSci LLB LLM (Cape Town); emsekawabe@gmail.com

*'conversion therapy', all amount at a minimum to degrading treatment under human rights law, and give rise to positive obligations on the part of state parties to the African Charter.*

**Key words:** *LGBTQIA+ rights; 'conversion therapy'; Africa; dignity; torture; punishment*

## 1 Introduction

'Conversion therapy' is a widely discredited practice that, according to the United Nations (UN), seeks to 'cure' lesbian, gay, bisexual, transgender, queer, intersex and asexual (LGBTQIA+) persons by altering or suppressing non-heteronormative sexual orientations and non-cisgender gender identities.[1] These practices take various forms including 'talk therapy, exorcism, drinking herbs, prayer, laying of hands for healing, beatings, and rape or another form of sexual assault'.[2] As of 20 September 2024, approximately 16 countries, including Germany, Ecuador and Brazil, have introduced a full or partial ban on 'conversion therapy'.[3] In the United States of America, 20 states have introduced bans on the practice,[4] although many exempt religious counsellors and organisations from the scope of the prohibition. A similar exemption is part of the ban on 'conversion therapy' in Queensland, one of the three Australian jurisdictions that currently ban the practice.[5]

In addition to the surprising fact that only a handful of states have banned the practice, it is further surprising that there is a dearth of legal scholarship on the matter.[6] For example, very few scholars have

1 United Nations Human Rights Council 'Practices of so-called "conversion therapy" report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity' 1 May 2020, A/HRC/44/53 para 2. See also Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.

2 Y Wamari & K Farisè *Converting mindsets, not our identities* (2022) 8.

3 'What is conversion therapy and when will it be banned?' *BBC News* 20 September 2024, www.bbc.com/news/explainers-56496423 (accessed 2 December 2024).

4 At the time of writing, these countries are New Jersey, California, Oregon, Illinois, Vermont, New Mexico, Connecticut, Rhode Island, Nevada, Washington, Hawaii, Delaware, Maryland, New Hampshire, New York, Massachusetts, Colorado, Maine, Utah and Virginia.

5 The others are Victoria and the Australian Capital Territory.

6 IY Nugraha 'The compatibility of sexual orientation change efforts with international human rights law' (2017) 35 *Netherlands Quarterly of Human Rights* 176. 'Conversion therapy' involving children is mentioned in the United Nations Committee on the Rights of the Child General Comment 20 on the implementation of the rights of the child during adolescence CRC/C/GC/20, 6 December 2016 34; I Trispiotis & C Purshouse '"Conversion therapy" as degrading treatment' (2021) 42 *Oxford Journal of Legal Studies* 105.

examined the compatibility of 'conversion therapy' with particular human rights such as the right to dignity and the prohibition on torture and other cruel, inhuman or degrading treatment.[7] This is a peculiar omission, given the strong body of evidence indicating that 'conversion therapy' causes serious harm,[8] not only to those who undergo the 'treatment' but also to the LGBTQIA+ community more generally. Moreover, according to the Independent Forensic Group, an organisation of 42 distinguished experts from 42 countries specialised in the evaluation of torture and ill-treatment cases, there is no evidence that 'conversion therapy' achieves its purported objectives.[9]

Accordingly, it is not surprising that the UN and the European Parliament[10] have called on states to take action against 'conversion therapy'.[11] However, this article is not concerned with politically useful declarations; rather, its focus is on whether the African Charter on Human and Peoples' Rights (African Charter) requires state parties to ban 'conversion therapy' and, if so, why. In doing so, two theoretical arguments will be advanced.

First, it is argued that 'conversion therapy' violates article 5 of the African Charter as it violates the dignity of LGBTQIA+ individuals. Article 5 of the African Charter provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

---

7 Exceptions to this include Trispiotis & Purshouse (n 6); Engage with Outright reports and CHR reports on conversion therapy; O Atilola, Y Wamari & K Farisé *Health ethics and the eradication of conversion practices in Africa'* (2024); T Naidoo & A Sogunro 'Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ rights in Africa' (2021) *African Human Rights Policy Paper* 3.

8 United Nations Human Rights Council (n 1) para 2; A Bartlett and others 'The response of mental health professionals to clients seeking help to change or redirect same-sex sexual orientation' (2009) 9 *BioMed Central Psychiatry* 7.

9 Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.

10 European Parliament Committee on Civil Liberties, Justice and Home Affairs, 'Amendment 8 to the Report on the Situation of Fundamental Rights in the EU in 2016' A8-0025/8 21 February 2018.

11 United Nations 'United Nations entities call on states to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children' (2015); Annual Report of United Nations High Commissioner for Human Rights 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (2011) para 56; United Nations 'Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) para 24.

This article argues that 'conversion therapy' disrespects LGBTQIA+ persons and, therefore, violates their dignity, not only because it places them at real risk of grave physical and psychological harm, or only because it denies them specific freedoms related to sexuality and gender identity, or only because it depends on, and reflects, their social subordination. 'Conversion therapy' disrespects LGBTQIA+ persons for all those reasons, at the same time.

Second, it is argued that this distinct coalescence of wrongs entails that all forms of 'conversion therapy' violate article 5 of the African Charter's prohibition on 'torture, cruel, inhuman or degrading punishment'. It will be demonstrated that 'conversion therapy' is relevantly akin to examples of abuse that are recognised as more typical forms of degrading treatment. For that reason, this article analyses the meaning of 'degrading' treatment under article 5 of the African Charter and argues that the term is conditioned by the ideas of human dignity and power. Through an analysis of case law, the article concludes that an act is degrading and, therefore, constitutes a violation of article 5, if it expresses the unequal moral worth of the other and if the acting person or entity has sufficient power or status over the survivor such that their actions can undermine their dignity.

The article also argues that the intentions of the agent and the perception of the survivor are not necessary preconditions for degrading treatment, whereas the consequences of ill-treatment for individual interests do play an important role.[12] The article then applies degrading treatment to 'physical' forms, forcible forms and, finally, 'non-physical' and non-forcible forms of 'conversion therapy'. It is concluded that all forms of 'conversion therapy' amount, at a minimum, to degrading treatment in human rights law as all forms of 'conversion therapy' fall within the scope of the prohibition on degrading treatment. As the focus of the article is determining whether 'conversion therapy' violates article 5 of the African Charter, the article ends with a brief examination of the positive state obligations in this area. It is acknowledged that this subject warrants its own lengthy discussion.

## 2 Definition of 'conversion therapy'

'Conversion therapy' is an umbrella term that describes 'a multitude of practices and methods' to change or suppress an individual's sexuality or gender identity to better align them with

12 Trispiotis & Purshouse (n 6) 107.

heteronormative standards.[13] Each practice or method 'attempts to pathologise and erase the identity of individuals'.[14] The scope of methods of 'conversion therapy' is limitless. However, the most common methods of a physical nature are 'corrective' rape and sexual assault,[15] physical abuse,[16] electroconvulsive shock treatments,[17] hormone treatments[18] and 'aversion therapy'.[19] Conversion practices that do not involve overt physical violence, often referred to as 'talking therapies', include psychotherapy, pastoral counselling or peer support.[20] These 'therapies', whether physical or non-physical, have been found to frequently lead to life-long effects, such as loss of self-esteem, anxiety, depression, social isolation, intimacy difficulty, self-hatred, shame, sexual dysfunction, suicidal ideation and post-traumatic stress disorder.[21] It has been asserted that it is difficult to classify certain forms of 'conversion therapy' due to the range of physical and psychological elements.[22]

## 3 Emergence of 'conversion therapy' in Africa

Globally, 'conversion therapy' practices emerged in the mid-nineteenth century due to the medicalisation of minority gender and sexual identities.[23] These practices sought to find medical interventions to 'correct' such identities.[24] Religious groups soon became providers of these practices through the provision of 'spiritual cleansing' based on their own conception of gender non-conformity and homosexuality as immoral, prohibited and or evil possession.[25]

In contemporary times, 'conversion therapy' is a global phenomenon that LGBTQIA+ individuals across the globe

13 United Nations Human Rights Council (n 1) 17. See also Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.
14 United Nations Human Rights Council (n 1) 17.
15 United Nations Human Rights Council (n 1) 18 & 39.
16 United Nations Human Rights Council (n 1) 39, 50 & 52.
17 Special Rapporteur of the Commission on Human Rights 'Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) 24.
18 United Nations Human Rights Council (n 1) 46.
19 United Nations Human Rights Council (n 1) para 43.
20 KA Hicks '"Reparative" therapy: Whether parental attempts to change a child's sexual orientation can constitute child abuse' (1999) 49 *American University Law Review* 506.
21 United Nations Human Rights Council (n 1) 56. See also J Fjelstrom 'Sexual orientation change efforts and the search for authenticity' (2013) 60 *Journal of Homosexuality* 801.
22 Trispiotis & Purshouse (n 6) 109.
23 Atilola and others (n 7) 10.
24 As above.
25 As above.

experience.[26] However, there is a lack of data on the prevalence of these practices worldwide. Health and human rights researchers have only recently focused on collecting data relating to conversion practices. Their efforts have been further complicated by the fact that LGBTQIA+ individuals often conceal their experiences and identity and, therefore, are difficult to access during research.[27]

One of the most recent surveys, which included over 8 000 respondents in more than 100 countries, on the prevalence of conversion practices indicated that 20 per cent of participants had personally been subjected to 'conversion therapy' or knew someone who had endured the treatment.[28] In Africa, research conducted by Outright International in South Africa, Kenya and Nigeria found that approximately half of the 2 891 LGBTQIA+ participants indicated that they had been subjected to 'conversion therapy' (58, 44 and 49 per cent of the surveyed participants surveyed in these countries, respectively).[29]

On the African continent, 'conversion therapy' takes many forms and the practice is primarily driven by members of religious communities.[30] Non-heteronormative and non-cisgender expressions of sexual orientation and gender identity are often perceived to be spiritual problems rather than mental illnesses.[31] Churches and other religious institutions may organise exorcisms and prayers to drive out the 'demon of homosexuality'.[32] Indeed, a South African LGBTQIA+ individual who was subjected to 'conversion therapy' reported that the practice left him feeling 'dirty and cursed'.[33]

Other common practices on the continent include torture, wrongful imprisonment in camps or religious centres, and sexual violence, including forced or coerced marriage.[34] Other providers of 'conversion therapy', according to Out Right International's research, include traditional healers and healthcare workers.[35]

26 See, generally, A Bishop *Harmful treatments: The global reach of so-called conversion therapy* (2023).
27 This is true even in non-criminalising countries such as the United Kingdom. Eg, see A Jowett and others *Conversion therapy: An evidence assessment and qualitative study* (2020) 1.
28 Atilola and others (n 7) 10.
29 Wamari & Farisè (n 2) 8.
30 As above.
31 Atilola and others (n 7) 10.
32 Wamari & Farisè (n 2) 8.
33 Wamari & Farisè (n 2) 23.
34 Wamari & Farisè (n 2) 9.
35 Wamari & Farisè (n 2) 25.

In 2019 the international organisation Out Right International conducted a study on 'conversion therapy' in Africa, which found that 75 per cent of 'conversion therapy' practices are carried out for religious and cultural reasons.[36] Many African countries continue to tolerate these kinds of religious interventions despite the harmful experiences of LGBTQIA+ persons.[37]

## 4 African LGBTQIA+ individuals as rights holders

There is no mention of the terms associated with 'LGBTQIA+' identity, such as 'sexual orientation' and 'gender identity', in the African Charter. Therefore, it is necessary to establish that LGBTQIA+ individuals indeed are rights holders in terms of the African Charter and, consequently may rely on the rights contained therein. The African Commission on Human and Peoples' Rights (African Commission) has interpreted the African Charter in an increasingly progressive manner.[38] However, 'gender identity' and 'sexual orientation' have remained largely unexplored by the African Commission. This is despite ongoing and sustained violations against LGBTQIA+ individuals in numerous African countries.[39]

Non-discrimination is addressed by article 2 of the African Chater, which provides that individuals enjoy the rights contained within the African Charter 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status'. Viljoen and Murray persuasively argue that the inclusion of phrases 'or other status' and 'such as' indicates that the list of grounds is 'open' as the phrasing suggests that the drafters of the African Charter envisioned that the list of grounds could be expanded.[40] Indeed, the rationale of the African Charter requires that 'other status' should be an 'expansive and open-ended' concept due to the grave consequences, in relation to the reliance on other African Charter rights, which follow from the exclusion of the ambit of article 2.[41]

36 Bishop (n 26) 38.
37 Naidoo & Sogunro (n 7) 9.
38 RH Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) *29 Human Rights Quarterly* 87.
39 Amnesty International 'Africa: Barrage of discriminatory laws stoking hate against LGBTI persons' 9 January 2024, https://www.amnesty.ie/africa-discrimination-lgbti/ (accessed 1 May 2025).
40 Murray & Viljoen (n 38) 91.
41 As above.

The fact that LGBTQIA+ status falls within the ambit of article 2 finds further support in the African Commission's adoption of the Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (Resolution 275). Resolution 275 was adopted in line with the African Commission's mandate[42] to interpret the rights in the African Charter.

Despite constituting 'soft law', Resolution 275 is significant for the purposes of this article in three ways. First, the Preamble to the Resolution indicates that LGBTQIA+ status falls within the ambit of article 2 of the African Charter and, therefore, LGBTQIA+ individuals are entitled to the rights contained therein. Second, the African Commission urged states to end all acts of violence and abuse, committed by state and non-state actors, which target persons 'on the basis of their imputed or real sexual orientation or gender identities'. Part 2 of this article makes it clear that 'conversion therapy' practices constitute 'abuse' and 'violence'. Third, and perhaps most importantly, the Preamble to Resolution 275 suggests that LGBTQIA+ individuals specifically enjoy the protection of article 5 of the African Charter, a provision which is central to this article.

## 5 Degradation and dignity in the African Charter on Human and Peoples' Rights

Article 5 of the African Charter is dedicated to the right to dignity and combating several manifestations of its violations. The article provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

This provision recognises an enforceable right to dignity. Accordingly, the provision differs from the reference to dignity in the Preamble which refers to a value that informs all the rights incorporated under the African Charter.[43] Further, this provision unequivocally perceives dignity as something that is embedded within every human person. This formulation of human dignity aligns with the provisions of several human rights instruments such as the Universal Declaration

42 Under art 45 of the African Charter.
43 TA Gelaye 'The role of human dignity in the "human rights" jurisprudence of the African Commission on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 127.

of Human Rights (Universal Declaration).[44] Notably, the African Court on Human and Peoples' Rights (African Court) and the African Commission have interpreted the right to life broadly to include both the 'inviolable nature and integrity of the human being'[45] as well as the right to a dignified life.[46]

The African Commission has interpreted 'inhuman or degrading treatment or punishment' quite broadly to include the 'widest possible protection against abuse, whether physical or mental'.[47] For example, the African Commission found that addressing individuals in degrading language constitutes an infringement of article 5.[48] In the context of the right to dignity, the African Court and African Commission have also found infringements relating to living conditions of detained persons,[49] mandatory death penalties[50] and unlawful detention.[51]

In relation to the dignity of members of the LGBTQIA+ community on the African continent, the African Commission, through Resolution 275, expressed concern about violence and other human rights violations committed against persons based on their real or imputed non-heteronormative sexual orientation or gender identity. Considering the right to human dignity, in conjunction with other human rights enumerated in the African Charter, the African Commission, through Resolution 275, implored state parties to arrest perpetrators of all forms of violence against sexual minorities and to adopt legislation to protect them. Furthermore, the African Commission acknowledged that violence and discrimination based

44 African Commission on Human and Peoples' Rights Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity (2014).
45 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012, African Court on Human and Peoples' Rights (2017) 152.
46 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) (2015) 3.
47 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 58. See also *Armand Guehi v United Republic of Tanzania* Application 1/2015, African Court on Human and Peoples' Rights (2018). See also *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 71; *Doebbler v Sudan* (2009) AHRLR 208 (ACHPR 2009) para 37.
48 *Purohit* (n 47) paras 58-59.
49 *Purohit* (n 47) para 55; *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 53; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 41.
50 *Ally Rajabu & Others v United Republic of Tanzania* Application 7/2015 African Court on Human and Peoples' Rights (2019) 119.
51 *African Commission on Human and Peoples' Rights v Libya* Application 2/2013 African Court on Human and Peoples' Rights (2016) 78-85. See also *Institute for Human Rights and Development in Africa* (n 49) para 50; *Huri-Laws* (n 49) para 40.

on sexual orientation and gender identity violate the right to human dignity.[52]

A key trend that has emerged in the jurisprudence of the African Commission is the importance of 'equal moral personhood' in assessing infringements of human dignity. For example, in *Purohit* the African Commission found that an individual cannot lose their dignity or respect due to a disability. Rather, their value as any other member of the human family always persists.[53]

In *Open Society v Côte d'Ivoire* the African Commission issued perhaps its strongest statement on human dignity, by stating the following:[54]

> Dignity is … the soul of the African human rights system and which it shares consubstantial with both the other systems and all civilised human societies. Dignity is intrinsic and inherent to the human person. In other words, when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society … When dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights.

This passage underscores the intrinsic nature of human dignity and its indelible relationship to human nature. Accordingly, when one's dignity is jeopardised, their very human nature is also threatened.

## 6 Dignity and 'conversion therapy'

In addition to constituting moral wrongs because of the harmful psychological and physical effects of 'conversion therapy',[55] all forms of 'conversion therapy' inherently undermine the equal moral worth of LGBTQIA+ persons. Regardless of the grave harms that 'conversion therapy' inflicts on LGBTQIA+ individuals, and social and cultural understandings of what constitutes disrespectful behaviour, all forms of the practice fail to recognise that all individuals possess equal moral worth despite their gender identity and sexuality. In the remainder of this part, two ways in which 'conversion therapy' fails to treat LGBTQIA+ individuals with equal moral personhood will be outlined.

52 A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 23-24.
53 Gelaye (n 43) 129.
54 *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights (2015) para 139.
55 Identified earlier in the article.

### 6.1 Attacks on autonomy

First, 'conversion therapy' practices disrespect the equal moral personhood of LGBTQIA+ individuals as they discount the group's important autonomy concerns without any justifiable rationale for such disregard.[56] In essence, 'conversion therapy' singles out LGBTQIA+ identities as being inferior to heterosexual and cisgender identities and, consequently, furnishes less regard to the interests of individuals with these identities.[57] Accordingly, despite a person's gender identity or sexuality constituting the justification of this lower regard, the 'responses constitutive of less consideration are focused on the person and their interests'.[58] This communication of inferiority, which is inherent to 'conversion therapy', emerges in testimony of a South African transmasculine survivor of 'conversion therapy' who states that 'I have always felt like a guy and still feel like a guy. Conversion hasn't changed anything. I just felt impure.'[59]

As such, it has been argued that all forms of 'conversion therapy' possess a common goal of undermining autonomy, that is, to restrain a set of deep-seated paramount interests concerning gender identity and sexuality,[60] of which perhaps the most patent is the interest to develop one's sexual attraction into sexual activity.[61] This is the case as many forms of 'conversion therapy' seek to either inhibit same-sex attraction or inhibit the possibility of the development of same-sex attraction into consensual same-sex sexual activity.[62] Both objectives seek to inhibit choices that are fundamental to the model of an autonomous life formed by an individual's continuous external and internal identity affirmation regarding gender identity and sexuality, of which transgender, cisgender, non-binary, heterosexual, bisexual, asexual and homosexuality identities are seen as having equal moral personhood.[63]

56 H Frankfurt *Necessity, volition, and love* (1999) 146-155.
57 N Kolodny 'Rule over none II: Social equality and the justification of democracy' (2014) 42 *Philosophy and Public Affairs* 287.
58 Trispiotis & Purshouse (n 6) 110.
59 Atilola and others (n 7) 12.
60 Since 'conversion therapy' breaches autonomy-based duties, state intervention is legitimate. See J Raz *The morality of freedom* (1986) 416-417.
61 Trispiotis & Purshouse (n 6) 110.
62 The definitions of 'conversion therapy' in some of the existing laws against it cover practices that aim to convert, cancel or suppress sexual orientation or gender identity. See, eg, the legislation adopted in Queensland (Public Health Act 2005, sec 213F as amended by Health Legislation Amendment Act 2020, sec 28) and Victoria (Change or Suppression (Conversion) Practices Prohibition Act 2021, sec 5).
63 J Gardner 'On the ground of her sexuality (1998) 18 *Oxford Journal of Legal Studies* 172-173. The question of whether sexuality constitutes an immutable characteristic or a fundamental choice cannot determine whether people are entitled to protection from 'conversion therapy'. In either case, sexuality and

### 6.2 Unfair subordination of LGBTQIA+ individuals

The second way in which all forms of 'conversion therapy' fail to treat LGBTQIA+ persons as human beings with equal moral personhood is by inhibiting LGBTQIA+ individuals from possessing pride in their gender identity and sexuality and asserting these elements as aspects of their public personality. The suppression of pride in one's LGBTQIA+ identity that associated with 'conversion therapy' is humanised through the testimony of a South African survivor of 'conversion therapy', who states: 'I believed I needed to change. I attempted suicide several times.'[64]

This decision to possess pride in your identity, and to express this pride in your public personality, is a profound decision that is also fundamental to personal autonomy, as the self-suppression of one's identity impedes full engagement in worthy aspects of public culture – such as politics, art and music – which are shaped and imbued by a myriad of gender identities and sexual orientations.[65] By denouncing these critical choices, 'conversion therapy' undermines self-worth as individuals determine their own sense of worth in relation to their capacity to realise their potential, objectives and aspirations.[66] Therefore, 'conversion therapy' diminishes the equal moral personhood of LGBTQIA+ individuals without justifiable rationale, by disregarding fundamentally significant interests that are core to their personal autonomy.

Importantly, the harm of 'conversion therapy' to the dignity of LGBTQIA+ individuals extends beyond harming the dignity of those specific individuals who are subjected to the practice. 'Conversion therapy' is sustained by and manifests a social order in which LGBGTQIA+ persons are disempowered and are treated with less respect than heterosexual and cisgender individuals.[67] The existence of 'conversion therapy' implies the disdain or contempt for LGBTQIA+ identities, which can and should be eradicated. This implication is humiliating for all LGBTQIA+ persons, including those who have never themselves been subjected to 'conversion therapy',[68]

---

gender identity are so central to self-definition that the harms of 'conversion therapy' amount to an attack on the autonomy of LGBTQIA+ persons.

64 Atilola and others (n 7) 12.

65 Gardner (n 63) 176-8.

66 DG Réaume 'Discrimination and dignity' (2003) 63 *Louisiana Law Review* 673; T Khaitan 'Dignity as an expressive norm: Neither vacuous nor a panacea' (2012) 32 *Oxford Journal of Legal Studies* 1; J Wolff 'Fairness, respect, and the egalitarian ethos' (1998) 27 *Philosophy and Public Affairs* 107.

67 Trispiotis & Purshouse (n 6) 111.

68 On the demeaning message of discrimination, see D Nejaime and RB Siegel 'Conscience wars: Complicity-based conscience claims in religion and politics' (2015) 124 *Yale Law Journal* 2574-2578.

as it advances the message that LGBTQIA+ individuals are social deviants – a message that underlies their pre-existing stigma in many societies.[69] Accordingly, the negative effects of 'conversion therapy' are not limited to those who experience the practice but also to the LGBTQIA+ population more generally as the practice influences the perceptions of the population towards the LGBTQIA+ community. Indeed, evidence indicates that there is a link between the absence of a legal ban on 'conversion therapy' in most European countries, on the one hand, and a social context of historical stigmatisation of homosexuality, on the other.[70]

Let us consider real-life examples with the opposite aim in terms of which courts have found that coercive forms of interference with core aspects of an individual's identity, such as religion, are unlawful. Here, due to the fact that there is no jurisprudence from African Court or the African Commission on the issue, case law from the European Court of Human Rights (European Court) will be considered. Notably, the African Commission has drawn upon European Court case law in interpreting the right to dignity in numerous cases.[71] The European Court has consistently ruled that exploiting a power imbalance within certain settings, for example, in a military environment,[72] in order to change an individual's religious beliefs is unlawful in terms of the European Convention on Human Rights (European Convention).[73]

### 6.3 The issue of consent

'Conversion therapy', sustained by and manifesting the systemic disempowerment of LGBTQIA+ individuals, occurs in many societies in Africa.[74] These broader, subjugating effects of 'conversion therapy'

69 M Nussbaum *From disgust to humanity: Sexual orientation and constitutional law* (2010) 2-26.

70 The force of this objection depends on an analysis of the socio-historical particularities that determine the meaning of an act.

71 Eg, *Ireland v UK* (1978) ECtHR 1, cited in *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) AHRLR 90 (ACHPR 2011) para 194 and *Huri-Laws v Nigeria* (n 49) para 41. See also R Murray 'Article 5: Respect of dignity; prohibition of slavery and torture and other forms of ill-treatment' in R Murray (ed) *The African Charter on Human and Peoples' Rights: A commentary* (2019) 139.

72 *Larissis v Greece* (1998) ECtHR 51.

73 This argument does not suggest that there is a positive state obligation to ban all forms of proselytism. It only aims to show that the legitimacy of proselytism, to a significant extent, depends on an evaluation of the background conditions in which it takes place. See *Nasirov & Others v Azerbaijan* (2020) ECtHR 65; *Jehovah's Witnesses of Moscow & Others v Russia* (2010) ECtHR 122. More broadly, egalitarian considerations can justify restrictions on freedom of religion or belief; see I Trispiotis 'Religious freedom and religious antidiscrimination' (2019) 82 *Modern Law Review* 864.

74 AA Onyisi and others 'Constitutional protection of the LGBT rights and access to justice: A case analysis of select East African Community (EAC) states' (2023) 4

provide a further important need to counter the practice. However, one might assert that the argument only applies to instances of forced 'conversion therapy' as opposed to instances when individuals choose to subject themselves to the practice. The objection may proceed to assert that if a practitioner of 'conversion therapy' details the risks associated with 'conversion therapy, then an individual who chooses to undergo the 'practice' is responsible for the concomitant harm. It may be argued that allowing an individual to make this choice is in itself a form of respect for their autonomy.

Indeed, consent is not irrelevant in the determination of whether particular conduct constitutes prohibited treatment in human rights law. For example, the African Court has found a violation of article 5 of the African Charter in an instance where an individual was forced to act against 'his will or conscience'.[75] Nevertheless, the objection is based on an untenably restrictive interpretation of the moral significance of choice, and disregards the underlying circumstances in which the decision is taken. Crucially, this conception of consent is incongruous with regard to the existing jurisprudence on article 5, which was detailed in part 5 of this article, in terms of which the existence of systemic prejudice against a group or the vulnerability of the survivor is the principal consideration and not whether the survivor had a choice to avoid the relevant conduct. The jurisprudence on article 5 reflects a more extensive understanding of the moral significance of choice in terms of which certain conditions must be satisfied prior to determining whether an individual's choice is sufficient.

### 6.4 The issue of intention

The last issue to address in this part is the relationship between the intention of the provider of the 'therapy' and the repudiation of the equal moral personhood of LGBTQIA+ individuals. Although the belief that LGBTQIA+ persons lack equal moral personhood is central to most instances of 'conversion therapy', it does not follow that the practice should be banned only in instances where the provider holds such a belief. To underscore this point, let us consider a religious leader who provides 'conversion therapy' to save a lesbian woman from eternal damnation. It is possible for the religious leader to assert that she believes that LGBTQIA+ individuals possess equal moral value and, therefore, efforts must be taken to save their souls

*Journal of International Social Science and Humanities* 172.

75 *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 79.

through 'treatment' in the form of 'therapy'. A religious leader with such beliefs would not be providing the 'therapy' due to their belief that LGBTQIA+ individuals are inherently less valuable than others.

However, even if, in these instances of the provision of 'conversion therapy', it is due to benevolent motives, the right to dignity of LGBTQIA+ individuals is nevertheless infringed as their interests – personal autonomy, development of personality, and physical and mental wel-lbeing – are, without good cause, considered less valuable than the corresponding interests of their cisgender heterosexual counterparts. Accordingly, the violation of the right to dignity through 'conversion therapy' is independent of a therapist's beliefs. Rather, the violation stems from a belief that sexual orientations and gender identities that differ from an ordained norm dictate that certain interests of LGBTQIA+ persons should be disregarded to achieve a certain objective.

## 7 'Conversion therapy' and the scope of the prohibition on torture or degrading treatment

The preceding part demonstrated why 'conversion therapy' constitutes a grave violation of human dignity. In this part of the article it will be assessed whether all forms of 'conversion therapy' constitute 'degrading treatment' and/or 'torture'. The importance of this determination cannot be overstated due to the existence of an absolute ban on degrading treatment in the African regional human rights system.

### 7.1 Article 5's absolute ban

The African Commission has affirmed that the article 5 ban against, cruel, inhuman and degrading treatment is absolute.[76] Even in instances of combating alleged terrorist activities, it is 'not justified to subject' individuals to such treatment.[77] This absolute ban is underpinned by the absence of a derogation clause in the African Charter.[78] Notably, this provision refers to both 'punishment' and 'treatment', but typically these terms are not distinguished one from one the other.[79] It is further regrettable that the African Commission's

76 *Huri-Laws* (n 49) 41.
77 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 113-114.
78 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 165.
79 Association for the Prevention of Torture (APT) and the Centre for Justice and International Law (CEJIL) *Torture in International Law* (2008) 127.

and Court's efforts to distinguish between 'punishment' or 'treatment' that is 'cruel', 'degrading', 'inhuman' and 'torture' are *ad hoc* and do not demonstrate an intention for the terms to be treated separately.[80]

In line with the European Court, the African Commission refers to 'the minimum level of severity' in order to determine whether treatment constitutes a violation of article 5. These factors include the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the survivor, and so forth.[81]

### 7.2 The nature of the 'punishment' and 'treatment' that violates article 5

The determination that 'treatment' or 'punishment' is 'inhuman or degrading' is case-specific.[82] In making this determination, it is clear that the dignity of the affected person or persons is an important consideration.[83] For example, the African Court has endorsed the European Court's findings that in order for treatment to be 'degrading', the relevant individual must have undergone humiliation or debasement attaining a minimum level of severity in their own eyes or the eyes of others.[84] In this respect, violations of article 5 have been found in the context of situations that are 'analogous to slavery',[85] the denial of identity documents to an ethnic group[86] and the issuance of death threats in incommunicado detention.[87] A common thread in these series of findings is the practice demonstrating the unequal moral worth of certain individuals or groups.

In addition to violations of article 5 being found in the context of 'punishment' or 'treatment' that signals the unequal moral worth of the other, a further trend that emerges in the case law is the existence of a person or persons that occupy a position of power over the survivor that allows them to humiliate or degrade the other. For example, in *Doebbler* the complainant alleged that the punishment

80 See also F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* (2014) 48-51.
81 *Huri-Laws* (n 49) 41.
82 *Egyptian Initiative for Personal Rights* (n 71) para 187.
83 *Egyptian Initiative for Personal Rights* (n 71) paras 189-190.
84 *Campbell and Cosans v UK* (1982) ECtHR 1, as cited in *Egyptian Initiative for Personal Rights* (n 71) para 200.
85 *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 135.
86 *Open Society Justice Initiative* (n 54) para 69.
87 *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/09 African Commission on Human and Peoples' Rights (2013) para 74.

by security agents and police officials of individuals by lashings was disproportionate and humiliating.[88] An aggravating factor here, according to the African Commission, was the public nature of the lashing which 'is contrary to the high degree of respect accorded to females in Sudanese society'.[89] A further example of the existence of a power imbalance in the context of an article 5 'punishment' and 'treatment' violation involved Egyptian state security intelligence officers being complicit in sexual assault and physical beatings.[90]

In these contexts, the societal message that is communicated is that victims are powerless under the control of a person in a position of power, usually a law enforcement official, and that the individual is morally inferior to them.[91]

### 7.3 Degrading and inhuman treatment and 'conversion therapy'

The foregoing parts have demonstrated that under the African human rights law system, degrading 'punishment' and 'treatment' (article 5) violations exist when (i) an act displays the unequal moral worth of an individual or group of individuals; and (ii) the person who commits the act occupies a position of power over the survivor that allows them to humiliate and degrade others. It has been argued that the formulation of these two conditions reflects the close relationship between dignity and degrading treatment that exists in our moral vocabulary.[92]

It will now be considered whether two of the most common forms of 'conversion therapy' (namely, extreme and violent forms of 'conversion therapy', on the one hand, and milder, non-forcible forms of 'conversion therapy', on the other) satisfy the conditions outlined above. The former types of 'conversion therapy', such as those involving, among others, the injection of drugs, rape, forced genital examinations and electroshocks, cause severe mental and physical pain[93] and, therefore, constitute a 'punishment' and 'treatment' violation according to article 5. Depending on the severity of this treatment, they may constitute 'torture' as opposed to 'degrading and inhuman punishment or treatment'.[94]

88 *Doebbler v Sudan* (n 47).
89 *Doebbler v Sudan* (n 47) para 32.
90 *Egyptian Initiative for Personal Rights* (n 71) 186.
91 Trispiotis & Purshouse (n 6) 117.
92 Trispiotis & Purshouse (n 6) 118.
93 Special Rapporteur of the Commission on Human Rights (n 17) 24.
94 Trispiotis & Purshouse (n 6) 124.

The second class of 'conversion therapies' to consider are the milder forms, which typically include non-physical 'talking' sessions that pathologise certain gender identities and/or sexualities and seek to repress or eliminate their expression.[95] If it is shown that these non-physical forms of 'conversion therapy' violate the 'treatment' and 'punishment' article 5 provision, then all types of 'conversion therapy' – from its most violent and forcible forms to its milder and non-forcible forms – would face absolute prohibition by article 5 of the African Charter. It will be demonstrated that all forms of 'conversion therapy' satisfy the two preconditions for 'treatment' and 'punishment' article 5 violations outlined above.

### *7.3.1 The first condition*

An inherent feature of all forms of 'conversion therapy' is the treatment of LGBTQIA+ individuals as if they are of less value than their non-LGBTQIA+ counterparts as every iteration of the 'practice' exhibits disdain for LGBTQIA+ identities.[96] This disdain is discharged through the purposeful refusal to acknowledge the equal value of the well-being of LGBTQIA+ persons.[97] This is a violation of dignity that necessarily manifests irrespective of whether the survivors of 'conversion therapy' suffer mental or physical harms. It is important to note that the implication is not that the damaging effects of 'conversion therapy' on the survivors are irrelevant. Rather, the easily foreseeable deleterious mental and physical consequences that 'conversion therapy' has on its survivors are relevant in determining the degrading nature of the practice.[98]

As outlined, the practice results in a significant risk of severe, life-long physical and psychological suffering of its survivors detailed in the second part of this article. Separate from these mental and physical harms, however, the existence of the practice also constitutes a message of contemptuous disdain for the well-being and interests

95 This does not include counselling that seeks to provide acceptance, support, facilitation and understanding of a person's sexual and gender identity. That is why some bans expressly exempt such practices from the scope of 'conversion therapy'. See, eg, the legislation adopted in Queensland (Public Health Act 2005, sec 213F as amended by Health Legislation Amendment Act 2020, sec 28) and Victoria (Change or Suppression (Conversion) Practices Prohibition Act 2021, sec 5).

96 Trispiotis & Purshouse (n 6) 126.

97 As above.

98 Thus, legal intervention against 'conversion therapy' is justified, at least in part, by appeal to the states of affairs it promotes. This (broadly) consequentialist view is different to rule of utilitarianism because it is unconcerned with benefit maximisation. See TM Scanlon 'Rights, goals and fairness' in TM Scanlon (ed) *The difficulty of tolerance* (2003) 33-39.

of LGBTQIA+ individuals,[99] including instances where the message is not blatantly communicated, but the degrading essence of the practice is unambiguous to its recipients as it indicates and sustains a widely intelligible message regarding sexuality and gender identity norms and expectations related to normality and desirability.[100] This message is easily understood by its recipients as they are members of the 'same community of shared meanings as those who try to "convert" them'.[101] For this reason, 'conversion therapy' degrades its recipients even if individual survivors do not feel degraded and also in circumstances where it is not the intention of the 'provider' of the 'therapy' to degrade.[102] Therefore, the practice is inherently irreconcilable with the understanding of self-worth that is central to human dignity, a concept that entails that an individual feels assured in their individual identity, 'including as a member of those communities with which they identify'.[103]

This understanding of 'self-worth' is extinguished by 'conversion therapy' as the 'practice's' intrinsic objective is to supress the freedom of LGBTQIA+ individuals to pursue options with respect to some of the most intimate and important domains of life. These possibilities that 'conversion therapy' obstructs would not be denied to a non-LGBTQIA+ individual.[104] Therefore, all forms of 'conversion therapy' satisfy the first condition of not treating individuals with equal moral worth.

### *7.3.2 The second condition*

The second condition, that is, the person who commits the act occupies a position of power over the survivor that allows them to humiliate and degrade others, will now be considered. All forms

99 The prohibition on discrimination is partly a response to the subordinating meaning of 'institutionalised humiliation' conveyed by certain forms of disadvantageous treatment. See JM Balkin & RB Siegel 'The American civil rights tradition: Anti-classification or anti-subordination?' (2004) 58 *University of Miami Law Review* 9. Expressive harms can directly injure, and function differently from ideological or purely subjective injuries. Student note 'Expressive harms and standing' (1999) 112 *Harvard Law Review* 1313; RH Pildes & RG Niemi 'Expressive harms, "bizarre districts", and voting rights: Evaluating election-district appearances after *Shaw v Reno*' (1993) 92 *Michigan Law Review* 483.

100 Trispiotis & Purshouse (n 6) 126.

101 As above.

102 Subordinated groups do not choose the social meanings imposed on them by society's institutions, such as religious groups or medical experts. L Melling 'Religious refusals to public accommodations laws: Four reasons to say no' (2015) 38 *Harvard Journal of Law and Gender* 177; M Lim & L Melling 'Inconvenience or indignity? Religious exemptions to public accommodations laws' (2014) 22 *Journal of Law and Policy* 705.

103 Trispiotis & Purshouse (n 6) 126.

104 Trispiotis & Purshouse (n 6) 127.

of 'conversion therapy' also satisfy this criterion as an appreciable power imbalance is intrinsic to the practice.

'Conversion therapy' is customarily provided by individuals belonging to prominent social institutions, such as healthcare practitioners and religious leaders, who occupy a higher social status and appreciable power disparity in relation to survivors. As a result of this significant power imbalance between therapists, doctors, pastors, imams, and so forth, and individual survivors, the disrespect conveyed by 'conversion therapy' degrades survivors in addition to insulting them.[105]

Accordingly, all manifestations of the practice of 'conversion therapy' constitute a 'treatment' and 'punishment' article 5 violation because they all involve disrespect of the equal moral worth of LGBTQIA+ individuals coupled with an appreciable status or power differential between the relevant parties.

## 8 Positive obligations

So far, it has been demonstrated that all forms of 'conversion therapy' violate the human dignity of all LGBTQIA+ individuals in a society and amount to degrading treatment. Therefore, while article 5 of the African Charter neither expressly prohibits 'conversion therapy', nor does it mention the terms 'sexual orientation' or 'gender identity', the elements that are inherent to all forms of 'conversion therapy' place the practice within the ambit of article 5. Therefore, state parties are obligated to prohibit all forms of 'conversion therapy'.

It has been widely acknowledged that the civil and political rights detailed in several human rights instruments do not exclusively create negative obligations on states, in the sense that they impose duties on states to refrain infringing the enumerated rights, but they also impose positive obligations on states to take active measures to allow the enjoyment of rights.[106]

Article 1 of the African Charter contains the source of positive obligations under the instrument. This provision states that '[m]ember states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms

105 As above.
106 JV Wibye 'Reviving the distinction between positive and negative human rights' (2022) 35 *Ratio Juris* 375.

enshrined in this Chapter and *shall undertake to adopt legislative or other measures to give effect to them*'.[107]

Also, in *Legal Resources Foundation v Zambia*, the African Commission held:[108]

> The Commission is mindful of the positive obligations incumbent on States Parties to the Charter in terms of article 1 not only to 'recognise' the rights under the Charter but to go on to 'undertake to adopt legislative or other measures to give effect to them'. The obligation is peremptory, States 'shall undertake' …. Indeed, it is only if the States take their obligations seriously that the rights of citizens can be protected.

Indeed, the African Commission has found that even in instances of civil war, a state cannot escape a finding of its violation of article 1 on the basis that the violations were committed neither by the state nor its agents. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, the African Commission held as follows:[109]

> The Charter specifies in article 1 that the States Parties shall not only recognise the rights duties and freedoms adopted by the Charter, but they should also 'undertake ... measures to give effect to them'. In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.

While focus of this article has been on the African Charter, the UN Committee Against Torture's (CAT Committee)'s work on 'conversion therapy' demonstrates that this article's main arguments are applicable more generally under international law. While a more comprehensive analysis is beyond the scope of this article, the relevance of the broader international human rights law framework serves to be emphasised.

The Yogyakarta Principles, which codify international human rights standards and how they apply to LGBTQIA+ persons, are also increasingly respected as a source of international law, albeit as a soft law source,[110] oblige states to prohibit all forms of 'conversion therapy'.[111] The source of this obligation is the absolute prohibition on 'cruel, inhuman and degrading treatment' in terms of article 2(2)

107 My emphasis.
108 (2001) AHRLR 84 (ACHPR 2001) para 62.
109 (2000) AHRLR 66 (ACHPR 1995) para 20.
110 A Jjuuko *Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa* (2020) 149.
111 The Yogyakarta Principles Plus 10, Principle 10 E. See M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 237-247.

of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as confirmed by two state periodic reports of the CAT Committee. The first report called on the Republic of Ecuador to close all private centres where 'conversion therapy' is administered and to hold all involved individuals accountable.[112] Likewise, the body has called on the People's Republic of China to ban 'conversion therapies', as well as all other 'forced, involuntary or otherwise coercive or abusive treatments' against LGBTIQIA+ persons.[113] The reference to 'abusive treatments' is crucial as it indicates the little importance that the CAT Committee attaches to consent to such 'therapies'. States are obliged to ban all 'abusive treatments' targeting LGBTQIA+ individuals as opposed to exclusively 'forcible' forms of 'conversion therapy'.[114] The African Charter implicitly bars public authorities from engaging in the provision of 'conversion therapy' as doing so would violate article 5.

## 9 Compliance with positive obligations

The preceding part nevertheless raises the question as to whether articles 1 and 5 of the African Charter, read together, place a positive obligation on states to criminalise all forms of 'conversion therapy' or whether civil measures will suffice. Parts 4 and 5 of the article demonstrated that all forms of 'conversion therapy', at a minimum, amount to a violation of article 5 of the African Charter as they all constitute a severe violation of human dignity. The provision of civil remedies to individuals who have experienced 'conversion therapy' should not be overlooked. Indeed, such an approach may be a more appropriate response to address the human rights infringements present in cases of non-intentional forms of 'conversion therapy'.[115] Nevertheless, this part demonstrates that applying the African Commission's jurisprudence on article 5 and corresponding jurisprudence from the European Court, criminalising all forms of 'conversion therapy', can be justified under the African Charter. One must keep in mind, however, that while criminal sanctions are generally assumed to provide an effective means of retribution and

112 United Nations Committee Against Torture 'Concluding Observations on the seventh periodic report of Ecuador' (2017) 49.
113 United Nations Committee Against Torture 'Concluding Observations on the fifth periodic report of China' (2016) 55.
114 United Nations Committee Against Torture (n 112) 56.
115 *Mitkus v Latvia* (2010) ECtHR 76. That might not be the case, however, for grossly negligent violations of art 3. See K Kamber *Prosecuting human rights offences: Rethinking the sword function of human rights law* (2017) ch 1.

deterrence,[116] broadening the scope of criminal conduct in order to protect human rights entails appreciable risks.[117]

### 9.1 The issue of criminalisation

The African Commission has found that the duty under article 5 can translate to a state duty to mobilise the criminal law against proscribed forms of ill-treatment. For example, in a previous instance of a violation of article 5, the African Commission ordered the relevant state to 'immediately amend' its criminal statute 'in conformity with its obligations under the African Charter and other relevant international human rights instruments'.[118]

In considering how this duty under article 1 applies to 'conversion therapy', the remainder of this part of the article will rely heavily upon the precedents of the European Court, as the African Commission has largely followed the latter's jurisprudence to develop positive obligations under the African Charter.[119] In doing so, it is useful to consider the text of article 3 of the European Convention, which largely mirrors article 5 of the African Charter, stating that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

The European Court has found that violations of article 3 of the European Convention places a positive duty on states to make amendments to criminal laws in the following contexts: sexual abuse of minors;[120] ill-treatment in custody;[121] rape;[122] disproportionate police violence;[123] and domestic violence.[124] However, the rationale

116 For a critical appraisal of this presumption, see L Lazarus 'Positive obligations and criminal justice: Duties to protect or coerce' in L Zadner & J Roberts (eds) *Principles and values in criminal law and criminal justice* (2012) 135-157; F Tulkens 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577.
117 Trispiotis & Purshouse (n 6) 130.
118 *Doebbler v Sudan* (n 47) 44.
119 This approach is consistent with the mandate of the African Commission to 'draw inspiration from international law on human and peoples' rights' (art 60 of the African Charter) and to 'take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognised by member states of the Organisation of African Unity ... as well as legal precedents and doctrine' (art 61 of the African Charter). See also O Mba 'Positive obligations under the African Charter on Human and Peoples' Rights: The duty of the Nigerian government to enact a Freedom of Information Act' (2009) 35 *Commonwealth Law Bulletin* 16.
120 *M and C v Romania* (2011) ECtHR para 4.
121 *Myumyun v Bulgaria* (2015) ECtHR para 77.
122 *MC v Bulgaria* (2003) ECtHR para 166*; X and Y v The Netherlands* (1985) ECtHR para 80.
123 *Cestaro v Italy* (2015) ECtHR para 225.
124 *Volodina v Russia* (2019) ECtHR para 81.

underlying the instances in which the state has a duty to criminalise certain forms of 'ill-treatment' is not entirely apparent. For example, although the aforementioned examples all involve physical abuse, the European Court has upheld the need for criminalisation on the grounds that the degrading treatment in question gravely affects psychological well-being and human dignity,[125] irrespective of whether physical harm of a certain level of seriousness has been suffered.[126]

### 9.2 The adoption of specific provisions

Nevertheless, the exact combination of criminal and civil law protections that would adequately protect LGBTQIA+ individuals from 'conversion therapy' warrants further analysis within a further thorough contextual evaluation, which is beyond the scope of this article. However, it is plain to assert that it is unlikely that state parties to the African Charter can comply with the positive duty imposed on them by articles 1 and 5 without adopting specific provisions against 'conversion therapy', which define the scope of the practice and detail the duty and power that public authorities have in acting against providers of the 'therapy'. Moreover, these provisions must identify remedies available to survivors and include a support and reporting framework for survivors. At the bare minimum, the African Charter requires a basic legal framework of this nature to be adopted. The remainder of this part is dedicated to detailing three factors for consideration in the adoption of such a ban.

First, 'conversion therapy' in Africa often occurs outside public spaces, such as in locations provided by religious bodies.[127] Thus, the obligation imposed on state parties by the African Charter cannot be fully complied with if a legislated ban on the 'practice' only imposes sanctions on the conduct of healthcare professionals to the exclusion of other actors.[128] As state parties' positive obligation to ban the 'practice' is the result of the absolute prohibition on torture or cruel, inhumane and degrading treatment under the African Charter, the ban must apply to all potential providers, including non-state actors such as religious actors.

Second, as both consensual and non-consensual types of 'conversion therapy' constitute, at a minimum, degrading treatment, states must ban both forms. However, therapeutic interventions that

125 *Myumyun* (n 121) para 74.
126 *Volodina* (n 124) para 81.
127 Bishop (n 26) 38.
128 As is the case, eg, in Albania.

seek to affirm LGBTQIA+ identities, as opposed to pathologising them, must be exempted from the ban as they do not amount to 'conversion therapy'. This is the case as they are not grounded in the supposition of a hierarchy of gender identities or sexualities and, therefore, do not seek to suppress aspects of or alter an individual's identity.

Third, this article does not postulate that the imposition of a legal ban on 'conversion therapy' on its own will eliminate the practice or offer adequate protection to the LGBTQIA+ community. Other steps exist that must be taken in tandem with a legal ban to fully eradicate this deeply inegalitarian practice. These steps include supporting survivors of 'conversion therapy', public awareness initiatives that involve engagement with religious and traditional leaders and community groups, including provisions addressing the role of parents and legal guardians. While these accompanying measures are necessary to protect the LGBTQIA+ community, this article has demonstrated why the African Charter requires a ban on all forms of 'conversion therapy' to begin with. This ban is a vital first step towards addressing the impunity that providers of the damaging 'practice' currently enjoy.

## 10 Conclusion

The rights of LGBTQIA+ individuals in Africa continue to be violated on a daily basis. This article has argued that LGBTQIA+ status falls within the ambit of article 2 of the African Charter and, therefore, enjoys the rights and freedoms contained in the instrument. Therefore, LGBTQIA+ individuals enjoy the protection of article 5 of the African Charter which protects their human dignity and protects them from being subjected to 'torture or cruel, inhumane and degrading treatment'.

Arguably, being subjected to 'conversion therapy' ranks among the worst of the violations that African LGBTQIA+ individuals experience as all forms of the practice disrespect the equal moral personhood of LGBTQIA+ persons. Accordingly, all forms of 'conversion therapy' amount to a violation of human dignity, which is prohibited by article 5 of the African Charter. Furthermore, depending on the nature or scope of the particular 'conversion therapy' intervention, the act could amount to an act of 'torture or cruel, inhumane and degrading treatment'. This article concludes by arguing that all state parties to the African Charter are obliged to take effective measures to protect LGBTQIA+ individuals from harms associated with 'conversion therapy'. A vital step that states must take to comply with their

positive obligation is to ban all forms of 'conversion therapy'. While the exact additional measures, whether they be criminal or civil, that state parties must adopt to comply with their obligations to protect LGBTQIA+ individuals from 'conversion therapy' warrants a lengthy and context-dependent analysis, the penultimate part of this article provided policy and law makers with key factors to consider.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Mahmoudi '"Nothing to report on": Revitalising resocialisation as an obligation in the African human rights system in the context of gender discrimination' (2025) 25 *African Human Rights Law Journal* 85-113
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a4

# 'Nothing to report on': Revitalising resocialisation as an obligation in the African human rights system in the context of gender discrimination

*Anisa Mahmoudi**
Post-doctoral Fellow to the HF Oppenheimer Chair in Human Rights, Department of Public Law, University of Stellenbosch, South Africa
https://orcid.org/0009-0002-2271-4808

**Summary:** *This article explores the relatively underutilised state resocialisation obligation contained in global and African regional human rights law. This obligation is critical because it requires states to address and modify the underlying socio-cultural norms and practices that form the root causes of gender inequality. Using the Convention on the Elimination of all forms of Discrimination against Women as its point of departure, this article compares article 5(a) of CEDAW with the resocialisation provisions contained in the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The purpose is to demonstrate the utility of resocialisation as an obligation, as well as the (in)adequate understanding of and engagement by states and the African Commission on Human and Peoples' Rights with this obligation.*

* LLB (Cape Town) LLM (University College London) LLD (Stellenbosch); anisa@sun.ac.za. My sincere gratitude to Gideon Basson for the insightful feedback and valuable suggestions that significantly improved earlier drafts of this article. My appreciation also goes to Sandy Liebenberg for the unwavering support and constructive discussions throughout the writing process. I am thankful to the two anonymous reviewers for their time and feedback. While acknowledging these contributions, any remaining errors or oversights are solely my responsibility. The research presented in this article forms part of the research conducted in relation to the author's LLD thesis.

*This analysis demonstrates the crucial role that resocialisation as an obligation plays in the realisation of the substantive rights of women. It draws on the African Charter and the African Women's Protocol to highlight several resocialisation provisions that give rise to state obligations, embedding resocialisation as a precursor to substantive gender equality within the African regional human rights law framework. A feminist lens is employed to consider the key resocialisation provisions contained in CEDAW, the African Charter and the African Women's Protocol, with the overall aim of delineating the obligations on states to modify the underlying socio-cultural determinants to gender inequality, violence and discrimination, as provided for by the various resocialisation provisions discussed. What is expected of states in terms of this obligation is then contrasted with existing practice to demonstrate the necessity of enhancing capacity to engage with resocialisation as an obligation. The underlying assumption of this article is that unless states implement resocialisation to address the root causes of gender inequality, the transformative potential of global and African regional human rights will not be realised.*

**Key words:** *substantive gender equality; resocialisation; African Charter; African Women's Protocol; state obligations*

## 1 Introduction

The law plays a role in maintaining systemic gender inequality.[1] As Charlesworth and others note, feminist theory 'derives its theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women'.[2] To address global gender inequality, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[3] was enacted, followed by its African regional equivalents, the African Charter on Human and Peoples' Rights (African Charter)[4] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[5]

1 H Charlesworth, C Chinkin & S Wright 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613.
2 As above.
3 UN Convention on the Elimination of All Forms of Discrimination against Women adopted 18 December 1979, entered into force 3 September 1981 1249 UNTS 13.
4 African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986 1520 UNTS 217.
5 African Union 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 CAB/LEG/66.6.

Notwithstanding the important achievement that these instruments embody insofar as the recognition of women is concerned, the reach of its substantive provisions in improving women's lived realities remains limited by the existence of prevalent socio-cultural norms and practices. Such limitations necessarily impact the goal of accelerating gender equality both globally and on the African continent.[6] Modifying gendered norms to reflect the equal humanity of women, as guaranteed by global and African regional human rights law, is necessary for these instruments to yield the desired results. In this regard, article 5(a) of CEDAW notes:

> State Parties shall take all appropriate measures:
>
> to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Gendered social norms are deeply embedded and internalised through socialisation.[7] Resocialisation seeks to alter current patriarchal social undercurrents inhibiting the realisation of women's rights. As article 5(a) mandates, states must modify the conduct of women and men, ensuring that the focus remains on everyone. One important avenue for enabling resocialisation takes root in global and African regional human rights law, operating as an obligation, right and remedy.[8] Resocialisation is a legal obligation crucial to realising the rights of women to gender equality.[9]

Resocialisation also operates as a right of women and may be utilised as a remedy to redress the harm caused by gendered discrimination. Before delving into resocialisation as a right and remedy, it is important to understand resocialisation as an obligation as the point of departure. It is for this reason that the sole focus of this article is on resocialisation as an obligation, viewed through

6 'UN chief: Legal equality for women could take 300 years as backlash rises against women's rights' 2024, https://apnews.com/article/un-international-womens-day-equality-discrimination-rights-48283363821f80ad880f86e4f1ed9d48 (accessed 19 May 2024).

7 United Nations Development Programme 'Breaking down gender biases: Shifting social norms towards gender equality' June 2003 4, https://hdr.undp.org/system/files/documents/hdp-document/gsni202303pdf.pdf (accessed 19 May 2024).

8 A Mahmoudi & A Rudman 'A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice' in A Fuentes & A Rudman (eds) *Human rights adjudication in Africa: Challenges and opportunities within the African Union and sub-regional human rights systems* (2024) 141.

9 Mahmoudi & Rudman (n 8) 143.

resocialisation provisions contained in global and African regional human rights law. The purpose of this article, then, is to elaborate and provide greater clarity on the state obligations that arise therefrom.[10] It demonstrates the role of resocialisation as an obligation in realising the substantive rights of women and in achieving substantive equality for women under CEDAW, the African Charter and the African Women's Protocol. Viewed through a feminist legal theoretical framework,[11] the article demonstrates that because states are yet to adequately interpret and apply their resocialisation obligations, state compliance and engagement is limited, leaving the underlying determinants to gender inequality intact and hampering efforts towards the realisation of the substantive rights of women. Indeed, as the title indicates, states often have nothing to report on in the context of their resocialisation obligations. As the Committee on the Elimination of Discrimination against Women (CEDAW Committee) notes, the 'position of women will not be improved as long as the underlying causes of discrimination, and of their inequality, are not effectively addressed'.[12] With this in mind, the article analyses resocialisation as an obligation in international law, contrasting it with the obligations contained in the African Charter and the African Women's Protocol. In doing so, it demonstrates the embeddedness of resocialisation as obligation in international human rights law. The article also considers how resocialisation as an obligation is conceived of in practice through CEDAW Committee cases and general recommendations, contrasted on a continental level with the state party reports to the African Commission on Human and Peoples' Rights (African Commission) and the accompanying Concluding Observations.

Part 2 begins with a brief account on the concept of state obligations more generally before delving into an exploration of CEDAW's perspective on resocialisation as an obligation in part 3. Part 4 outlines the resocialisation provisions in the African Charter and African Women's Protocol, exploring obligations and the practical application of resocialisation by states and the African

10 For more on resocialisation as a right and remedy, see A Mahmoudi 'Resocialisation as an obligation, right and remedy under international and African regional human rights law in the fulfilment of African women's rights' LLD thesis, University of Stellenbosch, 2023, https://scholar.sun.ac.za/items/25aa37ed-c8c5-4d2c-b27a-03545c0c9707.

11 L Hodson 'A feminist approach to *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*' in D Gonzalez-Salzberg & L Hodson *(eds) Research methods for international human rights law: Beyond the traditional paradigm* (2020) 42.

12 UN Committee on the Elimination of Discrimination against Women 'General Recommendation 25: Article 4, Paragraph 1 of the Convention (Temporary Special Measures)' 12 May 2004 UN Doc HRI/GEN/1/Rev.1 para 10.

Commission.[13] Part 5 concludes by providing insight into state resocialisation obligations to fully realise women's rights and in facilitating substantive transformative gender equality.

## 2 State obligations

The act of states signing and ratifying human rights treaties gives rise to the state obligation to give effect to the provisions contained therein. Indeed, '[i]t is on states that most obligations rest and on whom the burden of compliance principally falls'.[14] A breach of the obligations in CEDAW, the African Charter and the African Women's Protocol may give rise to state responsibility.[15] To comply with their obligations, states are required to protect, fulfil and respect the rights of women.[16] Notably in this context, the obligation on states to resocialise requires that states protect, fulfil and respect article 5(a) of CEDAW, as well as the relevant resocialisation provisions in the African Charter and African Women's Protocol, as noted below.

As the CEDAW Committee suggests, the obligation to respect requires that states refrain from promulgating laws and policies that undermine women's rights. This is a negative obligation on states. The obligation to fulfil mandates active state engagement by requiring the implementation of steps and measures aimed at achieving both *de jure* and *de facto* equality.[17] Lastly, the obligation to protect calls on states to protect women from discrimination by private, non-state actors.[18] The due diligence obligation, as discussed under part 3, therefore, surfaces in this regard.

The African Charter imposes similar resocialisation obligations on states, as discussed below under part 4. Furthermore, the African Women's Protocol emphasises the importance of substantive gender equality by placing positive obligations on states to give effect to the rights of women.[19] The Women's Protocol rejects notions of

13 Reference to state practice and COs is made using a limited number of examples. For a more comprehensive demonstration, see Mahmoudi (n 10).
14 J Crawford & S Olleson 'The nature and forms of international responsibility' in MD Evans (ed) *International law* (2010) 442.
15 International Law Commission '2001 Articles on Responsibility of States for Internationally Wrongful Acts' UN Doc A/RES/56/83 (2001) art 12.
16 UN Committee on the Elimination of Discrimination against Women 'General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of Discrimination against Women' 16 December 2010 UN Doc CEDAW/C/GC/28 para 9.
17 General Recommendation 28 (n 16) para 9.
18 As above.
19 A Rudman 'Introduction' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women: A commentary* (2023) 1.

equality as being purely formal in nature and espouses substantive, transformative gender equality.[20]

The next part provides an analysis of resocialisation as an obligation within the broader international law framework of the obligation on states to protect, respect and fulfil the rights of women. The implementation of resocialisation as an obligation will ultimately realise three forms of equality, namely, formal, substantive and transformative equality, as discussed further below.

## 3 Resocialisation as an obligation under CEDAW

Article 1 of CEDAW defines discrimination against women, casting the net wide to include any distinction, exclusion or restriction based on sex, interpreted by the CEDAW Committee to include gender-based discrimination.[21] This is crucial for resocialisation as women experience both gender and sex-based discrimination. Socially constructed differences and characteristics, often steeped in stereotypes and other socio-cultural norms, frequently result in discrimination against women over and above sex-based discrimination. This inclusion, therefore, is crucial to understanding where state obligations to resocialise lie. According to the CEDAW Committee, article 2 is significant as it outlines the general state party obligations to respect, fulfil and protect the rights of women.

The CEDAW Committee confirms resocialisation, rooted in article 5(a) of CEDAW, as integral to the general interpretative framework for all substantive rights in CEDAW, with three central obligations arising from a joint reading of articles 1 to 5.[22] The first is to ensure formal or *de jure* equality; the second to ensure that the position of women is improved in real terms (substantive or *de facto* equality); and the third mandates addressing 'prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts but also in law, and legal and societal structures and institutions'.[23] This third obligation, that of transformative equality, 'aims at changing society in such a way that those features of existing culture and of legal, social and economic structures that obstruct the equality and human dignity of women are subjected to fundamental change'.[24]

20 A Rudman (n 19) 2.
21 General Recommendation 28 (n 16) para 5.
22 General Recommendation 25 (n 12) para 6.
23 General Recommendation 25 (n 12) para 7.
24 R Holtmaat & J Naber *Women's human rights and culture: From deadlock to dialogue* (2011) 26.

What is required is a transformation of 'opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'.[25] The influence of socio-cultural norms on the denial of women's rights is further acknowledged by the existence of the resocialisation provisions contained in the African Charter and the African Women's Protocol, as discussed under part 4.

The following parts describe each of the obligations on states as they pertain to resocialisation; the obligation to respect, protect and fulfil to facilitate the acceleration of substantive transformative gender equality. The aim is to elucidate the resocialisation obligations on states in greater detail not only from a theoretical perspective, but from its application in practice by the CEDAW Committee.

### 3.1 Obligation to respect

General Recommendation 28 stipulates that the obligation to respect entails refraining from enacting laws, policies, regulations, programmes, and the like, which would directly or indirectly result in the denial of rights.[26] It further requires that states refrain 'from performing, sponsoring or condoning any practice, policy or measure that violates the Convention'.[27] In the context of resocialisation, this obligates states to prevent the enactment of laws, policies and practices that directly or indirectly prioritise cultural rights over the rights of women, as well as those entrenching harmful attitudes, biases, assumptions and stereotypes as they relate to women and their role in society.

The CEDAW Committee addressed the obligation to respect in various cases. In *Vertido*[28] it discussed the obligation to refrain from entrenching harmful stereotypes in the context of the right to a fair trial, stating that

> the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.[29]

25 General Recommendation 25 (n 12) para 10.
26 General Recommendation 28 (n 16) para 9.
27 General Recommendation 28 (n 16) para 37(a).
28 Communication 18/2008 *Vertido v Philippines* 22 September 2010 UN Doc CEDAW/C/46/D/18/2008 (2010).
29 Vertido (n 28) para 8.4.

Similarly, in *VK*,[30] *Carreño*[31] and *RPB*[32] the CEDAW Committee underscored that state responsibility may arise where judicial authorities base their decisions on the 'inflexible standards' placed on women's behaviour in cases of rape or gender-based violence. Such 'inflexible standards' include stereotypical views about how a woman ought to behave in situations of rape[33] and the application of these 'inflexible standards based on preconceived notions of what constitutes domestic violence'.[34] In response to this trend, the CEDAW Committee issued a General Recommendation on women's access to justice[35] noting that

> [o]ften, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalise those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws.[36]

The CEDAW Committee recommends implementing resocialisation, termed capacity building in this instance, to address the rigid standards dictating what is deemed as appropriate behaviour of women alleging rights violations.[37] The inflexible standards mentioned in *Vertido* above is expanded on in General Recommendation 33 from those relating only to situations of rape to include the standards placed on women more generally in the context of access to justice.[38] As an example, General Recommendation 33 notes the obligation on states to

> [r]eview rules of evidence and their implementation … and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.[39]

30 Communication 20/2008 *VK v Bulgaria* 27 September 2011 UN Doc CEDAW/C/49/D/20/2008 (2011) para 9.11
31 Communication 47/2012 *Angela González Carreño v Spain* 15 August 2014 UN Doc CEDAW/C/58/D/47/2012 (2014) para 9.7.
32 Communication 34/2011 *RPB v The Philippines* 12 March 2014 UN Doc CEDAW/C/57/D/34/2011 (2014) para 8.8.
33 *Vertido* (n 28) para 8.4.
34 *Carreño* (n 31) para 9.7.
35 UN Committee on the Elimination of Discrimination against Women 'General Recommendation 33 on Women's Access to Justice' 3 August 2015 UN Doc CEDAW/C/GC/33.
36 General Recommendation 33 (n 35) para 26. This is confirmed verbatim in Communication 148/2019 *AF v Italy* 18 July 2022 UN Doc CEDAW/C/82/D/148/2019 (2022) para 7.5.
37 General Recommendation 33 (n 35) para 29(c)(ii).
38 General Recommendation 33 (n 35) paras 8 & 26.
39 General Recommendation 33 (n 35) para 51(h).

Furthermore, the CEDAW Committee highlights the problematic nature of the judiciary subscribing to harmful stereotypes and penalising women who do not conform.[40] As the CEDAW Committee notes, this influences the probative value given to women's voices, which necessarily impacts the likelihood of criminal convictions, 'upholding a culture of impunity'.[41] Indeed, the CEDAW Committee suggests that the obstacles women face in accessing justice 'occur in a structural context of discrimination owing to factors such as gender stereotyping'.[42] This, again, highlights the importance of transformative gender equality, the primary aim of the resocialisation obligation.

In *ES and SC*[43] the CEDAW Committee highlighted the obligation to respect in the context of multiple legal systems, citing discriminatory inheritance laws as a violation of this obligation. Indeed, the trial court noted that 'it was impossible to effect customary change by judicial pronouncement and that doing so would be opening a Pandora's box'.[44] This reluctance to challenge harmful customary norms constitutes a breach of the resocialisation obligation, triggering state responsibility. The CEDAW Committee held that the legal framework unfairly distinguishing between widows and widowers in inheritance violated the state's resocialisation obligation, among others.[45] In *SFM*[46] the CEDAW Committee held that the administrative and judicial authorities applied stereotypical views in direct contravention of the resocialisation obligation when medical professionals opted for unnecessary obstetric interventions, without explanation or an opportunity for the complainant to give an opinion thereon.[47]

The obligation to respect requires states to refrain from enacting laws, policies, practices, and the like, entrenching stereotypes, biases and other harmful socio-cultural norms and practices. The above cases and General Recommendations demonstrate the emphasis the CEDAW Committee places on negative obligations on states to respect the resocialisation obligation.

40 General Recommendation 33 (n 35) para 26.
41 General Recommendation 33 (n 35) para 26.
42 General Recommendation 33 (n 35) para 3.
43 Communication 48/2013 *ES and SC v United Republic of Tanzania* 13 April 2015 UN Doc CEDAW/C/60/D/48/2013 (2015).
44 *ES and SC* (n 43) para 7.7.
45 *ES and SC* (n 43) para 7.6.
46 Communication 138/2018 *SFM v Spain* 28 February 2020 UN Doc CEDAW/C/75/D/138/2018.
47 *SFM* (n 46) para 7.5. See Communication 154/2020 *MDCP v Spain* 9 March 2023 UN Doc CEDAW/C/84/D/154/2020 para 7.13; Communication 149/2019 *NAE v Spain* 13 July 2022 UN Doc CEDAW/C/82/D/149/2019 para 15.5.

### 3.2 Obligation to fulfil

The CEDAW Committee emphasises that the obligation to fulfil involves the implementation of 'a wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures'.[48] For resocialisation, this means implementing resocialisation measures to address harmful socio-cultural norms, attitudes and practices, including stereotyping that leads to gendered discrimination.[49] Adhering to this obligation arguably facilitates transforming systems and processes to give effect to transformative gender equality.

In *NAE* the CEDAW Committee underscored the significance of resocialisation to address the 'patronising attitudes of doctors'[50] leading to obstetric violence. The CEDAW Committee further reiterated the obligation on states to adopt 'legal and policy measures to protect women during childbirth'.[51] This was echoed by the Committee in *MDCP*.[52]

The CEDAW Committee stressed the importance of states implementing measures, including resocialisation measures in *Belousova*, a case relating to sexual harassment in the workplace. Here the complainant claimed, among others, that the state failed to implement resocialisation as directed by article 5(a) of CEDAW.[53] The CEDAW Committee noted that article 5(a) requires states 'take steps to eliminate direct and indirect discrimination and improve the *de facto* position of women'.[54] The CEDAW Committee reminded the state of its obligation to 'modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women'.[55] In this regard, the Committee recommended that the state 'provide regular, gender-sensitive training … so as to ensure that stereotypical prejudices do not affect decision-making'.[56] In other words, the CEDAW Committee recommended that the state recognise its obligation to fulfil by implementing the above resocialisation measures.

48 General Recommendation 28 (n 16) para 9.
49 S Cusack 'The CEDAW as a legal framework for transnational discourses on gender stereotyping' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 130-131.
50 *NAE* (n 47) para 15.5.
51 As above.
52 *MDCP* (n 47) para 7.9.
53 Communication 45/2012 *Belousova v Kazakhstan* 25 August 2015 UN Doc CEDAW/C/61/D/45/2012 para 3.2.
54 *Belousova* (n 53) para 10.10.
55 As above. The CEDAW Committee confirms this in Communication 91/2015 *OG v Russia* 20 November 2017 UN Doc CEDAW/C/68/D/91/2015 para 7.2.
56 *Belousova* (n 53) para 11(b)(iv).

The obligation to fulfil, one inherently positive in nature, mandates the implementation of resocialisation measures to recognise the rights of women and to accelerate the structural transformation needed to realise substantive gender equality. Intimately connected to this is the obligation to protect women from the actions of private actors and to put in place and implement measures to give effect to this prong of resocialisation obligations, as discussed below.

### 3.3 Obligation to protect

The CEDAW Committee asserts that the obligation to protect necessitates states to safeguard women from acts of discrimination undertaken by private, non-state actors and to implement resocialisation measures within the broader population to ensure such protection.[57] General Recommendation 28 expands on this noting the state party obligation to take 'steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations'.[58]

In *RPB* the CEDAW Committee noted the author's allegation that '[t]he credibility of the complainant in a rape case is mostly based on a standard of behaviour that courts believe a rape victim should exhibit. Those who satisfy the stereotypes are considered credible, while the others are met with suspicion and disbelief, leading to the acquittal of the accused.'[59]

Here the CEDAW Committee drew attention to the unreasonable behavioural expectations placed on the author leading the court to dismiss her complaint. The Committee confirmed that the prevalence of gender stereotyping utilised by the trial court amounted to sex and gender-based discrimination and a failure by the state to protect the author.[60]

*Carreño* illustrates how stereotypes led authorities to question the credibility of the author and her daughter, who was ultimately killed.[61] It highlights the devastating impact of stereotypes, biases, assumptions and other socio-cultural norms on women's and girls' lives. Here the author's repeated requests that the state protect her and her daughter fell on deaf ears with the state permitting unsupervised

57 General Recommendation 28 (n 16) para 9.
58 General Recommendation 28 (n 16) para 37(b).
59 *RPB* (n 32) para 3.3.
60 *RPB* (n 32) para 8.9.
61 *Carreño* (n 31).

visitations with the violent father. Had the authorities not based their decisions on harmful gendered assumptions and biases, they would have understood the severity of the situation before them, taking the necessary steps to protect the author and her daughter from harm. The state failed in its obligation to protect.[62]

As observed in *MDCP*, the obligation to protect surfaces in all contexts, including those involving obstetric violence, where this obligation to protect against discrimination during pregnancy is highlighted.[63] *RKB* demonstrates the state's failure to shield the complainant from wrongful stereotypes, leading to the termination of an employment contract without reasons.[64] *Belousova* similarly illustrates the state's failure to protect the rights of the complainant against sexual harassment in the workplace.[65] These cases highlight the states' neglect in implementing resocialisation measures to protect the rights of women from discrimination.

The due diligence obligation takes the state obligation to protect one step further by implicating the state for the actions of private, non-state actors who have violated women's rights, as noted above.[66] This due diligence obligation[67] is particularly significant in the context of women's rights violations and, notably, violence against women, because such violations often take place in the private sphere. As noted under part 3, the failure to respect, protect and fulfil women's rights triggers state responsibility when states fail in their due diligence. This is significant for the purposes of redressing harms already experienced by women and to prevent future failures at the hands of private, non-state actors.

In *HH, IH and YH* the CEDAW Committee reiterated that, in accordance with General Recommendation 28, states have a due diligence obligation to prevent acts of gender-based violence.[68] In this case, the authors claimed that the state relied on the behaviour of Ms Jeiranova – which involved falling in love with someone other than her husband – to accept 'the presumption of suicide and failed to exclude any causes despite evidence of her fear of being killed,

62 *Carreño* (n 31) para 9.7.
63 *MDCP* (n 47) para 8(b)(i).
64 Communication 28/2010 *RKB v Turkey* CEDAW Committee 13 April 2012 UN Doc CEDAW/C/51/D/28/2010.
65 *Belousova* (n 54) para 9.4.
66 Holtmaat & Naber (n 24) 16.
67 For due diligence in general, see *Velàsquez Rodriquez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 29 July 1988; DM Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 1.
68 Communication 140/2019 *HH, IH and YH v Georgia* 13 December 2021 UN Doc CEDAW/C/80/D/140/2019 para 7.3.

her vulnerability and the existence of an 'honor'-based motive for a forced suicide or murder'.[69]

Indeed, the honour killings prevalent in the state ought to have been the target of resocialisation given its embeddedness in harmful socio-cultural norms, practices, beliefs and assumptions about women and their inferiority.[70] The CEDAW Committee held that the attitudes of the authorities led to Ms Jeiranova's mistreatment and the accompanying rights violations.[71]

Finally, in *Sandra* the CEDAW Committee noted that 'impunity for [acts of violence] contributes significantly to the entrenchment of a culture of acceptance of the most extreme forms of gender-based violence against women in society, which feeds their continued commission'.[72]

The Joint General Recommendation issued by the CEDAW Committee and the Committee on the Rights of the Child (CRC Committee) similarly confirms the obligation of states to prevent acts 'that impair the recognition, enjoyment or exercise of rights by women and children and ensure that private actors do not engage in discrimination against women and girls'.[73]

The due diligence obligation in the context of resocialisation, thus, is underscored. As Cusack notes, failure in their due diligence obligation to resocialise their populace makes states complicit in the harms women experience.[74] Indeed, the Committees confirm the nature of the due diligence obligation as comprising active measures to combat harmful practices, which includes resocialisation measures.[75]

Part 3 demonstrated that resocialisation as an obligation – notably as an obligation to respect, fulfil and protect – plays a critical role in transforming systemic gender inequality pervading society. Article 5(a) provides an interpretative framework for all other rights contained in CEDAW. In respecting, fulfilling and protecting the

69 *HH, IH and YH* (n 68) para 3.5.
70 *HH, IH and YH* (n 68) para 9(a)(i)&(ii).
71 *HH, IH and YH* (n 68) para 7.7.
72 Communication 153/2020 *Sandra Luz Romàn James v Mexico* 22 November 2022 UN Doc CEDAW/C/83/D/152/2020 para 7.3.
73 CEDAW Committee and CRC Committee 'Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices' 8 May 2019 UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 para 11.
74 Cusack (n 49) 125.
75 Joint General Recommendation 31 (n 73) para 41.

rights of women, states not only facilitate the creation of formal equality, but also alter the position of women in real terms to give effect to substantive equality. Most significantly, the obligation to respect, fulfil and protect by way of resocialisation gives rise to transformative equality.

Part 4 looks to the African regional system and the resocialisation provisions contained in both the African Charter and the African Women's Protocol. The substantive transformative potential both instruments hold positions the African regional human rights system as uniquely armed to address the real and significant need for the modification of socio-cultural norms and practices underpinning gendered discrimination.

## 4 Resocialisation as an obligation in African regional human rights law

### 4.1 African Charter

At continental level, women's rights are protected in the African Charter and the African Women's Protocol. Significant in this regard is the obligation on the African Commission insofar as its mandate to promote and ensure the protection of human rights is concerned. The African Charter mandates the African Commission to 'draw inspiration from international law on human and peoples' rights'[76] and to 'take into consideration … international conventions',[77] supporting CEDAW's applicability, notably its resocialisation provision, in the African context. Resocialisation, therefore, is present on the continent simply by virtue of the above two mandates.

While the African Charter lacks an explicit resocialisation provision as in CEDAW, it provides a framework to explore resocialisation through articles 2, 3, 18(3) and 25. This is significant because while 54 out of the 55 African Union (AU) states have ratified the African Charter, only 45 states have ratified the African Women's Protocol.[78] Examining the resocialisation obligations in the African Charter, therefore, not only provides insight into the obligations of states that have ratified the African Charter, but also serves to protect the rights

76 Art 60 African Charter.
77 Art 61 African Charter.
78 Botswana recently deposited its ratification: https://soawr.org/2023/12/01/botswana-has-ratified-the-maputo-protocol/ (accessed 19 May 2024).

of women in the states that have yet to ratify the African Women's Protocol.

The subsequent parts examine each of the resocialisation provisions contained in the African Charter, highlighting the state obligations, and elucidating the way in which states interpret and apply these through the reporting mechanism. This analysis demonstrates that despite the existence of resocialisation obligations, states have yet to adequately interpret and apply their obligations in a manner giving effect to substantive gender equality. The same is true of the African Commission, which is yet to utilise the potential of resocialisation as an obligation on the continent.

### *4.1.1 Articles 2 and 3*

Article 2 provides a general non-discrimination clause, while article 3 promotes equality before the law. The right to non-discrimination remains a central feature of human rights. As Mugwanya suggests, the African Charter's commitment to non-discrimination is emphasised in article 3, which promotes equality before and equal protection of the law.[79] Article 2 implies a due diligence obligation on states to ensure women's substantive equality and requires implementing temporary special measures to that end. Article 3 is connected to article 2, both of which the African Commission characterises as non-derogable obligations. These articles are often cited together in the context of equality.[80] The African Commission notes that these obligations must be 'respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter'.[81] Resocialisation as an obligation, thus, aids states to fulfil obligations to ensure non-discrimination and gender equality.

Botswana's 2015 report acknowledged that notwithstanding 'government's effort to promote equality before the law, especially gender equality, certain roles continue to be performed along gendered lines [therefore] [t]here are still challenges towards the absolute elimination of role stereotypes and negative cultural

79 GM Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2014) 192.

80 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 45.

81 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49. See also *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights 17th extraordinary session 19-28 February 2015 (2016) para 155.

practices'.[82] The African Commission, however, did not respond, but recommended awareness-raising to address gender-based violence, without reference to the above.[83]

Lesotho's 2018 report noted that customary law often impedes gender equality since it is not subject to constitutional scrutiny.[84] The state attempted to address this through awareness-raising campaigns focused on modifying societal attitudes relating to women.[85] In its Concluding Observations, the Commission refers to the 'prevalence of deep-rooted cultural and religious practices some of which are recognised by the Constitution' as factors impeding the realisation of rights,[86] reiterating the persistent traditional and religious influences as hindering gender equality.[87]

As noted, these provisions provide for resocialisation as an obligation. While the above examples demonstrate some understanding by the state and the African Commission, most state party reports relating to these articles simply report on the legislative and constitutional protections available, failing to adequately engage with resocialisation as a tool to realising women's rights to non-discrimination and equality before the law.

### *4.1.2 Article 18*

Article 18(3) protects women's rights 'as stipulated in international declaration and conventions'. Thus, states are obligated to respect, protect and fulfil women's rights while cognisant of obligations in other international human rights law instruments, such as CEDAW. Since this provision is the only one in the African Charter relating to women, this reference to international law is significant.

82 Botswana Second and Third Report to the African Commission on Human and Peoples' Rights (ACHPR): Implementation of the African Charter on Human and Peoples' Rights (2015) 28.
83 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 26th extraordinary session para 73.
84 The Kingdom of Lesotho Combined Second to Eighth Periodic Report Under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (April 2018) para 28.
85 Combined Report of the Kingdom of Lesotho (n 84) para 31.
86 Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at its 68th ordinary session para 33.
87 Concluding Observations Lesotho (n 86) para 51.

State party reports on article 18 suggest that states focus their efforts on modifying women's behaviours in society, narrowing the targets of resocialisation to women only. Placing the onus on women to alter the circumstances in which they find themselves represents a misunderstanding of the role that systemic inequality plays in producing environments that not only perpetuate all forms of discrimination, but which also exclude women. Similarly, it fails to ensure that behavioural modification is targeted at everyone. This, therefore, only partially gives effect to resocialisation as an obligation. For example, Rwanda's 2016 report establishes agencies to 'advocate for women's rights and sensitise women to take up leadership roles'.[88] The African Commission overlooked an opportunity to highlight this in its responding Concluding Observations to Rwanda.[89]

Cameroon's 2018 report mentions sensitising girls on school enrolment and pregnancy risks. It does so while omitting boys' role in pregnancy or gender-based violence as a source of teenage pregnancy.[90] This places the burden of gender inequality on women and girls without acknowledging the contributions made by men and boys in maintaining systemic gender inequality. While underscoring the importance of women's rights under article 18, the state narrowly focuses its attention on girls, failing to fulfil its resocialisation obligation. While the African Commission notes, as a positive aspect, the steps taken to ensure the education of pregnant girls, it fails to identify this problematically narrow focus on girls.[91]

Similarly, in its Concluding Observations of 2021 to Lesotho's report, the African Commission recommends that the state provide incentives to women to take up leadership roles and contest for public office.[92] It fails to mention any accompanying resocialisation required to facilitate the conditions conducive to women's effective functioning in such roles. This demonstrates the Commission's own limited understanding of resocialisation as an obligation targeted at everyone.

88 Republic of Rwanda 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights and the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa: Period Covered by the Report 2009-2016 54.

89 Concluding Observations and Recommendations on the Combined 11th, 12th, and 13th Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 64th ordinary session.

90 Republic of Cameroon 3rd Periodic Report of Cameroon Within the Framework of the African Charter on Human and Peoples' Rights, April 2013 para 482.

91 Concluding Observations on the 3rd Periodic Report of Cameroon adopted at its 15th extraordinary session para 27.

92 Concluding Observations (n 86) para 71.

### *4.1.3 Article 25*

Article 25 creates an obligation to promote and ensure respect for all rights and freedoms contained in the African Charter, including those of women in articles 2, 3 and 18(3). This implies active engagement in human rights education. The African Commission notes human rights education as 'a prerequisite for the effective implementation of the [Charter] and other international human rights instruments',[93] obligating states to provide it 'at all levels of public and private education … to law enforcement personnel, civil or military, as well as medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment'.[94]

It is unclear why the African Commission opted to limit human rights education to the abovementioned targets only, excluding the broader population.

Nonetheless, article 25's effective implementation could alter the human rights landscape and acceptance of rights by all. Together with article 27(2)'s limitations clause, it could promote greater respect for women's rights and freedoms, as cultural relativism[95] may be less influential when

> [i]ndividuals are asked to reflect on how the exercise of their rights in certain circumstances might adversely affect other individuals or the community. The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others. By rejecting the egotistical individual whose concern is fulfilling self, article 27(2) raises the level of care owed to neighbours and the community.[96]

This level of care that is arguably raised is enhanced when article 25 is adequately implemented and when human rights are understood and accepted by all. Such level of care comes about through resocialisation. Indeed, when a presumption is entrenched that individual development is contingent upon the way in which each

93 African Commission on Human and Peoples' Rights Resolution on Human Rights Education (1993) African Charter/Res.6 (XIV) 93.
94 Resolution on Human Rights Education (n 93).
95 For more on the role of resocialisation in countering cultural relativism, see A Mahmoudi 'Cultural relativism and the role of resocialisation in the realisation of African women's rights to a positive cultural context (art 17)' in A Fuentes & A Rudman (eds) *Women's rights, gender inequality, and intersectional vulnerabilities: Exploring substantive transformative equality in the African continental and regional human rights systems 20 years after the adoption of the Maputo Protocol* (2025) 71.
96 MW Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law'* 369.

engages with the other, the scope for cultural relativism to operate to undermine women, as an example, arguably becomes limited.

State party reports demonstrate poor engagement with article 25. Where states do engage, they do so from the promotional mandate perspective. Many make no reference to this provision, while others note awareness raising without detail.[97] Those that do engage often prioritise training magistrates, law enforcement and judges, while some include human rights education in school curricula, textbooks and law degree programmes at universities.[98]

For instance, Gabon reports on article 25 in combination with article 17, noting an initiative undertaken to train women educators in early childhood development.[99] This illustrates a narrow view of article 25. In its Concluding Observations to Gabon, the African Commission recommends human rights education from primary to tertiary schools, through training of police and law enforcement and awareness raising for the entire population on their rights, legal procedures and remedies.[100] Although these recommendations are made without direct reference to article 25, the broadened view of the recipients of human rights education demonstrates the African Commission's progressive understanding of the resocialisation obligation. This is similarly evident in its Concluding Observations of 2017 to Burkina Faso, where the Commission highlights that a lack

97 Republic of Benin Combined Periodic Report from the 6th to 10th Periodic Reports on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights. At 72 it notes: 'Nothing to report on'. The two most recent reports by the Republic of Cameroon are silent on this provision. See Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon Relating to the African Charter on Human and Peoples' Rights and 1st Reports Relating to the Maputo Protocol and the Kampala Convention 3 January 2020 8; 3rd Periodic Report of Cameroon (n 90).

98 People's Democratic Republic of Algeria African Charter on Human and Peoples' Rights 5th and 6th Periodic Report 69. See Concluding Observations and Recommendations on the Combined Periodic Report of the Peoples' Democratic Republic of Algeria, adopted at its 42nd ordinary session; Republic of Burundi African Charter on Human and Peoples' Rights First Implementation Report; Central African Republic Initial and Cumulative Report of the Central African Republic on the African Charter on Human and Peoples' Rights; Democratic Republic of the Congo Eighth, Ninth and Tenth Periodic Reports to the African Commission on Human and Peoples' Rights; Republic of Mauritius Ninth to Tenth Combined Periotic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016-August 2019).

99 The Gabonese Republic Initial Report by Gabon on Implementation of the African Charter on Human and Peoples' Rights 1986-2012 82. See also People's Democratic Republic of Algeria African Charter on Human and Peoples' Rights Fifth and Sixth Periodic Report (n 98) para 420, 69.

100 Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights (1986-2012), adopted at its 15th extraordinary session 10.

of human rights awareness across the generality of the population remains a factor impeding the enjoyment of rights.[101]

Even though the African Charter does not contain an explicit resocialisation provision, the above demonstrates that articles 2, 3, 18(3) and 25 operate as resocialisation provisions, providing obligations on states. State and Commission engagement, however, demonstrates that these provisions have yet to be fully understood, interpreted and applied.

The next part considers resocialisation as an obligation from the vantage point of the African Women's Protocol, demonstrating further the embeddedness of resocialisation as an obligation within the continent's legal framework.

### 4.2 African Women's Protocol

The transformative potential of several provisions in the African Women's Protocol strengthens arguments in favour of resocialisation as a precursor to gender equality. As noted, the third goal of article 5(a) of CEDAW is transformative equality. As Albertyn and Goldblatt suggest, this 'involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality'.[102] The resocialisation provisions below give effect to the transformative equality goal that lies at the heart of CEDAW and the African Women's Protocol.[103]

The African Women's Protocol is notable in its focus on women in Africa. As Rudman notes, '[t]o contribute to a more comprehensive protection of African women's rights, the Maputo Protocol was created as an African Charter-adjacent instrument under Article 66 of the latter'.[104] Murray suggests that the African Women's Protocol is an 'African CEDAW … reflecting the specificities of women's rights

101 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013), adopted at its 21st extraordinary session paras 16-18.

102 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 249.

103 As above. The practice is demonstrated through state reports and accompanying Concluding Observations. Where no mention of Concluding Observations is made, the Commission has yet to issue a Concluding Observations addressing resocialisation in the context of the provision concerned.

104 A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS Courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 428.

on the continent'.[105] Its incorporation of positive African values set it apart from its counterparts and, as Viljoen suggests, it 'speaks in a clearer voice about issues of particular concern to African women, [and] locates CEDAW in African reality'.[106] Several of the African Women's Protocol provisions give rise to resocialisation as an obligation.[107]

### *4.2.1 Article 2(2)*

Article 2(2) mandates states to, among others, ensure a change in the traditional roles of women *and* men in society; it prescribes the realisation of substantive, transformative equality. This is the primary resocialisation provision of the African Women's Protocol.

Article 2(2) expands on article 5(a) of CEDAW, guiding states on methods to modify harmful socio-cultural norms, including the use of public education, information and communication strategies. Broadly construed, the obligation extends beyond a focus on educational methods only to every aspect of societal functioning, including creating appropriate governance structures giving effect to the requisite implementation of obligations; appointing civil servants advancing this obligation; ensuring equal representation of women at all levels of government; implementing mechanisms for monitoring and evaluation of resocialisation measures; and gender mainstreaming. This complements other methods such as the use of the media, and the involvement of traditional leaders and women in devising strategies, among others. Article 2(2) also implies an obligation to refrain from all behaviours, practices and narratives that drive discrimination.

Few Concluding Observations refer to article 2 generally, and none to article 2(2) specifically.[108] However, states' failure to report

105 Murray (n 80) 466.

106 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington Lee Journal of Civil Rights and Social Justice* 21.

107 These include arts 2(2), 5, 4(2)(d), 8, 12 and 17. This article does not delve into art 17 as this provision relates to the nuances of culture, cultural rights, and the rights of women to a positive cultural context. To avoid glossing over crucial issues relating to culture, a piece was written outlining the obligations on states in terms of art 17. For more on resocialisation in the context of article 17, see Mahmoudi (n 95).

108 Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, adopted at its 70th ordinary session; Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015-2019) and Initial

on article 2(2) does not necessarily imply a lack of understanding regarding the role and influence of socio-cultural practices and behaviours in driving gendered discrimination. For instance, South Africa's 2015 report acknowledges the impact of stereotyping on the rights of women stating that it is

> cognisant that gender-based stereotyping and prejudice is rooted in the gender discourses of masculinity and femininity with concomitant prescribed behaviours, norms and attitudes that ultimately lead to discrimination and gender-based violence. It is an articulation of, or an enforcement of, power hierarchies and structural inequalities that are informed by belief systems, cultural norms and socialization processes.[109]

Malawi's 2015 report notes challenges due to customs and cultural practices,[110] while Seychelles' 2019 report recognises that '[g]ender discrimination and bias … may be present in societal gender roles and attitudes, thus, making it harder to eradicate stereotypes made unintentionally'.[111] The African Commission's Concluding Observations of 2022 to Eswatini note the 'persistence of pervasive structural disparities and deep-rooted harmful gender stereotypes' as an area of concern.[112] However, this is noted without direct reference to article 2(2),[113] recommending that Eswatini '[s]trengthen its efforts to combat deep-rooted harmful gender stereotypes'.[114] The Commission's Concluding Observations of 2015 to Liberia documents the 'patriarchal attitudes and stereotypes relating to the role and responsibilities of men and women [which] exacerbate harmful traditional practices'.[115] It recommends that Liberia '[s]trengthen its efforts to eliminate existing patriarchal and gender stereotypes on the roles and responsibilities of women and men in the family and society'.[116] Although not directly mentioning

---

Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005-2013), adopted at its 70th ordinary session; African Commission Concluding Observations Rwanda (n 91).

109 Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (August 2015) para 128.

110 Republic of Malawi Report to the African Commission on Human and Peoples' Rights, Implementation of the African Charter on Human and Peoples' Rights (1995-2013) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005-2013) para 150.

111 Republic of Seychelles Country Report 2019: Protocol to the African Charter on Human and Peoples' Rights of Women in Africa 10.

112 African Commission Concluding Observations Eswatini (n 108) para 48.

113 This is noted 'Articles 2 and 3 – Equality and non-discrimination'.

114 African Commission Concluding Observations Eswatini (n 108) para 80.

115 Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights, adopted at its 17th extraordinary session para 24.

116 African Commission Concluding Observations Liberia (n 115) 11 para i.

article 2(2), it is one of only two Concluding Observations making use of the language contained in this provision, even if not *verbatim*.[117]

These examples demonstrate that while the resocialisation provisions do, indeed, exist, as well as indicators that states are cognisant of the influence that harmful socio-cultural norms and practices have on the rights of women, the systematic interpretation and application of article 2(2) remains an area in need of development.

### *4.2.2 Article 5*

Article 5 requires states to prohibit and condemn all practices harmful to women. Prohibition implies legislative bans, accompanied by sanctions where they occur, with a view to eradicating all such practices, providing support to victims, and protecting women at risk of harmful practices. Condemnation involves the state's express, regular disapproval of harmful practices, itself a resocialisation method.

The CEDAW and CRC Committees note that harmful practices are 'deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles'.[118] The role of resocialisation in discharging this obligation, thus, is underscored with the Committees stressing the obligation on states to 'challenge and change patriarchal ideologies and structures that constrain women and girls from fully exercising their human rights and freedoms'.[119] Emphasised in the context of CEDAW, the principle similarly applies to article 5, as both aim to eliminate harmful practices and realise substantive and transformative gender equality.

Eswatini's 2019 report discusses harmful practices within its constitutional and legislative framework, suggesting that practices ought to be 'examined with the constitutional lens'[120] and that its legislative arrangements ensure that 'women are no longer forced to engage in cultural practices'.[121] However, the existence of enabling

117 See also African Commission Concluding Observations Malawi (n 108) para 69.
118 Joint General Recommendation 31 (n 73) para 6.
119 Joint General Recommendation 31 (n 73) para 61; S Nabaneh 'Article 5: Elimination of harmful practices' in Rudman and others (n 19) 129.
120 Kingdom of Eswatini Formerly Known as the Kingdom of Swaziland Combined 1st, 2nd, 3rd, 4th, 5th, 6th,7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa paras 406-410.
121 Combined Periodic Report of the Kingdom of Eswatini (n 120) para 407.

environments for women to exercise choice remains unclear. The Gambia's 2018 report recognises this, stating:[122]

> Despite the legislation enacted to prohibit these entrenched harmful practices, evidence has shown Legislation alone is not enough. Evidence … indicates that people with entrenched beliefs will resort to other measures that will enable them to practice what they believe in. There is therefore a need for attitudinal change and beliefs and the need for sustained sensitisation, awareness creation and behaviour change communication for people to give up the practice.

South Africa's 2015 report demonstrates a misunderstanding of what constitutes harmful practices,[123] outlining efforts to eliminate certain practices while permitting virginity testing in girls over 16 with 'proper counselling'.[124] The existence of such legislation condones the harmful practice of virginity testing.

Only three Concluding Observations directly reference article 5, although several refer generally to the influence of harmful practices.[125] As an example, the African Commission's Concluding Observations of 2017 to Burkina Faso note concern regarding the practice of 'clandestine excision …[and] the continuation of early marriages',[126] recommending steps to combat this practice and to penalise all involved.[127]

### *4.2.3 Article 4(2)(d)*

Article 4(2)(d) mandates states to 'actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'.

This provision is closely connected to article 4(2)(c), which requires states to identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such. The former generates capacity to respond to the latter, while

122 The Republic of The Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 138.
123 Combined Second Periodic Report of South Africa (n 109) paras 166-167.
124 Sec 12(5) South African Children's Act 38 of 2005.
125 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013), adopted at its 21st extraordinary session para 45; African Commission Concluding Observations Malawi (n 108) para 64; African Commission Concluding Observations Rwanda (n 89) para 69.
126 African Commission Concluding Observations Burkina Faso (n 125) para 62.
127 African Commission Concluding Observations Burkina Faso (n 125) para 69.

article 4(2)(d) builds on the latter by explicitly providing the means to prevent violence. It emphasises the utility of resocialisation in addressing the identified causes and consequences of violence against women by way of peace education.

The central goal of article 4(2)(d) is the eradication of elements in traditional and cultural beliefs, practices and stereotypes underlying violence against women, resocialising the populace to recognise women's rights and freedoms, including their right to be free from violence. The CEDAW Committee notes, in relation to the development of curricula, that the 'content should target stereotyped gender roles and promote the values of gender equality and non-discrimination',[128] emphasising the development of educational curricula and awareness-raising programmes, as in article 4(2)(d).[129]

State practice places greater emphasis on article 4(2)(c) than article 4(2)(d). Angola's 2017 report communicates steps taken in furtherance of article 4(2) including the implementation of 'information, awareness-raising and education campaigns'.[130] Without reference to article 4(2)(c)'s second prong of the two-pronged obligation, the state notes steps taken to prevent and eliminate violence against women. Similarly, it does not refer to the active promotion of peace education as per article 4(2)(d). The 2015 report of the Democratic Republic of the Congo (DRC) notes under article 4(2)(c) studies contributing to revised national strategies to enable behavioural change,[131] aimed at combating violence, considering 'stereotypes that are anchored in the mentality and behaviour of individuals within grassroots communities'.[132] This gives effect to the first prong of article 4(2)(c), which requires identifying the causes and consequences of violence against women. The report specifies that the 'strategy focuses precisely on the fight against stereotypes and other sexist prejudices'.[133] What these strategies are and their resultant impact, however, is unclear. Nonetheless,

128 UN Committee on the Elimination of Discrimination against Women 'General Recommendation No 35 on Gender-based Violence against Women, Updating General Recommendation No 19' 26 July 2017 UN Doc CEDAW/C/GC/35 para 30(b)(i).
129 General Recommendation 35 (n 128) paras 30(b)(i) and (ii).
130 Republic of Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 para 29 of Part C.
131 Democratic Republic of the Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights From 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) para 164.
132 Periodic Reports DRC (n 131) para 164.
133 As above.

the state report refers to resocialisation and the negative impact of socio-cultural attitudes and behaviours on the realisation of gender equality.[134]

### *4.2.4 Article 8*

Article 8(c) provides for the 'establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women'. It mandates resocialisation to eliminate harmful socio-cultural norms and practices impeding women's access to justice. Article 8(d) requires equipping law enforcement to effectively interpret and enforce gender equality rights, presupposing resocialisation to ensure that existing harmful conceptions and biases against women do not sway the work of those tasked with protecting the rights of women. Like article 8(c), the obligations to respect, protect and fulfil arise in article 8(d). Failure to equip or resocialise law enforcement may trigger state responsibility.

The DRC's 2015 report highlights measures to 'raise awareness and educate the population on the respect for women's rights'.[135] The state acknowledges that magistrates, lawyers, court clerks and prison personnel lack requisite knowledge of women's rights, which violates article 8(d), but omits reference to remedial measures.[136] Adequate implementation of resocialisation is key to discharging obligations in terms of articles 8(c) and (d).

Togo's 2017 report reiterates the principle of non-discrimination in the context of access to justice. Without directly noting article 8(c), it highlights the establishment of a legal unit aimed at training women, in collaboration with the police services, on access to justice.[137] The narrow focus on training women, however, falls foul of the goal of this provision. Further, it notes the training of various public servants, such as judicial assistants and security forces on gender and women's rights, although again without direct reference to article 8(d).[138]

134 Periodic Reports DRC (n 131) para 174.
135 Periodic Reports DRC (n 131) para 121.
136 Periodic Reports DRC (n 131) para 126.
137 State of Togo 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) para 509.
138 Periodic Reports State of Togo (n (n 137) para 510.

### *4.2.5 Article 12*

In the context of the right to education and training, article 12(1)(b) requires states to 'eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination'. Article 12(1)(e) embeds resocialisation, mandating states to 'integrate gender sensitisation and human rights education at all levels of education curricula including teacher training'. Article 12 arguably extends the obligations in articles 2(2) and article 8(c). As Viljoen notes, education 'runs like a golden thread throughout the Protocol'.[139]

Eliminating stereotypes in textbooks, syllabi and the media, as per article 12(b), ensures that states actively work towards preventing the reproduction of harmful socio-cultural norms, while article 12(e) recognises the role of individuals, such as teachers, in reproducing those harmful norms and mandating preventative state action. Prioritising the elimination of harmful socio-cultural norms and practices from textbooks, syllabi, school programmes, teaching methods and the like is crucial for successful resocialisation and will impact and accelerate the realisation of the other substantive rights of women and girls.[140]

Cameroon's 2019 report notes efforts to realise article 12 generally, including its 'fight against cultural barriers within the framework of awareness raising among communities'[141] and the implementation of campaigns aimed at behavioural changes for parents to 'raise the young girl properly'.[142] What 'properly' refers to is unclear. Similarly, the report does not elaborate on what constitutes cultural barriers and what the awareness-raising campaigns aimed to achieve. A civil society strategy noted in the report involved educating traditional leaders' wives on protecting children's rights and promoting girls' education.[143] As noted above, article 12 generally addresses the rights of women to education and training through the elimination of stereotypes in textbooks, syllabuses and the media, as well as the integration of gender sensitisation and human rights education at all levels of education. Cameroon's account of its endeavours demonstrates a lack of appreciation of the resocialisation objectives of article 12(b).

139 Viljoen (n 106) 31.
140 UN Committee on the Elimination of Discrimination against Women 'General Recommendation No 36 (2017) on the Right of girls and Women to Education' 27 November 2017 UN Doc CEDAW/C/GC/36 para 26.
141 Periodic Reports of the Republic of Cameroon (n 97) para 762.
142 Periodic Reports of the Republic of Cameroon (n 97) para 764.
143 As above.

State party reports demonstrate a narrow focus on formal school settings, limiting the reach of article 12(2), which calls for gender sensitisation and human rights education at all levels.[144]

## 5 Conclusion

In the words of the CEDAW Committee in *AF*,

> without acknowledging that damaging stereotypes exist and taking determined actions to remedy unconscious bias, such efforts [initiatives on gender equality] cannot be relied upon to change the reality of women who are disproportionately victims of violence and abuse, which can leave scars (sometimes invisible) for life and intergenerationally.[145]

This article demonstrates the crucial role of resocialisation as an obligation in global and African regional human rights law as a tool for realising women's substantive rights and accelerating gender equality. By analysing key resocialisation provisions in CEDAW, the African Charter and the African Women's Protocol through a feminist legal theoretical framework, it has elaborated on the obligations of states to respect, fulfil and protect women's rights through resocialisation.

The article shows that CEDAW affirms resocialisation as integral to the interpretative framework for all substantive rights, with obligations to ensure formal and substantive equality, and to address prevailing gender relations and stereotypes. The African Charter and the African Women's Protocol contain several resocialisation provisions. These provisions require states to modify harmful socio-cultural conduct in furtherance of the overall objective of eliminating all forms of discrimination against women.

The CEDAW Committee notes the importance of resocialisation in several individual complaints, as well as in its General Recommendations. On the continent, the analysis of state party reports and Concluding Observations reveals inadequate awareness and engagement with resocialisation obligations, limiting compliance and leaving underlying determinants of gender inequality intact. States often focus on legislative and constitutional protections without actively engaging resocialisation as a method to

144 Eg, Combined Periodic Report of South Africa (n 109) paras 95 and 308; Burkina Faso Periodic Report of Burkina Faso Within the Framework of the Implementation of Article 63 of the African Charter on Human and Peoples' Rights (January 2015) paras 95 & 339.

145 *AF* (n 36) para 7.18.

realise women's rights. Similarly, states regularly narrow the target audience for resocialisation and focus on women and girls, failing to acknowledge the systemic nature of gender inequality.

Unless resocialisation is given the requisite attention as an obligation, the substantive rights of women will remain a distant reality. States must prioritise resocialisation to eliminate discrimination and violence against women. Only by addressing the root causes can the transformative potential of global and African regional human rights instruments be realised, accelerating progress towards substantive gender equality.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: BE Fox 'The role of soft law in ensuring durable solutions for children displaced by climate change in Africa' (2025) 25 *African Human Rights Law Journal* 114-140
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a5

# The role of soft law in ensuring durable solutions for children displaced by climate change in Africa

*Bryony Elizabeth Fox**
Post-Doctoral Fellow, Chair in Urban Law and Sustainability Governance, Faculty of Law, University of Stellenbosch, South Africa
https://orcid.org/0000-0003-4402-9262

**Summary:** *As global temperatures rise, the frequency and intensity of sudden and slow-onset climate impacts are increasing, disproportionately affecting African children. These impacts drive cross-border displacement, creating an urgent need for durable solutions that protect the rights of displaced children. However, the current international refugee regime does not recognise children displaced by climate change impacts as refugees unless they have experienced some form of individual persecution. Consequently, climate-displaced children are often excluded from the traditional durable solutions of voluntary repatriation, local integration and resettlement to a third state provided under this legal regime. Further, even if they were to have access to these durable solutions, such solutions may not be appropriate in the context of climate change displacement. To address this gap, the article explores the potential of international and regional soft law instruments as a means to protect the rights of climate-displaced children. Although soft law instruments show promise in the protection of climate-displaced children and their rights in Africa, the article concludes that the instruments fall short of*

* BA LLB (Rhodes) LLM LLD (Stellenbosch); Bfox459@gmail.com. This article builds on research conducted as part of a doctoral thesis titled 'Not just hot air: Soft law and the protection of climate change-induced displaced children's needs and rights' (2024). The insights gained during that study have significantly informed and enriched the analysis presented here.

*fully supporting states in fulfilling their obligations to such children under key legal frameworks, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. This stems from a distinct lack of recognition of the need for access to durable solutions for children, generally, or for children whom climate change impacts have displaced and are who not refugees, more specifically. The findings suggest that while international and regional soft law may offer a bridge for some protection gaps, there is still a need for stronger legal mechanisms and practical measures to fully protect the rights of climate-displaced children in Africa.*

**Key words:** *soft law; climate change; African children's rights; displacement; durable solutions*

## 1 Introduction

As global temperatures rise, climate change is increasingly recognised as a significant driver of cross-border displacement.[1] Both sudden-onset events, such as extreme weather and flooding, and slow-onset processes, including rises in sea levels and land degradation, are forcing populations to cross international borders in search of international protection. In *Ioane Teitiota v New Zealand*[2] the United Nations (UN) Human Rights Committee underscored this reality, emphasising the urgent need to protect those displaced by climate change.[3] Further, the Intergovernmental Panel on Climate Change (IPCC) 2022 Sixth Assessment Report reinforces the likelihood of widespread displacement due to climate change impacts.[4]

Africa, where surface temperatures are rising faster than the global average, is experiencing increasingly frequent and severe climate

1 Intergovernmental Panel on Climate Change (IPCC) 'Africa' in 'Climate Change 2022: Impacts, adaptation and vulnerability' Working Group II Contribution to the IPCC Sixth Assessment Report (2022) 1285, 1289.

2 *Ioane Teitiota v New Zealand UNHR Committee* (7 January 2020) CCPR/C/127/D/2728 para 9.11.

3 See, eg, the most recent discussion by W Kälin & HE Chapuisat 'Protection of persons displaced across borders in the context of disasters and the adverse effects of climate change' UNHCR Legal and Protection Policy Research Series PPLA/2024/01 (2024) 1, 5; D Cantor and others 'International protection, disasters and climate change' (2024) 36 *International Journal of Refugee Law* 185-190; G Lauria 'International law, the climate-migration nexus, and *Teitiata v New Zealand*' in C Nicholson & B Mayer (eds) *Climate migration: Critical perspectives for law, policy and research* (2023) 185-200.

4 Intergovernmental Panel on Climate Change 'Key risks across sectors and regions' in 'Climate change 2022: Impacts, adaptation and vulnerability' Working Group II Contribution to the IPCC Sixth Assessment Report (2022) 2247.

change impacts.[5] As a result, the Task Force on Displacement (TFD)[6] warns that African states face a heightened risk of displacement, requiring urgent rights-based solutions, especially for vulnerable groups such as children, who are among the most affected groups.[7]

Children are particularly susceptible to climate-related risks, which are compounded by the risks they face when displaced from their state of origin.[8] As such, their fundamental rights, as enshrined in the Convention on the Rights of the Child (CRC)[9] and the African Charter on the Rights and Welfare of the Child (African Children's Charter),[10] are threatened by continued displacement. As such, there is a need for the international community to develop durable solutions to displacement due to climate change, which aim to end a child's continued displacement.[11] Traditional durable solutions are derived from the international protection regime stemming from the Convention Relating to the Status of Refugees (1951 Refugee Convention)[12] and the African Union (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee

5 IPCC (n 1) 1285-1289.

6 The Task Force on Displacement (TFD) is a mechanism created by the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) at the Convention on Climate Change Conference of the Parties 21.

7 Task Force on Displacement 'Report of the Task Force on Displacement' (2018) para 22; World Meteorological Organisation 'The State of the Climate in Africa 2022' (2023) 17.

8 See part 2 below.

9 Convention on the Rights of the Child adopted 20 November 1989, entered into force 2 September 1990 1577 UNTS 3 (CRC). CRC currently is the most ratified rights instrument in the world, with just the United States of America abstaining. It provides children with a balanced approach to children's rights, recognising their need for protection and autonomy. For a detailed explanation of how this Convention protects children's rights, see J Tobin *The UN Convention on the Rights of the Child: A commentary* (2019).

10 African Charter on the Rights and Welfare of the Child adopted 11 July 1990, entered into force 29 November 1999 CAB/LEG/24.9/49 (African Children's Charter). The Children's Charter is the first regional instrument that specifically focuses on the rights of the child and acts as a bridge between international law and African observation of rights. The importance of the Charter can be seen in its supplementation of CRC to ensure that the African child's rights are appropriately protected. For an in-depth discussion on how this Convention protects the rights of children in Africa, see J Sloth-Neilsen, E Fokala & G Odongo *The African Charter on the Rights and Welfare of the Child: A commentary* (2024).

11 United Nations Children's Fund 'Children displaced by climate change: Preparing for a future already underway' (2023) 3; United Nations Children's Fund 'Time to act: African children in the climate change spotlight' (2023)16; IPCC (n 4) 2246-2247; *Ioane Teitiota v New Zealand* (n 2) para 9.11.

12 Art 1A(2) Convention Relating to the Status of Refugees adopted 28 July 1951, enacted 22 April 1954 189 UNTS 137 (1951 Refugee Convention).

Convention).[13] However, as explored in this article, the international refugee regime and its associated durable solutions are not adequate for addressing climate change displacement.[14]

Given these limitations, this article examines how primary soft law instruments, which are non-binding yet norm-setting legal frameworks, may provide alternative solutions for African children displaced by climate change.[15] While not legally binding, these instruments can influence state practice and over time evolve into enforceable legal standards for states.[16]

The article first contextualises child displacement in Africa due to climate change before exploring the concept of durable solutions, particularly in relation to displaced children. It then analyses the limitations of traditional durable solutions within the refugee regime for situations of climate displacement and examine how primary soft law instruments may help fill protection gaps. Finally, the article presents conclusions and recommendations, adopting a child rights-based approach that recognises children as rights holders and states as duty bearers.[17]

## 2 Displacement of children due to climate change impacts in Africa

Due to their unique physical, psychological and developmental immaturity, children are particularly vulnerable to the risks associated with both climate change and displacement.[18] For example, climate change creates risks to a child's right to life, survival and development

13 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa adopted 10 September 1969, enforced 20 June 1974 United Nations Treaty Series 14691 (OAU Refugee Convention).

14 See parts 3 and 4.

15 Primary soft law may declare new norms or reaffirm or rearticulate existing binding norms and obligations in a new context. Secondary law, on the other hand, is the recommendations and General Comments from various United Nations or regional supervisory bodies, the jurisprudence of international and regional courts, decisions of Special Rapporteurs, and resolutions from organs such as the United Nations General Assembly. D Shelton 'Soft law' in D Armstrong *Routledge handbook of international law* (2009) 68-72; A Guzman & T Timothy 'International soft law' (2010) 2 *Journal of Legal Analysis* 171-226.

16 Shelton (n 15) 68-72; Guzman & Timothy (n 15) 171-226.

17 For a detailed explanation of this approach, see UN Committee on the Rights of the Child General Comment 13 on the right of the child to freedom from all forms of violence (2011) CRC/C/GC13 para 59; see also UN Committee on the Rights of the Child General Comment 26 on children's rights and the environment, with special focus on climate change (2023) CRC/C/GC/26 paras 6-8; United Nations Secretary-General 'Guidance note of the Secretary-General on child rights main streaming' (31 July 2023).

18 United Nations Children's Fund 'The climate crisis is a child rights crisis: Introducing the Children's Climate Risk Index' (2021) 3.

due to increased and more severe exposure to extreme temperatures, storms and flooding. Further, various other rights found in the conventions are at risk due to disruptions by climate impacts to children's access to health care, education and social services, as well as increased exposure to violence and exploitation.[19]

The prolonged and ongoing drought in the Horn of Africa, which began in 2020, serves as a stark example of the effects of climate change impacts.[20] This drought has exacerbated food and water scarcity, resulting in heightened child mortality and morbidity rates.[21] Moreover, the effects of the drought on livelihoods within the region have contributed to increased occurrences of child labour, gender-based violence and harmful practices such as early marriage and female genital mutilation.[22] Overall, children's vulnerability to climate change and the associated risks pose a significant threat to the realisation of children's rights, as found in CRC and the African Children's Charter.[23] These risks can drive or influence the decisions of children or their families to leave their place of origin in search of international protection.[24]

19 United Nations Human Rights Council 'Human rights and climate change' (25 March 2009) 10/4; Intergovernmental Panel on Climate Change 'Summary for policymakers' in Climate change 2022: Impacts, adaptation and vulnerability' Working Group II Contribution to the IPCC Sixth Assessment Report (2022) 3, 9 & 11; FMN Asadullah and others 'Child marriage, climate vulnerability and natural disasters in coastal Bangladesh' (2021) 53 *Journal of Biosocial Science* 948-967; R Alsalem Report of the Special Rapporteur on Violence against Woman and Girls, its causes and consequences: Violence against women and girls in the context of the climate crisis, including environmental degradation and related disaster risk mitigation and response 11 July 2022 A/77/136 para 46; MH Greenfield 'An urgent need to reassess climate change and child labour in agriculture' (2022) *The Lancet Planetary Health* e456-e457; United Nations Office of the Special Representative of the Secretary-General on Violence Against Children 'The climate crisis and violence against children' (2022) 4-6.

20 World Food Programme 'Regional drought response plan for the Horn of Africa: 2023' World Food Programme 23 January 2023, https://www.wfp.org/publications/regional-drought-response-plan-horn-africa-2023 (accessed 12 August 2024); World Health Organisation 'Drought and food insecurity in the greater Horn of Africa' 30 July 2024, https://www.who.int/emergencies/situations/drought-food-insecurity-greater-horn-of-africa (accessed 23 August 2024).

21 United Nations Children's Fund 'Children are facing deadly drought in the Horn of Africa' 22 April 2022, https://www.unicef.org/stories/climate-drought-horn-of-africa (accessed 30 April 2024); K Terry & A Rai 'Amid record drought and food insecurity, East Africa's protracted humanitarian crisis worsens' Migration Policy Institute 18 January 2023, https://www.migrationpolicy.org/article/east-africa-drought-food-insecurity-refugee-migration (accessed 30 April 2024); International Organisation for Migration 'East and Horn of Africa regional drought response 2023' Global Crisis Response Platform, https://crisisresponse.iom.int/response/east-and-horn-africa-regional-drought-response-2023 (accessed 12 August 2024).

22 UNICEF (n 21); Terry & Rai (n 21).

23 E Gibbons 'Climate change, children's rights, and the pursuit of intergenerational climate justice' (2014) 16 *Health and Human Rights Journal* 22; CRC (n 9); African Children's Charter (n 10).

24 UNICEF 'Preparing for a future' (n 11); UNICEF 'Time to act (n 11) 16.

Children who have been displaced across a state border, especially if they are unaccompanied or have crossed using irregular means, are at further risk of exposure to, among others, trafficking; abduction; sexual and labour exploitation; both physical and mental trauma; limited access to health care; and family separation.[25] Further, there may be limited or no access to education and other social services while they are on the move, which are essential to the survival and development of the child.[26] These displacement risks to the rights are further compounded by climate change impacts, such as the risks associated with extreme weather exposure while on the move.[27]

Given children's vulnerability due to ongoing displacement, ending such displacement, where possible, is essential to protecting their rights and reducing potential long-term harm to their health, well-being and development.[28] The way in which host states and the international community can develop durable solutions that address the consequences of climate displacement for children, however, has often been overlooked.[29]

As will be expanded upon below, durable solutions are traditionally associated with the international refugee regime.[30] However, McAdam, Kälin, Cantor and others have established that the traditional refugee regime is inadequate for addressing displacement due to climate change impacts.[31] For example, the definition of refugee found within the 1951 Refugee Convention precludes persons displaced by climate change impacts due to the narrow,

25 Office of the Special Representative of the Secretary-General on Violence Against Children 'Keeping the promise: Ending violence against children by 2030' United Nations July 2019 55; R Marcus and others 'What works to protect children on the move: Rapid evidence assessment' (2020) 7 & 25; CRC Committee General Comment 26 (n 17) paras 35-36; African Committee of Experts on the Rights and Welfare of the Child General Comment 7 on article 27 of the African Children's Charter 'Sexual exploitation' (2021) para 118.

26 Marcus and others (n 25) 7 & 25; CRC Committee General Comment 26 (n 17) paras 35-36.

27 United Nations High Commissioner for Refugees 'Climate change and disaster displacement' UNHCR Africa, https://www.unhcr.org/climate-change-and-disasters.html (accessed 9 January 2023); F Perera *Children's health and the peril of climate change* (2022) 25; United Nations Human Rights Council 'Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child' A/HRC.35/13 May 2017 3. See also D Martinez Garcia & M Sheehan 'Extreme weather-driven disaster and children's health' (2016) 46 *International Journal of Health Services* 81.

28 MT Chazalnoë and others 'Background paper children on the move: Why, where, how?' (2021) 2.

29 UNICEF 'Preparing for a future' (n 11) 3; IPCC (n 4) 2246-2247; *Ioane Teitiota v New Zealand* (n 2) para 9.11.

30 See part 3.

31 J McAdam *Climate change, forced migration, and international law* (2012) 44, 238; Kälin & Chapuisat (n 3) 5-14; W Kälin & N Schrepfer 'Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches' (2012) UNHCR Legal and Protection Policy Research Series (2012) 69-72; Cantor and others (n 3) 185-190.

individualist, persecution-based nature of the definition.[32] Regionally, it has been suggested that the OAU Refugee Convention broadens the definition of refugee to include persons who, due to events that 'seriously disturb public order' in the state of origin, are compelled to leave their places of habitual residence to seek refuge.[33] Woods states that events that disturb the 'public order' can and should be interpreted to include climate change impacts.[34] However, such an interpretation would be implied as it is not made explicit in the Convention.[35]

Considering the inadequacy of the conventions named above, Kälin and Schrepfer, as well as McAdam, suggest that primary soft law instruments may provide an alternative framework for protecting children displaced due to climate impacts in Africa.[36] These soft law instruments may include climate-specific instruments such as the Paris Agreement to the UN Framework Convention on Climate Change (Paris Agreement), but primarily consist of instruments that deal with aspects of human mobility.[37]

Fundamental human mobility primary soft instruments include international instruments such as the New York Declaration (NYD),[38] its accompanying Global Compacts – the Global Compact for Safe, Orderly and Regular Migration (GCM)[39] and the Global Compact for Refugees (GCR);[40] the Nansen Initiative's Protection Agenda for Cross-border Displaced Persons in the Context of Disasters and Climate Change (Nansen Protection Agenda);[41] and the United Nations Children's Fund (UNICEF) Guiding Principles for Children on the Move in the Context of Climate Change (UNICEF Guiding

32 Art 1A (2) 1951 Refugee Convention; Kälin & Chapuisat (n 3); Cantor and others (n 3) 184-190; G Goodwin-Gill & J McAdam 'Displacement related to the impacts of disasters and climate change' in G Goodwin-Gill & J McAdam *The refugee in international law* (2021) 1083-1135; McAdam (n 31) 41-51.
33 Art 1 OAU Refugee Convention (n 13).
34 T Wood 'Who is a refugee in Africa? A principled framework for interpreting and applying Africa's expanded refugee definition' (2019) 31 *International Journal of Refugee Law* 13 & 22.
35 African Union Commission 'Summery conclusions: Roundtable on addressing root causes of forced displacement and achieving durable solutions in Africa' (2019) 6.
36 Kälin & Schrepfer (n 31) 69-72; Goodwin-Gill & McAdam (n 32); McAdam (n 31) 238.
37 The Paris Agreement to the United Nations Framework Convention on Climate Change adopted 12 December 2015, entered into force 4 November 2016 TIAS 16-1104 (Paris Agreement).
38 New York Declaration for Refugees and Migrants 3 October 2016 A/RES/71/1 (NYD).
39 Global Compact for Safe, Orderly and Regular Migration, UN Doc A/RES/73/195 19 December 2018 (GCM).
40 Global Compact on Refugees, UN Doc A/73/12 (Part II) 2 August 2018 (GCR).
41 The Nansen Initiative 'Agenda for the protection of cross-border displaced persons in the context of disasters and climate change' (Vol 1 December 2015) 6 (Nansen Protection Agenda).

Principles).[42] The NYD, GCM and GCR, for the most part, have been well received in Africa and, despite their non-binding nature, have a track record of improving the rights of those they affect.[43] Furthermore, African regional instruments include the African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers (African Guiding Principles).[44]

## 3 Conceptualising durable solutions for displaced children

When looking at 'solutions' to displacement, the first step is to define the problem that must be addressed.[45] In the context of the displacement of children due to climate change impacts, the question arises as to how states end the continued displacement of such children in a way that will respect, protect and fulfil their rights. As such, what follows is a discussion of solutions that seek to end existing displacement situations.

The original conceptualisation of durable solutions began in the context of the international refugee regime.[46] As such, durable solutions are seen as 'any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives'.[47] These durable solutions traditionally include voluntary repatriation, local integration or resettlement.[48] The United Nations High Commissioner for Refugees (UNHCR) has subsequently provided its own definition of durable solutions to encompass '[t]he means by which the situation of persons of concern to the UNHCR can be satisfactorily and permanently resolved through ensuring

42 UNICEF Guiding principles for children on the move in the context of climate change (2022) (UNICEF Guiding Principles).

43 For a discussion on the implementation of these soft law frameworks, see African Union 'Senior officers validate plan of action to implement the global compact for safe, orderly and regular migration 28 August 2024, https://au.int/en/pressreleases/20240828/senior-officers-validate-action-plan-gcm-implementation-africa (accessed 26 January 2025); International Organisation for Migration 'Migration governance indication data on the implementation of the global compact for migration in Africa' (2024); F Khan & C Sackeyfio 'What promise does the Global Compact on Refugees hold for African refugees? (2018) 30 *International Journal of Refugee Law* 696-698.

44 African Commission on Human and Peoples' Rights African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers (2023) (African Guiding Principles).

45 BS Chimni *International refugee law: A reader* (2005) 331.

46 M Bradley and others 'Whither the refugees? International organisations and "solutions" to displacement, 1921-1960' (2022) 41 *Refugee Survey Quarterly* 159, 161.

47 International Organisation for Migration *Glossary on migration* (2019) 59-60.

48 As above; United Nations High Commissioner for Refugees 'Global Appeal' 2018-2019 (2019) 201; see also Statute of the Office of the United Nations High Commissioner for Refugees adopted 14 December 1950 Annex to UN Doc A/Res428(V) ch 1 para 1.

national protection for their civil, cultural, economic, political and social rights'.[49] Finding durable solutions, therefore, represents the end of mobility for those who have been displaced.[50]

Ending mobility is particularly important for children to ensure the protection of their rights, as found in CRC and the African Children's Charter. States should embark on this important process from the moment that a child crosses a state border into the host state. Displacement for a child without finding a durable solution, on average, is 17 years, the equivalent of a child's entire education from birth to high school completion or, in other words, the equivalent of their entire childhood.[51] The need for durable solutions for children therefore is immediate, as children cannot postpone their growth and development while waiting on the immigration systems of a host state to find a solution to their displacement.[52] Goodwin-Gill captures the need for urgency, stating that '[s]olutions for children … cannot be mortgaged to some future time and place, but to be durable must contribute now to the full development of the child'.[53]

Thus, durable solutions for children require that their displacement has ended in its entirety, that solutions are found timeously and that the rights of the child, as found in CRC and the African Children's Charter, are respected, protected and fulfilled.

## 4 Traditional solutions and climate change-displaced children

There is no hierarchy for durable solutions, and all solutions to displacement should be determined on a case-by-case basis.[54] Nevertheless, in general, host states tend to gravitate towards voluntary repatriation as the first-choice solution.[55] In the context

49 United Nations High Commission for Refugees 'Durable solutions' UNHCR Master Glossary (2021), https://www.unhcr.org/glossary/#d (accessed 27 February 2023); UNHCR (n 42) 201.

50 M Bradley & J McAdam 'Rethinking durable solutions to displacement in the context of climate change,' Brookings 14 May 2012 1, https://www.brookings.edu/research/rethinking-durable-solutions-to-displacement-in-the-context-of-climate-change/ (accessed 30 April 2024).

51 MO Ensor & EM Goździak 'Introduction' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 8.

52 J Pobjoy 'Refugee children' in C Costello (ed) *Oxford handbook on international refugee law* (2021) 759.

53 G Goodwin-Gill 'Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions' (1995) 3 *International Journal of Children's Rights* 405-407.

54 United Nations High Commissioner for Refugees 'Refugee protection and mixed migration: The 10-point plan in action' (2011).

55 M Zieck 'Reimagining voluntary repatriation' in C Costello and others *The Oxford handbook of international refugee law* (2021) 1064-1079. See also K Long

of climate displacement, there are significant barriers to making use of this solution. Further, these barriers are exacerbated when those displaced are children.

Voluntary repatriation refers to the free and informed return of forcibly displaced persons to their country of origin in safety and dignity.[56] The process of voluntary repatriation can be categorised as either 'organised', where assistance is provided by entities such as the United Nations Refugee Agency (UNHCR) or the host state, or 'spontaneous', where displaced individuals return on their own.[57] However, the preference for repatriation is often influenced more by the host state's interests and the socio-political/geopolitical context than by what is truly best for the displaced person and their rights.[58] Further, depending on the severity of the climate impact that drove the initial displacement, repatriation may not be a viable solution for children displaced by climate change impacts.[59] Repatriation in the context of climate change impacts runs the risk of reintroducing the child to situations resulting in irreparable harm, breaching the state's obligation of *non-refoulement*.[60] This can be attributed to the long-term impacts many states will suffer due to climate change.

Moreover, the 'voluntariness' of voluntary repatriation can be scrutinised when applied to children.[61] Children are at risk of having their interests subsumed into those of their parents if accompanied or disregarded due to perceived incapacity if unaccompanied.[62] States should ensure the respect for, protection and fulfilment of rights such as the right to life, survival and development,[63] best interests,[64]

'Rethinking "durable" solutions' in E Fiddan-Qamiyeh and others *The Oxford handbook of refugee and forced migration studies* (2016) 475-487.

56 United Nations High Commissioner for Refugees 'Voluntary repatriation' UNHCR Master Glossary (2021), https://www.unhcr.org/glossary/#v (accessed 27 February 2023).

57 Chimni (n 45) 334-336.

58 Chimni (n 45) 331; Bradley and others (n 46) 164; JC Hathaway 'Refugee solutions, or solutions to refugeehood? (2007) *Refuge: Canada's Journal on Refugees* 4.

59 Bradley & McAdam (n 50)1-3.

60 UNICEF 'Preparing for a future' (n 11); United Nations Human Rights Council (n 27) paras 29 & 37; R Johannessen 'Durable solutions for children toolkit' (2019) 3.

61 Chimini (n 45) 331.

62 J Pobjoy *The child in international refugee law* (2017) 46-47; J Bhabha 'More than their share of sorrows: International migration law and the rights of children' (2003) 22 *Saint Louis University Public Law Review* 267; J Kanics 'Challenges and progress in ensuring the right to be heard and the best interests of children seeking international protection' (2016) 32 *Refuge* 18; United Nations High Commissioner for Refugees 'Guidelines on international protection: Child asylum claims under articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees' (December 2009) HCR/GIP/09/08 para 2.

63 Art 6 CRC; art 5 African Children's Charter.

64 Art 3 CRC; art 4 African Children's Charter.

participation[65] and non-discrimination[66] in decisions regarding a child's return.

In contrast, local integration serves as the solution, offering the least adverse effects on the rights of children when timeously implemented and with the child's active involvement in the process.[67] Local integration is a durable solution in which a displaced individual permanently settles into a host state.[68] This is a complex and gradual process that interacts with several other interrelated processes, including legal, economic and socio-cultural integration.[69] This solution is often finalised with the naturalisation of the displaced person into the host state.[70] Nevertheless, this solution faces several barriers to respecting, protecting and fulfilling children's rights. Displaced children often experience discrimination when attempting to access the same rights as local citizens. They are also frequently subjected to stigma and isolation. These challenges can prevent them from fully integrating into the host state and its society.[71] Further, the gradual nature of this solution may restrict a child's access to education, health care and other basic services required to safeguard their rights.[72]

As with voluntary repatriation, climate change impacts create unique barriers to the use of local integration as a durable solution to displacement. Most persons displaced across state borders are found in neighbouring states.[73] These states may not have the capacity to integrate the displaced population into their communities, resulting

65 Art 12 CRC; arts 4(2) & 7 African Children's Charter.
66 Art 2 CRC; art 3 African Children's Charter.
67 Ensor & Goździak (n 51) 7.
68 United Nations High Commissioner for Refugees 'Local integration' UNHCR Master Glossary (2021), unhcr.org/glossary/#I (accessed 27 February 2023).
69 United Nations High Commissioner for Refugees (n 68); United Nations High Commissioner for Refugees 'Executive committee (ExCom) local integration (2005) Conclusion 104 (LVI); and ExCom, Local Integration and Self-Reliance' (2 June 2005) EC/55/SC/CRP.15.
70 United Nations High Commissioner for Refugees (n 68). Naturalisation practices of states vary dramatically, especially prevalent between the Global North and Global South. F Khan & R Ziegler 'Refugee Naturalisation and Integration' in C Castello (ed) *Oxford Handbook on International Refugee Law* (2022) 1059.
71 Chimini (n 45) 332; International Federation of the Red Cross 'Displacement, climate change and durable solutions: fact sheet 8' IFRC 4, https://ctk.climatecentre.org/downloads/modules/training_downloads/2g%20FactSheet%2008%20-%20Displacement%20and%20Climate%20-%20Durable%20Solutions.pdf (accessed 11 March 2023).
72 A Price 'Enduring solution in the midst of "crisis": Refugee children in Europe' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 35-36 & 41-43. See also EM Goździak 'What kind of welcome? Addressing the integration needs of Central American children and adolescents in US local communities' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 51-78.
73 Platform on Disaster Displacement 'Human rights, migration and cross-border displacement in the context of adverse effects of climate change' Platform on Disaster Displacement 6 October 2017, https://disasterdisplacement.org/

in the expansions of displacement encampments or urban slums.[74] Additionally, they may lack the capacity to mitigate and adapt to the negative consequences of climate change. Due to their proximity to the state of origin, these states may experience the same or similar sudden and slow-onset climate change impacts.[75] As such, children, already displaced by climate change impacts, may face secondary displacement in the state in which they have sought international protection.[76]

Resettlement in a third state thus stands out as the potential go-to solution for children displaced by climate change.[77] Resettlement refers to the process whereby persons currently situated in the host state in which they initially sought protection are transferred to a third state that has agreed to admit them with permanent residence status.[78] The UNHCR highlights that this solution provides resettled displaced persons, as well as their dependents, with access to rights similar to those enjoyed by nationals of the third state.[79] Resettlement, however, is often considered a last-resort solution for those who have been displaced and who do not have the option of repatriation or local integration.[80] Kneebone and Macklin highlight that resettlement is a 'solution' most often favoured by high-income states in the Global North who, for varying reasons, are reluctant to receive displaced persons from the Global South.[81] As a durable solution, resettlement often proves problematic as host states do not have a specific legal obligation to facilitate resettlement.[82] Further,

staff-member/human-rights-migration-and-cross-border-displacement-in-the-context-of-adverse-effects-of-climate-change/ (accessed 27 February 2023).

74 Intergovernmental Panel on Climate Change 'Health, wellbeing, and the changing structure of communities' in Sixth Assessment Report Impacts, Adaptation and Vulnerability (2022) 1100; Bradley & McAdam (n 50) 4.

75 IPCC (n 74) 1100.

76 Bradley & McAdam (n 50) 1-4; M Cullen 'Disaster, displacement and international law: Legal protections in the context of a changing climate' (2020) 8 *Politics and Governance* 275.

77 Bradley & McAdam (n 50) 3.

78 United Nations High Commissioner for Refugees 'Resettlement' UNHCR Master Glossary (2021), https://www.unhcr.org/glossary/#r (accessed 28 February 2023).

79 As above.

80 United Nations High Commissioner for Refugees 'What is resettlement' October 2020, https://www.unhcr.org/5fe06e8b4 (accessed 7 March 2023).

81 S Kneebone & A Macklin 'Resettlement' in C Costello (ed) *Oxford handbook on international refugee law* (2021) 1080. In 2023 the United Kingdom's attempt to introduce the Safety of Rwanda Bill, which aimed at implementing third-state resettlement, faced criticism for potentially endangering refugees and asylum seekers by limiting their choice and participation in the process. United Nations 'UK-Rwanda asylum law: UN leaders warn of harmful consequences' 23 April 2024, https://www.unhcr.org/news/press-releases/uk-rwanda-asylum-law-un-leaders-warn-harmful-consequences (accessed 30 April 2024).

82 Kneebone & Macklin (n 81) 1080-1081.

unlike voluntary repatriation and local integration, this solution is not a solution underwritten by the principles of *non-refoulement*.[83]

In addition, children who are resettled may face many of the risks associated with local integration described above as they attempt to assimilate into their new host state, and they may also experience heightened exposure to instances of discrimination and xenophobia, trafficking, lack of access to basic education and other needs.[84] As noted by Van Selm, the success of resettlement is judged by the local integration of the displaced individual into the new host society.[85] Further, the Committee on the Rights of the Child (CRC Committee) highlights in this regard that the potential for the child to experience these risks is multiplied if the child is separated or unaccompanied.[86]

## 5 Bridging the protection gap: The role of soft law in safeguarding climate-displaced children

Despite the limitations discussed above, it remains essential for states to pursue durable solutions for children displaced by climate change, as ongoing displacement poses numerous risks to their rights. However, a protection gap has been created by the lack of explicit recognition of persons displaced by climate impacts by the 1951 Refugee Convention and the OAU Refugee Convention. Therefore, soft law instruments, which purport to protect the rights of persons displaced by climate change impacts, can be examined to determine the extent to which they support the implementation of climate-displaced children's rights when seeking durable solutions to their displacement.

At the international level, several soft law instruments, such as NYD, GCR and GCM, acknowledge climate change as a significant driver of human mobility in the twenty-first century.[87] However, much like the traditional refugee regime, they do not specifically identify persons displaced by climate impacts as a distinct group

83 Kneebone & Macklin (n 81) 1080.
84 Price (n 72) 35-36 & 41-43. See also MO Ensor 'Refugee girls and boys and the dilemmas of (un)sustainable return to South Sudan' in MO Esor & EM Goździak EM (eds) *Children and forced migration: Durable solutions during transient years* (2016) 105-126.
85 J van Selm 'Refugee resettlement' in E Fiddan-Qamiyeh and others *The Oxford handbook of refugee and forced migration* (2016) 520.
86 CRC Committee General Comment 6: Treatment of unaccompanied and separated children outside their country of origin (2005) CRC/GC/2005/6 paras 92-94.
87 GCR (n 40) para 8; GCM (n 39) Objectives 2(h)-(l) para 18; see also W Kälin 'The global compact on migration: A ray of hope for disaster-displaced persons' (2018) 30 *International Journal of Refugee Law* 665.

in need of protection when crossing international borders. Instead, they indicate that states are likely to classify such persons as irregular migrants, subjecting them to the immigration policies of the host states rather than asylum or protection policies.[88] Consequently, they are excluded from the refugee protection regime, relieving states of the obligation to offer them durable solutions.[89] These instruments maintain the traditional binary of 'refugee' and 'voluntary migrant' that has been used to describe those who leave their habitual homes. However, following the introduction of the African Guiding Principles, this position may no longer be the default in the African regional context.

The African Guiding Principles, developed by the African Commission on Human and Peoples' Rights (African Commission),[90] are rooted in African regional treaty law, case law, standards and resolutions, serving as a framework for AU member states upon which to base their human mobility legislation.[91] Each principle is accompanied by an explanatory note outlining their derivation and interpretation aims to address contemporary challenges in human mobility, including displacement due to climate change impacts. [92] These principles reiterate that displacement may be motivated by adverse effects of both sudden or slow-onset climate change impacts, which may result in different degrees of vulnerability. These levels include forced displacement, migration and planned relocation.[93] Further, they highlight that displacement due to climate change impacts may be temporary, recurrent or permanent.[94] Thus, when there is any type of mobility across international borders as a result of climate change impacts, those displaced are to be defined as 'climate migrants'.[95] However, the African Guiding Principles go further than just recognising that climate change impacts may result in mobility across a state border by stating that the definition of 'refugee', as laid out in article 1 of the OAU Refugee Convention, will now also explicitly apply to persons who are 'compelled to seek refuge outside their country of origin, nationality or habitual residence as *a result*

88 UNICEF Guiding Principles (n 42) 18.
89 Objective 2 of the GCM seemingly confirms that persons displaced by climate change impacts will be considered irregular migrants. The GCM also states that as part of the guiding principle of national sovereignty, states may distinguish between regular and irregular migration status. GCM (n 39) paras 15 & 18.
90 The African Commission derives its powers to create this instrument from art 45(1)(b) of the African Charter on Human and Peoples' Rights adopted 27 June 1981, enforced 21 October 1986 CAB/LEG/67/3rev.5, 21 ILM 50.
91 African Guiding Principles (n 44) Foreword 6.
92 As above.
93 Principle 2(2) African Guiding Principles.
94 As above.
95 As above.

*[of] climate change* that affects their fundamental rights, regardless, of whether such events seriously disturb public order'.[96]

What is unique about the African Commission's definitions and explanations of 'climate migrant' and 'refugee' is that they move away from the binary approach traditionally found in forced migration policy, soft law and scholarship. Characterising human mobility in a binary fashion does not capture the complexities of twenty-first century movement.[97] Rather, it recognises that human mobility should be viewed as a spectrum. On the one end, there are voluntary migrants and, on the other end, there are refugees. Between these two extremes lie persons forced to leave their habitual homes for various reasons, including due to sudden and slow-onset climate change impacts.[98]

The creation of the 'climate migrant' definition, the recognition of the spectrum of mobility and the inclusion of climate-displaced persons as refugees are major steps forward for the protection of persons displaced due to climate impacts and their recognition as a group in need of protection. Therefore, when addressing durable solutions for climate-displaced children in Africa, consideration must be given to those now classified as refugees and those who, while forcibly displaced, may not meet traditional refugee criteria.

### 5.1 Obligations and commitments towards climate-displaced children deemed refugees

International soft law endorses the notion that traditional durable solutions should be accessible to all persons classified as refugees, a category now extended in the African context to encompass individuals identified as refugees due to the effects of sudden or slow-onset climate change impacts.[99] In particular, NYD and GCR outline in significant detail the commitments made by states regarding finding durable solutions for refugee persons. Notably, both instruments commit to working towards durable solutions from the outset of a refugee situation, with a focus on sustainability, safety and dignity.[100] By specifying the various elements of the traditional durable solutions,

96 My emphasis; Principle 2(4) African Guiding Principles.
97 K Warner 'Coordinated approaches to large-scale movements of people: Contributions of the Paris Agreement and the Global Compacts for migration and on refugees' (2018) 39 *Population and Environment* 384.
98 R Hamlin *Crossing: How we label and react to people on the move* (2021) 2; I Atak & F Crépeau 'Refugees as migrants' in C Castello and others *The Oxford handbook of international refugee law* (2021) 134; Warner (n 97) 384.
99 Principle 2(4) African Guiding Principles.
100 NYD (n 38) para 75; GCR (n 40) para 85.

GCR aims to enhance predictability and increase the likelihood of achieving these solutions for all refugees.[101] Additionally, the African Guiding Principles specify that these principles pertain to the entirety of the displacement process and mandate that 'states shall receive refugees and ensure the resettlement of those refugees'.[102]

The duties and procedures that states are required to undertake concerning all three traditional durable solutions found in the international refugee regime have been broadened in NYD, GCR and the African Guiding Principles. For example, among other things, these instruments, in the context of voluntary repatriation, highlight that host states should recognise the right of refugees and asylum seekers to leave and return to the host state without undue penalisation towards their status determination applications.[103] Further, NYD states that to ensure sustainable, safe and dignified repatriation and reintegration of refugees, host states, alongside UN organisations and other relevant stakeholders, should recognise the necessity of the voluntary nature of repatriation for as long as refugees require international protection from the host state.[104] The priority, thus, is to create an environment conducive to voluntary return to the state of origin while respecting the principle of *non-refoulement* and ensuring free and informed choice for refugees.[105] Measures for informed repatriation, reintegration and reconciliation should be planned and supported, including through funding for rehabilitation and legal safeguards for access to support mechanisms in the host state.[106] Further, direct repatriation support should be provided, particularly for vulnerable groups such as children, to prevent further displacement.[107]

In discussing local integration as a durable solution, NYD, GCR and the African Guiding Principles emphasise the importance of granting legal stay to persons seeking international protection to facilitate their integration into a host state while acknowledging that determinations regarding permanent settlement or citizenship lie within the jurisdiction of the host nation.[108] They highlight that local integration requires efforts from both refugees and host

101 GCR (n 40) para 86.
102 Principles 2 & 21 African Guiding Principles.
103 Host states are thus expected to provide identification and travel documents, facilitate the socio-economic reintegration of returnees, and consider measures for property restitution. NYD (n 38) Annex I para 11; Principles 17 (1)-(3) African Guiding Principles.
104 NYD (n 38) Annex I para 12(a).
105 GCR (n 40) para 87; Principles 20(3)-(4) African Guiding Principles.
106 NYD (n 38) Annex I paras 13(b)-(d); GCR (n 40) 99.
107 GCR (n 40) para 89.
108 NYD (n 38) annex I para 13(a); GCR (n 40) para 97; Principle 18(2) African Guiding Principles.

communities.[109] With reference to children, efforts should focus on promoting self-reliance by enhancing their access to education, health care and other services in the host state.[110] Importantly, host states should empower child refugees to make the most of their skills and capacities, as this enables them to contribute significantly to their well-being and that of their host communities.[111]

Furthermore, GCR makes commitments in support of states that choose to pursue local integration, which include the international community providing financial and technical assistance to host states.[112] This support includes developing a strategic framework for local integration, strengthening relevant institutions, communities and civil society, as well as addressing documentation issues, providing language and vocational training, and promoting respect and good relations.[113] Investments in settlement areas aligned with national development plans and the 2030 Agenda will be encouraged, and regional frameworks for legal status or naturalisation for refugees will be explored where appropriate.[114]

Regarding resettlement as a durable solution, states are encouraged to expand opportunities for refugees through various means, such as medical evacuation, humanitarian admission, family reunification, skilled migration, labour mobility and education.[115] In situations of mass displacement, states are encouraged to broaden their criteria for resettlement and humanitarian admission programmes, along with the consideration of temporary humanitarian evacuation programmes.[116] Further, states commit to sharing their best practices, providing refugees with information for informed decisions and upholding protection standards.[117] In addition, efforts will be made to strengthen good resettlement practices, such as establishing multi-year schemes, efficient processing, investing in reception and integration services and prioritising vulnerable cases, including at-risk women and girls.[118] Core groups will continue to coordinate responses in specific situations, aligning with existing multilateral resettlement mechanisms.[119] Currently, only a limited number of states offer resettlement as a durable solution to displacement. There

109 GCR (n 40) para 98.
110 NYD (n 38) Annex I paras 13(b) and 39.
111 NYD (n 38) Annex I para 13(c).
112 GCR (n 40) para 99.
113 As above.
114 As above.
115 NYD (n 40) Annex I para 14(a).
116 NYD (n 40) Annex I para 14(c).
117 NYD (n 40) Annex I para 14(b).
118 GCR (n 40) para 92.
119 GCR (n 40) para 93.

is a need to help create an environment that encourages expanded adoption of this durable solution.[120]

In addition to the traditional durable solutions, GCR also recognises the need for other pathways for admitting individuals with international protection needs that can enhance access to protection and solutions.[121] These pathways may include family reunification, private or community sponsorship programmes, humanitarian visas, migration corridors, educational opportunities and labour mobility for refugees with needed skills.[122]

Importantly, GCR purports to align these commitments with international human rights standards such as CRC and the African Children's Charter, requiring states to offer comprehensive assistance to refugee children, including mental health support, child protection systems and family reunification.[123] Further, NYD mandates adherence to CRC obligations, aiming to provide a nurturing environment for refugee children to fully realise their rights and capabilities.[124] The African Guiding Principles state that states must take all appropriate measures in all areas of the migration and displacement process to safeguard the rights and well-being of children, providing suitable assistance to every child, whether accompanied or unaccompanied, which includes prioritising the child's best interests and respecting their right to express their views in all matters affecting them.[125] As these principles apply to the entire displacement process, these protections of children's rights, particularly in terms of participation, should include decisions about finding suitable durable solutions for displaced children.[126]

It is clear from the above that the soft law takes a big step forward in protecting those displaced by climate change, if they are recognised as refugees, when seeking durable solutions. However, none of the above instruments discussed addresses the need for durable solutions for children specifically, nor for these solutions to be found timeously, leaving them vulnerable to prolonged displacement and associated risks.

For children who are not considered refugees, but who have nevertheless been displaced by a climate change impact across

120 GCR (n 40) para 90.
121 GCR (n 40) para 94.
122 GCR (n 40) para 95.
123 GCR (n 40) para 76.
124 NYD (n 38) para 32.
125 Principle 10(2) African Guiding Principles.
126 Principle 2 African Guiding Principles.

a state border, the above risks are exacerbated by the absence of explicit obligations placed on states for such children seeking durable solutions to end their displacement. This raises concerns about the protections and support available to such children, especially considering the complexity of their displacement and the unique challenges they face. What follows is an exploration of the obligations and commitments – or lack thereof – towards these children within existing international and regional soft law frameworks.

### 5.2 Obligations and commitments towards climate-displaced children who are not refugees

There are no explicit obligations or commitments made by GCR, GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles or the African Guiding Principles regarding finding durable solutions for persons or children who are not defined as refugees but who have nonetheless been forcibly displaced across a state border due to climate change impacts. As such, this leaves a lacuna in the protection of the rights of such children seeking durable solutions. Nevertheless, the above-named instruments purport to be child sensitive. This means that they aim to aid states in respecting, protecting and fulfilling the rights of children as found in CRC and the African Children's Charter during all stages of mobility (which should include ending a child's displacement). With this in mind, various provisions found in these soft law instruments may be read to reflect some of the aspects of the traditional durable solutions described above. These aspects of durable solutions could be used to establish state practices that will protect the rights of children displaced by climate change who have crossed an international border.

GCM, for example, lacks explicit objectives for finding durable solutions in migration contexts. Rather, it broadly refers to all non-refugees as migrants without specific consideration for persons displaced due to climate change impacts who may not be voluntary migrants but who also are not refugees.[127] This has been criticised as perpetuating the refugee-migrant binary, which allows for those who do not fit into the categories neatly to fall between the protection cracks.[128] While it distinguishes between regular and irregular migrants, it does not offer a dedicated objective for comprehensively

127 GCM (n 39) para 15.
128 H Crawley & D Skleparis 'Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in European "migration crisis"' (2018) 44 *Journal of Ethnic and Migration Studies* 48-64; Warner (n 97) 384.

addressing irregular migration and associated protections.[129] Instead, the topic of irregular migration is woven throughout the GCM, touching upon issues such as migrant detention and trafficking prevention.[130] Consequently, GCM does not envision durable solutions, specifically. However, elements of the traditional solutions described above, such as voluntary repatriation and local integration, can be found scattered across various objectives. For instance, Objective 21 of GCM emphasises safe and dignified return procedures, highlighting child-sensitive reintegration programmes and *non-refoulement* obligations.[131] Similarly, Objective 16 promotes local integration measures such as the provision of language training and access to employment for all migrants.[132] Yet, it is important to note that GCM does not discuss naturalisation or permanent settlement for irregular migrants. Further, these objectives and their associated commitments were not drafted to act as durable solutions for displaced persons but rather to ensure dignified immigration policies for irregular migrants.

GCM does, however, introduce potential pathways for new solutions beyond the three traditional durable solutions. Objective 5, for instance, acknowledges the need for flexible migration pathways for those displaced by sudden-onset disasters, mentioning temporary humanitarian visas and temporary work permits.[133] Unfortunately, this objective focuses more on controlling entry into a host state than ending situations of displacement, thus still leaving displaced children vulnerable to the risks associated with displacement. In terms of more permanent forms of displacement, Objective 5 calls for state cooperation on solutions for those displaced by slow-onset impacts where adaptation in or return to may not be possible through the creation of a visa, but lacks specifics as to how this will work and its impacts on ending displacement, and whether specific considerations should be made in the context of children.[134]

Furthermore, GCM also does not discuss access to durable solutions for children specifically. The protection of climate-displaced children is left to the general principle of child-sensitive procedures found in

129 A Pécoud 'Narrating an ideal migration world? An analysis of the Global Compact for Safe, Orderly and Regular Migration' (2021) 42 *Third World Quarterly* 25; Objective 13(h) 'Protect and respect the right and best interests of the child at all times, regardless of their migration status' GCM (n 39) para 29; Objective 15: 'We commit to ensuring that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services' GCM (n 39) para 31.
130 GCM (n 39) Objectives 10 & 13.
131 GCM (n 39) para 37.
132 GCM (n 39) para 32.
133 GCM (n 39) para 21(g).
134 GCM (n 39) para 21(h).

the instrument, which purports to align the commitments within the instruments with children's rights as outlined in CRC and the African Children's Charter.[135] Nevertheless, Objective 2 emphasises the need for states to develop coherent approaches to address the vulnerabilities of climate-displaced persons, including children, by promoting sustainable outcomes and considering recommendations from consultative processes such as the Nansen Protection Agenda.[136]

The Nansen Protection Agenda underscores the temporary nature of protection for climate-displaced persons and emphasises that once the temporary measures and protections come to an end, durable solutions are needed that will allow persons displaced due to climate change impacts to rebuild their lives in a 'sustainable way in their country of origin, in some cases, in the country that received them or in exceptional cases in a third country.'[137] It suggests bilateral return agreements and host state integration efforts, stressing the importance of the involvement of displaced persons and communities.[138] Cooperation between the state of origin and host states should be ensured to receive returnees with respect for their safety, dignity and human rights.[139] If the return of a climate-displaced person to a state of origin is not possible, for example, where the causes of the displacement persist, host states should consider local integration or resettlement in a third country.[140] Importantly, measures should be developed to support the cultural and familial ties of the displaced in such cases.[141] However, the Protection Agenda does not address effective practices specifically in the context of children finding durable solutions for climate change displacement. For this, one could look to the UNICEF Guiding Principles.

The UNICEF Guiding Principles focus on the rights of climate-displaced children while on the move. However, they regrettably do not comprehensively discuss durable solutions for such children. They only go as far as mentioning that such solutions are at the discretion of host states, emphasising children's best interests.[142] These principles neither outline states' obligations regarding durable solutions nor detail aspects of traditional solutions.

135 GCM (n 39) para 15.
136 GCM (n 39) para 18(k).
137 Nansen Protection Agenda (n 41) 71.
138 As above.
139 As above.
140 As above.
141 As above.
142 UNICEF Guiding Principles (n 42) 29.

Lastly, the African Guiding Principles also do not explicitly address durable solutions for individuals not classified as refugees. However, they incorporate protective measures that correspond to the durable solution approaches described above. For instance, Principle 20(3) emphasises voluntary repatriation, stipulating that states must not repatriate migrants, irrespective of their migration status, if they face a genuine risk of irreparable harm to their fundamental human rights, especially the right to life. Additionally, Principle 37(6) underscores the importance of state cooperation in enabling the safe and dignified return of migrants.

When comparing the commitments for durable solutions in the soft law instruments in the refugee context with the objectives, guiding principles and best practices outlined for non-refugees, it becomes apparent that the latter are more aligned with protecting the rights of children. For instance, the UNICEF Guiding Principles were expressly crafted to safeguard the rights of children displaced by climate change, while GCM emphasises the importance of upholding a child's best interests as a cross-cutting and fundamental principle.[143]

Furthermore, the African Guiding Principles do not have a principle dedicated to the protection of the rights of children. Nevertheless, the protection of the rights of children is woven throughout the instrument. In particular, Principle 10(2), which deals with migrants in vulnerable situations, emphasises the responsibility of states to provide comprehensive support to migrant children, whether they are accompanied or unaccompanied, ensuring that their best interests are prioritised. This includes assistance tailored to their needs and respecting their rights to express their opinions, considering their age and maturity.[144] It covers various aspects, including legal proceedings regarding their migrant status and determining their identity and relationships with accompanying adults.[145] This principle will also apply to those migrants deemed 'climate migrants' in the African region and, thus, the rights of children should be considered when a host state is searching for durable solutions for a climate-displaced child. However, these commitments often lack explicit provisions for expeditiously finding durable solutions for climate-displaced children, leaving them vulnerable to prolonged displacement situations.

Thus, none of the aforementioned soft law instruments explicitly delineate durable solutions for individuals or children not

143 GCM (n 39) para 15.
144 Principle 10(2) African Guiding Principles.
145 As above.

classified as refugees. This includes the African Guiding Principles, notwithstanding its progressive strides toward acknowledging persons displaced by climate change impacts as a vulnerable group deserving of protection. However, GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles and the African Guiding Principles do contain certain commitments that, while not explicit, have the potential to be interpreted in a way that helps guarantee certain rights associated with durable solutions for children displaced by climate change.

The above-named soft law instruments could potentially be used as tools by host states to influence state behaviour, address the some of the gaps in protection created by the binding legal frameworks, and ensure that the rights of climate-displaced children are upheld in the context of finding durable solutions. However, it is nevertheless noted that these measures were not drafted with the intention to end displacement but rather to facilitate regular migration, as such states would have to be explicit in their intentions to uphold the rights of climate-displaced children in ending their displacement.

## 6 Recommendations

The above body of soft law instruments, particularly the African Guiding Principles, brings the international community a step closer to ensuring that the rights of children displaced due to climate change impacts are protected. In summary, the above discussion highlighted the following:

- NYD, GCR and GCM acknowledge climate change impacts as a driver of displacement but do not explicitly classify climate-displaced persons as refugees, limiting their access to durable solutions. However, the African Guiding Principles have subsequently introduced the concept of 'climate migrants' and broadened the refugee definition found in the OAU Refugee Convention to include those displaced by climate change, ensuring stronger protection in Africa and providing access to some children displaced by climate change impacts to the traditional durable solutions.
- GCR and NYD touch on access to durable solutions for those classified as refugees, which now includes those covered by the refugee definition found within the African Guiding Principles. However, these durable solutions are not child sensitive and do not protect the rights of displaced children.

- The soft law instruments analysed lack explicit commitments for durable solutions for those children who have been displaced by climate change impacts but are not recognised as refugees. However, they do contain commitments that could be interpreted to support aspects of durable solutions, such as safe and dignified return procedures, integration efforts and humanitarian pathways. GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles and the African Guiding Principles are also committed to ensuring that these procedures, efforts and pathways are child sensitive, helping to respect, protect and fulfil the rights of climate-displaced children.
- Despite the various child-sensitive principles, no soft law instrument analysed mandates time-bound solutions for climate-displaced children, leaving many vulnerable to prolonged displacement.
- Thus, while these soft law instruments are not legally binding, they can influence state behaviour, guiding policies to bridge protection gaps. States must intentionally align their efforts with child rights frameworks to ensure effective, durable solutions for children displaced by climate change in Africa.

In relation to the above, an actionable recommendation is for states to use periodic reports to child rights treaty-monitoring committees to demonstrate how they protect and fulfil the rights of climate-displaced children in Africa.[146] In other words, reports to the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) hold states accountable for children's rights.[147] Host states should include information on legislative, administrative and other measures taken to support climate-displaced children in their search for durable solutions.

In 2024 the CRC Committee adopted the simplified reporting procedure as the default for state reports.[148] It is recommended that the CRC Committee include specific questions in its list of issues prior to reporting (LOIPR) for states hosting climate-displaced children.[149] These questions could be integrated into climate change efforts or

146 Art 44 CRC; art 43 African Children's Charter.
147 As above.
148 Office of the High Commissioner for Human Rights 'Reporting guidelines' United Nations, https://www.ohchr.org/en/treaty-bodies/crc/reporting-guidelines (accessed 21 September 2023).
149 CRC Committee 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by states parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child' 3 March 2015 CRC/C/58//Rev3 para 40.

the special protections rights cluster. Their inclusion aligns with the CRC Committee's General Comment 26 on children's rights and climate change, which underscores states' obligations to protect displaced children from rights violations caused by environmental degradation.[150] This includes obligations related to admission policies and *non-refoulement*. A state's LOIPR responses will now constitute its periodic report.[151] The African Children's Committee has not yet adopted a simplified reporting procedure, but states should still include measures taken in line with African Children's Charter rights.

In addition, even if climate-displaced children can access traditional durable solutions, numerous hurdles remain due to the nature of climate change impacts. Innovative, adaptable solutions beyond conventional approaches are needed. [152] For example, host states could integrate durable solutions for climate-displaced children into their climate adaptation commitments under frameworks such as the Paris Agreement.[153] This would involve recognising displacement due to climate change as a natural adaptation response, ensuring that states adapt to climate impacts to alleviate displacement drivers, and facilitating planned relocation when necessary. The African Guiding Principles open this avenue up by recognising resettlement in Principle 2(2) as a part of climate change migration and the commitments made in Principle 32 for a favourable environment for all migrants. In particular, Principle 32(4) states:

> States shall develop adaptation and resilience strategies to sudden-onset and slow-onset disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought, and sea level rise, reducing climate risks and vulnerability and taking into account the need to create pathways for migration.

As such, there is a growing need for innovative, practical and adaptable solutions beyond traditional solutions' conventional scope. States should thus also consider incorporating durable solutions

150 CRC Committee General Comment 26 (n 17) para 50. General Comments, a form of secondary soft law, are used to promote the implementation of CRC and assist states in fulfilling their reporting obligations. They are an essential tool in helping explain the Convention obligations in the context of particular issues. Child Rights Connect 'Fact Sheet 3: General Comments of the Committee on the Rights of the Child', https://childrightsconnect.org/wp-content/uploads/2013/10/Fact-sheet-CRC-GC-EN.pdf (accessed 2 October 2023).

151 Art 43 African Children's Charter. See, eg, African Guiding Principles (n 44).

152 OC Ruppel & S van Wyk 'Climate change-induced movement of persons in Africa: Human rights responses to aspects of human security' in OC Ruppel and others (eds) *Climate change: International law and global governance* 805; McAdam (n 23) 7-9; S Atapattu 'Climate change, human rights and forced migration: Implications for international law' (2009) 27 *Wisconsin International Law Journal* 608.

153 Paris Agreement (n 37).

for climate-displaced children into their nationally determined contributions under the Paris Agreement.[154] Further research should also be conducted on the required level of international collaboration, guided by the principles of equity and common but differentiated responsibilities needed to achieve these adaptation measures.[155] Importantly, these adaptation strategies should reflect a children's rights-based approach, supporting the respect for, promotion and fulfilment of the rights owed to children displaced by climate change who are seeking durable solutions as found in CRC and African Children's Charter.[156]

## 7 Conclusion

This article has demonstrated that while soft law instruments cannot replace binding legal frameworks, they play a crucial role in shaping national and regional policies and fostering international cooperation. In particular, primary soft law frameworks help address the protection gap left by the 1951 Refugee Convention and the OAU Refugee Convention for children displaced by climate change in Africa. The African Guiding Principles and other soft law instruments analysed above offer valuable guidance for host states and international bodies receiving displaced persons. However, these frameworks still fall short of adequately supporting states in fulfilling their obligations under CRC and the African Children's Charter.

A comparison of soft law commitments for durable solutions in refugee and non-refugee contexts reveals a stronger alignment with children's rights in the latter. Instruments such as the UNICEF Guiding Principles, GCM and the African Guiding Principles explicitly emphasise children's rights in climate displacement, whereas refugee frameworks lack this clarity. Additionally, soft laws do not adequately prioritise timely solutions for displaced children, which is fundamental in the protection of their rights as prolonged displacement exacerbates their vulnerabilities. Further challenges also remain in ensuring that children's interests are not overshadowed by those of their parents, as highlighted in both refugee and non-refugee contexts.

The evolving landscape displacement due to climate impacts in Africa requires a shift from broad commitments to concrete, rights-based actions by states. Strengthening the implementation of the existing primary soft law frameworks, integrating child-sensitive

154 Art 3 Paris Agreement (n 37).
155 Art 2(2) Paris Agreement (n 37).
156 UN Secretary-General (n 17).

approaches into climate adaptation strategies and fostering greater international cooperation are critical steps forward in the protection of the rights of climate-displaced children. As climate change continues to drive displacement, the protection of children's rights must remain at the forefront of policy responses. By embedding durable solutions within national and international legal and policy frameworks, states and global institutions can work towards a future where all children, regardless of displacement status, have access to stability, security and the full enjoyment of their rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: CA Khamala 'Ghost of the Malabo Protocol: Political conditions influencing African countries' refusals to extradite International Criminal Court suspects' (2025) 25 *African Human Rights Law Journal* 141-172
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a6

# Ghost of the Malabo Protocol: Political conditions influencing African countries' refusals to extradite International Criminal Court suspects

*Charles A. Khamala**
Dean and Senior Lecturer, Faculty of Law, the Catholic University of Eastern Africa, Nairobi, Kenya
https://orcid.org/0000-0002-9354-3359

**Summary:** *For strategic constituencies, the Rome Statute of the International Criminal Court facilitates the pursuit of international criminal justice's instrumental goals. Such impacts on a post-conflict country include restoring peace and security. Significantly, the International Criminal Court is constrained to pursue international criminal justice while respecting complementarity. A rational approach, therefore, measures the degree to which the ICC must not merely satisfy deontological retributive goals posited by the Assembly of State Parties, but also appease domestic publics. In March 2023, arising from Russia invading Ukraine, the ICC issued arrest warrants against President Vladimir Putin and in 2024 against another two Russians. State parties to the Rome Statute are obligated to extradite them to face atrocity charges. Consequently, to avoid detention, Putin avoided attending a South African BRICS summit, since no safe haven would be available there. Comparing South African and Kenyan extradition laws, this article evaluates the international obligation to extradite or prosecute atrocity*

* LLB (Nairobi) LLM (London) PhD (Université de Pau et des Pays de l'Adour); chalekha@yahoo.co.uk; ckhamala@cuea.edu

*fugitives. It evaluates political influences on the international mutual legal assistance obligation reminiscent of the Malabo Protocol's immunity provision. Unless fugitives voluntarily surrender for trial, the ICC triggers arrest warrants in requested countries. Yet previously, despite warrants against then Sudanese President Al-Bashir, some states, including Kenya and South Africa, hosted him. By refusing to extradite him, both declined cooperation. Nonetheless, his further travel was inhibited by looming apprehension prompted by civil society-initiated court injunctions. Refusals to surrender fugitive suspects indicates ambivalence towards the justice cascade. Ineffective regional instruments on surrendering fugitives include the 1994 ECOWAS, 2002 SADC and 2009 IGAD extradition treaties. A new alternative is the 2023 UN Hague Convention on International Cooperation in the Investigation and Prosecution of International Crimes. Ratifications which would facilitate combating atrocity crimes.*

**Key words:** *Al-Bashir; complementarity; cooperation; International Criminal Court; justice cascade; mutual legal assistance; Putin; Rome Statute*

## 1 Introduction

Late twentieth century genocides in Rwanda and Bosnia precipitated the Rome Statute's passage, establishing the International Criminal Court (ICC).[1] The ICC provides a complementary institution for prosecuting individuals found most responsible for grave crimes of international concern.[2] Paradoxically, it simultaneously operates in opposition to state interests, while stubbornly protecting state interests.[3] Member states submit to the Court's jurisdiction in respect of genocide, crimes against humanity, war crimes and the crime of aggression.[4] Jurisdictionally, accused persons may be held accountable either when they are citizens of a state party, or commit

1 T Murithi 'The African Union and the International Criminal Court: An embattled relationship?' Policy Brief 10 Institute for Justice and Reconciliation (2013), http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20 Miruthi.pdf (accessed 11 June 2024); see also D Bosco *Rough justice: The International Criminal Court in a world of power politics* (2014).

2 Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (accessed 11 June 2024) (Rome Statute).

3 M Drumbl 'Collective responsibility and post-conflict justice' in T Isaacs & R Vernon (eds) *Accountability for collective wrongdoing* (2011) 63.

4 The ICC gained jurisdiction over the crime of aggression on 17 July 2018, when the amendment defining the crime was adopted and its prosecutorial powers were only extended to parties that ratified the amendment.

an offence on a state party's territory.[5] Moreover, not only may the United Nations (UN) Security Council refer cases to the Office of the Prosecutor (OTP), but equally, states that are not a party to the Rome Statute may recognise the ICC's jurisdiction.[6] Pivoted on the complementarity principle,[7] the ICC supplements national legal systems. Whenever domestic authorities are unable or unwilling to genuinely investigate or prosecute, cases become admissible before the ICC.[8] Correspondingly, state parties are committed to fully cooperate with the Court's responses to atrocity crimes. This cooperation entails surrendering fugitives of international justice, together with supporting materials upon the ICC's request.[9] Clearly, lacking police of its own creates dependence on full cooperation from state parties to either enforce justice within their territories or to extradite suspects.

Yet, in 2009 and 2010, despite the ICC issuing arrest warrants against then Sudanese President Omar Al-Bashir, Kenya and South Africa, among other African countries, hosted him. They alleged the ICC's bias as a hegemonic tool of Western powers, targeting only the continent.[10] Thus, the intensity of international pressures in criminal trials of heads of state varies from minimal to strong. For example, the international community not only created judicial tribunals to prosecute Charles Taylor and Slobodan Milošević, but also pressured the harbouring states for their surrender.[11] Changes in international and domestic willingness to hold former heads of state accountable motivates a justice-power nexus. This is evidenced by domestic judges reversing amnesties accorded for atrocities perpetrated by leaders.[12] Similarly, political considerations impact on states' decisions and willingness to cooperate with or defy the ICC. Yet, judicial independence and impartiality requirements motivated the ICC's establishment. Indeed, the Rome Statute's ratification continues to provide a reference point in eligibility for developmental aid.[13] This article revisits the politicised decisions by Kenya and South Africa in the *Al-Bashir* case, and their implications for the Court's effectiveness.

5 Arts 6-9 Rome Statute (n 2).
6 Rome Statute (n 2) Part 2 on jurisdiction.
7 Art 18(2) Rome Statute.
8 RS Lee *Introduction in the International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (2002).
9 Arts 86-89 Rome Statute.
10 C Fehl *Growing up rough: The changing politics of justice at the International Criminal Court* PRIF Report 127, 2014.
11 EL Lutz & C Reiger 'Introduction' in EL Lutz & C Reiger (eds) *Prosecuting heads of state* (2009) 21.
12 EL Lutz & C Reiger 'Conclusion' in Lutz & Reiger (n 11) 275.
13 Lutz & Reiger (n 12) 276.

Are there indicators to facilitate a prediction on whether African countries are likely to extradite atrocity suspects in future?

In 2023 the ICC issued arrest warrants against Russian President Vladimir Putin and its Commissioner for Children's Rights, Maria Alekseyevna Lvova-Belova.[14] Global public opinion has since split into two ideologies aligning with North Atlantic Treaty Organisation (NATO) or Brazil, Russia, India, China, South Africa (BRICS) countries.[15] Based on the possibilities of different legal realities, this article evaluates the political considerations, potentially compromising the ICC's effectiveness in enforcing justice and accountability against Putin. The objective is to determine the extent to which political considerations encompassing hegemony, geopolitical interests and sovereignty affect state willingness to cooperate with the ICC in delivering justice.

Theoretically, effective courts apply the law 'objectively, dispassionately, and impartially'.[16] From a legal perspective, evaluating a court's effectiveness entails assessing the extent to which its judgments reflect legal merits using methods of statutory interpretation or following binding and persuasive precedents. However, deploying such interpretive methods to measure court performance is problematic for three reasons. First, because judges themselves are unlikely to disclose their own ideological or strategic considerations that may drive their decision making.[17] The ICC's legitimacy is increasingly important, since a majority of ICC judges have recently been accused of 'perverting the concept of jurisdiction for the sake of advancing their own political interests'.[18] In lieu of the relevant empirical evidence, most scholars use certain proxy indicators such as judicial independence, judgment-compliance or institutional design[19] to infer effectiveness. We have elsewhere shown some limitations of these proxies.[20] Here, I go beyond the

14 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova in ICC' 17 March 2023, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 4 June 2024).

15 LA Júnior & GD Branco 'BRICS countries and the Russia-Ukraine conflict' (2022) 17 *Rev Carta Inter, Belo Horizonte* 1-25.

16 CJ Carrubba & MJ Gabel *International courts and the performance of international agreements: A general theory with evidence from the European Union* (2005) 87, citing JA Segal & HJ Spaeth *The Supreme Court and the attitudinal model revisited* (2002) 33.

17 As above.

18 R Morav 'The ICC's dangerous decision and its possible implication for Ethiopia' *The Reporter* 20 February 2021, https://www.thereporterethiopia.com/article/iccs-dangerous-decision-and-its-possible-implication-ethiopia (accessed 20 October 2023).

19 Carrubba & Gabel (n 16) 14-15.

20 L Juma & CA Khamala 'A dynamic approach to assess the International Criminal Court's performance in the Kenya cases' (2017) 25 *Lesotho Law Journal* 39-73.

goal-based approach,[21] to measure the extent to which the ICC achieves its prescribed goals as an evaluation of its effectiveness. A second problem arises because all courts, more so international courts, have multiple goals, some ultimate, others idiosyncratic.[22] Invariably, each stakeholder places weight on aspects that advance its own interests. Consequently, stakeholder choices of methods and, ultimately, assessments of the ICC's effectiveness vary. Comparisons can be made of perspectives ranging from international criminal law scholars (process orientation) to the Assembly of States Parties (ASP) (the mandate providers), as well as third parties, particularly key stakeholders from within situation countries (the strategic constituencies). That goal-based interpretation facilitates a refined assessment of the ICC's effectiveness in the Kenya cases.

The article proceeds as follows: Contextual problems stated in part 2 arise from the tension between the process-oriented perspective proffered by international criminal law scholars who emphasise the ICC's *intrinsic* goal of vindicating the rule of law, on the one hand, and the mandate providers' perspective, evinced by the ASP's *retributivist* goal of punishing mass atrocity perpetrators, on the other.[23] As part 3 illustrates, the article's purpose is to develop a normative standard against which to assess the social impact of the ICC's decisions. Its findings should evaluate the extent to which the ICC's intervention balances its *intrinsic*, *retributive* and *instrumental* goals. The priority varies depending on the perspective of a particular stakeholder evaluating the situation. Part 4 works within Carrubba and Gabel's rational theory hypotheses to fill a gap in the manner in which political dynamics influence states' non-cooperation with the ICC. Part 5 claims that in the *Al-Bashir* case, the Kenyan and South African executives' respective assessments of the ICC's performance reflect international criminal law's *instrumental* goals. Invariably, non-cooperation is rationalised by the discordant goals pursued by different stakeholders: international criminal law scholars (*intrinsic*), the ASP (*retributive*) and domestic executive authorities (*instrumentalist*). The point is that international criminal procedure recognises *instrumentalist* goals as prioritised by certain domestic authorities. Part 6 considers the groundswell that gave rise to the 2014 Protocol on Amendments to the Protocol on the Statute of the African Charter Court of Justice and Human Rights (Malabo Protocol) and concludes that a dynamic interpretation of the ICC's performance in the *Al-Bashir* case facilitates a refined understanding of various

21 Y Shany *Assessing the effectiveness of international courts* (2014).
22 As above.
23 JD Ohlin 'Meta-theory of international criminal procedure: Vindicating the rule of law' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77-120.

conflicting positions of political constituencies in African countries in response to the ICC's Putin warrants. The diplomatic decision by the Russian President to skip the August 2023 BRICS Nations Summit at Johannesburg preempted another (non)-cooperation decision by his South African counterpart, the dilemma of whether to belligerently disobey orders from the domestic judiciary to detain him during his planned visitation.

## 2 Problems with relying on legal merits to evaluate international courts

Has international criminal justice been attained with respect to Kenya's post-2007 conflicts? To most liberals, justice implies neutrality.[24] Therefore, as between victims and suspects, justice is construed from the perspective of disinterested third parties, who should respond by applying the rules to the facts. However, contexts, conditions and contingencies influence legal decisions. For example, rejecting the Nuremberg criminalisation of the Holocaust, Mamdani recommends 'rethinking of the political community for all survivors – victims, perpetrators, bystanders, beneficiaries – based on common residence and the commitment to build a common future without the permanent political identities of settler and native'.[25]

Lutz and Sikkink demonstrated a broad norms shift in Latin America in the latter quarter of the twentieth century, indicating increased regional consensus in prosecuting human rights abusers.[26] However, considering the role of international engagement and intervention in decision making about the trial of leaders, Lutz and Reiger acknowledge that although such judicial proceedings are entirely different processes from power plays dressed up in legal garments, nevertheless their didactic function invites accusations of being show trials. Consequently, they suggest that it is premature to declare that the justice cascade 'is today a consolidated global phenomenon'.[27] To what extent is the normative human rights framework 'thinning' at the international level? Within prosecutorial processes, Carrubba and Gabel observe how three factors intervene, interfere with or influence the legal merits of international trials. First,

24 Carrubba & Gabel (n 16); see also T Krevor 'Unveiling (and veiling) politics in international criminal trials' in C Schwöbel (ed) *Critical approaches to international criminal law: An introduction* (2015) 123.
25 M Mamdani *Neither settler nor native: The making and unmaking of permanent minorities* (2020).
26 EL Lutz & K Sikkink 'The justice cascade: The evolution and impact of foreign human rights trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1-34.
27 Lutz & Reiger (n 12) 277.

like domestic judiciaries, so also international judges are tempted to decide cases according to their personal or political ideologies, rather than according to established legal principles. Yet, their written judgments rarely expressly disclose such political biases. Hence, it is necessary for scholars to deduce the influence or impact which extra-judicial factors, actors or institutions may have on formal judgments.[28] Second, domestic states are expected to voluntarily adopt and implement decisions by international courts. This is because the international legal system lacks any hierarchic sovereign to enforce its decisions. Moreover, countries may refuse to comply with international judgments, thus rendering them ineffective. Third, the mandate providers may threaten to override unpopular judgments by either budgetary constraints or even by amending the treaty that creates the international court and establishes obligations that bind state parties.[29]

Consequently, Lutz and Reiger posit two hypotheses motivating governmental prosecution of former leaders for committing atrocities under their watch. First, transforming from authoritarian to democratic rule inspires progressive leaders to try senior political or military leaders of the previous repressive regime. Judicial condemnation of totalitarian predecessors may convince domestic constituencies that they are making a 'clean break' from the past. Second, international factors, such as indicating the state's worthiness to join the community of democratic nations, may attract foreign aid from Western countries that impose adherence to human rights, the rule of law, democracy and accountability as conditionalities for donor funding.[30]

## 3 Justification for invoking the International Criminal Court's complementarity jurisdiction

The international criminal law regime prescribes norms, including an 'anti-impunity norm'.[31] Among 123 other countries, Kenya endorsed this norm upon signature of the Rome Statute in 2002 and by ratifying it in 2005.[32] Nonetheless, in 2007 to 2008 mass atrocities were

28 Carrubba & Gabel (n 16).
29 A Schwarz 'The legacy of the Kenyatta case: Trials *in absentia* at the International Criminal Court and their compatibility with human rights' (2016) 16 *African Human Rights Law Journal* 99-116.
30 Lutz & Reiger (n 12) 287-288.
31 Ohlin (n 23).
32 Coalition for the International Criminal Court, http://www.iccnow.org/?mod=kenya (accessed 6 November 2023).

perpetrated in the wake of post-election violence.[33] The subsequent failure by domestic authorities to prosecute 'the most serious crimes of concern to the international community as a whole' triggered the ICC's intervention.[34] However, in 2014 the cases against President Uhuru Kenyatta and ambassador Francis Muthaura were withdrawn, before they could even commence. In September 2016 the *Kenyatta* case was eventually referred to the ASP to determine whether Kenya should be sanctioned for non-cooperation with the OTP.[35] In April 2016, due to 'intolerable interference and political meddling', the cases against then Deputy President William Ruto and journalist Joshua Arap Sang were discontinued.[36] However, until November 2023 when the OTP formally closed all investigations, it remained open to bringing fresh charges in future.[37] Meanwhile, Kenya not only applied for review of the OTP's investigations in both cases, but also threatened to withdraw from the Rome Statute altogether.[38] As a result, the Kenya cases severely tested the principles of both complementarity and cooperation. Contemporaneously, two African countries, The Gambia and Burundi, withdrew in 2016, followed by Russia that same year and the Philippines in 2019. Others, including South Africa and Namibia, contemplated exit.[39] Therefore, the ICC's critics contend that its hegemonic performance has resulted in decreased public confidence in its ability to achieve its *retributive* goals. Nonetheless, proponents praise its counter

33 The Waki Report *Commission of inquiry into post-election violence* (2008), http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 9 November 2023).

34 Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May, 2011 *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Situation in the Republic of Kenya, https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF (accessed 9 November 2023).

35 ICC Trial Chamber V(B) refers non-cooperation of the Kenyan government to the Assembly of States Parties to the Rome Statute, *The Prosecutor v Uhuru Muigai Kenyatta*, https://www.icc-cpi.int/pages/item.aspx?name=pr1239 (accessed 6 November 2023).

36 Decision on defence applications for judgments of acquittal, 5 April 2016 Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red (accessed 9 November 2023).

37 'ICC formally closes cases against President Ruto, Joshua Arap Sang' *Capital News* 28 November 2023, https://www.capitalfm.co.ke/news/2023/11/icc-formally-closes-cases-against-president-ruto-joshua-arap-sang/ (accessed 19 February 2024).

38 J Wanga 'Kenya issues threat to pull out of ICC' *Daily Nation* 22 November 2015, http://www.nation.co.ke/news/politics/Kenya-issues-threat-to-pull-out-of-ICC/1064-2966586-iok8k7z/index.html (accessed 6 November 2023).

39 'Russia withdraws from International Criminal Court treaty' *BBC* 16 November 2016, https://www.bbc.com/news/world-europe-38005282; see also 'Gambia joins South Africa and Burundi in exodus from International Criminal Court' *The Independent* 26 October 2016, http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html (accessed 6 November 2023).

hegemonic performance which procure *instrumentalist* goals.[40] Amid ambivalence, this article argues that it is opportune to revisit and rethink the ICC's philosophical foundations, offences or procedures in relation to political factors influencing state (non)-cooperation.

Membership in multilateral agreements signals a state's commitment to their international values.[41] However, the unfolding neo-authoritarian, geo-political global developments suggest that some state parties no longer believe that membership of the Rome Statute is in their interests. Have such states ceased to abhor the perpetration of gross human rights violations? Do they condone impunity? In their defence, African states that were contemplating withdrawal complained against the ICC's selectivity of intervening in situations – considering that since its inception, by 2017, nine out of its ten investigations were opened in Africa. Georgia was the exception. That was so, notwithstanding that similar or worse human rights violations were arguably perpetrated in Syria, Palestine or even by Western countries – such as the United States (US) and the United Kingdom (UK). Clearly, controversy shrouds the ICC's non-adherence to the liberal ideal adjudicative standard of 'neutrality, objectivity and impartiality'. The Kenya cases gained particular notoriety for significantly polarising legal and political opinions, domestically as well as globally. Therefore, it would be interesting and useful to apply more refined criteria to evaluate the ICC's performance in the Kenya cases. From the outset, an understanding the Court's unique jurisdictional basis is useful.

The ICC's structural assets comprise its inputs which are factors of production for manufacturing its decisions. There are three categories of inputs: first, the judges themselves, whose competence is ensured by appointment criteria and secure tenure of office;[42] second, accused persons, victims and witnesses as well as interested third parties who file *amicus* briefs;[43] they supply raw materials in the form of testimonies, exhibits and documents; third, the procedural rules that govern trial operations.[44] Substantive rules circumscribe its jurisdictional scope. For example, the ICC can only entertain incidents pertaining to the specific subject matter that falls within its defined crimes (*ratione materiae*).[45] It cannot consider atrocities

40 F Jeßberger, L Steinl & K Mehta *International criminal law: A counter-hegemonic project?* (2023).
41 AJ Bellamy *Massacres and morality: Mass atrocities in an age of civilian immunity* (2012).
42 Art 40 Rome Statute (n 2).
43 Rule 103(1) of the Rules of Procedure and Evidence, an instrument for the application of the Rome Statute (n 2).
44 Rome Statute (n 2).
45 Arts 12(2)(a) & (b) Rome Statute.

pre-dating the 2002 Statute's entry into force (*ratione temporis*).[46] Furthermore, it must limit itself to the situation in the country in which the incidents transpired (*ratione loci*).[47] Finally, it must target persons for the most serious crimes of international concern (*ratione personae*).[48] Moreover, its admissibility rules require that domestic authorities must be either unwilling or unable to genuinely investigate or prosecute (complementarity).[49] This article is justified by the need to comprehend the manner in which political dynamics affect state cooperation with the ICC. The aim is to uncover the patterns of political interference or influence that impacts a state's willingness to cooperate with the Court, compromising its pursuit of impartial justice. Such examination is crucial for identifying challenges revolving around the states' and ICC's interaction, and proposing reforms that might be effective in addressing the challenges and contributing to the broader discussion on the interplay of politics and international criminal justice.

## 4 Rational theory for assessing performance

Various authors have endorsed using a dynamic interpretive approach to assess the effectiveness of international courts.[50] Carrubba and Gabel propose a formal or rational approach for judicial impact assessment based on game theory. As realists,[51] they construe the international community as being anarchic. In a repeat prisoner's dilemma, members of multilateral treaties refrain from defaulting on their commitments in order to avoid punishment by other members who may retaliate in future.[52] Thus, in furtherance of mutual long-term interests, all member countries are motivated to cooperate to further *collective action*.[53] Defecting from commitments may satisfy short-term benefits at the cost of acquiring a bad reputation that encourages other states to retaliate in due course. Instead, to achieve mutual self-interest, states not only form a common regulatory regime, but also create a court.[54] In order to avoid punishment, it is optimum for states to keep their promises. Thus, courts are institutions that aid norm clarification and assist state parties to abide by their agreed obligations. Two metaphors are illustrative.

46 Art 11 Rome Statute.
47 Art 26 Rome Statute.
48 Arts 6-8 Rome Statute.
49 Art 17 Rome Statute.
50 A Grabert *A dynamic interpretation in international criminal law: Striking a balance between stability and change* (2014); see also G Letsas *A theory of interpretation of the European Convention on Human Rights* (2007).
51 Carrubba & Gabel (n 16) 5.
52 Carrubba & Gabel (n 16) 7.
53 Carrubba & Gabel (n 16) 27.
54 Carrubba & Gabel (n 16) 29-31.

One, litigants who lodge and defend cases, as well as third parties who may file *amicus* briefs, make the Court act as a *fire alarm*. Two, the Court is a venue for making arguments. Therefore, it is also an *information clearinghouse*.[55]

In Carrubba and Gabel's model, two hypotheses are instructive. First, the 'political sensitivity' hypothesis.[56] They argue that the Court is likely to be influenced by the preponderance of third party states which file *amicus* briefs, whether on behalf of defendants or plaintiffs (prosecutors). Applying this criterion to the context of the ICC Kenya cases, it is relevant that between 2011 and 2015, Kenya undertook protracted international political campaigns: one before the UN, seeking deferral of the cases by one year; another before the African Union (AU), seeking referral of the ICC cases for determination and disposal by Kenyan courts.[57] According to the 'political sensitivity' hypothesis, obtaining such political support from third parties would necessarily influence the ICC's decision-making processes. Eventually, in the *Ruto and Sang* case, the Trial Chamber majority decried the Kenyan government's 'political meddling and intolerable interference'.[58] Consequently, the judges terminated it midway due to the negatively politicised atmosphere that intimidated and discouraged witnesses from testifying. Due to such new intervening factors, scores of prosecution witnesses recanted their prior-recorded statements, while others were declared hostile or disappeared altogether.

Second, Carrubba and Gabel's 'conditional effectiveness'[59] hypothesis argues that states are likely to comply with international court judgments, if a preponderance of third party briefs are filed recommending judgment compliance, rather than defection. In the Kenya cases, the state itself was not a party to the proceedings. Nonetheless, it lobbied numerous third party states to file 'interested party' briefs.[60] It even instigated a mass withdrawal resolution by the AU. That show of third party solidarity for the Kenyan defendants suggested that a significant number of states favoured Kenya's non-compliance with the ICC's orders. Consequently, the ICC's decision

55 Carrubba & Gabel (n 16) 31-32.
56 Carrubba & Gabel (n 16) 125.
57 Muriithi (n 1).
58 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-1 (accessed 9 November 2023) (*Ruto*).
59 Carrubba & Gabel (n 16) 47, 156.
60 *The Prosecutor v Uhuru Muigai Kenyatta*, Request for leave to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/09-02/11, 29 April 2015, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04206.PDF (accessed 28 October 2024) (*Kenyatta*).

discontinuing the *Ruto and Sang* case may be seen as having been effectively conditioned by these political protests. On its part, Kenya continued to formally advance legal claims asserting compliance with its Rome Statute obligations. For example, it insisted that the OTP's demands for certain information in Kenyatta's case[61] were vague and, therefore, amounted to outsourcing its investigative functions.[62] Nonetheless, the Kenyatta Trial Chamber referred Kenya's alleged non-compliance to the ASP at its November 2017 General Meeting.

Carrubba and Gabel distinguish *direct* from *indirect* judgment-compliance factors. *Direct* influence flows from a ruling by an international court that is automatically binding and therefore obeyed by domestic courts.[63] Constitutionally, '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya'.[64] This is monism, under which the legal relationship between national law and international law, each is part of a unified system that binds both the state and the individual.[65] However, in practice such *direct* influence does not happen. Rather, Kenya's International Crimes Act[66] specifies intricate modalities that operationalise international criminal law domestically, evincing dualism, two separate legal systems, one binding on the individual, the other binding the state.[67] For instance, in 2011 the High Court injuncted key police and administrative witnesses from recording statements about post-election violence. The state did not appeal.[68] Conversely, during the later stages of the Kenya cases, the High Court permitted the extradition of journalist Walter Barasa for trial on charges of obstructing international justice.[69] Moreover, the Court of Appeal affirmed that extradition order.[70] Nonetheless, a delay in state cooperation enabled the 'coalition of the accused' to ascend to state power from where coercive political influence by strategic constituencies polluted the juridical atmosphere.

61 *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, https://www.icc-cpi.int/kenya/kenyatta (accessed 9 November 2023).
62 Kenyans for Peace with Truth and Justice & Africa Centre for Open Governance *All bark no bite? State cooperation and the International Criminal Court* (2014).
63 Carrubba & Gabel (n 16) 10.
64 Art 2(6) Constitution of Kenya (2010).
65 WR Slomanson *Fundamental perspectives on international law* (2000) 611.
66 Act 16 of 2008.
67 Slomanson (n 65) 609.
68 O Mathenge 'Kenya: ICC will not get police statements' *The Star* 12 June 2013, https://allafrica.com/stories/201306131023.html (accessed 28 October 2024).
69 *The Prosecutor v Walter Osapiri Barasa* ICC-01/09-01/13-1-Red2, 26 September 2013, https://www.icc-cpi.int/court-record/icc-01/09-01/13-1-red2 (accessed 7 November 2023).
70 S Muhindi 'Journalist Barasa loses ICC extradition appeal' *The Star* 29 August 2019, https://www.the-star.co.ke/news/2019-08-29-journalist-barasa-loses-icc-extradition-appeal/ (accessed 6 November 2023).

An international prosecutor's decision to prosecute, derived from a state being either unwilling or unable to genuinely investigate or prosecute, has been interpreted as being subject to domestic relinquishment. This was held when the Kenyan High Court rejected the ICC's extradition warrants seeking to prosecute persons for alleged interference with the administration of international justice. In 2017 the High Court prohibited the Internal Security Minister and the Director of Public Prosecutions from facilitating extradition of two Kenyan lawyers, Paul Gicheru and Phillip Bett, to face offences alleging interfering with the administration of international justice. The indictments consisted of corruptly influencing witnesses regarding cases from the situation in Kenya.[71] Applying article 17 of the Rome Statute, the High Court faulted the ICC Pre-Trial Chamber for usurping Kenya's primary jurisdiction to try alleged violators of international criminal law. Judge Kimaru (as he then was) ruled that prior to obtaining *ex parte* warrants, the ICC Prosecutor ought to have consulted Kenyan authorities regarding the purported unwillingness or inability to prosecute. ICC Chief Prosecutor Fatou Bensouda did not do so. Hence, the High Court concluded that the Pre-Trial Chamber was wrong to speculate that 'national prosecution is unlikely in the present case'. Consequently, the ICC's issuance of arrest warrants against Gicheru and Bett violated the suspects' fair hearing rights and was prohibited as being unconstitutional. In the context of rising sovereignty, such complementarity jurisprudence protects against abuse of process by international institutions. Nonetheless, deference to the international criminal justice system prompted one of the fugitives to subsequently seek to clear his name.

In 2020 Gicheru surrendered to the ICC, and in 2021, in *Prosecutor v Paul Gicheru*,[72] he was granted interim release to Kenya on bail conditions imposed by the Trial Chamber.[73] Remarkably, he was a Kenyan citizen, a country that lobbied for withdrawal from the ICC in events leading up to the Malabo Protocol. Eventually, his witness-tampering case closed after the Chamber had heard eight prosecution witnesses. However, no verdict was rendered. Upon receiving respective closing submissions, but without any evidence from the defence, judgment day was awaited. However, in October 2022 the ICC terminated proceedings against Gicheru following his sudden demise.[74] Bett remains at large.

71 *Republic (through Cabinet Secretary, Ministry of Interior and Coordination of National Government) v Paul Gicheru & Another* [2017] eKLR.
72 *Gicheru* case (Icc-cpi.int, 2021), https://www.icc-cpi.int/kenya/gicheru (accessed 3 October 2024).
73 As above.
74 'ICC terminates proceedings against Paul Gicheru' 14 October 2022, https://www.icc-cpi.int/news/icc-terminates-proceedings-against-paul-gicheru

Meanwhile, in August 2022, Ruto won the presidency. Unsurprisingly, in 2023, the ICC closed its investigations into the situation in Kenya. Carrubba and Gabel note that diffuse or *indirect* influence may emanate from domestic public support for the ICC decisions or processes, irrespective of whether the public agrees with a specific decision.[75] This is because the domestic public, particularly civil society, is capable of understanding that their duly-elected government may pursue certain agendas that are contrary to the public interest. More intriguingly, it is even possible for domestic publics to disagree with a specific ICC decision, while nonetheless insisting that the executive should comply with it for the greater good of political society.

## 5 Determining the ICC's effectiveness in the *Al-Bashir* case

### 5.1 The politics of non-cooperation

This article's major proposition is that the ICC's effectiveness is influenced by global political dynamics that change state behaviour. The claim is that although the OTP accused Kenya of *indirect* interference in the *Ruto and Sang* case, which was discontinued in 2016, and, furthermore, notwithstanding Kenya's alleged non-cooperation in the *Kenyatta* case as decided by the Kenyatta Trial Chamber in September 2016, nonetheless, from Carrubba and Gabel's rational theory of assessing performance, the ASP may have been justified in evaluating the OTP's performance as being less than satisfactory, since its retributive mandate was frustrated and, hence, the ICC, was ineffective. The minor proposition is that states with stronger national sovereignty concerns, as the Kenya cases showed, are more likely to be instrumentalist and non-cooperative with the ICC. It is concluded that the decision about whether to find that Kenya was in breach of its Rome Statute cooperation obligations with the ICC depends on perspectives of third parties to the case. These include the domestic stakeholders, namely, not only the executive, but also the judiciary, opposition as well as civil society or the victims, and external stakeholders, the state parties to the Rome Statute, and even international criminal law scholars (including those who filed *amicus* briefs). Because state non-cooperation negatively affects the ICC's ability to investigate and effectively prosecute international crimes, therefore comparing critical perspectives of

(accessed 28 October 2024).
75 Carrubba & Gabel (n 16) 214-215.

diverse stakeholders, in particular situation countries, may facilitate a more refined assessment of the ICC's performance in the *Al-Bashir* arrest warrant case and also provide valuable lessons for the *Putin* and others arrest warrant case.

### 5.2 *Al-Bashir* case

Senior officials and heads of state are most likely to be the masterminds or beneficiaries of international crimes.[76] However, states may shield powerful officials from prosecution for crimes of which they are suspected. A good example is Sudan's former President Omar Al-Bashir, who was indicted by the ICC for numerous atrocity crimes he allegedly committed as President. In 2009 and 2010, ICC arrest warrants were issued against Al-Bashir for five counts of crimes against humanity, comprising murder, extermination, forcible transfer, torture and rape, as well as two counts of war crimes, inlcuding, intentionally directing attacks against a civilian population, among many other crimes. Similar charges are preferred in the case of *Prosecutor v Omar Hassan Ahmad Al-Bashir*.[77] Following the arrest warrants, the ICC has been attempting to obtain Al-Bashir's extradition for several years. Whenever he would visit a country, the ICC would call on such a host to prosecute or extradite him.

Eventually in 2019, he was ousted by a *coup d'état*. Sudan's non-assent to the Rome Statute proved insufficient to bar the ICC from having jurisdiction over Sudan's head of state.[78] In 2020 Sudan's ruling council agreed to cooperate by handing over ICC indictees.[79] Currently, the ICC is seeking his surrender so that he can be prosecuted for atrocity crimes.[80] Such commitment to cooperation indicates a wind of change in Africa, problematising the norm requirements under the Malabo Protocol. Suppose that the Malabo Protocol was active and its proposed court was operational? With its infamous immunity provision, if Al-Bashir was still in power, he would continue to be shielded, notwithstanding how much harm he may have committed. This is because, despite the UN Security Council's referral and his ouster from power, on Carrubba and Gabel's 'political

76 Lutz & Reiger (n 11).
77 *Al Bashir* case (Icc-cpi.int, 2021), https://www.icc-cpi.int/darfur/albashir/Pages/default.aspx (accessed 6 June 2024).
78 M al Attar 'Subverting Eurocentic epistemology: The value of nonsense when designing' in I Venzke & K Heller (eds) *Contingency in international law: On the possibility of different legal histories* (2021) 148.
79 'Sudan agrees to transfer "those indicted by the ICC" to The Hague' *France 24* 2021, https://www.france24.com/en/20200211-sudan-agrees-to-transfer-ex-president-bashir-to-icc-for-war-crimes (accessed 6 June 2024).
80 As above.

sensitivity' and 'conditional effectiveness' hypotheses, the Protocol's *indirect* political influence precludes his surrender from the continent to the Court. Indeed, both Kenya's and South Africa's judiciaries decried their respective executive's non-cooperation to execute the ICC arrest warrants.

### 5.3 Al-Bashir in Kenya

In 2010 Kenya was instructed to arrest Al-Bashir while he attended the 27 August Constitution's promulgation ceremony in Nairobi. It did not. In the case of *Kenya Section of the International Commission of Jurists v Attorney General & Another*,[81] Ombija J issued an arrest warrant against Al-Bashir and stated that '[i]t is common ground that Kenya is a state party to the Rome Statute. That state parties are under a duty to prosecute or extradite the perpetrators of international crimes to the ICC for prosecution.'[82] On appeal, in *Attorney General & 2 Others v Kenya Section of International Commission of Jurists*,[83] Musinga J, Ouko J (as he then was) and Murgor JJA explained that as 'a matter of general customary international law it is no longer in doubt that a Head of State will personally be liable if there is sufficient evidence that he authorised or perpetrated those internationally recognised serious crimes'. Therefore, the Court concluded:[84]

> [W]e have delineated the obligation of the Government of Kenya as regards the warrants issued by the ICC and suggested that, unless they are rescinded by the ICC, the warrants remain outstanding and can still be executed by Kenya. We have also declared that the Government's failure to effect the arrest of President Al Bashir breached relevant international instruments, our own Constitution and legislation. Those are important perspectives.

### 5.4 Al-Bashir in South Africa

South Africa is another country where the Court of Appeal and Supreme Court in 2016 stated that the South African government had breached its international obligation by failing to arrest Al-Bashir who was wanted by the ICC.[85] Yet, Akande insists that South Africa

81 *Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011] eKLR.
82 As above.
83 *Attorney General & 2 Others v Kenya Section of International Commission of Jurists* [2018] eKLR.
84 As above.
85 D Akande 'The Bashir case: Has the South African Supreme Court abolished immunity for all heads of states'? Ejiltalk.org (2021), https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/ (accessed 10 June 2024).

would act in breach of international law if it were to allow arrest (other than in cases where it was fulfilling an ICC cooperation request) and prosecution of heads of state. This is because only where there is no dedicated treaty governing the exercise of jurisdiction is it governed by 'an opinion of law or necessity'[86] under customary international law. For Akande, this shows that these countries' domestic courts uphold the principle that heads of state should be accountable for atrocity crimes, notwithstanding being in office. South Africa signed the Rome Statute in 1998 and adopted an Implementation Act.[87] Notably, as in the Kenya incident, the South African executive also posed a non-cooperation challenge. Both executives were aiders and abettors of immunity. By failing to arrest Al-Bashir when he was at an AU meeting in Johannesburg in 2015, the domestic court held that South Africa violated its Rome Statute obligations.[88] The High Court rejected arguments that South Africa was, by a host agreement under section 5(3) of the Diplomatic Immunities Act 37 of 2001, expected under section 4(1) to grant immunities to AU Commission delegates.[89]

Considering article 87(7) of the ICC Statute, the ICC OTP conceded that customary international law does not exclude the immunity of heads of state from arrest and extradition. Nonetheless, articles 27(2) and 98(1) duties do not exempt state parties from cooperating and arresting him. However, in July 2017 the ICC judges declined to refer South Africa to the ASP or UN Security Council. This was because domestic courts had already censured the government for breaching its 2002 Implementation Act obligation in Al-Bashir's case. Thus, referring it to the mandate providers would likely have little effect.[90]

86 *Opinio juris sive necessitates*, https://en.wikipedia.org/wiki/Opinio_juris_sive_necessitatis (accessed 6 June 2024).
87 Act 27 of 2002.
88 W Nortje 'South Africa's refusal to arrest Omar Al-Bashir' *FICHL Policy Brief Series* 85 (2017) 1-4, https://www.toaep.org/pbs-pdf/85-nortje/ (accessed 28 October 2024).
89 N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations, and the visit by Sudan's President Omar Al Bashir' (2017) 26 *Washington International Law Journal* 563-564.
90 T Sterling 'ICC declines to refer S Africa to UN for not arresting Sudan's Bashir' *Reuters* 6 July 2017, https://www.reuters.com/article/warcrimes-sudan-safrica-idAFA5N1GS00P (accessed 6 June 2024).

# 6 Ghost of the Malabo Protocol: The Rome Statute in its application to the Russia-Ukraine war

## 6.1 Immunity or impunity?

Before the adoption of the Malabo Protocol, Africa was rebelling against the ICC, based on the notion that the ICC was biased against Africans. As explained above, at that time both Kenya's President and Deputy President, Kenyatta and Ruto, were facing ICC indictments.[91] Although they voluntarily participated in the Hague trials, besides contesting the legal charges in Court, they simultaneously pursued political strategies, among others, through which the Malabo Protocol was adopted by the AU in 2014. The Protocol establishes a regional criminal court to try international and transnational crimes. However, this multilateral instrument that came as a saviour for persecuted African leaders, has some provisions that – from a sceptical viewpoint, may be construed as promoting African tyranny, typical of traditional chiefdoms or perhaps colonial command governance systems – are being sneaked in through the back door.

One such highly criticised provision is article 46A*bis* of the Protocol, which provides as follows: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'[92] This controversial provision seeks to shield heads of state or senior officials from being charged for atrocity offences while in office. Conversely, article 143(4) of the Kenyan Constitution provides that '[t]he immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.[93] Clearly, the Constitution's drafters intended to confer no domestic immunity for Rome Statute crimes. Therefore, if the Malabo Protocol actually enters into force, then it is bound to conflict with the spirit and letter of municipal laws. If the domestic courts find that indeed a head of state can be liable for international crimes, yet the Malabo Protocol contemplates shielding the same

91 CA Khamala *Crimes against humanity in Kenya's post-2007 conflicts: A jurisprudential approach* (2018).

92 Art 46A *bis* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed 6 June 2024).

93 Art 143(4) Constitution (n 66).

leaders, will this not instigate normative conflict? Such concern has been expressed in that 'the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa'.[94] The motive behind the article 46A*bis* provision conferring immunity on AU heads of state and senior government officials attracts criticism from international criminal law scholars for promoting, instead of fighting, impunity.[95]

The international criminal justice environment has vastly transformed since the Protocol was drafted. Atrocity crimes are no longer the preserve of Africa as was the case in 2014, when the Malabo Protocol was adopted. Moreover, nowadays many African countries are cooperating with, rather than rebelling against, the ICC. Therefore, Jalloh criticises the tendency of Europe to issue arrest warrants against African leaders in the name of universal jurisdiction.[96] For example, in the *Arrest Warrant* case,[97] when Belgium issued an arrest warrant against the Democratic Republic of the Congo (DRC) foreign minister for crimes against humanity and war crimes, the International Court of Justice agreed that Belgium misused the universal jurisdiction principle.[98] Issuing warrants did not remove immunity from arrest that foreign ministers possess. Rather, under customary international law, serving and former ministers have immunity from criminal prosecution in respect of all official acts (*ratione materiae*) committed while in office. Undeterred, in June 2022, a Belgian court ordered the arrest of five former high-level Guatemalan government officials for the disappearance and murder of three Belgian missionaries in Guatemala in the 1980s.[99] Hence, Mutua, in trying to define the tenets of Third World Approaches to International Law (TWAIL) theory, asserts:[100]

94 JN Kariri 'Can the new African Court truly deliver justice for serious crimes'? *ISS Today* 8 July 2014, www.issafrica.org (accessed 6 June 2024).

95 International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights Statute' 2014, www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-inamendment-to-African-court-of-justice-and-human-rights-statute/ (accessed 6 June 2024); see also D Tladi 'Article 46A *bis* beyond the rhetoric' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 850-865.

96 CC Jalloh *The place of the African Court of Justice and Human and Peoples' Rights in the prosecution of serious crimes in Africa* (2019).

97 As above.

98 *Democratic Republic of Congo v Belgium* (14 February 2002) Judgment *ICJ Rep* 2002.

99 S Weber 'Universal jurisdiction: What can Belgian justice bring for Guatemalan victims'? justiceinfo.net 8 July 2022, https://www.justiceinfo.net/en/103279-universal-jurisdiction-belgian-justice-guatemalan-victims.html#:~:text=In%20the%20early%201980s%2C%20three,government%20officials%20for%20these%20crimes (accessed 6 June 2024).

100 MW Mutua 'What is TWAIL'? (2000) 94 Proceedings of the ASIL Annual Meeting 31, https://digitalcommons.law.buffalo.edu/articles/560 (accessed 11 June

> The regime of international law is illegitimate. It is a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalisation of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination … The broad dialectic of opposition to international law is defined and referred to here as … TWAIL.

Departing from the Court's trend of perceived partiality, in May 2024, ICC arrest warrants were issued not only for Hamas military commander Mohammed Deif, but also Israeli Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant, for war crimes and crimes against humanity amid the Gaza Strip war.[101] Presumably, similar questions regarding the likelihood of enforcement of extradition of such fugitives through invoking cooperation obligations incumbent on ICC member states parties may be posed were they to visit member countries.

### 6.2 To provide a safe haven for or to extradite Russian fugitives?

If Russia is victorious in its war against Ukraine, the Malabo Protocol as a product of a rebellion might once again fit the emerging authoritarian global times. This shows that when it comes to a majority of international crimes in Russia, some leaders and senior officials are indicted as masterminds. As shown above, the Malabo Protocol expressly seeks to provide immunity from prosecution to AU leaders and senior government officials for atrocity crimes while they hold office. Indeed, some scholars have even suggested that immunity serves to reduce escalating conflicts by inducing incumbents to relinquish power or relent from conflicts without fearing reprisals or repercussions. This article highlights some of the issues that the Malabo Protocol debate implies and its spirit, thus, may be persuasive regarding the issue of immunity of indicted Russian leaders in the post-Russo-Ukraine war scenario.

---

2024).

101 'Situation in the state of Palestine: ICC Pre-Trial Chamber I rejects the state of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges (accessed 23 December 2024).

Although numerous world leaders and international organisations were outraged at Russian forces illegally seizing Crimea in 2014, neither Putin nor any senior Russian officials were indicted by the ICC for the crime of aggression. Emboldened by the international community's inaction, on 24 February 2022 Putin invaded Ukraine. In October 2022 Russia annexed four regions over which Putin's military seized control. Yet, the purposes of the UN are '[t]o maintain international peace and security'.[102] Thus, these illegal actions not only threaten Ukraine, but also the UN principles of sovereignty and territorial integrity on which peaceful coexistence of nations is based.[103]

Russia is not a member of the Rome Statute. Nonetheless, since criminal trials cannot take place in Ukraine for legal reasons, the ICC in March 2024 indicted Russian Generals Sergei Kobylash and Viktor Sokolov to answer for systematic damage to Ukraine's power generation and transmission facilities.[104] By mid-2023, Kyiv had already convicted 10 people over crimes committed during Russia's invasion. Furthermore, Ukraine had already indicted 186 people, mostly *in absentia*, and filed court papers for another 45. The Ukrainian prosecutor insists that '[a]ll of the hits of every missile, every drone, every damage of civil infrastructure, every Ukrainian who was killed or wounded by these missile attacks, all of them are documented and criminal proceedings were opened'.[105] Subsequently, Karim Khan, the ICC Chief Prosecutor, opened investigations into the situation in Ukraine. Besides Russian air strikes, described by Western leaders as war crimes, the UN Independent International Commission of Inquiry on Ukraine has further detected torture, rape and the deportation of Ukrainian children.[106]

102 Art 1 Charter of the United Nations, 26 June 1945, 59 Statute 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945, http://hrlibrary.umn.edu/peace/docs/aunchart.htm (accessed 28 October 2024).

103 A Speri 'The mother crime: Will Putin face prosecution for the crime of aggression in Ukraine'? *The Intercept* October 2022, https://theintercept.com/2022/10/08/russia-putin-ukraine-war-crimes-accountability/ (accessed 10 June 2024).

104 AFP 'Ukraine could extradite Russians to ICC: Prosecutor' *France 24* 13 October 2022, https://www.france24.com/en/live-news/20221013-ukraine-could-extradite-russians-to-icc-prosecutor (accessed 10 June 2024); see also 'Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov', https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and (accessed 23 December 2024).

105 AFP (n 104).

106 'Commission of inquiry finds further evidence of war crimes in Ukraine' *UN News* 20 October 2023, https://news.un.org/en/story/2023/10/1142617 (accessed 8 November 2023).

Will Russia once again escape accountability for the war crimes it has committed in the Ukraine war?[107] Arrest warrants have been issued for Putin's perpetration of two war crimes of unlawful deportation of population, and of children and of their transfer.[108] Consequently, in May 2023 the South African opposition party Democratic Alliance sued its government to arrest Putin if he were to attend a planned BRICS Summit in the country in August 2023.[109] In July 2023, in compliance with the ICC's directive, the High Court ordered the government to arrest Putin, if he ever sets foot in the country.[110] He skipped the event 'by mutual agreement'.[111] Nonetheless, as argued in the next sub-part, the entire international security architecture will bear contrary consequences upon a Russian victory. For if Russia prevails, it is unlikely that extraditing Russians suspected of atrocity crimes will be in the interests of Third World countries who would prefer not only to steer clear of the burden of war crimes prosecutions in their own criminal justice systems, but also to avoid antagonising a superpower, the burden on Ukraine's national judicial system, or ICC's cooperation requirements notwithstanding. If annexed, Ukrainian territory shall form part of Russia, as does Crimea. Thus, on Carrubba and Gabel's 'political sensitivity' and 'conditional effectiveness' hypotheses, the Malabo Protocol's immunity provision – expressed under Van den Wyngaert's rationales underpinning the political offence exception – are worth extrapolating to interstate conflicts. Her three arguments against extradition are[112] (i) the *political argument* that states should remain neutral in relation to political conflicts in other states and that, therefore, extradition on political opponents is to be *a priori* refused; (ii) the *moral argument*, based on the premise that resistance to oppression is legitimate and that political crimes can therefore be justified; and (iii) the *humanitarian*

107 M Venneri 'War crimes in Ukraine: Failure to prosecute Russia will damage international security for years to come' *Mei@75* 22 November 2022, https://www.mei.edu/publications/war-crimes-ukraine-failure-prosecute-russia-will-damage-international-security-years (accessed 10 June 2024).

108 'Situation in Ukraine' (n 14).

109 'South Africa says Putin will come for BRICS Summit, despite ICC arrest warrant' *Aljazeera* 30 May 2023, https://www.aljazeera.com/news/2023/5/30/opposition-sues-south-africa-government-to-force-putin-arrest (accessed 14 February 2024).

110 C Krishnasai 'South African High Court orders government to arrest Vladimir Putin on arrival for war crimes' *WION* 21 July 2023, https://www.wionews.com/world/south-african-government-ordered-to-arrest-vladimir-putin-618206 (accessed 22 February 2024).

111 AFP 'Putin to skip Brics Summit in South Africa amid ICC arrest warrant' *The East African* 19 July 2023, https://www.theeastafrican.co.ke/tea/news/rest-of-africa/putin-to-skip-brics-summit-in-s-africa-under-arrest-threat-4308740 (accessed 22 February 2024).

112 CV den Wyngaert 'The political offence exception to extradition: How to plug the "terrorists' loophole" without departing from fundamental human rights' (1989) 19 *Israel Yearbook on Human Rights* 298.

*argument*, whereby a political offender should not be extradited to a state in which he risks an unfair trial.

Putin justifies attacking Ukraine as an act of self-defence against 'Ukrainian neo-Nazis'.[113] Invoking the maxim that today's terrorist is often tomorrow's leader, thus, political offence exceptions have been exploited by those seeking political asylum. This is because democrats in liberal countries are much more sensitive to war outcomes than autocrats.[114] Yet, the big problem with democratising overseas continues to lie with 'we the people'. In most cases, 'we seem to prefer that foreign nations do what *we want*, not what *they* want'.[115] Thus, to Krevor, 'if we wish to have a transformative effect on (asymmetrical) power relations' that are constituted and reproduced and through legalistic procedures then we should 'focus attention on the ideological role of international criminal trials and not retreat into the comfortable but ultimately obfuscatory terrain of a narrowly conceived (liberal) politics'.[116]

### 6.3 No consensus about political offences

There arguably is a well-established correlation between democracy and the rule of law, on the one hand, and the state's willingness to prosecute delinquent leaders for mass atrocity crimes, on the other. According to Lutz and Reiger, these two variables are directly proportional, so that the more consolidated democratic norms are, so also the more consolidated the justice norm is likely to be.[117] Fukuyama is of the view that 'two very different futures present themselves. If Putin is successful in undermining Ukrainian independence and democracy, the world will return to an era of aggressive and intolerant nationalism reminiscent of the early twentieth century.' This is because other democracies will not be immune to this trend as populists aspire to replicate Putin's authoritarian ways. 'On the other hand, if Putin leads Russia into a debacle of military and economic failure, the chance remains to relearn the liberal lesson that power unconstrained by law leads to national disaster and to revive the ideals of a free and democratic world.'[118]

113 'Putin justifies Ukraine invasion as a "special military operation"' *npr* 24 February 2022, https://www.npr.org/2022/02/24/1082736110/putin-justifies-ukraine-invasion-as-a-special-military-operation (accessed 23 December 2024).
114 BB de Mesquita & A Smith *The dictator's handbook: Why bad behaviour is almost always good politics* (2011) 288.
115 De Mesquita & Smith (n 114) 296 (emphasis in original).
116 Krevor (n 25) 131.
117 Lutz & Reiger (n 12) 289.
118 F Fukuyama 'A country of their own: Liberalism needs a nation' (2022) 101 *Foreign Affairs* 91.

De Mesquita and Smith contend that in democracies, leaders who fail to deliver policies their constituents want are deposed.[119] Democrats might say that they care about the rights of people overseas to determine their own future, and they might actually care too. However, if they want to keep their jobs, they will deliver the policies that their people want. Nonetheless, autocrats are less likely to engage in actions that promote the international community's interests and ideals such as promoting the production of public peace through international criminal law.[120] It follows that in the post-Ukraine-Russia war period, if Ukraine wins, liberal democratic values are likely to flourish. That would include extraditing war criminals to face trial at The Hague. Conversely, if Russia annexes Ukrainian territory, then autocratic values shall predominate. In the latter situation, perpetrators of atrocity crimes during that war will be less likely to be extradited to face international criminal justice. As a 'politically sensitive' *clearing-house* weighing the preponderance of information supporting prosecution or defence in *amicus* briefs, the ICC's effectiveness in attaining victim justice is thus conditioned by geopolitical hegemonic influences.

State parties to the Rome Statute are more likely to prosecute leaders for human rights abuses in their domestic courts or extradite them to The Hague. This inference follows not merely from the positive legal obligation incumbent on them upon ratification, but also from their broader commitment to accountability. Generally, a myriad of reasons for trying senior officials seem to be operating simultaneously among different governmental actors, whether the executive, legislature or judiciary. Moreover, numerous motivations exist for changing perspectives over time.[121] Predicting whether African countries are likely to extradite or not to extradite is not entirely principled, but may be a pragmatic decision, depending on the concerned stakeholder. For example, 'whereas the basis of Chile's interest in prosecuting Pinochet probably shifted from instrumental to normative, the rationale for trying Hussein in Iraq probably began as normative and shifted to a mix of less wholesome reasons'.[122] Yet, the liberal perspective insists that 'charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state', for torture and hostage taking 'are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does

119 De Mesquita & Smith (n 114) 296.
120 'South Africa says Putin will come for BRICS Summit, despite ICC arrest warrant' *Kyiv Post* 15 July 2023, https://www.kyivpost.com/post/19475 (accessed 15 February 2024).
121 Lutz & Reiger (n 12) 289.
122 Lutz & Reiger (n 12) 290.

to everyone else; the contrary conclusion would make a mockery of international law.'[123] Such compelling laws comprise peremptory norms of general international law or *jus cogens*. These *erga omnes* obligations cannot be set aside by any treaty.[124]

## 6.4 Regional and international instruments on mutual legal assistance

In 2006 former Liberian President Charles Taylor, wanted for war crimes by the Special Court for Sierra Leone, was arrested in Northern Nigeria on the Cameroonian border. He was deported to Monrovia and transferred to UN custody in Sierra Leone. The day before his arrest, on learning that Nigerian President Olusegun Obasanjo was ready to hand him over to the new Liberian authorities,[125] he disappeared from South-Eastern Nigeria, where he hid in exile since 2003, as part of an arrangement brokered by the AU, the Economic Community of West African States (ECOWAS) and other key international actors including the US, to end Liberia's 14-year civil war.[126] In 2012 Taylor became the first former head of state since Nuremberg to be convicted for war crimes and crimes against humanity by an international or hybrid tribunal. His offences comprised providing arms, financial and moral support to the Sierra Leonean Revolutionary United Front and the Armed Forces Revolutionary Council rebel forces. He did so with the motive of destabilising the country and gaining access to Sierra Leonean natural resources. During the military actions, civilians were killed, beaten, terrorised, raped and abducted. Children were also abducted and involved in the military actions. He was sentenced to 50 years' imprisonment.[127]

Horizontal agreements may mitigate imperialistic tendencies of a vertical international criminal justice system. Most countries tend to provide a legal framework for international cooperation by way of mutual legal assistance. These frameworks provide for effective international and transnational criminal justice, balanced with

123 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

124 https://www.merriam-webster.com/legal/jus%20cogens (accessed 24 December 2024).

125 C Boisbouvier 'Liberia: 15 years later, we remember the long hunt for Charles Taylor' *The Africa Report* 29 March 2021, https://www.theafricareport.com/73802/liberia-15-years-later-we-remember-the-long-hunt-for-charles-taylor/ (accessed 12 October 2024).

126 N Ray 'Charles Taylor's arrest: A message to the continent' *IDSA Comment* 4 April 2006, https://idsa.in/idsastrategiccomments/CharlesTaylorsArrest_NRay_040406 (accessed 12 October 2024).

127 'ICD-Taylor-Asser Institute' (Internationalcrimesdatabase.org, 2021), http://www.internationalcrimesdatabase.org/Case/1107 (accessed 12 October 2024).

respect to state sovereignty and territorial integrity. Every sovereign state has control over its own territories. Within a state, no other state can exercise governmental powers and functions.[128] Therefore, no state should interfere with another's domestic affairs, lest an internationally wrongful act be attributable to it for violating the sovereign equality principle.[129] Intervention in the internal affairs of a sovereign state violates not only the UN Charter, but also customary international law norms.

In 2023 the East African region recorded the highest levels of organised criminality in Africa, trailed by West and Central Africa, respectively.[130] This trend of terrorism and transnational organised crimes plaguing the Horn and Nile Valley regions has persisted since 2019.[131] Yet, so far only Djibouti and Ethiopia have ratified the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters. It is unclear why other Horn of Africa states, Eritrea, Kenya, Somalia, South Sudan, Sudan and Uganda, have not.[132] One reason for IGAD's poor track record in securing support for mutual legal assistance is that the extradition instrument is not focused on priority threats common to all member states. Instead, bilateral extradition or mutual legal assistance instruments exist between neighbouring countries, such as Kenya and Uganda (1967), Ethiopia and Sudan (2014), Uganda and South Sudan (2016), and Ethiopia and Djibouti (2020). Neither the Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters (2002), nor the ECOWAS Conventions on Extradition (1994) or Mutual Legal Assistance (1992) has entered into force.[133]

The question arises as to whether African countries prefer to support the May 2023 UN Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes. Mirroring the Rome Statute, it addresses the 'most serious

128 H Strydom & L Juma 'The fundamental principles of the international legal order' in H Strydom and others (eds) *International law* (2016) 108.
129 Art 2(1) UN Charter (n 104).
130 S Galal 'Organised crime index in Africa 2023, by region 26 March 2024', https://www.statista.com/statistics/1223862/criminality-according-to-the-organized-crime-index-in-africa-by-region/#:~:text=In%202023%2C%20East%20Africa%20had,West%20and%20Central%20Africa%2C%20respectively (accessed 14 August 2024).
131 TS Metekia 'East Africa could achieve better cooperation on criminal matters' *ISS Today* 31 August 2022, https://issafrica.org/iss-today/east-africa-could-achieve-better-cooperation-on-criminal-matters (accessed 14 August 2024).
132 As above.
133 As above.

crimes of concern to the international community as a whole'.[134] It thus purposes to help deliver justice to victims of genocide, crimes against humanity, war crimes and other international crimes.[135] Reflecting the Rome Statute complementarity principle, under the MLA Convention, states have the primary responsibility to investigate international crimes. It requires states to designate central authorities responsible for communicating in writing with other states. The 2023 MLA Convention provides rules about deposing witnesses, conducting hearings by video conference, transferring detained individuals, and establishing joint investigation teams.[136] The MLA Treaty requires ratifying states to do three things:[137] (i) criminalise war crimes, crimes against humanity, and genocide (as defined in the ICC Statute and reproduced in article 5 of the MLAT); (ii) exercise jurisdiction over offenders accused of such crimes (article 8 of the MLAT); and (iii) provide mutual legal assistance regarding the extradition, judicial proceedings, and enforcement of penal sanctions with respect to offenders.

### 6.5 Politicisation of extradition for international crimes

In principle, 'it can no longer be doubted that as a matter of customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated'[138] international criminal conduct. Yet, given the African continent's backlash against the ICC upon establishing the Malabo Protocol a decade ago, the question of whether governmental absorption of a cascading justice norm is motivating the conduct of African governments is unclear. Earlier episodes of international political pressure, involving the atrocity crimes and

134 The Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes adopted at the MLA Diplomatic Conference Ljubljana, Slovenia, 15-26 May 2023, 26 May 2023, https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf (accessed 13 August 2024).

135 BO Biazatti & E Amani 'The Ljubljana – The Hague Convention on Mutual Legal Assistance: Was the gap closed?' *Ejiltalk* 12 June 2023, https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/ (accessed 14 August 2024).

136 AJ Shanes, H Sweeney & OB Hoff 'An assessment of the Ljubljana – The Hague Convention on Mutual Legal Assistance' *Lawfare* 1 September 2023, https://www.lawfaremedia.org/article/an-assessment-of-the-ljubljana-the-hague-convention-on-mutual-legal-assistance (accessed 13 August 2024).

137 LN Sadat 'Understanding the New Convention on Mutual Legal Assistance for International Atrocity Crimes' (2023) 12 *American Society of International Law* 27, https://www.asil.org/insights/volume/27/issue/12 (accessed 13 August 2024).

138 A Jones & A Doobay *On extradition and mutual assistance* (2004) 114.

grand corruption trials of Taylor[139] and Chiluba,[140] were blatant. In others, the rationale informing decisions to prosecute leaders seems to be partially instrumental. In post-conflict contexts, reformists may prosecute purely to placate their populace by being seen as making a 'fresh start'. Lackeys may prefer to 'lock in' international justice as a strategy for attracting financial assistance from Western donors.[141] For example, before a brokered peace-for-justice swap between the UK, the US, the AU, Liberia and Nigeria, Taylor enjoyed Nigeria's protection for nearly 1 000 days. Then, external coercive pressure compelled his host to eject him to Liberia for onward prosecution in Sierra Leone.[142] Although Kenya and South Africa are Rome Statute signatories, it seemed as if their governments' initial resentment and rebellion against the ICC had dwindled. This was buttressed by their courts ordering cooperation with the ICC by directing Al-Bashir's arrest. Crawford would contend that the executives' refusals to arrest Al-Bashir need not have been rationalised by customary international law. Rather, they may be justified by 'empiricism and adherence to national policies'.[143] Moreover, multiple national and international principles intervene in practice. Hence, states' refusals to extradite may not rely exclusively on a single jurisdictional principle.[144] Specifically, South African courts directed not only Al-Bashir's, but even President Putin's arrest. This trend follows in the activist trail blazed by Belgian courts that continue exercising universal jurisdiction, despite the ICJ's decision in the *Arrest Warrant* case finding that the mere issuance of an arrest warrant would be a breach of international law. The key question is whether Africa should strive to fight impunity on the continent while simultaneously striving to have a regional capacity to handle international and transnational crimes.[145]

Ostensibly, the Rome Statute and Malabo Protocol provide conflicting obligations. Although Benyera insists that African countries possess universal jurisdiction to prosecute perpetrators of atrocity crimes, there are both instances of cooperation and non-cooperation with international prosecutions. As numerous judicial decisions regarding Al-Bashir confirmed, if requested to cooperate

139 A Tejan-Cole 'A big man in a small cell: Charles Taylor and the Special Court for Sierra Leone' in Lutz & Reiger (n 11) 205-232.
140 P Lewis 'Shifting legitimacy: The trials of Frederick Chiluba' in Lutz & Reiger (n 11) 130-150.
141 Lutz & Reiger (n 12) 289.
142 Lutz & Reiger (n 12) 291-292.
143 J Crawford *Brownlie's principles of international law* (2012) 457, cited in C Gevers & P Vrancken 'Jurisdiction of states' in Strydom and others (n 128) 238.
144 Crawford (n 143) 477.
145 E Benyera 'Is the International Criminal Court unfairly targeting Africa? Lessons for Latin America and the Caribbean states' (2018) *Unisa Press* 37, https://upjournals.co.za/index.php/Politeia (accessed 6 June 2024).

with the ICC, African countries are obligated under the Rome Statute to either extradite or prosecute. The former requirement entails surrendering ICC fugitives to The Hague to face international criminal prosecution.

Nonetheless, Carrubba and Gabel's *fire-alarm* metaphor not only explains realism undercurrents of the Malabo Protocol that influenced Kenya's domestic non-cooperation policies resulting in premature discontinuation of the *Kenyatta* and *Ruto* cases. Their *information clearinghouse* metaphor also identifies the determinative factor as being third party *amicus* briefs that influenced the orientation of ICC processes to terminate Ruto's case. Such intervening factors explain Kenya's and South African executives' non-cooperation with the ICC regarding Al-Bashir, despite judicial orders directing them to do so. Thus, according to Gevers and Vrancken, the unlawfulness of an act under international law hardly is the sole consideration by states in their choice to exercise or not to exercise jurisdiction. They may exercise self-restraint based on domestic requirements or policy concerns (comity considerations).[146] This is because international law merely *permits* every state to apply its jurisdiction against its own, or even foreign, citizens. Ultimately, concerns of a domestic or political nature obfuscate the distinction between – a state's refusal to extend its jurisdiction based on the belief that international law does not permit it – and its refusal to do so based on domestic law.[147] Non-cooperation thus is effected politically, with the executive's tacit acquiescence, *indirectly* circumventing the formal, judicial extradition mechanisms. A preponderance of 'politically sensitive' *amicus* briefs lodged before the UN and AU influences the ICC's 'conditional effectiveness'. Carrubba and Gabel's rational theory explains why a domestic brief to enforce Putin's detention and extradition to face prosecution for atrocity crimes in Ukraine at The Hague prompted 'mutual agreement' with the South African government, thus informally influencing him to skip the 2023 BRICS Summit to evade ICC arrest warrants. While the opposition Democratic Party prevailed domestically, Ukraine won the diplomatic battle internationally. Accordingly, only if Ukraine wins the war, and democracy prevails around the globe, including in Africa, shall 'justice cascade'.[148] The continent may then be less likely to provide a safe haven for war crimes fugitives from international criminal justice. Therefore, Sadat concludes that 'the MLA Treaty will undoubtedly prove useful to states wishing to deepen their cooperation with other states on core

146 Gevers & Vrancken (n 143) 238.
147 Gevers & Vrancken (n 143) 239.
148 K Sikkink *The justice cascade: How human rights prosecutions are changing world politics* (2011).

crimes, which do not yet have either MLA treaties or extradition agreements otherwise allowing them to do so'.[149] Nonetheless, '[d]espite these positive trends, politics can still trump legal process'.[150] The longstanding tradition that heads of state will find safe havens in exile remains prevalent. Indeed, in September, 2024, notwithstanding Mongolia's Rome Statute obligations, Putin toured there untouched. His defiant visit echoes 'the broader political factors often weighing against ICC mandates, highlighting the limits of the Court's enforcement regarding powerful state actors' reminiscent of Al-Bashir's escapades around Africa.[151]

On the one hand, former Philippine President Rodrigo Duterte is due to become Asia's first former head of state to be charged before the ICC. On 11 March 2025, Ferdinand 'Bongbong' Marcos Jr enforced an ICC arrest warrant alleging Duterte's crimes of murder as a crime against humanity.[152] On the other hand, given Rome's close ties to Tripoli as well as Italian energy interests in Libya, the ICC's 18 January 2025 arrest warrant for Ossama Al-Masri[153] created a dilemma. Initially, on 19 January 2025, Italian police arrested Al-Masri, also known as Anjiem, *en route* from Germany to watch a Turin football match. However, rather than Rome extraditing him to the ICC, they put him aboard an Italian military aircraft and deposited him in Libya, which is not a Rome Statute member. How did Italy officially explain to the ICC its freeing of a Libyan fugitive facing torture, murder and rape charges?[154]

Italian Interior Minister Piantedosi claimed that Al-Masri was expelled as a 'national security risk'.[155] However, Justice Minister Nordio submitted to Parliament that Al-Masri's detention warrant was plagued with 'inaccuracies, omissions, discrepancies and

149 Sadat (n 137).
150 Lutz & Reiger (n 12) 291.
151 J Joldoshev 'A critical examination of individual criminal responsibility and head-of-state immunity' *fedbarblog* 12 November 2024, https://www.fedbar.org/blog/breaking-legal-barriers-the-icc-arrest-warrant-for-vladimir-putin/ (accessed 23 December 2024).
152 R Picheta 'Former Philippine President Duterte in ICC custody over anti-drugs crackdown' *CNN* 12 March 2025, https://edition.cnn.com/2025/03/11/asia/rodrigo-duterte-philippine-arrest-icc-hague-plane-intl/index.html (accessed 13 March 2025).
153 'Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes', https://www.icc-cpi.int/news/situation-libya-icc-arrest-warrant-against-osama-elmasry-njeem-alleged-crimes-against-humanity (accessed 19 February 2025).
154 'ICC opens inquiry into Italy over release of Libyan warlord' *Associated Press* 10 February 2025, https://www.voanews.com/a/icc-opens-inquiry-into-italy-over-release-of-libyan-warlord/7969989.html (accessed 19 February 2025).
155 D Ghiglione 'Libyan war crimes suspect freed because of errors in warrant, Italy says' *BBC* 5 February 2025, https://www.bbc.com/news/articles/cx2p6d48ywjo (accessed 19 February 2025).

contradictory conclusions' precluding the Libyan from being jailed. Therefore, decrying the fact that Al-Masri's ICC warrant initially bypassed the justice ministry, the Italian Court of Appeals ordered his release. Besides severely harming Italy's reliability, non-compliance with its Rome Statute's article 89 cooperation obligations in the *Al-Masri* case, endorsed by the domestic judiciary, risks eroding the ICC's credibility.[156]

Hence, this article takes cognisance of political conditions influencing African countries' refusals to extradite ICC suspects. Consider the second Russia-Africa Summit at Saint Petersburg in 2023, renewing Moscow's effort to consolidate diplomatic relations with the continent. Notably, Africa, the UN's largest voting bloc's 54 nations appeared divided over the Russo-Ukraine war. Consequently, heads of state attendance declined from 43 who attended the first Summit in 2019[157] to only 17 in 2023, despite the latter's 'multipolar world' banner. Low turnout occurred because Westerners encouraged African leaders to boycott in protest of the Kremlin's invasion of Ukraine. Putin posed rhetorically: 'Why do you ask us to pause fire? We can't pause fire while we're being attacked.'[158] Strategically, he offered '"total support" for Africa, including in the struggle against terrorism and extremism'.[159]

## 7 Conclusion

The issue of head of state immunity, which is deemed impermissible for *jus cogens* norms, is increasingly being politicised. Divergence between state practice and *opinio juris* is problematic. In practice, when deciding whether to exercise prescriptive or criminal jurisdiction to prosecute a suspect, executives consider both domestic and international law. Customary international law prohibits interference in the domestic affairs of sovereign states. It is within a host state's discretion to refrain from prosecuting or extraditing a suspect to a requesting state. International law merely permits

156 'Comment on Italy's failure to execute ICC arrest warrant (the *Almasri* case)' (2025) *Italian Yearbook of Human Rights*, https://unipd-centrodirittiumani.it/en/news/comment-on-italys-failure-to-execute-icc-arrest-warrant-the-almasri-case (accessed 19 February 2025).

157 'Putin woos African leaders at a summit in Russia with promises of expanding trade and other ties' *AP* 29 July 2023, https://apnews.com/article/russia-africa-summit-putin-food-grain-00408e40403c3c30f89371a474bb4f9d (accessed 12 March 2025).

158 'African leaders leave Russia summit without grain deal or path to peace in Ukraine' *Associated Press* 29 July 2023, https://www.npr.org/2023/07/30/1190968770/african-leaders-leave-russia-summit-without-grain-deal-or-path-to-peace-in-ukrai (accessed 13 March 2025).

159 'Putin offers African countries Russia's "total support"' *BBC* 10 November 2024, https://www.bbc.com/news/articles/ce9grpyejg1o (accessed 14 March 2025).

extradition. However, cooperation is not mandatory. A requested state's considerations are not based purely on legal factors, such as sufficiency of evidence or even the violation of *jus cogens* or peremptory norms. Rather, policy and self-interest influence such decisions (*opinio necessitatis*). Historically, some states have not responded favourably to extradition requests, whether based on universal jurisdiction claims by other states or even arrest warrants issued by the ICC. Such exercise of extra-judicial choices may be construed as unlawful from the perspective of international criminal law scholars. However, the international system exhibits realism. The fact that countries have ratified the Rome Statute and MLA and, hence, domesticated their provisions as part of municipal law is hardly helpful. Rather, the Malabo Protocol shows, cooperation remains fettered by dualism. Thus, in the past, executives in countries such as Kenya and South Africa chose not to extradite Al-Bashir, despite being notified of his visits to their territories. Conversely, judiciaries interpreted their ratification obligations as imposing a duty to arrest. Such obligations would manifest a 'justice cascade', whereby the norm of holding leaders accountable for serious human rights violations is becoming increasingly pervasive. The article relies on Carrubba and Gabel's 'political sensitivity' hypothesis, expounded by *fire alarm* and *information clearinghouse* metaphors. According to the former, the ICC's arrest warrants serve as a *fire alarm*, pressurising states to prosecute or extradite. The latter describes third party *amicus* briefs. In the Kenya cases before the ICC, Kenya deployed a twin strategy of both challenging the admissibility of the cases as well as objecting to jurisdiction through political campaigns before the ASP, the AU and the UN. Although the *Kenyatta* and *Ruto* cases were admitted, external coercive political pressure resulted in their withdrawal and termination. The article's importance lies in facilitating predictions about whether African or indeed other countries are likely to extradite Russian President Putin and others pursuant to the ICC's arrest warrants of 2023 to 2024. Extradition is unlikely, if Russia defeats Ukraine and authoritarianism prevails. *Opinio juris*, expressed by international criminal law scholars, insists that international criminal trials are untarnished by vagaries of power relations and purified of politics. Instead, this article illustrates how political contingencies from the Malabo Protocol's ghost haunts the enforcement of ICC's arrest warrants, even in Africa. Politicisation seriously undermines the ASP's search for retributive justice regarding grave crimes and confounds the ICC's calls on all countries to join the fight against impunity. For this reason, it is opportune for the MLA Treaty to reinforce the Rome Statute's cooperation provisions.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: J Kilonzo 'Rights-based disarmament, demobilisation and reintegration as a measure to address security risks posed by vigilante groups in the Lake Chad Basin' (2025) 25 *African Human Rights Law Journal* 173-193
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a7

# Rights-based disarmament, demobilisation and reintegration as a measure to address security risks posed by vigilante groups in the Lake Chad Basin

*Josephat Kilonzo**
Lecturer, Strathmore University Law School, Nairobi, Kenya
https://orcid.org/0000-0002-3105-0284

**Summary:** *Since 2009, Boko Haram insurgency has become a serious challenge to security and safety in the Lake Chad Basin. Despite the robust military response against Boko Haram and its splinter factions by Nigeria, Cameroon, Niger and Chad, the group has remained resilient. It has continued to conduct attacks causing the deaths of thousands and displacement of millions of people. Due to the inadequacies of security responses by the four Lake Chad Basin states, vigilante groups have emerged to protect their communities through combating Boko Haram. While the vigilante groups have been celebrated for turning the tide against the insurgency, there have been concerns about the future of the vigilante groups. This is based on the fear that they may pose security risks to their communities in future if they turn to ordinary criminal activities or organised crime. This article explores the reliance on vigilante groups against Boko Haram in Cameroon, Chad, Nigeria and Niger. It also discusses the security concerns about the future of vigilante*

* LLB (Moi University) LLM LLD (Pretoria); Jkilonzo@strathmore.edu/Kilonzojoe@gmail.com. This article draws from my Doctor of Laws research at the Centre for Human Rights, University of Pretoria, which examined a rights-based approach to disarmament, demobilisation, and reintegration (DDR) in the context of countering violent extremism in Africa

*groups, and finally considers rights-based disarmament, demobilisation and reintegration of vigilante groups as a potentially valuable measure to address the security risks posed by the vigilantes to their communities.*

**Key words:** *vigilantes; screening; disarmament; demobilisation; reintegration*

## 1 Introduction

The Boko Haram insurgency comprises part of the most pressing and greatest security challenges facing states in the Lake Chad Basin. Since 2009 the group has caused the deaths of tens of thousands of civilians and the displacement of millions of people across the Lake Chad Basin which straddles Nigeria, Niger, Chad and Cameroon.[1] In response to Boko Haram activities, the governments of these four riparian states resorted mainly to a military and security approach.[2] Aside from nationally driven military efforts, in 2015 the four states, together with Benin, enhanced military cooperation under the auspices of the African Union (AU)-mandated Multinational Joint Task Force (MNJTF).[3]

Despite the strong military campaigns that resulted in degrading Boko Haram's territorial control, the group remained resilient and adaptable in its tactics.[4] With the continued resilience of Boko Haram, there was the development and employment of vigilante groups to shore up efforts to combat the group.[5] Vigilante groups essentially are 'either citizens who organise themselves into groups to take the law into their own hands in order to reprimand criminals or associations in which citizens have joined together for self-protection under conditions of disorder'.[6] The rise and popularity of vigilante groups against Boko Haram in the Lake Chad Basin is as a result of three gaps,[7] namely, (i) a security gap, where the state is unable to

1 See UNDP 'Understanding and managing vigilante groups in the Lake Chad Basin region: Background study in support of the Lake Chad Basin Regional Strategy for Stabilisation, Recovery and Resilience for Areas Affected by the Boko Haram Crisis' March 2023 5. See also S Brechenmacher 'Stabilising Northeast Nigeria after Boko Haram' (2019) *Carnegie Endowment for International Peace* 1.
2 AU Regional Strategy for the Stabilisation, Recovery and Resilience of the Boko Haram Affected Areas of the Lake Chad Basin Region 16.
3 International Crisis Group 'What role for the multinational joint task force in fighting Boko Haram?' (2020) Crisis Group Africa Report 291.
4 See Brechenmacher (n 1) 1.
5 UNDP (n 1).
6 MI Schuberth 'The challenge of community-based armed groups: Towards a conceptualisation of militias, gangs, and vigilantes (2015) 36 *Contemporary Security Policy* 7-8.
7 UNDP (n 1) 7.

offer security to its citizens; (ii) a capacity gap, when the state is not able to offer basic services to its citizens; and (iii) a legitimacy gap, when the state does not have legitimacy among its citizens and, hence, governs by oppression.

Notably, the use of vigilante groups in the Lake Chad Basin is not novel. Since the 1980s, the multi-faceted challenges in governance and decline in services among the states in Lake Chad have led to the emergence of vigilante groups.[8] Thus, with the security challenges presented by Boko Haram, it was not surprising for vigilante groups to emerge and become popular in the conflict. However, the emergence and use of vigilante groups has varied among the four Lake Chad Basin states. In 2013 vigilantes against Boko Haram first emerged in Maiduguri, the capital of Borno state and the epicentre of the conflict, following the double pressure of increasing Boko Haram violence and enhanced military force in response to the violence.[9] The vigilantes, which began operating under the name Civilian Joint Task Force (CJTF), complemented the efforts of the Joint Task Force (JTF), led by the Nigerian army because of their potential as a source of intelligence, local knowledge and manpower.[10] The use of vigilantes spread to Cameroon in 2014 and Chad in 2015, where they were known in French as *comités de vigilance* (vigilante committees).[11] Due to its past struggles with vigilantes, Niger remained cautious.[12]

While these self-defence groups have generally been seen and celebrated as instrumental in the fight against Boko Haram, communities have started to be concerned about the future of the groups.[13] There are concerns about the likelihood of security challenges associated with vigilante groups, especially with the chances of politicisation, a turn to organised crime and inter-vigilante rivalries.[14] The downside and security risks associated with 'vigilantism', such as resort to criminal activities and violence, are well-known in the Lake Chad Basin, across Africa and worldwide.[15] Therefore, there is a compelling need for and reason to address both short and long-term security risks that are likely to be posed by vigilantism in the Lake Chad Basin.

8 International Crisis Group 'Watchmen of Lake Chad: Vigilante groups fighting Boko Haram' (2017) Report 244 i.
9 As above.
10 As above.
11 As above.
12 As above.
13 Brechenmacher (n 1) 12.
14 As above.
15 See International Crisis Group (n 8) and Brechenmacher (n 1).

Considering the foregoing concerns, there have been calls for disarmament, demobilisation and reintegration (DDR) of the vigilantes.[16] DDR is one of the useful peace-building tools in conflict-affected communities because it ensures the collection and destruction of weapons, the demobilisation of former combatants, the reintegration of former combatants and the broad provision of security. DDR, therefore, is suggested as one of the ways in which to incorporate vigilantes into civilian life, thereby preventing the likelihood of vigilantes developing into a new security threat in the region.[17] While there have been calls for DDR of vigilante groups fighting against Boko Haram, there have not been studies exploring how the DDR programmes should be conceptualised or constructed, at least from a rights-based perspective. Therefore, this article focuses mainly on rights-based DDR for vigilante groups in Lake Chad Basin. The article is divided into the following five parts: part 1, introduction; part 2, brief overview of vigilante groups against Boko Haram in the four Lake Chad Basin states; part 3, security concerns about the future of vigilante groups; part 4, character of rights-based DDR for vigilantes in Lake Chad Basin; and part 5, concluding remarks.

## 2 Brief overview of vigilante groups against Boko Haram in the four Lake Chad Basin states

### 2.1 Civilian joint task force in Nigeria

Despite the military efforts by the Nigerian government against Boko Haram since 2009, the group continued to unrelentingly attack civilians in North-Eastern Nigeria.[18] This led to the emergence of local vigilante group Yan Gora in 2013, and was nicknamed CJTF.[19] Because the group did not emerge in opposition to state security forces, it became complementary to military efforts in shielding communities from Boko Haram attacks.[20] The CJTF has been useful in collecting and sharing intelligence; working with security forces; carrying out security scans and body searches; running checkpoints and patrolling; screening individuals to ensure community safety

16 OB Saheed & FC Onuoha 'Child of necessity: (Ab)uses of the civilian joint task force in Borno State, Nigeria' (2019) 3 *Journal of African-Centred Solutions in Peace and Security* 7. See also H Angerbrandt 'Nigeria and the Lake Chad region beyond Boko Haram' Nordic Africa Institute, Policy Note 3 June 2017 6 and V Felbab-Brown 'Nigeria case study' in C Salih and others (eds) *The limits of punishment, transitional justice and violent extremism* (2018) 117.
17 As above.
18 A Monday & O Okpanachi 'Role of vigilante groups in war against terrorism in Northeastern Nigeria' (2019) 7 *Global Journal of Politics and Law Research* 53.
19 As above.
20 UNDP (n 1) 13.

and peace of mind; offering security to enable daily life; assisting individuals to safety; and resolution of disputes.[21] As a result, the CJTF has been credited by civilians for bringing back a semblance of stability and safety in North-Eastern Nigeria.[22]

The membership of the group has been estimated as comprising approximately 30 000 members spread across all 27 local government areas of Borno state.[23] The members of the group range from ages 15 to 50 years, including children and women.[24] However, the group is dominated by male vigilantes. Most of the members of the group do not have college degrees and have mainly been engaged in local trading activities, public transport work and menial jobs.[25] Reasons for joining the group are varied, and include patriotism; a quest for justice and fear of the military; personal loss; a collective desire for a return to normal lives; attachment to one's community; hope to find government employment in the security sector, as a source of earning a wage; and power and prestige that is derived from collaboration with security forces.[26]

After the CJTF was formally recognised in May 2013, the group has been receiving varying degrees of support from the government. In the past the government has provided the vigilantes with uniforms, vehicles and stipends on condition that they participate in a training programme offered by the military.[27] Under the state-sponsored Borno Youth Empowerment Scheme (BOYES), approximately 1 850 CJTF members participated in a four-week paramilitary training course and received a monthly stipend of N15 000 ($48).[28] Some of the vigilantes were trained by the Kofi Annan International Peacekeeping Training Centre in Accra, Ghana.[29] BOYES training focused on the gathering of intelligence, human rights, the art of self-protection, and facets of civilian-military engagements.[30] However, the programme was soon discontinued after the training of the first batch, because of the military's uncertainty concerning the offer of

21 C Nagarajan 'Civilian perceptions of the Yan Gora (CJTF) in Borno State, Nigeria' (2018) Centre for Civilians in Conflict 12-14.
22 Nagarajan (n 21) 3.
23 UNDP (n 1) 14.
24 As above.
25 As above.
26 UNDP (n 1) 17.
27 A Okeowo 'The women fighting Boko Haram' *The New Yorker* 22 December 2015, https://www.newyorker.com/news/news-desk/the-women-fighting-boko-haram (accessed 23 December 2023).
28 UNDP (n 1) 18.
29 As above.
30 As above.

training to potentially undependable youth and the possibility of infiltration by Boko Haram spies.[31]

Depending on the level of government support, CJTF has been stratified along three layers: the first layer being the BOYES;[32] a second layer, called Borno State Youth Vanguard, comprising a few thousand.[33] This group has been provided with weapons by the military, but it has neither been trained, nor paid.[34] The third layer comprises the majority of CJTF members that have not been provided with arms, or training, and are not formally paid.[35] Members of the last two layers have become resentful, feeling left out and ignored by the state.[36]

## 2.2 Reliance on vigilantes against Boko Haram in Cameroon

In 2013 Boko Haram attacks for the first time spilled over into Cameroon.[37] By taking advantage of the weaknesses in Cameroon's border security, the group carried out multiple attacks in the far northern region of the country, including targeted killings of Cameroonians and expatriates.[38] The International Crisis Group notes that between 2012 and 2016, thousands of Cameroonians joined Boko Haram informed by various motivations including ideological reasons, opportunism, religious conviction and duress.[39] Also, certain ties, including religious, linguistic and social relations between Northern Nigeria and Cameroon's far north region, contributed to Boko Haram's spill-over into Cameroon.[40]

In response to Boko Haram, just as in Nigeria, Cameroon adopted coercive measures including increased security presence in the far northern region,[41] and collaboration with MNJTF. Considering the limitations of coercive measures adopted by the government of Cameroon, 'local communities also took responsibility for security

31 As above.
32 Felbab-Brown (n 16) 94.
33 As above.
34 As above.
35 As above.
36 As above.
37 US Department of State Country reports on terrorism: Africa overview April 2014, https://2009-2017.state.gov/j/ct/rls/crt/2013/224820.htm (accessed 24 October 2023).
38 As above.
39 International Crisis Group 'Cameroon's far north: A new chapter in the fight against Boko Haram' (2018) *Africa Report* 263 i.
40 M Gebremichael and others 'Nigeria conflict insight' (2018) 1 Institute for Peace and Security Studies, Addis Ababa University 5.
41 US Department of State (n 37).

into their own hands by forming vigilante groups'.[42] This was not surprising considering that Cameroon has had a long history with vigilante groups. Since the 1950s to the early 1970s, vigilante groups were part of the Cameroonian government's fight against the left-wing Union des Populations du Cameroun.[43] Between the 1990s and 2000s, Cameroon worked with *comités de vigilance* to combat the criminal activities of bandits in the northern regions.[44]

The vigilance committees against Boko Haram were established in the far northern region in 2014, following a regional decree by the governor, Augustine Awa Fonka.[45] Members of vigilance committees range from 15 years to 40 years of age, including mostly unemployed youths and women.[46] To date, it is estimated that there are between 14 000 and 16 000 vigilantes fighting against Boko Haram in the far north.[47] Just as in Nigeria, the vigilantes provide vital intelligence to the Cameroonian security apparatus, act as guides and scouts and, at certain times, combat Boko Haram directly and protect their villages, especially against suicide attacks.[48]

### 2.3 Reliance on vigilantes against Boko Haram in Chad

While Chad was actively engaged in the fight against violent extremism in the Sahel, until 2015 violent extremism was not a serious threat to peace and security in the country.[49] In February 2015, Boko Haram carried out its first attack in Chad.[50] Throughout 2015, Boko Haram carried out multiple attacks in Chad, particularly around the Lake Chad area.[51] Just like its neighbours, Nigeria,

42 OS Mahmood & DC Ani 'Responses to Boko Haram in the Lake Chad region: Policies, cooperation and livelihoods' Institute for Security Studies 19 July 2018.
43 Geneva Academy 'Non-international armed conflicts in Cameroon', https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-cameroon#collapse5accord (accessed 23 October 2023).
44 As above.
45 International Crisis Group (n 8) 1.
46 UNDP (n 1) 26.
47 UNDP (n 1) 25.
48 International Crisis Group (n 39) i.
49 See US Department of State Country reports on terrorism: Africa overview 31 July 2012, https://2009-2017.state.gov/j/ct/rls/crt/2011/195541.htm (accessed 24 October 2023); US Department of State Country reports on terrorism: Africa overview 30 May 2013, https://2009-2017.state.gov/j/ct/rls/crt/2012/209979.htm (accessed 24 October 2023); US Department of State (n 37); and US Department of State Country reports on terrorism: Africa overview April 2015, https://2009-2017.state.gov/j/ct/rls/crt/2014/239404.htm (accessed 24 October 2023).
50 US Department of State Country reports on terrorism 2015, https://2009-2017.state.gov/j/ct/rls/crt/2015/257514.htm (accessed 24 October 2023).
51 See International Crisis Group 'Chad: Between ambition and fragility' Africa Report (2016) 233.

Cameroon and Niger, Chad's response to attacks by Boko Haram has been mainly coercive in nature.

With the increase in Boko Haram attacks, in 2015 Chad saw the emergence of vigilance committees seeking to address challenges posed by the group.[52] Unlike in the case of Nigeria and Cameroon, where vigilante groups have become central to the fight against Boko Haram, Chad has been more cautious about relying on vigilantes to combat Boko Haram.[53] This is due to revolts that the country has in the past experienced.[54] The country has experienced several rebellions and, in the 1980s, the Lake Chad region provided refuge to rebels opposed to Hissène Habré, who at the time was the President.[55] Also, Chad sees reliance on vigilante groups in the fight against Boko Haram as 'both a sign of weakness and a real threat to the state's authority and power'.[56]

Therefore, vigilance committees in Chad generally carry out their activities with tacit approval of the government.[57] Considering the rebellions of the past, the government of Chad has been reluctant to provide arms to vigilantes.[58] Unlike the case of Nigeria, vigilantes in the country do not carry out joint patrols with security forces.[59] In many instances the vigilantes carry out searches at the entrances of mosques, markets and areas of aid distribution, and provide intelligence to authorities.[60] Because of weaknesses in its bureaucratic apparatus, the country depends on chiefs to select, identify and control members of vigilante groups.[61]

### 2.4 Reliance on vigilantes against Boko Haram in Niger

Since 2013, Niger began to experience the spill-over of Boko Haram activities.[62] In 2015 Boko Haram frequently crossed over Niger's border with Nigeria to carry out attacks in the Diffa region of Niger, resulting in the deaths of many civilians and security forces.[63] In 2016 the group conducted attacks in the Diffa region, including the

52 UNDP (n 1) 10.
53 International Crisis Group (n 8) i.
54 International Crisis Group (n 8) 3.
55 As above.
56 UNDP (n 1) 28-29.
57 UNDP (n 1) 30.
58 As above.
59 International Crisis Group (n 8) 19.
60 As above.
61 International Crisis Group (n 8) 10.
62 US Department of State (n 37).
63 See United Nations Department of Peace Operations (UNDPO), United Nations Office for Disarmament Affairs (UNODA) & Lake Chad Basin Commission (LCB) 'Weapons and ammunition dynamics in the Lake Chad Basin' (2022).

attacks on 3 and 6 June in Bosso town, which caused deaths of 32 soldiers, and the 16 June attacks in Ngagam village in Diffa, which resulted in the deaths of seven *gendarmes* and the theft of supplies.[64]

In addition to intervention by security agencies, Niger has also depended on vigilantes in combating Boko Haram. However, just as the case of Chad, the government of Niger has been cautious about reliance on vigilantes as a source of security.[65] As such, the use of vigilantes in Niger in the fight against Boko Haram is not widespread.[66] The country has been cautious with reliance on vigilantes because of its past revolts by vigilantes.[67] Niger has prohibited civilians from manning road blocks, carrying weapons, and has required vigilantes to serve as informants within the civilian-army cooperation units.[68] Notably, under both President Mahamadou Isoufou and President Mohamed Bazoum, Niger strongly resisted the arming of communities or civilians.[69]

## 3 Security concerns about the future of vigilante groups

While it is evident that vigilante groups have been useful in the fight against Boko Haram, the future of vigilante groups has become a matter of concern. These concerns about the future of vigilante groups in the Lake Chad Basin are based on various reasons. First, the history of reliance on vigilante groups has shown that although they are instrumental in addressing security challenges, they have a tendency to reorient towards becoming militias or gangs over time.[70] Across Africa, some of the groups that have been used to provide security in their communities include People Against Gangsterism and Drugs (PAGAD) in South Africa; White Farmers in the Orange Free State in South Africa; the Sungusungu Movement to combat cattle rustling in Tanzania; anti-thief and anti-witch organisations in Bugisu district in Uganda; the Kamajors in Sierra Leone; the Mungiki in Kenya; and the Bakassi boys in Nigeria.[71] Despite being useful in providing security in areas where the state was unable to address insecurity, violence and criminality, these groups over time became

64 US Department of State Country Reports on Terrorism 2016, https://www.state.gov/reports/country-reports-on-terrorism-2016/ (accessed 24 October 2023).
65 UNDP (n 1) 28.
66 As above.
67 International Crisis Group (n 8) 13.
68 UNDP (n 1) 8.
69 See International Crisis Group 'A worrying new phase in the Sahel crisis' 24 July 2023, https://www.crisisgroup.org/africa/sahel-niger/worrying-new-phase-sahel-crisis (accessed 24 October 2023).
70 Saheed & Onuoha (n 16) 27.
71 Saheed & Onuoha (n 16) 27-28.

susceptible to abuses and manipulation.[72] Therefore, they ultimately became another security challenge.[73]

In Nigeria, perceptions towards CJTF have changed increasingly over time with various concerns raised about their future. Some of the concerns by civilians include[74] (i) the increased politicisation and manipulation of the group by politicians; (ii) the likelihood of the involvement of the group in criminal and gang activities; (iii) the chances of the group derailing the ongoing DDR processes for former associates of Boko Haram; and (iv) tensions within the group, or between the group and other vigilante groups such as *yan banga* and/or *kungiyar maharba*, which would lead a new phase of the conflict in North Eastern Nigeria. So far, the group has been implicated in various cases of human rights violations, both independently and complicitly with security forces.[75] Some of the allegations relate to extrajudicial killings, torture, sexual harassment, rape, exploitation and abuse, and extortion of money.[76]

In Cameroon, various issues have been raised about security challenges posed by vigilante groups that have been assisting in the fight against Boko Haram. There has been the concern that 'the government does not have full control over these committees, and the concerns that some vigilante groups may create further security problems in the region'.[77] Also, in the absence of proper checks and balances, vigilantes in the country have been accused of excesses and human rights violations, either independently or alongside security agencies.[78] The allegations relate to extrajudicial killings, forced disappearances, torture and arbitrary deprivations of liberty.[79]

Second, in Nigeria, the CJTF has also voiced agitation as to the plan that the government has for its members as the threat posed by Boko Haram starts to decline.[80] The group considers itself to have greatly contributed to 'winning' the war against Boko Haram by supporting security forces to combat Boko Haram and to regain territories from the insurgents.[81] This support has come at an immense cost.

72 As above.
73 As above.
74 Nagarajan (n 21) 3.
75 See DE Agbiboa 'National heroes or coming anarchy? Vigilant youth and the war on terror in Nigeria' (2017) 11 *Critical Studies on Terrorism* 1.
76 Nagarajan (n 21) 17.
77 Mahmood & Ani (n 42) 20.
78 UNDP (n 1) 27.
79 As above.
80 Mahmood & Ani (n 42) 36. See also I Hassan & Z Pieri 'The rise and risks of Nigeria's civilian joint task force: Implications for post-conflict recovery in Northeastern Nigeria' (2018) Combating Terrorism Centre at West Point 84.
81 As above.

The agitation by CJTF members has become stronger because the government is conducting a DDR process for former Boko Haram members under the Operation Safe Corridor (OPSC) programme.[82]

Considering these concerns, DDR of vigilante groups has been proposed as an important component of peace-building processes in Lake Chad Basin. In fact, some of the objectives of the AU, Regional Strategy for the Stabilisation, Recovery and Resilience of the Boko Haram Affected Areas of the Lake Chad Basin Region, include DDR of vigilante groups and vigilante committees in the Lake Chad Basin.[83]

## 4 Character of rights-based DDR of vigilantes in Lake Chad Basin

At the time the four Lake Chad Basin states embark on DDR of vigilante groups in the region, they will be building on a practice that has been in existence for more than three decades. Since the late 1980s, DDR has assumed a vital place in the 'imagination of peace, security and development', stabilisation and reconstruction engagements in conflict-affected communities worldwide.[84] DDR programmes have been undertaken in Africa, the Americas, the Middle East, South and South East Asia, the South Pacific and Eastern Europe.[85] The common use of DDR in peace-building processes in conflict-affected communities is founded on the idea that DDR together with Security Sector Reforms (SSR) enhances the (re)building of a state's capacity to (re)assert control over the use of force.[86] Based on this understanding, DDR of vigilantes becomes necessary in the efforts geared towards the creation of a climate of peace and security in the Lake Chad Basin.

Both in the past and present, compliance with human rights obligations during the designing and implementation of DDR programmes has not been a priority to many of the actors.[87] This has not been surprising considering the never-ending dilemma and

82 As above.
83 See Strategic Objectives 7 and 12 of the AU Regional Strategy for the Stabilisation, Recovery and Resilience of the Boko Haram Affected Areas of the Lake Chad Basin Region.
84 See R Muggah & C O'Donnell 'Next generation disarmament, demobilisation and reintegration' (2015) 4 *Stability*: *International Journal of Security and Development* 1.
85 As above.
86 L Waldorf 'Getting the gunpowder out of their heads: The limits of rights-based DDR' (2013) 35 *Human Rights Quarterly* 703.
87 See a discussion on this in JM Kilonzo 'A rights-based approach to disarmament, demobilisation, and reintegration in countering violent extremism in Africa' Unpublished LLD Unpublished LLD thesis, University of Pretoria, 2023.

debate between peace and justice.[88] Therefore, building on lessons from past and present DDR programmes, Cameroon, Nigeria, Niger and Chad should adopt a rights-based approach to DDR of vigilantes fighting against Boko Haram. In this article, a rights-based approach is one that systematically adopts and applies values, principles and standards that are outlined in international and regional human rights and humanitarian law to both procedural and substantive processes of DDR programming.[89] Although there is no specific treaty on DDR, this article recognises that the existing international and regional human rights and humanitarian law frameworks provide a robust basis for the adoption and implementation of a rights-based approach to DDR of vigilantes in the Lake Chad Basin.

The parts below explore various phases of DDR of vigilantes in the Lake Chad Basin from a rights-based perspective. The phases include screening and verification, disarmament, demobilisation and reintegration. Also, a discussion on the protection of rights of vulnerable groups, such as women, children and persons with disabilities, during the DDR process is undertaken.

### 4.1 Screening and verification phase

The screening and verification phase should be the initial phase of determining the profile of individuals associated with vigilante groups to determine whether they are eligible to participate in the DDR process or to be investigated and prosecuted for the commission of certain crimes such as war crimes, gross human rights violations, crimes against humanity, genocide, and so forth. In traditional DDR processes, which are implemented in post-conflict societies, screening has been a critical process as it offers room to determine who is eligible for DDR support and who should not be a beneficiary of a DDR process.[90] In third-generation DDR processes, which are implemented during ongoing conflict – for instance in the context of countering violent extremism – screening is seen

88 Secretary-General of the United Nations Press Release: 'Secretary-general expresses hope for new Security Council commitment to place justice, rule of law at heart of efforts to rebuild war-torn countries' UN Doc SG/SM/8892, SC/7881 25 September 2003.

89 See elaboration of human rights-based approach in United Nations Development Group (UNDG) *The human rights-based approach to development cooperation: Towards a common understanding among UN agencies* (2003), https://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies (accessed 24 October 2023).

90 See MDRP 'Screening, verification and registration: Vital elements in demobilisation', https://reliefweb.int/sites/reliefweb.int/files/resources/7B5B034518854718C12571F700436DB1-WB-Sep2006.pdf (accessed 24 October 2023).

as 'the initial process of determining the main profile of a person, currently in the custody of authorities or under the responsibility of authorities, in order to recommend particular treatment: including further investigation or prosecution; or direct participation in a rehabilitation and/or reintegration programme'.[91]

The screening and verification phase of DDR programmes for vigilante groups is essential to ensuring that Cameroon, Nigeria, Niger and Chad comply with the state obligation to hold to account perpetrators of serious crimes and provide remedies to victims under international and regional human rights law. The state obligation to investigate and punish perpetrators of war crimes and human rights violations is outlined both under international human rights law and international humanitarian law as an extension of the obligation to prevent violations of the two bodies of law.[92] Under international human rights law, the obligation is viewed as implicit in the obligation to provide effective remedies to victims of violations of human rights.[93] Under international humanitarian law, states have an obligation to investigate war crimes suspected to have been committed by their nationals or in their territory and, where appropriate, prosecute the suspects.[94] As such, the four Lake Chad Basin states have an obligation to ensure that the allegations that vigilante groups have committed human rights violations and war crimes are investigated and, where appropriate, prosecutions are undertaken, and victims are offered an effective remedy.

Importantly, the screening and verification phase should be guided by standing operating procedures (SOPs) that guarantee transparency and accountability. In most of the third-generation DDR processes that are implemented in Africa in places such as Nigeria and Somalia, accountability and transparency have been lacking.[95] As such, there is a need to develop the SOPs in an inclusive process that involves civil society organisations, community leaders, DDR practitioners, scholars and development partners. Further, to ensure human rights

91 See Lake Chad Basin Commission 'Pillar paper for screening, prosecution, rehabilitation and reintegration' (2018) 7.

92 UN Human Rights Committee General Comment 36, Article 6 (Right to Life) 3 September 2019, CCPR/C/GC/35 para 21. See also Inter-American Court of Human Rights *Velásquez Rodriguez v Honduras* 29 July 1988 para 176; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 57; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995).

93 General Comment 36 (n 92) para 27.

94 See JM Henckaerts & L Doswald-Beck (eds) *Customary international humanitarian law Vol 1: Rules* (2005) (ICRC Customary Law Study) Rule 158, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1 (accessed 24 October 2023).

95 See Brechenmacher (n 1) 1. See also A Parrin 'Creating a legal framework for terrorism defectors and detainees in Somalia' (2016) 55 *Columbia Journal of Transnational Law* 258.

compliance, the screening and verification phase should eliminate arbitrariness, avoid torture and arbitrary detention, respect the right to privacy, enhance the right to fair trial, and respect and protect the rights of vulnerable groups. Considering that the state bears the primary responsibility with respect to security and human rights obligations, where there has been a violation of human rights during the screening phase, it must ensure accountability and provide a remedy for the violation.

### 4.2 Disarmament phase

Although states in the Lake Chad Basin have been cautious about arming and training most vigilantes to avoid proliferation of weapons in general, vigilantes have still had access to weapons.[96] For instance, there is evidence indicating that CJTF already has a large cache of small and light weapons in their possession.[97] Concerns have been raised that in Bono state, CJTF has looted armouries of Boko Haram during operations and has refused to surrender the recovered arms to the relevant authorities.[98] Therefore, there is a need to plan and implement a disarmament process. The United Nations (UN) Integrated Disarmament, Demobilisation and Reintegration Standards (IDDRS) define disarmament as

> the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants and often also of the civilian population. Disarmament also includes the development of responsible arms management programmes.[99]

Nigeria, Niger, Chad and Cameroon should develop and implement disarmament protocols that ensure the effective collection, documentation, control and disposal of weapons that are in the possession of vigilante groups. This should be accompanied by responsible weapon management. The process of disarmament should commence with the carrying out of an assessment and information gathering on the profile and size of the vigilante groups, and the number, type and location of weapons that they possess.[100] Also, as noted by International Crisis Group, the disarmament process should focus on the collection of functional automatic weapons as opposed to spending resources on 'decommissioning hunting rifles

96 See Hassan & Pieri (n 80) 85.
97 As above.
98 As above.
99 UN 'Integrated disarmament, demobilisation and reintegration standards: Glossary and terms' Module 1.20 1 August 2006 6.
100 See I Idris 'Lessons from DDR programmes' GSDRC (2016) Helpdesk Research Report 1368 (GSDRC, University of Birmingham).

and locally produced weapons, which are easily replaced and less lethal'.[101]

Importantly, the lack of a weapon should not be a basis for excluding those who do not have one from participating in the DDR process. In the past, women and children have been excluded from traditional DDR process because of the requirement of gun ownership or the knowledge to operate a gun. For instance, in Sierra Leone, during the initial stages of the DDR process, ownership of a gun as a requirement to join the programme led to the exclusion of women associated with armed groups in the country because they did not own a gun.[102] The programme later became more inclusive after this requirement was revised.[103]

### 4.3 Demobilisation phase

The DDR of vigilantes in the Lake Chad Basin should entail a well-planned demobilisation phase. Demobilisation as defined by the UN IDDRS entails[104]

> the formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage of demobilisation may extend from the processing of individual combatants in temporary centres to the massing of troops in camps designated for this purpose (cantonment sites, encampments, assembly areas or barracks). The second stage of demobilisation encompasses the support package provided to the demobilised, which is called reinsertion.

As such, the demobilisation of members of vigilante groups should include formal and controlled discharge from the groups. In consultation with relevant stakeholders, including civil society organisations, community leaders and development partners, the governments of Cameroon, Nigeria, Niger and Chad can decide whether the demobilisation phase should entail the processing of individual members of vigilante groups in temporary centres or in designated sites or assembly points.

At the second stage, the demobilisation of members of vigilante groups should include a support package to cover some basic needs for the demobilised members of vigilante groups. Where the situation requires, this can entail the provision of food, shelter, medical

101 International Crisis Group (n 8) 22.
102 MG Sesay & M Suma 'Transitional justice and DDR: The case of Sierra Leone' (2009) International Centre for Transitional Justice Research Brief 12-13.
103 As above.
104 UN (n 99) 6.

services, training, employment and short-term education.[105] This will be compliant with the states' obligations relating to the rights to food,[106] shelter,[107] health,[108] education[109] and work.[110] Importantly, the process should not be discriminatory in terms of gender, religion, ethnic origin or other status.

### 4.4 Reintegration phase

After the demobilisation of members of vigilante groups, their reintegration into society should follow. Reintegration as defined by the UN IDDRS is 'the process by which ex-combatants acquire civilian status and gain sustainable employment and income. Reintegration is essentially a social and economic process with an open time-frame, primarily taking place in communities at the local level.'[111]

Reintegration essentially is a long-term process that takes place at individual, community and national level, and its success is determined by social, psychological, political and security factors.[112] As such, the reintegration of members of vigilante groups should focus on establishing social relationships between them and other members of their communities, creating means of livelihoods for them, enhancing their participation in political life of their communities and country, and mitigating the likelihood of rejoining vigilante groups or turning to criminal activities. In doing so, the reintegration process will encompass the three spheres of reintegration, namely, social reintegration, economic reintegration and political reintegration.

Reintegration activities should be broad enough to consider other members of the community whose livelihoods have been adversely affected by violent extremism. Considering the ongoing DDR efforts in Cameroon, Nigeria, Niger and Chad that are focusing on former associates of Boko Haram, if reintegration activities of vigilante groups do not encompass the wider community and other necessary transitional justice processes, DDR processes can be

105 UN (n 99) 19.
106 Art 11 International Covenant on Economic, Social, and Cultural Rights (ICESCR). See also Committee on Economic Social and Cultural Rights (ESCR Committee) General Comment 12: The Right to Adequate Food (art 11 of the Covenant) 12 May 1999.
107 See ESCR Committee General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant) 13 December 1991 E/1992/23. See also *SERAC* (n 92) para 60.
108 Art 12 ICESCR and art 16 African Charter on Human and Peoples' Rights.
109 Art 13 ICESCR.
110 Arts 6 & 7 ICESCR.
111 UN (n 99) 6.
112 UN (n 99) 4.

perceived as 'rewarding' those who have actively been participating in the conflict. Such a perception can lead to resentment by the community, thereby undermining the successful reintegration of both members of vigilante groups and former associates of Boko Haram.

Notably, a rights-based approach to reintegration of vigilante groups should be premised on non-discrimination, transparency, accountability, and the empowerment of individuals participating in the reintegration process. As such, it should be designed and implemented in an inclusive manner that entails community engagement, the involvement of civil society, and vulnerable groups. Importantly, it should respect, protect and fulfil the rights of vigilante members that are likely to be affected during reintegration. These include the right to safety and security;[113] the right to an adequate standard of living;[114] the right to work;[115] the right to participate in political life;[116] and the protection of the rights of vulnerable groups.

### 4.5 Protection of rights of vulnerable groups during DDR process

One of the core features of the rights-based approach to DDR is the protection of the rights of certain groups that are considered vulnerable. While there is no definitive definition of vulnerable groups, there is consensus that these groups can be viewed particularly as disadvantaged groups, at-risk groups or marginalised groups.[117] These groups include women, children and persons with disabilities. The specific consideration that is given to vulnerable groups stems from the acknowledgment that they often 'systematically lack enjoyment of a wide range of human rights'.[118]

The inclusion and protection of women's rights in DDR of vigilante groups is necessary considering that there is evidence that women have been part of counterinsurgency vigilante activities. For instance, in North Eastern Nigeria, scores of women have been taking part in

113 See Human Rights Committee General Comment [80] (The nature of the general legal obligation imposed on state parties to the Covenant) 26 May 2004 CCPR/C/21/Rev.1/Add.1.31.
114 Art 11 ICESCR. See also *SERAC* (n 92) para 60.
115 Arts 6 & 7 ICESCR.
116 Art 25 ICCPR. See also Human Rights Committee CCPR General Comment 25: Article 25 (Participation in public affairs and the right to vote), The right to participate in public affairs, voting rights and the right of equal access to public service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.
117 AR Chapman & B Carbonetti 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 724.
118 Chapman & Carbonetti (n 117) 682 & 683.

counter-insurgency activities, especially relating to combating the activities of women insurgents and suicide violent extremists.[119] As members of CJTF, women have been playing different roles, including assisting security forces and CJTF men to search ladies at checkpoints; the identification of suspects; intelligence gathering; the guarding of IDP camps; and sometimes actively engaging in fights against Boko Haram.[120] Also, in Cameroon, women have been part of vigilance committees and have been providing security forces with critical local intelligence about Boko Haram activities.[121] The participation of women in counter-insurgency activities against Boko Haram mirrors women's counter-insurgency movements in conflict areas such as Iraq and Syria, including all-female Kurdish Battalions, the Yazidi female militia, and the Assyrian female militias.[122]

During DDR processes, women and men have distinct practical needs that should be taken into account during each stage of the DDR process. In the case of DDR of vigilante groups, Cameroon, Nigeria, Niger and Chad have an obligation to address the needs of and protect the rights of women and girls right from the screening phase to the reintegration phase. The obligation is spelled out in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);[123] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);[124] UN Security Council Resolution 1325 (2000); and other relevant UN resolutions.[125] The two treaties and UN Security resolutions cement the place and instrumentality of gender mainstreaming in peace-building and conflict resolution procedures.

To address the specific needs and rights of women and girls in DDR of vigilante groups, states and development actors should consider the different groupings of women and girls associated with vigilante groups, for instance, women who are actively involved in fighting against Boko Haram, women who are associated with vigilante groups as wives or widows of vigilante men who have been killed by Boko Haram, and women who live in areas affected by Boko Haram and have shown some degree of support to vigilante groups. This should be premised on the acknowledgment that these groupings may at times overlap, thus they may not be as clear.

119 DE Agbiboa 'Out of the shadows: The women countering insurgency in Nigeria,' (2022) 18 *Politics and Gender* 1017.
120 As above.
121 UNDP (n 1) 26.
122 Agbiboa (n 119).
123 See art 2 CEDAW.
124 See art 2 African Women's Protocol.
125 The relevant UN Security Council resolutions include Resolution 1820 (2008), Resolution 1888 (2009), Resolution 1889 (2009) and Resolution 2349 (2017).

When children are concerned, there is evidence of their recruitment and participation in activities of vigilante groups, which obviously is against international and regional law.[126] For instance, children have been recruited and have participated in CJTF counter-insurgency activities such as intelligence-related engagements, search operations, crowd control, night patrols and manning guard posts.[127] Also, in Cameroon, allegations have been made that vigilante committees recruit and use children in their counter-insurgency activities.[128] Some of these children are as young as 12 years of age.[129]

The four Lake Chad states have an obligation to include and protect the rights of children during DDR of vigilante groups. In doing so, they should consider different groupings of children associated with vigilante groups, including children who have been recruited into vigilante groups and children born of members of vigilante groups. Notably, in addition to barring the recruitment and use of children in conflicts, the UN Convention on the Rights of the Child (CRC)[130] and the African Charter on the Rights and Welfare of the Child (African Children's Charter)[131] place an obligation on states to take 'all feasible measures to ensure protection and care of children who are affected by armed conflicts'.[132] Moreover, CRC under article 39 requires states to promote the physical and psychological recovery and social reintegration of children. To meet the obligation to protect, care and promote the physical and psychological recovery and reintegration of children associated with vigilante groups, states must ensure the inclusion of children in the DDR process.

Moreover, the best interests of the child should be given primary consideration in all measures taken for children during DDR of vigilante groups.[133] Also, as underscored by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in General Comment 22 of the African Children's Charter, 'children shall be dealt with as victims regardless of their

126 See art 38 of the UN Convention on the Rights of the Child and art 22 of the African Children's Charter.
127 Nagarajan (n 21) 10.
128 UNDP (n 1) 27.
129 As above.
130 Art 38(2) prohibits the recruitment of children who have not reached 15 years of age.
131 Art 22(2) prohibits the recruitment of children below the age of 18 years since the definition of a child under art 2 of the Charter is every person below the age of 18 years.
132 Art 38(4) CRC; art 22(3) African Children's Charter.
133 See art 3 of CRC (the best interests of the child should be a primary consideration) and art 4 of the African Children's Charter (the best interests of the child should be the primary consideration).

association with armed forces and armed groups'.[134] As such, children associated with vigilante groups should be treated as victims whose rights should be protected during the DDR process.

Regarding persons with disabilities (PWDs), there are indications that they have also been involved in counter-insurgency activities of vigilante groups. For instance, in Nigeria, some PWDs became disabled while participating in counter-insurgency activities of CJTF.[135] Others joined CJTF while they were already disabled.[136] While PWDs may not participate in active combat, they have been playing critical roles such as checking those entering IDP camps and other places, and taking responsibility while able-bodied members of CJTF leave for operations.[137] They have also been taking part in the resolution of disputes in their communities.[138]

As asserted by Priddy, despite the severe impact that armed conflict has on PWDs, they are often the 'forgotten victims of armed conflict'.[139] In accordance with the International Convention on Civil and Political Rights (ICCPR),[140] the African Charter on Human and Peoples' Rights (African Charter)[141] and the Convention on the Rights of Persons with Disabilities (CRPD),[142] during DDR of vigilante groups, states have an obligation to guarantee and promote the full realisation of human rights and fundamental freedoms of PWDs. Particularly, CRPD under article 11 places an obligation on states to adopt the necessary measures of protection and safety of persons with disabilities in situations of risk, including armed conflict.[143] This obligation requires the four Lake Chad states to take all the necessary measures of protection and safety of PWDs during DDR of vigilantes. Further, these states have an obligation to ensure that PWDs are afforded reasonable accommodation during DDR of vigilante groups.[144] Importantly, the UN, the AU and civil society organisations closely working to support the design and implementation of these DDR programmes must call for the inclusion and protection of the vulnerable.

134 African Children's Committee General Comment on article 22 of the African Charter on the Rights and Welfare of the Child 'Children in situations of conflict' para 26.
135 Nagarajan (n 21) 10.
136 As above.
137 As above.
138 As above.
139 A Priddy 'Disability and armed conflict' (2019) The Geneva Academy of International Humanitarian Law and Human Rights Academy Briefing 14, 13.
140 Art 2 ICCPR.
141 Art 2 African Charter.
142 Art 4 CRPD.
143 See Priddy (n 139) 76.
144 Art 5 CRPD.

## 5 Concluding remarks

The Boko Haram insurgency has remained one of the main security challenges facing Nigeria, Niger, Cameroon and Chad. With security gaps that have been occasioned by inadequacies of the security apparatus of the four states, vigilante groups have emerged to protect their communities against Boko Haram. This article has underscored that while the vigilante groups were initially celebrated for turning the tide against Boko Haram, there are concerns about their future. The fears about the future of vigilante groups are informed by the fact that if their fate is not determined in time, they may become a security threat in their communities. As such, the long-term security of Lake Chad Basin areas is dependent on both addressing challenges posed by Boko Haram and measures taken to determine the fate of vigilante groups.

Premised on this understanding, this article explores the roles of vigilante groups fighting against Boko Haram, security concerns about their future, and outlines a rights-based approach to DDR of vigilantes as one of the ways in which to avert security risks that they may pose to their communities. On the discussion relating to DDR, the article has underscored that while there is no treaty that relates to DDR, existing international and regional human rights treaties and international humanitarian law place an obligation on the four Lake Chad Basin states to design and implement a rights-based DDR of vigilantes.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: AF Hammond & C Dowuona-Hammond 'A review of the legal, policy and institutional framework on child labour in Ghana' (2025) 25 *African Human Rights Law Journal* 194-222
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a8

# A review of the legal, policy and institutional framework on child labour in Ghana

*Ama F Hammond**
Associate Professor, University of Ghana School of Law
https://orcid.org/0009-0000-5464-1987

*Christine Dowuona-Hammond**
Associate Professor, University of Ghana School of Law
https://orcid.org/0000-0002-4488-590X

**Summary:** *Child labour persists in Ghana despite a range of policy and legal measures implemented by the government and other development partners. This article reviews Ghana's legal, policy and institutional framework on child labour to determine whether it meets international labour and human rights norms. It also assesses the framework to see whether it is well-positioned to combat child labour in Ghana. Although the article notes the steps taken by relevant legislation to incorporate international labour organisations' standards aimed at combating child labour, it observes that local legislation is not sufficiently detailed, especially on what constitutes the worst forms of child labour. Other forms of child labour, such as the use of children in mining and the illicit production of drugs, are not specifically addressed. The article also critiques the institutional framework that segregates enforcement along the lines of the formal and informal sectors. While the article commends the strong decentralised institutional structures in Ghana's current*

* BA (Cape Coast) LLB (Ghana) LLM (Harvard) PhD (British Columbia); afhammond@ug.edu.gh. The authors are grateful to Prosper Batariwah, LLB (Ghana), a graduate assistant at the University of Ghana School of Law, for his research support, and to the University of Ghana School of Law for funding this research.

** LLB (Ghana) LLM (Michigan); cdowuona-hammond@ug.edu.g

*plan for eliminating child labour, it argues that the strong institutional structures created by the plan should be given legal status and their roles clarified with a view to establishing legally-binding duties on the government. The article also proposes amendments to strengthen the legal framework and align it with international best practices. In this regard, it proposes the expansion of the hazardous work list, the introduction of the minimum conditions for light work and outlawing the use of children in mining and the illicit production of drugs.*

**Key words:** *Ghana; child labour; legislative gaps; human rights; legal reforms*

## 1 Introduction

Child labour remains one of the world's most intractable problems. Approximately 160 million children worldwide are engaged in child labour.[1] More than half of these children are in sub-Saharan Africa. Ghana has made significant efforts to eradicate child labour since the Ghana Statistical Service reported in 2001 that approximately 2,47 million children aged 5 to 17 years of age were engaged in economic activities.[2] Nevertheless, further efforts are required, as subsequent surveys by the Ghana Statistical Service show that more than 20 per cent of all children between the ages of 5 to 14 years do some economic work.

The country's response to the problem of child labour has been both legal and policy-based. On the legal front, Ghana has signed on to several International Labour Organisation (ILO) conventions, including the two most crucial conventions geared at eliminating child labour: the ILO Minimum Age Convention 138 of 1973 and the ILO Worst Forms of Child Labour Convention 182 of 1999. These conventions have been domesticated and incorporated into Ghanaian law through the Children's Act and related statutes. In terms of policy, Ghana has developed several national action plans, each of which builds on the strengths of its predecessor's plan. The latest of these plans is the Ghana Accelerated Action Plan Against Child Labour (National Plan of Action for the Elimination of Child Labour) (2023-2027), which sets an ambitious target of eliminating child labour,

1 International Labour Organisation (ILO) & United Nations Children's Fund (UNICEF) *Child labour: Global estimates 2020, trends and the road forward* (2021) 22.

2 Ghana Statistical Service and Ministry of Finance and Economic Planning *Ghana child labour survey – 2001* (2003) 3.

at least its worst forms, by 2025. The country has also confirmed its commitment to eliminating child labour by 2025 by joining Alliance 8.7, a platform where governments, businesses, workers and international and regional organisations can share information and best practices, and cooperate to achieve Sustainable Development Goal (SDG) 8.7.[3] Ghana has also benefited from private sector, civil society and development partner-led interventions in areas where child labour is endemic. These interventions have usually invested heavily in the mining and cocoa sub-agricultural sectors. With less than a year to go, it is important to ask whether the policy, legal and institutional framework is sufficient to achieve the ambitious target set by the government.

This article critically assesses Ghana's legal and policy framework for the elimination of child labour in Ghana to determine its suitability and adequacy in the fight against child labour. The second part of the article provides a situational analysis of the legal, policy and institutional framework on child labour in Ghana. The third part discusses the international legal framework on child labour and Ghana's attempt to legislate its obligations domestically in child and labour laws. The fourth part examines the policy and institutional response to child labour. The fifith part exposes the gaps, limitations and deficiencies in the legal, policy and institutional framework for eliminating child labour. The sixth part summarises our recommendations and concludes the article.

## 2 A situational analysis of the legal policy, and institutional framework on child labour in Ghana

Defining child labour can be challenging. It is a loaded term that hardly renders itself to objective interpretations. While it is easy to confuse any form of work done by children as child labour, child work and child labour are not the same.[4] Children do all kinds of work, some of which are not detrimental to their overall well-being and may even equip them with the essential skills needed to become useful and employable adults in the future. For this reason, it has

3 For information about this alliance, see https://www.alliance87.org (accessed 13 February 2024); SDG 8.7 strives to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms'.

4 A Frimpong and others 'Concepts, causes and institutional response to child labour in Ghana: A socio-economic review' (2021) 1 *Journal of Economic Research and Review* 2, https://opastpublishers.com/open-access/concepts-causes-and-institutional-response-to-child-labour-in-ghana-a-socio-economic-review.pdf (accessed 13 February 2024).

been suggested that describing all forms of children's work as child labour is to 'trivialise the issue [of child labour]'.[5] Therefore, there is a need to distinguish between the broader category of children's work and work that affects children's well-being. Children's work generally may be positive if it does not interfere with a child's right to education and teaches them useful life skills.[6] Thus, it is acceptable for children to engage in light work, such as helping out with their families' businesses.[7] Child labour, on the other hand, is restricted to those forms of work that interfere with the child's welfare, particularly the child's right to education.[8] The ILO defines child labour as follows:[9]

> Work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development. It refers to *work that*:
>
> - *is mentally, physically, socially or morally dangerous and harmful to children*; and/or
> - *interferes with their schooling* by depriving them of the opportunity to attend school; obliging them to leave school prematurely; or requiring them to attempt to combine school attendance with excessively long and heavy work.

Child labour cannot be monolithically understood; it admits of different societies' notions of childhood and varying socio-cultural beliefs about nurturing children. A child's age, the number of hours worked, and the sectors in which a child works are all significant determinants of child labour.[10] Determining whether a child is involved in child labour is always a question of degree and not a question of scientific precision. Humbert, a legal scholar, notes:[11]

> [T]he relevant international organisations such as the UN Children's Fund (UNICEF) and the ILO as well as most of the legal writers speak of a continuum that embraces at one end work that is beneficial, promoting or enhancing a child's physical, mental, spiritual, moral or social development without interfering with schooling, recreation and rest. At the other end, the work is exploitative including as most obvious examples child prostitution and bonded child labour. Between the two poles, much child labour falls into a grey area.

Be that as it may, the substratum of child labour is that children are involved in work that offends their dignity, reduces their capacity to

5 F Humbert *The challenge of child labour in international law* (2009) 14.
6 ILO 'What is child labour', https://www.ilo.org/ipec/facts/lang--en/index.htm#:~:text=The%20term%20"child%20labour"%20is,harmful%20to%20children%3B%20and%2For (accessed 13 February 2024).
7 As above.
8 As above.
9 As above (original emphasis).
10 As above.
11 Humbert (n 5) 17-18.

enjoy rights, and attain a high standard of living; they are involved in work that is 'intolerable and exploitative'.[12] Children's work, therefore, has been categorised into light work, hazardous work and the worst forms of child labour (WFCL). Child labour encompasses the last two categories.

Child labour has always been on the agenda of the ILO as far back as 1919 when the first convention stipulating a minimum age at which children could work in industry was adopted. In 1992 the ILO established the International Programme for the Elimination of Child Labour (IPEC). This programme is the most ambitious programme targeted at the elimination of child labour in the world. With an operational budget of over $60 million, the IPEC offers technical, operational and financial support to member countries committed to fighting child labour.[13]

In 2000 the ILO-IPEC started publishing its quadrennial reports and estimates on child labour. The data shows that between 2000 and 2020, the number of children in child labour reduced from 245,5 million to 160 million.[14] While there was a consistent downward trend in the number of children in child labour between 2000 and 2016, there was an increase in the number of children in child labour between the years 2016 and 2020.[15] In these four years, the number of children involved in child labour increased from 151,6 to 160 million children.[16] The difference has been attributed to the impact of the COVID-19 pandemic on the economic livelihoods of households.[17]

It should be noted that while the rest of the world seems to have consistently reduced the number of children in child labour, sub-Saharan Africa has fared less well. Over 23,9 per cent (an estimated 86,6 million children) of all children in the region are involved in child labour.[18] Between 2008 and 2020, the region has only managed to reduce its children in child labour from 25,3 per cent to 23,9 per cent.[19]

12 Humbert (n 5) 18.
13 ILO 'The International Programme on the Elimination of Child Labour (IPEC, nd), https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/genericdocument/wcms_210580.pdf (accessed 14 February 2024).
14 ILO and UNICEF (n 1) 23.
15 As above.
16 As above.
17 ILO and UNICEF (n 1) 54-59.
18 ILO and UNICEF (n 1) 13; Latin America has almost halved its child labour rates, bringing the percentage down to 6% in 2020 from 13,3% in 2008; ILO and UNICEF (n 1) 24.
19 ILO and UNICEF (n 1) 12.

The Ghana Living Standards Survey Round 6, published in 2014, noted that of all children in Ghana aged 7 to 14 years, 28.8 per cent are child labourers.[20] The majority of these children, approximately 91,2 per cent of them, worked in agriculture, forestry and fishing, while another 13,2 per cent worked in wholesale and retail trade.[21] Others worked in manufacturing, mining and quarrying, and some in the services industry, including transportation, hospitality, food, information and communication.[22] Two-thirds of these children worked less than 20 hours daily, while another one-third worked more than 20 hours.[23] Remuneration for work done ranged from 8 cedis to 220 cedis (US$0,62 to US$16,94)[24] a month.[25] In the Ghana Living Standards Survey Round 7, published in 2020, the number of children in child labour within the same bracket increased to 29,2 per cent. Approximately 73,9 per cent of these children worked in agriculture and fishing, and another 14,5 per cent in the services industry.[26] A few children were also involved in mining, quarrying, manufacturing and construction.[27] Most of the children worked less than 40 hours a week, while a small percentage of 5,6 per cent worked more than 40 hours.[28] Forty hours a week would mean that a child works not less than 8 hours daily. The 2020 statistics do not in any way show a reduction or improvement in Ghana's fight against child labour. Rather, it supports the conclusion that the number of children working illegally has risen.

Admittedly, generating child labour statistics can be difficult and may not always reflect the facts on the ground. Although child labour is work that is said to be detrimental to a child's welfare, the statistics less often reflect this and may include children who are involved in light work. Lieten, an expert on childhood studies and child labour, asserts:[29]

> Recording one figure for the complex category of child labour, and analysing trends, equates putting apples and oranges in one basket; it includes children who do or do not go to school and may do light work in and around the household (eg on the family farm), as well as

20 Ghana Statistical Service *Ghana Living Standards Survey Round 6* (Ghana Statistical Service 2014) 58.
21 Ghana Statistical Service (n 20) 59.
22 As above.
23 As above.
24 Using a cedi-to-United States dollar exchange rate of 12,99 cedis to 1 United States dollar as of 12 April 2024.
25 Ghana Statistical Service (n 20) 60.
26 Ghana Statistical Service *Ghana Living Standards Survey Round 7* (2019) 106.
27 Ghana Statistical Service (n 26) 107.
28 Ghana Statistical Service108.
29 GK Lieten 'Introduction: The worst forms of child labour in Latin America' in GK Lieten (ed) *Hazardous child labour in Latin America* (2011) 9.

> children who are at work most of the day and most of the year and who are impaired in their normal development as a child.

In Ghana, especially, Hilson, a scholar of mining and development in Africa, has suggested that the data from the Statistical Service about child labour in agriculture is

> misleading because [such figures] stem from a misdiagnosis of the role smallholder agriculture plays in Ghana altogether … 80 per cent of national agricultural production originates from smallholder farms of less than two hectares in size, which are 'linked largely to household subsistence' (Aryeetey and Nyanteng, 2006: 7), not export markets.[30]

Thus, he argues that the figures include a category of children who simply accompany their parents to the farm. The information from the Ghana Living Standards Surveys fails to differentiate between the varying degrees of severity in the work performed by child workers, whether the work done is light work, hazardous work or those forms of work known as the worst forms of child labour. There are also no definitions of what even constitutes child labour. Thus, the statistics seem to reflect child work generally and not child labour.

Nonetheless, studies carried out by state agencies, human rights organisations and non-governmental organisations illustrate the extent of the problem. In 2021 the Commission of Human Rights and Administrative Justice published a study on child labour in the communities along Ghana's Volta Lake.[31] The research was conducted in communities in the Kpando municipality, Effutu municipality, Ada-East district and the South Dayi/Afadjato districts. The research revealed that many children under the age of 17 years were employed to perform fishing or fishing-related activities on the Volta Lake. These activities include mending nets, paddling canoes, diving, scooping water from canoes, preparing baits, salting, and smoking fish. These children were often poor, hardly attended school and were even trafficked. In Ada-East, children were often trafficked and exchanged for money or material benefits.[32] Trafficked children were transported to other communities close to the lake under the pretext that they were to be apprenticed or offered a livelihood. It was also noted that trafficked children were often abused and, in some circumstances, died. Children in all the communities worked long hours, sometimes at night, with little to no rest periods and were poorly remunerated. It was noted that

30 G Hilson 'Child labour in African artisanal mining communities: Experiences from Northern Ghana' (2010) 41 *Development and Change* 543.
31 Commission on Human Rights and Administrative Justice (CHRAJ) *Qualitative study of child labour in Ghana's fishing communities along the Volta Lake* (2021).
32 CHRAJ (n 31) 26.

> generally, there was a preference for child labour instead of adult labour. Most formal actors indicated that children were easy to employ and offer cheap labour. They were smart, energetic, dutiful, malleable and seldom complained under bad working conditions. Besides, children were better skilled than adults at diving and paddling and could paddle for long distances.[33]

Furthermore, it is important to acknowledge that in the majority of the impacted communities, educational institutions were either absent or poorly resourced.

Amnesty International has also published a report on child labour in Ghana, Nepal and Uganda titled, '"I must work to eat": COVID-19, poverty, and child labour in Ghana, Nepal and Uganda'.[34] Amnesty interviewed about 24 working children in Ghana.[35] Most of these children stated that the pandemic had adversely affected their family's income and that entering the labour force was the only way to support their families.[36] These children, who worked in industries such as fishing, transportation and gold mining, worked long hours, were poorly paid and handled toxic substances, which affected their health.[37] Some of these children earned as low as two cedis a day (US$ 0,15)[38]. Fifteen of the children interviewed worked in gold mining and, among other things, blasted ores, carried heavy loads and handled toxic chemicals such as mercury.[39] The lack of protective gear and the fumes and dust emanating from mining activities adversely affected the children's health.[40]

Several foreign news outlets have also reported stories of impoverished children in Ghana who work on cocoa farms instead of attending school.[41] The use of children on cocoa farms is singularly damaging to the country's reputation and the goodwill of key players in the chocolate industry, both of which have committed to the elimination of child labour in Ghana.[42] The pressure to remove

33 CHRAJ (n 31) 13.
34 Amnesty International '*I must work to eat': COVID-19, poverty and child labour in Ghana, Nepal and Uganda* (2021).
35 Amnesty International (n 34) 44.
36 Amnesty International (n 34) 46-48.
37 Amnesty International (n 34) 48-52.
38 Using a cedi-to-United States dollar exchange rate of 12,99 cedis to 1 United States dollar as of 12 April 2024.
39 Amnesty International (n 34) 50-52.
40 As above.
41 'Why is the cocoa industry still using child workers in Ghana?' 5 January 2023, https://www.youtube.com/watch?v=DyZnkXQUL6M&t=33s (accessed 14 February 2024); 'Iconic chocolate brand linked to child labour in Ghana' 1 December 2023, https://www.youtube.com/watch?v=fYapy2GJN9E&t=214s (accessed 14 February 2024).
42 The private sector players in the cocoa industry signed the Harkin Engel Protocol in which they committed to work together with governments other key players

children from cocoa farms is also a result of increased advocacy on the human and business front, where there is a call to make supply chains more sustainable, including eliminating child labour in the industry.[43]

The evidence suggests that across the country, there are children engaged in hazardous work, some of which constitute the WFCL. It is well documented that child labour has adverse effects on children. Children in child labour are more likely to have poor educational outcomes.[44] They are also more likely to drop out of school.[45] They may also suffer physical and mental harm or exhaustion when they do hazardous work. Inevitably, the inability of such children to fully pursue their education means that they are unable to reap the dividends of education and will often end up poor with little to no room for social mobility.[46] The result is the perpetuation of intergenerational poverty, which itself perpetuates child labour.[47]

Child labour in Ghana, though a result of poverty and economic deprivation and impoverishment, is also caused by other factors. For instance, it has been suggested that cultural beliefs also impact Ghanaians' perceptions about child labour.[48] Some Ghanaians believe that children's involvement in work, even hazardous work, is part of the socialisation process. In other words, children can become better and more productive adults if they work alongside their parents early on in life. While children's work may be beneficial, the cultural belief underpinning it has often been used to involve children in hazardous work. Whatever the case, measures to eradicate child labour will have to combine legal standard-setting measures with policy interventions targeted at educating Ghanaians and empowering the economically-vulnerable segments of society.

---

to eliminate child labour in the industry. The Framework of Action to Support Implementation of the Harkin-Engel Protocol was signed in 2010 to provide more specific steps to eliminate child labour in the industry in Ghana and Côte d'Ivoire. See also a report published by the organisation Voice Network about sustainability interventions in the cocoa industry; AC Fountain & FH Adams *Cocoa Barometer* (2022).

43 C Pugmire 'Child labour in Ghana' (2022) 3 *Ballard Brief* 14-18.

44 ES Hamenoo, EA Dwomoh & M Dako-Gyeke 'Child labour in Ghana: Implications for children's education and health' (2018) 93 *Children and Youth Services Review* 251-252.

45 Hamenoo and others (n 44) 252.

46 Pugmire (n 43) 17-18.

47 As above.

48 E Takyi 'Child labour in Ghana: Ecological perspective' (2014) 4 *Developing Country Studie* 38; O Adonteng-Kissi 'Causes of child labour: Perceptions of rural and urban parents in Ghana' (2018) 91 *Children and Youth Services Review* 59, 62.

## 3 Ghana's legal obligations under international labour law on the elimination of child labour

Several international legal instruments address the issue of child labour directly or indirectly. Among these instruments are those that outlaw slavery and protect children against exploitation. However, the most influential instruments in the area of child labour are the ILO Minimum Age Convention 138 of 1973[49] and its Minimum Age Recommendation 146 of 1973,[50] and the ILO Worst Forms of Child Labour Convention 182 of 1999[51] and its Recommendation 190.[52] Convention 138 and Convention 182 are considered fundamental to the ILO under its 1998 Declaration on Fundamental Principles and Rights at Work.[53] This means that even states that have not ratified the conventions are obliged to respect their provisions. Nonetheless, Ghana has ratified both Conventions 138 and 182.[54]

While we acknowledge the contribution of child rights treaties such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter), we limit our discussion to the ILO Conventions as they most directly address the issue of child labour. This part parses the two conventions to first identify Ghana's legal obligations on the elimination of child labour and the degree to which domestic child and labour laws fulfil these obligations.

49 ILO Minimum Age Convention 138 of 1973, 58th Conference Session, Geneva, 26 June 1973 (Convention 138).

50 ILO Recommendation R146: Minimum Age Recommendation, 58th Conference Session, Geneva 26 June 1973 (Recommendation 146).

51 ILO Worst Forms of Child Labour Convention 182 of 1999, 87th Conference Session, Geneva, 17 June 1999 (Convention 182).

52 ILO Recommendation R190: Worst Forms of Child Labour Recommendation 190, 87th Conference Session, Geneva, 17 June 1999 (Recommendation 190).

53 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 86th Conference Session, Geneva, 1998 amended at the 110th session, Geneva, 2022. Art 2 of the Declaration states: 'Declares that all members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) *the effective abolition of child labour;* (d) the elimination of discrimination in respect of employment and occupation; and (e) a safe and healthy working environment' (our emphasis).

54 Ghana ratified Convention 138 on 6 June 2011 and Convention 182 on 13 June 2000.

### 3.1 Convention 138 and Recommendation 146

In 1973 the ILO adopted Convention 138 to provide a single minimum age applicable to all industries to replace the many minimum age conventions.[55] Recommendation 190 gives more detail on the Convention's provisions.

Under Convention 138, state parties are under a duty to develop a national policy to ensure the elimination of child labour and to 'raise progressively the minimum age of admission to employment or work to a level consistent with the fullest physical and mental development of young persons'.[56] Recommendation 143 asks that the needs of children and young people be prioritised in national development and that special attention be given to employment, poverty-alleviating social and economic measures, social security and family welfare measures, education and training, and the development of other facilities necessary for the development of children and young people.[57] Other policy considerations should address the needs of children without families, migrant children and nomadic children. Full-time school attendance should also be pursued up to an age equal to the minimum age requirements in article 2 of the Convention.[58]

Each ratifying state must stipulate a minimum age for admission to work, which shall coincide with the age at which children complete compulsory education and, in any case, the age should not be lower than 15 years.[59] However, developing countries whose 'economy or educational facilities are insufficiently developed' may prescribe 14 years as the minimum age.[60] Under Article 2(1), no person under the prescribed age shall be admitted to work of any form.[61] States are encouraged to progressively take steps to increase the age to 16 years for all levels of economic activity.[62] In the specific case of agriculture, states are encouraged to, at the very least, adopt a minimum age for plantations and commercial agriculture.[63]

55 For a full list of minimum age conventions, see M Borzaga 'Limiting the minimum age: Convention 138 and the origin of the ILO's action in the field of child labour' in G Nesi, L Nogler & M Pertile (eds) *Child labour in a globalised world: A legal analysis of ILO action* (2008) 25-26.
56 Art 1 Convention 138.
57 Pt 1 Recommendation 146.
58 Para 4 Recommendation 146.
59 Arts 2(1) & (3) Convention 138; permits may, however, be granted for children's participation in artistic dances subject to reasonable conditions; see art 8.
60 Art 2(4) Convention 138.
61 Pt II Recommendation 146.
62 Pt II paras 6 & 7 Recommendation 146.
63 Pt II para 8 Recommendation 146.

Children are permitted to do light work under the Convention. Light work is work that meets two conditions: The work is not likely to harm the child's health or development, and the work does not affect the child's attendance at school or participation in vocational or training programmes.[64] The state may permit only children between 13 and 15 years to engage in light work.[65] Where light work is permitted by a state, the state must stipulate the number of hours and the conditions under which the child should work.[66] Under the Convention, work done by children in school as part of a vocational, technical or training programme is also permitted.[67]

For hazardous work, described as work that 'is likely to jeopardise the health, safety or morals of young persons', the minimum age must be at least 18 years.[68] Each state, in consultation with employers and workers' organisations, determines the tasks that qualify as hazardous work.[69] In determining what constitutes hazardous work, states are encouraged to have regard to international labour standards, particularly those concerning dangerous substances, agents or processes.[70] The list may be revised by states in light of scientific and technological advancement.[71] However, after consulting employers and workers' organisations, states may peg the minimum age for hazardous work at 16 years only if children above that age have been sufficiently trained and are fully protected from the adverse effects of such work.[72] While states can exclude limited categories of work for which the application of the Convention will be difficult, states cannot exclude hazardous work.[73]

The Convention grants more concessions to developing countries, which may initially limit the Convention's application.[74] However, there are certain industries to which the limitations may not extend, and these are mining and quarrying, manufacturing, construction, electricity, gas and water, sanitary services, transport, storage and communications and commercial agriculture.[75]

Every state must undertake all requisite measures within its jurisdiction to effectively implement and enforce the provisions

64 Art 7(1) Convention 138.
65 As above.
66 Art 7(3) Convention 138.
67 Art 6 Convention 138.
68 Art 3(1) Convention 138.
69 Art 3(2) Convention 138.
70 Pt III para 10(1) Recommendation 146.
71 Para 10(2) Recommendation 146.
72 Art 3(3) Convention 138.
73 Art 4 Convention 138.
74 Art 5 Convention 138.
75 Art 5(3) Convention 138.

outlined in the Convention. This shall include legal rules on penalties and registers or documents to be kept by employers with the names, ages and dates of birth of child workers.[76] It is proposed that the legal rules should assign the responsibility of enforcement to an effective person or authority.[77] The recommendation part of this article advocates using labour inspections to ensure compliance with the provisions outlined in the Convention.[78]

Although the Convention was the first truly global instrument to address child labour in all economic activities and at all levels, it was not rapidly ratified as expected, especially by developing countries.[79] According to Borzaga, a legal academic, the reasons why many states in the Global South were not keen to ratify the Convention were cultural, legal and economic. Borzaga states that some of these states were less than likely to ratify a highly-prescriptive instrument – prescriptive in the sense that it indicated minimum age requirements to be applied.[80] The Convention was also said to have been based on a Western model of childhood, which put children out of the workplace. The Western model clashed with the model from the Global South where 'children are considered mature starting with adolescence and thus are asked to play a frequently important role in order to increase their family's well-being [and] the value of family unity and solidarity definitely prevails over a presumed right of children not to work'.[81] As of 1919, when the first minimum age convention was adopted, many countries in the Global South were still under colonial rule. Despite the subsequent decolonisation of the Global South, their admission into the ILO, and the flexibility and concession made for developing countries, the core philosophy of minimum age as the sure way to rid the world of child labour loomed heavily over the Convention. Consequently, numerous states in the Global South opted not to ratify it. In light of these reasons, it is not surprising that Ghana only ratified the Convention in 2011.

Although Ghana's Children's Act 560 of 1998 precedes its ratification of Convention 138, its provisions reflect the letter and spirit of Convention 138. Section 87 of the Children's Act outlaws exploitative labour, to which the law refers as work that 'deprives the child of its health, education and development'.[82] The Act prohibits night work for children and defines night work as work that takes

76 Arts 9(1) & (3) Convention 138.
77 Art 9(2) Convention 138.
78 Pt V, para 14(1)(3) Recommendation 146.
79 Borzaga (n 55) 40-41.
80 Borzaga (n 55) 40.
81 Borzaga (n 55) 54.
82 Sec 87 Children's Act 1998 (Act 560).

place between 20:00 and 06:00.[83] The minimum age of admission to work for children is 15 years,[84] while the minimum age for light work is 13 years.[85] Light work is defined as 'work which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or the capacity of the child to benefit from school work'.[86]

The minimum age for hazardous work is 18 years, and hazardous work relates to work that involves the following categories:[87]

(a) going to sea;
(b) mining and quarrying;
(c) porterage of heavy loads;
(d) manufacturing industries where chemicals are produced or used;
(e) work in places where machines are used; and
(f) work in places such as bars, hotels and places of entertainment where a person may be exposed to immoral behaviour.

The minimum age for any apprenticeship in the informal sector is 15 years or after the completion of basic school.[88] It seems that the applicable age will be whichever is later. Every apprenticeship should be preceded by an apprenticeship contract entered into between the parents or guardians of the apprentice and the craftsperson according to the customs of the trade.[89] The agreement, which must be in writing, must include provisions relating to the cost of protective equipment and tools, which cost is borne by the parent or guardian. It should also outline the craftsperson's commitment to providing shelter for the child and paying an allowance, which should not be less than half of the daily minimum age.[90] The agreement lapses immediately if either party breaches it.[91] The informal sector is characterised by a high degree of illiteracy and informality; thus, contracts or agreements are unlikely to be reduced to writing. Also, the requirement that the apprenticeship agreement in the informal sector be documented is impractical and unrealistic. It is more likely to be violated than followed.

The child is entitled to be released upon completion of the apprenticeship, and the conditions for this release should not be

83 Sec 88 Children's Act 1998 (Act 560).
84 Sec 89 Children's Act 1998 (Act 560).
85 Sec 90(1) Children's Act 1998 (Act 560).
86 Sec 90(2) Children's Act 1998 (Act 560).
87 As above.
88 Sec 98 Children's Act, 1998 (Act 560).
89 Secs 100 (1) & (2) Children's Act, 1998 (Act 560).
90 Secs 101(3) & (4) Children's Act 1998 (Act 560).
91 Sec 101(5) Children's Act 1998 (Act 560).

exploitative. A certificate of release shall also be issued to the child apprentice.[92] Disputes about the apprenticeship agreement are to be referred to the district labour officer for resolution.[93]

In line with the provisions of the ILO Convention, which requires states to legislate the keeping of registers, section 93 of the Children's Act indicates that an employee in an industrial undertaking must keep a register of children, including their dates of birth.[94] An industrial undertaking is explained to mean any form of work that is not related to commerce or agriculture. These forms of work include mining and quarrying, manufacturing and related activities, transportation and related activities.

There are two enforcement mechanisms in the Act. One applies to the formal sector, and the other applies to the informal sector. For the formal sector, enforcement is carried out by labour officers whose role is to carry out relevant enquiries to ensure that the provisions of the Act are strictly complied with in the formal sector.[95] This provision, though well-intentioned, is spectacularly vague and unhelpful. Where, how and when the labour officers should act are unstated. Related provisions do not help much. For instance, the labour officer may interrogate any person and, if satisfied that the provisions have not been complied with, should report the non-compliance to the police for investigation and prosecution. The authority of labour officers regarding child labour is so limited that it raises questions about how they can effectively enforce the provisions of the Children's Act. Contrary to these very narrow powers given to labour officers under the Children's Act, labour inspectors have broad powers under the Labour Act 651 of 2003. They can inspect any workplace during working hours, carry out any probe to ascertain compliance with the Labour Act and its regulations, interview employees or workers in respect of compliance, demand that books, registers and necessary documents be produced for inspection, and enforce notices.[96]

In the informal sector, enforcement is entrusted to the District Assemblies through their Social Services Sub-Committee and the Department of Social Welfare.[97] A member of the social services, who has interrogative powers like labour officers, is under a duty to report non-compliance to the police for investigation and prosecution.[98]

92 Sec 102 Children's Act 1998 (Act 560).
93 Sec 103 Children's Act 1998 (Act 560).
94 Sec 93(1) Children's Act 1998 (Act 560).
95 Sec 95(1) Children's Act 1998 (Act 560).
96 Sec 124 Labour Act 2003 (Act 651).
97 Sec 96(1) Children's Act 1998 (Act 560).
98 Secs 96(2) & (3) Children's Act 1998 (Act 560).

If the offender is a family member, a member of the social services subcommittee or the Department may ask that a social inquiry report be prepared. The police may consider the report before initiating any action.[99]

The Children's Act includes penalties for non-compliance. Violation of the provisions on child work is an offence, punishable by a fine of not more than 1 000 cedis, a term of imprisonment of not more than two years, or both.[100] Failure to keep registers attracts a fine of not less than 50 cedis.[101]

### 3.2 Convention 182 and Recommendation 190

In the 1990s, the ILO and other international organisations recognised that Convention 138 was not working and gradually adjusted its strategy by focusing on the progressive elimination of only the WFCL. In 1998 a new convention was proposed to deal with the matter. Under article 1, states agreed to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'. What constitutes WFCL is described in article 3 of the Convention as follows:

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

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Under the Convention, states must identify the types of work that constitute WFCL in their territories in collaboration with employers and workers' organisations in accordance with international standards.[102] The list is to be reviewed periodically.[103]

99 Secs 96(5) & (6) Children's Act 1998 (Act 560).
100 Using a cedi-to-United States dollar exchange rate of 12,99 cedis to 1 United States dollar as of 12 April 2024, 1 000 cedis would amount to US $76,98.
101 Sec 94 Children's Act 1998 (Act 560); using a cedi-to-United States dollar exchange rate of 12,99 cedis to 1 United States dollar as of 12 April 2024, 50 cedis would amount to US $3,85.
102 Arts 4(1) & (2) Convention 182.
103 Art 4(3) Convention 182.

States have the responsibility to consult their employers and workers' organisations to set up mechanisms to implement the Convention in their respective jurisdictions.[104] States have to design and implement programmes geared towards eliminating the worst forms of child labour and implement them in collaboration with the relevant government institutions, employers and workers' organisations.[105] States are to equally consider the use of criminal sanctions, education, and time-bound measures to prevent and remove children from these WFCLs, with special focus given to vulnerable children and girls.[106] The breadth of programmes that should be implemented is captured in the recommendation part. States have to put policy measures in place to collect and analyse data on child labour, establish monitoring institutions and mechanisms, and criminalise child slavery and slave-like practices, the trafficking of children, child sex work and child pornography, and the use of children for illicit work.[107]

It should also be noted that Convention 182 does not define some key terms used in framing its definition of the instances that constitute WFCL. For instance, it does not define forced labour and child pornography. Thus, it has been suggested that the definitions of these terms in related instruments should be utilised to fill in the gaps.[108] For instance, the ILO Forced Labour Convention defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[109] The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography may also give insight into the meaning of child pornography.[110]

Convention 182, unlike Convention 138, found favour with many countries, which soon ratified it. Convention 182 became the first international ILO instrument to be ratified by all member states – a record indeed.[111] Analysis of the Convention by the ILO's Committee

104 Art 5 Convention 182.
105 Art 6 Convention 182.
106 Art 7 Convention 182.
107 Pt III paras 5-16 Recommendation 190.
108 D Rishikesh 'The worst forms of child labour: A guide to ILO Convention 182 and Recommendation 190' in G Nesi, L Nogler & M Pertile (eds) *Child labour in a globalised world: A legal analysis of ILO action* (2008) 85-87.
109 ILO Forced Labour Convention (14th Conference Session, Geneva 28 June 1930) art 2(1).
110 Art. 2 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornograph (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227 (Optional Protocol to the CRC).
111 ILO & UNICEF (n 1) 58.

of Experts on the Application of Conventions and Recommendations (CEACR) also shows that the Convention has made massive inroads into global and domestic interventions against child labour. It has been noted, for instance, that many states have passed legislation to prohibit child trafficking and forced slavery, child prostitution and the use of children for hazardous work.[112] For hazardous work, in particular, states have either prohibited such work generally or introduced a list of hazardous work.[113] Many states have also introduced time-bound measures to eradicate WFCL.[114] These time-bound measures may apply to some forms of hazardous work, and others may address hazardous work in specific sectors such as construction, mining and plantation farming.[115] It has also been suggested that some time-bound measures identify priority areas within its broad framework, and these priority areas could be child domestic labour, mining and quarrying, deep-sea fishing, footwear-making, and so forth.[116]

A review of Ghana's child and labour laws shows that no piece of legislation references WFCL. Perhaps WFCL are covered by other enactments. For instance, the Criminal Offences Act 29 of 1960 bans slavery and customary servitude. The Human Trafficking Act 694 of 2005 also criminalises the trafficking of persons within and outside Ghana's borders.

## 4 Policy measures and institutional responses to child labour

While the country appears to have not effectively tackled the problem of child labour, it is important to acknowledge that some interventions have in the past been introduced to address the issue. This part examines some of the policy measures and interventions that have been implemented by the government of Ghana and other partners to address child labour in Ghana since 2000.

Ghana adopted a National Plan for the Elimination of Child Labour in 2001 with the help of ILO-IPEC and the United Nations Department of Labour. The programme aimed to eliminate customary servitude in the Volta region, domestic servitude in the Kumasi metropolis, and child labour in the tourism industry in some areas of the Central

112 Rishikesh (n 108) 92-93.
113 Rishikesh (n 108) 96-97.
114 As above.
115 Rishikesh (n 108) 97.
116 As above.

region.[117] The project also sought to prevent the movement of child porters, popularly known as *kayaye*, from Northern Ghana.[118] The project was instrumental in establishing the Child Labour Unit at the Ministry of Manpower Development and Employment, now the Ministry of Employment and Labour Relations, and the National Steering Committee on Child Labour. The National Steering Committee is a multisectoral committee of representatives from different government ministries, departments and agencies working together to enhance cross-sectoral collaboration in the fight against child labour.

The ILO-IPEC Time Bound programme was subsequently initiated in 2004 to help Ghana eradicate WFCL.[119] District and community child protection committees were set up and tasked with developing child labour plans and monitoring systems.[120]

Hilson argues that the Time Bound programme was based on a 'small information base and inconclusive evidence about the drivers and implications of child labour in rural Ghana' as the statistics often relied on by the ILO, and the government data did not consider the fact that many children who worked on farms were in fact children 'going to farm' and not children being exploited.[121] Hilson, who conducted his research in the artisanal mining communities of the Talensi-Nabdam district of the Upper East region, indicates that the increase in the number of children who supposedly are engaged in artisanal mining activities may be part of a result of widespread economic diversification in the area. Thus, some of the children in mines are actually children who accompany their parents to the mine and perform light work just like children who 'go to farm' with their parents.[122] Hilson also argues that the link between education and child labour is often drawn as inversely related, which is more complex than it is, as there is evidence to show that many of these children work to support their education.[123]

Ghana also participated in the ILO-IPEC's West Africa Cocoa/ Commercial Agriculture Programme (WACAP), which was launched in 2002 and implemented in Ghana, Guinea, Cameroon, Côte

117 ILO *Evaluation Summaries: National programme for the elimination of child labour in Ghana* (2004) 1.
118 As above.
119 Hilson (n 30) 452.
120 As above.
121 Hilson (n 30) 453.
122 As above.
123 Hilson (n 30) 461-465.

d'Ivoire and Nigeria.[124] The US$6 million programme carried out studies in child labour, particularly in the cocoa sector, developed a training manual for farmers, improved basic education and tested a novel child monitoring and reporting mechanism in some cocoa-producing districts in Ghana.[125] The project successfully withdrew 6 223 children from child labour and placed them in formal education, while another 3 457 were placed in vocational training programmes.[126]

The country adopted a new national plan of action towards eliminating child labour (NAP I) for the years 2009 to 2016. The NAP phase had among its objectives the review, revision and enforcement of the laws on child labour; making education affordable, accessible and quality, especially in deprived communities; and strengthening institutions and empowering them to identify, withdraw and reintegrate children who are victims of the worst forms of child labour. The NAP's performance was lacklustre, and it was blamed on institutional, technical and logistical incapacity.[127] During the period, though, the government developed a Hazardous Activity Framework (HAF), a standard operating procedure to address the worst forms of child labour and community and district action plans in over a hundred districts in the country.[128] The Anti-Human Trafficking Unit of the Ghana Police Service was also noted for intercepting child trafficking incidents.[129]

In 2009 the Eliminating the Worst Forms of Child Labour in West Africa and Strengthening Sub-Regional Cooperation through ECOWAS I project was initiated to support the efforts of Côte d'Ivoire, Ghana and Nigeria in fighting child labour and by enhancing cooperation among sub-regional policy makers in West Africa.[130] This was followed up by the Eliminating the Worst Forms of Child Labour

124 ILO 'West Africa cocoa/commercial agriculture programme to combat hazardous and exploitative child labour (Cameroon, Côte d'Ivoire, Ghana, Guinea and Nigeria)', https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-abuja/documents/publication/wcms_303658.pdf (accessed 17 February 2024).

125 Bureau of International Labour Affairs *2004 Findings on the worst forms of child labour – Ghana, United States Department of Labour* (2005), https://www.refworld.org/reference/annualreport/usdol/2005/en/62366 (accessed 20 February 2024).

126 ILO (n 124) 4.

127 Ministry of Employment and Labour Relations and Partners *The national plan of action phase II (NPA2) for the elimination of the worst forms of child labour in Ghana – 2017-2021)* (NPA II) 22-23 (NPA II).

128 NPA II (n 127) 22.

129 As above.

130 'Eliminating the worst forms of child labour in West Africa and strengthening sub-regional cooperation through ECOWAS – I', https://www.ilo.org/africa/WCMS_303810/lang--en/index.htm (accessed 20 February 2024).

in West Africa and Strengthening Sub-Regional Cooperation through ECOWAS II.[131]

In 2015 the Convening Stakeholders to Develop and Implement Strategies to Reduce Child Labour and Improve Working Conditions in Artisanal and Small-Scale Gold Mining (CARING Gold Mining) Project by ILO-IPEC and the United States Department of Labour was launched to reduce the child labour in artisanal small-scale mining in Ghana and the Philippines.[132]

The country adopted another national action plan (NAP II) in 2017 to run from 2017 to 2022.[133] The goal of the policy was 'to reduce the worst forms of child labour to the barest minimum (<10 per cent), by 2021 while laying strong social, policy and institutional foundations for the elimination and prevention of all forms of child labour in the longer term'.[134]

The NAP II identified specific priority areas that were to receive specific focus, with emphasis placed on the WFCL.[135] Among the priority areas were public awareness creation and the implantation of education, rural economy and youth employment policies, law enforcement, withdrawal of children aged 15 or less from child labour and the protection of those above 15 from hazardous work and the operationalisation of the HAF. The NAP II blended upstream measures with community and district mechanisms to directly implement interventions where they occurred. The government, committed to achieving SDG 8.7, adopted the Protocols and Guidelines for Establishing Child Labour Free Zones (CLFZs) in 2019, to complement the NAP II. A CLFZ is defined as 'a geographical area (metropolitan, municipal or district) in which incidence of child labour is eradicated'.[136] The CLFZ Protocol contains the conditions and modalities under which a geographical area may be declared a CLFZ.

131 'Eliminating the worst forms of child labour in West Africa and strengthening sub-regional cooperation through ECOWAS – II', https://www.ilo.org/africa/WCMS_304007/lang--en/index.htm (accessed 20 February 2024).
132 'Convening stakeholders to develop and implement strategies to reduce child labour and improve working conditions in artisanal and small-scale gold mining (CARING Gold Mining) project', https://www.ilo.org/ipec/projects/global/WCMS_460499/lang--en/index.htm (accessed 20 February 2024).
133 NPA II (n 127).
134 NPA II (n 127) 28.
135 NPA II (n 127) 24.
136 Ministry of Employment and Labour Relations and Partners *Establishing child labour free zones (CLFZS) in Ghana: Protocols and guidelines* 5.

While the NAP II appeared to have worked better than its predecessor, several issues remained.[137] Despite increased awareness of child labour, a significant number of children continued to engage in perilous labour in mines, at sea and other places.[138] A lack of resources also hindered the ability of the Child Labour Unit to monitor compliance.[139] Although social intervention services had been expanded, there was poor communication between the Ministry of Employment and Labour Relations and the Ministry of Gender, Children and Social Protection.[140] Both used different management and monitoring systems. The Ministry of Employment and Labour Relations used the Ghana Child Labour Monitoring System (GCLMS), while the Ministry of Gender, Children and Social Protection used the Social Welfare Information Management System (SWIMS). Thus, social protection efforts entered into the SWIMS were not recorded in the GCLMS.[141] Additionally, it was found that there was no coordination between the district labour officers and the social services sub-committees of the district because the district labour officers were not members of the sub-committees, which made implementation at the decentralised levels difficult.[142]

In 2021 the European Union (EU) also launched the Trade for Decent Work Project to, among other things, build the country's capacity to enable it to comply with its reporting standards to the ILO's CEACR, help review the list of hazardous work and enhance advocacy towards the elimination of child labour in the cocoa industry.[143] In 2022 the EU, Ghana and Côte d'Ivoire committed to the Alliance for Sustainable Cocoa initiative and agreed to take time-bound measures to make West African cocoa more sustainable.[144]

A new national action plan aimed at building on the successes of NAP II while addressing the defects identified has been adopted for 2023 to 2027.[145] The plan was developed with the support of the United Nations Children's Fund (UNICEF) and the International

137 Ministry of Employment and Labour Relations and Partners *Ghana accelerated action plan against child labour (National plan of action for the elimination of child labour) (2023-2027)* 13-17 (NPA III).
138 NPA III (n 137) 13.
139 As above.
140 NPA III (n 137) 14.
141 As above.
142 As above.
143 'Trade for decent work project – Ghana', https://www.ilo.org/africa/countries-covered/ghana/WCMS_782061/lang--en/index.htm (accessed 21 February 2024).
144 Directorate-General for Trade 'EU, Côte d'Ivoire, Ghana and the Cocoa sector endorse an alliance on sustainable cocoa' 28 June 2022, https://policy.trade.ec.europa.eu/news/eu-cote-divoire-ghana-and-cocoa-sector-endorse-alliance-sustainable-cocoa-2022-06-28_en (accessed 21 February 2024).
145 NPA III (n 137).

Cocoa Initiative. NAP III draws inspiration from the HAF and will focus on child labour in the following priority areas: agriculture; street hawking; begging and porterage; illegal small-scale mining and quarrying; transportation; child domestic work; plastic waste and scraps collection; commercial sex exploitation of children (CSEC); and gaming and betting.[146]

The NAP III intends to 'build institutional capacity and empower communities to halve child labour in agriculture in particular and all other priority sectors of Ghana by 2027 towards a child labour-free Ghana in the long term'.[147]

In order to do this, it establishes a very elaborate institutional framework. The highest policy institution in the framework is the National Steering Committee on Child Labour hosted by the MELR, which has a defined membership.[148] Sub-committees and technical working groups will be formed from these committees.[149] The Child Labour Unit will also be strengthened and renamed the Child Labour Coordinating Secretariat.[150] It is impressive that regional and district labour offices will also have additional roles as regional child labour coordinators and district child labour coordinators, respectively. Where a district does not have a child labour officer, an officer of the Department of Social Welfare may be recognised as the child labour coordinator.[151] The child labour coordinators are responsible for implementing the NAP III in their respective locations. For the first time, there is a clear intention to give labour officers a greater role in the fight against child labour. Regional child protection committees, district child protection committees and community child protection committees shall also be established, and regional and district labour officers shall be co-opted into the social services sub-committee of the district assemblies.[152] As part of the activities in the NAP III,

146 NPA III (n 137) 21.
147 NPA III (n 137) 22.
148 From the policy members of the National Steering Committee are representatives from the following: Ministry of Gender, Children and Social Protection; Ministry of Food and Agriculture; Ministry of Fisheries; Ministry of Lands and Natural Resources; Ministry of Education; Ministry of Environment, Science, Technology and Innovations; Ministry of Local Government Decentralisation and Rural Development; Ministry of Interior; Ministry of Justice and Attorney General; the Trades Union Congress (TUC) and the Ghana Employers Association; Ghana Cocoa Board; Fisheries Commission; Minerals Commission, Forestry Commission, Commission on Human Rights and Administrative Justice (CHRAJ); National Development Planning Commission; National Commission for Civic Education (NCCE); Ghana Journalists Association; Federation of Muslim Councils; Christian Council; Civil Society Organisations and a representative of the Private Sector/ Industry; see NPA III (n 137) 24.
149 NPA III (n 137) 24-25.
150 NPA III (n 137) 25.
151 As above.
152 NPA III (n 137) 26-28.

the Attorney-General and the CHRAJ are to develop legislation to implement the Hazardous Activity Framework.[153]

## 5 Identification of the gaps, limitations and deficiencies in the legal, policy and institutional framework on child labour in Ghana

### 5.1 The mismatch between the law and policy

The policy framework for the protection of child labour is far advanced and has consistently built on the progress made in previous policy and social interventions. The interventions described above illustrate that child labour in the mining and cocoa industry remains a pressing programme, and efforts have consistently been made over the years to reduce children's involvement in these industries. The development of the HAF is also commendable and, if implemented, will help provide normative ground for eliminating WFCL.

The institutional structure for eliminating child labour has also been strengthened. The National Steering Committee on Child Labour, the National Child Labour Coordinating Secretariat and the various regional, district and community protection committees with various levels of supervisory oversight hold promise for the full implementation of child labour programmes in Ghana.

All these innovations notwithstanding, the core policy documents, the NAPs, admit that there is a need for law reform to reflect higher labour standards and best practices, especially concerning the implementation of the HAF. However, these documents provide limited information regarding the specific nature of these changes or initiatives for legal reform. The various components of the institutional structures have never been officially introduced into the legislation. Labour officers still have very limited powers under the Children's Act, and the enhanced roles that will be given to them under the NAP III are not reflected in the Children's Act. It, therefore, appears to be the case that there is a strong mismatch between the law and the policy.

Other than the legal measures, which will be explained in the succeeding subparts, there is a pressing necessity to amend the Children's Act to incorporate some of the policy measures that

153 NPA III (n 137) 38.

have been introduced or will be introduced. For instance, the institutional structure for child work should be more elaborate. The Children's Act, by law, should establish the National Steering Committee, the National Child Labour Secretariat, and the regional, district and community protection committees. The composition of these institutions should be stated, and their functions, duties and conditions under which they hold office should be described. The enhanced roles given to the labour officers should be reflected in the law. In light of this, the distinction between child labour in the formal and informal sectors as regards the enforcement of the provisions on child labour should be jettisoned, and a more collaborative posture between the labour officers and social services sub-committees of the district assemblies should be fostered. To supplement the implementation role of the labour officers, the vague and unhelpful powers given to labour officers to enforce the provisions on child work should be removed. We recommend that all enforcement, investigative and directive powers of the labour officers in the Labour Act should apply when the labour officers enforce the Children's Act provisions on children's work.

Generally, legislative measures possess great legal validity. Accordingly, legislating the various interventions will potentially increase the state's inclination to eliminate child labour. The policy prescriptions, while commendable, could remain merely aspirational.

### 5.2 There are no legislative provisions on conditions of work for light work

Children who are 13 years or over can do light work. However, the provisions do not specify the conditions of service which should apply when children do light work. The absence of such provisions opens children up to potential labour exploitation and manipulation. We recommend that the Children's Act be amended to introduce minimum labour protections for children engaged in light work.

Drawing inspiration from South Africa's Regulations on Hazardous Work by Children in South Africa,[154] we suggest that, at the very least, conditions of work should include a guarantee from an employer that the child's work will not affect the child's nutrition, access to primary healthcare services, and education if the child

154 Government of South Africa. Basic Conditions of Employment Act (75 of 1997): Regulations on Hazardous Work by Children in South Africa, No 32862, (2010), https://www.saflii.org/za/legis/consol_reg/rohwbcisa545/ (accessed 21 February 2024) (South African Regulations).

is enrolled in an institution.[155] If a child remains separated from their parents or guardians, it is imperative to establish appropriate measures to guarantee the child's continued attendance at school, adequate shelter, and provision of sufficient bedding, lavatory or washing amenities. It is also imperative to ensure that the child is adequately supplied with nourishing food, either through direct provision or by granting them an allowance that enables them to purchase or obtain such items.[156] A child should be entitled to a minimum wage, and their remuneration should be determined by the successful completion of assigned tasks rather than the amount of work performed.[157] These measures will reduce the incidence of exploitation. There should also be a strict number of hours children are permitted to work. We suggest that no child should work more than eight hours on any day when not attending school or during school holidays.[158] When enrolled in school, children should not be allowed to work more than 20 hours a week.[159]

### 5.3 Updating the hazardous work list

In 2008 the government adopted a policy framework to guide decision making in the area of hazardous work done by children in the Cocoa sector.[160] This policy framework, the Hazardous Child Labour Activity Framework for the Cocoa Sector in Ghana, identified work in the cocoa sector that the state considered hazardous. These included activities such as bush burning and forest clearing. As of 2016, the policy framework has been extended to other sectors where children are found to be doing hazardous work. The policy framework has recognised the insufficiency of the hazardous work list in the Children's Act. A new updated list has been developed, and the following types of work are considered hazardous in Ghana:[161]

(1) fishing in open waters, that is, sea, river, lake and lagoon;

(2) fish processing and sale (fish mongering);

(3) mining and quarrying;

(4) crop agriculture – cocoa, rubber, cotton, oil palm, citrus, rice, vegetables and fruits;

155 Reg 3 South African Regulations.
156 Reg 4 South African Regulations.
157 Reg 7 South African Regulations.
158 Reg 6 South African Regulations.
159 As above.
160 Ministry of Man Power, Youth and Employment *Hazardous child labour activity framework for the cocoa sector in Ghana* (2008).
161 Child Labour Unit of the Labour Department Ministry of Employment and Social Welfare (MESW) *Hazardous child labour activity framework for Ghana* (HAF) (nd) 38-39, https://www.cocoainitiative.org/sites/default/files/resources/Hazardous-Activity-Framework_2016-002.pdf (accessed 21 February 2024).

(5) livestock keeping – cattle herding, goat and sheep rearing;
(6) domestic work;
(7) porterage and carting of heavy loads, for instance, *kayaye*;
(8) street hawking;
(9) street beggars guide;
(10) scavenging at garbage dumps;
(11) working in commercial kitchens, that is, chop bars and restaurants;
(12) working in the hospitality industry, that is, hotels, drinking bars, casinos and nightclubs;
(13) small-scale textile manufacturing, that is, tie and dye;
(14) foundries works, that is, aluminium and lead smelting and blacksmithing;
(15) work at mills and machine shops, that is, sawmills and grinding mills;
(16) transportation of passengers and goods, that is, drivers' mate;
(17) workshops and garages, that is, fitting parts, welding and spraying of cars.

However, the Children's Act has not been updated to reflect this list. We join the ILO in calling for the state to 'take the necessary measures to ensure that the HAF is adopted in the near future'.[162] Section 90(2) of the Children's Act should be amended to reflect the updated list in the HAF.

### 5.4 There is no prohibition on WFCL in armed conflicts and the production of illegal drugs

WFCL in Ghana have been penalised under the Criminal Offences Act 29 of 1960, as amended, and other related statutes such as the Human Trafficking Act 2005. Slavery, trafficking and child prostitution have all been criminalised under these statutes. However, there is no clear prohibition on the use of children in the production of illicit drugs. Although Ghana's Narcotics Control Commission Act 1019 of 2020 creates several drug-related offences, none of these directly target the use of children for the production of such drugs. Hence, we recommend an amendment to Act 1019 to criminalise the use of children in the production of illicit drugs.

162 International Labor Organisation, 'Observation (CEACR) adopted 2022, published 111th ILC session',2023, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID%2CP13100_COUNTRY_ID:4312195%2C103236 (accessed 21 February 2024).

We also note that there is no clear prohibition on the use of children in armed conflict. The state's international obligations under Convention 182 require that steps be taken to remove and shield children from theatres of war. We recommend the inclusion of a provision in Act 29 to criminalise and impose severe penalties on any person who recruits and uses children in armed conflicts.

### 5.5 Criminalising illegal mining

Children's involvement in illegal mining is uncontested. However, the focus of legislative attention has consistently revolved around the criminalisation of illegal mining and the enhancement of penalties to deter persons from engaging in illegal mining.[163] The offences have often been about mining without a licence, and the prohibition on foreigners in the small-scale mining industry as main participants or mine service providers, among others. There have been no express provisions on the use of child miners. Thus, we recommend that legislative changes be made to the Minerals and Mining Act 703 of 2006 to criminalise the use of child miners in Ghana. The change should make it a crime to use, permit, require, transport, harbour or receive a child for illegal mining. The payment of 5 000 penalty units or a minimum sentence of seven years, in our view, seems justifiable and sufficiently deterrent to effectively eradicate child labour in the mining sector.

### 5.6 Extending registers to other undertakings

It is important to note that section 93 of the Children's Act requires employers in industrial undertakings to keep registers of children employed. However, this excludes agriculture and commerce. While we concede that many children who support their families in subsistence agriculture are not victims of child labour but rather are contributing to the sustenance of their families, the prevalence of subsistence agriculture should not serve as justification for excluding all forms of agriculture from strict anti-child labour laws. We also understand that many children do light work and help their families in trading. Again, this should not be a reason to exempt all employers in the commercial sector from complying with the provision on keeping registers. Overall, there is no justification for granting an exemption to plantations, commercial agricultural establishments, and medium to large commercial entities from the requirement

163 See Mining and Minerals Amendment Act 2015 (Act 900) and Minerals and Mining (Amendment) Act 2019 (Act 995).

to maintain registers. We, therefore, suggest that the provisions on maintaining registers for employed children be extended to all forms of work save subsistence agriculture and small family-based businesses in which it is safe to conclude that children do only light work.

## 6 A summary of recommendations and conclusion

Ghana's ambitious target to eliminate child labour by 2025 is a daunting task that can only work if the country follows through with the actual implementation of proposed reforms in its National Action Plan III. Our observations show that some work remains to be done to bring the law in line with the aspirational policy goals in the NAP III. In conclusion, we propose the following:

(1) The institutional structure for eliminating child labour, introduced and built upon by previous national action plans, should be established as fully-fledged legal institutions under the Children's Act. Labour officers, who will be called child labour coordinating officers in some cases, should also be given the power to enforce the Children's Act by exercising all the powers given to them under the Labour Act.

(2) Conditions of employment for child workers as regards light work should be introduced. These conditions of service should guarantee the child's nutrition, education, access to health care, arrangements for shelter, hours of work, and remuneration.

(3) The hazardous work list should be updated to reflect the Hazardous Activity Framework.

(4) The Narcotics Control Commission Act should be amended to criminalise the use of child workers for illicit drug activities.

(5) The Criminal Offences Act should be amended to criminalise the use of children in armed conflicts.

(6) The Minerals and Mining Act should also be amended to criminalise the employment or use of children in mines.

(7) The obligation to keep registers should be extended to commercial and plantation agriculture and medium to large-scale commercial enterprises.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: KJ Kelepa 'The role of social workers in addressing child marriage in Lesotho' (2025) 25 *African Human Rights Law Journal* 223-250
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a9

# The role of social workers in addressing child marriage in Lesotho

*Kabelo Justice Kelepa**
Admitted advocate of the courts of Lesotho; Advocate at K Ndebele Attorneys, Maseru, Lesotho
https://orcid.org/0009-0007-8059-103X

**Summary:** *Lesotho is a state party to global and regional treaties that seek to address the issue of child marriage. To respond to the clarion call by international bodies to domesticate those treaties, Lesotho has promulgated the Children's Protection and Welfare Act 2011. Despite the promulgation of this Act, the level of child marriage in Lesotho remains alarming. This article discusses the global (United Nations), regional (African Union) and sub-regional (Southern African Development Community) legal frameworks available to address the challenges arising from child marriage. It further examines the causes and challenges experienced by children in Lesotho, in general, and by girls, specifically. The article suggests a number of roles that social workers, as professionals who are highly equipped with the skills to handle children's issues, may play in addressing the causes of child marriage. The article argues that Lesotho is failing to implement the existing legal framework and suggests that social workers, if engaged, are better positioned to assist the country in curbing child marriage. The article further argues that social workers may play a key role in bridging the gap between the legal and the social approaches to protect children from early marriage. The article concludes by recommending ways in which social workers can be useful in addressing this seemingly intractable social dilemma.*

* LLB (National University of Lesotho); justicekelepa7@gmail.com

**Key words:** *social workers; child marriages; causes; challenges; laws; implementation; Lesotho*

## 1 Introduction

According to a United Nations Children's Fund (UNICEF) report,[1] child marriage includes any legal or customary union involving a boy or a girl below the age of 18 years, or any marriage without the free and full consent of both intended spouses below the age of 18 years.[2] Child marriage is a prominent public health concern and human rights violation rooted in deeply-entrenched gender inequality. It affects as many as one in five girls globally.[3]

The purpose of this article is to explore the global (United Nations (UN)), regional (African Union (AU)), sub-regional (Southern African Development Community (SADC)) and national legislative and policy frameworks that seek to define child marriage and address it. The article also explores ways in which this social dilemma has been and continues to be addressed at different levels in Lesotho. In this spirit, the article interrogates how social workers can be part of the fight against child marriage. It is also argued that child marriage is a case for gender equality in Lesotho to the extent that the laws provide for girls to be married at the age of 16 and boys at the age of 18 years. These objectives will be achieved by defining, with the aid of legislative instruments, what child marriage is and what its consequences are. To paint a better picture of the factors that allow child marriage to take place, the article analyses some of the causes of child marriage. Further, the text defines what and who social workers are and suggest ways in which they can be part of the struggle. Finally, recommendations are made on how better the Kingdom of Lesotho can approach this harmful practice.

## 2 Global instruments that define child marriage

Article 16 of the 1948 Universal Declaration of Human Rights (Universal Declaration) provides as follows:[4]

1 UNICEF *Annual report 2016*.
2 CEDAW Committee & UNCRC Committee Joint General Recommendation 31 of the Committee on the Elimination of Discrimination Against Women/General Comment 18 of the Committee on the Rights of the Child on Harmful Practices UN Doc CEDAW/C/GC/31/Rev. 1-CRC/C/GC/18/Rev. 1 (8 May 2019).
3 UNICEF 'Child marriage: Child marriage threatens the lives, well-being and futures of girls around the world: 2022', https://www.unicef.org/protection/child-marriage (accessed 31 January 2025).
4 Arts 16(1) & (2) Universal Declaration.

> (1) Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

The 1962 (UN) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage reaffirms that state parties

> should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, *inter alia*, complete freedom in the choice of a spouse, eliminating child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or another register in which all marriages will be recorded.[5]

These obligations have been reiterated in subsequent human rights instruments.

The 1994 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that the betrothal and marriage of a child shall have no legal effect. The Convention calls on member states to take all necessary action, including legislation, to specify a minimum age for marriage. Member states should also make the registration of marriages in an official registry compulsory.[6] In this article we gather that the issue of registration of marriages is an important task, including the stipulation of the minimum age for entry into marriage.

The 1989 Convention on the Rights of the Child (CRC) mandates state parties to take appropriate legislative, administrative and other measures to protect the child from all forms of violence and abuse, including sexual abuse. Article 34 of CRC obligates states to protect children from all forms of sexual exploitation and abuse. Child marriage, being another form of sexual exploitation, is also envisaged in this provision.[7] Maluleke argues that although some forms of treatment, practices and customs may be normal in the local communities where they are perpetuated, they are inconsistent with the principles outlined in the Universal Declaration.[8]

---

5 United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage 1962 Reaffirmation statement read with art 3.

6 Art 16(2) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); CEDAW Committee General Recommendation 21: Equality in Marriage and Family Relations, UN Doc A/49/38 (1994) 1.

7 Art 19(1) Convention on the Rights of the Child 1989.

8 MJ Maluleke 'Culture, tradition, custom and gender equality' (2012) 15 *Potchefstroom Electronic Law Journal* 1-22; Fact Sheet 23, Harmful Traditional

Through their first ever joint General Recommendation, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the Committee on the Rights of the Child (CRC Committee) recommended that state parties adopt or amend legislation to ensure that 'a minimum legal age of marriage for girls and boys is established, with or without parental consent, at 18 years'.[9] Arthur and others clarify that when marriage is allowed at an earlier age under exceptional circumstances, the absolute minimum age should not be below 16 years and that marriage should only be permitted by a court of law based on strictly defined grounds and full, free and informed consent of the intended child spouse(s).[10]

## 3 Regional instruments that define child marriage

The African Charter on Human and Peoples' Rights (African Charter)[11] is the continental bedrock of human rights promotion and protection in Africa. The African Charter serves as a guiding tool to human rights on the continent. The African Charter aims, among others, to address non-discrimination against women and combat inequality.[12]

The African Charter requires states to eliminate discrimination against women and girls and protect their rights as outlined in international agreements.[13] The Charter also focuses on fixing the age of marriage at 18 years with no exceptions in line with article 6(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and article 21(2) of the African Charter on the Rights and Welfare of

Practices Affecting the Health of Women and Children. In dealing with the alleged violations of art 16 of the African Children's Charter by the Tanzanian government, the African Children's Committee made reference to CRC and the Universal Declaration. The Committee made it clear that the state is responsible for all the humiliating acts done to children by private actors as long as the state is aware of them; African Children's Committee Communication 12/Com/001/2019, Decision 002/2022, *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* para 33; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 71; African Commission General Comment 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5) para 58.

9 Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 2014.

10 M Arthur and others 'Child marriage laws around the world: Minimum marriage age, legal exceptions, and gender disparities' (2018) 39 *Journal of Women, Politics and Policy* 51-74.

11 African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217.

12 E Mensah 'Women's rights in Africa: Exploring the integration of CEDAW and ACHPR in addressing violence against women' (2024) 12 *Journal of Social Science for Policy Implications* 1-8.

13 Art 18(3) African Charter.

the Child (African Children's Charter), which prohibit marriage and the betrothal of children below the age of 18 years.

To advance this mandate to provide protection for women and girls, the African Women's Protocol was enacted. The Protocol provides that state parties must enact appropriate national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties. The Women's Protocol sets the minimum age of marriage for women at 18 years. It encourages monogamy as a form of marriage. The Women's Protocol makes it a requirement that every marriage be recorded in writing and registered following national laws for it to be legally recognised.[14] Article 5 also disapproves of all harmful practices that militate against women's and girls' rights.[15]

Article 21 of the African Children's Charter provides as follows:[16]

> (1) State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child and in particular –
>
> (a) those customs and practices prejudicial to the health or life of the child; and
>
> (b) those customs and practices which are discriminatory to the child on the grounds of sex or other status.
>
> (2) Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 2 of the African Children's Charter states that a child 'is every human being below the age of 18 years'. This provision is reinforced by the African Women's Protocol which also provides that the 'minimum age of marriage for women shall be 18 years'.[17] Chirwa and Bakta submit that by setting a minimum age of 18 years, the two instruments discount the possibility of any consensual or lawful marriage with any person, or between any persons, younger than 18 years. They also echo that the reason for setting the age at 18 is

14 Art 6 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).
15 Art 5 African Women's Protocol.
16 Art 21 African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter).
17 Art 6(c) African Women's Protocol.

because all children under this age have no capacity to give consent to marriage.[18]

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has stated that applying the principle of the best interests of the child, state parties must adopt and enforce legislation that sets the minimum age of marriage at 18 years for both boys and girls.[19] The principle also requires the adoption of effective prevention and redress measures to address those at risk and those already affected by child marriage. The Committee has also expressed that the minimum age of 18 set in article 21 does not offer any exception for marriage or betrothal.[20]

Literature shows that the inter-connectedness of the provisions of the African Children's Charter enhances its protective nature to children.[21] Assim articulates that article 1(3) obligates states to discourage customs that are inconsistent with the rights. Article 3 guarantees freedom from discrimination. Article 4 provides for the best interests of the child and mandates states to do all in the interests of the child. Article 5 provides for survival and development of children.[22] Article 27 provides that children should be protected from sexual exploitation.[23] All these provisions read in totality provide adequate protection against, among others, child marriage.

The AU launched a Campaign to End Child Marriage in Africa on 29 May 2014.[24] Initially, the campaign was set to last for two years, from 2014 to 2016, targeting ten high-burden countries, but

18 DM Chirwa & S Bakta 'Article 2 – Definition of the child' in J Sloth-Nielsen, E Fokala & C Odongo (eds) *African Charter on the Rights and Welfare of the Child – A commentary* (2024) 23-35.

19 I Ebertuk 'Global diffusion of laws: The case of minimum age of marriage legislation' (2021) 8 *European Journal of Cultural and Political Sociology* 294-328; AJ Melnikas and others 'Perceptions of minimum age at marriage laws and their enforcement: Qualitative evidence from Malawi' (2021) 21 *BMC Public Health* 2-12; B Maswikwa and others 'Minimum marriage age laws and the prevalence of child marriage and adolescent birth: Evidence from sub-Saharan Africa' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 58-68. In the 4th cycle of the Human Rights Council working group on universal periodic review held at Geneva, Switzerland 28 April-9 May 2025, Lesotho was also recommended to amend its marriage laws to set the minimum age of marriage to 18.

20 Joint General Comment of the African Commission and the African Children's Committee on ending child marriage 2017 para 16.

21 R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213-236; ACERWC/GC/02 (2014) (Article 6 of the African Charter on the Rights and Welfare of the Child) para 25.

22 L Mwambene & O Mawodza 'Children's rights standards and child marriage in Malawi' (2017) 17 *African Studies Quarterly* 21-44.

23 U Assim 'Article 21 – Protection against harmful social and cultural practices' in Sloth-Nielsen and others (n 18) 301-316.

24 The African Union launched the Campaign on Ending Child Marriage on 29 May 2014 at the 4th Conference of Ministers of Social Development.

it was extended for another two years, to 2018, targeting 30 high-prevalence countries. A new campaign strategy for the period from 2019 to 2023 was subsequently developed.[25]

With the launch of the campaign, the AU immediately appointed the Presidential Champion on Ending Child Marriage (ECM), the African Union Goodwill Ambassador (AU GWA) and the Special Rapporteur on Child Marriage within the African Children's Committee to support the advocacy, monitoring and accountability of the continental commitments.[26]

Overall, an AU Champion aims to strengthen collaboration and a common framework for the eradication of child marriage at a continental level; to ensure increased collaboration between heads of state and government; to promote ownership and involvement of African programmes; to coordinate activities at the highest level; and to facilitate peer learning and review.[27] Although this initiative is at the continental level, among the work of the Champion is to mobilise change and foster collaboration by all the structures that seek to protect children. The objective is to spread the word against child marriage and improve the protection mechanisms for children. It has been observed that in African countries there is poor awareness of existing laws in communities.[28] Many people are not aware of the legal ramifications of child marriage and the laws themselves. This role can best be played by social workers as they are professionals specially trained to deal with vulnerable people, namely, children.

The role of the Goodwill Ambassador on Ending Child Marriage will continue to be a strategic position appointed to the AU Campaign to End Child Marriage with a two-year mandate, on a rotational basis.[29] After the appointment of the Goodwill Ambassador, the campaign was integrated into the work of the African Children's Committee,

25 At the 3rd Specialised Technical Committee on Social Development, Labour and Employment held in Addis Ababa, Ethiopia, 1-5 April 2019, there was a request to the AUC to develop a comprehensive 5-year strategic plan for the direction and strengthening of the campaign.

26 African Commission and African Children's Committee Joint General Comment on Ending Child Marriage 2017 1.

27 Summary Mandate of the African Union Presidential Champion on Ending Child Marriage, presented to the Zambian government during the African Union Monitoring and Support Mission on Ending Child Marriage, 2-6 August 2022.

28 Ending Child Marriage in Eastern and Southern Africa: Challenges in Implementing Domestic Laws and the SADC Model Law on Child Marriage (2023).

29 Strategy of AU Campaign to End Child Marriage (2019-2023) adopted at the 4th Specialised Technical Committee on Labour, Employment and Social Development, April 2022.

which appointed an AU Special Rapporteur to investigate special cases of child marriage.[30]

The launch of the AU Campaign to ECM by member states was essential as it contributes towards the Sustainable Development Goals (SDGs).[31] Target 5.3 aims to 'eliminate all harmful practices, such as child, early and forced marriage', including Target 16.2, which aims to 'end abuse, exploitation, trafficking and all forms of violence against and torture of children'.

Despite the above continental initiatives to provide strategic leadership, child marriage continues to affect millions of girls every year. In response, the AU continues to organise a series of high-level meetings and consultations, in order to mobilise member states and partners towards implementation of the campaign and its policies.

## 4 SADC sub-regional instruments that define child marriage

The eradication of child marriage, using a human rights-based approach, is of crucial importance to the Southern African Development Community (SADC) Parliamentary Forum (PF) to achieve its legislative intent. In June 2014, at its fifty-fifth Plenary Assembly, the PF unanimously approved a review of the status of child marriage in the SADC. This decision was followed in February 2015 by a SADC Regional Parliamentary Dialogue on Child Marriage Laws organised by the PF with the Association of European Parliamentarians with Africa (AWEPA) and Plan International Netherlands. The forum discussed the benefits of model legislation on child marriage and the possible contents of such a law.

The SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriages (SADC Model Law), adopted in 2016, is a landmark regional initiative aimed at domesticating and assisting member states in the design of their national legislation.[32] The objective of the Model Law is to create a legislative yardstick based on agreed-upon concepts derived from international human rights instruments to which member states of SADC have already committed themselves. Therefore, it is a normative tool designed to make it easier for legislators and legislative drafters in member states

30 UNICEF *Review of the African Union Campaign to End Child Marriage 2014-2018* (2018).
31 Sustainable Development Goals Agenda 2030 A/RES/70/1.
32 Adopted on 3 June 2016 by the 39th Plenary Assembly of the SADC Parliamentary Forum, which met in the Kingdom of Eswatini.

to revise, reform and improve their domestic laws and policies in the context of child marriage.

The SADC Model Law defines a child as a person who is younger than 18 years of age.[33] If implemented properly, the Model Law has the potential to end child marriage in the sub-region as it suggests policy changes, implementation, funding and monitoring of such policies initiatives and programmes. However, the benefits of the Model Law can only be optimised by member states adopting the recommended provisions as the Model Law itself is normative rather than binding in nature. The provisions of the SADC Model Law are grounded in binding international and regional human rights standards that most SADC member states, including Lesotho; have ratified. This includes the African Women's Protocol and the Joint General Comment on Ending Child Marriage issued by the African Commission on Human and Peoples' Rights (African Commission) and the African Children's Committee, which made recommendations similar to those of the SADC Model Law.

Lesotho's domestic law does not yet fully incorporate the standards set by these international instruments or the SADC Model Law. Lesotho has a dual legal system that recognises both customary and statutory law and applies equally to marriage laws. International law in Lesotho is not self-executing and, therefore, there should be a statute that is promulgated to domesticate the relevant treaties.[34]

The eradication of child marriages, using a human rights-based approach, is of crucial importance to the SADC PF to achieve its legislative intent. In June 2014, at its thirty-fifth Plenary Assembly, the PF unanimously approved a review of the status of child marriage in SADC. This decision was followed in February 2015 by a SADC Regional Parliamentary Dialogue on Child Marriage Laws organised by the PF with AWEPA and Plan Netherlands.

Child marriage is endemic in most parts of SADC member states and can no longer be regarded as a private matter confined to the family. It is, therefore, time that suitable pieces of legislation be enacted to stop child marriage and its attendant consequences.

33 UNFPA, ESARO & Equality Now *Ending child marriage in Southern Africa: Domesticating the SADC Model Law on Child Marriage: 2023*.

34 I Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy' (2019) 19 *African Human Rights Law Journal* 193-218; J Dugard *International law: A South African perspective* (2011) 42-43; F Viljoen *International human rights law in Africa* (2012) 518-525.

All SADC member states, including Lesotho, are parties to many instruments that are governed by public international law. Article 26 of the Vienna Convention on the Law of Treaties states that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[35] Article 27 states: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[36] These provisions reiterate the obligation of Lesotho to ensure that it domesticates all treaties that have been signed and ratified.

The SADC Protocol on Gender and Development also prohibits marriage to a person below the age of 18 years, and puts the responsibility on states to amend or enact their laws to ensure that no person enters into marriage before the age of 18.[37] It is also a requirement under the Protocol that all marriages, whether customary or civil, be recorded in the registry and that they should be entered into freely and voluntarily by both parties.[38] It also provides that service providers, such as law enforcement agencies and social welfare services, should be given gender education, and that they should provide accessible information on services available to survivors of gender-based violence.[39]

Forere realises that the provisions of the SADC Gender Protocol resemble those of the African Women's Protocol, specifically its six objectives.[40] Zirima describes the Gender Protocol as 'groundbreaking' and as 'the most far-reaching of any sub-regional instrument for achieving gender equality'.[41] This Protocol complements the regional and global legal frameworks that provide for the protection of children against child marriage. It closes the small gaps that were left by the African Women's Protocol and also reinforces the responsibility of states to protect children.

35 See also T Meyer 'Good faith, withdrawal, and the judicialisation of international politics' (2014) 2 *Questions of International Law* 3-19.
36 Vienna Convention on the Law of Treaties 1969. See also Y Rumiana 'Article 27 of the VCLT: Internal law and observance of treaties' University of Cambridge Faculty of Law Research Paper 27/2023; M Killander 'How international human rights law influences domestic law in Africa' (2013) 17 *Law, Development and Democracy* 387.
37 Art 8(2)(a) 2016 Consolidated Text Protocol on Gender and Development, consolidating the 2008 SADC Protocol on Gender and Development, 2008 and the 2016 Agreement Amending the SADC Protocol on Gender and Development (SADC Gender Protocol).
38 Art 8(2) SADC Gender Protocol.
39 Arts 23 & 24 SADC Gender Protocol.
40 M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 434-458.
41 P Zirima 'SADC Protocol: From commitments to action' (2009) 9 *Southern African News Features*.

## 5 National normative frameworks that define child marriage

In Lesotho, the protection of children from abuse is set out in the Children's Protection and Welfare Act 2011 (CPWA). This Act is the fundamental document that seeks to consolidate and reform all laws relating to the protection and welfare of children and to provide for incidental matters. The CPWA is vivid when it defines child abuse and seeks to address it to the core.[42]

Sections 15, 16, 17 and 18 are clear about child protection and they draw up and define child abuse as any form of harm or ill-treatment deliberately inflicted on a child, and includes assaulting a child or inflicting any other form of deliberate injury or harm on a child; sexually abusing a child; committing an exploitative labour practice concerning a child; exposing or subjecting a child to behaviour that may socially, emotionally, physically or psychologically harm the child; exposing a child to physical or mental neglect; abandoning or leaving a child without visible means of support; and subjecting a child to harmful substances such as alcohol and drugs. Section 11(2) indicates that no child should be expelled or denied the right to education by any educational institute on account of pregnancy or any cultural issues. This section takes cognisance of the fact that children's development should not be hindered by either marriages or pregnancy. It allows mechanisms to be in place to reintroduce children to schools even after the aftermath of pregnancy.[43]

Similarly, CPWA 2011, which seeks to domesticate CRC and the African Children's Charter, prohibits marriage under 18 for both boys and girls, as opposed to the Marriage Act 1974 which permits girls to marry at the age of 16.[44] Therefore, this illustrates that there is a need to harmonise the laws in line with the SADC Model Law which calls for an absolute standard of 18 as the minimum age of marriage without exception, and for the harmonisation of laws to remove ambiguity in interpretation.

The lack of harmonisation of laws on marriage creates an implementation conundrum. There is a lack of a consolidated law on sexual offences, which could be remedied by the pending amendment, the Children's Protection and Welfare Bill 2023. The

42 T Manyeli 'Empowerment and participation of children, parents, kinsmen and guardians in reducing children's risk in Lesotho' in F Ross & P Mahao (eds) *Children at risk in Lesotho: Perspectives from Lesotho and Germany* (2021) 1-14.
43 Secs 11(2), 15, 16, 17 & 18 Lesotho Children's Protection and Welfare Act 2011.
44 Sec 25 Lesotho Marriage Act 1974.

Bill specifically addresses the issue of child marriage and child sexual abuse.

The Marriage Act of 1974 declares void a marriage where either of the parties is below the age of 16 years. However, parental and judicial consent may be given for marriage under 21 and above 16 years.[45]

In addition, the Laws of Lerotholi[46] (the codification of Lesotho's customary law) allow boys and girls to be married, as long as they are over the age of puberty. Both the Marriage Act 1974 and the Laws of Lerotholi are in contradiction with CPWA, which makes child marriage a punishable offence.[47] As a result, it is important for the state party, considering this challenge, to pass the Children's Protection and Welfare Amendment Bill mentioned above in order to cure this age defect as it has the far-reaching consequences for the way in which issues of child marriage are dealt with in the country. The duty to set the minimum age for marriage remains that of the state and the state is urged to use equal criteria between men and women in performing this exercise.[48] This will not only be a domestication and implementation of international law, but will also offer extended protection to children and achieve gender equality as the minimum age will be standard and non-discriminatory, thus achieving gender equality between boys and girls.[49]

From the above analysis, one of the major challenges in Lesotho is the setting of a minimum age of marriage below 18 years, with the minimum age set for girls lower than that for boys.[50] This is based on erroneous assumptions that girls mature faster than boys. It also is an indication of patriarchal notions of girls' and women's value being measured by their homemaking and reproductive functions. This results in girls being married off earlier, while boys continue

45 As above.
46 The Laws of Lerotholi 1903 is the main source of Lesotho customary law. It contains provisions related to marriages and seduction, among others.
47 'Girls not brides – Lesotho country analysis', https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/atlas/lesotho (accessed 29 November 2024).
48 UN Human Rights Committee on ICCPR General Comment 28: Article 3 (The equality of rights between men and women) CCPR/C/21/Rev. 1/Add. 10 (29 March 2000).
49 *Association Pour le Progres et la Defense Des Droits Des Femmes Maltennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (Application 46/2016) held that having the minimum age for marriage below the age of 18 for girls is a violation of art 6(b) of the African Women's Protocol and arts 2, 4(1) and 21 of the African Children's Charter.
50 AU reports that African governments were urged to change the legal age for sex from 16 to 18 to end child marriage in 2017.

with their education,[51] hence economically placing young girls at a disadvantage. This gender inequality continues and perpetuates inequalities within the broader society as boys are perceived to be better than girls.

In the same spirit, Princess Senate Mohato Seeiso was appointed the Champion of Ending Child Marriage. Her responsibilities are equivalent to those of the AU GWA as she has to spearhead the campaign, be the face of it and sensitise communities on the effects of child marriages. Although this was a critical step in the right direction, there has not been a notable change as studies conducted afterwards reveal that child marriage is still rising. As much as the princess was appointed to lead this campaign, it seems that there was no clear plan of action on how she will be engaged as she would only be seen when the country commemorates important days, such as the International Day of the Girl Child.

It is important that the country develops the clear plan of engagement of the princess and allocates the necessary budget and resources for her to be able to execute her duties as the champion in addressing child marriages.

Given the numerous undesirable consequences associated with child marriage, including the violation of human rights, it is difficult to justify the circumstances in which a child marriage would be in the best interests of the child, especially when the laws permit judicial or government consent for child marriages below the prescribed minimum age of 18 years. The laws of Lesotho do not even clearly provide guidelines for determining when such permission may be granted.

The enactment of robust laws prohibiting child marriage has been proven to have a positive influence on the reduction of incidences of child marriage and improving the general welfare of children. Research[52] shows that countries with laws that set the minimum age as 18 without exceptions (such as parental consent to marry below the general minimum age of marriage) have relatively lowered the incidences[53] of child marriages and adolescent pregnancies.

51 By contrast, child brides are much more likely to drop out of school and complete fewer years of education than their peers who marry early, https://www.worldbank.org/en/news/immersive-story/2017/08/22/educating-girls-ending-child-marriage (accessed 29 November 2024).

52 B Maswika and others 'Minimum marriage laws and the prevalence of child marriage and adolescent birth: Evidence from sub-Saharan Africa' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 58.

53 UN Women *Progress of the world's women: In pursuit of justice* (2011).

To further illustrate this, research done in Mali[54] indicates that when the minimum age of marriage was lowered from 18 to 16 years, child marriages progressively increased. Consistent laws, therefore, have the impact of not only acting as a deterrent, but also demonstrating to the community the need to allow children to grow and attain their full potential by positively influencing societal attitudes.

International human rights instruments such as CRC, the African Children's Charter and the African Women's Protocol categorically state the minimum age of marriage as 18 years, with no exceptions.

The African Commission and the African Children's Committee, in their Joint General Comment on Ending Child Marriage, adopted in 2018, also unequivocally state the minimum age of marriage as 18 with no exceptions. The SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage also echoes these human rights principles and recommends that member states do not deviate from the minimum age of marriage, which is 18 years.[55]

In 2016 the High Court of Tanzania handed down a landmark ruling striking down sections 13 and 17 of the Marriages Act, which sets different minimum ages for boys and girls to enter into marriage. This decision was upheld on appeal in 2019. Despite the Court of Appeal giving the government a year to amend the law, progress has been slow.[56] This is to demonstrate that the slow progress in the implementation of the laws on child marriage is not only experienced in Lesotho but also in other African countries.

Similarly, in South Africa, despite the discussions dating back as far as 2015, the pace of progress of putting in place a law that prohibits child marriage in all circumstances remains slow.[57] These delays encourage impunity for child marriages and disregard the urgency of the issue. Slow progress is also caused by changes in political players who have been driving the process. The situation is similar to that in

54 E Batyra & LM Pesando 'Reverse policies?' Reducing the legal minimum age of marriage increases child marriage among the poorest in Mali' University of Pennsylvania Population Centre Working Papers (2022).

55 UNFPA, ESARO & Equality Now *Ending child marriage in Southern Africa: Gaps and opportunities in the legislative frameworks* (2023).

56 'Government speaks on marriage amendment' *The Citizen* 11 September 2022, https://www.thecitizen.co.tz/tanzania/news/national/government-speaks-on-marriageact-amendment-3944798 (accessed 28 November 2024).

57 L Mwambene 'Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' (2018) 18 *African Human Rights Law Journal* 527.

Lesotho, as there is a Bill that has been pending since 2021, which attempts to criminalise child marriages, but due to rapid changes in Parliament, the progress is slow.

What these laws seek to achieve is to empower the girl child and to ensure that she should be able to decide whether to marry while at the proper, qualifying age. This is important as it will have a positive effect in reducing the number of children getting married. The laws that regulate child marriage, therefore, should be highly popularised at the community level. This local level engagement should strongly focus on changing norms by engaging with girls for empowerment and through the provision of safe spaces. This is a role best played by social workers.

Section 69 of CPWA 2011 empowers the social worker to cause the arrest of a person who they believe has kept the child in their custody against the child's will. This provision is important as persons who marry children can be arrested by social workers. Unfortunately, on the ground, this provision is never triggered, as reports demonstrate that neither children nor parents report these incidences that force them into marriage.[58] Another argument could be that the very children themselves are not acquainted with these laws and, as a result, they would not be aware of their rights. This then becomes the reason for improved child empowerment activities and community sensitisation programmes, which are also best dealt with by social workers.

The celebrated CPWA 2011 has placed social workers as key personnel in the implementation of the Act. This is because the nature of the profession of social work is intervention-oriented. The issue of child marriage concerns the attitudes and beliefs of society. Therefore, the solution lies in the profession that is particularly focused on promoting social development, social harmony, and the empowerment and emancipation of individuals.[59]

58 Ending Violence Against Children in Lesotho Survey 2018; ECPTA International Contribution to the Global Thematic Report (2018); Kingdom of Lesotho Voluntary National Review on the Implementation of the Agenda 2030 Report 2019; Prevention of Violence Against Women and Girls: Stakeholder Network Analysis – Lesotho Country Report 2018.

59 International Federation of Social Work (IFSW) *The global definition of the social work profession* (2014); H Bartlett 'A working definition of social work practice' (2003) 13 *Research on Social Work Practice* 267-270.

## 6 Causes and consequences of child marriage in Lesotho

A question would then arise as to what causes or pushes the community to fall under this unlawful act, which is also under severe criticism by the world under different fora. The question, therefore, needs to be answered as to what might be the causes of this unlawful act in Lesotho.

Research shows that child marriage is the result of many societal issues, including patriarchal norms,[60] economic challenges,[61] traditional beliefs,[62] curtailed or limited access to education[63] as well as, in some instances, conflict or natural disaster-related disruptions.[64]

The United Nations Children's Fund (UNICEF) indicates that families are propelled by poverty to give their daughters in marriage as a strategy for poverty alleviation, in the hope that the families will be secured by those in marriage.[65] Vulnerable girls sometimes perceive marriage as a way out of their circumstances such as poverty, whereas their spouses are also underprivileged, leading to further entrapment in sustained poverty. Circumstances, therefore, do not change for the better but rather worsen. As a result, children born out of these families will grow up in extreme situations and, resultantly, have the same experiences.

In some parts of Africa, including Lesotho, unemployed parents are driven by poverty to regard girls as financial inconveniences, especially as far as payment for their education is concerned.[66] They thus see marriage as an ultimate solution to reduce the economic burden on their households.

The enduring poverty leads to a challenge where parents do not realise that their belief to wed girls for financial protection

60 Sikweyiya and others 'Patriarchy and gender-inequitable attitudes as drivers of intimate partner violence against women in the central region of Ghana' (2020) 20 *BMC Public Health* 682.
61 M Seedat and others 'Violence and injuries in South Africa: Prioritising an agenda for prevention' (2009) 374 *The Lancet* 1011-1022.
62 K Sibanyoni and others 'Legislative responses to child victims of abduction into forced marriages in Lesotho' (2022) 11 *International Journal of Research in Business and Social Science* 495-502.
63 KJ Tjamela and others 'The effects of early marriage and early fertility on women educational attainment: Evidence of Lesotho' (2021) 8 *International Journal of Educational Policy Research and Review* 36-42.
64 S Mahato 'Causes and consequences of child marriages: A perspective' (2016) 7 *International Journal of Scientific and Engineering Research* 698-702.
65 UNICEF *Annual report of 2008*.
66 AU *Annual report of 2015*.

leads to ongoing vulnerability, as they still experience poverty after the marriage of their daughters.[67] Mosa and others, in their study conducted in Lesotho in the highlands, found that the family sometimes contributes to the child being abducted as they deliberately send the girl child somewhere to a place where she is unprotected. They intentionally create an opportunity for abduction, unknowing to the child, to take place. By sending her to that place, they create an environment conducive to the perpetrator snatching his victims uninterruptedly. In this manner, the parents become complicit in this activity as a consequence of poverty with which the family is confronted.[68]

## 7 Challenges in implementing laws on child marriage in Lesotho

The implementation of the laws also requires that the people whom the law is meant to protect are aware of its content and how to seek assistance. Without effective implementation, the laws prohibiting child marriage remain good only on paper. There is poor awareness of existing laws in communities. Many people are not aware of the legal ramifications of child marriage and the laws themselves.

International standards require that children who are victims of child marriage be given the support, physically and psychologically, that is necessary.[69] Research reveals that adolescent mothers have negative experiences with healthcare personnel when they attempt to access services, which contributes to negative maternal outcomes.[70]

Women and girls do not have sufficient information to understand and claim their rights. The legal empowerment of girls is central to creating a culture of justice, as it improves access to justice as well as to the quality of justice they receive. There is also a lack of understanding among parliamentarians and government officials regarding their obligations under international human rights laws and the need to utilise a human rights-based approach while implementing laws on child marriage.[71]

67 UNICEF *Annual report of 2015*.
68 MP Likoti & K Sibanyoni 'Children as victims of forced marriages in Lesotho: A question of cultural practice or approval of child exploitation' (2022) 9 *International Journal of Criminology and Sociology* 723-734.
69 SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.
70 R Apolot and others 'Maternal health challenges experienced by adolescents: Could community score cards address them? A case study of Kibuku district in Uganda' (2020) 19 *International Journal for Equity in Health* 19.
71 UNFPA, ESARO & Equality Now *Ending child marriage in Eastern and Southern Africa: Implementing domestic laws and the SADC Model Law on Child Marriage* (2023).

Girls may too often be depicted as victims or survivors rather than as rights holders. A focus on the lack of access to education or sexual and reproductive healthcare services should be reinforced with the issue of broader gender inequalities and power disparities that underpin the practice of child marriage. Although this article does not concern gender inequality in accessing sexual and reproductive health, the lack of education in that sphere plays a detrimental role, as a lack of access to sexual and reproductive healthcare services perpetuates unsafe sex, resulting in early pregnancies, leading to child marriage.

For example, it was documented that during the COVID-19 pandemic, the disruption in sexual and reproductive health services contributed to an increase in adolescent pregnancies and, in many settings, child marriages.[72] UNFPA estimates indicated that

> COVID-19 will disrupt efforts to end child marriage, potentially resulting in an additional 13 million child marriages taking place between 2020 and 2030 that could otherwise have been averted. By reopening schools, implementing effective laws and policies, ensuring access to health and social services – including sexual and reproductive health services – and providing comprehensive social protection measures for families, we can significantly reduce a girl's risk of having her childhood stolen through child marriage.[73]

Although this pandemic has subsided, it still serves as a reason why the country faced difficulties in fighting child marriage at that time and the progress made, albeit slow, suffered a tremendous setback. Therefore, it is important to equip the community-based formal and informal child protection structures with the necessary skills and knowledge to handle child protection issues. The role that the social workers can play in this regard is the provision of training and capacity building workshops to these structures.

## 8 Role of social workers in addressing child marriage

According to Becket, a social worker is a child protector who takes immediate action that is necessary to protect the child at risk from acute harm.[74] Patel defines social work as a profession that promotes

72 'Child marriages, pregnancies soar during pandemic' *ReliefWeb* 12 October 2020, https://reliefweb.int/report/world/child-marriage-pregnancies-soar-during-pandemic?gclid=Cj0KCQjw_r6hBhDdARIsAMIDhV82ogsdxpGUj5jYvYGsGvV5dInBwfI_Ad-j0bQq3eIQ0JTSP81glsAaAvPlEALw_wcB (accessed 28 November 2024).
73 UNFPA Report of 2020.
74 C Beckett *Essential theory for social work practice* (2007).

social change, social cohesion, development, empowerment and the liberation of people.[75] Social work practice reflects the professional application of social work values, principles and techniques to one or more of the following ends: assisting people in obtaining tangible services; counselling and psychotherapy with individuals, families and groups; helping communities or groups to provide or improve social and healthcare services; and participating in legislative processes.[76]

Social workers are professionally trained to consider their clients as individuals, families, organisations and communities that function in diverse environments. Grounded in a strengths-based approach to intervention, social work practitioners strongly believe in the capacity and potential for change at both the personal and community levels.[77]

Social workers are held to the core values and principles of serving others, effecting social justice on behalf of vulnerable and marginalised populations, believing in the dignity and worth of individuals, recognising the importance of human relationships, and practising with integrity within their areas of competency.[78] Social workers promote social justice and, therefore, can facilitate programmes that will help girls to realise their full development by recognising their capacities and values.[79] This will prevent school drop-outs and contribute to a mental shift in societal norms that a girl's value is bound to become a mother and housewife.

Social workers can protect the rights of people by empowering them with skills to act when confronted by injustices.[80] Human rights-based approaches and practices create circumstances under which power and coercion can be changed through communal action to safeguard the rights of individuals and groups. In this regard, it was reported that social workers as counsellors take the responsibility of providing counselling and psychosocial support to affected populations.[81]

75 L Patel *Social welfare and social development in South Africa* (2005); L Patel & T Hochfeld 'Developmental social work in South Africa: Translating policy into practice' (2013) 13 *International Social Work* 690.

76 National Association of Social Workers (NASW) *Practice*, http://www.naswdc.org/practice/default.asp (accessed 28 November 2024).

77 D Saleebey *The strengths perspective in social work practice* (1997). See also PD Miśra *Social work philosophy and methods* (1994).

78 National Association of Social Workers (NASW) 'Code of ethics of the National Association of Social Workers: Ethical Principles', http://www.socialworkers.org/code.asp (accessed 28 November 2024).

79 S Kafula 'The role of social work in peace, human rights, and development in Africa' (2016) 3 *Journal of Education and Social Policy* 115.

80 J Ife *Human rights and social work: Towards rights-based practice* (2012).

81 L Nyahunda and others 'Role of social workers in mitigating the effects of climate change in Makonde communal lands, Zimbabwe' (2020) 16 *Asian Journal of Social Sciences and Humanities* 1823.

Social work has an important role to play in mainstreaming human rights and social justice issues. Social work intervention is required to challenge the causes of the practice of child marriage. Social workers should engage with girls, families and communities by facilitating access to resources for human development.[82] This includes educating parents and communities about the importance of investing in education for girls. The connection between the achievement of formal educational qualifications and consequent occupational and career success is extensively valued as a result of investment in formal education.[83]

Social workers can bring about social change by promoting a dual focus on the person and the environment, and the interaction between these two. Social workers wish to bring about social change to overcome limiting socio-cultural beliefs and institutional barriers to leading a full life. Social workers can empower girls to be aware of their rights, to have a chance to overcome the structural barriers to sustain social change and gender equality, which could bring about a positive cycle resulting in a healthy generation. Social workers' objective is to invest in people to enable them to take care of themselves. Thus, they are key in ensuring that communities are resilient and able to fend for themselves, even in the aftermath of child marriage.[84]

As a key method in social work practice, community work involves working with communities to address shared problems.[85] Community workers involve community members to participate in understanding potential hazards as well as their capacities in responding to them.[86]

Social workers have the ability and competence when it comes to cultural understanding. Likoti and Sibanyoni are of the view that in Lesotho, the culture of abduction is still practised, which is one way for children to enter into marriage.[87] With social workers in place, they can be instrumental in fostering cultural change and influencing the community to foster change among society.

82 C Chitereka 'Social work practice in a developing continent: The case of Africa' (2009) 10 *Advances in Social Work* 144-156.
83 J Midgley *Social development: Theory and practice* (2014). See also J Midgley *Social welfare in global context* (1997).
84 D Machimbidza 'Climate change and its implications on child welfare: An overview of Africa and Asia' World Social Work Day Symposium, University of Zimbabwe (2018).
85 T Manyeli 'The evolution of social welfare in Lesotho' (2007) 11 *Lesotho Social Sciences Review* 21-33.
86 D Machimbidza 'Effects of climatic changes on children's health in rural areas of Zimbabwe: A case of ward 12 Buhera district' University of Zimbabwe (2021).
87 As above.

In Lesotho communities, traditional leaders still have a role to play and still enjoy communal confidence. Because social workers are trained to influence cultural change, it is their role to equip community leaders, for instance, chiefs, with adequate information as to how to handle victims of child marriage and how to report it. This is critical as chiefs play a strategic role in the daily affairs of the community. Chiefs should have at their disposal adequate information, with which they can lead the community in the right direction.[88]

The community should play a part in reintegrating the child from marriage into society.[89] For the community to be able to restore the child victim of marriage, social workers should have a role to play, from equipping society with skills to rehabilitate the victim.[90] They should be able to sensitise the community on such issues and remove the stigma always surrounding such child victim of marriage. This is because, as alluded to above, child marriage is also a cultural norm that attracts a stigma for children not involved in it.

Social workers are better placed to assume the roles of leadership in critical poverty reduction programmes. This is due to the understanding nature of their profession to always demand change for the betterment of the community through skills development projects. Social workers are trained to empower people and develop them. The issue of poverty reduction is critical in issues of child marriage as the literature cited above demonstrates that among the sources of child marriage, poverty is the leading cause.[91]

After COVID-19, studies reveal that the economic situation has worsened. The argument, therefore, is that there is a high possibility of a rise in the statistics of child marriage. However, social workers are able to use their skills to address the situation. This is because, as alluded to above, poverty is the main cause of child marriage. The

88 AL Sari 'The role of social workers in the development of tourism villages: Descriptive case study in Cianjur regency' (2017) 7 *JISPO* 1-23.

89 A Kiconco 'Returning from rebel captivity: Forced marriage, emotions and reintegration in Uganda' (2024) 10 *Journal of Migration History* 463-449; S Rebecca 'Moving on: Family and community reintegration among Indonesian trafficking victims' (2017) NEXUS Institute Washington, DC; PC Daniel 'The role of the church in reintegration of street children into their families in Lusaka district' (2025) 6 *British Journal of Multidisciplinary and Advanced Studies* 1-12.

90 FU Prasetyo 'The role of social workers in women's personality development training' Conference paper, Proceedings of the 2nd International Conference of Science Education in Industrial Revolution 4.0, ICONSEIR, 17 December 2019, Medan, North Sumatra, Indonesia 2-7.

91 J Millar & M Austin 'The role of social workers in welfare-to-work programmes: International perspectives on policy and practice' (2006) 5 *Journal of Policy Practice* 149-158.

rise in poverty, therefore, is directly proportional to the rise in child marriage.

Lesotho also has the National Information System for Assistance (NISA) tool,[92] which is the single registry or database of the whole country. The purpose of the tool is to assist in planning, how to support the most vulnerable groups and identify their areas of need. This data is instrumental in assisting social workers to target the areas where there is high poverty rate (where the rate of child marriage is high) when they conduct the 'no to child marriage' sensitisation activities. The data has since been improved to align with the post-COVID-19 situation.

There is also the Lesotho Social Workers' (Draft) Bill 2024. This upcoming piece of legislation aims to improve the social work profession and establish its regulatory council. As a result, the country intends to improve the role and performance of social workers role in society, which includes fighting child marriage and improving community empowerment. This article argues that the enactment of this legislation will go a long way towards fighting child marriage in Lesotho.

The lesson learnt post-COVID-19 is that the use of digital technology, especially to reach young people, is crucial. The article argues that technology, youth, and social work are closely linked for purposes of fighting child marriage, especially in the urbanised and semi-urbanised societies in Lesotho. Some projects on ending child marriage focus entirely on young people. It becomes equally important that modern technology be used to assist in those projects, especially because the social workers of today are young and active people who are enlightened about technology and its use. It could be a simple task for them to administer online platforms that target child marriage.[93]

In general, social workers' workforce remains relevant and instrumental as they have the cultural understanding to foster the

92 National Information System for Social Assistance (2010) relaunched in 2018 and updated in 2024.

93 MV Aguilar-Tablada and others 'Social work educational programmes aimed at the young: Redefining programmes to succeed?' (2020) 39 *Social Work Education* 41-59; EJ Gómez-Ciriano and others 'Is there anyone on the other side? About the opportunity of building educational social work focused on youth' (2020) 39 *Social Work Education* 1-8; AL Peláez & EJ Gómez-Ciriano 'Intercultural communication in social work practice' in R Guido & S Rasinger (eds) *The Cambridge handbook of intercultural communication* (2020) 319-334; AL Peláez and others 'Young people, social workers and social work education: The role of digital skills' (2020) 39 *Social Work Education* 825-842.

shift in this harmful cultural norm of child marriage. They are also trained professionally to deal with marginalised and vulnerable members of society. As a result, they are in a position to assist in rehabilitation and case management in cases of child marriage. Again, social workers by their nature are advocates for social change. They are best positioned to conduct the community empowerment initiatives and sensitise communities about child protection laws and abuse-reporting mechanisms. In this way, they remain at the top of the ladder as those equipped with the skills needed to reach the child.

## 9 Conclusion

Children should be allowed to complete their schooling to enhance their human capital. Educating girls will break the cycle of illiteracy and poverty in their families, thereby empowering their families and children to follow in their footsteps and, thus, sustainable development is promoted. Child marriage proves to be the deadliest social illness that needs urgent and serious attention from the country of Lesotho. As a result, social workers are the key personnel who can assist in this epidemic as they are equipped with requisite skills and capacities. On the other hand, the country needs to improve information dissemination strategies and popularise child protection laws.

## 10 Recommendations

In terms of capacity building, Lesotho should conduct continuous training and capacity building of relevant stakeholders. The training should include law enforcement officials, judicial officers, child protection and social welfare personnel, healthcare workers and education personnel.[94] Training should not be *ad hoc* but be conducted systematically, for both new personnel and continuous education for existing personnel. The training should include sensitivity in handling child marriage survivors, correct information on the effects of child marriage, as well as tackling prejudices.[95] These trainings will also be performed by social workers as they are trained professionally to provide psycho-social support.[96] Having

94 J Mitchell & RS Lynch 'Beyond the rhetoric of social and economic justice: Redeeming the social work advocacy role' (2003) 10 *Race, Gender and Class* 8-26.

95 FS Danis 'Social work response to domestic violence: Encouraging news from a new look' (2003) 18 *Affilia* 177-191.

96 L Mwansa 'Social work education in Africa: Whence and whither' (2011) 30 *Social Work Education* 4-16.

these stakeholders trained will not only improve the child protection system to be able to swiftly respond to the scourge of child marriage but rather, it will also improve the coordination between these service providers so that they will be able to easily communicate these issues and to timeously assist children.

This article does not seek to portray the work of fighting child marriage as being the sole responsibility of social workers. It should be understood, therefore, that this is an exercise that requires the collaborative effort among the professions that share a similar aim. This is why the article emphasises the need for collaboration among different personnel, while at the same time underlining the pivotal role of social workers.

Literature shows that social workers have a demonstrable ability in combating this unacceptable practice by using their role as educators, advocates and resource mobilisers. The ability to conduct resource mobilisation activities is clearly based on the availability of the right resources and motivations. As a result, a reasonable belief is that social workers have the ability to eliminate child marriage or, at the very least, to significantly reduce it. Although combating child marriage requires a multi-sectoral approach and collaboration between key stakeholders, as has been argued in previous paragraphs of the article, social workers play the leading and pivotal role.[97]

As far as information dissemination is concerned, Lesotho needs to ensure that any new laws or amendments, when passed, are accompanied by a clear information dissemination strategy. This can be done by cascading information to local government structures and conducting awareness programmes in their constituencies. To disseminate this information is possible as Lesotho has local government councils where people are officially elected to constitute the government at the community level. Those leaders can pioneer this initiative and ensure that they spread the information. In this instance, the critical amendments and new laws are the Counter Domestic Violence Act 2022 and the Children's Protection and Welfare Amendment Bill 2023, which have not yet been enacted. These laws prescribe specific procedures and hold important issues that all the stakeholders working with child related issues must know and fully appreciate. The stakeholders such as prosecutors, police and judicial officers should be up-to-date with these developments

97 S Amadasun *Social work for social development in Africa* (2020); J Dalrymple & J Boylan *Effective advocacy in social work* (2013); M Nguyen & Q Wodon *Estimating the impact of child marriage on literacy and education attainment in Africa* (2011).

in order to fully implement these developments outlined in the upcoming pieces of legislations alluded to earlier. As a result, it remains important for these pieces of legislation and others related to child protection to be well disseminated.

Lesotho should translate new and existing laws into local languages to ensure that these are rendered accessible to community members.[98] The state should address any disinformation that might be circulating on child marriage,[99] and correct the narrative through clear, consistent information campaigns. The media can be engaged as an important partner.

Civil society organisations are important stakeholders in helping to spread information on the risks and consequences of child marriage. In Lesotho, many civil society organisations joined the government's call to end child marriage and, as a result, this recommendation is practicable. Community-based organisations, in particular, have networks that can help educate the community. Thus, the government of Lesotho should partner with these organisations to make the programmes more effective.

Parliamentarians should play a leadership role within communities as advocates to demystify taboos to prevent child marriage. Members of parliament play a leadership role and often are in the communities sharing messages of development to the nation. Issues of child marriage should also form part of their agenda.

In terms of protection services, the country should create peer and community support groups for children at risk of child marriage, in marriage, or in return from marriage. These can be in the form of voluntary groups utilising existing community structures such as church groups, cooperatives and burial societies. These can be trained to correct misinformation on child marriage and equipped with skills to deal with the myriad of challenges these children face emotionally and physically. Peer-to-peer counselling services can also be offered to restore the dignity of children that is lost due to the consequences of child marriage.

Support groups should also be trained on the content of the law, to create accessible referral mechanisms for children in need of

98 World Vision Lesotho led the initiative to translate the Counter-Domestic Violence Act 2022 of Lesotho.

99 The myths that circulate in society are that when you get married, you will be rich. For a boy child that marries, it resembles strong manhood; for girls, when they get married young, it is because they are disciplined, more especially when they get married in their neighbourhood.

services (including removal from marriage, medical or psychological services) and access to justice.[100]

Teachers and other school authorities should be trained on how to handle readmitted learners, to reduce discrimination and stigmatisation of survivors of child marriage and young mothers.[101] Schools can also periodically carry out sensitisation exercises, including publicising the referral mechanisms and integrating comprehensive sexuality education within the curricula.[102] In Lesotho, life skills education is developed and made part of the curriculum. However, challenges remain as there are not adequate teachers to deliver the syllabus.

The provision of toll-free national help lines, which are as accessible as possible, will assist in to protecting at-risk children.[103] In the case of rural children without access to telephones, clear referral pathways should be established at public institutions and be publicised. These should be linked to the support groups highlighted above, who will be better equipped to provide swift assistance.

The child help lines that were launched in 2008 have been relaunched in 2021 and now provide 24-hour emergency assistance, and long-term resources to children who have experienced any form of violence and are in need of care. Through the support of development partners, the government of Lesotho was able to employ permanent staff that work specifically to ensure that the child help line is available around the clock. Among others, the technical staff recruited are none other than social workers, whose mandate, among others, is to contact the community outreaches and teach children about their rights and raise awareness on harmful practices such as child marriage.

Social workers remain critical in this child help line system since, as soon as they receive calls regarding issues of child marriage, they will be able to make proper follow-ups in a skillful and proper manner as they remain professionals. This is key as they will be able to track and

100 The Ministry of Social Development in collaboration with World Vision Lesotho established the structures called Community Care Coalitions. This is the support group structure meant to provide psycho-social support services to children in the community. Members of the groups receive training and periodic workshops to improve their service delivery and address the challenges they face.

101 M Rupured and others 'Improving family financial security: A family economics-social work dialogue' (2000) 11 *Family Counselling and Planning* 1-8.

102 MT Hernandez & HJ Karger 'The decline of the public intellectual in social work' (2004) 31 *Journal of Sociology and Social Welfare* 51-68.

103 Child Helpline, which is toll-free in Lesotho, is available and children can call it any time they need help. The number is 116 and is accessible through Vodacom and Econet lines.

manage cases of child marriage and refer to other service providers through proper channels. Development partners such as World Vision Lesotho continue to play a crucial role in the strengthening of the child protection systems.[104] The national child protection reporting and referral pathways initiative has been launched. In this critical mechanism, aimed at protecting children against all forms of violence, including child marriage, social workers play a pivotal role.

This tool offers a clear mechanism through which community members, service providers and children themselves can report incidents of abuse. Importantly, this initiative defines the roles of various service providers, such as healthcare practitioners, police, the judiciary and psychosocial support service providers, in managing child protection cases from identification to resolution. The role of social workers remains topmost, as they are the ones responsible for psychologically supporting the children and soothing their souls, making them ready and available to access and enjoy other services.

Financially, the state should ensure sustainable financing, including adequate yearly appropriations in the budget and exploring opportunities to establish sustainable anti-child marriage funds as a best practice, to finance programmes aimed at supporting the eradication of child marriage. As part of adopting a multi-sectoral approach, budget allocation to different government sectors should include budget lines for mainstreaming activities that contribute to eliminating child marriage.

Budgetary allocations should be increased for social protection programmes aimed at alleviating poverty in the most vulnerable communities. As recommended by the SADC Model Law, governments should provide cash transfers to families to prevent child marriage and provide funds to girl children to enable them to complete secondary school.[105]

Under its obligations under global and regional human rights treaties, Lesotho should align its domestic laws in line with international human rights standards, particularly in fixing the age of marriage at 18 years with no exceptions in line with article 6(b) of the African Women's Protocol and article 21(2) of the African

104 https://www.wvi.org/publications/lesotho/strengthening-child-protection-launch-national-child-protection-reporting-and (accessed 28 November 2024).

105 Although not necessarily intended to delay children from getting married, the government of Lesotho has set up the child grants programme and the education bursary to support vulnerable children with their needs. This fund plays a pivotal role in ensuring that those who have nobody to take care of them are not left destitute and end up resorting to marriage.

Children's Charter. Both these provisions prohibit marriage and the betrothal of children below the age of 18 years. States are required to apply this prohibition should to all forms of marriage, including customary and religious marriages.

Importantly, in Lesotho, when the laws that seek to eradicate child marriage are enacted, the state must ensure that the domestication of global and regional human rights instruments that may impact on the rights of the child and women, is achieved, as the state has already committed to the obligations under these instruments. This commitment flows from the requirement in the Vienna Convention on the Law of Treaties of 1969 to act in good faith and not to invoke it domestic law to undermine its international obligations.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: S Ibe 'Localising global norms: An examination of Nigeria's implementation of Part IV of the Optional Protocol to the Convention against Torture' (2025) 25 *African Human Rights Law Journal* 251-276
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a10

# Localising global norms: An examination of Nigeria's implementation of Part IV of the Optional Protocol to the Convention against Torture

*Stanley Ibe**
Senior Partner, Goodshare & Maxwells, Abuja, Nigeria
https://orcid.org/0000-0001-7105-5461

**Summary:** *Nigeria ratified the Optional Protocol to the Convention against Torture (OPCAT) on 27 July 2009, signalling its intention to establish and operate a national preventive mechanism that aligns with OPCAT. In its 2021 Concluding Observations, the CAT Committee determined that Nigeria's NPM – National Committee Against Torture (NCAT) – had not met this requirement. This article examines Nigeria's compliance in light of four requirements of NPMs drawn from a review of OPCAT and the literature on NPMs, namely, transparency and inclusivity; independence of the institution and its personnel; the right to visit places of deprivation of liberty; and collaboration with the United Nations Sub-Committee on the Prevention of Torture (UN SPT). The article argues that Nigeria has taken some positive steps to redress gaps the CAT Committee identified. Although the most recent incarnation premises the NPM on a presidential order which references a legislative text, namely, the National Human Rights Commission (Establishment) Act, 2010, it does not fully address the concerns about anchoring the NPM on a constitutional or*

* LLB (Lagos State) LLM (Maastricht) MSC (Oxon) MBA (Essex) PGD (Abo/Turku); stanley.ibe@proton.me. The author submitted a longer version of this article as a dissertation for an MSc in International Human Rights Law at the University of Oxford in April 2024.

*legislative text, nor does it guarantee the independence of the institution and its personnel. To become more compliant, this article recommends the amendment of the NHRC Act to embed the NPM, insulating the staff and operations of the NPM from government interference, making the NPM's funds a direct line charge on the consolidated revenue fund, and strengthening its capacity to periodically visit detention centres and make appropriate recommendations.*

**Key words:** *compliance; detention; preventive; torture*

## 1 Introduction

Nigeria witnessed spontaneous protests decrying police abuse under the rubric of #EndSARS in October 2020.[1] The protests turned global attention to police use of torture, extrajudicial killings and enforced disappearance as tools for solving crimes. Nigeria had ratified the Optional Protocol to the Convention against Torture (OPCAT) and designated a national preventive mechanism (NPM) – the National Committee Against Torture (NCAT) – more than ten years before the protests. Yet, the NPM played a limited role in preventing the torture crises that led to these protests. It has done little since then.

Since its inception in September 2009, NCAT has struggled with functional and operational independence. Its members are not independent of the appointing authority, and the institution lacks guaranteed funding. Although Nigeria launched a new NCAT in 2022 and designated the National Human Rights Commission (NHRC) as the NPM in 2024[2] to address these concerns, the NPM is only marginally better – with more civil society representatives, a slightly stronger legal basis and greater access to places of detention. However, it is led by the executive secretary of NHRC, who is a supervisee of the Attorney-General. It remains unclear what measures the NHRC has taken to ensure the operational independence of the NPM. This situation violates Nigeria's obligations under part IV

1 SARS was the Special Anti-Robbery Squad of the Nigerian police force. Established in the 1990s, SARS became notorious for torturing, maiming and killing crime suspects. For a brief review of one case arising from the #EndSARS protests, see S Ibe 'ECOWAS Court overlooked Nigeria's due diligence obligations in the #EndSARS decision' Oxford Human Rights Hub 9 September 2024, https://ohrh.law.ox.ac.uk/ecowas-court-overlooked-nigerias-due-diligence-obligations-in-endsars-decision/ (accessed 17 March 2025).

2 See Designation of the National Human Rights Commission as Nigeria's National Preventive Mechanism Order 2024, Government Notice 22 21 May 2024, https://www.apt.ch/sites/default/files/2024-09/NHRC%20NPM%20GAZETTE.pdf (accessed 29 November 2024).

of OPCAT[3] and compromises the rights of arrested and detained persons, particularly the right not to be subjected to torture.

This article examines the referenced obligations and the role of the NPM in bringing these obligations to fruition. It proceeds on the assumption that an NPM that is neither independent nor accountable is unlikely to contribute to the elimination of torture because it would struggle to perform its duties with the credibility and objectivity required.

The article responds to two research questions: (i) In what way(s) has Nigeria failed to fulfil its obligations under Part IV of OPCAT? and (ii) What can the state do to improve its current standing?

## 2 International standards on torture

This part highlights some international torture-prohibiting standards Nigeria has ratified and the obligations arising therefrom. It also reflects on relevant torture-prohibiting mechanisms and attempts to combat torture.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) creates three main obligations for ratifying states. First, states must establish and exercise jurisdiction over three connected offences – torture, attempt to commit torture and complicity in torture.[4] Second, states must have laws that punish torture (and related offences) in their territories. The laws must also extend to their nationals – as victims or perpetrators – even when the offence is committed outside their territories. This obligation also includes detaining perpetrators of the crime of torture elsewhere who come within the territory of a ratifying state.[5] For this category of individuals, ratifying states must either submit them to prosecuting authorities or extradite them to states that can prosecute them.[6] The obligation to extradite incorporates a supplementary obligation to refrain from transferring persons to places where they could be at risk of torture.[7] Finally, CAT creates an obligation on states to prevent torture through different

3 Two of the more fundamental of these obligations are the obligation to establish an independent NPM that visits detention centres and cooperates with the UN SPT and the obligation to allow independent experts of the UN SPT access to detention centres. See part 2.1.2 below.
4 Art 4 CAT.
5 Art 5(1) CAT.
6 Arts 6 & 7 CAT.
7 Art 3 CAT.

mechanisms[8] and to enable victims of torture to submit complaints and access appropriate remedies.[9]

OPCAT establishes a system of 'regular visits' to places of detention to prevent torture and other cruel, inhuman and degrading treatment or punishment.[10] OPCAT also establishes two mechanisms to undertake these visits – the United Nations (UN) Sub-Committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the NPM. OPCAT creates two key obligations for ratifying states:[11] an obligation to establish an NPM to visit detention centres and cooperate with the SPT; [12] and another obligation to allow independent experts at the SPT access to detention centres to protect detainees from torture and other cruel, inhuman and degrading treatment or punishment.[13]

The International Covenant on Civil and Political Rights (ICCPR) expressly prohibits torture. Indeed, article 7 of ICCPR provides that 'no one shall be subjected to torture or cruel, inhuman and degrading treatment or punishment'. Complementing article 7, article 10(1) requires state parties to treat all persons deprived of liberty with 'humanity and respect for the inherent dignity of the human person'. Article 4(2) does not permit any derogation for the crime of torture.[14] In summary, ICCPR creates obligations on ratifying states[15] to prohibit torture, to treat all persons deprived of their liberty with humanity and respect, and to ensure no derogation for the offence of torture.

Article 5 of the African Charter on Human and Peoples' Rights (African Charter) promotes respect for the dignity of the human person and encourages ratifying states[16] to prohibit all forms of exploitation and degradation, particularly torture, inhuman or degrading treatment or punishment. To elaborate on the extent of state obligations under article 5, the African Commission on Human and Peoples' Rights (African Commission)[17] adopted the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa (Robben Island Guidelines) in 2002 with three key obligations

8 Art s 2, 11 & 16 CAT.
9 Arts 13 & 14 CAT.
10 Art 1 OPCAT.
11 Nigeria ratified OPCAT on 27 July 2009.
12 Art 11(b) OPCAT.
13 Art 11(a) OPCAT.
14 HRC General Comment 20 on art 7 para.3.
15 Nigeria ratified ICCPR on 29 July 1993.
16 Nigeria ratified the African Charter on Human and Peoples' Rights on 22 July 1983.
17 Under art 45(1) the Commission can formulate principles and rules to address problems associated with human and peoples' rights and fundamental freedoms.

for state parties – prohibit torture, prevent torture and respond to the needs of torture victims.

## 2.1 Mechanisms for upholding the prohibition on torture

By its ratification of the standards highlighted in part 2, Nigeria is subject to supervisory mechanisms such as the UN Committee against Torture (CAT Committee), the UN Human Rights Committee, the UN SPT, the African Commission on Human and Peoples' Rights and its Committee for the Prevention of Torture in Africa (CPTA). In this part I highlight the most recent engagements of these mechanisms with Nigeria.

### *2.1.1 United Nations Committee against Torture*

Article 19(1) of CAT requires states to submit their initial report within one year of the Convention's entry into force in their states. By this provision, Nigeria's initial report was due on 28 June 2002. Regrettably, it failed to submit the initial report and subsequent reports that should follow every four years.

In its Concluding Observations in the absence of the initial report, the CAT Committee[18] regretted Nigeria's failure to meet its obligations despite its inclusion on the list of states with overdue reports for 19 years. The Committee also acknowledged the combined effect of the provisions of the Evidence Act of 2011, the Administration of Criminal Justice Act of 2015 and the Anti-Torture Act of 2017 which renders confessions obtained by torture inadmissible. However, it expressed concern that Nigeria's security services continued to use torture.[19]

### *2.1.2 United Nations Human Rights Committee*

The UN Human Rights Committee (HRC) has the mandate of monitoring the implementation of ICCPR. Its General Comment 20 elaborates the obligations set in article 7 of ICCPR relating to the prevention of and prohibition on torture. Those obligations extend to informing the HRC of legislative, administrative, judicial and other

18 CAT/C/NGA/COAR/1 of 21 December 2021, https://www.ohchr.org/en/documents/concluding-observations/catcngacoar1-concluding-observations-absence-initial-report (accessed 16 August 2024).
19 CAT Committee (n 18) 5 para 15.

measures taken to prevent and punish acts of torture and cruel, inhuman and degrading treatment or punishment.[20]

The HRC adopted its most recent Concluding Observation on Nigeria on 29 August 2019. The document lamented Nigeria's failure to submit its second periodic report due almost two decades earlier – on 28 October 1999.[21] It acknowledged Nigeria's adoption of the Anti-Torture Act and the ratification of CAT and OPCAT, but regretted that these frameworks existed contemporaneously with allegations of frequent use of torture by law enforcement agents, including for the purpose of the extraction of confessions. The document also deprecated the lack of rehabilitation for victims.[22]

The Concluding Observations recommended the prompt, thorough and effective investigation of allegations of torture as well as the prosecution and punishment of perpetrators. It also recommended that confessions obtained by coercion should not be admissible in court, and that, for the purpose and the broader goal of preventing torture, the state should take steps to strengthen the education of judges, prosecutors, police, military and security forces.[23]

### *2.1.3 United Nations Sub-Committee on the Prevention of Torture*

The UN SPT performs two main functions, namely, to visit places of detention and to advise states on the establishment of national preventive mechanisms.[24] The SPT has undertaken a special 'optional protocol advisory visit' to Nigeria. One objective of the visit was to facilitate the full implementation of OPCAT. Although about a decade old,[25] the visit has not yielded the desired result.[26]

### *2.1.4 African Commission on Human and Peoples' Rights*

State parties to the African Charter owe the obligation to submit periodic reports to the African Commission on measures taken to give

20 UN HRC General Comment 20 para. 8.
21 Human Rights Committee 'Concluding Observations on Nigeria in the absence of its second periodic report' CCPR/C/NGA/CO/02 1 para 3, https://www.ohchr.org/en/documents/concluding-observations/ccprcngaco2-human-rights-committee-concluding-observations (accessed 16 August 2024).
22 Human Rights Committee (n 21) 7 para 32.
23 Human Rights Committee (n 21) 7 para 33.
24 Art 11 of OPCAT lists three functions. The third is cooperation with the UN, international, regional and national bodies for the prevention of ill-treatment.
25 1-3 April 2014.
26 Nigeria has appeared on the list of states with substantial non-compliance with art 17 since 2015.

effect to the rights and freedoms recognised and guaranteed under the African Charter.[27] Nigeria submitted its sixth periodic report to the Commission covering the period 2015 to 2016 in 2017.

In its Concluding Observations on this report,[28] the African Commission acknowledged the enactment of the Anti-Torture Act of 2017 and raised several concerns, including the absence of information on the remedies available to individuals convicted based on confessions allegedly obtained through torture;[29] the absence of information about the prevalence of torture allegations against personnel of the Special Anti-Robbery Squad (SARS);[30] the absence of information about allegations of torture against the military in the framework of the counter-insurgency operations;[31] and the absence of a detailed report on the work of NCAT since its establishment in 2009.[32] Nigeria has not submitted another report, with the result that these concerns remain unaddressed.

### *2.1.5 Committee for the Prevention of Torture in Africa*

The African Commission established the Committee for the Prevention of Torture in Africa (CPTA) in 2004 to foster the implementation of the Robben Island Guidelines. The African Commission adopted these Guidelines in 2002 by a resolution.[33]

The Guidelines have three parts. The first urges states to ratify and domesticate existing instruments. The second part highlights preventive measures, including safeguards, mechanisms of oversight, awareness raising and human rights training. The final part seeks to respond to the needs of victims – treatment, support and reparations. Unlike the SPT, the CPTA does not have the mandate to regularly visit places of detention, partly because the African Commission has another mechanism focused specifically on that.[34] Given this

27 Art 62.
28 'Concluding Observations and recommendations: Nigeria 6th periodic report, 2015-2019' 10 November 2019, https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-nigeria-6th-periodic-report-2015 (accessed 17 August 2024).
29 Para 40(i).
30 Para 40(viii).
31 Para 40(v).
32 Para 40(vii).
33 The Guidelines give effect to art 5 of the African Charter, which prohibits all forms of degradation of man, including torture, cruel, inhuman and degrading punishment.
34 The Special Rapporteur on Prisons and Conditions of Detention in Africa.

background, the CPTA has not conducted any visit, but it reports to the African Commission.[35]

The Committee's most recent report[36] references Nigeria only concerning its inclusion on the SPT list of nine African states that have not complied with the provisions of article 17 of OPCAT.[37]

## 2.2 Reflections on Nigeria's anti-torture efforts

Before December 2017, Nigeria had no legislation criminalising torture. It is worth noting, however, that section 394(1)(a) of the Criminal Law of Lagos State, 2011 provides that '[a]ny person who cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates or terrifies any animal, or causes or procures, or, being the owner, permits any animal to be so used ... is guilty of an offence'. Under this law, it is a crime to torture animals, but not human beings.

However, there were legislations protecting the right to be free from torture without necessarily criminalising it. The principal federal laws are the 1999 Constitution of Nigeria,[38] the Evidence Act of 2011[39] and the Administration of Criminal Justice Act of 2015.[40] This part reviews these legislations and the Anti-Torture Act of 2017 to ascertain the extent to which they go to dissuade law enforcement personnel from routinely using torture.

### *2.2.1 1999 Constitution*

Section 34 of the 1999 Constitution preserves the right to dignity of all individuals and specifically proclaims that 'no one shall be subjected to torture or inhuman and degrading treatment'. However, it fails to define torture and inhuman and degrading treatment. It also neither

35 Rules 25(3) & 64 of the Commission's Rules of Procedure require special mechanisms such as CPTA to report on its activities at every ordinary session of the Commission.

36 Intersession Activity Report to the 77th ordinary session, 20 October-9 November 2023, https://achpr.au.int/ar/node/3868 (accessed 18 August 2024).

37 Intersession Activity Report (n 36) para 41.

38 See the Constitution of the Federal Republic of Nigeria, 1999 (updated with 1st-5th alteration, 2023), https://placng.org/i/wp-content/uploads/2023/05/Constitution-of-the-Federal-Republic-of-Nigeria-2023.pdf (accessed 18 August 2024).

39 See Evidence Act, 2011, https://www.refworld.org/legal/legislation/natlegbod/2011/en/104226 (accessed 18 August 2024).

40 See Administration of Criminal Justice Act, 2015, https://www.policinglaw.info/assets/downloads/2015_Administration_of_Criminal_Justice_Act.pdf (accessed 18 August 2024).

stipulates any punishment – typical of any modern constitution – nor points to the need for separate legislation on that.

### *2.2.2 Evidence Act 2011*

The Evidence Act of 2011 provides an important safeguard against confessional statements extracted in the context of law enforcement activities. Section 29(2) provides circumstances in which such statements will be inadmissible in court:[41] primarily, where oppression played a role in obtaining the statement (oppression in this context includes torture, inhuman and degrading treatment);[42] second, where a defendant makes a statement in furtherance of anything said or done which could render it unreliable.

This safeguard reflects an understanding and appreciation of the endemic use of torture in law enforcement practice and, therefore, places the burden on law enforcement personnel to demonstrate that confessional statements presented in support of any case meet minimum thresholds. In practice, where the defendant alleges that law enforcement officers extracted the statement in violation of the law, the court must conduct a trial within a trial.[43]

A trial within a trial reverses the order of proceedings by making the prosecutor the defendant and *vice versa*. In this circumstance, the defendant is at liberty to ask questions to establish that the statement failed the due process test. If they succeed, the case collapses.[44]

### *2.2.3 Administration of Criminal Justice Act 2015*

The Administration of Criminal Justice Act (ACJA) is a revolutionary legislation in many ways. ACJA establishes an Administration of Criminal Justice Monitoring Committee (ACJMC)[45] to address one of the more significant challenges of criminal justice administration – the lack of coordination among institutions on account of Nigeria's faulty federal structure. The law also introduces monthly visits by

41 The general rule is that relevant evidence is admissible regardless of the mode of collection. See *Musa Abubakar v EI Chuks* (2007) 18 NWLR Pt 1066, 386.
42 Sec 29(5) Evidence Act (n 39).
43 There is no legal or legislative basis for a trial within a trial. It is one of the practices Nigeria inherited by virtue of its connection with the United Kingdom, whose jury system introduced the concept.
44 In *Eke v State* (2011) 3 NWLR Part 1235 59, the Court hinted that successfully demonstrating the voluntariness of the confessional statement makes it admissible in evidence.
45 Sec 469 establishes the ACJMC and saddles it with the responsibility to 'ensure efficient and effective application of this Act by the relevant agencies'.

chief magistrates to detention facilities,[46] requires mandatory records of arrests[47] and stipulates time limits for pre-trial detention[48] as a way of reducing the incidence of prolonged pre-trial detention and consequential acts of torture, and so forth.

As laudable as these provisions are, they have not translated into tangible outcomes for ordinary citizens and users of the criminal justice system. For one, there is no concerted effort to track implementation. Second, the government has demonstrated limited political will to make implementation happen. In its most recent annual report, the ACJMC found that only 19 per cent of 43 police divisions in Nigeria's federal capital, Abuja, complied with the reporting obligations set out in ACJA;[49] 34,3 per cent failed to comply with these obligations because they did not receive the necessary instructions from their supervisors within the police institution.[50] One way in which to track the government's commitment to improving criminal justice outcomes is to institutionalise an annual review of implementation efforts involving all stakeholders. The review report would be publicly available and open to scrutiny.

### *2.2.4 Anti-Torture Act 2017*

The Anti-Torture Act (ATA) took effect in December 2017. Although it attempted to mirror CAT in its definition of torture, the CAT Committee found three fundamental omissions – the non-recognition of an attempt to commit torture as an offence; the absence of provisions excluding amnesties, pardons and statutes of limitation for the offence of torture; and the exclusion of acts of torture carried out for a purpose based on discrimination alone.[51] In line with CAT, the Act does not justify torture.[52] It excludes evidence extracted using torture[53] and offers victims a right to complain[54] as well as remedies, including up to 25 years' imprisonment for perpetrators.[55]

46 Sec 34. The visits serve three purposes – to inspect records of arrests; direct arraignment of suspects; and grant bail to deserving suspects.
47 Sec 15 mandatorily requires record keeping in respect of arrests and detention.
48 Sec 296(1)(2) mandates a maximum of 42 days divided into three 14-day detention periods. The magistrate is required to review after every 14-day cycle and release at the end of 42 days unless there is a compelling reason not to do so.
49 Sec 33 requires officers in charge of police stations to report all arrests without warrants to the nearest magistrate every month.
50 Administration of Criminal Justice Monitoring Committee Annual Report 2020 (Abuja 2021) 54, https://acjmcng.org/2022/06/06/acjmc-annual-report-2020/ (accessed 19 August 2024).
51 CAT Committee (n 18) 3 para 9.
52 Sec 3(1) Anti-Torture Act, 2017.
53 Sec 3(2) Anti-Torture Act.
54 Sec 4(1) Anti-Torture Act.
55 Sec 8(1) Anti-Torture Act.

Regrettably, the Act also includes a possible death penalty for torture leading to the victim's death.[56]

Section 9 invests in the Attorney-General the power to designate a regulatory agency to oversee the implementation of the Act.

Seven years after its enactment, the ATA has scarcely been subjected to judicial review. Indeed, this author found only one case in which an applicant challenged the violation of the Act before a domestic court in Nigeria.[57] Regrettably, the High Court of Nigeria's federal capital, Abuja, held that no claim of damage was established because the applicant's nine month-long detention and torture by police officers was 'within the ambit of law'.[58] It is unclear why the judge reached this decision. Nigeria's supreme law – the 1999 Constitution (as amended) – does not permit detention in police facilities beyond 48 hours[59] and the ATA criminalises torture. Regrettably, the case did not proceed on appeal to the next court in the judicial hierarchy – the Court of Appeal – for a review. Although it is beyond the remit of this article, further study on the reason(s) for the paucity of cases on the ATA is worth undertaking. One theory is that victims fear reprisals by law enforcement personnel.

## 3 Does the National Human Rights Commission as national preventive mechanism have the potential to ensure Nigeria's compliance?

This part reflects on the expectations of OPCAT and the CAT Committee concerning a NPM against the reality that is Nigeria's NCAT/NHRC. It examines NCAT's establishment and operations, highlights some challenges it confronted, and offers an opinion on whether – as presently constituted – the NPM-NHRC since May 2024 has the potential to progressively reduce the prevalence of torture in Nigeria.

56 Sec 8(2). Where torture results in death, the law presumes that a murder has been committed. Murder attracts the death penalty.

57 *Shedrach John v Inspector General of Police & 3 Others* Suit FCT/HC/CY/3568/2021, https://www.fcthighcourt.gov.ng/download/main-judgment/2022-Judgments/1st-Quarter/COURT-07-HON.-JUSTICE-O.A-MUSA/SHEDRACH-JOHN-VS.-IGP-3-ORS-ENFORCEMENT-OF-FUNDAMENTAL-RIGHTS.pdf (accessed 20 August 2024).

58 *Shedrach John* (n 57) 18.

59 Sec 35(4) of the 1999 Constitution prescribes that anyone arrested and detained must be brought before a court within a reasonable time. Sec 35(5) defines a reasonable time as 24 hours if there is a court within a 40km radius; otherwise, 48 hours.

### 3.1 Expectations on the establishment/operations of national preventive mechanisms

Article 17 of OPCAT mandates state parties to establish, designate or maintain one or more NPMs for the prevention of torture at the domestic level. This provision offers ample latitude to establish a new NPM or designate an existing institution as an NPM. It also provides the opportunity to designate one or more entities as NPMs.

Nigeria is one of a few federal states to designate a single institution as its NPM. Other federal states such as Australia, New Zealand[60] and even quasi-federal South Africa[61] tend to designate multiple institutions as their NPMs. It is instructive to note that the provisions of OPCAT apply in every part of a federal state without exceptions or limitations.[62]

A review of OPCAT and the literature on NPMs reveal specific requirements for establishing and running NPMs.[63] In this article I focus on four of the more essential requirements for two main reasons. These requirements apply regardless of the structure of the state looking to establish NPMs and they are foundational to maintaining the character and integrity of NPMs. The chosen requirements are transparency and inclusiveness of the consultative process leading to its identification,[64] functional independence of the institution and

60 E Steinerte 'The jewel in the crown and its three guardians: Independence of national preventive mechanisms under the Optional Protocol to the UN Torture Convention' (2014) 14 *Human Rights Law Review* 1, https://academic.oup.com/hrlr/article/14/1/1/667044?login=true (accessed 21 August 2024).

61 South African National Preventive Mechanism 'Submission to the United Nations Sub-Committee on Prevention of Torture on Draft General Comment on article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' 20 April 2023 2 para 6, https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/cfis/gc1-art4/submission-spt-gc-article4-NPM-SouthAfrica.pdf (accessed 21 August 2024).

62 Art 29.

63 Transparency, inclusion and information about the process of designation; diversity of membership; enabling legislation/constitutional provision; regular preventive visits; unfettered access to all places of detention; independence of the institution and its members; collaboration with UN SPT; and implementation of recommendations of the institution.

64 Association for the Prevention of Torture *Establishment and designation of national preventive mechanisms* (2006) 8, https://biblioteca.corteidh.or.cr/tablas/25431.pdf (accessed 22 August 2024); B Buckland & A Olivier-Muralt 'OPCAT in federal states: Towards a better understanding of NPM models and challenges' (2019) 25 *Australian Journal of Human Rights* 23, 30, https://www.tandfonline.com/doi/full/10.1080/1323238X.2019.1588061 (accessed 21 August 2024).

its personnel,[65] the right to visit places of deprivation of liberty[66] and collaboration with the UN SPT.

Regarding the first requirement, the process of designating an NPM as well as identifying its members should be transparent and inclusive of key stakeholders including civil society. This is critical in building the trust and confidence every NPM requires to function optimally.

Concerning the second requirement, article 18(1) of OPCAT demands 'functional independence' of an NPM[67] and independence of its personnel[68] as a condition precedent to establishing and maintaining an NPM that meets OPCAT standards. Krisper describes functional independence with reference to autonomy from state authorities whether executive, legislative or judicial.[69] She also identifies three indicators of functional independence, namely, a clear constitutional or legislative framework for the NPM; financial independence; and the appointment of members and staff of the NPM for a secure term.[70] Regarding independence of personnel, the UN SPT recommends that both the identification of the NPM and the process of selecting its members should be done through an 'open, transparent, and inclusive process'.[71]

For the third requirement, article 20(c) enjoins states to grant NPMs unfettered access to all places where persons deprived of their

65 Steinerte (n 60) 1; Buckland & Olivier-Muralt (n 64) 24; J McGregor 'The challenges and limitations of OPCAT national preventive mechanisms: Lessons from New Zealand' (2017) 23 *Australian Journal of Human Rights* 351, 358, https://www.tandfonline.com/doi/full/10.1080/1323238X.2017.1392477 (accessed 21 August 2024).

66 Art 4 OPCAT; Buckland & Olivier-Muralt (n 64); McGregor (n 65); Steinerte (n 60) 5.

67 OPCAT encourages states to refrain from supervising NPMs. See UN SPT 'Analytical assessment tool for national preventive mechanisms' UN Doc CAT/OP/1/Rev. 1 (25 January 2016) para 3, https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf (accessed 21 August 2024).

68 NPM experts are required to have the requisite capabilities and professional knowledge. The composition of NPMs should reflect gender balance and 'adequate representation of ethnic and minority groups in the country' (art 18(2) OPCAT).

69 S Krisper 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part IV National Prevention Mechanisms art 18 independence, pluralism and efficiency of national preventive mechanisms' in M Nowak, M Birk & G Monina (eds) *The United Nations Convention against Torture and its Optional Protocol: A commentary* (2019) 890.

70 As above.

71 SPT *Guidelines on National Preventive Mechanisms* CAT/OP/12/5 9 December 2010 para 16, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en (accessed 21 August 2024).

liberty are detained.[72] These places extend beyond the traditional police cells and prisons. They include military bases, immigration detention centres, closed psychiatric institutions, and so forth.[73] Even unofficial detention places and 'irregular detention' are within the contemplation of article 20(c).[74]

The visits should be regular and preventive.[75] Regarding its preventative nature, the UN Special Rapporteur on Torture pointed to the potential of unannounced visits, access to registers, interviews with detainees and medical investigations of torture victims to deter future acts of torture as well as create the atmosphere for constructive dialogue between the visitors (SPT or NPM) and the state to resolve identified problems.[76]

In addition to allowing unfettered access to places of detention, states should also accord the necessary privileges and immunities to members and staff of the NPM required to undertake their assignment without interference.[77] The power to visit these places of detention also includes the authority to investigate the treatment of detained persons.[78] To perform this function effectively, states are required to provide adequate resources to NPMs,[79] review the recommendations of the NPMs to implement them,[80] and publish/disseminate the annual reports of NPMs.[81] The distribution list for annual reports must include the national parliament and the UN SPT.[82]

Fourth, article 20(f) creates an obligation on state parties to grant NPMs the authority to stay in touch with the UN SPT.

Although every state party to OPCAT may choose the NPM model it finds most appropriate and in consonance with its peculiar circumstances – administrative, financial, and geographic – the UN

72 SPT (n 71) para 10.
73 Buckland & Olivier-Muralty (n 64) 24.
74 Report of the UN Working Group to Draft an Optional Protocol to the UN Convention against Torture UN Doc. E/CN.4/1993/28 2 December 1992 paras 38-40, https://documents.un.org/doc/undoc/gen/g92/148/10/pdf/g9214810.pdf?token=yHpoywpt2cWRltVP8A&fe=true (accessed 21 August 2024).
75 Art 1 OPCAT.
76 2006 Report to the UN General Assembly, UN Doc A/61/259 14 August 2006 para 72.
77 SPT (n 71) para 26.
78 Art 19 OPCAT.
79 Art 18(3) OPCAT. In his 2010 interim report, the UN Special Rapporteur on Torture hinted that the 'most independent NPM with the strongest mandate cannot function without sufficient resources'. See UN Doc A/65/273 10 August 2010 83.
80 Art 22 OPCAT.
81 Art 23 OPCAT.
82 SPT (n 71) para 29.

SPT recommends that states should identify NPMs by an 'open, transparent and inclusive process'[83] involving a range of stakeholders, including civil society.

## 3.2 Establishment of Nigeria's NPM-NCAT (NHRC since May 2024)

In this part I review the establishment and operations of Nigeria's NPM – the NCAT (NHRC since May 2024) – against the four essential requirements highlighted in part 3.1 – transparency and inclusiveness of the process leading to NCAT's establishment; independence of the institution and its personnel; unfettered access to detention centres; and collaboration with UN SPT. Before delving into these requirements, it is necessary to introduce NCAT.

### *3.2.1 Introducing the National Committee Against Torture*

Nigeria inaugurated two NCATs from the day it ratified OPCAT on 27 July 2009 to the presidential order of May 2024 designating the NHRC as the NPM. The Attorney-General of Nigeria inaugurated the first NCAT on 28 September 2009[84] and the second on 11 September 2022. It is important to note that two separate Attorneys-General conducted the inauguration ceremonies.[85] The second NCAT became necessary because the first performed below expectations. Both had terms of reference as founding documents rather than the SPT-prescribed constitutional or legislative framework.[86]

The first NCAT had seven items on its terms of reference[87] while the second had eight items.[88] In terms of similarities, both terms of reference mandated NCAT to receive and consider torture-related complaints, provide information and education on torture

83 SPT (n 71) para16.
84 The Committee had Dr SS Ameh, a retired academic and senior lawyer, as Chairperson, and Mr Olawale Fapohunda, a lawyer and civil society activist, as Co-Chairperson.
85 Michael Aoadoakaa conducted the 2009 inauguration while Abubakar Malami conducted the 2022 inauguration.
86 The UN SPT has identified having a legal basis for an NPM as a 'prerequisite for its institutional stability and functional independence'. SPT 'Report on the visit to Honduras' UN Doc CAT/OP/HND/1 10 February 2010 para 262, https://digitallibrary.un.org/record/678917?v=pdf (accessed 22 August 2024).
87 Federal Ministry of Justice 'Mandate of the National Torture Committee', https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 22 August 2024).
88 A Oluwafemi 'FG sets up committee to monitor compliance with laws against torture' *The Cable* (Nigeria) 11 September 2022, https://www.thecable.ng/fg-sets-up-committee-to-monitor-compliance-with-laws-against-torture (accessed 22 August 2024).

prohibition, report quarterly to the Attorney-General, and propose enactment or review of anti-torture law as well as the development of anti-torture policy.

Concerning differences, the 2009 terms of reference required NCAT to visit places of detention, while the 2022 terms of reference did not expressly mention that. Also missing from the 2022 terms of reference is the requirement to review interrogation rules, methods, practices and arrangements.

For its part, the 2022 terms of reference invites the NCAT to engage with the CAT Committee and regional human rights mechanisms on reporting dialogue, and facilitation of country visits, facilitate the preparation of country reports, including the consultation and data collection required as well as consultations and follow-up necessary before and after the submission of reports. The 2022 terms of reference appears to lean heavily on meeting Nigeria's obligations to the UN CAT ostensibly because Attorney-General, Abubakar Malami, submitted in his inauguration speech that the 2009 NCAT was 'unable to establish proper official communication or engagement' with the CAT Committee. This was a misstatement of facts as that committee did submit at least one report to the UN SPT.[89] However, it is fair to say that the 2009 NCAT struggled to perform its functions. Indeed, 56 months after its establishment in May 2014, Amnesty International reported that NCAT had not 'received its funding or been able to carry out its work'.[90] The most recent NPM is the NHRC.

### *3.2.2 Transparency and inclusiveness of process leading to the establishment of NCAT/NHRC*

The process leading to the establishment of NCAT was neither transparent nor inclusive. Neither the process of determining the type of NPM nor the composition of the NPM was open to public consultation. The Attorney-General designated the NPM and appointed the 2009 and 2022 committees without broad stakeholders' consultations involving civil society. This is consistent with the government's style of appointing committees. However, in the framework of developing Nigeria's official UN Universal Periodic Review (UPR) report, the government tends to consult civil society

89 DD Ameh '4th quarterly report of the National Committee against Torture for the period ending 31 December 2014 to the UN Sub-Committee on Torture', https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 22 August 2024).

90 Amnesty International 'Stop torture: Nigeria' (2014) AFR 44/005/2014 3, https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440052014en.pdf (accessed 22 August 2023).

and other stakeholders as mandated by the UPR process.[91] This demonstrates that it is possible to be more consultative and inclusive. The process of designating the NHRC as the new NPM similarly was non-transparent and non-inclusive.

Regarding civil society participation in NCAT, the state ought to make its decision about the choice of representatives in consultation with civil society or allow civil society to make the choice. Unfortunately, this was not the case with the first and second NCATs. The Attorney-General's office simply identified some non-governmental organisations (NGOs) and appointed these to the committee. Although some of these NGOs have torture prevention projects, they did not emerge from a consultative process. Concerning the NHRC, the establishment Act reserves five slots of a 16-member governing council for civil society – three representatives of human rights organisations and two representatives of the Nigerian Bar Association. Apart from the Bar Association, which has the prerogative to choose its representatives, civil society was not consulted about the choice of its representatives.

### *3.2.3 Independence of NCAT/NHRC and its personnel*

The 2022 NCAT is similar to the previous one. It runs on a set of terms of reference rather than a legislative or constitutional framework. This is contrary to SPT's recommendation that requires the mandate of NPMs to be set out in a 'constitutional or legislative text'.[92]

Recognising this shortcoming in its December 2022 response to the CAT Committee's Concluding Observations[93] of November 2021, Nigeria claimed that the establishment of NCAT based on terms of reference is backed by the Anti-Torture Act of 2017 – specifically sections 10 and 12, which give the Attorney-General powers to make regulations for the implementation of the Act.[94] However, that

91 Nigeria's National Report submitted pursuant to United Nations Human Rights Council Resolutions 5/1 and 16/21, A/HRC/WG.6/45/NGA/1 15 December 2023 2, part II, https://www.ohchr.org/en/hr-bodies/upr/ng-index (accessed 23 August 2024).

92 United Nations High Commissioner for Human Rights *Preventing torture: The role of national preventive mechanisms* (2018), https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf (accessed 23 August 2024).

93 See CAT Committee 'Information received from Nigeria on follow-up to the Concluding Observations in the absence of its initial report' CAT/C/NGA/FCOAR/1 4 January 2023, https://digitallibrary.un.org/record/4003818 (accessed 23 August 2024).

94 CAT Committee (n 93) para 35.

explanation does not change the fact that the mandate and powers of NCAT are not set out in a constitutional or legislative text.

The terms of reference are neither a constitutional nor a legislative text. Therefore, there is no formal legal basis for NCAT. Furthermore, the NCAT terms of reference do not set out the powers, appointment criteria and membership processes,[95] terms of office and grounds for dismissal,[96] funding sources and lines of accountability, as one might expect a legislative text to do. Although NHRC is founded on a legislative text, its designation as an NPM is founded on a presidential order, which did not go through a formal legislative process.

For its composition, Nigeria submitted that the 2022 NCAT is more diverse in its membership and more inclusive of civil society.[97] Compared to the previous committee, this is true. The prior committee had two civil society organisations – the Human Rights Agenda Network[98] and the Nigeria Bar Association. The 2022 NCAT has four more – Access to Justice; *Avocats Sans Frontières* (ASF France); International Federation of Women Lawyers (FIDA); and Prisoners Rehabilitation and Welfare Action (PRAWA) joining the initial two. However, all 21 committee members are appointees of the Attorney-General and they report to him. Indeed, the committee Chairperson and alternate Chairperson[99] report directly to the Attorney-General. Six other members represent institutions that report to the Attorney-General.[100] The final seven members represent six law enforcement institutions often accused of committing acts of torture,[101] and one independent expert.[102] Regrettably, the mode of appointment of these individuals – particularly civil society representatives – was not

95 SPT 'Report on the visit by SPT for providing advisory assistance to the NPM of Malta: Report to state party' UN Doc CAT/OP/MLT/1 1 February 2016 para 26, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FMLT%2F1&Lang=en (accessed 23 August 2024).

96 Guidelines on NPMs (n 71) para. 9.

97 Guidelines on NPMs (n 71) para 34.

98 HRAN is a coalition of civil society organisations committed to promoting human rights in Nigeria.

99 The co-Chairpersons are Beatrice Jedy Agba (Solicitor-General of the Federation) who is next in line to the Attorney-General, and Tony Ojukwu (Executive Secretary, National Human Rights Commission) whose institution reports directly to the Attorney-General.

100 These are two senior staff members of the Ministry of Justice, namely, the Director of Citizens Rights Department and Director of Public Prosecutions; representatives of four direct reports of the Attorney-General, namely, Directors General, Legal Aid Council, and Nigerian Institute of Advanced Legal Studies, Director Academics, Nigerian Law School and Director, Monitoring NHRC.

101 Nigerian Police Force, Nigeria Correctional Service, National Security and Civil Defence Corps, Department of State Services, Nigerian Army, and Economic and Financial Crimes Commission. It is unclear why the Attorney-General excluded the Nigerian navy, air force and National Drug Law Enforcement Agency which also arrests and detains suspects, and has been accused of torturing suspects.

102 Ambassador Christy Ezim.

open, inclusive and transparent. For its part, the NHRC Governing Council has five of 16 members representing civil society. This is a fair representation. However, apart from the bar representatives, the other civil society representatives do not necessarily report back to their constituencies

Regarding funding, Nigeria pledged to have 'separate appropriation in the budget of FMOJ and NHRC from 2023 financial year'.[103] This intervention was supposed to address the concerns about the financial independence of NCAT. However, separate appropriation in the budget of the justice ministry or that of the NHRC does not guarantee financial independence because NCAT will have to rely on either or both institutions to receive its funding. Interestingly, the committee is led by heads of both institutions who report to the Attorney-General. In summary, there was neither operational nor financial independence with the two NCATs. Although the NHRC has its funding as a direct charge to the consolidated revenue fund, it is unclear whether acting as an NPM, it will ringfence funds for the operation of the NPM in view of other pressing priorities.

It is worth noting that designating the NHRC as NPM means that it stands a better chance of accessing places of detention than the two previous NCATs because the Commission has legally guaranteed right of access to detention facilities. Nonetheless, there is a question about the extent to which the NHRC utilises this mandate in practice.

### *3.2.4 Unfettered access to detention centres*

As suggested in part 3.2.3, the 2009 Committee struggled with accessing detention centres partly because it did not have the full support of the government to do so, but also because the committee was comatose for most of its 13-year history.[104]

There is no record of the Committee producing any annual report. Apart from its report to the UN SPT in December 2014,[105] there is no record of any other submission to the UN SPT. In the 2014 report, NCAT Chairperson, DD Ameh, alleged that the Committee was

103 CAT Committee (n 93) para 34.

104 Committee Chairperson, DD Ameh, publicly hinted that his committee could not 'meet, investigate properly, and even send periodic reports to the United Nations because of lack of funding'. S Ogunlowo 'We are suffering from lack of funding – FG's Anti-Torture Committee' *Premium Times* (Nigeria) 21 June 2022, https://www.premiumtimesng.com/news/more-news/538425-we-are-suffering-from-lack-of-funding-fgs-anti-torture-committee.html?tztc=1 (accessed 23 August 2024).

105 Ameh (n 89).

short of funds and operating 'out of the personal intervention of the chairman'.[106] Although the report suggested that more than one member of the Committed conducted the visit to one prison and 'a number of police stations',[107] the pictures demonstrate that Mr Ameh was the only member of the Committee on that trip. Furthermore, Mr Ameh signed off on the report with his private office address, telephone, email and website.[108]

Given this background, it is fair to ask why the government of Nigeria set up this Committee. Was it to tick the box on compliance with article 17, which requires the establishment of an NPM? In its latest annual report, the UN SPT unsurprisingly lists Nigeria as one of 14 states that have made little or no progress towards fulfilling their obligations regarding the establishment of NPMs under OPCAT.[109] The designation of NHRC as NPM unlocks access to detention centres for reasons highlighted in part 3.2.3, but some of the initial challenges remain.

### *3.2.5 Collaboration with UN SPT*

The UN SPT paid an 'optional protocol advisory visit'[110] to Nigeria for the first time in April 2014. One objective of this visit was to 'hold discussions on the role, achievements and challenges' of NCAT.[111] Another objective was to help the UN SPT understand the situation in the country.[112]

Following this visit, the SPT issued a confidential report to Nigeria on 9 July 2014.[113] Regrettably, that visit did not appear to change NCAT's collaboration with the SPT because there is no record of subsequent dealings by the first NCAT with the SPT. In its 2021

106 Ameh (n 89) 16.
107 Ameh (n 89) 15.
108 Ameh (n 89) 19.
109 SPT '16th annual report of the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' CAT/C/76 adopted at 76th session, 17 April-12 May 2023 para 33, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F76%2F2&Lang=en (accessed 23 August 2024).
110 SPT '8th annual report of the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' CAT/C/54/2 adopted at 54th session, 20 April-15 May 2015 para 15, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F54%2F2&Lang=en (accessed 23 August 2024).
111 SPT 'Nigeria: UN torture prevention body to visit from 1-3 April' Press release 27 March 2014, https://www.ohchr.org/en/press-releases/2014/03/nigeria-un-torture-prevention-body-visit-1-3-april (accessed 23 August 2024).
112 SPT (n 111) 47.
113 UN Treaty Body Database for OPCAT, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological (accessed 23 August 2024).

Concluding Observations, the CAT Committee noted that Nigeria had neither notified the SPT of its designation of an NPM, nor allowed an official visit by the SPT.[114] Given its existing relationship between the NHRC and the UN SPT and other UN human rights organs, I expect that collaboration with the SPT will improve under the new dispensation, that is, with the NHRC as NPM.

### 3.3 Can the recently designated NPM-NHRC ensure Nigeria's compliance?

As presently constituted, the NHRC has a greater incentive to perform its functions as an NPM than the 2009/2022 Committees – it has more secure funding – at least in principle, better access to detention facilities, and greater diversity in its membership. Indeed, Ayo-Ojo argues that it is 'arguably the best model for the Nigerian NPM'.[115] However, some of the main concerns remain – independence of personnel, reference to a legislative text and functional independence of the institution itself.

Although the NHRC – in principle – is independent, its administrative/operational head reports to the Attorney-General of Nigeria. This is problematic to the extent that the Attorney-General can wield some influence on the Commission's decisions.

Regarding its right to visit places of deprivation of liberty, the Commission has made the effort to visit prisons but paid less attention to other places, including police stations and detention centres maintained by other security institutions such as the military, department of state services (DSS) and other paramilitary institutions.

The fact that the administrative leadership team at the Commission consists of career civil servants without security of tenure – but for the executive secretary – makes it less likely that the Commission will do well with torture prevention because their careers could be negatively impacted by reports perceived unfavourably by the government. This does not align with the spirit of the CAT Committee requirement that states should refrain from supervising the NPM.

It is crucial to underscore that the designation of the NHRC as Nigeria's NPM is both beneficial and burdensome. It is beneficial to the extent that it improves access to places of detention. However, it is

114 CAT Committee (n 18) para 21.
115 BS Ayo-Ojo 'A critical appraisal of the national institutional mechanism for the prevention of torture in Nigeria' (2024) 8 *African Human Rights Yearbook* 118, https://www.ahry.up.ac.za/ayo-ojo-bs (accessed 17 March 2025).

also a burden because the executive secretary as operational head of the NHRC has the primary responsibility for delivering on its 18-point mandate.[116] Although the prevention of torture is connected to the mandate of the Commission,[117] adding it as a specific function to the already saturated portfolio of the NHRC reduces the attention they can pay to other pressing human rights issues across the country.

Although the NHRC owes its existence to a legislative text, the instrument designating the NHRC as an NPM is an executive order that does not qualify as a legislative text. To the extent that it references an existing legislative text, the executive order serves a useful purpose. However, it might have been better to amend the NHRC Establishment Act to include a provision designating the NHRC as an NPM. This would have put an end to the argument about whether or not the NPM is founded on a constitutional or legislative text. Regardless, the executive order carries more legal weight than the terms of reference upon which the 2009 and 2022 NCATs were based.

Beyond designating the NHRC as an NPM, it would be interesting to see how this pans out in real terms. Would the department serving as the secretariat for the NPM be adequately resourced to perform its functions without inhibitions? This is still unclear. If the presidential order is anything to go by, there are concerns about how seriously the government takes the functional and operational independence of the NPM. Article 2(2) of the order places the responsibility for ensuring 'operational independence' and 'appropriate resourcing' on the NHRC. This is rather curious as as the NHRC is not self-financing. The government ought to have taken a more proactive approach by inserting clauses that guarantee independence and adequate resourcing of the NPM. One proposal would have been to indicate that the department will have direct line funding and its activities will not be subject to interference by the leadership of the NHRC or the Ministry of Justice. That said, the budget of the department for 2025 could provide a hint about the future of the NHRC as NPM because it should demonstrate how much of a priority an NPM is in the scheme of things.

116 Including monitoring and investigating complaints of human rights violations; assisting victims to seek appropriate remedies for violations; publishing annual reports on the state of human rights in Nigeria; and undertaking studies for the formulation of government policies on human rights. For a full list, see NHRC mandate, https://www.nigeriarights.gov.ng/about/nhrc-mandate.html (accessed 23 August 2024).

117 Its first mandate is to 'deal with all matters relating to the promotion and protection of human rights' as guaranteed under the Constitution of Nigeria and international instruments to which Nigeria has subscribed.

# 4 What more can Nigeria do to get closer to the goal?

In this part I identify what Nigeria needs to do to get closer to the goal of an OPCAT-compliant NPM.

## 4.1 Back to the basics – Constitutional or legislative Act?

The government of Nigeria took a positive and commendable step in designating the NHRC as the new NPM. That step changed the dynamic for the NPM to the extent that it stopped being anchored on a set of terms of reference and tilted a little towards the requirement of a constitutional or legislative text. As previously indicated, the act of designating via a presidential order strengthens the legal basis for the NPM, but the order itself is not a constitutional or legislative act.[118] Having done this, the government should take a further step by amending the NHRC Act to specifically include the department responsible for performing NPM functions – incorporating themes such as its operational and financial independence. It might also be helpful to indicate how the civil society representatives on the governing council of the NHRC will play a role in the work of this department.

Embedding the NPM directly in the NHRC legislation has dual benefits. One is that it makes the institution OPCAT-compliant but, more importantly, it provides an opportunity, through the law review process, for stakeholders to debate what form and/or shape the institution should take. The current presidential order did not benefit from such debate.

Embedding the NPM in legislation may not address all the challenges it confronts, but would place it on a firmer footing to overcome these. Taking the question of the independence of the institution and its personnel, for instance, inserting a section that creates a fixed term of office for members/staff and insulates them from politics would help focus members' attention on getting the job done without looking over their shoulders.

One caveat is necessary at this point. Nigeria has a reputation for crafting decent laws but often struggles with implementing

118 Ayo-Ojo (n 115) suggests that by designating the NHRC as an NPM via a presidential order, the government of Nigeria has 'incorporated those mandates into an Act of Parliament' (121) This could be interpreted to imply that presidential orders can amend laws enacted by Parliament. The author has difficulty in finding a legal basis for this practice.

them. For example, section 9(3) of the Administration of Criminal Justice Law of Lagos State 2011 requires that law enforcement officers interrogate crime suspects on video or in the presence of a lawyer of their choice as a safeguard to prevent or minimise torture. Regrettably, only a handful of mostly donor-funded police stations have recording facilities. For their part, police officers scarcely invite lawyers to their interrogation rooms.[119] Therefore, it will take more than just revising the NHRC Establishment Act to get more traction on the NPM. The government must demonstrate commitment to making greater efforts to ensure compliance.[120]

### 4.2 Independence of the institution and its personnel

The Nigerian government can make a simple commitment to strengthening the financial independence of the NPM by charging its budget, as a department of the NHRC, to the consolidated revenue fund (CRF) – a special fund from which recipients can directly draw resources without relying on other parts of the government. In practice, the funds of the NHRC are on the CRF. However, there is no indication that the department responsible for performing NPM functions will have access to whatever funds are allocated to it as and when due. In addition, it is unclear how much of a priority that department will have in terms of flexibility to perform its functions. This needs to be addressed either in the amendment to the NHRC or by a policy decision.

Under the presidential order, it seems clear that the staff of NHRC will manage the department responsible for NPM functions. While this makes sense, it might help to indicate that they will be required to inspect detention centres and to annually report on this assignment. This is critical because the NHRC has not been consistent in publishing annual reports on its detention centres visit mandate. In addition, the law or policy needs to make it clear that the mandate extends to all places of detention – not only prisons and police stations. This responsibility has financial implications and, therefore, the budget of the NPM needs to take cognisance of this. Furthermore, hiring external consultants might help to improve the perception of independence and strengthen the capacity of the department to deliver on its mandate.

119 Access to Justice A report on the implementation of the administration of criminal justice law 2011 of Lagos State (2020) 23, https://www.accesstojustice-ng.org/Research%20Report%20-%20Implementation%20of%20the%20ACJ%20Law.docx (accessed 23 August 2024).

120 Ayo-Ojo (n115) uses the popular Nigerian phrase 'political will' to describe this commitment (121).

### 4.3 Visiting rights and documentation

One of the more outstanding features of the NPM is the possibility to make unscheduled visits. Unscheduled visits provide a rare opportunity for visitors to see detention facilities in their most vulnerable state and, therefore, get a more accurate picture of what goes on behind the walls. Although the NHRC as NPM has a right of unscheduled visits to detention centres, it often informs prisons before conducting its prison audits.

Nigeria's security services often cite the current security crises as the reason why they require prior notification before official visits. However, the security crises make the argument for unscheduled visits more compelling because the lower the risk of torture in detention, the less likely it is that detainees will resort to violence or jailbreak, and the more likely it is that evidence produced will pass the test of credibility before local and international audiences. Addressing this tendency to push back on unscheduled visits will require a firm resolve by the government to sanction uncooperative security personnel and by the NPM to perform its statutory function in the best way possible.

It is important to note that police officers prevented a magistrate from accessing police detention cells in Lagos State[121] despite a provision of the Administration of Criminal Justice Law, 2021 mandating magistrates to visit monthly to decongest the cells.[122] Regrettably, there was no consequence for that action, partly because the magistrate in question was unwilling to cooperate with the investigations into that violation of the law.

Beyond visiting, systematic documentation is critical to outlining what challenges trigger the use of torture and to tracking progress on torture prevention in places of deprivation of liberty. To be helpful, the reports of these visits should be publicly available so that groups and individuals working in torture prevention can follow developments and contribute to the process of progressively rolling back on the use of torture in detention facilities.

121 S Oyeleke 'Controversy as Lagos magistrate, assistant commissioner clash' *Punch* (Nigeria) 3 June 2022, https://punchng.com/controversy-as-lagos-magistrate-assistant-police-commissioner-clash/ (accessed 23 August 2024).

122 Sec 283(1) Lagos State Administration of Criminal Justice (Amendment) Law 2021.

### 4.4 Improving collaboration with UN SPT

In part 2 I provided evidence that NCAT's collaboration with the UN SPT and the UN system has improved marginally. NCAT's response to the CAT Committee's Concluding Observations in the absence of an initial report demonstrates a commitment to collaboration. Although the NHRC has a record of working well with UN human rights treaty-monitoring bodies, I suggest two ways in which it can build on its collaboration with the UN SPT. One, NHRC as NPM can play a role in persuading Nigeria to deposit a standing invitation to the CAT Committee to visit the country. Second, the NHRC should produce and submit periodic reports to the UN SPT as and when due.

## 5 Conclusion

This article examined Nigeria's compliance with OPCAT requirements for the establishment and operation of its NPM. Against the backdrop of four essential requirements for an NPM, it reviewed Nigeria's compliance level and identified a few gaps. The article also offered some suggestions to address the gaps, including amending the NHRC Act to expressly embed its role as the NPM. Other proposals include NHRC providing the CAT Committee with a standing invitation to visit Nigeria, and insulating the department of NHRC responsible for performing NPM functions from direct executive control by charging its funds to the consolidated revenue fund, ensuring its operations are unimpeded by civil service bureaucracy, and enabling the infusion of external consultants to strengthen its independence and capacity to deliver. I also recommended that civil society representatives on the NHRC Governing Council should play a more visible and proactive role in preserving the independence and integrity of the NPM.

Taken together, these proposals have the potential to bring Nigeria closer to fully complying with its obligations under OPCAT and safeguarding the rights of citizens and residents from wanton abuse by law enforcement and military personnel.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: DT Eyongndi, AM Okwori, U Nnawulezi & JO Adedeji 'Imperativeness of institutionalising work as a fundamental right in Nigeria: Lessons from Belarus and India' (2025) 25 *African Human Rights Law Journal* 277-301
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a11

# Imperativeness of institutionalising work as a fundamental right in Nigeria: Lessons from Belarus and India

*David Tarh-Akong Eyongndi**
Associate Professor, College of Law, Bowen University, Iwo, Osun State, Nigeria
https://orcid.org/0000-0003-0072-1812

*Arome M Okwori***
Associate Professor, Department of International Law and Jurisprudence, Faculty of Law, University of Jos, Nigeria
https://orcid.org/0009-0001-4596-014X

*Uche Nnawulezi****
Assistant Professor, College of Law, Bowen University, Iwo, Osun State, Nigeria
https://orcid.org/0000-0003-2718-3946

*John Oluyinka Adedeji*****
Senior Lecturer, Department of Private and Business Law, Lead City University, Ibadan, Nigeria
https://orcid.org/0009-0003-4692-9747

**Summary:** *The Constitution of the Federal Republic of Nigeria, 1999 guarantees various rights, which are regarded as non-justiciable and justiciable rights, under chapters 2 and 4. Work falls under the latter and may not be enforced by court action despite Nigeria's high level of unemployment. This is notwithstanding the fact that several international human rights instruments recognise work as a human right.*

* LLB (Hons) (UNICAL) BL LLM (Ibadan) PhD (Bowen University, Nigeria); eyongndi18@gmail.com or david.eyongndi@bowen.edu.ng
** BL LLB LLM PhD (University of Jos, Nigeria); okworia@unijos.edu.ng
*** BL LLB LLM PhD (Bowen University, Nigeria); uche.nnawulezi@bowen.edu.ng
**** BL LLB LLM PhD (Ibadan); Oluyinka.adedeji@lcu.edu.ng

*Through comparative analysis, this article examines the legal framework on the right to work in Nigeria, using the concept of interrelatedness, interdependence and indivisibility of human rights in advancing the imperativeness of institutionalising work as a justiciable right in Nigeria. The article found that most Nigerians live below the poverty line, and their economic conditions are exacerbated by an inability to earn an income that can meet their basic needs, thereby making the enjoyment of their justiciable rights impracticable. The article goes further to examine jurisprudential practices on the right to work in India and Belarus aimed at drawing lessons for Nigeria. It recommends that in order to address the high rate of unemployment in Nigeria aggravated by the COVID-19 pandemic, it becomes imperative to make the right to work a justiciable right to attain the United Nations Sustainable Development Goals 2 and 8.*

**Key words:** *employment; human rights imperative; India; Nigeria; right to work; Sustainable Development Goals*

## 1 Introduction

The natural law theory postulates that from its origin, man is endowed with certain rights by his maker.[1] These rights are indissoluble, universal, inherent and avails every human irrespective of any distinguishing feature such as race, creed, sex, religion, political opinion, colour, opinion, tribe, and so forth. There are both domestic and international legal instruments that address these rights, which are not created by these instruments, but are simply acknowledged and given legal immutability in the instruments.[2] These rights – their existence and observance – are the hallmark of a civilised society. Hence, all governments the world over are encouraged to accord special recognition to the scrupulous observation of these rights.[3]

In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (CFRN 1999) is the principal domestic Bill of Rights. It contains rights that are classified into two broad categories. One category is found in chapter 2 of the Constitution which contains rights under the umbrella of Fundamental Objectives and Directive Principles of

1 BO Nwanbueze 'The value of human rights and their challenge for Africa' Paper delivered at the Annual General Conference of the Nigerian Bar Association at Abuja, 27 August 1998 9.
2 See Constitution of the Federal Republic of Nigeria, 1999 Cap C23 Laws of the Federation of Nigeria, 2004; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
3 *Kuti v AGF* [1985] 8 NWLR (Pt 6) 211 230.

State Policy (FODPSP), while chapter 4 contains a second category of rights under the head of Fundamental Human Rights. As a general rule arising from judicial interpretation, the rights contained in chapter 2 (such as the rights to education, work, food, employment, housing, and so forth) are regarded as non-justiciable, while those in chapter 4 are justiciable. The foregoing is to the effect that there is a dualist conception of fundamental rights in Nigeria. This notwithstanding, neither chapter 2 nor chapter 4 of CFRN 1999 is independent of or unrelated to the other. The optimal enjoyment of human rights requires mutuality of recognition and observance of both the chapters of the Constitution.

This article argues for the recognition of the right to work as a fundamental right in Nigeria. It does so by examining the state of the law under international legal instruments and some selected jurisdictions where the rights under consideration have been given both statutory and judicial recognition. At present, the unemployment and underemployment levels in Nigeria are astronomically high. The rise in precarious employment practices, particularly the casualisation of employment and other non-standard forms of employment, is a testament of this grave reality. It is a simple economic fact that an increase in demand will lead to a hike in prices. Thus, the ever-increasing number of job seekers with the quagmire of limited or non-existing jobs has naturally given the employer an undue advantage in employment relations. Hence, at present in Nigeria, the employer can pick and choose whom to employ and on what terms and conditions without mutual bargaining between the parties, as ordinarily expected. Several international legal instruments have recognised work as a human right. In fact, the right to work seems to be the first gift to man by his Creator as contained in the Christian Holy Writ.[4] The right to work is intrinsic to man so that the enjoyment of all other rights is contingent upon it. In pursuit of its objective, this article adopts a doctrinal and comparative method, relying on both primary and secondary data such as CFRN 1999; the Labour Act of Nigeria 2004; the United Nations (UN) Universal Declaration of Human Rights, 1948 (Universal Declaration); the African Charter on Human and Peoples' Rights (African Charter); the International Convention on Economic, Social and Cultural Rights, 1976 (ICESCR); the International Labour Organisation Employment Policy Convention 122, 1964; the Constitution of the Republic of Belarus, 1994; case law; textbooks; and online materials. The data was subjected to rigorous content and jurisprudential analysis.

4 Genesis ch 2:15 King James version.

## 2 Domestic and international legal frameworks on the right to work in Nigeria

Sections 17(3)(a), (b), (c) and (e) of the CFRN 1999, which are provisions in the FODPSP and are generally regarded as non-justiciable, enjoin government at all levels to formulate policies geared at guaranteeing that all citizens, irrespective of any distinction or differences, have access to adequate and suitable means of livelihood, as well as the chance to secure appropriate employment. Furthermore, governments are to guarantee that working conditions are benevolent and fair through the provision of, or by making available, facilities that promote relaxation, aid workers' practice of their religions, safeguard their health, promote social well-being, safety and general welfare of all persons that are employed in some undertaking or the other. The government is to ensure that its policies or that of private employers are implemented in a way and manner that encourages the observation of equal pay for equal work without discrimination on the basis of sex, or on any other distinguishing factor whatsoever. While the aforementioned provisions of CFRN 1999 are non-justiciable *per se,* they are nevertheless not to be treated with careless abandon by government at all levels in Nigeria, as the sanctity of gainful work by the citizenry of any country cannot be overemphasised. Interestingly, the Supreme Court of Nigeria (SCN)[5] in *Ukpo v Imoke*[6] has held that all organs of the Nigerian government are constitutionally obliged to ensure the attainment of the lofty aspirations in chapter 2 of CFRN 1999 pursuant to section 13 thereof. The SCN, with specific reference to section 17(3) of theCFRN 1999, and in reference to the right to work, has recently held in *Lafia Local Government v Governor of Nasarawa State & Another*[7] that the Nigerian state has an obligation to ensure that its citizens have the opportunity to access suitable and freely chosen employment without any form of discrimination whatsoever. In this case, the SCN, on the ground of unconstitutionality, set aside the Edict of the Nasarawa State Government which directed indigenes to return to their respective local government area (LGA) to continue work instead of the subsisting arrangement of working wherever anyone finds themselves within the state irrespective of their LGA. The wealth and well-being of any nation is directly proportionate to the number of its gainfully employed citizens. Being gainfully employed reduces various vices in society that are bred by unemployment. Despite this declared obligation by the SCN of the Nigerian state, Eyongndi

5 Supreme Court of Nigeria is simply referred to as SCN.
6 [2009] 1 NWLR (Pt 1121) 90.
7 [2012] 17 NWLR (Pt 1328) 94.

and Onu[8] have noted that non-standard forms of employment especially casualisation of employment is increasing in Nigeria with its attendant unpalatable outcomes on labour relations.

The African Charter on Human and Peoples' Rights (African Charter),[9] which is a regional human rights legal instrument, recognises the right to work. Interestingly, pursuant to its dualist posture, contingent on its section 12, CFRN 1999 requires that intentional treaties between Nigeria and other sovereign states must be domesticated in order to acquire the force of law. Pursuant to section 12 of CFRN 1999, the African Charter has been domesticated in Nigeria since 1983.[10] The implication of this is that from the date it was domesticated, the African Charter has become part and parcel of the *corpus juris Nigeriana* and is enforced like any other law made by the National Assembly as opined by Eyongndi and Okongwu.[11]

In fact, in *Abacha v Fawehinmi*[12] the SCN authoritatively held that the African Charter forms part of the laws of Nigeria, with the result that Nigerian citizens are entitled to the rights guaranteed thereunder. The Fundamental Rights (Enforcement Procedure) Rules (of Nigeria) 2009 made by the chief justice of Nigeria pursuant to section 46(2) of CFRN 1999 to effectuate the provisions of chapter IV of CFRN 1999 recognised the fact that its applicability regulates proceedings covering the provisions of chapter IV of CFRN 1999 and that of the African Charter.

Article 9 of the African Charter recognises every individual's right to work when it provides that 'every person shall have the right to work under fair and reasonable conditions, and shall receive equal pay for equal work'. By this provision, the right to work is not only guaranteed, but such work must be performed under reasonable and suitable conditions. It would be safe to reason that what article 9 of the African Charter guarantees, is not creation of an absolute obligation on the government to provide work, but where a person is employed, such employment must be aligned with the conditions mentioned therein. Hence, working under precarious or inhumane conditions that disregard basic employment rights of

8 DT Eyongndi & KON Onu 'A comparative legal appraisal of "triangular employment" practice: Some lessons for Nigeria' (2022) 9 *Indonesian Journal of International and Comparative Law* 181-207.
9 African Charter on Human and Peoples' Rights, 1981.
10 African Charter on Human and Peoples' Rights (Ratification) and Enforcement Act, Cap A9 LFN 2004.
11 DT Eyongndi & C Okongwu 'Interrogating the national industrial court strides towards attaining safe workplace for Nigeria's female worker' (2021) 6 *Bangladesh Institute of Legal Development Law Journal* 122-146.
12 [2000] 6 NWLR (Pt 660) 228.

employees, such as bullying and victimisation by the employer or senior staff; absence of leave with benefits; no or irregular payment of salary; unilateral amendment of the terms and conditions of employment by the employer; unjustifiable delay in promotion; denial of the right of freedom of association and collective bargaining, and so forth, runs afoul of this provision. It is apposite to note that the right to work as encapsulated under the African Charter requires that there is no discriminatory wage regime as there should be equal pay for equal work done by all employees without gender-based discrimination. Thus, the practice of casualisation of employment with its characteristic nature of wage discrimination between casual workers and their permanent/standard counterparts within the same employ is a contradiction.[13] Article 29 of the African Charter imposes a duty on every individual to 'work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of society'. This implies that the African Charter recognises the inherent ability of man to work and the dignity in work, thereby imposing a duty on man to work and contribute to the well-being of society through the payment of taxes that would be used to provide basic public amenities.

In actual fact, the conceptualisation of work under the African Charter is in consonance with the African idea of work wherein idlers and lazy persons are abhorred and often colloquially warned of 'no food for a lazy man', meaning that there is a natural expectation that every able-bodied person should engage in work as there is dignity in labour. The African Commission on Human and Peoples' Rights (African Commission) has elucidated on the notion, scope and philosophical underpinning of the right to work under the African Charter. The right to work, according to the Commission, is for the realisation of other socio-economic and cultural rights, extending to civil and political rights, which is crucial for both survival and human development.[14] The nuances of the right to work under the African Charter has at least three components. States' minimum core obligations are to prohibit slavery, forced or coerced labour, guarantee the right to freedom of association and its appurtenances, the protection of safety nets against arbitrary termination of employment and security of tenure/employment. Also, the obligation is on member states to adopt programmes and strategies that will promote the rights of citizens to voluntarily access suitable

13 DT Eyongndi 'An analysis of casualisation of labour in Nigeria' (2016) 7 *Gravitas Review of Business and Property Law Journal* 102-116.

14 AE Akintayo 'The right to work in the legal profession: An analysis of *Senator Bello Sarakin & Anor v Senator Atiku Bagudu & Ors*' (2016) 3 *UNILAG Journal of Public Law* 239.

and freely chosen work with equitable working conditions and fair remuneration. Also deducible is the obligation on member states to ensure equality and non-discrimination in employment and labour-related matters, especially in relation to vulnerable persons. These notions have been amplified by some decisions given by the African Commission. For instance, in *Zimbabwe Lawyers Union for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*[15] the defendant had closed down the workplace of the applicant, seized their tools and dispersed its workers leading to a loss of jobs. The African Commission held that the action of the respondent state was in violation of article 15 of the African Charter that guarantees the right to work. Also, in the matter of *Prince v South Africa*[16] the African Commission gave approval to everyone's right to occupational choice to access the labour market without any discrimination whatsoever.

At the international plane, the Universal Declaration, in unambiguous terms, recognises the right to work. Article 23(1) provides that every person has the right to work, in particular, the right to choose the type of employment he or she wishes, which conditions and terms thereof shall be equitable and fair. It further requires that people should be protected from unemployment. It affirms the right of employees to be equally remunerated for the same work done without any distinction in terms of type of employment.[17] The import of this is that where an employer, for instance, has permanent and casual staff in its employ who perform the same job, they ought to be remunerated equally. Hence, where some are termed casuals while others are permanent but they perform the same work, their wages should be the same. The work they do should be the determinant of the wage they earn and not how their employment is described. Hence, every employee is entitled to just and complimentary remuneration to carter for their needs as well as that of their family, thereby giving them a dignified life which every human deserves. The attainment of this dignified life, which is expedient, should be facilitated through social protection by the government. Thus, it is an affront against this international legal instrument if and when some employers deny their employees from forming or joining trade unions to protect their interests as argued by Eyongndi and Ilesanmi.[18] The right to work as provided under the Universal Declaration is such that it is all-encompassing.

15 (2009) AHRLR 235 (ACHPR 2009) para 179.
16 (2004) AHRLR 105 (ACHPR 2004) paras 45-46.
17 Art 23(2) Universal Declaration 1984.
18 DT Eyongndi & SI Ilesanmi 'Territorial jurisdiction of the national industrial court of Nigeria (NICN) and the requirement of endorsing originating processes under the sheriffs and civil process act (SCPA) determined' (2022) 9 *Journal of Comparative Law in Africa* 162-177.

Everyone willing and capable to work must be protected against unemployment and must work under favourable employment conditions, and should not simply be working. The right seems to proscribe a case of 'half a bread is better than none' or assertions that it is better to be doing something than nothing. The wage paid must be equal for all employees in the same category who perform the same work, and discriminatory wage is forbidden. The 'take home' of an employee must be able to take them home in truth and, indeed, it should be capable of offering basic comforts and not necessarily luxury to the employee and their family. It can be argued that aside from ensuring that people are gainfully employed, the government is duty bound, through social welfare packages, where necessary, to supplement the earnings of an employee for a befitting livelihood. Inherent in the right to work is an employee's right to form or join a trade union in order to protect their interests. This right must be accorded to all categories of employees, status notwithstanding. Article 24 bestows on every employee the right to leisure and rest, including reasonable limitation of working hours and periodic holiday with remuneration.

Articles 6 and 7 of the International Convention on Economic, Social and Cultural Rights (ICESCR) recognise the right to work by providing that parties to the Covenant shall give recognition to the right to work and create enabling opportunities for gainful employment. State parties are obligated to take necessary actions through policies and training to ensure the realisation of this right. In engendering the realisation of this right, state parties are to ensure that safety of employment, including unionising, is encouraged and not directly or indirectly inhibited.

Nigeria ratified ICESCR on 29 July 1993 and as of February 2021, 171 states have ratified it, making it a global legal framework, thus according the right to work seemingly universal acceptance. Having ratified this Covenant, Nigeria is deemed to have tacitly recognised the right to work and is duty bound to create gainful employment opportunities for its citizens. In fact, from the tenor of the above quoted articles, it can be safely argued that the enjoyment of civil and political rights is contingent on the recognition of economic, social and cultural rights and the citizens' access to these rights. Without the availability of the latter, the exploitation of the former will be minimal and of no effect whatsoever, if not practically impossible.

The International Labour Organisation (ILO) as the vanguard of decent work agenda and standard-setting organisation, since its creation to date, has adopted several conventions and recommendations that have recognised the right to work and has

enjoined member states to give effect to this right. Article 1 (2) of the ILO Employment Policy Convention 122, 1964 provides that each member state shall take steps geared towards the advancement of a standard of living, the eradication of unemployment as well as the improvement of the living standard of its citizens. Hence, they must formulate and implement policies that guarantee decent and gainful work for their teeming working population, devoid of any form of discrimination whether on the basis of sex, colour or creed. Technical and vocational training opportunities are to be facilitated for persons who are desirous of acquiring such skills through which they can secure a favourable and dignified livelihood. Situations where people are constrained to take up employment, owing to mass unemployment or unavailability of desired work, must be prevented by member states.

It is crystal clear that the ILO enjoins all member states to promote and provide suitable work for its citizenry. It is apposite to note that the ILO does not only advocate that work is a human right, but that persons are entitled to not just work, but to do decent work which, in itself, is a basic human right.

## 3 Interrelatedness, interdependence and indivisibility of human rights

Various philosophical foundations have emerged in an attempt to ascribe a meaning to the concept of law, and human rights is amenable to the same vicissitude since it is an offspring of law. Of course, a product is necessarily affected by the process. The natural school is based on the claim that there are neutral moral values that depend upon the nature of the universe and which can be discovered by reason.[19] What this means is that this is grounded on the belief that the rules of human conduct are inferences from the nature of man as they reveal themselves in reason and these rules are independent of any man-made enactment.[20] This theory draws inspiration from nature and is founded upon the well-grounded supposition that there is a law in nature according to which all things, including man, ought to behave. Nature is identical in all human beings and does not vary. The precepts of nature have universal and unassailable legitimacy notwithstanding the diversity of individual conditions, geographical environment, historical development and civilisations, culture or any other distinguishing feature present and

19 MDA Freeman *Lloyd's introduction to jurisprudence* (2001) 90.
20 ON Ogbu *Human rights law and practice in Nigeria* (2013) 6.

these precepts are of great antiquity as nature itself.[21] In fact, some scholars would rather have natural law called natural right, thereby foregrounding the nexus between natural law and nature (precepts of nature).[22] Thus, the natural school will consider human rights as inherent, inalienable, imprescriptible, inviolable rights bequeathed by nature to all humans regardless of any distinguishing feature such as race, creed, religion, political persuasion, gender, nationality, colour, language, ethnicity, and so forth, and these rights rank equal in importance notwithstanding their recognition. Once the humanity of any human being is not in doubt, the person has human rights.[23] To the natural school, dichotomising human rights to demonstrate importance is needless because all the rights are jointly and equally important.[24] Their optimal enjoyment and utilisation is interdependent and interrelated, meaning that none of the rights is an island; therefore, dichotomising them for whatever purposes is not only needless but should be avoided.

The positive school of thought, on the other hand, views law as the prescription of the sovereign backed up by sanctions, hence, only what the sovereign has prescribed as law is law. This approach to the understanding of law has caused the positive school to disregard international law as law, although modern realities are challenging this proposition. Based on this, the positivists regard human rights are those rights so declared by the sovereign and not mere bequeaths of nature as declared by the natural law school. To this school, unless and until the sovereign (that is, a person or body that has law-making powers) recognises anything as a human right whereupon it becomes legally enforceable, same cannot be regarded as a human right.[25] They are of the view that human rights are only a prescription of positive law comprised in enacted laws (statutes, codes, regulations) that can be enforced by the courts.[26] Thus, human rights denote a set of rights guaranteed under a given legal system contained in legal documents that is activated either when there is a threat to or actual infraction by any person or authority who has a duty to forebear or perform towards the person seeking their enforcement. The positive school has the inclination that human rights are relative and not universal since there is no universal idea of human rights; what is regarded as a human right differs from society to society.[27] The development of human rights

21 E Bodenheimer *Jurisprudence* (1967) 13.
22 FE Dowrick *Human rights – Problems, perspective and texts* (1979) 11.
23 EA Udu *Human rights in Africa* (2011) 10.
24 IG Shivji *The concept of human rights in Africa* (1989) 16-17.
25 Ogbu (n 20) 23.
26 RWM Dias *Jurisprudence* (1985) 331.
27 Udu (n 23) 8.

has seen the rights being categorised into first, second, third and even fourth generation rights as well as civil and political rights, economic, social and cultural rights.[28] It would seem that there is no end in sight to the categorisation as civilisation evolves, there is bound to be terminological progression and categorisation of human rights.

These philosophical conceptualisations of human rights have led to two fundamental arguments that are germane to this work. The first is the argument that human rights are interdependent, interrelated and indivisible, and the second is that of the universality versus the cultural relativism of human rights.[29] It is apposite to note that the essence of this article is not to engage in an in-depth interrogation of these arguments but to comment on them while using them to buttress the point that the right to work should be regarded as a fundamental right in Nigeria and not a mere socio-economic or political aspiration, which it is at present under chapter 2 of CFRN 1999. Work in this context is not merely having a place to go for the purposes of earning an income or being engaged *per se*, but decent work in which the terms and conditions of employment are not only fair and just, but humane. This is a situation where the physical conditions of work, particularly the right to equality, equal pay for equal work done, non-discrimination, formation or joining of trade unions, security of tenure or employment, gender equality and equity, are present and promoted. The observance of basic employment rights and the promotion of a healthy work-life balance is inclusive.

It must also be noted that the conceptual foundation of this work is founded on two complementary components: the right to work and rights in work.[30] These components promote the idea that the government has an obligation to adopt policies, programmes, strategies and initiatives that will promote full employment. It also encompasses the recognition of the rights of workers to form or join trade unions of their choice for the purpose of advancing their interests, the elimination of exploitative child labour, the prohibition of forced or coerced labour, and the right not to be discriminated against in all labour and employment-related matters. It also includes an obligation on the part of the government to create a conducive and enabling environment where jobs could be created.

28 Ogbu (n 20) 25-27.
29 CC Nweze 'The evolution of the concept of socio-economic rights in human rights jurisprudence: International and national perspectives' in CC Nweze (ed) *Justice in the judicial process: Essays in honour of Honourable Justice Eugne Ubaezonu JCA* (2002) 525.
30 Akintayo (n 13) 239.

The drafting of the Universal Declaration triggered the emergence of two main covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and ICESCR.[31] The first Covenant contains rights aimed at guaranteeing individual freedoms, the promotion of political participation by citizens and access to justice. The second Covenant seeks to engender social welfare by obligating the state to ensure that its policies are geared towards realising it for the betterment of the citizenry.[32] The idea of indivisibility, interrelatedness and interdependence of human rights originated within the UN circle in the early 1940s and 1950s.[33] This concept suggests that irrespective of their classification according to their evolution (that is, first generation or civil and political rights, second generation or economic, social and cultural rights, or third generation or developmental rights), in actual fact, the optimal enjoyment of these rights cannot be disjunctive.[34] The notion of interdependence of human rights connotes that despite their distinctiveness, the optimal realisation or enjoyment of a certain right is contingent upon the availability and accessibility of another right(s), which may or may not fall into the same category as the primary right for which enjoyment is being sought.[35] For example, freedom of movement (a civil right) is a necessary precondition for the exercise of other civil rights (such as freedom of assembly), political rights (for instance, the right to vote), economic rights (the right to work, for example) and so forth.[36] The idea of 'interrelatedness' of human rights means that they are brought into a situation of mutual relationship or connectedness. It argues in favour of the permeability between categories of rights.[37] The indivisibility of human rights is comparable to the triune nature of the Holy Trinity in Christian religious doctrine – God the Father, the Son and the Holy Spirit, despite their independent personality and manifestation. It suggests that irrespective of the classification of human rights into civil and political rights, on the one hand, and economic, social and cultural rights, on the other, in practical terms they are one and the same thing. As such, dividing the rights robs them of their potency. The idea of indivisibility, interdependence

31 N Priscila, GI Martins & L Heller 'Human rights' interdependence and indivisibility: A glance over the human rights to water and sanitation' BMC International Health and Human Rights 8 March 2019 10.
32 As above.
33 DJ Whelan 'Untangling the indivisibility, interdependency, and interrelatedness of human rights' (2008) 7 *University of Connecticut, Human Rights Institute Economic Rights Working Papers* 1-30.
34 L Minkler & SE Sweeney 'On the indivisibility and interdependence of basic rights in developing countries' (2011) 33 *Human Rights Quarterly* 351-396.
35 Whelan (n 33) 2.
36 As above.
37 S Craig 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769-875.

and interrelatedness of human rights is inherent in the Universal Declaration which had no categorisation of human rights but recognised all rights (that is, civil and political and economic, social and cultural rights) as human rights.

The utilitarian value of this concept is seen when the exploitation of human rights is examined. For instance, the right to life, dignity of the human person and ownership of property fall under what is designated as civil and political rights. On the other hand, education, work, shelter, food and clothing may be regarded as economic, social and cultural rights, which under CFRN 1999 are non-justiciable.[38] The issue arising is how a person who has no education (especially basic formal education), shelter, food and clothing and work, can be said to be enjoying the right to life, dignity of their human person or ownership of property. How can a citizen actively and productively participate in the political life of their society without the requisite education?[39] It is obvious that the existence and implementation of the rights regarded as economic, social and cultural rights is a prerequisite for the optimal enjoyment of civil and political rights.[40] The right to life, for instance, does not merely concern a person being able to breathe, but the quality of life, and even the air the person lives in and breathes, are equally, if not more, important than life itself. It is ironic to assert that a destitute person who has no shelter, clothing, food or work has the right to life or dignity of the human person because the things that would ordinarily dignify them (for instance, shelter, food, clothing, employment, and so forth) are absent.[41]

Applying this to the theme of this article, which is the need to elevate work to the status of the rights in chapter 4 of CFRN,1999, it can safely be argued that central to the enjoyment of the civil and political rights enshrined in chapter 4 of CFRN 1999 is the presence of the 'rights' contained in chapter 2, especially the right to work. In fact, the dignity of the human person of any Nigerian is not so much tied to freedom from inhumane and degrading treatment by the government or any private person as is ordinarily thought.[42] Being

38 K Olaniyan 'Hierarchies of human rights in Nigeria' *Newsverge.com* 20 August 2017, https://newsverge.com/2017/08/20/rethinking-hierarchies-human-rights-nigeria/ (accessed 7 September 2023).
39 MO Imasogie 'Human rights, women rights: So long a journey' 3rd Bowen University Inaugural Lecture (2017) 4.
40 As above.
41 As above.
42 P Ifeoma 'Appraising the justiciability question of chapter II of the 1999 Constitution of Nigeria' *dnllegalandstyle.com* 18 December 2022, https://dnllegalandstyle.com/2021/appraising-the-justiciability-question-of-chapter-ii-of-the-1999-constitution-of-nigeria/ (accessed 6 August 2023).

without decent and gainful work can be adjudged as the worse way of infracting the dignity of the human person as it transcends physical to psychological hurt. Through work, one does not only find fulfilment, but needs are met in a legitimate way, justifying the aphorism that there is dignity in labour. Since it is abundantly clear that work is an indispensable requirement for the enjoyment of other rights and that when it comes to implementation, there cannot be division, and given the high level of unemployment in Nigeria, which has been exacerbated by the outbreak of COVID-19, it is imperative for work or employment to be elevated to the status of the rights in chapter 4 of CFRN 1999.

## 4 The right to work in selected jurisdictions

In the preceding part, it has been established that there is a robust international legal framework on the right to work and decent work. Some jurisdictions have gone a step further to make the right to work a fundamental right. This part of the article examines selected jurisdictions in which work is regarded as a human right either through legislative action or judicial activism. Belarus and India are selected because India is a Commonwealth nation like Nigeria, and the statutory and judicial practice in these jurisdictions on the issue is advanced and would serve as a good pointer for Nigeria to emulate.

### 4.1 Belarus

Belarus became a signatory to ICESCR on 9 March 1968 and ratified same on 12 November 1973 as the Belorussian Soviet Socialist Republic.[43] Article 21 of the 1994 Belarus Constitution provides the primary aim of government which is safeguarding the rights and freedoms of citizens of the Republic of Belarus which is the equivalent of section 14 of the 1999 CFRN. The right to work is recognised under both domestic and international legal regimes that the government has ratified. The Constitution of Belarus recognises the right to work in clear and unambiguous terms in sections 41 and 42, but particularly in section 41 of its Constitution which guarantees Belarusians the right to work.[44] Hence, the state is obligated to create conditions that necessitates the employment of its population. In fact, where a person is unable to secure decent employment due to a lack of qualifications, the state has the responsibility to ensure that they

43 Wikipedia 'International Covenant on Economic, Social and Cultural Rights', https://en.wikipedia.org/wiki/International_Covenant_on_Economic,_Social_and_Cultural_Rights (accessed 24 December 2023).
44 Constitution of the Republic of Belarus, 1994.

acquire necessary skills or the enhancement of their qualifications, geared towards securing gainful employment and, while this is being done, to give some social benefit stimulus in accordance with the law.

Section 11 of the Belarus Labour Code contains similar provisions as the one above, laying credence to the resolve of the country to provide or create an enabling environment for access to gainful employment by its citizens. Under this section, the state of Belarus is obligated not only to provide work, but to create conditions necessary for the full employment of its population. Where a person is unemployed owing to conditions beyond their control, it is the government's responsibility to guarantee training in a new specialisation and the upgrading of their qualification having regard to social needs, and unemployment benefits in accordance with the law. Citizens also have the right to the protection of their economic and social interests and to have equal pay for equal work performed irrespective of sex or age.

To fulfil its obligations arising from article 21 (requiring the government to take steps to protect the provisions of the Constitution), sections 41 and 42 above as well as article 6 of ICESCR, which provides that everyone has the right to work, and article 2(1) requiring the state party to take steps to the maximum of its available resources to achieve progressively the full realisation of the rights in this treaty, the Republic of Belarus established a Ministry of Labour and Social Protection in 2003. The Ministry and its regional offices have employment vacancy information on its portal and provision for the uploading of *curricula vitae* by persons seeking employment or a change of jobs. This is done to enhance ease of obtaining employment by bringing both employers and prospective employees together. In its efforts to aid skill acquisition, the government established a national working group on skill acquisition comprising the Ministries of Education, Economy, expert organisations and businesses. Through this effort, since 1999 Belarus has had a commendable decline in its unemployment rate. From 1999 to 2016, the unemployment rate dropped from 12,8 to 5,8 per cent.[45] By 2018 the unemployment rate has dropped to 5,71 per cent.[46] The UN General Assembly, during its twenty-fifth anniversary, acknowledged Belarus's reduction of its poverty rate, particularly

45 Tradingeconomics.com, https://tradingeconomics.com/belarus/unemployment-rate (accessed 24 May 2023).

46 Macrotrends.net 'Belarus unemployment rate 1991-2020', https://www.macrotrends.net/countries/BLR/belarus/unemployment-rate (accessed 24 December 2023).

from 2016, beyond what has been done by many countries in Europe and Asia.[47] Its poverty headcount has also reduced from 60 per cent in 2000 to less than 1 per cent in 2013.[48] This impressive decline in unemployment and poverty headcount in Belarus was made possible by its recognition of work as a human right, which led to the institution of various initiatives to realise same.

### 4.2 India

India can be regarded as a progressive jurisdiction as far as fundamental human rights are concerned. Under the leadership of Mahatma Ghandi, India was instrumental in the adoption of the Universal Declaration in 1948.[49] India ratified the Universal Declaration, being one of the pioneers in its drafting, as well as ICESCR on 10 April 1979. Just like the Nigerian Constitution, which is made up of fundamental objectives and directive principles of state policy and the fundamental human rights provisions, the Indian Constitution is also dichotomised. Under its dichotomised framework, the right to work is not regarded as a fundamental right. The right to work is contained in article 41, which falls in Part II of the Indian Constitution containing the fundamental objectives. Thus, one can rightly argue that there is no right to work under the Indian Constitution.

Notwithstanding the foregoing, through purposive judicial interpretation of the Constitution, Indian courts have given recognition to the right to work, concretising it as a fundamental right. The courts, while espousing on the province of the right to life as a fundamental human right, have countenanced the fact that the right to work cannot be divorced from the right to life. The decision in *Olga Tellis & Others v Bombay Municipal Corporation & Others*[50] explicates the foregoing position. In this case the petition was filed by the petitioners under article 32 of the Indian Constitution before the Supreme Court, challenging the decision of the respondents to demolish pavement dwellings and slums in which they lived and fended from. The petitioners contended that the destruction amounted to an infraction of their right to livelihood, which is traceable and discoverable from article 21 of the Constitution, which is integrated into their right to life. The petitioners further

47 World Bank.org 'Poverty reduction in Belarus' *World Bank.Org* 17 October 2017, https://www.worldbank.org/en/news/feature/2017/10/17/poverty-reduction-in-belarus (accessed 24 December 2023).
48 As above.
49 M Kothari 'India's contribution to the Universal Declaration of Human Rights' *The Wire.in* 20 June 2019, https://thewire.in/rights/indias-important-contributions-to-the-universal-declaration-of-human-rights (accessed 30 November 2023).
50 AIR 1986 SC 18.

argued that their act of encroaching on the pavement was foisted on them by economic exigencies and, thus, calling them trespassers would be diametrically opposed to the intention of the Constitution. In response, the respondents argued that the petitioners were committing a criminal offence by converting a public residence into private use, which is prohibited under section 441 of the Indian Penal Code, tagging it a 'criminal trespass', and urged the Court to dismiss the petition.

The Court approved the contention of the petitioners that the right to life is interwoven with the right to a livelihood, and that the two are inseparable, interrelated and interdependent. Accordingly, the right to life encompasses the right to a livelihood. Hence, the demolition was an infraction of the right to life of the petitioners and, by extension, their right to work (livelihood). The Court further noted that the economic conditions of the people living in the slum was what caused their living in the slums. This was primarily to preserve their work, which was their only means of economic survival and an adequate standard of living. Thus, if these persons had to move out of the slums, they would have lost their jobs. The Court further noted that for anyone to live a meaningful life, there has to be an adequate means of livelihood. What this means is that not regarding access to a livelihood as fundamental is the surest way in which to divest a person of their right to life. This would be to deny the person the opportunity of earning a living (that is, work). The Court noted that the provision of both fundamental objectives and fundamental rights in the Constitution by the drafters was deliberate as the two are complementary, supplementary and not disjunctive. Going by the above, it is trite that since the right to a livelihood is intrinsic in the right to life, anything that is capable of affecting one's life to a livelihood can be challenged just as in the case of the right to life.

The above decision was followed in *State of Uttar Pradesh v Charan Singh*.[51] In this case, the petitioner's employment was arbitrarily terminated and he petitioned the industrial tribunal, which held that the termination was illegal since it was arbitrarily perpetuated, and ordered for the reinstatement of the petitioner. The respondent appealed both the decision of the industrial tribunal and the High Court of Allahabad. On appeal to the Supreme Court, the Court reiterated its position in *Olga Tellis & Others v Bombay Municipal Corporation & Others*[52] and decided that the indiscriminate termination of the employment of the petitioner by the respondent

51 (2011) 3 UPLBEC 2151.
52 AIR 1986 SC 18.

was in violation of his right to a livelihood, which cannot be disintegrated from his right to life. The position taken by the Indian Court is laudable and resonates with the immortal proposition of the Nigerian Supreme Court judge, Kayode Eso JSC, in the case of *Trans Bridge Trading Co Ltd v Survey International Limited*[53] to the effect that judges must espouse the law and expand it within permissible limits so as to meet the prevailing needs of society and not be limited by technicalities.

It is apposite to note that article 6 of ICESCR provides that everyone has the right to work. Article 2(1) provides that each state party must take steps to the maximum of its available resources to progressively achieve the full realisation of the rights in this treaty.[54] While India as a signatory to ICESCR, it has taken legislative progressive steps towards realising the aspiration of article 2(2). Indian courts have done so and are likely to persist therein. For instance, the Employment Assurance Scheme Food for Work Programme (EASFWP), 2004 and the enactment of the National Rural Employment Guarantee Act, 2005 are obvious testaments of India's laudable implementation actions. The EASFWP scheme was originally launched in February 2006 in 200 districts.[55] The scheme is also known as the Mahatma Gandhi National Rural Employment Guarantee Act. It undertakes to provide for every rural household in India 100 days of employment annually on public work projects for those who demand work.[56] This is an unrestricted entitlement with no eligibility requirements.[57] The scheme has availed essential income support to some of India's deprived and most relegated people who mainly are the class of persons that social protection programmes find difficult to reach. As of March 2012, the scheme was being implemented in 593 districts.[58] The scheme requires that people who do not obtain employment under 15 days will be provided with daily wages by the government of India, particularly the state government.[59] The scheme has employed 10,6 million households in the period from 2007 to 2008, which surged to above 53,47 million by the years 2010 to 2011.[60]

53 (1996) 4 NWLR (Part 37) 596-597.
54 http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module10.htm (accessed 12 May 2023).
55 As above.
56 A Pankaj 'Employment guarantee scheme in India social inclusion and poverty reduction through MGNREGS' Expert and Inter-Agency Meeting on Implementation of the Second United Nations Decade for the Eradication of Poverty (2008-2017) Addis Ababa, Ethiopia, 27-29 May 2015, https://www.un.org/esa/socdev/egms/docs/2015/Pankaj.pdf (accessed 11 August 2023).
57 As above.
58 R Jenkins 'A grassroots revolution', https://www.thehindubusinessline.com/opinion/a-grassroots-revolution/article8300813.ece# (accessed 29 October 2023).
59 Ministry of Rural Development, 2008.
60 Jenkins (n 58).

Although the scheme is targeted at India's rural community plagued by high unemployment rates, it is mostly utilised by women who have suffered severe prolonged employment discrimination. In the period from 2012 to 2013, the scheme has helped to drastically reduce unemployment in India, particularly in Punjab where it has been reported that approximately 9 779 007 employment cards were issued and the unemployment rate there has been reduced to 26,76 per cent.[61] This has helped to reduce the high rate of suicide and depression associated with the locality. Generally, the unemployment rate in India has drastically reduced. It has one of the lowest unemployment rates among other developing countries, with an unemployment rate of 2,55 per cent as of 2017. Although the National Rural Employment Guarantee Scheme still lacks a level of implementation and has faced several problems concerning corruption among certain rural community leaders, it is unarguable that significant progress has been made. The impact of this scheme can be easily observed: The UN Development Programme released its 2019 Multidimensional Poverty Index where India had an impressive decline in its poverty rate, from 365,55 million in 2005 to 2006 to lifting 271 million people out of poverty in 2016 to 2017.[62]

From the foregoing analysis, it is clear that Belarus and India, through statutory and judicial activism, have recognised work as a justiciable right and have set up institutional frameworks to implement same. The Indian courts have engaged in a purposive interpretation of the Indian Constitution, thereby elevating rights that ordinarily are non-justiciable to justiciable rights.

## 5 Right to work: Charting a new course for Nigeria

From the preceding parts, the point has been underscored that human rights, irrespective of the morphological or legal classification given to the rights – whether civil and political, economic, social and cultural or developmental rights – there is a golden thread that runs through them. This is that they are intrinsically interwoven to the extent that they are inseparable, interrelated, interdependent and indissoluble as far as their optimal exploitation is concerned. Also, it has been underscored that work from an ethno-religious

61 M Azam 'The impact of Indian job guarantee scheme on labour market outcomes: Evidence from a natural experiment', http://ftp.iza.org/dp6548.pdf (accessed 19 November 2023).

62 N McCarthy 'Report: India lifted 271 million people out of poverty in a decade', https://www.google.com/amp/s/www.forbes.com/sites/niallmccarthy/2019/07/12/report-india-lifted-271-million-people-out-of-poverty-in-a-decade-infographic/amp/ (accessed 19 November 2023).

perspective is a bequeath of the Creator to man as the Holy Writ made it abundantly clear that he who does not work, should not eat. The advent of the COVID-19 pandemic led to a widespread loss of jobs and a reduction of employment opportunities in Nigeria.[63] It is apposite to note that, prior to the outbreak of COVID-19, Nigeria was grappling with an unprecedented high rate of unemployment and underemployment with no feasible plan on how to confront same save through ameliorative palliative programmes. The unemployment rate among the youth (that is, the employment of persons between 15 and 24 years of age) in Nigeria was 17,69 per cent.[64] The World Bank reported that a total of 42 per cent of people surveyed in Nigeria lost their jobs during the COVID-10 pandemic, while 79 per cent reported a loss in income.[65]

In May 2019, the Minister of Labour, Employment and Productivity of Nigeria hinted that the federal government estimated an unemployment rate of 33,5 per cent by 2020.[66] In 2019 the World Poverty Clock (WPC) rated Nigeria as the poverty capital of the world with an estimated 89,1 million people out of a population of 196 million living in abject poverty.[67] Due to the debilitating effect of the COVID-19 outbreak, which hampered several businesses with concomitant job losses, this figure is bound to increase. In June 2018, the Brookings Institution in the United States had presaged that Nigeria has unsurprisingly overtaken India as the world's headquarters of poverty by having an estimated 87,9 million people living in chronic poverty against India's 74 million. Since that June, India, with a population of 1,2 billion, has lifted 24 million people out of poverty.[68] The figure presented by the WPC as the sum of Nigerians living in abject poverty does not include those living below poverty line, surviving on $1,9 per day.[69] Statistics from the African Development Bank (AfDB) indicates that 80 per cent of Nigerians live beneath the poverty line.[70] In mid-June 2020, the World Food Programme of the UN warned that COVID-19 may lead to the loss

63 Peacefmonline 'COVID-19 causes "huge job losses" in Nigeria', https://www.peacefmonline.com/pages/business/news/202008/423531.php (accessed 30 August 2023).
64 As above.
65 As above.
66 A Okunola 'How COVID-19 is hitting employment in Nigeria and pushing people into poverty', https://www.globalcitizen.org/en/content/how-covid-19-hitting-employment-nigeria-poverty/ (accessed 30 August 2023).
67 K Panchal 'The poverty capital of the world: Nigeria' (2020) *Borgen Magazine*, https://www.borgenmagazine.com/the-poverty-capital-of-the-world-nigeria/ (accessed 20 June 2023).
68 J Uwah 'World poverty clock report on Nigeria', https://independent.ng/world-poverty-clock-report-on-nigeria/ (accessed 30 August 2023).
69 As above.
70 As above.

of 13 million jobs in Nigeria.[71] This figure paled into insignificance when the former Vice-President Yemi Osinbanjo-led Economic Sustainability Plan Committee, at the peak of the pandemic, informed the nation that the COVID-19 pandemic had caused an astronomic 33,6 per cent rise in unemployment, indicating that 39,4 million people would be unemployed by the end of 2020 if proactive steps are not taken to arrest the situation. As at the third quarter of 2023, the unemployment rate in Nigeria stood at 26,5 per cent.

The sharp drop in the price of oil on the world market has further exacerbated the situation. As at 2021, the unemployment rate in Nigeria is projected at a depressing 32,5 per cent. There is no guarantee that this number will not increase as most businesses are still grappling with the debilitating effects of COVID-19 and more persons are being rendered jobless, while atypical forms of employment, including casualisation of the labour, is on the increase with the youth unemployment rate at 53,4 per cent.[72] All this points to the irresistible conclusion that finding and keeping a job in Nigeria is becoming increasingly difficult as several Nigerian graduates from various tertiary institutions roam the streets seeking employment with little or no hope of securing any. In fact, it can be safely argued that the hope of an average Nigerian job seeker securing decent employment is becoming a mirage except for a few privileged persons in society that have access to the corridors of power or by providential interposition.

Interestingly, COVID-19 has radically led to a redefinition of who an employee is, which is a total shift from the traditional conceptualisation. Traditionally, an employee under labour law[73] was regarded as someone hired to work or render service to an employer, who in turn is remunerated for the work done or service rendered and who is under the control of the employer with regard to the performance of the work or rendering of the service.[74] Over the years, the control element has proved inadequate in identifying who an employee is due to sophistication and modernisation in certain

71 E Omeihe 'COVID-19 and job loss', https://thenationonlineng.net/covid-19-and-job-loss/ (accessed 1 January 2023).

72 Take-Profit.org 'Employment rate and unemployment data in Nigeria', https://take-profit.org/en/statistics/unemployment-rate/nigeria/ (accessed 20 August 2023).

73 See sec 91(1) of the Labour Act, Cap L1 Laws of the Federation of Nigeria (LFN) 2004; sec 73 of the Employees Compensation Act, 2010; sec 53 of the National Industrial Court Act, 2006; sec 48 of the Trade Disputes Act Cap T8 LFN, 2004; sec 52 of the Trade Unions Act, T4 LFN 2004; *National Association of Local Government Officers v Bolton Corporation* (1943) AC 166.

74 DT Eyongndi & SI Ilesanmi 'Employee suspension and the contract of employment under Nigerian labour law: Matters arising' (2019) 10 *Ebonyi State University Law Journal* 107.

employment relationships, thereby making it practically impossible for the employer to determine how and when an employee can perform their work. For instance, a hospital can employ a doctor, but the hospital management cannot give the doctor instructions on how to carry out an operation. In the same way, a law firm can employ a lawyer but cannot determine the style the lawyer will adopt in arguing a case in court in the course of effectuating the employment relationship, as that aspect of the work is left to the absolute discretion of the doctor or lawyer based on their exposure, skill and knowledge over which the employer may have insignificant or no control.[75] This challenge led the courts to develop a series of tests aside the control or superintendence test enunciated by Bramwell LJ in *Yewen v Nokes*[76] and given judicial approval by the Nigerian Court in *Dola v John*[77] before Streatfiel J in identifying who an employee is from an independent contractor.[78]

Other tests that have been propounded due to the inherent inadequacies of the control test are the organisation (integration), multiple and modern reality approach tests.[79] The organisational or integration test countenances the fact that with increased skilled labour and technological advancement, the employer may not be well-placed –even where he provides the tools and implements that the employee uses to work with – to determine or control how the employee actually carries out the work due to its sophistication or required skill or technology deployment, Thus, the employee, under this test, is afforded a reasonable latitude of freedom from the employer's control to determine how best to perform the work or deliver the service to the employer.[80] The fact that the employee enjoys freedom from the direct control of the employer in the performance of their duties does not detract from the fact that the employee is into a contract of service.[81] With regard to this test, the employee is employed as an integral part of an establishment and renders his services as an essential part of the business concern.[82] The employee is employed and works as part and parcel of the organisation, as was stated in *Ready Mixed Concrete (South East)*

75 EA Oji & OD Amucheazi *Employment and labour law in Nigeria* (2015) 19.
76 (1880) 6 QBD 530.
77 (1973) 1NMLR 58. See also *Gould v Minister of National Insurance* (1951) 1 KB 731; *Atedoghu v Alade* (1957) WNLR 185 where the Court held that the 'absence of control and the casual nature of the employment … point to the conclusion that there was no relationship of master servant'.
78 *Gibbs v United Steel Co Ltd* (1957) 1 WLR 668 670.
79 Oji & Amucheazi (n 75) 19-26.
80 *Cassidy v Ministry of Health* (1951) KB 343.
81 CK Agomo *Nigerian employment and labour relations law and practice* (2011) 63-64.
82 *Stevenson, Jordan and Harrison Ltd v Macdonald Evans* (1952) 1 TLR 101.

*Ltd v Ministry of Pension.*[83] It is an improvement on the control test, which captures experts and professional employees who may not be susceptible to an employer's direct control.[84]

The multiple test, as the name connotes, envisages that more factors have to be considered alongside control and integration. This is due to the fact that in some organisations, deciphering the existence of an employment contract requires the consideration of multiple factors of which control is inclusive. In adopting this test, factors such as the provision of tools for work, instruction on when and where to work, payment of remuneration, grant of leave or holiday, discipline of the person working, payment of redundancy benefits, and so forth, are used as determinants of the subsistence of an employer-employee relationship between the parties. This test was enunciated in *Morren v Swinton and Pendlebury Borough Council.*[85] The modern reality test is hinged on the *dicta* of McKenna J in *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance*[86] where McKenna J enumerated the three conditions which, if present, are conclusive proof that an employer-employee relationship is in existence. These conditions include the payment of wages, an express or implied agreement to be under the control (total or qualified) of another while working, and the absence of any contrary provision that the contract is one of service.[87] Further fundamentals of this test were raised by Coker J in *Market Investigations Ltd v Minister of Social Society.*[88] The SCN in *Shena Security Company Ltd v Afro Pak (Nig) Ltd & 2 Ors*,[89] while countenancing the other test, adopted complementarily, the modern reality test in determining whether a person employed in a casual triangular employment relationship was an employee, and came to the conclusion that, for all intents and purposes, the relationship was one of contract of service.[90] In adopting this test, the Court scrutinised the affiliation between the parties in relation to the existing employment circumstances irrespective of how the parties may have described it.

The issue is, as plausible as these tests have been and over the years have acquired notoriety, automation of operation and the use of artificial intelligence (AI), the COVID-19 pandemic has introduced a novel phenomenon into employment relationship,

83 (1960) 2 QB 497.
84 *Westall Richardson Ltd v Roulson* (1954) 2 All ER 448.
85 (1965) 2 ALL ER 349.
86 (1960) 2 QB 497.
87 Oji & Amucheazi (n 75) 24.
88 (1968)3 All ER 732.
89 [2008] 18 NWLR (Pt 1118) 82.
90 Oji & Amucheazi (n 75) 25-26.

making the answer to the question of who an employee is more complicated than it has been before. The advent of COVID-19 and the non-pharmaceutical measures (especially lockdown) imposed by government saw the rise in machines performing work or delivering services. The issue arises as to whether these robots are deployed by employers as a replacement for human employees. Certainly, such machines will qualify as employees, and where a third party suffers damage due to its act or omission, the employer will be vicariously liable under appropriate circumstances.

## 6 Conclusion and recommendations

While there are a plethora of international and regional human rights legal frameworks recognising work as a human right, CFRN 1999 does not recognise it as such but as a mere political aspiration which should guide the formulation and implementation of government policies. This is because the right to work falls under chapter 2 of CFRN 1999, which is not justiciable. This situation persists despite the fact that the 'rights' enumerated in chapter 2 are necessary for the optimal enjoyment of those contained under chapter 4 because all rights, irrespective of classification, are universal, interdependent, interrelated and indivisible. Work is a legitimate means through which human needs are met, and the sanity of society is maintained. This is because a society of an army of unemployed persons is characterised by various evils. Nigeria's underemployment and unemployment rates continue to rise, which is further exacerbated by the outbreak of COVID-19 which has led to enormous job losses with no tangible government blue print to address the situation. The employment practice in Nigeria is tilted towards the unjustified favour of the employers culminating in a high rate of insecurity of employment, especially in the private sector master-servant employment. Several exploitative employment patterns have emerged, such as triangular employment[91] and casualisation of employment being used by employers to the chagrin of employees. Thus, it has become expedient for work to be elevated to the level of a human right to stem the evil tides blowing through its non-recognition.

91 Triangular employment, also known as disguised employment, is a situation where a contractor employer hires an employee for the use or service of an end-user employer wherein the contractor employer is paid from the remuneration of the employee and together with the end-user employer, exercises control and management over the employee. This employment arrangement typically mystifies who the employer is as between the contractor employer and end-user employer. In this arrangement, there are three parties as against the traditional two parties to an employment contract. It is an evolving trend that is gaining ground in Nigeria.

Countries such as Belarus and India have taken commendable legislative and judicial proactive steps in approving work as a human right, and have set in place various statutory and institutional frameworks to address unemployment, with laudable outcomes. The unemployment rate and poverty levels in these jurisdictions have positively declined to the admiration of international observers. This feat was made possible through the recognition of work as a human right.

Sequel to the aforementioned outcomes, it is recommended that CFRN 1999 should be amendable and the right to work should be introduced under chapter 4 in the same way as in the Belarus Constitution. Doing this will place both a moral and legal obligation on the government to initiate programmes to tackle the almost convoluted unemployment that has plagued Nigeria for decades.

The government should also take proactive steps, after the example of India and Belarus, to introduce employment programmes targeted at the unemployed, especially youths and women, to help reduce or eradicate unemployment among these vulnerable groups. The Ministry of Labour, Employment and Productivity, which is responsible for implementing job creation programmes, should be used for implementing such programmes.

Since 2010, after the enhancement of its jurisdiction by the 1999 CFRN (Third Alteration) Act 2010, the National Industrial Court of Nigeria has already developed an employees' protectionist jurisprudence which has helped to counterbalance the unequal power between capital and labour. Until this aforementioned stance (that is, employee protectionism) of the National Industrial Court of Nigeria is enacted into law by the legislature, thereby giving it statutory flavour, as in the Indian courts, the National Industrial Court of Nigeria should judicially legislate work as a fundamental right, pursuant to the notion of indivisibility, interdependence and interrelatedness of fundamental rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Storey 'The United Nations' Universal Periodic Review and female genital mutilation in Somalia: The value of civil society recommendations' (2025) 25 *African Human Rights Law Journal* 302-331
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a12

# The United Nations' Universal Periodic Review and female genital mutilation in Somalia: The value of civil society recommendations

*Alice Storey**
Senior Lecturer in Law and Associate Director, Centre for Human Rights, College of Law, Social and Criminal Justice, Birmingham City University, United Kingdom
https://orcid.org/0000-0002-4810-6133

**Summary:** *Female genital mutilation is a violation of international human rights law and a public health concern. The Federal Republic of Somalia has the highest prevalence of FGM across the world, with an estimated 97 to 99 per cent of women and girls having undergone FGM. Worldwide, various strategies are being implemented seeking to eliminate FGM, including criminalisation, further education, and involvement of civil society organisations. The role of CSOs, through the United Nations' Universal Periodic Review mechanism, is the key focus of this article. Somalia's three UPR cycles to date are analysed, identifying (i) how frequently member states and CSOs recommend on similar themes; and (ii) whether CSOs' and/or member states' recommendations on FGM are sufficiently formulated to aid implementation by Somalia. Following this analysis, I argue that CSO recommendations do hold some value for member states, but to achieve success in the context of eradicating FGM in Somalia, improvements must be made by both CSOs submitting stakeholder reports with recommendations included, and member states*

* LLB (Hons) PG Dip LLM PhD (Bimingham City University); Alice.Storey@bcu.ac.uk. I wish to thank Dr Damian Etone and Dr Philip Oamen for their helpful comments, and to the organisers and attendees of the UN World Conference on Human Rights in Vienna 1993 – Strengthening Imperatives 30 Years After' for the interesting discussions on themes of this article. A further thank you to Nicola Stevens and Aise-Osa Igbinomwanhia for their research assistance.

*making recommendations within the UPR. Specific proposals are made, which could be utilised by CSOs and member states when preparing for Somalia's fourth cycle review scheduled for 2026.*

**Key words:** *international human rights; Universal Periodic Review; female genital mutilation; Somalia*

## 1 Introduction

Female genital mutilation (FGM) – also referred to as 'cutting' – is a public health issue that violates international human rights.[1] The Federal Republic of Somalia has the highest prevalence of FGM across the world, with an estimated 97 to 99 per cent of women and girls having undergone FGM.[2] Various strategies are being implemented worldwide seeking to eliminate FGM, including criminalisation, further education and involvement of civil society organisations (CSOs). The role of CSOs, through the Universal Periodic Review (UPR) mechanism of the United Nations (UN), is the key focus of this article.

The UPR is a peer-review mechanism of the Human Rights Council which cyclically reviews all 193 member states' protection and promotion of human rights. It involves input from governments, UN bodies and CSOs acting as 'stakeholders'. A core feature of the UPR is the recommendations process, where other UN member states make recommendations to the state under review regarding how to better promote and protect human rights on the ground. Whereas CSOs cannot make recommendations formally, they can – and do – provide recommendations in their stakeholder reports, submitted in advance of each state review.

1 A Gele, BP Bø & J Sundby 'Have we made progress in Somalia after 30 years of interventions? Attitudes toward female circumcision among people in the Hargeisa district' (2013) 6 *BMC Research Notes* 122.

2 See UNICEF 'UNICEF and UNFPA call on the government of Somalia to commit to ending FGM by passing law prohibiting the practice' 6 February 2021, https://www.unicef.org/somalia/press-releases/unicef-and-unfpa-call-government-somalia-commit-ending-fgm-passing-law-prohibiting (accessed 23 December 2024); RK Moody 'Women human rights defender's fight against female genital mutilation and child marriages in Africa' (2020) *Africa, Cities and Health, Special Issue: COVID-19* 2; BD Williams-Breault 'Eradicating female genital mutilation/cutting: Human rights-based approaches of legislation, education, and community empowerment' (2018) 20 *Health and Human Rights Journal* 226; TD Smith and others 'Female genital mutilation: Current practices and perceptions in Somaliland' (2016) 17 *Global Journal of Health Education and Promotion* 42.

To understand the value of these CSO recommendations within the UPR regarding FGM in Somalia, this article assesses Somalia's three cycles of UPR to date – from 2011, 2016 and 2021. To do this, I collated all recommendations related to FGM from CSOs and member states, coding them according to each recommendation's theme. Thereafter, I analysed the recommendations through two questions: (i) how frequently member states and CSOs recommend on similar themes; and (ii) whether CSOs' and/or member states' recommendations on FGM are sufficiently formulated to aid implementation by Somalia. Following this analysis, I argue that CSO recommendations do hold some value for member states, but to achieve success in the context of eradicating FGM in Somalia, improvements must be made by both CSOs submitting stakeholder reports with recommendations included, and member states making recommendations within the UPR. Specific proposals are made, which could be utilised by CSOs and member states when preparing for Somalia's fourth cycle review scheduled for 2026.

Part 2 of the article provides an overview of FGM in Somalia, relevant international, regional and domestic laws, and current strategies for eradicating FGM. Part 3 begins by outlining what the UPR is and the method adopted in this article. It then proceeds to detail the analysis and findings of the study. Part 4 concludes the study and recommends next steps for utilising the UPR, and in particular CSO recommendations, as a viable strategy for eliminating FGM in Somalia.

This is the second in a three-part series of articles assessing (i) the formulation of UPR recommendations;[3] (ii) the value of civil society UPR recommendations; and (iii) the implementation of UPR recommendations, through the lens of eliminating violence against women.

## 2 Female genital mutilation in Somalia

FGM is defined by the World Health Organisation (WHO) as 'all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons'.[4] There are four types of FGM: type 1, which

3 A Storey 'Improving recommendations from the UN's Universal Periodic Review: A case study on domestic abuse in the UK' (2023) 35 *Pace International Law Review* 193.

4 World Health Organisation 'Female genital mutilation' 31 January 2023, www.who.int/news-room/fact-sheets/detail/female-genital-mutilation (accessed 23 December 2024).

involves the total or partial removal of the clitoral glans and/or the clitoral hood; type 2, which includes the total or partial removal of the clitoral glans and labia minora, with or without the labia majora being removed; type 3, referred to as infibulation, where the vaginal opening is narrowed through creating a seal; and type 4 which covers all other, non-medical procedures performed on female genitalia.[5]

FGM is a historical practice, dating back almost 5 000 years.[6] It is now considered a global abuse of women's rights that is performed across the world, although predominantly in the Middle East and African countries, including Somalia.[7]

Somalia is situated in the Horn of Africa with a population of approximately 17 million people.[8] Somalia has a federal structure, including five federal states, plus Somaliland, and its legal system is comprised of civil, Islamic and customary law.[9] Since it gained independence from British and Italian colonisation in the 1960s, Somalia has been embroiled in civil war and political turmoil.[10] In 1991, during civil unrest in the country, Somaliland declared itself to be an independent country, although this has not been formally recognised by the UN or African Union (AU).[11] Puntland, one of the five federal states, was declared an autonomous state of Somalia in 1998.

Somalia has the highest rate of FGM across the world, as estimates indicate that 97 to 99 per cent of women and girls have undergone some form of the practice,[12] including girls as young as two years.[13] The most common method is type 3 FGM, infibulation, which is referred to in Somalia as pharaonic circumcision.[14] However, in Somaliland, reports indicate a move from type 3 to type 1 FGM, although Powell and Yussuf note that this shift is more prevalent

5 As above.
6 ME Shember 'Female genital mutilation and the First Amendment: An analysis of state FGM statutes and the right to free exercise' (2019) 96 *University of Detroit Mercy Law Review* 431, 437.
7 United Nations 'International Day of Zero Tolerance for Female Genital Mutilation', https://www.un.org/en/observances/female-genital-mutilation-day (accessed 23 December 2024).
8 BBC News 'Somalia country profile' 2 January 2024, www.bbc.co.uk/news/world-africa-14094503 (accessed 23 December 2024).
9 28 Too Many 'Somalia: The law and FGM' July 2018 3, www.orchidproject.org/wp-content/uploads/2019/05/somalia_law_report_july_2018.pdf (accessed 23 December 2024).
10 See BBC News (n 8).
11 28 Too Many (n 9).
12 See UNICEF (n 2); Williams-Breault (n 2); Moody (n 2); Smith and others (n 2).
13 Moody (n 2) 2.
14 28 Too Many (n 9) 1.

in urban than in rural areas.[15] A study undertaken in the Hargeisa and Galka'ayo districts found that the vast majority of participants continue to support the use of FGM,[16] and across Somalia, Johnson-Agbakwu and others found that women still strongly support FGM,[17] which is out of kilter with many other countries.[18]

FGM in Somalia is considered a cultural, traditional and religious practice,[19] where zero tolerance eradication efforts can be viewed as Western ideals encroaching on cultural traditions.[20] Indeed, Onsongo asks who gets to define a person's culture as 'barbaric',[21] and Cassman has argued that '[i]f the focus is truly on a solution, and not on the imposition of Western beliefs on African cultures, then this solution must reconcile how on one hand FG[M] is a torturous, painful, barbaric practice, while on the other hand, it is a practice that lies at the heart of cherished tradition, value, and honour'.[22] This is particularly relevant to African countries such as Somalia, as Gele and others note that in such cultures, FGM 'represents the central component of a traditional rite of passage ceremony in which girls are expected to pass through a transition from puberty to adulthood'.[23] Often, parents must make difficult decisions whether to subject their daughters to FGM, or abandon traditional, cultural practices. Moreover, while there is a widespread belief in Somalia that religion requires FGM,[24] whether religions, in particular Islam and Christianity, require the perpetration of FGM is contentious and contemporary views are moving away from a link between the two.[25]

15 RA Powell & M Yussuf 'Changes in FGM/C in Somaliland: Medical narrative driving shift in types of cutting' vi, January 2018 Population Council, https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=1534&context=departments_sbsr-rh (accessed 23 December 2024).
16 Gele and others (n 1) 7.
17 CE Johnson-Agbakwu and others 'Perceptions of obstetrical interventions and female genital cutting: Insights of men in a Somali refugee community' (2020) 19 *Ethnicity and Health* 440-457.
18 UNICEF 'Female genital mutilation' June 2023, https://data.unicef.org/topic/child-protection/female-genital-mutilation/ (accessed 23 December 2024).
19 UNICEF 'Somalia' (2021), www.unicef.org/media/128221/file/FGM-Somalia-2021.pdf (accessed 23 December 2024); OO Awolola & NA Ilupeju 'Female genital mutilation; culture, religion and medicalisation: Where do we direct our searchlights for its eradication' (2019) 31 *Tzu Chi Medical Journal* 1-4.
20 R Cassman 'Fighting to make the cut: Female genital cutting studies within the context of cultural relativism' (2007) 6 *Northwestern Journal of Human Rights* 128.
21 N Onsongo 'Female genital cutting (FGC): Who defines whose culture as unethical?' (2017) 10 *International Journal of Feminist Approaches to Bioethics* 112.
22 Cassman (n 20) 128.
23 Gele and others (n 1).
24 N Mehriban and others 'Knowledge, attitudes, and practices of female health care service providers on female genital mutilation in Somalia: A cross-sectional study' (2023) 19 *Women's Health* 8.
25 SR Hayford & J Trinitapoli 'Religious differences in female genital cutting: A case study from Burkina Faso' (2011) 50 *Journal for the Scientific Study of Religion* 252-271.

FGM is also linked to an idea of 'femininity, modesty, and sexuality'.[26] However, this presents a misogynistic, heteronormative and outdated view of women's sexuality, indicating that FGM is a form of sexual control over women, presuming that heterosexual marriage is the ultimate goal for women and without FGM they will be regarded as unsuitable for marriage.

The reality is that FGM provides no medical benefit to the women and girls on whom it is performed but, in fact, is more likely to lead to physical and psychological complications, up to and including death.[27] For example, type 1 procedures can involve 'excruciating pain, resulting in complications such as haemorrhage, trauma to nearby structures, and failure to heal'.[28] According to the World Health Organisation (WHO), the involvement of medical professionals does not improve the safety of FGM, contrary to common misconceptions.[29] Studies have shown a link between negative pregnancy or childbirth outcomes and FGM. For example, evidence from the Somalian diaspora in Norway showed 'that perinatal complications, such as foetal distress, emergency caesarean sections, and prelabour deaths, were more frequent among infibulated Somali women (with type 3) compared to Norwegian women'.[30] These medical complications have financial implications for states, as the WHO demonstrates current and future economic costs of FGM-related health care through its FGM Cost Calculator. The WHO found that annual FGM health care costs across 27 countries 'totalled 1,4 billion USD during a one-year period'.[31]

Somalia also has legal obligations regarding the practice of FGM in the country, which the following parts consider.

### 2.1 Somalia's legal obligations: International human rights

International human rights law, both substantive and customary, prohibits FGM on the grounds that it breaches the rights of women and girls.[32] The perpetration of FGM violates multiple, well-

26 Onsongo (n 21) 107.
27 WHO (n 4).
28 Smith and others (n 2) 45.
29 As above.
30 Gele and others (n 1). See also the adverse effects of FGM experienced by Kaafiyo Abdi Farah: UN Women Africa 'From knowledge to action: Ending female genital mutilation in Somalia' 31 May 2022, https://africa.unwomen.org/en/stories/news/2022/05/from-knowledge-to-action-ending-female-genital-mutilation-in-somalia (accessed 23 December 2024).
31 WHO (n 4).
32 See WHO 'Female genital mutilation: A joint WHO/UNICEF/UNFPA statement' 1997, https://apps.who.int/iris/bitstream/handle/10665/41903/9241561866.pdf?sequence=1&isAllowed=y (accessed 23 December 2024).

established human rights principles. This includes the right to life;[33] the right to be free from torture and cruel, inhuman or degrading treatment;[34] and the right to health,[35] all of which are substantiated by global human rights treaties, namely, the International Covenant on Civil and Political Rights (ICCPR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively. Somalia has ratified all three treaties.[36]

Article 24(3) Convention on the Rights of the Child (CRC) expressly directs states to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.[37] Somalia became a party to CRC in 2015, leaving just one country in the world that has not ratified it.[38] Further provisions of CRC, including a child's right to privacy,[39] protection from discrimination based on sex,[40] and protection from violence, injury or abuse,[41] are also relevant.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is applicable to the prevention of violence against women, including FGM.[42] Somalia has neither signed nor ratified CEDAW, and Williams argues that this 'may also suggest that the country's political activity and traditions need to evolve from a legislative perspective'.[43] The treaty bodies attached to CRC and CEDAW have provided joint general recommendations regarding FGM, most recently in 2019, noting the link between FGM being

33 Art 9(1) International Covenant on Civil and Political Rights (1976) 999 UNTS 171 (ICCPR).
34 Art 7 ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 39/46, 10 December 1984.
35 Art 122 International Covenant on Economic, Social and Cultural Rights (1978) 993 UNTS 3 (ICESCR).
36 See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=107&Lang=EN (accessed 23 December 2024).
37 Art 24(3) Convention on the Rights of the Child UNGA Res 44/25, 20 November 1989 (CRC).
38 At the date of writing, the United States of America is the only UN member state not to have ratified CRC.
39 Art 16 CRC.
40 Art 2 CRC.
41 Art 19 CRC.
42 Arts 1 & 2 Convention on the Elimination of All Forms of Discrimination against Women UNGA Res 34/180, 18 December 1979, UN Doc A/RES/34/180 (CEDAW); UN Committee on the Elimination of Discrimination Against Women General Recommendation 14: Female circumcision (1990) UN Doc A/45/38 and Corrigendum; UN Committee on the Elimination of Discrimination Against Women General Recommendation 19: Violence against women (1992) UN Doc A/47/38; UN Committee on the Elimination of Discrimination Against Women General Recommendation 24: Article 12 of the Convention (women and health) (1999) UN Doc A/54/38/Rev.1.
43 Williams-Breault (n 2) 227.

a violation of both women's and children's rights, and that both bodies are committed to preventing, responding to and eliminating practices including FGM.[44]

The UN and its subsidiary bodies have been taking action against FGM in earnest since 1997, when the WHO, the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA) issued a joint statement.[45] A growing number of policies have emerged since, including the UNFPA and UNICEF's Joint Programme on Female Genital Mutilation/Cutting in 2007, the WHO's 2010 Global strategy to stop healthcare providers from performing FGM, and the first evidence-based guidelines on the management of health complications from FGM, jointly authored by the WHO, UNFPA and UNICEF in 2016. Also, in 2022 the WHO launched a training manual for healthcare providers to challenge and assist in the prevention of FGM. The UN General Assembly has found that FGM constitutes 'irreversible abuse that impacts negatively on the human rights of women and girls'.[46] This signifies a positive collaboration between UN entities, and it can be argued that prohibiting FGM is emerging as customary international law.

### 2.2 Somalia's legal obligations: Regional law

Somalia is a member state of the regional group, the African Union (AU). The AU takes a clear stance towards the eradication of FGM, solidifying the regional view that this practice is a form of gender-based violence.

Somalia ratified the African Charter on Human and Peoples' Rights (African Charter) in 1985,[47] meaning that the country should adhere to its provisions. Although the African Charter does not directly reference the elimination of FGM, multiple other provisions can be construed to support this, including article 16, which guarantees the right to physical and mental health, article 4 which affirms the right to life and integrity of the person, and article 18 which protects the rights of women and children.

44 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child (2019) on harmful practices (8 May 2019) CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1.
45 WHO (n 32).
46 UN General Assembly 'Intensifying global efforts for the elimination of female genital mutilation' 5 March 2013 UN Doc A/RES/67/146.
47 See https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights (accessed 23 December 2024).

Somalia signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) in 2006 but has not ratified it.[48] This is concerning, given that, among others the African Women's Protocol provides vital protections related to FGM. Article 5 provides that 'state parties shall take all necessary legislative and other measures' to eliminate 'all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards', including 'prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them'.[49] Other provisions are also relevant, for example, article 14 which protects the health and reproductive rights of women in Africa, which includes the prevention of FGM.

The African Union Initiative on Eliminating Female Genital Mutilation Programme and Plan of Action 2019-2023 (Saleema Initiative) was put in place as part of Africa's Transformative Agenda 2063 which seeks to

> advocate for accelerated action at African Union member states level for protection and care of young girls and women towards zero cases of female genital mutilation by 2030. It will involve prioritising a comprehensive package of interventions, including high level interventions on policy and legislative action, domestic financial resource allocation, and service delivery as well as a community engagement for social norms change through a holistic approach, and creating a new cultural narrative to address the underlying gender gaps and inequalities that drive the practice of female genital mutilation in the communities most affected, across the continent and globally.[50]

While there is a particular focus on those AU states with a high prevalence of FGM, it appears that the Saleema Initiative has had limited impact in Somalia. In fact, the COVID-19 pandemic saw a rise in FGM in Somalia, as girls were 'subjected to door to door FGM' as the 'lockdown [was] seen as an opportune time for the procedure to be carried out in the home with ample time for healing'.[51]

48 Solidarity for African Women's Rights 'Protocol watch' 8 June 2023, https://soawr.org/protocol-watch/ (accessed 23 December 2024).
49 African Charter (n 47).
50 African Union 'African Union Initiative on Eliminating Female Genital Mutilation Programme and Plan of Action 2019-2023' (2022) 4-5, <https://au.int/sites/default/files/newsevents/workingdocuments/41106-wd-Saleema_Initiative_Programme_and_Plan_of_Action-ENGLISH.pdf (accessed 23 December 2024).
51 Plan International 'Girls in Somalia subjected to door to door FGM' 18 May 2020, https://plan-international.org/news/2020/05/18/girls-in-somalia-subjected-to-door-to-door-fgm/ (accessed 23 December 2024).

### 2.3 Somalia's legal obligations: Domestic law

Following the disorder in Somalia and 12 years of planning, the Provisional Constitution of the Federal Republic of Somalia was put in place in 2012,[52] as amended in 2016. The Provisional Constitution prohibits 'any form of violence against women' in article 15(2). Article 15(4) specifically states that 'female circumcision is a cruel and degrading customary practice, it is tantamount to torture. The circumcision of girls is prohibited.'[53] Despite this, there is no legislation that criminalises FGM or sets out punishments for the perpetration or assistance in the perpetration of FGM in either Somalia or Somaliland. While there is a provision in the Somali Penal Code that criminalises causing hurt to another, which carries a carceral sentence if found guilty, it does not specifically refer to FGM.[54] Moreover, both Somalia and Somaliland have protections against child abuse and neglect, which can be interpreted to include FGM, but these protections do not explicitly refer to FGM.[55]

In 2021 a group of civil society organisations (CSOs) participating in Somalia's third cycle UPR, found that while 'the government launched a number of policies' including an FGM Bill, 'many of these policies are drafts and [have] not [been] enacted or implemented'.[56] This suggests the need for new approaches and further work.

### 2.4 Strategies for eradicating female genital mutilation in Somalia

UN Sustainable Development Goal (SDG) 5 aims to achieve gender equality and empower all women and girls, setting a target to eliminate FGM globally by 2030 through SDG target 5.3.[57] There are multiple proposals for achieving this and, while passing legislation criminalising FGM is important, I contend that this alone will not eradiate the practice. World Health Assembly Resolution WHA61.16 from 2008 stressed 'the need for concerted action in all sectors:

52 See AE Kouroutakis 'The Constitution of Somalia on paper and the constitutional reality' in Pedone (ed) *Constitutions et lois fondamentales arabes* ((2018), who also provides a clear overview of the situation in Somalia since its independence from British and Italian colonisation.
53 Art 5(4) Federal Republic of Somalia Provisional Constitution (adopted 1 August 2012).
54 Art 440 Somali Penal Code.
55 Art 29 Provisional Constitution (n 53); Somaliland Child Rights Protection Act (2022).
56 United Nations Human Rights Council 'Summary of stakeholders' submissions on Somalia' (26 February 2021) A/HRC/WG.6/38/SOM/3 para 16.
57 UN Sustainable Development 'Goal 5', https://sdgs.un.org/goals/goal5 (accessed 23 December 2024); WHO (n 4).

health, education, finance, justice and women's affairs'.[58] Adigüzel and others have argued that 'further efforts and research from different countries, cultures, beliefs, organisations, and individuals, focusing on knowledge, awareness, legalisation, opinions of lay and religious leaders, particularly including women's rights activists, and women with FGM/C, are needed to stop FGM/C'.[59] This appears to be particularly important for Somalia, in that it may benefit from a multi-faceted strategic approach to eliminating FGM, as well as an inter-generational approach to achieve eradication, involving all generations and levels of the family. A sensitive approach must be taken when considering the eradication of FGM in Somalia, where the practice is seen as a social norm that is often performed to ensure social acceptance.[60] A human rights-based approach to ending the practice of FGM must also consider the cultural context to avoid challenges in implementing an eradication strategy. This part considers some of the existing and proposed strategies for the eradication of the practice.

Criminalisation, through domestic legislation, can assist with the elimination of FGM. This can include criminalising not only the cutting itself, but also those who fail to report FGM[61] and cross-border FGM.[62] Nabaneh and Muula argue that 'while criminalisation may not be the best means of stopping FGM, it creates an enabling environment to facilitate the overall strategy of African governments in eradication of the practice'.[63] However, while many countries – not including Somalia – have criminalised the practice, to ensure full eradication of FGM, I suggest that the law must be complemented by a structure to implement and enforce such laws.

Healthcare providers are well-placed to support the eradication of FGM, as the WHO recommends that healthcare sectors should take a comprehensive approach to preventing FGM through resources and guidance, including supporting countries to adapt resources to fit local contexts.[64] However, Nabaneh and Muula found that, in some African countries, this approach 'unintentionally leads to numerous parents and relatives seeking safer procedures, rather than

58 UN (n 8).
59 C Adigüzel and others 'The female genital mutilation/cutting experience in Somali women: Their wishes, knowledge and attitude' (2019) 84 *Gynecologic and Obstetric Investigation* 118.
60 UNICEF (n 22).
61 Williams-Breault (n 2) 228.
62 As above.
63 S Nabaneh & AS Muula 'Female genital mutilation/cutting in Africa: A complex legal and ethical landscape' (2019) 145 *International Journal of Gynecology and Obstetrics* 253.
64 WHO (n 4).

abandoning the practice' in its entirety.[65] Conversely, Population Council's research in Somaliland showed that '[p]ositive attitudes towards abandoners [of FGM] arose mainly from health care workers who encouraged abandonment of FGM[] due to the health complications experienced by girls'.[66] This suggests that healthcare workers can be part of a multi-faceted approach to eliminating FGM, but with clear guidance and support towards eradication that takes into account the nuances of Somalia's cultural context.

Education is a fundamental tool to seeking the elimination of FGM. A study on healthcare workers and their understanding of FGM in Australia identified that education must be culturally sensitive and involve both men and women.[67] Cultural sensitivity is particularly important in the Somalian context, as set out in part 2.1. Strategies for eliminating FGM must consider how education can be used as a tool to change mindsets from FGM being a traditional practice, to a violation of women's and children's rights to be free from violence. Culturally-sensitive education and reorientation could be of benefit, especially when targeted and tailored for different audiences, including families and wider communities, as well as local leaders.[68] There are examples of how this can lead to positive outcomes. For example, in Malawi, 'chiefs are leading efforts to informally adopt community laws towards addressing harmful practices', including FGM.[69] While not legally binding, the status of traditional leaders lends weight to these community laws, something that could be implemented as a stepping stone towards Somalia passing formal legislation to criminalise FGM. To get there, educating traditional leaders on FGM, alongside local communities, and pointing to success stories such as that of Malawi, are necessary first steps. Somalia's Provisional Constitution already provides the legal basis to do this, protecting the right to education in article 30 and the protection of the country's culture in article 31. Converging these two protections, while also learning from success stories such as that in Malawi, would be a vital step towards reorientation and changing mindsets on FGM in Somalia.

65 Nabaneh & Muula (n 63) 255.
66 Powell & Yussuf (n 17).
67 O Ogunsiji & J Usher 'Beyond illegality: Primary healthcare providers' perspectives on elimination of female genital mutilation/cutting' (2021) 30 *Journal of Clinical Nursing* 9-10.
68 See the UPR Project at BCU 'Joint submission of the BCU Centre for Human Rights and Arizona State University: Chad' July 2023, https://bcuassets.blob.core.windows.net/docs/chad-stakeholder-report-upr-project-at-bcu-and-asu-133341461393814582.pdf (accessed 23 December 2024).
69 T Kachika 'Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi' (2023) 23 *African Human Rights Law Journal* 126-155.

Although it is women and girls who suffer FGM, men can play a vital role in moving towards the abandonment of the practice as fathers, husbands and traditional leaders.[70] Varol and others conducted a systematic review of all articles published between 2004 and 2014 regarding the attitudes of men towards FGM. They found that '[m]any men wished to abandon this practice because of the physical and psychosexual complications to both women and men', but that '[s]ocial obligation and the silent culture between the sexes were posited as major obstacles for change'.[71] The study revealed that the higher the level of education, the more likely men would support the abolishment of FGM, underscoring the importance of culturally-sensitive education.[72] Varol and others suggest that '[a]dvocacy by men and collaboration between men and women's health and community programmes may be important steps forward in the abandonment process'.[73] Gele and others proposed that the 'best possible way to achieve a successful change is to accomplish a convention shift of intermarrying communities and a public declaration that marks the shift, in which every family understands that [FGM] is harmful'.[74]

A further suggestion for eliminating FGM is 'the idea of an "alternative ritual", which exclude[s] genital cutting but maintain[s] the ceremony and the public declaration for community recognition'.[75] This appears to have worked well in Kenya,[76] as well as in The Gambia, Senegal, Uganda and Tanzania.[77] Gele and others suggest that a similar approach that is tailored to the Somalian community's understanding of the practice is essential for the eventual eradication of FGM in Somalia.[78]

Civil society is a key driver for action in terms of eradicating FGM. There are examples of this in Somalia. For instance, 'Save the Children and partners are supporting local non-governmental organisations in modifying cultural perceptions of cutting as central to girls' rites of passage and in finding alternate ways to elevate the status and value of women in the family and community'.[79] Moreover, since 1996,

70 N Varol and others 'The role of men in abandonment of female genital mutilation: A systematic review' (2015) 15 *BMC Public Health* 1034.husbands, community and religious leaders may play a pivotal part in the continuation of female genital mutilation (FGM
71 As above.
72 As above.
73 As above.
74 Gele and others (n 1) 3.
75 Gele and others (n 1) 9.
76 As above.
77 Nabaneh & Muula (n 63) 256.
78 Gele and others (n 1) 9.
79 Williams-Breault (n 2) 230.

the African Women's Organisation has worked tirelessly to educate communities on FGM and support victims in African communities, including in Somalia.[80]

The UN's UPR can add to these strategies for eradicating FGM, by providing a mechanism that brings together the views and suggestions from governments, UN bodies and civil society, both globally and in Somalia. There is the opportunity to put forward suggestions for a multi-pronged approach to elimination, covering all strategies discussed above and more, while also involving civil society in discussions and strategies.

## 3 Somalia's UPR: Civil society and member state recommendations on female genital mutilation

### 3.1 The United Nations' Universal Periodic Review

Created in 2006, the UPR is an innovative mechanism of the UN Human Rights Council (UNHRC), which cyclically reviews all 193 UN member states' human rights protection and promotion every four and a half years. Each review is based on the UN Charter, the Universal Declaration of Human Rights (Universal Declaration), international human rights treaties, voluntary commitments made by states, and relevant humanitarian law.[81] The process is a 'peer-review' by other state delegations, and also involves civil society's input. Each review is recorded in publicly-available documentation. This starts with the preparation of three documents that underpin each review: the National Report, prepared by the state under review, and the Compilation of UN Information and Summary of Stakeholders' Information, both of which are compiled by the Office of the High Commissioner for Human Rights (OHCHR).

CSOs play a vital role in the UPR, acting as 'stakeholders' throughout the process. This is underscored by UNHRC Resolution 5/1, which makes it clear that the UPR should '[e]nsure the participation of all relevant stakeholders, including non-governmental organisations and national human rights institutions'.[82] A key role of CSOs within the UPR process is for them to submit stakeholder reports, which Resolution 5/1 states should include credible and reliable information.

80 African Women's Organisation, www.support-africanwomen.org/en/ (accessed 23 December 2024).
81 UN Human Rights Council Resolution 5/1 (2008) para 1.
82 UN Human Rights Council Resolution (n 81) para 3(m).

CSOs can submit single stakeholder reports, or can collaborate with other CSOs to make a joint submission, on human rights issues in the state under review. The OHCHR then summarises these reports into a 10-page document. As the summary report is one of the three reports that underpins every state's UPR, the stakeholder submissions are a core part of the mechanism.

The review itself takes place in the UNHRC, wherein the state under review and other states engage in an interactive dialogue. As part of this, recommendations are provided by UN member states regarding how the state under review can better protect and promote human rights. Once the review has taken place, and the member state recommendations have been made, proceedings are written up by the OHCHR and a troika of supporting states into the Report of the Working Group. As part of this, the state under review will decide whether to accept or note each of the recommendations – with noted recommendations signalling a *de facto* rejection. The report of the Working Group will thereafter be adopted at a UNHRC plenary session. Finally, the accepted recommendations should be implemented by the state under review, with progress on implementation forming the basis of the next review. States may also submit a mid-term review, halfway between cycles, updating on their progress.

CSOs can also participate in the UPR pre-sessions, which are organised by a leading non-governmental organisation (NGO), UPR Info, and take place at the Palais des Nations one month before the review. This provides CSOs and other stakeholders the opportunity to inform member state delegations about the human rights situation in the state under review, supporting the creation of meaningful recommendations.

The UPR has achieved success in attracting one hundred per cent cooperation from member states to date, with the fourth cycle of reviews having commenced in November 2022. Somalia has been reviewed three times: in 2011, 2016 and 2021, with cycle four scheduled to take place in 2026.

### 3.2 The UPR and female genital mutilation

Previous studies have been conducted on African states' participation in the UPR. For example, Smith's assessment of engagement with the first cycle of the UPR concluded that 'African states comment

repeatedly (usually positively) on other African group states'.[83] Etone's study confirmed this finding, proposing that a softer approach to recommendations could lead to better engagement regarding contentious issues.[84] Specifically regarding FGM at the UPR, a further analysis by Etone suggested that 'reframing female genital mutilation as a technical, health issue rather than a normative human rights concern can advance the human rights issue as internal to the African culture'.[85]

Gilmore and others conducted a study on the UPR and sexual and reproductive health and rights, which includes FGM, finding that the UPR 'can be a valuable mechanism for reviewing governments' performance' on this issue.[86] Patel's evaluation of the issue of FGM within the first cycle of the UPR discovered that 'states under review were overtly defensive in their responses [to recommendations on FGM] as they either referred to existing laws and policies that were already in place, or justified the continuance of the practice on cultural grounds'.[87] Whereas Gilmore and others' research found that, in the first seven sessions of cycle two of the UPR, 'implementation of [FGM-related] recommendations included legal and policy reforms, the establishment of prevention strategies, and investments in programmes to address the issue',[88] providing a positive example of implementation in Burkina Faso.

Existing work suggests that the UPR can have a positive impact on the issue of FGM, if a suitable approach to engaging with the mechanism is taken by all key actors. One possible way of achieving this is through amending the way in which member states formulate their recommendations.

83 R Smith 'A review of African states in the first cycle of the UN Human Rights Council's Universal Periodic Review' (2014) 14 *African Human Rights Law Journal* 363.

84 D Etone 'African states: Themes emerging from the Human Rights Council's Universal Periodic Review' (2018) 62 *Journal of African Law* 208, 223.

85 D Etone 'Theoretical challenges to understanding the potential impact of the Universal Periodic Review mechanism: Revisiting theoretical approaches to state human rights compliance' (2019) 18 *Journal of Human Rights* 36-56.

86 K Gilmore and others 'The Universal Periodic Review: A platform for dialogue, accountability, and change on sexual and reproductive health and rights' (2015) 17 *Health and Human Rights Journal* 167, 168.

87 G Patel 'How universal Is the United Nations' Universal Periodic Review: An examination of the discussions held on female genital mutilation in the first cycle of review' (2017) 12 *Intercultural Human Rights Law Review* 187, 221.

88 Gilmore and others (n 86) 174.

### 3.3 UPR recommendations

Recommendations are the core focus of this article. Given the importance of this part of the UPR process, it is imperative that it operates to its full potential, that is, stronger recommendations will lead to more positive actions on the ground and, ultimately, better human rights promotion and protection globally. My previous work has considered the formulation of UPR recommendations and how member states can improve these to have the most impact on the ground.[89] In that article, I suggested that member states should look to CSOs to guide them as, ideally, CSOs should 'provide their expertise' and member states should 'use their template recommendations during the UPR'.[90] This article builds upon this, by examining the value of CSO recommendations to member states. CSOs, acting as stakeholders within the UPR, do not formally provide recommendations during a review, but they can – and indeed are encouraged to[91] – provide recommendations in their individual stakeholder reports.

Literature has identified that information provided by stakeholders in their reports have been made use of by member states. For instance, Etone's examination of recommendations made on transitional justice found a link between CSO information provided in individual reports and member state recommendations on transitional justice in South Sudan.[92] Moreover, McMahon and others' study of the first cycle UPR concluded that 'recommendations do in fact reflect perspectives and themes contained in recommendations of 'CSOs, but that they were "framed in more general terms than those proposed by CSOs"'.[93] McMahon and others' study has built the foundations for arguing that CSO recommendations are valuable to member states. This article seeks to use this foundation to focus in on the role of CSO recommendations in terms of eliminating FGM, to understand whether the recommendations provided by CSOs during Somalia's UPRs are being identified and used by member states in practice.

89 Storey (n 3).
90 As above.
91 See OHCHR 'Universal Periodic Review (Fourth Cycle): Information and guidelines for relevant stakeholders' written submissions' 3 March 2022, www.ohchr.org/sites/default/files/2022-03/StakeholdersTechnicalGuidelines4thCycle_EN.pdf (accessed 23 December 2024).
92 D Etone 'The Universal Periodic Review and transitional justice' in D Etone, A Nazir & A Storey (eds) *Human rights and the UN Universal Periodic Review mechanism: A research companion* (2024) 147.
93 E McMahon and others 'The Universal Periodic Review. Do civil society organisation-suggested recommendations matter?' Friedrich Ebert Stiftung (2013) 1.

### 3.4 Method

To provide an empirical analysis of recommendations made by both CSOs and member states to Somalia on FGM, I followed Etone's approach to analysing UPR recommendations on a specific human rights issue.[94] I first collated all recommendations from the first three cycles of Somalia's UPR in 2011, 2016 and 2021. I identified CSO recommendations by reading through all individual stakeholder submissions by CSOs in the three cycles of review. I then collated all member state recommendations, along with responses from Somalia, from the reports of the Working Group and their Addendums. I restricted the collection of recommendations to include only those that referred explicitly to FGM, female circumcision, cutting, or any other synonym used to describe FGM.[95]

I then coded the recommendations according to each recommendation's 'theme', that is, what the particular focus of the recommendation was in relation to FGM. Nine themes were identified from the coding of CSO and member state recommendations, namely, (1) legislative reform; (2) implementation of laws; (3) adoption of measures related to FGM; (4) development of a national action plan; (5) culture and tradition; (6) funding for FGM eradication; (7) education; (8) eradication of FGM; and (9) raising awareness of FGM. Where a recommendation discusses multiple gender-based violence issues, it was only coded to the relevant theme in relation to the FGM section of the recommendation. Moreover, where a recommendation could be categorised into more than one theme, it was allocated to the clearest theme. For example, Iran's recommendation to '[t]ake all necessary legal and practical measures to eliminate FGM, including considering amendments to the penal code with provisions to specifically prohibit this practice'[96] was categorised into the 'legislative reform' theme, as the clearest part of the recommendation asked Somalia to amend its Penal Code.

Following the thematic coding, I engaged in a desk-based examination of all recommendations, using the following two questions to guide my analysis: (i) how frequently member states and CSOs recommend on similar themes; and (ii) whether CSOs' and/or member states' recommendations on FGM are sufficiently

94 Etone (n 92).
95 While this research has aimed to include all relevant member state and CSO recommendations, there is a caveat that I have not included indirect references to FGM, only explicit references.
96 UNHRC 'Report of the Working Group on the Universal Periodic Review: Somalia' 11 July 2011 UN Doc A/HRC/18/6, para 98.27 (Report of the Working Group Cycle One).

formulated to aid implementation by Somalia. These questions are addressed in the analysis below.

It should be noted that the findings of this study can only be attributed to the issue of FGM in Somalia. However, the study could be replicated for other countries and forms of violence against women and girls, to identify trends and formulate wider conclusions.

### 3.5 Analysis: Context

Somalia's first cycle UPR took place on 3 May 2011. In terms of stakeholders, 26 organisations submitted reports, of which seven specifically referred to FGM.[97] However, of the seven, only one stakeholder made a recommendation on FGM, under the theme of 'legislative reform'.[98] Compare this with member state recommendations. In cycle one, Somalia received 155 recommendations in total, 15 of which referred explicitly to FGM.[99] These recommendations were coded into four themes: legislative reform (eight recommendations);[100] adopt measures related to FGM (three recommendations);[101] develop a national action plan (two recommendations);[102] and culture and tradition (two recommendations).[103]

97 Coalition for Grassroots Women Organisations (COGWO) Iniskoy Peace and Democracy, JS1 – Somaliland's Civil Society Stakeholders' Coalition, Kaalo, Peace and Human Rights Network (PHRN), Somali Family Services (SFS), and Save Somali Women and Children.

98 UNHRC 'Contributions for the summary of stakeholder's information – JS1' 5, www.ohchr.org/en/hr-bodies/upr/uprso-stakeholders-info-s11 (accessed 23 December 2024).

99 Four recommendations also engaged with the broad theme of 'gender-based violence'.

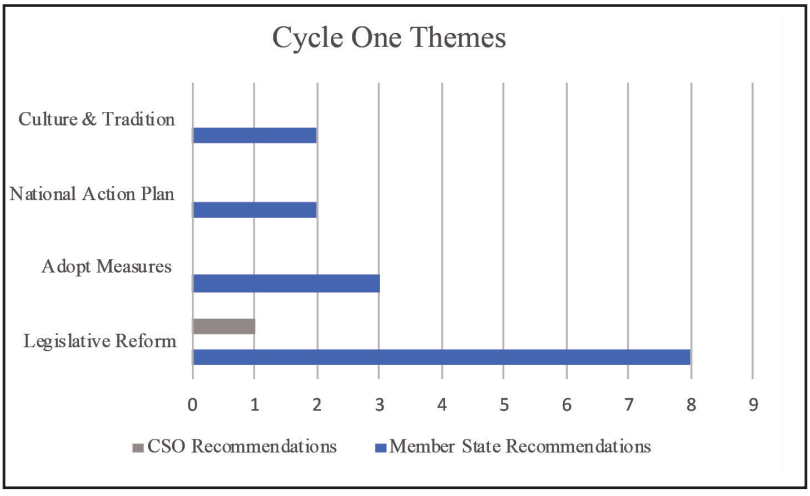
100 Report of the Working Group Cycle One (n 96) Italy (para 98.21); Norway (para 98.22); Canada (para 98.23); The Netherlands (para 98.24); Portugal (para 98.25); Australia (para 98.26); Islamic Republic of Iran (para 98.27); and Costa Rica (para 98.29).

101 Report of the Working Group Cycle One (n 96) Japan (para 98.60); Argentina (para 98.80); and Belgium (para 98.28).

102 Report of the Working Group Cycle One (n 96) Uruguay (para 98.55) and Spain (para 98.56).

103 Report of the Working Group Cycle One (n 96) Canada (para 98.81) and Mexico (para 98.82).

***Figure 1***

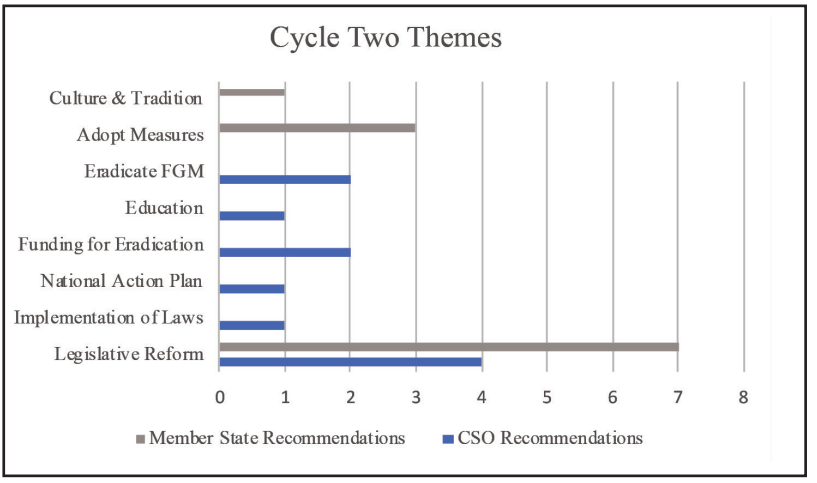



The second UPR of Somalia was held on 22 January 2016. Sixteen stakeholders submitted reports to cycle 2. While, overall, this was fewer than in cycle one, there was a noted increase in joint submissions, which are encouraged by the OHCHR 'when the stakeholders focus on issues of similar nature'.[104] Joint submissions are also permitted to use double the word limit when compared to an individual submission, increasing the word count from 2 815 to 5 630,[105] allowing more detail to be included by stakeholders. Five of the 16 reports included specific references to FGM[106] and, importantly, each of these five stakeholders also made 11 recommendations on FGM, covering six themes between them, a major improvement from the stakeholder recommendations in cycle one. The themes covered were legislative reform (four recommendations);[107] implementation of laws (one recommendation);[108] developing a national action plan (one recommendation);[109] funding for FGM eradication (two recommendations);[110] education (one recommendation);[111] and eradicating FGM (two recommendations).[112] Member states provided

104 OHCHR (n 91) para 15.
105 OHCHR (n 91) para 11.
106 Somaliland National Human Rights Commission, Muslims for Progressive Values (MPV), Terre Des Femmes, JS4 – Somaliland Civil Society Organisations, JS5 – Somalia Civil Society Organisations.
107 See SLNHRC 4, MPV 10, JS5 4, and TDF para 12 available at UNHRC 'Contributions for the summary of stakeholders' information', www.ohchr.org/en/hr-bodies/upr/uprso-stakeholders-info-s24 (accessed 23 December 2024).
108 TDF (n 107) para 13.
109 MPV (n 107) para 9.
110 MPV (n 107) para 10; TDF (n 107) para 15.
111 TDF (n 107) paras 14, 15.
112 JS4 (n 107) para XI.8; JS5 5.

228 recommendations in total to Somalia during cycle two, with 11 specifically referring to FGM.[113] These recommendations were coded to three themes: legislative reform (seven recommendations);[114] adopting measures related to FGM (three recommendations);[115] and culture and tradition (one recommendation).[116]

***Figure 2***

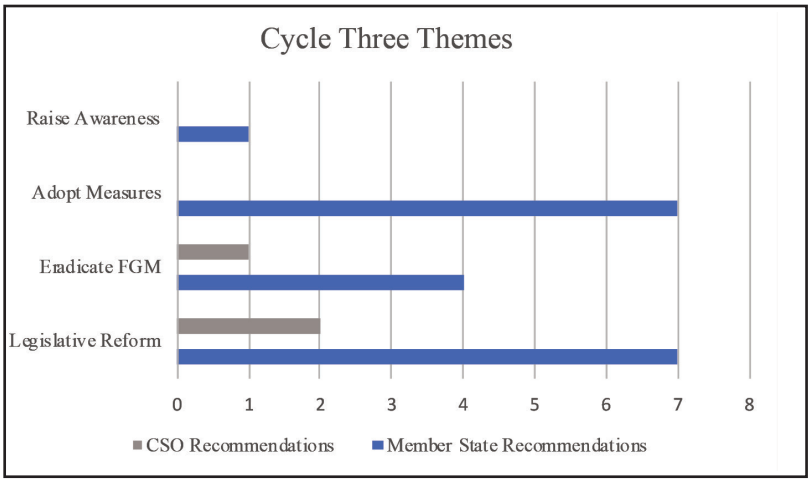



Somalia's most recent UPR, cycle three, took place on 6 May 2021. Thirty stakeholders submitted reports, with eight of those directly referring to FGM.[117] However, only three of these reports provided three recommendations on FGM, under two themes: legislative reform (two recommendations)[118] and eradicating

113 Nine recommendations also engaged with the broad theme of 'gender-based violence'.
114 UNHRC 'Report of the Working Group on the Universal Periodic Review: Somalia' 13 April 2016 UN Doc A/HRC/32/12, Philippines (para 136.78); Norway (para 136.79); Australia (para 136.80); Belgium (para 136.81); Uruguay (para 136.82); Italy (para 136.83); and Canada (para 136.84) (Report of the Working Group Cycle Two).
115 Report of the Working Group Cycle Two (n 114) Japan (para 136.74); Spain (para 136.75); and Slovenia (para 136.119).
116 Report of the Working Group Cycle Two (n 114) Republic of Korea (para 136.76).
117 See Egypt-Peace The International Alliance for Peace and Development, SOS Children's Villages Somalia, Joint Submission 3 – East and Horn of Africa Human Rights Defenders Project, NGO in Special Consultative Status with ECOSOC and National Coalition for Human Rights Defenders – Somalia, Joint Submission 6 – 13 Somali CSOs, JS7 – 126 Somali Civil Society Organisations, JS8 – Women's Rights and Gender Cluster, JS9 – Somali Women Development Centre (SWDC) & Sexual Rights Initiative (SRI) UNHRC 'Contributions for the summary of stakeholders' information', www.ohchr.org/en/hr-bodies/upr/uprso-stakeholders-info-s38 (accessed 23 December 2024).
118 JS7 (n 117) Cycle Three 5; JS8 Annex 1 Cycle Three 31.

FGM (one recommendation).[119] Compare this with member state recommendations. Out of the 273 recommendations received in total, 19 referred specifically to FGM, under four themes: legislative reform (seven recommendations);[120] adopting measures related to FGM (seven recommendations);[121] eradicating FGM (four recommendations);[122] and raising awareness of FGM (one recommendation).[123]

***Figure 3***




119 IADP (n 117) Cycle Three 7.

120 UNHRC 'Report of the Working Group on the Universal Periodic Review: Somalia' (11 July 2011) UN Doc A/HRC/18/6, Sudan (para 132.195); Sweden (para 132.196); Togo (para 132.197); Burkina Faso (para 132.199); Chile (para 132.200); Finland (para 132.204); and Canada (para 132.236) (Report of the Working Group Cycle Three).

121 Report of the Working Group Cycle Three (n 120) Zambia (para 132.198); Côte d'Ivoire (para 132.201); France (para 132.205); Greece (para 132.207); Italy (para 132.211); Latvia (para 132.212); and Liechtenstein (para 132.215).

122 Report of the Working Group Cycle Three (n 120) Japan (para 132.193); Poland (para 132.194); Norway (para 132.220); and Portugal (para 132.222).

123 Report of the Working Group Cycle Three (n 120) Croatia (para 132.192).

## 3.6 Analysis: Findings

This part of the article outlines the findings, guided by the two key questions set out in the method section: (i) how frequently member states and CSOs recommend on similar themes; and (ii) whether CSOs' and/or member states' recommendations on FGM are sufficiently formulated to aid implementation by Somalia.

### *3.6.1 Frequency of thematic recommendations from CSOs and member states*

Across Somalia's three cycles of review, the data shows that there are only two converging themes between CSO and member state recommendations regarding FGM: (i) legislative reform, across all three cycles; and (ii) the eradication of FGM, in cycle three. It appears that this is a missed opportunity for CSO recommendations to positively influence that of the member states, particularly because CSOs appear to be making recommendations on more substantive themes than member states. For example, in cycle two, CSOs raised the themes of funding for eradicating FGM and education, whereas member states did not identify these same themes across any of the three cycles. These were important recommendations, for example, MPV had suggested that Somalia should '[a]llocate sufficient funding for the launch of a community outreach initiative that raises awareness of the health consequences of FGM/C'.[124] TDF recommended on the importance of investing in education and improving on 'gender imbalance' within the education sector in Somalia.[125] These themes can be linked back to the strategies for eradicating FGM identified earlier in this article, indicating that CSOs are well placed to provide information and recommendations based upon their expertise and engagement on the ground. Yet, member states did not use these seemingly valuable recommendations. This suggests that, in relation to FGM in Somalia, CSOs are not successfully impacting member state recommendations. This does not confirm the findings of McMahon's study on cycle one, suggesting that while, broadly, CSO recommendations are valuable to the UPR, when doing a deep dive into the detail of specific thematic human rights issues, there is less success. Further studies are required on this, to identify whether other issues in other states' UPRs are seeing a better uptake of CSO recommendations on certain issues.

124 MPV (n 107) 10.
125 TDF (n 107) para 14.

There is an existing opportunity for CSOs to positively impact on member state recommendations, through the UPR pre-sessions. The pre-sessions take place prior to the review, in Geneva, and provide a panel of stakeholders the opportunity to present a statement to member states, which includes model recommendations for member states to use.[126] I have experienced the benefit of engaging with the pre-sessions and the pre-UPR advocacy, as I have engaged in the pre-sessions of multiple countries on behalf of the UPR Project at BCU. For example, in October 2020, the UPR Project submitted a report to Namibia's UPR, focusing on the rights of women and girls with HIV. This report received significant attention and citations from the UN in its Stakeholder Summary document.[127] In March 2021 I was invited to be a panellist for Namibia's UPR pre-session, where I discussed the core issues relating to the rights of women and girls with HIV with UN member states and other CSOs. After engaging in this advocacy, during Namibia's third cycle UPR it received three specific recommendations on women and girls, using the information provided by the UPR Project at BCU.[128] This was a significant improvement as it had received zero recommendations in the previous UPR cycle, when HIV/AIDS recommendations were broad and bracketed all people living with HIV together, ignoring their intersectional experiences.

While this experience was impactful, the advocacy took place online due to the COVID-19 pandemic. My UPR Project colleagues had further success in terms of our recommendations positively influencing that of member states, when engaging with the pre-sessions in person in Geneva, for the United Kingdom and Northern Ireland's cycle four review in 2022. After speaking at the pre-session, having in person meetings with government delegations, and taking part in the 'informal exchange of views with EU member states', member states used the UPR Project's recommendations during the UK's fourth cycle review.[129] The conclusion of the UPR Project team is that, 'whilst all our stakeholder submissions have been cited by the

126 UPR Info 'Pre-sessions', www.upr-info.org/en/upr-process/pre-sessions (accessed 23 December 2024).

127 The UPR Project at BCU 'Namibia' Centre for Human Rights, www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-namibia (accessed 23 December 2024).

128 UNHRC 'Report of the Working Group on the Universal Periodic Review – Namibia (29 June 2021) UN Doc A/HRC/48/4 para 138.92 'Increase its efforts to tackle stigmatisation of and discrimination against persons, especially women and girls infected with HIV/AIDS, by prioritising support and education' (South Africa); para 138.200 'Intensify its efforts to combat HIV/AIDS and prevent mother-to-child transmission' (Thailand); para 138.205 'Step up efforts to end stigmatisation and discrimination against women and children infected with HIV/AIDS (Kenya).

129 A Nazir, A Storey & J Yorke 'The Universal Periodic Review as utopia' in Etone and others (n 92) 35.

OHCHR, in order to truly influence member state recommendations stakeholders must engage in advocacy prior to the Working Group session'.[130] This approach may also benefit CSOs working on the issue of eradicating FGM in Somalia.

### *3.6.2 CSO and member state recommendations: Are they sufficiently formulated to aid implementation by Somalia?*

The low frequency of member states recommending on similar themes as CSOs could be explained, at least in part, by the formulation of CSO recommendations. A prominent criticism of the UPR mechanism is the broad nature of recommendations from member states.[131] The SMART approach is generally considered the most sensible – specific, measurable, achievable, realistic, timebound.[132] The reason for SMART recommendations is essentially to aid the state under review with implementation.[133] If CSO recommendations are to have value to member states when they are formulating their own recommendations, they must take the SMART approach in order to assist all key actors to support implementation domestically.

There are examples of recommendations within Somalia's UPRs that are well-designed and follow a SMART approach, and others that could be improved. For example, legislative reform was a common theme for both CSOs and member states across all three cycles. Such recommendations included '[a]mend the Penal Code

130 As above.

131 See Storey (n 3); A Nazir 'The Universal Periodic Review and the death penalty: A case study of Pakistan' (2020) 4 *RSIL Law Review* 126, 153; A Storey 'Challenges and opportunities for the UN Universal Periodic Review: A case study on capital punishment in the USA' (2021) 90 *UMKC Law Review* 148-149; E Hickey 'The UN's Universal Periodic Review: Is it adding value and improving the human rights situation on the ground?' (2013) 7 *International Constitutional Law Journal* 1; C de la Vega & TN Lewis 'Peer review in the mix: How the UPR transforms human rights discourse' in M Cherif Bassiouni & WA Schabas (eds) *New challenges for the UN human rights machinery: What future for the UN treaty body system and the Human Rights Council procedures?* (2011) 381; R Chauville 'The Universal Periodic Review's first cycle: Successes and failures' in H Charlesworth & E Larking (eds) *Human rights and Universal Periodic Review: Rituals and ritualism* (2015) 97; Centre for Economic and Social Rights 'The Universal Periodic Review: A skewed agenda? Trends analysis of the UPR's coverage of economic, social and cultural rights' (2016), www.cesr.org/sites/default/files/CESR_ScPo_UPR_FINAL.pdf (accessed 23 December 2024); S Shah & S Sivakumaran 'The use of international human rights law in the Universal Periodic Review' (2021) 21 *Human Rights Law Review* 264, 275; W Kälin 'Ritual and ritualism at the Universal Periodic Review: A preliminary appraisal' in H Charlesworth & E Larking (eds) *Human rights and Universal Periodic Review: Rituals and ritualism* (2015) 35-36.

132 UPR Info 'A guide for recommending states at the UPR' (2015), www.upr-info.org/sites/default/files/general-document/pdf/upr_info_guide_for_recommending_states_2015.pdf (accessed 23 December 2024).

133 A Storey & M Oleschuk 'Empowering civil society organisations at the UPR' (2024), https://bcuassets.blob.core.windows.net/docs/empowering-csos-at-the-upr-full-report-133680282970363754.pdf (accessed 23 December 2024).

to prohibit the practice of female genital mutilation' (Canada, cycle one)[134] and 'FGM law is to be drafted' (JS5, cycle two).[135] Canada's recommendation arguably is more persuasive, as it provides a specific action to take in terms of legislative reform, namely, amending Somalia's Penal Code to criminalise FGM, a much-needed action to begin the multi-faceted process of eradication. JS5's recommendation is too broad to be relied upon during the implementation phase, as it does not detail what the law should cover, or how it could be enacted in practice. MPV's cycle two recommendation perhaps was more persuasive, as it called on Somalia to '[a]mend the Penal Code with provisions to prohibit the harmful practice of FGM/C and ensure effective implementation, particularly in terms of prevention, awareness-raising, monitoring and sanctions'.[136] Although this is more specific in the type of legislative reform required, it could be strengthened by providing detail on *how* this could be achieved by the Somalian government.

Moreover, an issue with legislative reform, more generally, is that, as has been seen in other countries with a high prevalence of FGM, even when laws have been passed criminalising FGM, the practice has long continued.[137] A possible solution to this is recommending on implementation of such laws in practice, as was seen in cycle two by TDF, which noted that while legislation by itself will not lead to the eradication of FGM,[138]

> there is need to enforce implementation of laws, even those provided by the constitution of Somalia. Constitutional laws must not remain paper work, as the case is. They are drawn in order to be effective in protecting the inhabitants of Somalia, women and children inclusive. Gender discriminations for example are covered in the national constitution, and must be as well implemented.[139]

Yet, even this lacked specificity to encourage implementation. Such recommendations should also focus on *how* laws on FGM can be implemented in practice, giving practical suggestions and solutions to be tried and tested by the Somalian government.

Similarly, in cycle three, both CSOs and member states recommended on the theme 'eradicate FGM'. IADP proposed that Somalia should 'make more efforts to eliminate female genital

134 Report of the Working Group Cycle One (n 96) para 98.23.
135 JS7 (n 117) para 5.
136 JS7 (n 117) para 10.
137 See J Baumgardner 'A multi-level, integrated approach to ending female genital mutilation/cutting in Indonesia' (2015) 1 *Journal of Global Justice and Public Policy* 267.
138 JS7 (n 117) para 12.
139 JS7 (n 117) para13.

mutilation that is rampant in Somali society',[140] and Poland advised to '[e]radicate harmful practices such as female genital mutilation'.[141] However, FGM in Somalia is too complicated an issue to simply suggest that Somalia should 'eliminate' or 'eradicate' it. If member states are to use CSO recommendations as a template, as I argue they should, then CSO recommendations must be formulated in such a way that aids implementation on the ground. I have previously argued that, when making recommendations related to violence against women, member states should take an intersectional approach.[142] This would make clear to the government that women are not just one homogenous group, that they experience violence and discrimination differently dependent upon their differing characteristics. This also applies to FGM in Somalia. CSOs should use their vast knowledge on this issue to formulate SMART and intersectional recommendations for member states to use.[143]

Often, CSOs include very relevant and intersectional information in the text of the reports but do not provide SMART recommendations based on that information. For example, in cycle three, JS7 provided the following on FGM in Somalia:[144]

> [M]any young girls in Somalia are victims of female genital mutilation (FGM), which is a harmful traditional practice that causes serious harm, health implications and in certain cases even leads to the death of a child or complications during childbirth at a later age. The existing mechanisms and systems to protect children in Somalia are inadequate and do not meet the required international standards. This is most dire in remote rural areas, where there is a lack of health services to save lives. The government has promised during the past two UPR cycles to sustainably address these issues and provide services to the most vulnerable. Although some small progresses have been booked, there are still significant shortages of life saving systems and provisions for children in Somalia.

This provided vital information, particularly related to the intersectional experiences of women in rural areas and the needs of vulnerable women regarding FGM. However, JS7's recommendation suggested that Somalia should '[e]nact FGM law'.[145] JS7 could have used their in-depth knowledge of the issues to present intersectional

140 IADP (n 117) para 7.
141 Report of the Working Group Cycle Three (n 120) para 132.194.
142 Storey (n 3).
143 Yemo also found that an intersectional approach to stakeholder reports would be of benefit in her study on recommendations made to Sudan on women's rights generally. See R Yemo 'Intersectionality and the Universal Periodic Review: A case study of Sudan's women's rights recommendations' (2023) *Women's Studies International Forum* 98.
144 JS7 (n 117) para 4.
145 JS7 (n 117) para 5.

recommendations that Somalia should consider, accept and implement, with JS7 being able to keep track of implementation, assessing this in its submission to the next cycle.

Equally, CSOs should be tactical in how they approach the UPR. As noted above, joint submissions of stakeholder reports can be extremely beneficial. However, in collaborating on joint submissions, CSOs should not lose focus of key human rights themes. For instance, in cycle 3, JS7 was comprised of 126 CSOs, yet made just one recommendation on FGM, most likely because of word limit constraints. Perhaps, instead, JS7 could have co-ordinated multiple joint submissions between the 126 CSOs, ensuring that all key human rights issues were covered in detail. For example, one of these reports could have been solely focused on FGM, ensuring that this issue was covered more effectively, by making SMART and intersectional recommendations.

This is especially important because Somalia's government has to date been receptive to UPR recommendations related to FGM. For example, in cycle one, in accepting recommendations related to FGM, the government noted:[146]

> The harmful practice of FGM is very widespread in Somalia and almost all Somali women and girls are subjected to this damaging practice (see paragraphs 52-53, UPR National Report). Somalia will take all necessary measures including legal measures, educational awareness campaigns, and dialogue with traditional and religious leaders, women's groups and practitioners of FGM to eliminate the practice of FGM and other forms of violence against women. Somalia is committed to amend its penal code with provisions explicitly prohibiting the practice of FGM. Somalia seeks technical and financial assistance from fellow member States and calls upon the international community to share good practices in eradicating FMG that can be applied to Somalia.'

While this was a positive response, it is clear from the further two UPR cycles that little action has been taken by the government. One indicator as to why this is the case was shown in cycle two. In response to Uruguay's recommendation to '[m]ake all necessary efforts to pass legislation prohibiting female genital mutilation within the current year',[147] the Somalian government noted this, stating that '[c]onsidering the limited capacity of the government it will not be able to fulfil this recommendation in the current year'.[148] It accepted

146 The Republic of Somalia 'The consideration by the government of Somalia of the 155 Recommendations (Long Version) (21 September 2011) SPR/UNOG/000431/11.
147 Report of the Working Group Cycle Two (n 114) para 136.82.
148 UNHRC 'Report of the Working Group on the Universal Periodic Review Addendum: Somalia' (7 June 2016) UN Doc A/HRC/32/12/Add.1 5.

other recommendations asking for legislative reform, but they did not provide a timescale as Uruguay did, indicating that Somalia is open to the idea of prohibiting FGM but is reluctant or unable to take action imminently. CSOs should consider this, as well as Somalia's response in cycle one, which called upon the international community to provide 'technical and financial assistance' and 'to share good practices in eradicating FGM.' CSOs – and member states – should focus their submissions and, importantly, their recommendations on these points in order to genuinely support Somalia's attempt to eradicate FGM, considering what action could be taken to persuade Somalia to make immediate changes to law and practice regarding FGM. As the UPR is cyclical, it is vital that key actors are considering what has happened in previous cycles and shaping their engagement accordingly, as well as understanding the requirement for a multi-faceted approach to eradicating FGM.[149]

## 4 Conclusions and next steps

This is the second in a three-part series of articles assessing (i) the formulation of UPR recommendations;[150] (ii) the value of civil society UPR recommendations; and (iii) the implementation of UPR recommendations, through the lens of eliminating violence against women. The overarching aim of this three-part series of articles is to improve the implementation of UPR recommendations which, in turn, will advance the protection and promotion of human rights domestically, particularly for women and girls. This study has considered the value of CSO recommendations for member states regarding the eradication of FGM in Somalia. To date, opportunities have been missed for CSO recommendations to positively influence that of the member states.

In terms of lessons to be learned from the outcome of this study, there are three key points. First, CSOs should lead by example and provide SMART and intersectional recommendations within their stakeholder reports, making them more valuable to member states. There is a wealth of work suggesting the need for SMART recommendations and, if member states are to use CSO recommendations, CSOs using the SMART format will encourage states to follow the same structure. In readiness for Somalia's next UPR, CSOs should use their vast knowledge on the issue of FGM to not only provide this information in stakeholder submissions, but

149 See part 2.4 on 'Strategies for eradicating FGM'.
150 Storey (n 3).

also to provide SMART and intersectional recommendations on the issue.

Second, once CSOs have started to use SMART recommendations in their stakeholder submissions, they should then encourage member states to use these. One way to do this is by attending the UPR pre-sessions, hosted by UPR Info, and engaging in advocacy prior to the review, as demonstrated by the UPR Project at BCU's – and many other CSOs' – successes. For those CSOs that are unable to travel to Geneva, advocacy via email and online meetings is an alternative, along with considering partnering with other organisations who may be able to provide this support.[151]

Third, CSOs are encouraged to be tactical when submitting reports and joint submissions. The UN-mandated word limits on reports are very strict, so being strategic on how to make this work is vital. CSOs should not gloss over important human rights issues – it would be better to consider one theme in detail rather than ten points with minimal information and vague recommendations. As noted above, where there are a large number of CSOs providing one joint submission, it may be more prudent to split the CSOs into smaller groups, submitting a higher number of joint submissions that focus on different human rights issues in detail.

So far, this series of articles has provided multiple suggestions for member states to improve their recommendations, and the value of CSO recommendations in terms of violence against women and girls. The next article will now focus on the final stage of the UPR process, where those recommendations should be implemented in practice to better protect and promote human rights, by assessing implementation of UPR recommendations on FGM.

151 Eg, the BCU Centre for Human Rights provided support during Sudan's cycle two pre-session, after some Sudanese CSOs were prevented from leaving the country to attend the pre-session in Geneva; see the UPR Project at BCU 'Sudan' Centre for Human Rights, www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-sudan (accessed 23 December 2024); Storey & Oleschuk (n 133).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: LA Greeff 'The non-ratification of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: South Africa and Australia in perspective' (2025) 25 *African Human Rights Law Journal* 332-357
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a13

# The non-ratification of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: South Africa and Australia in perspective

*Laetitia-Ann Greeff**
Research Associate, Faculty of Law, Nelson Mandela University, Gqeberha, South Africa
https://orcid.org/0000-0003-1669-7538

**Summary:** *The year 2024 marked the tenth anniversary of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC or Optional Protocol). Initially, the Convention on the Rights of the Child did not have an individual communications procedure that allowed children, groups of children or their representatives to submit communications to the Committee on the Rights of the Child for alleged rights violations. It took more than two decades for the United Nations General Assembly to adopt a communications procedure for CRC. Despite incorporating CRC into a very progressive Bill of Rights and having a very good relationship with human rights law, neither South Africa nor Australia has ratified the Optional Protocol. South Africa is of the view that its domestic legal framework is more than adequate to deal with children's rights violations and that, therefore, it does not need to ratify the Optional Protocol. Australia, on the other hand, has a strained relationship with international law and has been slow to incorporate the*

* BProc LLB (Pretoria) GradDip Legal Practice (College of Law, Australia) LLM (New England, Australia) LLD (South Africa); laetitia-ann.greeff@mandela.ac.za

*provisions of CRC into domestic legislation. It is also disinclined to accept and implement the views of international treaty bodies. Despite these challenges, both jurisdictions ought to consider ratifying the Optional Protocol to increase its reach and impact. The CRC Committee dedicated the forthcoming General Comment 27 to the right of access to justice and effective remedies. Therefore, accession to OPIC is crucial for South Africa and Australia and would put these jurisdictions in lockstep with the CRC Committee concerning access to justice for children.*

**Key words:** *access to justice; children's rights; communications procedure; CRC; international law; OPIC*

## 1 Introduction

The year 2024 marked the tenth anniversary of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC or Optional Protocol).[1] Initially, the United Nations (UN) Convention on the Rights of the Child (CRC)[2] did not have an individual communications procedure that allowed children, groups of children or their representatives to submit communications to the Committee on the Rights of the Child (CRC Committee) for alleged rights violations. The CRC Committee is the body responsible for monitoring the implementation of CRC and Optional Protocols by state parties and making determinations on individual communications submitted to it for alleged children's rights violations. Although the inclusion of a communications procedure was considered during the drafting of CRC, the idea did not receive sufficient support from international stakeholders.[3] The drafting process took ten years and involved many compromises over various articles, so much so that when it came to including a communications procedure, the international community indicated that it was just not ready to do so at that time.[4] One of the sticking points was the inclusion of

1 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) adopted by General Assembly Resolution A/RES/66/138 on 19 December 2011 and entered into force on 14 April 2014.

2 Convention on the Rights of the Child (CRC) adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990. Notably, Australia was one of the first countries to ratify the Convention on 17 December 1990, and South Africa followed suit on 16 June 1995.

3 Y Lee 'Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol' (2010) 18 *International Journal of Children's Rights* 568.

4 As above.

economic, social and cultural rights, which were considered non-justiciable, in CRC.[5]

Despite not having a communications procedure, children's rights were further strengthened when the UN General Assembly (UNGA) adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) and the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (OPAC).[6] For the next two decades, CRC operated without a communications procedure. Eventually, the UNGA adopted the Third Optional Protocol on the Rights of the Child on a Communications Procedure in 2011, which came into force in 2014. This Optional Protocol finally brought CRC in line with all the other human rights instruments since it was the last human rights treaty to adopt a communications procedure.[7] Ironically, even though CRC is the most ratified international treaty with 196 states party to it, it is disappointing to note that, in comparison, just over 50 states have thus far ratified OPIC, while a little more than 50 states are signatories. Approximately 130 states have taken no action.[8] South Africa and Australia fall into the last category.

This article is a doctrinal study that gives an overview of the procedural aspects of OPIC and discusses the reasons for Australia's and South Africa's reluctance to ratify the Optional Protocol. This contribution starts in part 2 by giving a short overview of the creation of the Optional Protocol and a brief discussion relating to the theoretical aspects of access to justice for children. Furthermore, this part proceeds to list the fundamental rights that underscore the Optional Protocol as set out in the Preamble. It continues by giving an overview of the procedural aspects of the complaints mechanism. Although this part of the article is primarily descriptive, it is essential for readers unfamiliar with the Optional Protocol's structures and procedures.

5 G de Beco 'The Optional Protocol to the Convention on the Rights of the Child on a communications procedure: Good news?' (2013) 13 *Human Rights Law Review* 368; Lee (n 3) 569; S Pinheiro 'Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child' 10 December 2009 UN Doc A/HRC/WG.7/1/CRP.4 2. Interestingly, the drafters of the African Charter on the Rights and Welfare of the Child had no such reservations and included a built-in communications procedure in art 44.

6 Adopted by the General Assembly Resolution A/RES/54/263 in May 2000 and entered into force on 12 February 2002 (OPAC) and 18 January 2002 (OPSC).

7 RC Akhtar & C Nyamutata *International child law* (2020) 111.

8 https://treaties.un.org/Pages/ (accessed 27 September 2024).

In part 3 the article discusses children's access to justice in South Africa, the impressive body of children's rights jurisprudence accumulated since 1994 and South Africa's engagement with international law. This part interrogates why South Africa is reluctant to ratify the Optional Protocol. It is then argued that as a human rights leader on the African continent, it is appropriate for South Africa to ratify OPIC as the accession to the Optional Protocol strengthens the right to access to justice and effective remedies. In part 4 the article examines Australia's strained relationship with international law and treaty bodies and the slow rate of incorporation of CRC into domestic legislation. Additionally, this article interrogates the influence that the respective systems of government, constitutional and parliamentary supremacy, have on South Africa and Australia's decisions not to accede to the Optional Protocol. Moreover, this contribution examines some domestic challenges the Australian government faces and argues that these challenges impede Australia's accession to OPIC. Finally, in part 5 the article concludes that South Africa and Australia should accede to OPIC because having access to justice at the domestic and international levels is in the best interests of all children and, as Liefaard points out, it is their right.[9]

## 2 Communications procedure

Individual communications contribute to raising awareness of human rights breaches at the national and international levels. They have the advantage of highlighting issues of civil society campaigns and shining a spotlight on human rights violations that would otherwise go unnoticed and unreported. The UN High Commissioner for Human Rights defined 'access to justice' as 'the ability to obtain a just and timely remedy for rights violations as set out in national and international norms and standards, including the Convention on the Rights of the Child'.[10] Access to justice has a vital role in holding duty bearers to account for upholding their obligations to children, challenging discrimination, and providing the necessary remedies. The UN set out 17 Sustainable Development Goals (SDGs) for 2030 in its Agenda for Sustainable Development. Target 16.3 aims to promote the rule of law on the domestic and international levels and ensure equal access to justice for all.[11] Access to justice is transitioning from a legal concept to a recognised children's right, so much so that the CRC Committee dedicated its 27th General Comment to children's

9 T Liefaard 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 198.
10 https://www.ohchr.org/sites/Session25/ (accessed 29 September 2024).
11 https://sdgs.un.org/goals/goal16 (accessed 29 September 2024).

rights to access to justice and effective remedies.[12] Nevertheless, CRC does not explicitly mention the child's right to an effective remedy.[13] However, the CRC Committee has implied such a right in General Comment 5, stating that '[f]or rights to have meaning, effective remedies must be available'.[14] The CRC Committee realised that the '[l]ack of effective mechanisms at the national, regional and international level that enable children and their representatives to challenge violations and seek remedies weaken the enforcement of all the provisions of the CRC'.[15] Consequently, the UNGA adopted the Optional Protocol in 2011, which came into force in 2014. OPIC aims to encourage state parties to make the legal process more accessible to children at the domestic level.[16] The Optional Protocol, therefore, is a valuable mechanism to provide children with access to justice at the international level but also to promote the development of access to justice at the domestic level.

The Preamble to the Optional Protocol highlights that OPIC is based on certain fundamental children's rights principles that form the foundation of children's rights in international human rights law. These principles include universality, indivisibility, interdependence and interrelatedness of all human rights and freedoms; the status of a child as a rights holder, as a human being with dignity and with evolving capacities; the special and dependent status of children and their right to pursue remedies when there has been a breach of their rights; the principle of the best interests of the child should be a primary consideration in pursuing remedies for rights breaches; and that such remedies should reflect the need for child-sensitive procedures.[17]

Initial discussions of the Open-Ended Working Group, which was established by the Human Rights Council in June 2009 for the purposes of formulating an Optional Protocol for CRC, were about the outcomes a communications mechanism might create. The view was that a communications procedure 'may generate soft and persuasive legal influence' and 'could assist in better definition of children's rights and affect regional and national courts and tribunals in their interpretations in particular cases'.[18] However, at that time,

12 Draft General Comment 27 on children's rights to access to justice and effective remedies | OHCHR (accessed 29 September 2024).
13 Liefaard (n 9) 199; M Langford & S Clark 'The new kid on the block' (2010) 28 *Nordic Journal of Human Rights* 379.
14 CRC Committee General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 & 44 para 6) para 24.
15 Lee (n 3) 568.
16 Preamble OPIC (n 1).
17 As above.
18 Langford & Clark (n 13) 390.

Langford and Clark cautioned about having 'excessive expectations' and noted that the non-binding orders of a future optional protocol would only have a 'modest impact in practice'.[19] A concern was whether quasi-judicial orders could have measurable outcomes.[20] Of course, as these scholars pointed out, the answer is that they can, as can be seen in the case of Australia, where they lost a case in the Human Rights Committee (UNHR Committee), which led to a systemic change in human rights legislation for minorities in that jurisdiction.[21] As we now know, the eventual Optional Protocol established a quasi-judicial mechanism that allows children, groups of children or their representatives to bring a communication or complaint directly to the CRC Committee. Liefaard explains the quasi-judicial function as follows:[22]

> It should be noted that the case law or jurisprudence of the CRC Committee is, as such, not legally binding – its views serve as recommendations to state parties. As a UN treaty body under the CRC, the CRC Committee is not a judicial authority but, like the Human Rights Committee (HRC), its views 'are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions'.

While it is true that some states might not implement the views of the CRC Committee, even though the CRC Committee does undertake follow-up procedures, there are no significant sanctions against states that choose to ignore the CRC Committee's recommendations. Yet, Skelton, the former Chairperson of the CRC Committee, notes that up to 1 February 2024, 238 cases had been registered, decisions had been made in 137 cases and rights violations found in 45 of those.[23] The fact that the views of the CRC Committee are non-binding does not seem to have a negative impact on its workload. It is, therefore, encouraging to see that the Optional Protocol is being used for precisely the reason it was intended for. Specifically, the aim of OPIC is three-fold: (a) to protect the full range of children's rights under CRC; (b) to ensure that children have access to justice and effective remedies available to redress rights violations; and (c) to strengthen the effective implementation of CRC and the accountability of state parties.

---

19 As above.
20 As above.
21 See the discussion below on *Toonen v Australia* Communication 488/1992, UNHR Committee (31 March 1994), UN Doc CCPR/C/50/D/488/1992 (1992).
22 T Liefaard 'Children's rights remedies under international human rights law: How to secure children's rights compliant outcomes in access to justice?' (2023) 56 *De Jure Law Journal* fn 4.
23 A Skelton 'Children's rights to access to justice and remedy: Recent developments' (2024) 24 *Youth Justice* 4, https://doi.org/10.1177/14732254241238515 (accessed 29 September 2024).

The following is a general discussion of the outline of the framework of the Optional Protocol. The Optional Protocol consists of four parts and 24 articles: Part I (articles 1-4) contains the general provisions. Article 2 affirms that the CRC Committee, in fulfilling its functions under the Optional Protocol, shall be guided by the principle of the best interests of the child. The CRC Committee must also have regard to the rights and views of the child and give them due weight in accordance with the age and maturity of the child. Part II (articles 5-12) includes the communications procedure; part III (articles 13 and 14) contains the inquiry procedure; and part IV (articles 15-24) consists of the final provisions.

OPIC contains three complaint procedures: article 5 – individual communications; article 12 – inter-state communication; and article 13 – the inquiry procedure.[24]

Part II of OPIC comprises the communications procedure, which is included in articles 5-12. The CRC Committee derives its authority to consider communications from the Optional Protocol rather than from CRC.[25] Complaints may be made by or on behalf of an individual or a group of individuals within the jurisdiction of the state party that has ratified OPIC. Furthermore, the rights violation must have breached any of the rights set out in CRC or any of the first two Optional Protocols, OPSC or OPAC.[26]

In 2013, and subsequent to the provisions found in article 3, the CRC Committee adopted the Rules of Procedure under the Optional Protocols to the Convention on the Rights of the Child on a communications procedure (RoP),[27] which were later updated with amendments and inclusions. In 2015 the CRC Committee adopted working methods to deal with individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (working methods) based on the OPIC RoP, which were updated in 2017 and again in 2021.[28] In addition, under Rule 6(1) of the RoP, the CRC Committee has the

24 Akhtar & Nyamutata (n 7) 112.
25 Art 1 OPIC (n 1).
26 Art 5(1) OPIC (n 1).
27 Rules of Procedure (RoP) under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee at its 62nd session (14 January-1 February 2013) CRC/C/62/3. The present document (containing amendments and additions) was adopted by the CRC Committee at its 88th session (6-24 September 2021) CRC/C/158 4 November 2021.
28 Working methods to deal with individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee on 2 October 2015 and revised on 2 June 2017 and 4 June 2021.

authority to establish a working group(s) and designate rapporteur(s) to assist the CRC Committee with making recommendations and processing complaints. The working group comprises nine members, with four or five rotating biannually.[29] The Chairperson, elected by the working group members every two years, appoints one member of the working group per case as rapporteur. The Chairperson coordinates working group meetings and represents the working group at OPIC activities.[30] The Petitions Unit/Secretariat acts in a record-keeping capacity for reference and consultation by the CRC Committee. The Petitions Unit/Secretariat receives all communications submitted by an individual or individuals to the CRC Committee under OPIC. All communications received under the Optional Protocol submitted by children are forwarded without delay to the CRC Committee's Working Group on Communications, including those that are *prima facie* inadmissible.[31] The rapporteur examines all correspondence received by the CRC Committee and makes recommendations. Thereafter, drafts on admissibility and merits approved by the rapporteur are sent to the Working Group for information and comments.[32] Once the comments are received, the rapporteur prepares a consolidated draft decision on the admissibility and merits and forwards it to the Working Group.[33]

Where a complaint is made to the CRC Committee on behalf of an individual or group of individuals, this should be with the consent of the individual or group unless the author of the complaint can justify the absence of consent.[34] After the Petitions Unit receives a communication from a child or children, it will be forwarded to the working group for consideration, including those that seem to be *prima facie* inadmissible.[35] However, when the Petitions Unit receives communications from adults, including those who act as representatives of children, the communications will be screened for admissibility. Those that are found to be *prima facie* inadmissible are rejected.[36] However, Rule 20(4) of the RoP confuses the issue somewhat in that it states that when the CRC Committee receives a communication on behalf of a child or group of children without evidence of the necessary consent, and *after* considering the particular circumstances and information of the case, the CRC

29 Working methods (n 28) B.4-5.
30 Working methods (n 28) B.6.
31 Working methods (n 28) D.10.
32 J Doek 'Individual communications submitted under the Optional Protocol to the CRC on a communications procedure and admissibility' (April 2024) 51, https://hdl.handle.net/1887/4034998 (accessed 22 March 2025).
33 As above.
34 Art 5(2) OPIC (n 1).
35 Working methods (n 28) D.10.
36 Working methods (n 28) E.14.

Committee may then decide that it is not in the best interests of the child or children to examine the communication. It is argued that the rule 'suggests the Committee may choose to review a communication lacking consent if it is deemed in the best interests of the child'.[37] This rule contradicts the explicit nature of the words in article 5(2) of OPIC, which clearly states that when a communication is submitted on behalf of a child or group of children, it shall be with their consent unless the author can justify the absence of consent. Therefore, if the communication is *prima facie* inadmissible, it ought to be rejected without considering the particular circumstances of the case and whether it is in the best interests of the child to examine the communication.[38] For now, the CRC Committee will examine all communications submitted on behalf of an individual or group of individuals without consent unless it is not in the best interests of the child or children to do so.[39] However, if the CRC Committee decides not to examine a communication, it is argued that in those circumstances, it needs to explain the nature of its decision and under what interpretation of the best interests of the child principle such a decision is made.[40]

In 2019 the CRC Committee adopted Guidelines for Interim Measures under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Guidelines).[41] These Guidelines help to facilitate and implement the necessary interim measures under article 6(1) of OPIC, which states that at any time during the process, but before a determination on the merits of a communication, the CRC Committee has the discretion to request that the state party take the necessary interim measures to prevent irreparable damage to the victim or victims of the alleged rights violation.[42] However, this discretion should not be seen as a determination on either the admissibility or merits of the complaint.[43] According to the Guidelines, 'interim measures have a dual nature, precautionary and protective'.[44] The protective nature aims 'to avoid

37 Doek (n 32) 12.
38 As above.
39 As above. See, eg, *JSHR and LHL and AHL v Spain* Communication 13/2017, CRC Committee (15 May 2019), UN Doc CRC/C/84/D/13/2017 (2016); *YF and FF and EF v Panama* Communication 48/2018, CRC Committee (3 February 2020), UN Doc CRC/C/83/D/48/2018 (2018); *LH & Others v France* Communication 79/2019, CRC Committee (30 September 2020), UN Doc CRC/C/85/D/79/2019 (2019); and *AF v France* Communication 109/2019, CRC Committee (30 September 2020), UN Doc CRC/C/86/D/109/2019 (2019).
40 Doek (n 32) 12.
41 Guidelines for interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee at its 80th session (14 January-1 February 2019).
42 Art 6(1) OPIC (n 1); Rule 7(1) RoP (n 27); Guidelines (n 41) (1).
43 Art 6(2) OPIC (n 1); Rule 7(3) RoP (n 27); Guidelines (n 41) (6).
44 Guidelines (n 41) (2).

irreparable harm and preserve the exercise of human rights', while the precautionary nature aims at 'preserving a legal situation under consideration' by the CRC Committee.[45]

When the working group decides to declare a communication admissible, the decision must be unanimous.[46] Article 7 sets out the circumstances in which the working group may consider a communication to be inadmissible and, therefore, will not be considered by the CRC Committee.[47] The decision to declare a communication inadmissible must also be unanimous.[48] A communication to the CRC Committee must be in writing by an identified individual rather than a state. The RoP provide for an exception to this requirement where the non-written materials are supplementary to the written submissions.[49] The Petitions Unit can reject cases for inadmissibility at the pre-registration stage, and cases that are, however, potentially registrable are then forwarded to the working group for a decision on registration.[50]

Where the communication is an abuse of the right of submission or is incompatible with the provisions set out in CRC or Optional Protocols, such as an unreasonable delay in submitting the communication, it will be inadmissible.[51] Matters that have already been examined by the CRC Committee or are currently being considered by the CRC Committee or another forum are also inadmissible.[52] Crucially, authors must have exhausted all domestic remedies before submitting a communication to the CRC Committee.[53] The current OPIC case law suggests that the CRC Committee is unwilling to admit communications where domestic remedies have not been exhausted.[54] State parties are encouraged to develop domestic mechanisms to enable just and equitable access

45 As above.
46 Working methods (n 28) H.22.
47 Working methods (n 28) H.23; See, also, J Doek 'Communications with the Committee on the Rights of the Child under the Optional Protocol to the CRC on a Communications Procedure and Admissibility – Report on the Decisions of the Committee on Admissibility: Summary and Comments' 22 October 2020, https://www.childrensrightsobservatory.org/images/papers/Jaap-Doek-Report-on-Admissibility-under-CRC-OP3-2020.pdf (accessed 3 October 2024).
48 Working methods (n 28) H.23.
49 Rule 16(3)(d) RoP (n 27).
50 Doek (n 32) 51.
51 Art 7(c) OPIC and Rule 16(3)(e) RoP.
52 Art 7(d) OPIC and Rule 16(3)(f) RoP.
53 Art 7(e) OPIC and Rule 16(3)(g) RoP.
54 See, eg, T Bulto 'Exception as norm: The local remedies rule in the context of socio-economic rights in the African human rights system' (2012) 16 *International Journal of Human Rights* 561 for a comprehensive discussion on the reasons why international treaty bodies require that local remedies be exhausted before a communication would be considered admissible.

to justice and timely remedies.[55] Liefaard points out that the CRC Committee's views show that it has taken a cautious approach to assessing the admissibility of communications under the criteria set out in article 7(e).[56] This requirement, which is also found in other communications mechanisms, such as the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), 'supports the sovereignty of states and particularly their ability to resolve matters at a domestic level before international redress is available'.[57] The reason for this requirement is found in the OPIC Preamble, which requires state parties 'to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level'.[58] However, where there are no domestic remedies available, the communication will not fail the admissibility test in article 7(e), as was the case for many children of foreign fighters stranded in Syria.[59] The exception to this rule is where the domestic remedies are unduly prolonged or are unlikely to bring effective relief.[60] Where the communication is manifestly ill-founded or not sufficiently substantiated, and the violation of the right occurred before the date of entry into force of the Optional Protocol, unless the violation continues after that date, the communication will be inadmissible.[61] Finally, a communication would be inadmissible if submitted more than one year after the author has exhausted all domestic remedies unless the author can prove that it was impossible to submit the communication within the stipulated time limit.[62]

The CRC Committee will inform the state party when it receives a communication under OPIC as soon as possible and confidentially unless the communication is deemed inadmissible.[63] On receipt of this information, the state party shall provide the CRC Committee with written explanations clarifying the matter and the remedy, if any, that it may have provided to the author. Such explanations shall be provided as soon as possible and within six months.[64] To

55 Preamble OPIC (n 1).
56 Liefaard (n 22) 487.
57 B Swannie 'Individual communications: Can they provide effective redress for human rights violations?' (2023) 48 *Alternative Law Journal* 260.
58 Liefaard (n 22) 487.
59 *LH & Others v France* (n 39) and *AF v France* (n 39); *FB & Others v France* Communication 77/2019, CRC Committee 8 February 2022, UN Doc CRC/C/89/D/77/2019 (2019).
60 Doek (n 47) 12; Doek (n 32) 32.
61 Arts 7(f)-(g); Doek (n 47) 14.
62 Art 7(h) OPIC (n 1).
63 Art 8(1) OPIC (n 1).
64 Art 8(2) OPIC (n 1).

facilitate a friendly settlement, the CRC Committee will make available appropriate office space where the parties can meet based on respect for the obligations under CRC and/or OPIC.[65] Once a settlement is reached, the matter under consideration in response to a communication with the CRC Committee is closed.[66]

The CRC Committee shall consider communications under OPIC as swiftly as possible, based on all the documentation submitted, provided that these documents have been forwarded to all parties concerned.[67] Meetings will be closed, and where the CRC Committee has requested interim measures, it will expedite its considerations.[68] When examining alleged economic, social and cultural rights, the CRC Committee shall consider the reasonableness of any steps taken by the state party, bearing in mind a possible range of policy measures for implementing these rights.[69] The CRC Committee shall deliver its views and recommendations, if any, without delay to the parties concerned.[70]

Article 11 contains the follow-up procedure, which 'provides a mechanism to track the effectiveness of OPIC'. The follow-up progress report used agreed assessment criteria: 'compliance', 'partial compliance', 'non-compliance' and 'no reply'.[71] Article 12 contains provisions relating to communications between state parties. Part III consists of the inquiry procedure, which includes articles 13 and 14. Article 13 includes the inquiry procedure on grave and systematic violations of state parties under CRC and the two other Optional Protocols on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict. Article 14 contains the follow-up to the inquiry procedure. Finally, part IV contains the final provisions, which are found in articles 15 to 24.

65 Art 9(1) OPIC (n 1).
66 Art 9(2) OPIC (n 1).
67 Art 10(1) OPIC (n 1).
68 Arts 10(2)-(3) OPIC (n 1).
69 Art 10(4) OPIC (n 1).
70 Art 10(5) OPIC (n 1).
71 Akhtar & Nyamutata (n 7) 116.

# 3 Argument for accepting OPIC by South Africa

## 3.1 Access to justice in South Africa

South Africa is a constitutional democracy. The South African Constitution[72] comprises civil, political, social and economic rights and enshrines one of the world's most progressive bills of rights. Furthermore, Skelton asserts that international scholars have proclaimed the Bill of Rights as an exemplary constitution for protecting and furthering children's rights.[73] Section 28 contains a robust children's rights clause modelled on the provisions of CRC, and its influence is evident throughout the clause.[74] Legal scholars have even posited that since South Africa ratified CRC and incorporated it into domestic law, it has moved from a dualist to a monist state as far as children's rights are concerned.[75]

However, South Africa has not always had such an impressive legal framework concerning children's rights. After the first democratic elections in 1994, the focus shifted from an oppressive regime to a jurisdiction with a child rights-focused legal framework and progressive system of government. South Africa set out on a legislative and policy path that established a formidable children's rights foundation and produced a plethora of litigation and law reform over the next three decades.[76] This epochal shift is not surprising given the abject poverty and deplorable conditions present then and still now in many areas of the country. The need to lift the most vulnerable from poverty and despair could no longer be ignored. It is a credit to the judiciary at that time that children's rights were given due regard in the Constitutional Court.[77]

The robust jurisprudence encapsulating children's rights is due to the work done by children's rights organisations such as the Centre for Child Law at the University of Pretoria, for example. Strategic

72 The Constitution of the Republic of South Africa, 1996.
73 A Skelton 'South Africa' in T Liefaard & JE Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 14.
74 As above.
75 J Sloth-Nielsen & H Kruuse 'A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012' (2013) 21 *International Journal of Children's Rights* 671.
76 J Sloth-Nielsen 'Children's rights jurisprudence in South Africa – A 20 year retrospective' (2019) 52 *De Jure* 501.
77 See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), where the Court discussed the child's right to be heard, and *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC), where the Court addressed the paramount importance of the child's best interests.

litigation forms a significant part of the jurisprudence in children's rights matters, primarily as a result of the impact these organisations have in the protection of children's rights under CRC.[78] Moreover, to ensure that the provisions in the Bill of Rights in chapter 2 of the Constitution[79] are legally applied and enforced throughout its nine provinces, South Africa has a dedicated Constitutional Court, further cementing its status as a pioneer, both on the African continent and throughout the world, in the promotion of human rights, in general, and children's rights, in particular.[80] To illustrate, Skelton[81] and Sloth-Nielsen and others[82] have written extensively on the ever-expanding case law on children's rights in South Africa. The underscoring principle here is the child's right to access to justice and effective remedies. To this end, the South African Constitution[83] in section 28(1)(h) provides that every child has the right to legal representation at the state's expense. Moreover, section 34 states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. These sections, therefore, underscore the child's right to access justice and effective remedies at the domestic level but, however, should not be seen as a justification not to ratify OPIC.

Indeed, even if the South African government sees little added value in ratifying OPIC because of adequate domestic remedies, Viljoen and Orago argued that acceding to OP-ICESCR will 're-affirm South Africa's commitment to a continued constructive engagement with treaty monitoring bodies at the regional and international level'.[84] The same argument can be made for ratifying the Optional Protocol, which should not be seen as an unnecessary formality by the South African government. Even if children in South Africa already have a well-developed legal framework to deal with rights violations, accession to OPIC should be considered a meaningful gesture to show leadership on the African continent to increase the

78 Skelton (n 73) 17-28; See Sloth-Nielsen (n 76) for a comprehensive overview of children's rights jurisprudence up to 2019.
79 The Constitution of the Republic of South Africa, 1996.
80 Secs 166(a) and 167 of the Constitution of the Republic of South Africa, 1996.
81 Skelton (n 73) 13.
82 Sloth-Nielsen (n 76) 501; Sloth-Nielsen & Kruuse (n 75) 671; J Sloth-Nielsen & BD Mezmur '2+2=5? – Exploring the domestication of the CRC in South African jurisprudence (2002-2006)' (2008) 16 *International Journal of Children's Rights* 1; J Sloth Nielsen 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137.
83 The Constitution of the Republic of South Africa, 1996.
84 F Viljoen & N Orago 'An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2586.

impact and reach of the Optional Protocol to jurisdictions that may lack the sophistication of the South African legal framework, but where access to justice and effective remedies at the domestic level are not sufficient to address rights violations; where children need the help of the international treaty body and look to leaders such as South Africa to provide that assurance that OPIC can fill the gap where their domestic legal avenues are inadequate. South Africa's accession to the Optional Protocol will go a long way towards enhancing children's rights in South Africa and on the African continent by contributing to the development of jurisprudence on the implementation of the Convention.[85] The more states that ratify OPIC, the more robust the jurisprudence becomes and that, ultimately, benefits children in the long run.

### 3.2 South Africa's engagement with international law

It is argued that South Africa desires to maintain good standing among the international community, which has sometimes motivated the state to comply with its obligations under the UN human rights treaties.[86] To this end, South Africa has a good relationship with the international human rights structures and has played an active role in human rights institutions.[87] Furthermore, South Africa is regarded as a leader in international children's rights. Specifically, in addition to CRC, it also ratified the African Charter on the Rights and Welfare of the Child (African Children's Charter) on 7 January 2000.[88] Moreover, South Africa arguably has the world's most progressive Bill of Rights enshrined in chapter 2 of the Constitution.[89] Furthermore, section 28 contains provisions for protecting the rights of the child, similar to those found in CRC. Insofar as the implementation of CRC is concerned, it has even been argued that South Africa, for all intents and purposes, is a monist state since several provisions of CRC have been incorporated into domestic legislation.[90] As a direct result of this legal framework, children in South Africa have enjoyed greater access to and successes in the courts over the last three decades.[91] However,

85 De Beco (n 5) 369.
86 F Adegalu & T Mitchell 'The impact of the United Nations human rights treaties on the domestic level in South Africa' in C Heyns, F Viljoen & R Murray (eds) *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (2024) 1144.
87 Adegalu & Mitchell (n 86) 1079.
88 African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity on 11 July 1990 and entered into force on 29 November 1990.
89 The Constitution of the Republic of South Africa, 1996.
90 Sloth-Nielsen & Kruuse (n 75) 671.
91 The Constitutional Court has handed down decisions pertaining to the rights of the child in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SA 1 (CC) about corporal punishment in the home; in *Du*

South Africa has come in for some scrutiny by international treaty bodies, with the CRC Committee, in its Concluding Observations on its second periodic review of South Africa, recommending that South Africa ratify the Optional Protocol in order to further strengthen the fulfilment of children's rights.[92] This recommendation was reiterated in the CRC Committee's Concluding Observations to the combined third to sixth periodic reports on South Africa in March 2024.[93] In addition to the recommendation by the CRC Committee, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) noted with concern the non-ratification of the Optional Protocol, to which the South African delegation responded in defiant language that South Africa does not need to ratify OPIC since it already has an adequate domestic legal framework to deal with children's rights violations.[94]

However, the success of the South African legal system in addressing children's rights violations may be the reason why the South African government and potential child claimants see little added value in having a complaints procedure. This may be the reason why communications procedures are underutilised in other international instruments to which South Africa is a party.[95] This could indicate that the government does not recognise the views of treaty bodies as they are not legally binding and will not implement them.[96] South Africa also questions the legitimacy of the complaints mechanism in international law.[97] There is a belief that treaty bodies lack the necessary competence to understand South African society and its culture. Furthermore, the Constitutional Court

---

*Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC) about adoption by same-sex couples; in *AD v DW (Centre for Child Law as amicus curiae, Department for Social Development as intervening party)* 2008 (3) SA 183 (CC) about adoption by foreign couples; in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 480 (CC) about inheritance under customary law; in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) about the right to access antiretroviral medicines; and *Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)* 2011 (8) BCLR 761 (CC) about the right to a basic education, to name but a few.

92 Concluding Observations on the second periodic review of South Africa, CRC Committee 27 October 2016 UN Doc CRC/C/ZAF/CO/2 (2016) para 75.

93 Concluding Observations on the combined third to sixth periodic review of South Africa, CRC Committee 11 March 2024 UN Doc CRC/C/ZAF/CO/3-6 (2024) para 48.

94 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) Report of the 32nd session 12-20 November 2018 21-22.

95 Adegalu & Mitchell (n 86) 1095.

96 See, eg, *McCallum v South Africa* Communication 1818/2008, UNHR Committee 25 October 2010, UN Doc CCPR/C/100/D/1818/2008 (2008), in which the South African government took no steps to implement the views of the UNHR Committee.

97 Adegalu & Mitchell (n 86) 1095.

(as well as other South African courts) is viewed as the best forum for addressing human rights violations and providing effective and just remedies.[98] To illustrate, one has only to look at the accessibility of the courts to child litigants and their representatives and the various children's rights organisations willing to institute legal proceedings for perceived children's rights violations, such as the Centre for Child Law and Section 27. Furthermore, the binding nature of judicial orders gives children immediate relief, which is crucial for children whose sense of time is quite different to that of adults and for which there is no guarantee of relief under the Optional Protocol. Therefore, it is hardly surprising that some child litigants might choose domestic avenues over OPIC. This paradox suggests that South Africa has become a victim of its own success with regard to remedies available to children at the international level. However, the government's attitude is troubling and seems to disregard the impact that OPIC has on strengthening South Africa's relationship with international treaty bodies in the promotion of human rights at the domestic level and on the African continent. Acceding to OPIC cannot be seen as a binary: It is not a case of whether one chooses to proceed in the Constitutional Court *or* make submissions under OPIC. The rules of admissibility prevent this kind of reasoning.[99]

In their article, where they advocate accession to OP-ICESCR, Viljoen and Orago make a convincing argument, which is worth repeating here. References to CRC, the CRC Committee, OPIC and children's rights have been added so that it is relevant to this article. They submit:[100]

> Accession to the Optional Protocol is likely to enhance the overall understanding of [children's rights] among South Africans, as the Optional Protocol obliges states to widely distribute and disseminate the [CRC] and the Optional Protocol itself, as well as the views and recommendations emanating from the [CRC Committee] under its individual communications procedure.[101] Widespread knowledge of the [CRC], [OPIC] and other materials emanating from the [CRC Committee] at the national level would enhance domestic advocacy for the improved realisation of [children's rights] by individuals, groups as well as civil society organisations, with the effect that the national dialogue would be more inclusive and comprehensive. It would also improve the national civic monitoring and evaluation of the government's legislative, policy and programmatic framework for the realisation of [children's rights] using international standards, with the result that the government's accountability for the domestic

98 Adegalu & Mitchell (n 86) fn 80.
99 See the discussion in part 2 of this article.
100 Viljoen & Orago (n 84) 2857 (footnote omitted for the last sentence).
101 Art 17 OPIC (n 1).

> implementation of [children's rights] in South Africa would be enhanced.

South Africa's incorporation of international law into domestic legislation over the last three decades, specifically as it relates to CRC, forms an impressive legal standard against which to assess the challenges faced by Australia and its engagement with international law. The sheer volume of case law in which the courts have decided children's rights matters has put South Africa at the forefront of children's rights litigation.[102] Against this backdrop, the question remains as to why, given the enthusiastic engagement with international law, South Africa is so reluctant to ratify OPIC. It is argued here that non-accession of the Optional Protocol is not in children's best interests. The potential positive impact internationally of accession to the Optional Protocol cannot be overstated. At the domestic level, OPIC is meant to enhance and supplement the legal remedies.[103] It will not only lift the credibility of both jurisdictions but also set a good example for those jurisdictions that look up to South Africa (such as those on the African continent) and Australia (such as those in the Pacific region) by showing a willingness to engage with international human rights bodies.

## 4 Argument for accepting OPIC by Australia

### 4.1 Human rights in Australia

Australia stands in stark contrast to the South African approach to international human rights law. Williams and Reynolds contend that Australia's relationship with international treaty bodies became strained after a series of UN bodies criticised Australia for its poor human rights performance in 2000.[104] Consequently, and as a result of these criticisms, the then foreign minister stated that '[i]f a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose'.[105] Since then, Australia has had a tenuous relationship with international law, particularly when it comes to the incorporation of international treaties into domestic legislation and accepting and implementing treaty bodies' views. Williams and Reynolds lament that 'Australia is happy to set down standards for other nations, but bristles when these same rules are

102 Skelton (n 73) 17.
103 Liefaard (n 22) 493.
104 G Williams & D Reynolds *A charter of rights for Australia* (2017) 84.
105 As quoted in Williams & Reynolds (n 104) 84; S Joseph, A Fletcher & A Lochhead-Sperling 'The impact of the United Nations human rights treaties on the domestic level in Australia' in Heyns and others (n 86) fn 29.

applied to us. Our politicians often respond by rejecting interference from outside, and argue stridently that UN bodies not pass judgment on us.'[106]

The Commonwealth of Australia is made up of six autonomous states and two self-governing territories. As a former British colony, much of Australia's constitutional values are based on principles inherited from English law. As such, Australia adheres to the doctrine of parliamentary supremacy and responsible government, whereby the legislature retains the final say regarding any new legislation. Because of this, Australia has sometimes had a strained relationship with international law, particularly when it comes to the incorporation of international treaties into domestic legislation and accepting and implementing treaty bodies' views. International law is seen as rather pervasive and vague which, if allowed, will sweep away carefully constructed local norms and legal development.[107] International law provisions are seen as aspirational rather than normative and are ill-adapted to the Australian context and, as a result, are not considered relevant.[108] Therefore, CRC has only sparingly been incorporated into domestic legislation on the national level and only with regard to the Family Law Act 1975.[109]

Even though Australia has not ratified OPIC, it should be noted that where ratification of individual communication mechanisms did take place in other treaties, such as ICCPR,[110] they are not the panacea for all human rights violations.[111] In 1991 Australia ratified OP-ICCPR, which contains the communications procedure for ICCPR.[112] The first individual communication against Australia under OP-ICCPR was the case of Nicholas Toonen.[113] This case was the exception to the rule and brought about systemic change to the

106 Williams & Reynolds (n 104) 85; See, also, A Twomey '*Minister for Immigration and Ethnic Affairs v Theo*' (1995) 350 where the author quotes McHugh J on his views that treaty ratification is an international matter and should not have any domestic consequences; Joseph, Fletcher & Lochhead-Sperling (n 105) 38.

107 D Hovell & G Williams 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' (2005) *Melbourne University Law Review* 110.

108 As above.

109 See J Tobin 'The development of children's rights' in L Young, MA Kenny & G Monahan (eds) *Children and the law in Australia* (2017) 31-35 for other ways in which CRC plays a crucial role in Australia, such as judicial interpretation.

110 International Covenant on Civil and Political Rights (ICCPR) opened for signature on 19 December 1966 and entered into force on 23 March 1976.

111 Swannie (n 57) 262.

112 Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) opened for signature on 16 December 1966 and entered into force on 23 March 1976.

113 *Toonen v Australia* (n 21); See *Horvath v Australia* Communication 1885/2009, UNHR Committee 19 Augustus 2008 UN Doc CCPR/C/110/D/1885/2009 (2009) for a subsequent case where Australia accepted the UNHR Committee's views; see also *Kwok v Australia* Communication 1442/2005, UNHR Committee

protection of the sexual rights of minorities.[114] Tasmanian criminal law had criminalised a range of sexual activities between adult men in breach of the right to privacy in article 17. Nicholas Toonen, a homosexual man, complained to the UNHR Committee, which found the Commonwealth in breach of its international obligations under ICCPR.[115] The Commonwealth accepted the views of the UNHR Committee in which the Tasmanian law was found to violate ICCPR. As a result, the Commonwealth government passed the Human Rights (Sexual Conduct) Act 1994, overriding the Tasmanian Criminal Code Act 1924,[116] specifically sections 122 and 123, which prohibited both 'unnatural' intercourse and indecent practices between males. However, as Swannie points out in his examination of the efficacy of the communication procedures of ICCPR, Australia generally is not inclined to accept the views of the HRC.[117] Williams and Reynolds are of the following view:[118]

> The *Toonen* case demonstrates the possibilities and limits of the international legal protection of human rights. On the one hand, it offers another avenue for drawing attention to breaches of rights. On the other, such protection is only effective in Australia if the federal or relevant state parliament responds by changing the law, which happens rarely.

The question then is, what would make Australia more inclined to accept the views of the CRC Committee as opposed to those of the UNHR Committee? The answer lies in a comment made in 2015 by the then Prime Minister in response to a report by the UN Special Rapporteur on Torture, which was critical of Australia's border policies, that 'Australians are sick of being lectured to by the United Nations'.[119]

### 4.2 Parliamentary supremacy in Australia

Compare the two systems of constitutional supremacy in South Africa with the administrative arrangements in Australia. The Westminster system of government recognises the separation of powers between the executive, legislative and judicial arms of government and the

23 October 2009 UN Doc CCPR/C/97/D/1442/2005 (2005) for a case where Australia only partially accepted the views of the UNHR Committee.

114 Swannie (n 57) 260.

115 *Toonen v Australia* (n 21).

116 Joseph and others (n 105) 65; P Crofts *Criminal law elements* (2018) 1; Williams & Reynolds (n 104) 83.

117 Swannie (n 57) 260. See also K Eastman 'Australia's engagement with the United Nations' in P Gerber & M Castan (eds) *Critical perspectives on human rights law in Australia* (2021) 121.

118 As quoted in Williams & Reynolds (n 104) 84.

119 As above; Joseph and others (n 105) fn 31, 40.

various superior courts, which do not have the authority to strike down offending legislation for human rights violations.[120] This is so because Australia adheres to the doctrine of parliamentary supremacy and responsible government, where the legislature retains the final say when passing new laws.[121] This is in contrast to the principle of constitutional supremacy that is followed in South Africa, where the Constitution is the supreme law of the land, and the Constitutional Court is tasked with enforcing the provisions of the Constitution and the Bill of Rights in chapter 2. The Constitutional Court has the authority to strike down any legislation that violates the South African Constitution[122] or to develop the common law in such a way that it is human rights compliant.[123]

Parliamentary supremacy does not mean that all laws passed in fact are human rights compliant. The opposite is true, as the Australian Parliament *can* and *does* pass laws that breach human rights treaty obligations.[124] A perfect example of a law that violates international obligations is section 61AA of the New South Wales Crimes Act 1900, which replaced the common law defence of reasonable chastisement. Section 61AA created the new statutory defence of lawful correction. Lawful correction is a defence to a charge of common assault for parents or those *in loco parentis* who physically punish their children. This section of the criminal law breaches the rights set out in article 19(1) of CRC, which reads that state parties should take the necessary steps to protect children from all forms of physical or mental violence while in the care of their parents or persons *in loco parentis*. Furthermore, section 61AA also breaches article 37(a) of CRC, which reads that no child should be forced to endure torture or cruel, inhuman or degrading treatment or punishment. Ironically, the amendment to the Crimes Act 1900 was passed some 12 years after the Australian government had ratified CRC. Despite the fact that these breaches are found in state legislation, decentralisation of

120 R Solomon 'Reviewing Victoria's Charter of Rights and the limits to our democracy' (2017) 42 *Alternative Law Journal* 195.

121 S Joseph 'Australia's exceptionalism: Antipathy towards human rights?' in Gerber & Castan (n 117) 604; Joseph and others (n 105) 33; B Chen 'The quite demise of declarations of inconsistency under the Victorian Charter' (2021) 44 *Melbourne University Law Review* 931; Solomon (n 120) 197; G Williams 'The Victorian Charter of Human Rights and Responsibilities: Origins and scope' (2006) 30 *Melbourne University Law Review* 887.

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

123 See, eg, *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* 2020 (1) SA 1 (CC), where the Constitutional Court, on appeal, upheld the decision of the South Gauteng High Court. The Court declared the common law defence of moderate and reasonable chastisement to a charge of common assault incompatible with the Bill of Rights and, therefore, unconstitutional, which resulted in corporal punishment being made unlawful in the home.

124 Williams & Reynolds (n 104) 21.

power does not reduce the responsibility of the federal government to all children within its jurisdiction to comply with its obligations under CRC.[125]

### 4.3 Domestic challenges for Australia

Because Australia is a dualist state where domestic legislation runs concurrently with international law, any international obligations must be incorporated into domestic legislation before they become enforceable in Australian courts.[126] However, Australian governments are reluctant to incorporate treaties into domestic legislation because of the perception that international law is not law 'but a discretionary set of norms that states could neglect at will'.[127] Leading Australian human rights scholars believe that another reason for the Commonwealth government's reluctance to ratify OPIC is because of migrant and asylum-seeker children held in both onshore and offshore detention centres.[128] Since the 1970s, thousands of asylum seekers have arrived unauthorised by boat on Australian shores. In 1992 new federal laws mandated the detention of these asylum seekers until their claims were processed or until they left Australia. These mandatory detention measures became more severe in 2013 when asylum seekers were sent to Papa New Guinea and Nauru for their claims to be processed.[129] In 2016 the Nauru Regional Processing Centre reported widespread sexual and physical abuse of detainees, including women and children.[130] In the last few years, a large body of evidence has been compiled that shows that asylum seekers on these islands have been denied their fundamental human rights.[131] Using the Leiden University Children's Rights Observatory[132] to examine the case law regarding individual communications brought to the CRC Committee under OPIC provisions shows that the majority of these cases, until recently, were migrant-related.[133] Similar case law can also be found in the jurisprudence of OP-ICCPR.[134] The large volume

125 General Comment 5 (n 14) paras 20 & 40.
126 Joseph and others (n 105) 37; Joseph (n 121) 602.
127 Hovell and Williams (n 107) 107.
128 Joseph and others (n 105) 51.
129 Joseph and others (n 105) 35.
130 Williams & Reynolds (n 104) 32.
131 As above.
132 https://www.childrensrightsobservatory.org/ (accessed 29 September 2024).
133 See *OM v Denmark* Communication 145/2021, CRC Committee 16 October 2023, UN Doc CRC/C/94/D/145/2021 (2021); *KK v Switzerland* Communication 110/2020, CRC Committee 25 January 2023, UN Doc CRC/C/D/110/2020 (2020); *HK v Denmark* Communication 99/2019, CRC Committee 1 June 2022, UN Doc CRC/C/90/D/99/2019 (2019); *IAM on behalf of KYM v Denmark* Communication 3/2016, CRC Committee 25 January 2018, UN Doc CRC/C/77/D/3/2016 (2016).
134 See, eg, *Shafiq v Australia* Communication 1324/2004, UNHR Committee 31 October 2006, UN Doc CCPR/C/88/D/1324/2004 (2004).

of case law related to migrant issues will likely dissuade the Australian government from ratifying OPIC. It does not want to be embarrassed any further or have its mandatory detention policy questioned by a treaty body with whose views it does not agree.

In addition, the CRC Committee has also considered cases regarding the repatriation of wives and children of foreign fighters.[135] This will only add to Australia's reluctance to accede to OPIC since Australia still has approximately 40 women and children housed in camps in North-East Syria.[136] In September 2024 the Federal Court in *Save the Children Australia v Minister for Home Affairs* and *Save the Children v Minister of Home Affairs (No 2)* dismissed an application by Save the Children Australia for a *habeas corpus* order, finding that the Minister of Home Affairs and the Commonwealth of Australia lacked control over the detainment of these women and children.[137] Further issues to consider, which will likely affect the prospects of ratification, are the low age of criminal responsibility in Australian jurisdictions[138] and the lawfulness of corporal punishment in the home.[139] It is unlikely that the Commonwealth government will ratify OPIC any time soon for fear of being embarrassed even more in the international arena for failing to respect and protect the fundamental human rights of all Australian citizens, especially children. Although ratifying OPIC would go a long way towards repairing Australia's international reputation, the author acknowledges that this is unlikely to happen until Australia addresses these domestic issues.

Over the years, UN treaty bodies have voiced their concerns about Australia's human rights record, specifically concerning the issues mentioned above. For example, in 2012 the CRC Committee, in its Concluding Observations on its fourth periodic report on Australia, reiterated a previous recommendation that Australia take all appropriate measures to explicitly prohibit corporal punishment in all settings and in all states and territories.[140] In addition, the CRC Committee recommended that the defence of 'reasonable

135 See *LH & Others v France* (n 39) and *AF v France* (n 56); *FB & Others v France* (n 56); *PN & Others v Finland* Communication 100/2019, CRC Committee 12 September 2022, UN Doc CRC/C/91/D/100/2019 (2019).

136 D Gavshon 'Government fails to bring Australians from Syrian camps home: Families prepare legal action to secure repatriation as camp security deteriorates' Human Rights Watch 10 May 2023, https://www.hrw.org/news/2023/05/10/government-fails-bring-australians-syrian-camps-home (accessed 28 September 2024).

137 [2023] FCA 1343; [2023] FCA 1542.

138 https://humanrights.gov.au/ (accessed 28 September 2024).

139 LA Greeff 'The normative nature of corporal punishment in Australia' (2023) 59 *Australian Journal of Social Issues* 620.

140 Concluding Observations on the fourth periodic report of Australia, CRC Committee 28 August 2012 UN Doc CRC/C/AUS/CO/4 (2012) para 44(a).

chastisement' not be used as a defence to a charge of assault on a child.[141] As mentioned before, Australia has not incorporated the Convention to any significant degree and, in this regard, the CRC Committee, in its Concluding Observations on the combined fifth and sixth periodic reports of Australia, recommended that Australia enact a comprehensive national child rights act that fully incorporates CRC.[142] With regard to corporal punishment, the CRC Committee again urged Australia to explicitly prohibit corporal punishment in all settings and to repeal the defence of 'reasonable chastisement'.[143] With regard to the ratification of the Optional Protocol, the CRC Committee recommended that Australia, 'in order to strengthen the fulfilment of children's rights, ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure'.[144] The Committee against Torture (CAT Committee), in its Concluding Observations on its sixth periodic report of Australia, recommended with regard to mandatory immigration detention, including of children, that Australia take the necessary measures to repeal the legal provisions establishing the mandatory detention of any person entering Australia,[145] and to ensure 'that individuals held in immigration detention can bring complaints to an effective, independent, confidential and accessible mechanism'.[146] The CAT Committee further indicated that Australia should raise the age of criminal responsibility to align with international standards since the age in some jurisdictions is as low as ten years.[147] Furthermore, with regard to corporal punishment, the CAT Committee urged Australia to explicitly prohibit corporal punishment in all settings and repeal the defence of 'reasonable chastisement'.[148]

It is often argued that governments see international treaty bodies as interfering with the sovereignty of the state.[149] However, treaty bodies, specifically the CRC Committee, should be seen as a highly informed group of experts who authoritatively interpret CRC as an advocate for children's rights.[150]

141 CRC Committee (n 140) para 45(a).
142 Concluding Observations on the combined fifth and sixth periodic reports of Australia, CRC Committee 1 November 2019 UN Doc CRC/C/AUS/CO/5-6 (2019) para 7(a).
143 CRC Committee (n 142) para 28(a).
144 CRC Committee (n 142) para 52.
145 Concluding Observations on the sixth periodic report of Australia, CAT Committee 5 December 2022 UN Doc CAT/C/AUS/CO/6 (2022) para 28(a).
146 CAT Committee (n 145) para 28(h).
147 CAT Committee (n 145) para 38(a).
148 CAT Committee (n 142) para 48.
149 Swannie (n 57) 263; Williams & Reynolds (n 104) 84.
150 Swannie (n 57) 263.

## 5 Conclusion

April 2024 marked the tenth anniversary of OPIC. As a human rights instrument that facilitates the right to access to justice and effective remedies under CRC, it is disappointing that states have been slow to ratify OPIC. Neither South Africa nor Australia has ratified the Optional Protocol. Therefore, neither children in South Africa nor Australia, groups of children or their representatives can submit a communication or complaint to the CRC Committee for alleged rights violations under CRC or under its first two optional protocols, OPSC or OPAC. The South African government argued that the current legal framework provides an adequate mechanism to address children's rights violations or to enforce children's rights. It did not believe that ratifying OPIC would add any value to the South African legal framework for children in South Africa.[151] Since the Commonwealth government of Australia has a highly complex relationship with international law and treaty bodies, primarily because of the attachment to the doctrine of parliamentary supremacy and responsible government, it remains a dualist state where international law runs concurrently with domestic legislation. Yet, despite its extensive constitutional powers, the Australian government is reluctant to incorporate human rights treaties into domestic legislation. The exception is the partial incorporation of CRC into the Family Law Act 1975.

Since the Commonwealth government is unwilling to accept recommendations from treaty bodies and even less likely to implement them, it seems prudent that rights legislation be passed at the national level to bring Australia in line with other liberal democracies. However, a national human rights act does not negate the need for Australia to ratify OPIC. Indeed, a national human rights act, in addition to the ratification of OPIC, will undoubtedly strengthen the human rights approach in Australia. Such an approach is much needed in light of its current lack of leadership in relation to treaties and treaty bodies' views and the outright human rights law breaches that are perpetrated in the name of national security, such as the mandatory detention of asylum seekers and the non-repatriation of the wives and children of foreign fighters in Syria.

No matter how well-developed and sophisticated a domestic legal system is and no matter how effective the remedies under such a legal system are, state parties to CRC owe it to the international community, in general, and to children, in particular, to ratify the

151 Adegalu & Mitchell (n 86) 1086.

communications procedure. The CRC Committee is committed to giving children the appropriate mechanisms to access justice and to get the appropriate remedies that are effective, just and timely. During its 95th session, the CRC Committee dedicated the forthcoming General Comment 27 to the right to access to justice and effective remedies.[152] Therefore, accession to OPIC is crucial for South Africa and Australia and would put these jurisdictions in lockstep with the CRC Committee in relation to access to justice for children. Like adults, *all* children deserve and are entitled to have access to justice and effective remedies at the domestic and international levels to address perceived rights violations.

152 https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-27-childrens-rights-access (accessed 28 September 2024).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: P Mudau 'Judicial enforcement of the right to adequate housing against local government through the lens of General Comment 4 of the Committee on Economic, Social and Cultural Rights: A South African perspective' (2025) 25 *African Human Rights Law Journal* 358-403
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a14

# Judicial enforcement of the right to adequate housing against local government through the lens of General Comment 4 of the Committee on Economic, Social and Cultural Rights: A South African perspective

*Paul Mudau**
Senior Lecturer, Department of Public, Constitutional and International Law, College of Law, University of South Africa
https://orcid.org/0000-0002-8696-7495

**Summary:** *Based on a critical analysis of relevant case law and desk-based comprehensive legal research, this article examines the judicial enforcement of the right to adequate housing against local government in South Africa. The article focuses on how courts hold local government accountable in fulfilling the right measured against the baseline factors outlined in General Comment 4 of the United Nations Committee on Economic, Social and Cultural Rights. The factors that determine whether a certain form of shelter amounts to 'adequate housing' encompass seven integral components: security of tenure; availability of*

* LLB (Limpopo) LLM (Pretoria) LLM (Western Cape) PhD (Witwatersrand); mudaufp@unisa.ac.za. This article emanates from the author's thesis submitted according to the requirements for the degree of PhD in Law at the University of the Witwatersrand. The article is dedicated to my late mother, Ms Tambu Selinah Sibanda (6 May 1959-9 July 2023), who passed away at a time when I was completing my PhD thesis. In addition, I would like to appreciate my PhD supervisor, Prof Marius Pieterse, for his solid, critical and eye-opening comments and suggestions that splendidly guided my doctoral research.

*services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. General Comment 4 specifically expounds on the right to adequate housing as enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights. South Africa is a state party to ICESCR. Domestically, the right to access adequate housing, as guaranteed by section 26(1) of the Constitution of the Republic of South Africa, 1996, imposes a legally binding duties on the state. These duties are varyingly shared by the three spheres of government: the national, provincial, and local governments. However, Schedule 4A of the Constitution allocates the functional area of housing as a 'concurrent competency' of the national and provincial governments. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and powers by the national and provincial governments. Nonetheless, with an overstretched fiscus, municipalities are hesitant to assume housing delivery roles. Key findings reveal that numerous court cases bind municipalities by assigning to them increased rights-based responsibilities that they may not be adequately equipped or empowered to implement. Thus, despite courts not explicitly referencing General Comment 4, judicial enforcement of the right is consistent with the baseline factors.*

**Key words:** *adequacy; ESCR Committee; General Comment 4; ICESCR; local government; right to adequate housing; South Africa*

## 1 Introduction

South Africa is acclaimed for its robust and progressive housing laws, policies, programmes and jurisprudence.[1] This acclamation largely emanates from its transformative Constitution,[2] which is at the intersection of the country's legal, social and political life.[3] The Constitution contains an expansive Bill of Rights which is the cornerstone of the country's democracy. The Bill of Rights 'enshrines

1 L Chenwi 'Implementation of housing rights in South Africa: Approaches and strategies' (2015) 24 *Journal of Law and Social Policy* 68.

2 Transformative constitutionalism refers to a critical approach to constitutional law that seeks to transform society by aiming to address systemic inequalities and promoting social justice. This concept is rooted in the country's transition from apartheid to democracy, and is reflected in the South African Constitution, which seeks to address the injustices of the past and create a more equitable society. It prioritises social and economic rights, such as the right to access adequate housing, health care and education, etc; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

3 C Albertyn '(In)equality and the South African Constitution' (2019) 36 *Development Southern Africa* 752.

the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom'.[4] The constitutional recognition and protection of fundamental rights and freedoms has also heralded the insertion of fully justiciable socio-economic rights.[5]

Predominantly, discussions around human rights and social development are related to housing delivery.[6] Moreover, the South African pursuit of the right to adequate housing 'has established an important duty on the state to ensure universal access to decent accommodation'.[7] Although socio-economic rights (which require positive action and resources) may be binding on natural persons and corporate entities,[8] the state bears the primary responsibility. These obligations bind the state and all its organs, made up of the legislature, the executive and the judiciary.[9] These obligations pertain to both civil and political rights, and economic, social and cultural rights, which include the right to access adequate housing as provided by section 26(1) of the Constitution.[10] Accordingly, the rights in the Bill of Rights, including the right to adequate housing, impose duties on the state, a notion that includes local government.[11]

It should be noted that the functional area of housing is listed as a 'concurrent competency' of the national and provincial governments in Schedule 4A of the Constitution. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and

4 Sec 7(1) Constitution of the Republic of South Africa, 1996.
5 Sec 38 of the Constitution. In terms of this provision, where a right listed in the Bill of Rights is violated, a competent court may grant appropriate relief. In addition, the judiciary plays a pivotal role in shaping spatial planning policy, often balancing competing interests and constitutional imperatives; P Mudau 'Judicial delineation of local government spatial planning powers in South Africa' (2025) *Journal of Law, Society and Development* 1.
6 M Sobantu & N Noyoo 'Housing, human rights and social development in South Africa' (2022) 12 *African Journal of Development Studies* 233.
7 I Turok & A Scheba '"Right to the city" and the New Urban Agenda: Learning from the right to housing' (2019) 7 *Territory, Politics, Governance* 494.
8 Sec 8(2) of the Constitution provides for an explicit horizontal application of the Bill of Rights on individuals and private institutions. Thus, socio-economic rights are also binding on natural persons and corporate entities. Individuals have the obligations to respect and protect the socio-economic rights of others. Businesses and other organisations have the responsibilities to respect and promote socio-economic rights and must consider the impact of their actions on the realisation of these rights. P de Vos & W Freedman *South African constitutional law in context* (2021) 29.
9 Sec 8(1) of the Constitution.
10 The provision stipulates: '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'
11 NS Nag 'Government, governance and good governance' (2010) 36 *Indian Journal of Public Administration* 123.

powers by the national and provincial governments.[12] Nonetheless, with an overstretched fiscus, municipalities are hesitant to assume housing delivery roles. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and powers by the national and provincial governments.[13]

In ensuring that these duties are fulfilled, the courts play a key role in interpreting and enforcing the Bill of Rights, taking into account the broader international legal framework that informs the protection of socio-economic rights. The courts are required by the Constitution to consider international law when interpreting the Bill of Rights.[14] Hence, the United Nations (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966,[15] the interpretations and General Comments of the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee)[16] and its reports have influenced the framing of norms and standards of socio-economic rights contained in South Africa's Constitution and they also serve as invaluable guidelines to South African courts during the adjudication of socio-economic rights cases.[17] Even prior to the ratification of ICESCR, South Africa already adopted legislative, administrative and policy measures aimed at the realisation of socio-economic rights consistent with the obligations imposed by the Constitution.[18]

According to General Comment 4,[19] the significance of the 'adequacy' concept regarding the right to housing underlines baseline factors that determine whether a certain form of shelter amounts to

12 Sec 156(4) of the Constitution.
13 T Chonco 'The accreditation of municipalities to administer housing programmes' in MR Maziwisa & J de Visser (eds) *Local government in South Africa: Responses to urban-rural challenges* (2021) 18.
14 Sec 39(1)(b) of the Constitution.
15 United Nations International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, entered into force from 3 January 1976. The purpose of ICESCR is to give legal effect to the United Nations Universal Declaration of Human Rights, adopted on 10 December 1948. The Universal Declaration is the first international human rights instrument to recognise the right to adequate housing.
16 United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) is entrusted with the primary responsibility to oversee the effective implementation of ICESCR. In accordance with arts 21 and 22 of ICESCR, the Committee's mandate is assigned by the United Nations Economic and Social Council (ECOSOC). ECOSOC monitors the reporting obligations of states under Part IV of ICESCR.
17 I Currie & J de Waal *The Bill of Rights handbook* (2016) 571.
18 ESCR Committee 'Consideration of reports submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa' (2017) 4.
19 ESCR Committee General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant), 13 December 1991 para 1.

'adequate housing' as per ICESCR.[20] In part, the determination of adequacy may be based on economic, social, cultural, ecological, climatic and other factors. Yet, paragraphs 8(a)-(g) of General Comment 4 lists seven aspects that form integral components of the right: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. These baseline factors provide a universal framework that state parties may use to develop their housing laws, policies and practices that, at best, aim to promote and attain adequacy in relation to the right to housing.

In 2018 the ESCR Committee, in its Concluding Observations on the initial report of South Africa, expressed several concerns in relation to the realisation of the right to access adequate housing.[21] Among the issues raised encompass the large number of people living in inadequate housing, without access to basic services. With over 67 per cent of the population as a whole already residing in urban areas by 2017,[22] rapid urbanisation triggers the growth of informal settlements. More so, the state's failure to increase the provision of social housing units contributes to inadequate housing. Another major concern was 'the illegal evictions and the excessive use of force during evictions, as well as evictions taking place without municipalities offering suitable alternative accommodation'.[23]

Against this backdrop, this article critically analyses the nature and extent to which South African courts have adjudicated and imposed rights-based responsibilities on local government as per the baseline factors. Cognisant of the challenges of enforcing housing rights in South Africa, the article uses critical analysis of relevant case law and desk-based comprehensive legal research to compare the

20 ESCR Committee General Comment 4 para 8. The purpose of General Comment 4 can be explained as follows: (a) Authoritative interpretation: It provides an authoritative interpretation of the right to adequate housing as outlined in ICESCR. This clarifies the scope and content of this right for states that have ratified the Covenant; (b) Guidance for states: It offers guidance to states on how to fulfil their obligations regarding the right to adequate housing for their citizens. This includes defining what constitutes 'adequate housing' and outlining the steps states should take to progressively realise this right; (c) Accountability framework: It establishes a framework for holding states accountable for upholding the right to adequate housing. This can be used by individuals, non-governmental organisations, and other stakeholders to advocate and enforce this right; (d) Identifying key issues: It identifies key issues related to the right to adequate housing, such as forced evictions, discrimination in housing, and the specific needs of vulnerable groups; (e) Promoting implementation: It aims to promote the implementation of the right to adequate housing at the national level by providing clear expectations and best practices for states.

21 ESCR Committee 'Concluding Observations on the initial report of South Africa' (2018) para 58.

22 Statistics South Africa 'South Africa: Urbanisation from 2009 to 2019' 14 February 2025, https://tinyurl.com/4xtzr4v2 (accessed 4 April 2025).

23 ESCR Committee (n 21) para 58.

application of these baseline factors with the South African housing jurisprudence. Primarily, the article analyses how South African courts have adjudicated the constitutional right to access adequate housing against local government and hold the latter as one of the litigants accountable in its role to fulfil the right to access adequate housing.

The article is structured in seven parts. The first part provides the introduction and background to the article. The second part outlines the seven baseline factors as ensconced by ICESCR. Third, the article deals with the global patterns of local government's housing rights-based obligations. The article proceeds to offer a synopsis of local government's constitutional and legal housing roles, powers, functions and responsibilities pertinent to the right to adequate housing in South Africa in the fourth part. Fifth, the article focuses on the judicial enforcement of constitutional right to adequate housing while assessing the state of compliance with the seven baseline factors contained in General Comment 4. The sixth part is the conclusion, and the seventh part provides the article's recommendations.

## 2 International Covenant on Economic, Social and Cultural Rights

ICESCR is deemed to be the most important international legal source relating to socio-economic rights, in general,[24] and, particularly, the right to adequate housing.[25] South Africa is a state party to ICESCR.[26] ICESCR imposes obligations on South Africa that cast 'an increasingly significant impact on the development of South Africa's socio-economic rights jurisprudence'.[27] Article 11(1) of ICESCR enshrines the right to adequate housing as 'the most comprehensive and perhaps the most important of the relevant provisions'.[28] The clause stipulates as follows:

> The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

24 Currie & De Waal (n 17) 570.
25 Office of the United Nations High Commissioner on Human Rights (OHCHR) 'Women and the right to adequate housing' (2012) 6.
26 In October 1994, South Africa signed ICESCR and only acceded to the instrument 20 years after the signature on 15 January 2015.
27 The ratification means that, under international law, ICESCR is legally binding on South Africa. See Currie & De Waal (n 17) 570.
28 General Comment 4 para 3.

A narrow or restrictive interpretation of the right to housing equates its ambit to merely the provision of a roof over one's head, or by exclusively viewing shelter as a commodity.[29] In contrast, the appropriate lens to view the right to housing involves the right to live somewhere 'in security, peace, and dignity'.[30] In this respect, General Comment 4 advances two arguments for this approach. First, the right to housing is integrally associated to other fundamental human rights and principles contained in ICESCR. The interpretation of the term 'housing' requires the full consideration of a confluence of factors that epitomise 'the inherent dignity of the human person', irrespective of income or access to economic resources. Second, the right to housing conferred by article 11(1) of ICESCR should not merely be confined to housing *per se* but the reference should encompass 'adequate housing'.

Under article 2(1) of ICESCR, with a view to progressively achieving the full realisation of the right to adequate housing, a state party is obligated to undertake steps to the maximum of its available resources. In the same ICESCR proviso, one of the germane actions is the 'adoption of legislative measures'. Such entails enacting an apt legal framework that guarantees individuals the legal status, rights and privileges to claim the right to adequate housing from the state. The terms 'progressive realisation' and 'available resources' are qualification benchmarks that states may ascertain their means for achieving socio-economic rights and the right to adequate housing.[31]

Apart from adopting legislative measures,[32] a state party has the discretion to adopt other 'appropriate' measures and programmes with the intention of realising the right to adequate housing. These includes educational, administrative, social, financial and educational measures.[33] Moreover, General Comment 3 underscores the need to consider as part of the appropriate measures,[34] the stipulation of judicial remedies in order to secure the full realisation of the right to adequate housing. Nevertheless, the justiciability of the right to adequate housing must be compatible with the applicable domestic legal system and the adjudication of the constitutional right to adequate housing.

29 General Comment 4 para 7.
30 As above.
31 Currie & De Waal (n 17) 572.
32 General Comment 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant), 14 December 1990 para 5.
33 General Comment 3 para 7.
34 General Comment 3 para 5.

## 2.1 Integral components of the right to adequate housing: General Comment 4

### *2.1.1 Legal security of tenure*

First, legal security of tenure, which is an essential component of the right to adequate housing, confers on every individual the right to effective protection by the state against forced evictions or demolition of their home. Importantly, General Comment 7 defines 'forced evictions' as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[35]

International practice validates that in the housing arena, security of tenure is especially vital to poor households.[36] Nonetheless, the prohibition on forced evictions is not applicable to evictions that are implemented in conformity to the relevant law and international covenants on human rights.[37]

In 2014, under the then Special Rapporteur on Adequate Housing, Raquel Rolnik, the Guiding Principles on the security of tenure for the urban poor[38] were produced. These principles are premised on the legal conviction that security of tenure pronounces respect to housing and land. Fitzpatrick and Pawson define legal security of tenure as 'the legal arrangements which offer tenants indefinite tenure to their housing, subject to the proven breaches of their lease agreement that provide ground for termination action by the landlord'.[39] Security of tenure is derived from the fact that the law protects the basic individual rights to access and use the land and property in accordance with the law and fair procedures and that these rights are justiciable.

There are various forms of security of tenure. General Comment 4 includes emergency housing, lease, public and private rental accommodation, cooperative housing, owner-occupation, informal settlements and occupation of land or property. Apart from these types of tenure, every individual must have security of tenure that

35 General Comment 7: The Right to Adequate Housing (art 11.1 of the Covenant), 20 May 1997 para 3.
36 S Fitzpatrick & H Pawson 'Security of tenure in social housing: An international review' (2011) 3.
37 General Comment 7 para 7.
38 The Guiding Principles on security of tenure for the urban poor (2014).
39 Fitzpatrick & Pawson (n 36) 1.

assures legal protection against forced eviction and other threats. Owing to meaningful engagement, state parties should consult with affected persons and groups, and implement, immediately, measures that confer legal security of tenure upon persons and households without such protection.[40] Indeed, access to land provides space for housing and the enjoyment of the right to adequate housing depends largely on having secure access to land.[41]

### *2.1.2 Availability of services, materials, facilities and infrastructure*

Following the examination of legal security of tenure, this part shifts focus to another pivotal aspect of the right to adequate housing, namely, the availability of services, materials, facilities and infrastructure. This component is fundamental to ensuring that housing is not only secure but also liveable and conducive to the well-being of its occupants. The availability of these essential services plays a significant role in defining the adequacy of housing, impacting the health, safety and quality of life of residents. By exploring the legal and practical dimensions of service availability, this part aims to provide a comprehensive understanding of its importance in the broader context of the right to adequate housing.

The availability and quality of facilities, infrastructure, materials and services substantially impact the effective functioning of human settlements and the nature of social reproduction for inhabitants.[42] For housing to meet the adequacy requirement, it must contain facilities that are indispensable for human health, security, comfort and nutrition.[43] To this end, General Comment 4 provides that

> [a]ll beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[44]

The absence of these amenities would amount to an infringement of the beneficiary's right to adequate housing. As reflected by the proliferation of scholarship on urban amenities, the spatial locational

40 General Comment 4 para 8(a).
41 General Comment 26 (2022) on land and economic, social and cultural rights (24 January 2023) para 1. 'Without such access, people could be subject to displacement and forced eviction, which could violate their right to adequate housing'; see General Comment 26 para 7.
42 K Mchunu & S Nkambule 'An evaluation of access to adequate housing: A case study of eZamokuhle township, Mpumalanga; South Africa' (2019) 5 *Cogent Social Sciences* 5.
43 General Comment 4 para 8(b).
44 As above.

pattern analysis reveals that the level of concentration of facilities, infrastructure, materials and services varies significantly across different areas (for instance, a city, region or country).[45] For the right to adequate housing to be realised, this imbalance that leads to spatial disparities in accessing these basic amenities needs to be remedied accordingly.

With the importance of availability of services, materials, facilities and infrastructure established, the next critical aspect of the right to adequate housing is affordability. Ensuring that housing costs are reasonable and manageable for individuals and families is essential for achieving housing adequacy. This article next examines the component of affordability, its implications for housing policy, and the challenges faced by households in securing affordable housing.

### *2.1.3 Affordability*

As a human rights criterion, the principle of affordability requires that housing, either for rental or purchase, should be accessible at a price that is affordable to all people. The correlation between the components of affordability and accessibility offers a durable solution to the dynamics of urban real estate markets that do not often address the housing needs of diverse social groups, particularly poor households that intend either to rent or purchase a house.[46]

Spatial segregation is also intensified by systemic barriers to accessing social housing programmes.[47] The imposition of stringent eligibility requirements to qualify for housing prohibits or limits the ability of certain social groups that cannot meet the minimum incomes, credit scores, formal employment and residency permits.

Housing is deemed affordable when the dwelling is of an acceptable standard and its associated financial costs permit households to satisfy other basic needs or meet essential non-housing expenditures.[48] As eloquently stated by Cavicchia, when local planning is more market-oriented, housing accessibility becomes largely dependent

45 JA Parry and others 'Spatial analysis on the provision of urban amenities and their deficiencies – A case study of Srinagar City, Jammu and Kashmir, India' (2012) 2 *Research on Humanities and Social Sciences* 192-193.

46 W Wilson & C Barton 'What is affordable housing?' (2019) 7. See also EM Musvoto & MM Mooya 'Addressing challenges in the South African affordable housing market: A critical realist perspective' (2018) 8 *Journal of Construction Project Management and Innovation* 2198.

47 United Nations Human Rights Council 'Spatial segregation and the right to adequate housing' 4 March 2022 A/HRC/49/48 (2022) 12.

48 General Comment 4 para 8(c).

on household finances.[49] 'As a consequence, generating inequalities based on income and wealth differences and on intergenerational justice issues.'[50]

General Comment 4 obliges state parties to ensure that the general percentage of housing costs is proportionate to various income levels. A key measure for promoting affordable housing for all is housing subsidies. This entails that those who are unable to qualify for affordable housing are able to succeed owing to various forms of housing finance that satisfactorily reflect their housing needs. Thus, it is important to ensure that tenants are appropriately protected against unreasonable rent increases.

After dealing with affordability, the next crucial aspect of the right to adequate housing is habitability. This next part of the article explores the essential elements of habitability, including structural integrity, safety features and environmental factors, highlighting their significance in ensuring that housing meets the needs of its occupants.

### *2.1.4 Habitability*

The fourth element that General Comment 4 articulates as a constituent component of the normative content of the right to access adequate housing is habitability. This aspect simply advances that adequate housing includes habitable dwellings. Habitability refers to the physical conditions and characteristics of housing that make it safe, secure, and suitable for occupation. The premises must be appropriate for human occupation and without any grave defects that might pose risks to human health and safety. Therefore, this means that inhabitants should be provided with adequate living space and be guaranteed protection 'from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'.[51]

A central constituent of the built environment, for housing to be adequate, it must assure inhabitants of their physical safety. Thus, there

49 R Cavicchia 'Housing accessibility in densifying cities: Entangled housing and land use policy limitations and insights from Oslo' (2023) 127 *Land Use Policy* 2.
50 As above.
51 General Comment 4 para 8(d). Housing challenges forM part of the broad array of social problems such as the high mortality of children. Housing without clean water and sanitation, sufficient living areas and finished building materials gravely jeopardises children's health living in sub-Saharan Africa. See LS Tusting and others 'Housing and child health in sub-Saharan Africa: A cross-sectional analysis' (2020) 17 *PLOS Medicine* 1.

are strong links between housing, planning and health.[52] Normally, the inadequacy and deficiency of housing and living conditions relate to higher mortality and morbidity rates. As a result, state parties are urged to expansively apply the Health Principles of Housing.[53] These principles, prepared by the World Health Organisation (WHO), 'view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses'.[54]

### *2.1.5 Accessibility*

The understanding of accessibility in this part is quite central to spatial equity. Accessibility is about the accomplishment of a barrier-free design of housing and related public services, materials, facilities and infrastructure. It refers to the degree to which residents can easily reach certain areas and their interaction with social services.[55] For example, (land uses and densities in) urban structures must be compatible with people's social well-being and provide everyone with a full range of urban functions such as housing, employment and services.[56] Such a spatial pattern reduces the travelling distances to work or shop, and so forth.

In this manner, appropriate measures are implemented to ensure that all people have equal access to the physical environment, transportation and other public facilities and services available in both urban and rural areas. The right measures usually identify and eliminate any obstacles and barriers to accessibility that disconnect marginalised social groups from accessing adequate urban infrastructure. The physical obstructions of the built-up environment in urban areas often affect people with physical impairment, such as persons with disabilities or older persons with frail physiques. This, 'accessibility leads to independence, increased mobility, access to the labour market and, consequently, a better quality of life'.[57]

52 J Gbadegesin and others 'Housing, planning and urban health: Historical and current perspectives from South Africa' (2020) 48 *Bulletin of Geography. Socio-Economic Series* 23.

53 World Health Organisation 'Health Principles of Housing' (1989).

54 As above. The principles related to health deal with the following: protection against communicable diseases; protection against injuries, poisonings and chronic; reducing psychological and social stresses to a minimum; improving the housing environment; making informed use of housing; and protecting populations at special risk.

55 DJ du Plessis 'Land-use mix in South African cities and the influence of spatial planning: Innovation or following the trend?' (2015) 97 *South African Geographical Journal* 220.

56 Economic Commission for Europe 'Spatial planning: Key instrument for development and effective governance with special reference to countries in transition' (2008) 9.

57 United Nations Human Settlements Programme (UN-HABITAT) 'Accessibility of housing: A handbook of inclusive affordable housing solutions for persons with disabilities and older persons' (2014) 4.

Interestingly, General Comment 4 specifically enumerates an array of disadvantaged groups,[58] without clearly mentioning the landless and economically poor persons in the list. Nevertheless, the wording of General Comment's 'and other groups' could loosely be extended or translated as encompassing both the landless and the poor. At least the General Comment compensates the omission by stating that 'within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal'.[59]

All things considered, these groups should be prioritised in the housing sphere. One of the major obligations of state parties is that their housing laws and policies should fully consider the special housing needs of these groups. Lastly, the General Comment requires that 'discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement'.[60] A key method for improving accessibility is the adoption of an integrated approach to housing standards in the contexts of affordable and social housing programmes, as well as sustainable upgrading and the reconstruction of human settlements.

### *2.1.6 Location*

The fundamental aspect of adequacy pertains to whether housing developments are in either urban peripheries or inner-city areas or places closer to essential public amenities. In addition, the location of housing should not be in polluted and dangerous areas, which is integrally linked to the adequacy component of habitability.

A specific location gives poor households the opportunity to receive the same marginal benefit from the 'locational amenities'.[61] The theoretical perspectives on urban service delivery involve 'locational amenities' which plainly relate to easy access to basic amenities based on the geographic relationship between area and

58 Disadvantaged groups listed in General Comment 4 encompass older persons, children, persons with disabilities, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas.
59 General Comment 4 para 8(e).
60 As above.
61 WH Hoyt & SS Rosenthal 'Household location and Tiebout: Do families sort according to preferences for locational amenities?' (1997) 42 *Journal of Urban Economics* 159.

service provision.[62] 'The essence of urban planning is to provide adequate and equitable services to all groups.'[63] Location is closely linked to other housing adequacy elements such as legal security of tenure, availability of services and affordability.[64] Thus, there is a close link between location and accessibility.

In overlapping with the criterion of accessibility, the location must allow beneficiaries of low-income housing to have 'access to employment options, healthcare services, schools, childcare centres, and other social facilities'.[65] Due to expensive public transport fares, locational peripheries force poor households to persistently encounter challenges in terms of accessing economic opportunities found in the far-distanced inner cities. Nonetheless, this largely depends on the spatial form of a particular city – where the 'inner city' and 'periphery' are not always clear-cut. Accordingly, amenities and opportunities must equally be accessible from where people are located.[66]

The Special Rapporteur on the Right to Housing contends that the advancement of the right to housing hinges on the linkage between land policies and housing policies.[67] Cognisant of the location aspect, this entails spatial equity-based land use planning and mechanisms such as zoning and urban planning that implement housing programmes in well-located areas to address spatial discrimination and to realise the right to adequate housing.

Having examined the significance of location in ensuring access to essential services, opportunities and resources, the next part deals with the final aspect of the right to adequate housing: cultural adequacy. Cultural adequacy recognises the importance of housing being congruent with the cultural identity, practices, and values of its occupants. This dimension acknowledges that housing is not merely a physical structure, but also a space that reflects and supports the cultural heritage and lifestyle of individuals and communities. Exploring the concept of cultural adequacy assists to better

62 As above. In addition, see AJ Aderamo & OA Aina 'Spatial inequalities in accessibility to social amenities in developing countries: A case from Nigeria' (2011) 5 *Australian Journal of Basic and Applied Sciences* 316.
63 Hoyt & Rosenthal (n 61) 192-193.
64 K Marnane & K Greenop 'Housing adequacy in an informal built environment: Case studies from Ahmedabad' (2023) 38 *Journal of Housing and the Built Environment* 2062.
65 General Comment 4 para 8(f).
66 Y Li and others 'Accessibility-based equity of public facilities: A case study in Xiamen, China' (2021) 14 *Applied Spatial Analysis and Policy* 947.
67 United Nations Human Rights Council (n 47) 12.

understand how housing policies and practices can be designed to respect and promote the cultural rights of diverse populations.

### *2.1.7 Cultural adequacy*

In the list of baseline factors that determine whether certain forms of shelter can constitute 'adequate housing' (as enumerated in General Comment 4), the aspect of cultural adequacy is also included. The component of cultural adequacy in the context of housing emphasises the importance of respecting and promoting the cultural identity, practices and values of individuals and communities. However, this principle can be challenging to implement in practice, particularly in multi-cultural societies where diverse cultural groups may have competing interests and needs.[68] Hence, it can be difficult to balance the need for cultural sensitivity with the requirement for universal standards of housing quality and safety. For instance, cultural practices or traditions may be cited as reasons for tolerating poor living conditions or lack of access to basic services.[69] Therefore, it is essential to approach cultural adequacy in a meticulous manner, recognising the importance of cultural diversity while also ensuring that housing meets minimum standards of quality, safety and dignity.

Article 15(a) of ICESCR recognises everyone's right to participate in cultural life. Cultural rights are part of the corpus of human rights and concern many areas of life.[70] The aspect of cultural adequacy in relation to the right to housing does not receive substantial attention in international, regional and domestic legal frameworks. In literature, scant consideration is similarly observed. According to Sukhwani, although most human rights instruments recognise the significance of adequate housing, the aspect of cultural adequacy often gets sidetracked in matters dealing with the in-built environment.[71]

For the ESCR Committee, in General Comment 21, culture encompasses, among others, natural and man-made environments as well as a shelter through which individuals and communities may

68 JC Mubangizi 'Building a South African human rights culture in the face of cultural diversity: Context and conflict' (2012) 5 *African Journal of Legal Studies* 1; Council of Europe 'Competences for democratic culture: Living together as equals in culturally diverse democratic societies' (2016) 15.

69 SM Albert 'Impact of cultural, social, and community environments on home care' in S Olson *The role of human factors in home health care: Workshop summary* (2010) 247; European Commission 'The role of culture in preventing and reducing poverty and social exclusion' (2005) 3-4; CL van Scheepers 'Ethnicity, cultural diversity and poverty in South Africa: Archaeological perspectives from Iron Age Palestine' (2010) 23 *Old Testament Essays* 161.

70 M Özden & S Brunschwig *Cultural rights* (2013) 3.

71 V Sukhwani and others 'Enhancing cultural adequacy in post-disaster temporary housing' (2021) 11 *Progress in Disaster Science* 2.

express their humanity and meaning to their existence.[72] General Comment 4 alludes to the fact that 'the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'.[73]

Cultural adequacy forms part of the core principles of sustainable housing[74] outlined by the Geneva UN Charter on Sustainable Housing.[75] The principle of cultural adequacy requires that 'housing policy should take into consideration questions of cultural identity, value, and emotional wellbeing'.[76] Accordingly, this should be addressed through the following:[77]

(i) national housing policies that take into account social and territorial peculiarities and support the protection and enhancement of landscapes; historical heritage and cultural heritage;

(ii) emphasising the development of public spaces for cultural and social activities;

(iii) housing that takes into consideration the background and culture of inhabitants;

(iv) houses and neighbourhoods designed and actively maintained in order to enhance the emotional wellbeing of people, including by involving local communities in this process.

Accordingly, cultural identity and diversity must be mainstreamed in housing projects.[78] All spheres of government are expected to integrate cultural rights into their housing policies.[79] Development or modernisation activities should preserve the cultural dimensions of housing through the usage of the appropriate technological facilities.[80] Nawa states that 'local government has been identified as a locus where culture-led development best finds expression'.[81]

72 The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity; see General Comment 21: The Right of Everyone to Take Part in Cultural Life, 21 December 2009 para 13.
73 General Comment 4 para 8(g).
74 The other principles are (i) social inclusion and participation; (ii) economic effectiveness; and (iii) environmental protection.
75 The Geneva UN Charter on Sustainable Housing: Ensure access to decent, adequate, affordable and healthy housing for all (2015).
76 Geneva Charter (n 75) para 16.
77 As above.
78 F Shaheed 'Human rights are essential tools for an effective intercultural dialogue' 21 May 2010, https://tinyurl.com/3teayx39 (accessed 13 June 2024).
79 D Petrova 'Diverse cultural identities: The challenges of integrating cultural rights in policies and practices' (2010) 2.
80 General Comment 4 para 8(g).
81 LL Nawa 'Municipal cultural policy and development in South Africa: A study of the City of Tshwane Metropolitan Municipality' PhD thesis, University of South Africa, 2012 2.

Therefore, the infusion of cultural rights and practices in local government housing policies may express cultural identity and diversity in the housing processes and products.

Having explored the essential components of the right to adequate housing, the article next focuses on the critical role of local governments in upholding the right. Local governments are uniquely positioned to address housing needs, given their proximity to communities and understanding of local contexts. This part examines global patterns in local government obligations, highlighting best practices, challenges and innovative approaches to realising the right to adequate housing.

## 3 Obligations of local government: Global patterns

'The real effect of human rights is experienced locally.'[82] The typical nature of local government functions amplifies the exercise and enjoyment of fundamental rights.[83] Vormittag submits that 'the rise of decentralised paradigms of governance and a shift in the international human rights agenda from codification towards realisation was already bestowing upon cities the burden of realising human rights'.[84] The discourse for human rights orientation at local government level has also propelled the emergence of the phrase 'human rights city'.[85]

The national government may set uniform national housing laws, policies, standards and programmes. However, the local governments decide on the location for new housing developments and who benefits from housing subsidies or programmes, subject to the uniform frameworks established at the national level. For these reasons, as compared to national governments, local governments assume more immediate responsibilities that directly impact the housing rights of residents.[86]

82 Columbia Law School Human Rights Institute 'Bringing human rights home: How state and local governments can use human rights to advance local policy' (2012) 5.

83 CM Bosire 'Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa' (2011) 11 *African Human Rights Law Journal* 151.

84 P Vormittag 'Human rights mobilisation in São Paulo's policy response to COVID-19' in JE Nijman and others (eds) *Cities and global governance: Urban politics of human rights* (2023) 5.

85 MF Davis 'Introduction' in MF Davis and others (eds) *Human rights cities and regions: Swedish and international perspectives* (2017) 4.

86 J de Visser 'A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment' (2004) 7 *Law, Democracy and Development* 201; FT Khaile and others 'The role of local government in promoting a sense of belonging as an aspect of social cohesion: A document

Local governments are generally viewed as the front line for enabling the realisation of equal access to low-income and affordable housing. A universal benchmark for measuring human rights progress equally reflects local contexts. 'Human rights, therefore, are not only realised locally – local implementation gives meaning to human rights. Human rights treaties are intended to be implemented at the local level.'[87] Global patterns demonstrate that local governments can incorporate international human rights standards in their programmes of action.[88]

Most of all, for the purposes of enhancing decision making and directly responding to local needs, local governments can integrate human rights housing standards into local law, policy and practice. Therefore, joining 'a global community of local governments worldwide that have increasingly drawn from the human rights framework to benefit their work and their communities'.[89] For instance, through the United Cities and Local Governments (UCLG), a collaborative global group of cities representing their local governments adopted the Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City. By grounding concerted efforts in human rights terms, local governments greatly benefit from the positive influence of globalisation.[90] Aust and Du Plessis submit that 'SDG 11 proves that local governance is recognised as an autonomous yet interrelated part of the global pursuit of sustainable development'.[91]

All things considered; international human rights treaties seldom provide specific obligations that would apply to local governments. As part of the state, local governments are equally bound by human rights obligations. In addition to binding international legal instruments, soft laws, which operate as gap fillers, add to local governments' international obligations. This consolidation of imposed human rights obligations may require local governments to fulfil the right of access to adequate housing.

analysis' (2021) 10 *African Journal of Governance and Development* 8; OHCHR 'Implementing the right to adequate housing: A guide for local governments and civil society (2021) 4.

87 OHCHR (n 86) 4.

88 Columbia Law School Human Rights Institute (n 82) 1.

89 Columbia Law School Human Rights Institute (n 82) 5.

90 Eg, through the United Cities and Local Governments (UCLG), various local government structures from contracting state parties can collaborate to address a wide array of human rights issues.

91 HP Aust & A du Plessis 'Introduction: The globalisation of urban governance – Legal perspectives on Sustainable Development Goal 11' in HP Aust & A du Plessis (eds) *The globalisation of urban governance: Legal perspectives on Sustainable Development Goal 11* (2019) 5.

Between the state and local government, the Human Rights Council alludes to the notion of 'shared and complementary duties to respect, protect and fulfil human rights'.[92] After ratification, the state is bound to comply with obligations imposed by international human rights treaties. Hence, local governments form part of the state and are obliged to fulfil human rights obligations at the grassroots level. In its General Comment 16, the ESCR Committee emphasises that 'violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by states parties, or through their institutions or agencies at the national and local levels'.[93]

The UN Special Rapporteur on Adequate Housing provides a comprehensive framework on the role of local government in the realisation of the right to access adequate housing.[94] The Special Rapporteur acknowledges the significance of assigning crucial responsibilities relating to the right to adequate housing to local governments.[95] Among other things, the responsibilities consist of the production and management of social housing and infrastructure, land use planning, the upgrading of informal settlements, and the regulation of investor-driven markets.[96] Local governments enjoy close proximity to affected communities. They may be able to promote participatory decision making as opposed to other spheres of government, and are best capable of developing innovative solutions that adapt to local circumstances. UN-HABITAT states that the role governments should be playing involves 'providing supportive institutional, legislative, regulatory and financial environments, within which other actors can operate more effectively, and also intervening in land, housing and financial markets that so far are incompatible with the needs of the poor'.[97]

Local government's obligations to realise the right to housing must be through clearly delineated responsibilities established by national legislation. Consistent with norms and standards established at the national level, local governments should implement human rights-based housing strategies, with the goal of fully realising the

92 United Nations Human Rights Council 'Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee' AHRC/30/49 (2015) 5.
93 General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art 3 of the Covenant), 11 August 2005 para 42.
94 As above.
95 General Comment 16 (n 93) para 59.
96 As above.
97 UN-HABITAT 'Enabling shelter strategies: Review of experience from two decades of experience' (2006) 28.

right of access to adequate housing. General Comment 4 implies that, for the purposes of accountability in relation to the realisation of the right to housing, there must be clear processes that outline co-ordination among national, regional and local authorities.[98] The national government must empower local governments with housing strategies and adequate resources to ensure that they have the capacity to effectively implement the assigned housing functions. The Special Rapporteur bemoans the fact that local governments are assigned the obligation to realise the right to housing without the commensurate allocation of resources, knowledge, capacity and accountability mechanisms.[99]

Local governments must ensure that there is an adequate supply of housing that meets the needs of all who require this. This includes taking measures to address homelessness and ensuring that there are affordable housing options for low and middle-income households. Indeed, the nature to which local government may aim to realise the right to adequate housing hinges on the standards for local government and human rights.

Local governments may integrate human rights into their by-laws, policies and practice through several strategies.[100] First, they may adopt resolutions that affirm local commitments to the realisation of human rights. Second, as reflected in these resolutions, local governments can reframe local concerns to inform their responses to issues such as the lack of adequate housing. Third, through greater public participation, local government can address the identified local concerns by aligning, formulating and implementing the appropriate policies and programmes.[101] Fourth, to ascertain the impact and effectiveness of their policies and programme to identify barriers to reaching intended beneficiaries, local governments may conduct human rights-based audits and impact assessments. Finally, the Columbia Law School Human Rights Institute indicates that, with the intent for self-assessment regarding compliance with human rights standards, local government can engage in the periodic human rights treaty reporting process.[102] In the same vein, the fifth action plan of the Municipalist Declaration of Local Governments for the

98 General Comment 4 para 12.
99 United Nations Human Rights Council (n 47) para 60.
100 Columbia Law School Human Rights Institute (n 82) 7.
101 This aspect requires local governments to constantly evaluate their abilities to respond to local housing issues by collecting quantitative and qualitative data. Thus, this practice helps them to ensure that their policies and programmes are achieving intended results.
102 Columbia Law School Human Rights Institute 'Human rights recommendations to the United States: A desk reference for state and local human rights agencies' (2016) 5.

Right to Housing and the Right to the City calls for city governments to effectively cooperate with both national and international supra-municipal bodies to share knowledge and the best practices in urban and residential policies.

Having examined the global patterns of local government obligations in housing, the article now shifts focus to the domestic legal framework governing local government's roles, powers, functions and responsibilities in South Africa. This overview delves into the constitutional and legislative frameworks that shape the mandate of local government in addressing housing needs and delivering housing services. By exploring the domestic legal landscape, this part of the article aims to provide an understanding of the legal foundations underlying local government's housing roles, powers, functions and responsibilities in South Africa.

## 4 An overview of the domestic legal framework for local governments' housing roles, powers, functions and responsibilities

Part B of Schedules 4 and 5 of the Constitution lists functional areas over which a municipality has executive authority and the right to administer local government matters.[103] Schedule 4A of the Constitution lists housing as concurrent competency of national and provincial governments. Nonetheless, the national and provincial governments may still assign housing powers and functions to local governments.[104] However, the assignee municipality must have the competent capacity to best effectively administer the function locally.

The procedures for assigning functions to municipalities are set out in sections 99, 126 and 156(4) of the Constitution as well as sections 10 and 10A of the Municipal Systems Act.[105] The national minister or the provincial member of executive committee (MEC) responsible for housing, who initiates the assigning legislation or agreement, must take appropriate steps to provide sufficient funding and capacity-building initiatives to the assignee municipality.[106] These measures assist the municipality in effectively performing the assigned housing function or power.[107] It must be noted that there is

103 Secs 156(1) & 156(2) of the Constitution.
104 Sec 156(4) of the Constitution.
105 Act 32 of 2000.
106 Sec 10(3) Municipal Systems Act.
107 Before assignment of the housing functions or powers, a municipality is first accredited to administer national housing programmes. Accreditation is a capacitation measure towards the assignment and has been recognised on

a difference between the housing obligations and attendant powers that national legislation gives to all municipalities and those that pertain only to municipalities that are duly accredited to administer national housing programmes and thus, assigned to fulfil the housing functions and powers.

Despite the fact that the Constitution does not confer on local government the primary responsibility to implement the right to housing,[108] certain matters under Part B of Schedule 4 relate to housing. This includes building regulations, electricity and gas reticulation, potable water supply system, stormwater management systems in built-up areas, sanitation and waste disposal. However, even though several of the listed functions and powers relating to housing, 'they do not place the primary obligation to take the requisite measures for the fulfilment of the right to housing on local government'.[109]

Where housing is a constitutional right, the provision of housing is one of the fundamental duties of the state.[110] Section 7(2) of the Constitution imposes four different types of duties on the state,namely, the obligation to *respect, protect, promote* and *fulfil* the fundamental rights enshrined in the Bill of Rights. The duties to respect and protect are viewed as imposing negative duties on the state, whereas the duties to promote and fulfil are regarded as placing positive duties on the state.[111] The duty to 'respect' requires the state to desist from directly or indirectly implementing any practice, policy or legal measure that infringes the right to access housing. The duty to 'protect' imposes a positive obligation on the state to regulate, prevent and remedy any breaches of the right to housing by non-state actors.[112] Under the duty to 'promote', the state must adopt educational and informational programmes 'designed to enhance awareness and understanding of fundamental human rights'.[113] With the duty to 'fulfil', the state is required to adopt appropriate legislative and other measures to ensure the full realisation of the right to housing. This duty encompasses interventionist measures aimed at assisting disadvantaged groups that lack adequate housing.

paper, since 2009. See Department of Human Settlements 'Simplified guide to the National Housing Code' (2009) 5; K Tissington '"Jumping the queue", waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa' (2013).

108 De Visser (n 86) 205.

109 As above.

110 Global Strategy for Shelter to the Year 2000 para 13.

111 K Tissington 'A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice' (2011) 11.

112 Individuals and private entities are regulated by the state to prevent interference with the rights of individuals and groups; De Vos & Freedman (n 8) 796.

113 De Vos & Freedman (n 8) 797.

The constitutional right of access to adequate housing is given effect by several statutes that also allocate housing roles and responsibilities to local government. The Housing Act[114] provides municipalities with limited roles and responsibilities in social housing developments. Every municipality must 'ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis',[115] and that housing development provides individuals and communities with a variety of choices of housing and tenure options.[116]

The Social Housing Act requires a municipality to create conducive conditions that preserve the health and safety of residents and to ensure economically efficient services of water, sanitation, electricity, roads, stormwater drainage and transport.[117] South Africa's initial state report to the ESCR Committee also notes the following: 'Municipalities must ensure that the right to housing is progressively realised in their jurisdiction. They must also identify and designate land for housing and ensure that water, sanitation, electricity, roads, storm water drainage and transport are provided.[118]

The Act provides that, through collaboration with the social housing institutions and national and provincial governments, the local government must support the development of low to medium-income communities by providing housing with proximity to transport, markets and employment.[119] The national, provincial and local spheres of government must promote the suitable location of social housing stock in respect of employment opportunities.[120] Housing development must prioritise the poor,[121] meet the special housing needs of persons with disabilities,[122] marginalised women and other disadvantaged groups facing unfair discrimination,[123] including children, child-headed households, persons with disabilities and older persons.[124]

114 Act 107 of 1997.
115 Sec 9(1)(a)(i) Housing Act.
116 Sec 2(1)(c) Housing Act.
117 Secs 9(1)(a)(ii) & (iii) Social Housing Act 16 of 2008.
118 ESCR Committee (n 18) para 98.
119 Sec 2(1)(b) Social Housing Act.
120 Sec 2(1)(e)(viii) Social Housing Act.
121 Sec 2(1)(a) Housing Act.
122 Sec 2(2)(e)(viii) Housing Act.
123 Sec 2(2)(e)(x) Housing Act.
124 Sec 2(1)(a) Social Housing Act.

## 5 Adjudicating the constitutional right to adequate housing

In its monitoring report, the ESCR Committee recognises that the South African Constitution is one of the few constitutions in the world that contains a wide range of justiciable socio-economic rights.[125] Among all socio-economic rights ensconced in the Constitution, the most frequently litigated is the right of access to adequate housing.[126]

The case of *Government of the Republic of South Africa & Others v Grootboom & Others*[127] is viewed as the paramount litigation for socio-economic rights jurisprudence in South Africa. It is the first matter in which the right to access to adequate housing was entertained by the Constitutional Court.[128] It was held that the fulfilment of obligations imposed by the right to access to adequate housing requires proper and effective cooperation between the different spheres of government,[129] a breach of which would amount to a transgression of the right.[130] Subsequent cases that adjudicated on this right have also reaffirmed its justiciability against the local government.[131] Together with other spheres of government, the Court in *Grootboom* jointly implicated the local government in the actualisation of the right to housing by stating:[132]

> All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level

125 ESCR Committee (n 18) para 4.
126 Chenwi (n 1) 74.
127 2001 (1) SA 46 (CC).
128 M Pieterse 'Balancing socio-economic rights: Confronting COVID-19 in South Africa's informal urban settlements (2021) 39 *Nordic Journal of Human Rights* 41; P de Vos '*Grootboom,* the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258; L Chenwi 'Housing for persons with disabilities in South Africa' (2021) 21 *International Journal of Housing Policy* 324.
129 *Grootboom* (n 127) para 68. A major aspect of the Constitutional Court's handling of the matter was its use of international law in protecting and enforcing the housing rights of the homeless and landless people.
130 Currie & De Waal (n 17) 34.
131 *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (*Modderklip* (SCA)); *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). Socio-Economic Rights Institute of South Africa 'Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government' (2013) 3; M Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) 28 *South African Journal on Human Rights* 360.
132 *Grootboom* (n 127) para 82.

of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.

Moreover, meaningful engagement is of paramount importance for a court to assess if the eviction is just and equitable. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[133] the Constitutional Court stated that '[t]here must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their dignity.'[134]

Where the relocation process concerns several households, the government has a duty to engage meaningfully with residents, both individually and collectively. With meaningful engagement, the government is enabled to fully comprehend the needs and concerns of individual households and may ascertain the appropriate steps on how to address these concerns. The Court further held that 'the goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing'.[135]

In *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*[136] the Court held that 'every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2)'.[137] Similarly important, before evicting occupiers who could be rendered homeless afterwards, the Court held that it is essential for a municipality to meaningfully engage before ejecting people.

The primary focus of meaningful engagement is mutual understanding and the accommodation of each other's concerns, instead of merely coming to any terms just to reach an agreement. A well-structured and coordinated meaningful engagement is free from confusion, misunderstanding and mistrust, which are detrimental to the relocation project. For a solution, these shortcomings often lead to court intervention. A compelling assertion by Saul rejects the contention that meaningful engagement is a

133 2010 (3) SA 545 (CC).
134 *Joe Slovo* (n 133) para 238.
135 *Joe Slovo* (n 133) para 244.
136 2008 (3) 208 (CC).
137 *Olivia Road* (n 136) para 17. The Court also declared as unconstitutional sec 12(6) of the National Building Regulations and Building Standards Act for criminalising building occupation after a notice to vacate was served but without a court order; paras 47-51, 54(5) & (6).

procedural mechanism.[138] This rejection concurs with Liebenberg's stance, which views meaningful engagement as a constructive and transformative judicial measure with substantive implications for the application of section 26(3) of the Constitution.[139] When all is said and done, 'the achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves'.[140]

However, in the context of evictions jurisprudence, Liebenberg also argues that the Constitutional Court has been inconsistent in its application of the meaningful engagement principle.[141] According to Liebenberg, the Court has sometimes been too lenient in its assessment of the state's compliance with this principle, while at other times it has been overly rigid. For instance, in *Olivia Road* the Court 'emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason'.[142] This inconsistency has significant implications for the protection of socio-economic rights in South Africa. If the state is not held to a consistent standard of meaningful engagement, it may undermine the effectiveness of these rights and perpetuate inequality and injustice.

Following the analysis of adjudicating the constitutional right to adequate housing, the article delves into the judicial enforcement of this right in South Africa, guided by baseline factors of General Comment 4. These factors provide a framework for assessing the effectiveness of the judiciary in upholding the right to adequate housing, considering the housing crisis and its implications, relevant legislation and case law, landmark cases and their impact, and courts' ability to enforce housing rights.

### 5.1 Legal security of tenure

The most detrimental manifestation of tenure insecurity is vulnerability to eviction. Even the ESCR Committee expressed grave concerns about the rampant nature of illegal evictions and the excessive use

138 Z Saul 'Developing a community engagement model as a normative framework for meaningful engagement during evictions' LLD thesis, University of the Western Cape, 2016 7.
139 S Liebenberg *Socio-economic rights: Adjudication under transformative constitution* (2010) 302.
140 *Olivia Road* (n 136) para 407.
141 S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 28-29.
142 Liebenberg (n 141) 19. See also *Olivia Road* (n 136) para 30.

of force during evictions in South Africa.[143] Hence, recommending that South Africa should ensure that the implementation of evictions is a measure of last resort, without the use of force and in conformity to international human rights standards.[144]

*Grootboom* remains an instrumental benchmark in terms of upholding the right to housing in relation to evictions or removals.[145] In this matter, the Constitutional Court asserted the legal security of the tenure of evictees. The Court held that the functions of national, provincial, and local government in housing development are to 'provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements'.[146] In particular, local governments must enforce laws and policies that protect tenure rights, such as registration and titling systems; providing secure tenure options, and establish mechanisms for resolving tenure disputes while protecting vulnerable and disadvantaged groups.

In *Despatch Municipality v Sunrige Estate and Development Corporation (Pty) Ltd*[147] the Court declared that section 3B of the Prevention of Illegal Squatting Act,[148] which permitted land owners to demolish buildings or structures erected on their land without first requiring a lawful court order, was in violation of occupiers' rights. Similarly, in *Joe Slovo* the Court nullified the municipality's actions of removing applicants from their homes, the demolition of their homes, and their relocation. Also, the Court in *Joe Slovo* held that 'considerations of equity and justice require that the order for eviction, now suitably amplified to make it a great deal fairer'.[149]

In *Port Elizabeth Municipality v Various Occupiers*[150] the Constitutional Court nullified the eviction of occupants who unlawfully erected their own shelter on vacant, unused and private land. The Court also pointed out that the homeless must still be treated with dignity while awaiting access to new social housing developments.[151] In *Fischer v Persons Unknown*[152] the City of Cape Town was ordered to construct

143 ESCR Committee (n 18) para 58.
144 ESCR Committee (n 18) para 59.
145 BO Mmusinyane 'Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India' PhD thesis, University of South Africa, 2015 290.
146 *Grootboom* (n 127) para 51.
147 1997 (4) SA 596 (SE).
148 Act 52 of 1951.
149 *Joe Slovo* (n 133) para 409.
150 2005 (1) SA (CC).
151 *Joe Slovo* (n 133) para 12.
152 2014 (3) SA 291 (WCC).

the informal structures that had been demolished and to provide temporary habitable dwellings that afford residents shelter, privacy and amenities.

These judgments marked significant victories for the rights of informal settlement dwellers, vulnerable and disadvantaged communities. For instance, in *Fischer v Persons Unknown*,[153] by ordering the City to reconstruct the demolished structures and provide temporary habitable dwellings, the Court upheld the constitutional rights to adequate housing, dignity and security of the person. This decision highlights the judiciary's role in holding municipalities accountable for their obligations to provide housing and protect the rights of vulnerable communities.

However, the implementation of the Court's order poses practical challenges. The City's ability to provide suitable temporary dwellings that meet the required standards of habitability, shelter, privacy and amenities may be limited by resource constraints. Moreover, the judgment raises questions about the long-term sustainability of temporary solutions and the need for comprehensive housing policies that address the root causes of informal settlements. Ultimately, the effectiveness of the Court's order will depend on the City's commitment to implementing it and working towards more durable solutions for the affected communities.

Therefore, local governments must implement policies and practices that protect residents from arbitrary evictions, forced displacement and tenure insecurity. The right to legal security of tenure can be fulfilled through various forms of tenure, such as title deeds, leases or occupancy rights, and by ensuring that evictions are carried out only as a last resort, in accordance with the law, and with adequate compensation or alternative housing. By securing tenure rights, local governments can promote stability, dignity and security for residents, particularly vulnerable groups, and prevent homelessness and displacement.

Building on the importance of legal security of tenure as a fundamental part of adequate housing, below the focus falls on another critical aspect: the availability of essential services, materials, facilities and infrastructure. This component is vital for ensuring that housing is not only secure but also liveable and conducive to a dignified life.

153 As above.

### 5.2 Availability of services, materials, facilities and infrastructure

The sustainable access to services, materials, facilities and infrastructure is essential for health, security, comfort and nutrition. Informal housing with minimal amenities causes people to suffer great material inadequacies.[154] Each sphere of government must accept responsibility for the implementation of specific parts of the social housing programme.[155] In *Grootboom* the Court stated that the right to access to adequate housing obliges the government to provide access to services such as water, sewage, electricity and roads.[156] Conscious of the need to ameliorate the deplorable living conditions for all, the obligation to act positively and provide these services caters to both lawful residents and unlawful occupiers. The Court also held that 'every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing'.[157] These facilities and services have a bearing on spatial planning as well as land use and management. When a municipality provides services to residents in temporary residential units, it is fulfilling its statutory and constitutional obligations.[158]

Similarly, in both *Grootboom*[159] and *Joe Slovo*[160] it was pointed out that upholding the right to human dignity meant the local government had to fulfil its obligation of providing basic services to the poor and the most vulnerable people. In *Joe Slovo*, the order to vacate the land was conditional, subject to the occupiers' relocation to temporary residential units that meet several conditions listed by the Court. The specifications in the list include basic services, materials, facilities and infrastructure that are indispensable for adequate housing.[161]

154 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) SA 104 (CC) para 363.
155 *Grootboom* (n 127) para 40.
156 *Grootboom* (n 127) para 37.
157 *Grootboom* (n 127) para 82.
158 *Grootboom* (n 127) paras 29 & 39. Sec 152(1)(b) of the Constitution provides that the object of local government is 'to ensure the provision of services to communities in a sustainable manner'. According to sec 152(1)(d)) of the Constitution, the local government must 'promote a safe and healthy environment'. Sec 73(1)(c) of Municipal Systems Act gives effect to these constitutional duties and requires municipalities to provide communities with the 'minimum level of basic municipal services'. This Court has held that the obligation of the state to the poor and the most vulnerable includes treating them as human beings and providing them with services. Eg, *Grootboom* (n 127) paras 44 & 82-83.
159 *Grootboom* paras 44 & 82-83.
160 *Joe Slovo* (n 133) para 209.
161 Some of the requirements for temporary residential accommodation units are tarred roads; walls constructed with a substance called Nutec; a galvanised iron roof; a pre-paid electricity meter; being situated within reasonable proximity of a

Local governments must therefore 'fulfil their constitutional mandate to provide basic human rights and services, such as housing, water and sanitation, so that all who live in South Africa can live a life of dignity, equality and safety'.[162] Indeed, local governments' duties go beyond just building houses. They aim to create sustainable human settlements by ensuring access to essential services such as the provision of clean water and proper sanitation facilities, the supply of a reliable electricity connection, the building and maintaining of roads for accessibility within the community, and the development of schools, clinics and community centres. The availability and geographic distribution of all these services, materials, facilities and infrastructure complements the quest for the realisation of the right to adequate housing.

The element of availability of resources in the fulfilment of socio-economic rights is a highly contentious issue during the judicial enforcement of these rights.[163] In *Thubakgale*[164] the Constitutional Court held that 'the objective of socio-economic rights is not to give South Africans access to necessities of life within a fixed period of time. But it is to set goals to achieve this purpose over time.'[165] As far as the time period is concerned, De Wet contends that if the state unreasonably takes a long time to provide housing, it would be sufficient to conclude that there is a dereliction of duty on the part of the state.[166] In *Grootboom* it was held that '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.'[167] The realisation of the right of access to adequate housing is limited by the qualification that it is available only to the extent that state resources are available. Therefore, 'the availability of appropriate resources is a necessary condition for reasonable'. [168]

Accordingly, local governments must ensure residents' access to essential services such as clean water, sanitation, electricity and waste management. This involves investing in infrastructure development, maintaining existing services, and providing affordable and reliable

communal ablution facility; toilet facilities with water-borne sewerage; and fresh water; *Joe Slovo* (n 133) para 10.

162 Amnesty International 'Poor service delivery deprives people of dignity and their basic human rights' 5 July 2021, https://tinyurl.com/yxzfur85 (accessed 13 June 2024).

163 De Vos & Freedman (n 8) 815.

164 [2021] ZACC 45 paras 86-89 & 109.

165 *Thubakgale* (n 164) 164.

166 E de Wet *The constitutional enforceability of economic and social rights: The meaning of the German Constitutional Model for South Africa* (1996) 118.

167 *Grootboom* (n 127) para 46.

168 Currie & De Waal (n 17) 581.

access to these necessities. These services, materials, facilities and infrastructure are essential to create healthy and safe living environments, support residents' well-being, and promote dignity, ultimately contributing to the realisation of the right to adequate housing for all.

Following the discussion on the availability of essential services, materials, facilities and infrastructure, the following part explores major aspects of affordability. This part touches the various factors that influence housing affordability, including income levels, housing prices, rental costs and government policies.

### 5.3 Affordability

Affordability ensures that housing costs do not compromise an individual's or household's ability to meet other basic needs, such as food, health care and education. Given the persistent economic inequalities in South Africa, issues of property values, housing costs and income distribution across different areas have a bearing on housing affordability.[169] Hence, it is critical to identify strategies to make housing more accessible and sustainable for all, particularly vulnerable populations. Primarily, discrepancies in housing affordability are largely influenced by urban real estate markets. The Constitutional Court in *Grootboom* elaborated on housing affordability as follows:[170]

> [T]here is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups.

The plight of the poor who struggle to afford adequate housing in the urban cores was also highlighted in *Adonisi & Others v Minister for Transport and Public Works Western Cape & Others*.[171] According to the Court:[172]

169 E Govender 'The impact of housing costs on household income across primary and secondary areas in South Africa' Master's dissertation, Stellenbosch University, 2020 1.
170 *Grootboom* (n 127) para 36.
171 *Adonisi & Others v Minister for Transport and Public Works Western Cape & Others; Minister of Human Settlements & Others v Premier of the Western Cape Province & Others* [2021] 4 All SA 69 (WCC) para 34.
172 As above.

> The working class residents and the poor are unable to afford accommodation in the inner city or the surrounding central areas. Consequently, poorer residents of the city have to spend high percentages of their income on travelling costs to reach their places of employment, or to enjoy the city's many public and private amenities.

The *Adonisi* judgment also implicated the local government in the provision of affordable housing. It was held that 'all levels of state are to provide affordable housing'.[173] Accordingly, local government has the obligation to formulate and implement policies and programmes that allow everyone to afford housing, either for rental or purchasing, irrespective of income or access to economic resources.

The judgments highlight the necessity of local governments to implement policies and programmes that promote reasonable housing costs and without compromising residents' ability to meet other basic needs; therefore, implementing suitable subsidies, rent control measures and incentives for developers to build affordable housing. Additionally, local governments must prioritise mixed-income housing developments and community land trusts to maintain affordability and prevent gentrification, ultimately making housing accessible to low-income and vulnerable populations and promoting equitable access to safe and secure living environments.

### 5.4 Habitability

The Constitutional Court in *Blue Moonlight* stated that the primary purpose of including justiciable socio-economic rights in the Constitution is to address peoples' deplorable living conditions.[174] Indeed, the provision of justiciable socio-economic rights in the Constitution is a powerful tool for advancing human dignity, equality and social welfare of marginalised and disadvantaged groups.

In relation to habitability, the Court in *Joe Slovo* exposed several issues that constitute non-compliance with the established adequacy standards.[175] The construction of dwellings contravened municipal or building laws. Inadequate housing was also marked by arbitrarily drawn plots, lack of space for basic services, invariably density population, layout hindering installation of basic services, and poorly built dwellings that are largely unhygienic and prone to fire risks.

173 *Adonisi* (n 171) para 75.
174 *Adonisi* (n 171) para 197.
175 *Joe Slovo* (n 133) para 191.

The Constitutional Court's engagement order in *Olivia Road* precludes a municipality from separating '[the] duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other'.[176]

Safe and healthy buildings adhere to the internally accepted prescripts for the realisation of the right of access to adequate housing. When the safety of households is under threat due to natural disasters, the state is required to take precautionary steps to secure human life, health and safety. These measures may include the removal of residents from the disaster-stricken areas. In *Pheko & Others v Ekurhuleni Metropolitan Municipality*[177] the municipality discovered the development of sink holes in Bapsfontein, a privately owned land within the municipal area. The area was considered unstable for human settlements. Having initially relocated approximately 150 families from Bapsfontein in 2005, the municipality saw the necessity to again relocate new occupiers who subsequently erected shelters in the same area, without the municipality's endorsement. In *Blue Moonlight* the Constitutional Court conceded that social justice within a stable constitutional democracy is contingent upon the quest for a roof over one's head.[178] The municipality was ordered to provide temporary emergency accommodation to occupiers, including the victims evicted by private land owners.[179]

The habitability aspect requires local governments to ensure that housing developments meet basic standards of safety, health and comfort. This includes enforcing building codes and regulations to guarantee structurally sound and weather-tight dwellings, providing access to clean water, sanitation and waste management services, and implementing measures to prevent overcrowding and promote adequate ventilation and lighting; hence, protecting residents from health hazards and creating living environments that support physical and mental well-being, ultimately contributing to the realisation of the right to adequate housing.

176 *Olivia Road* (n 136) para 44.
177 2012 (2) SA 598 (CC).
178 *Blue Moonlight* (n 154) para 2.
179 *Blue Moonlight* (n 154) para 87.

### 5.5 Accessibility

'Accessibility' has been associated with the term 'progressive realisation' in *Grootboom* as the Court stated the following:[180]

> It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

The progressive realisation of the right of access to housing refers to the gradual process by which local governments fulfil their obligation to ensure that everyone has access to adequate housing. It acknowledges that achieving this goal might take time and resources, but a continuous effort is required. The notion about the gradual fulfilment of the right to access to adequate housing does not mean that everyone immediately gets a home. Rather, it is a commitment by the local government to work towards steadily improving housing conditions for all residents. The progressive realisation of the right to adequate housing is also resource dependent, meaning that local governments' ability to provide housing is influenced by their available resources, acting within its budget and economic capacity. Progressive realisation also requires careful planning and prioritisation. Local governments need to set clear goals and prioritise efforts to reach those experiencing the most significant housing challenges.

The concept of progressive realisation can also apply to *in situ* upgrading, which refers to the improvement of existing informal settlements, that are generally located in peripheral areas, where people already live.[181] Apart from providing secure land tenure for residents, upgrading infrastructure such as like sanitation, water supply and sanitation systems improves the quality of housing structures. Upgrading is implemented in stages, progressively improving living conditions without displacing residents. This approach respects existing communities and allows residents to participate in the improvement process.

180 *Blue Moonlight* (n 154) para 49.

181 H Wang 'Consolidating informal settlements through upgrading? The temporary implications of in-situ electrification from Thembelihle in Johannesburg, South Africa' (2022) 59 *Journal of Asian and African Studies* 425; Isandla Institute 'Participatory informal settlement upgrading in South Africa: Moving from theory to practice' (2014) 6-7.

In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd & Others*[182] it was underscored that 'the progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected'.[183] These vital and cumbersome processes must be carried out in an orderly and predictable manner. The Court boldly empathised with the affected homeless people, and held:[184]

> The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people.

The government has a constitutional obligation towards landless people and those who suffer deplorable living conditions.[185] Until an alternative accommodation is found, this is a duty that the government owes to 'landless people to provide them with access to adequate housing'.[186] Additionally, in *Joe Slovo* the Constitutional Court declared that 70 per cent of the new houses built on the site of the Joe Slovo informal settlement must be allocated to qualifying current and former.[187]

A minority judgment of the Constitutional Court in *Thubakgale v Ekurhuleni Metropolitan Municipality & Others*[188] touched on the issue of 'adequacy' as one of the primary components of the right to housing. The Court's analysis prompted the need to include defining features of adequate housing such as accessibility, affordability and location. It was held that the 'Court should be wary of endorsing housing solutions which enhance the segregation of our cities and may cause great difficulties to already vulnerable people'.[189] Having established social networks, and reliance on schools and jobs near Tembisa, the applicants' resettlement to Palm Ridge could result in daily commuting and prohibitive costs. Hence, this might 'have the same racist context as apartheid's forced removals'.

By designing and constructing housing that is physically accessible to all, including persons with disabilities, the elderly

182 [2005] 8 BCLR 786 (CC) para 49.
183 *Modderklip Boerdery* (n 182) para 49.
184 *Modderklip Boerdery* para 36.
185 *Joe Slovo* (n 133) para 214.
186 As above.
187 *Joe Slovo* (n 133) para 5.
188 [2021] ZACC 45 at paras 86-89 and 109.
189 *Thubakgale* (n 188) para 115.

and other vulnerable groups, local governments can promote equitable accessibility and realise the right to adequate housing. The incorporation of universal design principles, such as wheelchair ramps, wide doorways and adaptable interior spaces, into housing developments is crucial. Additionally, local governments must prioritise the allocation of accessible housing units to those who need them most, and ensure that housing developments are situated in areas with accessible public transportation and community facilities, thereby promoting equal access to opportunities and services for all residents.

### 5.6 Location

Access to land is a fundamental element of the realisation of the right to adequate housing. According to Shandu and Clark, 'the centrality of land – particularly well-located land – as a tool in any programme to dismantle the apartheid city cannot be overstated'.[190] Among the predicaments are restrictions from the urban real estate market which causes well-located land in urban areas to be very expensive, thus, hampering the affordability of housing construction at scale. The government's housing programmes constantly face criticism for minimal commitment to redressing the end results of spatial apartheid.[191] Instead, the implementation of these programmes, through municipal planning, has contributed to the problem by constructing most of the new housing developments in the urban peripheries. The implementation process merely concentrates on the number of housing units delivered rather than the creation of sustainable integrated human settlements.

The government may provide housing, but if the developments are planned and implemented in poorly located areas, this hampers efforts to achieve spatial equity. Hence, the courts play a significant role in the quest to address the ramifications of apartheid spatial planning, land use and housing laws and practices.[192] When all avenues have been exhausted, 'judicial recourse (as a measure of last resort) offers a solution to marginalised communities who reside in socially and economically disadvantaged areas'.[193]

190 M Shandu & M Clark 'Rethinking property: Towards a values-based approach to property relations in South Africa' (2021) 11 *Constitutional Court Review* 41.
191 QN Tshazi 'Why a blanket approach to redressing spatial inequity is flawed' 19 August 2020, https://tinyurl.com/5enft9e6 (accessed 5 April 2025).
192 J van Wyk 'Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?' (2015) 30 *Southern African Public Law* 31.
193 P Mudau 'Western Cape High Court sets a new benchmark for promoting spatial equity, access to land and housing' (2020) 15 *Local Government Bulletin* 1.

In *Olivia Road*[194] the Constitutional Court stated that before proceeding with an eviction, local authorities are obliged to determine the availability of suitable alternative accommodation or land. However, the Court's judgment in *Olivia Road* is silent on the question of the location of the alternative accommodation. Chenwi decries the Court's silence as follows: 'The Constitutional Court should have defined the elements to be considered in determining the location of alternative accommodation such as proximity to livelihood opportunities and distance from original site, which have been emphasised at the international level.'[195]

Nonetheless, through meaningful engagement, the parties in *Olivia Road* agreed that the provision for alternative accommodation must be within the city. In both *Joe Slovo*[196] and *Thubakgale*[197] it was held that people did not have a right to be housed at the location of their choice. In a precise manner, Tshoose particularises these features as follows:[198]

> In order to address the housing backlog and concomitant socio-economic realities faced by inhabitants of informal settlements the following cardinal points are important. First, the government ought to identify land which is suitable for low cost housing. Secondly, government should provide the poor with access to serviced land on which they can erect a temporary dwelling which, over time, they can improve. This land needs to be reasonably close to basic services including schools and transport to the main centres of employment. Lastly, government ought to allocate land to those who use it for the benefit of the community, not just the benefit of the few who currently own it. This includes the land used by individuals and private companies for profit without any benefit to the people.

The Court deemed the Joe Slovo informal settlement to be well-located, as it is located halfway between Cape Town international airport and the central business district (CBD).[199] Thus, it was stated that '[w]here informal settlements were to be upgraded on well-located land, mechanisms were to be introduced to optimise the locational value, and preference would generally be given to medium-density social housing solutions'.[200] The Court in *Joe Slovo*

194 *Olivia Road* (n 136) para 43.
195 L Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' in S Woolman and others *Constitutional Court review (2009) 2* (2009) 387.
196 *Joe Slovo* (n 133) paras 107 & 254.
197 *Thubakgale* (n 188) para 169.
198 C Tshoose 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom'* (2015) 30 *Southern African Public Law* 110.
199 *Joe Slovo* (n 133) para 373.
200 As above.

further held that not all occupiers would be able to return to the Joe Slovo informal settlement. However, all of them would eventually be provided with permanent adequate housing.[201] It is important to also highlight that the order to vacate the land was conditional, subject to the occupiers' relocation to temporary residential units that meet several conditions listed by the Court. The specifications in the list included basic services, materials, facilities and infrastructure that are indispensable for adequate housing.[202]

In *Pheko*[203] the applicants also identified suitable land in the vicinity of Bapsfontein to which they could be relocated. However, according to the municipality, the land that was identified by applicants belonged to a different state department which was not willing to relinquish it for social housing purposes. Despite the unavailability of this land, the Court held that the municipality was still not absolved from fulfilling its duty to identify and designate land for housing development for the applicants. Hence, the Court ruled that the applicants are entitled to effective relief, which obviously depends on the municipality's ability to identify and designate land for purposes of realising the applicants' rights to access to adequate housing.[204] Furthermore, while striving to identify suitable land in the immediate vicinity of Bapsfontein for the relocation of the applicants, the municipality was ordered to meaningfully engage with them. Essentially, the Court granted supervisory relief wherein the municipality was required to report to the Court 'about, amongst other things, whether the land has been identified and designated to develop housing for the applicants'.[205]

While the cases of *Grootboom, Blue Moonlight* and *Joe Slovo* emphasise that the state's housing policy must accommodate the emergency housing needs of the most vulnerable members of society, the *Adonisi* judgment,[206] although it was subsequently overturned by the Supreme Court of Appeal,[207] extended beyond the temporary housing option and sought a durable solution to the lack of access to urban land, makeshift housing and spatial inequalities.[208]

201 *Joe Slovo* (n 133) paras 33, 46 & 260.
202 Some of the requirements for temporary residential accommodation units are tarred roads; walls constructed with a substance called Nutec; a galvanised iron roof; a pre-paid electricity meter; being situated within reasonable proximity of a communal ablution facility; toilet facilities with water-borne sewerage; and fresh water.
203 As above.
204 *Pheko* (n 177) para 50.
205 As above.
206 *Adonisi* (n 173) paras 201-202.
207 *Minister for Transport and Public Works: Western Cape & Others v Adonisi & Others* (522/2021 & 523/2021) [2024] ZASCA 47 para 4.
208 *Adonisi* (n 207) paras 201-202.

The Western Cape High Court read sections 26(2) and 25(5) of the Constitution in conjunction with the analysis of reasonableness employed in *Grootboom* to address the state's failure to implement a reasonable housing policy. The provincial and local governments were berated for lack of sensitivity and apathy toward redressing the plight of the urban poor who struggle to have access to housing and essential services and facilities that are available in the city. The Court's judgment attempted to clarify the enforcement of rights and opportunities for judicial oversight over spatial transformation-related issues.[209]

The Court nullified the sale of a well-located property under the ownership of the Western Cape provincial government.[210] It was held that the City of Cape Town together with the provincial government were jointly obliged to take the necessary measures aimed at enabling disadvantaged citizens to gain access to urban land on an equitable basis and for the progressive realisation of citizens' rights of access to adequate housing. The Court held that all spheres of government must jointly provide housing

> in locations proximal to socio-economic goods, services and opportunities, as expeditiously as possible, through the design and implementation of policies and programmes that not only provide better housing to the poor and marginalised, but also challenge and overcome spatial and socio-economic inequality and exclusion.[211]

Hence, the Court imposed a constitutional obligation derived from a joint reading of the rights to access adequate housing and equitable access to land in reference to the principles of spatial justice and the 'right to the city'. As a result, based on constitutional prescriptions, the 'adequacy' of social housing must be scrutinised based on its ability to address the historical injustices of spatial apartheid.

In this respect, Coggin demonstrates that the 'social function of property' may contribute to the transformation of 'spatial and historical geography' of the city'.[212] While commenting on the positive implications of the *Adonisi* judgment, Willems viewed the proceeds of the sale of the well-located property could not be used to construct affordable housing on less expensive land that is situated in the urban peripheries.[213] This move would amount

209 Mudau (n 187).
210 *Adonisi* (n 207) para 75.
211 As above.
212 T Coggin '"They're not making land anymore": A reading of the social function of property in *Adonisi*' (2022) 138 *South African Law Journal* 697.
213 S Willems 'To sell or not to sell? An analysis of the Tafelberg sale in the light of the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights' University of Cape Town, 2022 43.

to a violation of the right to access to adequate housing. The the genuine intentions of the Western Cape provincial government and the City of Cape Town in releasing well-located for housing the poor remains questionable. It seems that there is a silent policy preference for not developing low-cost housing in central areas due to a desire to preserve the lucrative real estate market. The Court in *Adonisi* encapsulated that there is a tendency to adhere to a policy of not developing government-subsidised housing in the CBD.[214] The Court further held:[215]

> the only meaningful way in which [the] shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land as exist in and around the CBD … Simply put, the procurement by the State of privately owned land in the inner city has become prohibitively expensive. Indeed, at the end of the day, there is no dispute between the Province and the City, on the one hand, and RTC on the other, over the shortage of state-owned land in or near the inner city which is available for the development of affordable housing and, in particular, social housing projects. In the result, unless meaningful attempts are made by the authorities to redress the situation, spatial apartheid will be perpetuated, not only in the inner city areas but across the greater Cape Peninsula.

However, Cotton expressed concern pertaining to adherence to the rule of law after the *Adonisi* judgment.[216] 'Given the slow pace and issues with noncompliance of court proceedings, the final outcome of the case with regards to affecting spatial justice remains to be seen.'[217] The slow space was obviously due to the fact the provincial and local governments lodged an appeal against the Court judgment, which was upheld by the Supreme Court of Appeal.[218] This Court ruled that the applicants improperly relied directly on the Constitution instead of the Housing Act and Social Housing Act, which give effect to the asserted constitutional rights. In addition, the Court held that no proper case was made for the province and municipality's obligation to provide social housing in central Cape Town.

Despite the municipalities' rights-related obligations in relation to housing as witnessed in *Grootboom*[219] and *Adonisi*,[220] the municipalities are reluctant to provide government-subsidised housing in well-located areas found in the inner city or adjacent spaces. The general

214 *Adonisi* (n 208) paras 302, 364, 400 & 440.
215 As above.
216 S Cotton 'Legal geographies of "community" in South Africa and the Tafelberg case (a children's story)' 22 January 2022, https://tinyurl.com/45w2rwww (accessed 13 June 2024).
217 As above.
218 *Adonisi* (n 208) para 4.
219 *Grootboom* (n 127) para 29.
220 *Adonisi* (n 173) para 75.

gaps and disconnects between the local government's housing functions or powers and its spatial development powers as well as the lack of full legal, institutional and structural commitment to place government-subsidised housing in the inner city contribute to the perpetuation of spatial segregation. In the absence of a focused and intentional practical implementation of the desired spatial transformation in the cities and towns, all the impressive laws, policies and programmes at the national, provincial and local levels will remain in vain.

All things considered, local governments in South Africa must prioritise housing developments in areas with access to essential services, such as schools, healthcare facilities, public transportation and employment opportunities. This requires also careful land use planning and zoning regulations to ensure that housing is situated in safe and healthy environments, away from environmental hazards and pollution. By considering the location of housing developments, local governments can promote social and economic integration, reduce commuting times and enhance the overall quality of life for residents, ultimately contributing to the realisation of the right to adequate housing

### 5.7 Cultural adequacy

The aspect of cultural adequacy in relation to the right to housing requires that the construction of buildings should give an expression of cultural identity and diversity of housing.[221] 'South Africa is a multi-cultured state and cultural diversity underlies the South African legal system.'[222] The functional area of 'cultural matters' is enumerated as a concurrent competency of the national and provincial spheres of government in Part A of Schedule 4 of the Constitution. More so, the Constitution in Part A of Schedule B allocates the functional area of 'provincial cultural matters' as an exclusive provincial legislative competence. The Constitution accommodates and protects ethnic, religious and linguistic groups, by recognising everyone's right to participate in the cultural life of their choice.[223] The Constitution also entrenches everyone's right to enjoy their culture, practise their religion and use their language.[224]

221 General Comment 4 para 8(g).
222 HC Roodt 'Cultural policy and the landscape of the law in South Africa' (2006) 12 *Fundamina* 203.
223 Sec 30 of the Constitution.
224 Sec 31 of the Constitution.

In South Africa, courts play a pivotal role in the promotion and accommodation of cultural identity and diversity.[225] Both the Housing Act[226] and the Social Housing Act[227] enjoin the local government to promote the expression of cultural identity and diversity in housing developments. However, there seldom is an exposition of how the element of cultural adequacy and its acceptability features in South African housing rights jurisprudence. Given the well-established vibrancy and activism of the judiciary in South Africa, the element of cultural adequacy still has a high likelihood for its entrenchment in the country's housing jurisprudence, laws, policies and programmes.

Roodt indicates that since the new constitutional dispensation, the government hardly pays attention to 'cultural policy as a tool in social, economic and physical development'.[228] More profoundly, Roodt observes that, together with other state entities, the local government fails to assign to culture any specific role and use in community development.[229] The integrated development plans of most municipalities do not feature the aspect of culture as part of social, economic and physical development.[230] Nawa argues that 'cultural policy can indeed maximise the power of culture to deconstruct and reconstruct decaying cities, plan new ones and build integrated societies'.[231] The Department of Arts and Culture states that a local cultural policy should reflect and articulate

> commitment to social development. This entails issues of identity, relationships, values and aspirations, diverse cultural, religious and cultural heritage background, social inclusion, cohesion, accessibility, xenophobia, youth, homelessness, health, women, cultural tourism, prisons, games (indigenous and modern) and sport.[232]

Meaningful engagement provides an opportunity to ensure that housing solutions are culturally adequate. After successfully applying for state-subsidised housing, beneficiaries may be involved in identifying the site of the housing construction and planning of the settlement. This offers an opportunity to express the cultural practices of their choice in the process. Although not specifically incorporating the aspect of cultural adequacy, the Constitutional

225 C Rautenbach 'Celebration of difference: Judicial accommodation of cultural and religious diversity in South Africa' (2010) 10 *International Journal of Diversity in Organisations, Communities and Nations* 117.
226 Sec 2(1)(e)(xi) Housing Act.
227 Sec 2(1)(i)(vii) Social Housing Act.
228 Roodt (n 222) 205.
229 As above.
230 Roodt (n 222) 3.
231 L Nawa 'Local cultural policy in South Africa: A tool for urban regeneration' (2016) 51 *Journal of Public Administration* 759.
232 Department of Arts and Culture 'Local cultural policy framework for South Africa: A guide for local authorities' (2010) 25.

Court in *Grootboom* held that the state bears the primary obligation to ensure that the housing system can facilitate self-built houses through planning laws.[233] Accordingly, this is an opportunity for engraining the aspect of cultural adequacy in the housing process and housing product.

Nonetheless, apart from waiting for judicial enforcement of this integral component, local governments in South Africa can integrate cultural adequacy in order to realise the right to adequate housing by proactively incorporating traditional and cultural practices into housing designs and community planning. They can consult with local communities and individuals to understand their cultural needs and preferences, such as incorporating traditional architectural styles, communal spaces and culturally significant features. In the process, local governments can create housing solutions that respect and promote the cultural identity of residents, ultimately enhancing the dignity and well-being of communities. This approach can also help to address historical injustices and promote social cohesion in post-apartheid South Africa.

## 6 Conclusion

General Comment 4 of the ESCR Committee outlines the integral components of the right to adequate housing. According to the Comment, adequate housing encompasses more than just four walls and a roof. It includes seven baseline factors that determine if a certain form of shelter amount to 'adequate housing', namely, security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

These components are essential to ensuring that housing is not only physical shelter but also a foundation for human dignity, health and well-being. The security of tenure protects individuals from forced evictions and harassment; the availability of services, materials and infrastructure involves access to safe drinking water, sanitation and energy; affordability ensures that housing costs do not compromise other basic needs; habitability guarantees safe and healthy living conditions; accessibility prioritises vulnerable groups; location allows access to employment, health care and education; and cultural adequacy involves respecting cultural identity and diversity in the housing process and housing product. These aspects

233 *Grootboom* (n 127) para 36.

are crucial for state parties to respect, promote, protect and fulfil the right to adequate housing for all individuals.

Global trends indicate that the realisation of human rights, particularly the right to adequate housing, is significantly influenced by local governments due to their proximity to communities and their role in implementing policies and programmes. Local governments are crucial in deciding on housing developments, allocating housing subsidies and managing social housing and infrastructure. They have a direct impact on residents' housing rights and are viewed as the frontline for enabling equal access to low-income and affordable housing. International human rights treaties may not specify obligations for local governments, but as part of the state, they are bound by human rights obligations and can incorporate international human rights standards into local law, policy, and practice.

Local governments have various responsibilities in realising the right to adequate housing, including land use planning, upgrading informal settlements and regulating investor-driven markets. To fulfil these responsibilities, they should be empowered with adequate resources and housing strategies by national and provincial governments. Strategies for integrating human rights into local governance include adopting resolutions affirming human rights commitments, reframing local concerns, enhancing public participation, conducting human rights-based audits, and engaging in treaty-reporting processes. By adopting these strategies and working collaboratively with provincial, national and international bodies, local governments can effectively realise the right to adequate housing for their residents.

South Africa has progressive housing laws, policies, programmes and jurisprudence that conform to the baseline factors.[234] Numerous litigations against the local government in relation to the judicial enforcement of the right of access to adequate housing revolve around housing backlogs, evictions and removals. Commendably, in varying degrees of impact, the phenomenon of judicial enforcement of the right to adequate housing consistently gives effect to the various integral components that are necessary to uphold the required standards of housing adequacy as underlined by General Comment 4.

In the process, local governments must ensure that housing is accessible to all, including persons with disabilities, old persons and

234 Chenwi (n 197) 68.

other vulnerable groups. To satisfy the right of access to adequate housing, the Constitutional Court obliges the local government to provide citizens and permanent residents with access to permanent residential structures with secure tenure.[235] Housing must be of adequate quality, and should involve the essential services, materials, facilities and infrastructure.[236] It must be structurally sound and safe for habitation.[237]

In this regard, the constitutional and legislative obligations imposed on local governments are aimed at promoting and protecting the rights and interests of socially and economically disadvantaged urbanites that oftentimes languish in urban peripheries. Therefore, the courts have established new benchmarks for judicial enforcement of access to land, housing and the achievement of spatial equity in urban areas.

## 7 Recommendations

Despite the courts' vigorous enforcement of the right to adequate housing, concerns remain in terms of the full realisation of the right. Hence, the article makes five recommendations. First, the judiciary should exercise continuous and robust oversight over local government's compliance with housing rights and hold them accountable for any violations.

Second, the national and provincial government should assign housing functions and powers to competent municipalities in order to accelerate the provision of increased housing units. The assignment process must be accompanied by ensuring that the assignee municipalities have sufficient resources in order to provide adequate housing developments and maintenance of services, materials, facilities and infrastructure. Accordingly, the national and provincial governments must increase budget allocation for housing to local governments.

Third, local government should prioritise the development of housing policies that cater to the needs of low-income and marginalised communities in well-located areas. These areas should allow these communities to have access to employment options, healthcare services, schools, childcare centres and other essential social facilities. Fourth, local government should engage with

235 *Grootboom* (n 127) para 51.
236 *Grootboom* (n 127) para 37.
237 *Joe Slovo* (n 133) para 191.

communities in a meaningful and transparent manner to understand their housing needs and priorities, consistent with local governments' constitutional and legal obligations.

The last recommendation concerns the element of cultural adequacy, which seldom features in international, regional and domestic legal frameworks, literature and housing rights jurisprudence. The article has also argued that the Constitutional Court in *Grootboom* held that the state bears the primary obligation to ensure that the housing system can facilitate self-built houses through planning laws.[238] This serves as an opportunity for engraining the aspect of cultural adequacy in the housing process and housing product. The aspect of cultural adequacy is another interesting area for further research. Cultural identity and diversity must be mainstreamed in housing projects.[239] Importantly, global case studies of successful culturally sensitive housing projects[240] can serve as benchmarks of how South Africa can efficiently and effectively incorporate the aspect of cultural adequacy in the realisation of the right to adequate housing.

238 *Grootboom* (n 127) para 36.
239 Shaheed (n 78).
240 T Hadjiyanni and others 'Toward culturally sensitive housing – Eliminating health disparities by accounting for health' (2012) 39 *Housing and Society* 149. See also KN Penna and others 'Indigenous engagement: Towards a culturally sensitive approach for inclusive economic development' (2022) 16 *International Journal of Humanities and Social Sciences* 447.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: K Moyo 'The place of international law under Zimbabwe's 2013 Constitution' (2025) 25 *African Human Rights Law Journal* 404-430
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a15

# The place of international law under Zimbabwe's 2013 Constitution

*Khulekani Moyo**
Senior Lecturer, School of Law, University of the Witwatersrand, South Africa
https://orcid.org/0000-0002-1608-5980

**Summary:** *The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a delicate balance between sovereign imperatives and global cooperation. Zimbabwe's 2013 Constitution contains generous provisions entrenching a place for the reception of international law norms in the domestic legal order. The article explores the legal principles relating to states' duties to implement, at the domestic level, their international normative obligations, and this includes a brief engagement with the main theoretical approaches that seek to explain the interplay between international law and national law. The article proceeds to provide a comprehensive analysis of the normative framework for the domestication of treaties in the Zimbabwean legal order. The article reveals some of the key challenges impeding the implementation of international law. The article further analyses the reception of customary international law under the Zimbabwean legal order, and thereafter evaluates the constitutional provisions relating to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation. What is clear from the article is that the interaction between the international and national legal regimes often raises tensions and anxieties as states attempt to balance their international obligations and national interests, highlighting the complex interaction between the two legal orders.*

* LLB (Zimbabwe) LLM (Oslo) LLD (Stellenbosch); khulekani.moyo@wits.ac.za

**Key words:** *Constitution of Zimbabwe; international law; human rights*

## 1 Introduction

Zimbabwe's 2013 Constitution introduces what could be regarded as a mixed approach with regard to the relationship between national law and international law, containing elements of both monism and dualism in the reception of international law. In a watershed moment for the country, Zimbabwe adopted a new Constitution on 22 May 2013.[1] The Constitution replaced the 1980 Independence Constitution negotiated at Lancaster House, London in 1979 (Independence Constitution).[2] What is remarkable about the Constitution is that, unlike the Independence Constitution whose only explicit reference to international law in relation to national law was only inserted in a 1993 constitutional amendment,[3] the former contains generous provisions entrenching international law under the constitutional framework.[4] The openness of the Constitution to international law can be identified in Chapter 2 which provides for National Objectives, in particular sections 12 and 34. Section

1 Constitution of Zimbabwe Amendment Act 20 of 2013 (Constitution).

2 See Lancaster House Agreement 21 December 1979, Southern Rhodesia Constitutional Conference held at Lancaster House, London September-December 1979 Report. The 1979 Constitution is attached as Annex C to the Conference Report. See https://sas-space.sas.ac.uk/5847/5/1979_Agreement.pdf (accessed 15 May 2024). The Independence Constitution came into effect on 18 December 1980.

3 Sec 111B was inserted as an amendment to the Independence Constitution through sec 12(1) of Act 4 of 1993 – Amendment 12. Sec 111B explicitly introduced for the first time, in the Zimbabwean Constitution, that treaties would not bind Zimbabwe at the international level unless approved by parliament, and that parliamentary incorporation is required for treaties to have domestic effect at the national level. Remarkably, Sec 12(2) of Act 4 of 1993 provided that the new sec 111B shall not have the effect of requiring parliamentary approval of any convention, treaty or agreement that was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require parliamentary approval or ratification. A discussion on whether treaties concluded by Zimbabwe before 1 November 1993 were directly applicable (self-executing) is beyond the scope of this article.

4 Sec 12(1) of the Constitution states that the foreign policy of Zimbabwe must be based on respect for international law as one of the principles underlying the country's international relations; sec 46(1)(c) prescribes the role of international law in the interpretation of the Declaration of Rights contained in Ch 4; sec 165(7) enjoins members of the judiciary to keep themselves abreast of developments in international law; sec 326 provides for the incorporation of customary international law in the domestic legal order; sec 327 addresses the ratification and incorporation of treaties and international agreements into the Zimbabwean municipal order; sec 34 enjoins the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law; and sec 244 provides that the Zimbabwe Human Rights Commission may require any person or entity to provide it with information it needs to prepare any report required to be submitted to any regional or international body under any human rights treaty binding on Zimbabwe.

12 provides that Zimbabwe's foreign policy must be based on the respect for international law and peaceful co-existence with other nations.[5] In addition, section 34 provides, as one of the country's national objectives, that '[t]he state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.

The impetus for incorporating international law norms in the domestic legal orders, especially those of most post-colonial African countries, has been largely motivated by the need to entrench human rights and democratic governance, under pressure from domestic constituencies. Shelton is of the view that countries that have experienced dictatorships or foreign colonial subjugation tend to be largely receptive to international legal norms.[6] An argument could be made that the failures of national municipal legal orders and, in some cases, their complicity, during colonial times, in the dehumanisation of the oppressed peoples may have inspired formerly colonised countries and oppressed peoples to resort to international law as a safety net.[7]

In drafting the Constitution, Zimbabwe followed the recent trend of borrowing from international and comparative normative frameworks in order to benefit from the lessons learned by others.[8] Also noteworthy is that the Declaration of Rights contained in Chapter 4 of the Constitution includes a comprehensive catalogue of economic, social and cultural rights, alongside civil and political rights, which is a fundamental departure from the Independence Constitution.[9] In that regard, the Constitution follows the approach of the South African[10] and Kenyan Constitutions,[11] which have

5 Secs 12(1)(b) & (c) of the Constitution.
6 D Shelton 'Introduction' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) 2.
7 As above. Sarkin has noted that the trend towards borrowing from international and comparative norms is particularly prevalent where new democracies emerging from years of domination and repression seek to entrench democracy and provide protection from human rights abuses. See J Sarkin 'The effect of constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 177.
8 The Zimbabwean Constitution in so many respects is largely similar to the 1996 South African Constitution and the 2010 Kenyan Constitution on the reception of international law. See Sarkin (n 7) 177 discussing the South African Constitution.
9 The Independence Constitution only enshrined civil and political rights in secs 11-23 with no provision for economic and social rights.
10 For a discussion of socio-economic rights under the 1996 Constitution of South Africa, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010).
11 See J Biegon & GM Musila (eds) *Judicial enforcement of socio-economic rights under the new Constitution*: *Challenges and opportunities for Kenya* (2011) for a comprehensive analysis of the rights contained in the 2010 Kenyan Constitution.

incorporated a litany of socio-economic rights alongside civil and political rights.[12] Significantly, Zimbabwean courts are endowed with the power to judicially enforce the protected rights, including a broad discretion to make any order that is just and equitable in the event of a rights infringement.[13]

The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a balance between sovereign imperatives and global cooperation. This interaction often raises tensions and anxieties as states attempt to balance their international obligations and national interests, highlighting the complex interaction between the two legal orders. This tension is often illustrated in the way in which national legal orders relate to one normative source of international law – treaty law. The question of the municipal application of international treaties is particularly pertinent for a country such as Zimbabwe, which has ratified a considerable number of treaties, especially in the area of human rights and humanitarian law, but in various instances has failed to translate these international obligations into justiciable norms in the municipal legal order.

The challenges encountered in implementing international law in Zimbabwe are revealed, for example, by the fact that a number of key treaties that Zimbabwe has ratified have remained unincorporated in the domestic legal order. There may be various reasons for this, including a lack of capacity or expertise in the relevant state departments that are responsible for spearheading the domestication of treaties.[14] In some cases, it could be the result of suspicion that international norms are curtailing the country's sovereign imperatives, in addition to concerns about the incompatibility of certain international law norms and the municipal legal order. Such factors are likely to inhibit the effective domestication of international norms. This, in turn, creates doubts on Zimbabwe's compliance with its international obligations at the domestic level. It also raises

12 Constitution of the Republic of South Africa, 1996. See Ch 2 for the Bill of Rights under the South African Constitution. Ch 4 of the Constitution of Kenya, 2010 also enshrines a comprehensive Bill of Rights spanning civil and political and economic, social and cultural rights.

13 Sec 175(6) of the Constitution. See also sec 86 on the power of courts to grant any appropriate remedy. For an analysis of the constitutionalisation of socio-economic rights under the Zimbabwean Constitution, see K 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* (2022) 319-346.

14 W Scholtz 'A few thoughts on section 231 of the South African Constitution, Act 108 of 1996: Notes and comments' (2004) *South African Yearbook of International Law* 212.

questions as to whether the country's municipal laws are aligned to its international legal imperatives.

This article is structured as follows. It starts by providing an overview of the international law principles on the domestication of international law norms in national law. This is followed by a brief description of the main theoretical approaches that seek to explain the interplay between international law and national law. The article proceeds to explore the legal principles relating to states' duties to implement, at the domestic level, their international normative obligations. This is followed by an analysis of the normative framework for the domestication of treaties in the Zimbabwean legal order. The article proceeds to discuss the reception of customary international law under the Zimbabwean legal order, and thereafter evaluates the constitutional provisions relating to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation, followed by the conclusion.

## 2 General principles on domestication of international law norms

The reception of international law norms in the national legal order is a dynamic process shaped by the interaction of municipal legal systems with international legal principles, norms and institutions. The reception of international legal norms entails a number of approaches, ranging from direct incorporation of international law norms, translation of international law through legislation and indirect incorporation through judicial interpretation. It follows that, as a general rule, international law is not prescriptive on how states are to implement their international obligations at the municipal level. Rather, the methodological framework for the domestication of international law norms is largely a question of and determined by domestic law.[15]

In most domestic systems, the applicable national legislation or judicial practice often determines the approach towards the relationship between national law and international law.[16] Although the particularities of the legal systems of each state must be taken into account, from an international law perspective, it is important

15 IM Kysel 'Domesticating human rights norms in the United States: Considering the role and obligations of the federal government as litigant' (2015) 46 *Georgetown Journal of International Law* 1015.

16 R Wolfrum, H Hestermeyer & S Vöneky 'The reception of international law in the German legal order: An introduction' in E *de* Wet & H Hestermeyer *The implementation of international law in Germany and South Africa* (2015) 3.

that the means adopted must be adequate and effective to enable compliance with a state's international obligations.[17] In light of these complexities around the reception of international legal commitments in the domestic legal system, it is particularly important to briefly describe the main theoretical approaches that seek to explain the interplay between international law and national law.

A distinct theoretical divide, though waning, is still discernible in the international legal scholarship on the relationship between international law and national law. The divide is encapsulated through two main theories, namely, the monist approach, whose protagonists submit that international and domestic legal orders constitute a single system of law. On the other end of the spectrum is the dualist approach, which views the domestic legal order as autonomous, self-contained and separate from the international legal order.[18] These two main theoretical approaches are discussed below.

## 2.1 Monist approach

The legal theorist Hans Kelsen is considered the architect of the monist approach.[19] Kelsen argued that the international and domestic legal orders are part of the same systems of norms generated through an intellectual operation of a single basic norm, the *grundnorm*.[20] In this regard, the two systems derive their validity from the same source.[21] Monism assumes that there is only one body of law and, accordingly, international law is regarded as part of the state's municipal law and the two should be presumed to be coherent and consistent.[22] Under a monist approach to international law, treaties are incorporated into a nation's legal framework without the need for domestic law making,

17 L Chenwi 'Using international human rights law to promote constitutional rights: The (potential) role of the South African Parliament' (2011) 15 *Law, Democracy and Development* 10.

18 J Nijman & A Nollkaemper (eds) *Introduction: New perspectives on the divide between national and international law* (2007) 1. See also J Dugard and others *Dugard's international law: A South African perspective* (2018) 42. Shelton, however, argues that both monists and dualists may accept the concept that some international law (peremptory norms/*jus cogens*) is automatically binding, irrespective of a state's consent or domestic legal order – creating a sub-category of monist norms even for dualist systems. A second possibility is that domestic systems may consider themselves monist for one source of international law (eg custom) and dualist for another (treaty law). See Shelton (n 6) 2.

19 See discussion in J Crawford *Brownlie's principles of international law* (2019) 46 citing H Kelsen *General theory of law and state* (1966) 562.

20 As above.

21 As above.

22 Dugard and others (n 18) 42. See also Crawford (n 19) 45. Lauterpacht is regarded as one of the earliest leading proponents of a monist approach in explaining the relationship between international law and domestic law. See H Lauterpacht *International law and human rights* (1950) 70.

and such international norms can supersede existing domestic law.[23] Consequently, no formal change is therefore required when international law is applied at the domestic level.[24] It follows that international law can be directly incorporated and applied within the municipal legal order.[25]

## 2.2 Dualist approach

A dualist explanation of the differences between the two normative systems considers international law and national law as entirely separate branches of law.[26] Dualists argue that the fundamental principle of sovereign equality of states dictates dualism as a starting point in elucidating the intercourse between international law and the domestic legal order.[27] The dualist approach postulates that it is for each state to organise its legal system and determine the process for giving its consent to be bound by international law norms.[28] A dualist perspective places emphasis on the distinct nature of the international and municipal legal regimes in terms of substance of the law, sources and its subjects.[29] The philosophy behind this dualist approach is that international law is primarily applicable between states only.[30] The dualist position was eloquently captured by the South African Constitutional Court in *Zuma*, as follows:[31]

> The architecture of international law is constructed around the recognition of state sovereignty. That is why it is a cardinal tenet of international law, that to be given force and effect on the domestic plane of a dualist state, international treaties must be incorporated into a state's body of domestic law by way of an implementing provision enacted by that state's legislature.

Consequently, there must be a mechanism through which international law may be invoked and applied at the municipal level. Where a treaty enshrines rights and duties for the benefit of the

23 CA Bradley '*Breard*, our dualist constitution, and the internationalist conception' (1999) 51 *Stanford Law Review* 530.
24 Scholtz (n 14) 205.
25 Crawford (n 19) 45.
26 Dugard and others (n 18) 42. See also G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1471-1472 for a discussion on the dichotomy between the monist and dualist approaches.
27 G Arangio-Ruiz 'International law and interindividual law' in J Nijman & A Nollkaemper (eds) *New perspectives on the divide between national and international law* (2007) 15.
28 As Above.
29 Crawford (n 19) 45.
30 Scholtz (n 14) 205.
31 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* [2021] ZACC 28 para 108.

subjects of a state, the state must take steps to make these provisions enforceable by its subjects in the municipal legal order.[32] In a dualist system, the legislature must enact incorporating legislation in order to give treaties legal effect at the domestic level.[33]

It must, however, be noted that there are several variations to the above two approaches.[34] It has further been pointed out that neither theory offers an adequate account of the practice of international and national courts, whose role in articulating the practice of the various legal systems is crucial.[35] As a result, the practical relevance of these theories is increasingly being questioned. State practice on the reception of international law varies widely and does not follow either of the theories in its original form.[36] While the debate between the two theoretical approaches remains relevant, other approaches are becoming prominent. Theories of incorporation and harmonisation are particularly gaining traction as they are increasingly being invoked to explain the relationship between international and municipal law.[37]

Regardless of a state's theoretical posture as reflected in its domestic law, a state cannot justify non-compliance with its international law obligations by using deficiencies in its national law, a principle well established in international law and codified by the Vienna Convention on the Law of Treaties (VCLT).[38] In *Gramara*[39] the Harare High Court, citing articles 26 and 27 of the VCLT, emphasised the point that 'a state cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations'.[40] The Court further explained

32 Scholtz (n 14) 205.
33 Bradley (n 23) 530.
34 Crawford (n 19) 48.
35 Crawford (n 19) 47.
36 Wolfrum and others (n 16) 3. See also Ferreira & Ferreira-Snyman (n 26) 1472 who point out that '[a] complicating factor is that not all egal systems are clearly and distinctly either monist or dualist. Some legal systems display elements of both.'
37 Scholtz (n 14) 205.
38 See art 27 of the Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 331. This principle is also encapsulated in art 3 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Ats which provides that '[t]he characterisation of an act of state as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law.' See Articles on Responsibility of States for Internationally Wrongful Acts UN Doc A/RES/56/83 (2001), 53 UN GAOR Supp (No 10) 43, Supp (No 10) A/56/10 (IV.E.1).
39 *Gramara (Pvt) Ltd & Another v Government of Zimbabwe & Others* HH 169/2009 5.
40 As above. In the case of *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* Case SADC (T) 2/07, 13 December 2007 25, the Southern African Development Community tribunal was clear that Zimbabwe cannot rely on its national law to avoid its legal obligations under the Southern African Development Treaty. In a commentary on the *Campbell* decision, Moyo noted that '[t]he Tribunal's

that *pacta sunt servanda* is a fundamental tenet of international law,[41] and a corollary to such an obligation is that a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations.[42] It follows that there is a general duty incumbent on states to bring national law into conformity with their international law obligations. The following part discusses the legal principles relating to states' general duty, under international law, to implement their international law obligations at the domestic level.

## 3 The duty to implement international law obligations at the national level

Even though international law enjoins states to implement their international obligations at the national level where required, the processes used by states to transform international legal norms to domesticate legal norms often vary as reflected by the practice of states.[43] In the area of treaty law, many treaties in the area of human rights and international criminal law include specific obligations that enjoin particular actions at the domestic level in order to ensure state compliance.[44] Such provisions impose specific duties on ratifying states to implement the instruments at the domestic level. In addition to the specific textual obligations enshrined in some human rights treaty provisions, there is a growing view that human rights law generally carries certain positive duties enjoining states to take affirmative actions to implement such treaty obligations at the domestic level.[45]

The African Charter on Human and Peoples' Rights (African Charter), for example, imposes an obligation on state parties to 'recognise the rights, duties and freedoms' guaranteed in the Charter, including the duty to 'adopt legislative or other measures to give effect to them'.[46]

willingness to deny Zimbabwe the opportunity to invoke its national laws to evade international treaty obligations brings our regional jurisprudence in conformity with settled principles of public international law'. See A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 *African Human Rights Law Journal* 600.

41 *Gramara* (n 39) 5.

42 As above.

43 See generally Shelton (n 6).

44 Art 1 of the African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/rev.5 obliges states to 'recognise the rights, duties and freedoms' guaranteed in the Charter and 'adopt legislative or other measures to give effect to them'.

45 See sec 4(1)(a) of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49 which obliges state parties '[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention'.

46 See art 1 of the African Charter (n 44).

The International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, contains provisions that impose specific obligations on state parties regarding the domestic implementation of this instrument.[47] The position is buttressed by the Committee on Economic, Social and Cultural Rights (ESCR Committee)'s General Comments 3[48] and 9[49] and various theme-specific General Comments. Article 2(1) of ICESCR, for instance, requires a state to use any appropriate means, including the adoption of legislation, when domesticating that international instrument.[50] The ESCR Committee in its General Comment 9 elaborated as follows:[51]

> The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each state party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the state party. The means chosen are also subject to review as part of the Committee's examination of the state party's compliance with its obligations under the Covenant.

The United Nations (UN) High Commissioner for Human Rights has also explained domestication at the national level in the context of international human rights law as entailing 'a legal commitment, that is, acceptance of an international human rights obligation, to realisation by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations'.[52]

Although some treaties may provide for particular exceptions, as a rule, international law does not prescribe how states are to implement their international obligations at the municipal level. In some states, for example, treaties automatically become part of national law upon ratification, signalling a monist approach to the reception of treaty law into the municipal legal order. Under such legal regimes, treaties are considered to be self-executing. In other

47 See art 2(1) of the International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 (ICESCR).
48 See Committee on Economic, Social and Cultural Rights General Comment 3: The nature of state parties' obligations (1990) UN Doc E/1991/23.
49 See Committee on Economic, Social and Cultural Rights General Comment No 9: The domestic application of the Covenant (Nineteenth session, 1998), UN Doc E/C.12/1998/24 (1998).
50 See art 2(1) ICESCR (n 47).
51 ESCR Committee General Comment 9 (n 49) para 5.
52 United Nations Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 8 June 2009 para 3.

jurisdictions, treaties do not automatically form part of the municipal law of the ratifying state. In such jurisdictions, ratified treaties are not self-executing, that is, they do not have the force of law without the passage of incorporating national legislation, thereby signalling a dualist approach to the reception of treaty law. The doctrinal view, as observed by Kysel, does not oblige states to prefer any specific domestic measures, to the exclusion of others, in order to comply with their treaty obligations.[53] States enjoy a margin of appreciation in how they translate their international obligations into the national legal sphere.[54] A margin of appreciation is thus granted to states, the conduits through which international treaties are given effect, in recognition of the fact that national institutions are better situated and equipped to implement international law norms at the domestic level.[55] The following part discusses and evaluates the reception of international treaties in the Zimbabwean legal order.

## 4 Treaties

The Constitution provides for two types of international agreements, namely, international treaties (simply referred to as treaties in this article) and a certain species of agreements that do not meet the criteria of treaties.[56] The Constitution defines a treaty 'as a treaty between one or more foreign states or in which two or more independent states are represented'.[57] The above definition provides neither for the recognition of oral agreements nor for unilateral acts of a state. The definition, however, substantially aligns with the one provided under VCLT.[58] VCLT defines a treaty as an international agreement concluded between states in written form and governed by international law, whatever its particular designation.[59] The second category of agreements provided for are not really treaties in the technical sense and encompasses those agreements entered into

53 Kysel (n 15) 1021.
54 Wolfrum and others (n 16) 3. For different approaches, see, eg, art 144 of the Constitution of the Republic of Namibia which appears to adopt a monist approach to the domestication of international law and states that '[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. See also secs 2(5) & 6 of the 2010 Constitution of Kenya which provides that '[t]he general rules of international law shall form part of the law of Kenya' and that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.
55 *Zuma* (n 31) para 119.
56 See sec 327(3) of the Constitution in relation to agreements that are not international treaties.
57 Sec 327(1) of the Constitution.
58 Art 2(1) VCLT (n 38).
59 As above.

by Zimbabwe with foreign organisations or entities.[60] Unlike a treaty, an agreement does not require parliamentary approval for it to bind the country unless it imposes financial obligations on Zimbabwe, in which case such parliamentary approval is required.[61] This provision was presumably inserted to cater for those circumstances where the state may enter into investment, technical or executive agreements with non-state actors, which would not require Parliament's focused attention. Such agreements do not qualify as treaties and would not require parliamentary approval to be binding on Zimbabwe, with the exception that such approval is still required where such agreements impose financial obligations on Zimbabwe, hence the need for heightened parliamentary scrutiny.

The use of these types of agreements, if not properly managed, may result in issues with major policy and foreign relations implications being immunised from the necessary parliamentary oversight process. It is also disturbing that there is no constitutional requirement for such agreements to be placed before Parliament for scrutiny after their conclusion. Although the expedited procedures in respect of these agreements may be necessary for the expeditious conduct of economic and foreign relations, it can be problematic from a democratic accountability perspective if parliamentary oversight and scrutiny in respect of this category of agreements is completely absent.

The constitutional scheme of section 327 is deeply rooted in the separation of powers doctrine, in particular the checks and balances between the executive and the legislative arms of government. Under the Constitution, the negotiation of treaties is primarily the domain of the executive branch. Section 327(2)(a) of the Constitution confers on the President the constitutional authority to negotiate or authorise the negotiation and execution of treaties. The above is further buttressed by section 6(1) of the International Treaties Act which provides that 'every international treaty shall be concluded or executed by or under the authority of the President'.[62] Sections 6 and 7 of the International Treaties Act, however, are clear that

60 See secs 327(3)(a) & (b) of the Constitution. This would include Bilateral Agreement for the Promotion and Reciprocal Protection of Investments (BIPPAs) which Zimbabwe has signed with a number of states to facilitate investment flows into Zimbabwe from foreign corporations and individuals. For a list of BIPPAs that Zimbabwe has signed or ratified, see https://www.zimfa.gov.zw/index.php/bippas/list-of-ratified-bippas# (accessed 29 April 2024).

61 See secs 327(3)(a) & (b) of the Constitution.

62 See sec 6 of the International Treaties Act [Chapter 3:05]. See also sec 110(4) of the Constitution which stipulates that '[s]ubject to this Constitution, the President may conclude or execute conventions, treaties and agreements with foreign states and governments and international organisations'.

treaties must be approved by cabinet before approval by Parliament and ratified by the President, which denotes a collaborative approach in the formulation of the country's foreign policy as well as the negotiation and conclusion of treaties.[63] Under the Constitution, the President alone has the power to conclude treaties. The International Treaties Act, however, departs from this constitutional framework by vesting the authority to negotiate and conclude treaties in the cabinet, a model that better reflects principles of collaborative decision making. To concretise this collaborative approach, the Constitution should have explicitly designated the cabinet, rather than the President, as the body responsible for treaty negotiation and conclusion.[64] The constitutional entrenchment of such a framework would to institutionalise shared accountability. By relegating the requirement for a collaborative process to an Act of Parliament, the current model risks inconsistency. Statutory provisions, unlike constitutional provisions, remain vulnerable to amendment at the whim of politicians, potentially undermining the integrity of a collaborative treaty-negotiation process. The International Treaties Act, thus, should thus be read with section 327 of the Constitution, and the former should be regarded as the implementing legislation that operationalises section 327 of the Constitution. This is clear from the statute's long title, which states that the Act seeks to 'provide a uniform procedure for the consideration, approval, ratification and publication of international treaties'.[65] What is clear, however, is that Parliament does not have a role in the negotiation or signing of treaties. Given the significance of treaties as an important policy tool in a world where many problems and solutions transcend territorial boundaries, there is a need for Parliament's participation in the negotiation of treaties beyond simply approving treaties negotiated and signed by the executive. Although there may be discussions in Parliament during the approval and incorporation stages, the current

63 Sec 7(1) of the International Treaties Act envisages the approval of a treaty by cabinet before its approval by Parliament. See also sec 6(3)(c) of the International Treaties Act which provides that 'the negotiating Ministry shall, as soon as practicable thereafter, take all the necessary steps (i) to secure the approval of the treaty by Cabinet; and (ii) if the treaty is approved in terms of subparagraph (i), to secure its approval by Parliament in accordance with the Constitution; and (iii) if the treaty is approved in terms of subparagraph (ii), to secure the ratification of or accession to the treaty by the President'. The collaborative approach is further emphasised in sec 110(6) of the Constitution which provides that '[i]n the exercise of his or her executive functions, the President must act on the advice of the Cabinet'.

64 For a similar provision, see sec 231(1) of the Constitution of the Republic of South Africa, 1996 which states that '[t]he negotiating and signing of all international agreements is the responsibility of the national executive'.

65 See long title of the International Treaties Act. Sec 5 of the International Treaties Act also provides for the appointment and functions of a Public Agreements Advisory Committee whose remit includes the power to scrutinise all international treaties, recommend or decline to recommend approval of any treaty, as well as maintain and keep up to date a list of ratified treaties.

constitutional architecture is designed in such a way that Parliament only considers a treaty at the very end of the process – after the treaty has been negotiated, concluded and signed by the executive. There is a clear democratic deficit inherent in making these types of policy decisions that may have significant implications for a country's foreign relations without parliamentary involvement.

Section 327(2)(a) recognises the key role of Parliament in fulfilling domestic conditions for Zimbabwe to assume binding treaty obligations under international law. It established parliamentary approval as a mandatory precondition, compelling the executive to obtain parliamentary consent before it can deposit the instrument of ratification. Once Parliament provides its approval in terms of section 327(2)(a), the treaty is returned to the President, who ratifies it by executing an instrument of ratification. As a matter of terminology, although the role of Parliament is sometimes referred to as ratification, under the Zimbabwean constitutional framework, it is the President who formally ratifies treaties. Nonetheless, the approval of a treaty by Parliament is a condition precedent to the President's act of ratification.

### 4.1 Binding nature of treaties at international level

The first role of Parliament in the constitutional scheme is to approve a treaty before the executive can submit an instrument of ratification with the treaty depository. Section 327(2)(a) of the Constitution regulates the conditions under which Zimbabwe would be bound by international treaties at the international level. Section 327(2)(a) is clear that a treaty that has been concluded or executed by the President or under the President's authority must be approved by Parliament for it to be binding on Zimbabwe at the international level. The only exception is provided under sections 327(4) and (5). Section 327(4)(a) provides that an Act of Parliament may dispense with the need for parliamentary approval before a treaty concluded by the President or under the President's authority can be binding on Zimbabwe at the international level. In addition, section 327(5) states that a parliamentary resolution may dispense with the need for parliamentary approval before a treaty concluded by the President or under the President's authority can be binding on Zimbabwe. The provisions dispensing with the need for parliamentary approval will probably encompass routine treaties of a technical and administrative nature that do not have major political significance, as well as agreements that do not impact domestic law in any material way. Such a waiver, however, does not apply to treaties whose application or operation requires the withdrawal or appropriation of funds from

the Consolidated Revenue Fund, or any modification of the law of Zimbabwe.[66]

Although Zimbabwe's ratification of treaties does not render them enforceable and, therefore, sources of rights in domestic courts and tribunals, at the international level these instruments are nevertheless binding and enforceable against Zimbabwe. The approval of a treaty under section 327(2)(a) of the Constitution conveys Zimbabwe's intention to be bound, at the international level, by the provisions of the treaty. Additionally, such approval constitutes an undertaking at the international level, as between Zimbabwe and other state parties to the treaty, to take steps to comply with the substance of the treaty. This undertaking will be given effect to by either incorporating the agreement into Zimbabwean law or taking other steps to bring the domestic law in line with the treaty. It follows that failure to observe the provisions of the treaty may result in Zimbabwe incurring responsibility towards other state parties to the treaty. Significantly, the consequence of Zimbabwe being bound at international law is that other state parties to a treaty may seek to hold the country responsible for any breaches of treaty obligations in an international forum having relevant jurisdiction in the matter. This means that where domestic players such as courts construe the Zimbabwean domestic law in a manner that is not aligned to Zimbabwe's treaty obligations, Zimbabwe may incur international responsibility at the international level despite the fact that it would have acted in compliance with its domestic law.[67] Therefore, it is incumbent on domestic courts to interpret domestic law in a way that aligns with a country's international obligations. In the following part the article discusses and evaluates the normative framework for

66 See secs 327(5)(a) and (b) of the Constitution.

67 See the case of *Vincencio Scarano Spisso v Bolivarian Republic of Venezuela* CCPR/119/D/2481/2014 where the Supreme Court of Venezuela had convicted the complainant for contempt of court and sentenced him to 10 months and 15 days' imprisonment for failing to obey a court order. The complainant took the matter to the Human Rights Committee where he argued, among others, that the Court had violated his rights under arts 9, 10, 14 and 25 of ICCPR. The Human Rights Committee found that Venezuela had violated the relevant provisions of ICCPR and ordered Venezuela to compensate the complainant and take steps to prevent similar violations in the future. In the case of *Dissanayake v Sri Lanka* CCPR/C/93/D/1373/2005 the complainant was convicted by the Supreme Court of Sri Lanka for contempt of court pursuant to which he was sentenced to a two-year jail term. The complainant approached the Human Rights Committee alleging violations of his rights under arts 9, 14, 15, 19 and 25 of ICCPR. The Human Rights Committee found that Sri Lanka had violated the complainant's protected rights and imposed a compensation order against Sri Lanka, including an order for Sri Lanka to amend its laws to foreclose any recurrence of such convictions. What is clear from both cases is that the impugned actions were taken in accordance with the domestic laws. It was clear, however, that such domestic laws could not be a shield to protect a state party where it violates its obligations under international law and, in this instance, its obligations under ICCPR.

the domestication of international treaties in the Zimbabwean legal order.

### 4.2 Domestic application of treaties

Parliament's second key role in the scheme under section 327 is its constitutional mandate relating to the incorporation of treaties into domestic legislation. The ratification of international treaties, under the current constitutional architecture, as noted above, does not render them enforceable at the domestic level, but rather binds Zimbabwe at the international level. In order for treaties to apply at the domestic level, section 327(2)(b) of the Constitution prescribes that treaties must first be enacted into domestic law by means of legislation. The domestication of a treaty refers to making a treaty part of national law either by way of incorporation or transformation.[68] Domestication, thus, entails that the provisions of national laws and regulations are harmonised with the norms and standards contained in international instruments with a view to their full implementation.

Section 327(2)(b) is clear that a treaty 'does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament'. The position was judicially affirmed by the Supreme Court in of *Magodora & Others v Care International Zimbabwe*, where the court reiterated that 'international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an Act of Parliament'.[69] Once enacted into domestic law, the treaty will function as any other Act of Parliament and, consequently, will prevail over the provisions of any prior treaty in the event of any inconsistency.[70] In this regard, Zimbabwe follows a dualist system regarding the reception of treaties, requiring ratified treaties to be enacted into law by national legislation before they acquire binding force in domestic law. The only exception is provided in section 327(4) of the Constitution and section 5 of the International Treaties Act with regard to self-executing treaties and partially self-executing treaties.

Section 327(4) envisages an Act of Parliament dispensing with the need for legislative incorporation before a ratified treaty can be binding at the domestic level. Through section 327(4), the Constitution introduces the possibility of ratified treaties becoming

68 F Viljoen *International human rights law in Africa* (2012) 22.
69 SC 24/14 6.
70 See *IRC v Collco Dealings Limited* [1962] AC 1.

self-executing where there is permissive legislation. The concept of self-executing treaties under the Zimbabwean legal framework is fully discussed below. Barring the invocation of section 327(4), it follows that unimplemented treaties cannot be a source of rights or obligations under the national legal order, and a failure by Zimbabwe to comply with such treaties is without effect under the municipal legal order. The country may, however, breach its international legal obligations at the international level, as discussed in the preceding part.

A significant, albeit uncertain, position regarding the incorporation of treaties is the Zimbabwean legal framework's embrace of the concept of self-executing treaties. Zimbabwean courts will have to deal with the issue to determine the circumstances under which a treaty could be regarded as self-executing.[71] The International Treaties Act defines a self-executing treaty as a treaty requiring no alteration of the domestic law or no additional legislation in order to domesticate it.[72] From that perspective, a self-executing treaty thus is a treaty that by its terms is capable of being incorporated into the domestic law of Zimbabwe in the absence of implementing legislation. The International Treaties Act further defines a 'partially self-executing' treaty as a treaty in respect of which some provisions are self-executing within the domestic law of Zimbabwe and severable from the other provisions of the treaty that require legislative incorporation.[73] Section 7(3) of the International Treaties Act states that every ratified treaty shall be published through a statutory instrument.[74] In addition, such publication of a treaty shall be accompanied by a general notice in the *Gazette* specifying whether the treaty is wholly or partially self-executing and, accordingly, domesticated, or requires to be domesticated by altering or incorporating the treaty into the domestic law of Zimbabwe.[75] To date, no court in Zimbabwe has

71 The issue has been debated in the United States (US) particularly after the US Supreme Court decision in *Medellin v Texas* 552 US 491 (2008) which concerned the domestic effect in the US of the decision of the International Court of Justice in *Avena and Other Mexican Nationals, Mexico v United States* [2004] ICJ Rep 12. In 2007 the US Supreme Court stated in *Medellín v Texas* 552 US 505 (2008) that a treaty was to be considered self-executing only if it includes 'stipulations [which] require no legislation to make them operative'. The majority opinion held that art 94 of the UN Charter, which provides that each UN member state 'undertakes to comply with the decision of the [ICJ] in any case in which it is a party' was not self-executing. US courts' jurisprudence has considered a multiplicity of factors to determine the self-executing status of a treaty, and these include the purposes of the treaty, and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, among others. See *US v Postal* 589 F2d 862, 877 (5th Circ 1979).

72 See sec 2(1) of the International Treaties Act.

73 As above.

74 Sec 7(3) of the International Treaties Act.

75 See secs 7(5)(a)(i) & (ii) of the International Treaties Act.

had the opportunity to explore the concept of self-executing treaties in the context of Zimbabwean law.

The question of what constitutes a self-executing treaty has been notoriously difficult to define. The concept of self-executing treaties was imported from American law and, as noted by Hollis and Vazquez, remains a complex and difficult issue even in American law.[76] It is mainly understood to refer to provisions of a treaty that can be directly applied in municipal law without the need for legislative incorporation.[77] This would mean that the nature and content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures of implementation.[78]

Academic literature in South Africa has also engaged with the concept of self-executing treaties in light of the recognition of such category of treaties in South African law. Section 231(4) of the South African Constitution provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. South African courts have thus far neither adequately engaged with nor elaborated on the meaning and import of self-executing treaties.[79] This has prompted South African academic commentators to point out that although the issue of self-executing treaties is provided for in the country's Constitution adopted close to three decades ago, the 'concept has thus far remained a dead letter in the practice of South African courts'.[80] There is, however, consensus that a self-executing provision in a treaty implies that the nature and content of the relevant treaty provision is sufficiently precise and not requiring a further implementing act and, therefore,

76 DB Holllis & CM Vazquez 'Treaty self-execution as "foreign" foreign relations law?' Temple University Legal Studies Research 2018-25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212910 (accessed 18 May 2024).

77 Liebenberg (n 10) 103.

78 E de Wet 'The reception of international law in the South African legal order: An introduction' in E de Wet, H Hestermeyer & R Wolfrum (eds*) The implementation of international law in Germany and South Africa* (2015) 34.

79 In the case of *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) para 26, the South African Constitutional Court noted in passing that where a relevant principle of international law binds South Africa, it may be directly applicable. In the case of *Claassen v Minister of Justice and Constitutional Development & Another* 2010 (2) SACR 451, the High Court dismissed the applicant's direct invocation of the liberty and security of the person rights protected under art 9(5) of ICCPR. The High Court stated in para 36 that '[t]he ICCPR is not a self-executing legal instrument in the sense that this country's formal adoption of its provisions did not, without more, amend our established domestic law'.

80 De Wet (n 78)16.

capable of judicial enforcement in the absence of any additional implementation measures.[81]

In General Comment 9 the ESCR Committee counselled that it is especially important 'to avoid any *a priori* assumption' that the norms in ICESCR should be considered non-self-executing.[82] The ESCR Committee further observed that many of these norms 'are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing'.[83] For the concept of self-executing treaties to have any relevance in the Zimbabwean constitutional and legislative architecture, it would be important for Zimbabwean courts to, first, elaborate on the meaning and import of self-executing treaties, including the development of objective criteria for the identification of such category of treaties in the Zimbabwean context. Most of the rights found in the International Covenant on Civil and political Rights (ICCPR) and ICESCR have been incorporated into the Declaration of Rights, albeit sometimes in somewhat different formulations, hence the importance of utilising the concept of self-execution in the absence of incorporation of treaties. The next PART discusses and evaluates the reception of customary international law under the Zimbabwean legal framework.

## 5 Customary international law

Section 326 of the Constitution is the clearest expression of Zimbabwe's receptiveness to international law under the 2013 Constitution. Section 326(1) of the Constitution explicitly provides that customary international law is part of Zimbabwean law in so far as it is consistent with the Constitution or an Act of Parliament.[84] In addition, section 326(2) enjoins courts and tribunals, when interpreting legislation, 'to adopt any reasonable interpretation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law'. Zimbabwean common law has always treated customary international law as part of Zimbabwean law. This was judicially affirmed as early as 1983 in the Supreme Court decision of *Barker McCormac Pvt Ltd v Government of Kenya*.[85] In this case the

81 De Wet (n 78) 34.
82 General Comment 9 (n 49) para 11.
83 As above.
84 The position was judicially affirmed by the Supreme Court in *Magodora* (n 69) 6 where it reiterated that 'international customary law is not internally cognisable where it is inconsistent with [the Constitution or] an Act of Parliament'.
85 1983 (2) ZLR 72 (SC) 77.

Supreme Court confirmed that customary international law is part of Zimbabwean law and would be applied when the rules founded under it were consistent with statute or judicial precedent.[86] Since then, various court judgments have endorsed the direct incorporation of customary international law principles into the Zimbabwean legal order. In the case of *Gramara* the Court emphasised that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent.[87] The difference with the post-2013 position is that customary international law is no longer subject to conflicting case law but will only give way to superior constitutional and statutory provisions in the event of a conflict, as confirmed by the Supreme Court in *Minister of Foreign Affairs v Michael Jenrich & Others*.[88] This means that Zimbabwe adopts a monist approach towards customary international law, which eliminates the need for legislative translation of customary law into domestic law. This is in contrast with dualist regimes that require domestic legislation to incorporate international law into domestic law. Once a court or tribunal ascertains that there is no conflict between a customary international law norm with any constitutional or statutory provision, the customary international law rule must be accepted as a rule of law applicable and enforceable in the domestic legal order. There is no requirement to establish the validity of such rules by evidence as will be the case with matters relating to facts or foreign law.

There can be little doubt that the constitutionalisation of customary international law gives it additional weight under the Zimbabwean legal framework, although it is clear that a constitutional provision or an Act of Parliament that is clearly inconsistent with customary international law will prevail over it.[89] From a practical perspective, section 326(1) enjoins adjudicative mechanisms such as courts or tribunals to undertake a two-stage inquiry. First, the adjudicator must determine what the relevant customary international law norm is in relation to the issue before the adjudicator. The second leg of the inquiry is for the adjudicator to determine whether the relevant customary international law norm is consistent with the Constitution

86 As above.
87 *Gramara* (n 39) 15. The Court also referred to the High Court decision in the case of *Route Toute BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement & Others* HH 128-2009.
88 In the case of *Minister of Foreign Affairs v Michael Jenrich & Others* SC 03/163 the Supreme Court explained that before May 2013 (effective date of the 2013 Constitution), '[i]nternational custom enjoyed even less cognisance and could only be domestically applied to the extent that it was not inconsistent with statute or judicial precedent'.
89 See sec 326(1) of the Constitution. This provision is modelled on sec 232 of the 1996 South African Constitution, which is similarly worded.

and statute.[90] A constitutional or legislative provision will prevail over a conflicting customary international law norm. Significantly, Zimbabwean courts and tribunals, in their determination of the applicable customary international law rules on a particular issue, do not have the power to develop customary international law norms. Additionally, domestic courts do not have the authority to include any stringent requirements than those accepted through the practice of states as extant customary international law. This principle was eloquently captured by the South African Supreme Court of Appeal in *Minister of Justice v Southern Africa Litigation Centre*, where the court stated:[91]

> Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.

Case law from both the pre- and post-2013 constitutional dispensations demonstrates that Zimbabwean courts have always taken judicial notice of customary international law as if it is part of the country's common law.[92] The constitutionalisation of customary international law gives it added mettle and entrenches is as a veritable source of Zimbabwean law. It follows that Zimbabwean courts and tribunals must of necessity turn to decisions of international courts and tribunals, multilateral treaties, national court decisions, both domestic and comparative, for guidance on whether a particular principle is a rule of customary international law.[93] The significance of customary international law rules is that, unlike treaties, they

90 For detailed discussion, see Dugard and others (n 18) 67-68.

91 2016 (3) SA 317 (SCA) at para 74.

92 However, it must be noted that the role of domestic courts, when it comes to customary international law, is only limited to ascertaining the customary international law position on an issue and not to develop it. This must be contrasted with common law or customary law where Zimbabwean superior courts have the power to develop common law or customary law; see secs 176 & 46 of the Constitution. On this score, see also the South African Supreme Court decision in the case of *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre* (n 91) para 74, relying on the English decision in the case of *Jones v Ministry of the Interior (Saudi Arabia)* [2006] UKHL 26 para 63.

93 See, eg, *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* (n 91) para 70 where the South African Supreme Court of Appeal was considering the issue of immunity for heads of state under customary international law in connection with international crimes. The Court stated that 'in the absence of a binding treaty or other international instrument creating such an exception, or an established universal practice, one looks at the decisions of international courts for guidance as to the existence of such an exception'.

have general application in all states, whether or not the states in question participated in their formulation, unless there is evidence that a state has persistently objected to the emergence of such a customary international law rule.[94] Noteworthy is the fact that the failure to react over time to a practice may serve as evidence of acceptance as law, provided a state was in a position to react and the circumstances called for some reaction.[95] Importantly, international and comparative jurisprudence is clear that general acceptance as opposed to universal acceptance is sufficient for proof of customary international law.[96]

However, it must be noted that a certain category of customary international law rules that have attained peremptory status[97] are universally binding on all states and are not subject to objection. Articles 53 and 64 of VCLT reinforce the supremacy of peremptory norms over all other norms, making it clear that these norms prevail over any other rule of international law, whether conventional or customary, in the event of a conflict. Obvious examples of peremptory norms would include the prohibition against genocide, the prohibition against torture, denial of the right to self-determination and crimes against humanity. In the case of *Belgium v Senegal* the International Court of Justice (ICJ) was clear that 'the prohibition against torture is part of customary international law and has become a peremptory norm of international law, sometimes referred to as *jus cogens*'.[98] In a decision by the South African Constitutional Court in *National Commissioner of Police v Southern Africa Litigation Centre,* a case relating to South Africa's obligation to investigate torture allegations committed in Zimbabwe by Zimbabwean government officials, the Court held that the prohibition against torture was not only an international crime under customary international law but also a peremptory norm under the international legal regime.[99] It

94 See *Anglo American Fisheries Case (United Kingdom v Norway)* ICJ 1951.
95 *ICJ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246.
96 See *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique* 1980 (2) SA 111(T) 125 A-B.
97 See VCLT (n 38) art 53 which explains that 'a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.
98 See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ GL No 144 (Official Case No) ICGJ 437 (ICJ 2012) para 99.
99 2015 (1) SA 315 (CC). In *Armed Activities on the Territory of the Congo* (*Democratic Republic of the v Rwanda*) [2006] ICJ General List No 126, the International Court of Justice recognised the prohibition against genocide and racial discrimination as peremptory norms of international law. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [1951] ICJ Rep 15, the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved nor derogated from.

follows that such norms are part of Zimbabwean law and the fact that Zimbabwe has still not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[100] for instance, does not make much difference. In that case, such superior customary international law norms will prevail not only against conflicting constitutional or statutory provisions but will also prevail against conflicting treaty provisions, whether or not such a treaty was concluded before or after the emergence of such peremptory norms.[101] The next part focuses on the constitutional provisions that provide for recourse to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation.

## 6 Interpretation of legislation in accordance with international law

The Constitution enjoins an international law-friendly interpretation of legislation. Section 326(2) stipulates that '[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law'. Additionally, section 327(6) of the Constitution enjoins courts and tribunals, when interpreting legislation, to adopt 'any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement'.[102] The cardinal interpretative role of customary

100 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 [1989] ATS 21 (CAT).

101 See VCLT (n 38) arts 53 & 64. Art 53 stipulates that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. In addition, art 64 provides that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Arts 53 and 64 of the VCLT make it clear that these norms prevail over any other rule of international law, whether conventional or customary, in the event of a conflict. As to a conflict between peremptory norms and customary international law, see *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening* ICGJ 434 (ICJ 2012) 140. A *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris* by most states. This should be read with the concept of obligations *erga omnes*. Recognised by the ICJ in the *Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)* [1961] ICJ Rep 9 case in 1970, obligations *erga omnes* flow from obligations that have a *jus cogens* character. In *East Timor, Portugal v Australia, Jurisdiction, Judgment* [1995] ICJ Rep 90, the ICJ held that the right to self-determination has an *erga omnes* character.

102 The wording of this provision may have been inspired by sec 233 of the 1996 South African Constitution which provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation

international law and treaties was judicially affirmed by the Supreme Court in *Jenrich* where the court explained that '[i]n terms of s 326(2) of the Constitution, the courts are enjoined to interpret legislation in a manner that is consistent with international customary law. In similar vein, s 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe'.[103]

The phrase 'any international convention, treaty or agreement which is binding on Zimbabwe' must be interpreted to entail all treaties that Zimbabwe has ratified or assented to since these instruments are already binding on the country regardless of whether or not they have been domesticated into the municipal legal order. Thus, legislation that impacts on people's rights should be interpreted, as far as reasonably possible, in harmony with applicable international law norms. This provides additional impetus for Zimbabwean courts to interpret legislation in ways that take into account widely accepted international law norms, both treaty and customary.[104] However, it is important to note that treating international conventions, treaties and agreements binding on Zimbabwe as guides to interpretation does not entail giving them the status of domestic law.

Sections 326(2) and 327(6) should also be read together with section 46(1)(c) which provides that when interpreting the Declaration of Rights a court, tribunal, forum or body must take into account 'international law and all treaties and conventions to which Zimbabwe is a party'.[105] In this regard, judicial and quasi-judicial

---

that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

103 See *Jenrich* (n 88) 3-4.

104 See Liebenberg (n 10) 104.

105 The courts' approach has been to invoke both binding and non-binding international instruments as an interpretative guide. In *Jestina Mukoko v The Attorney-General* SC 11/12 31, decided a year before the 2013 Constitution was adopted, the Supreme Court referred to a number of international instruments as interpretative guides, both binding and non-binding, and these included the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc A/39/51 1984; the 2003 African Commission Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247; and the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders 1990 (DHLAUTH) 113359. The Court was clear that these instruments were relied upon as interpretative guides in interpreting the Constitution, noting that '[t]he relevance of the reference to the provisions of article 15 of the UN Convention on Torture is not in the substance of the obligation imposed on state parties. It is on the principle of interpretation involved.' See also *The State v Willard Chokuramba (Justice for Children's Trust & Zimbabwe Lawyers for Human Rights Intervening as Amicus Curiae)* CCZ 10/19, a case involving corporal punishment for a juvenile offender in which the Court invoked various international human rights treaties as an interpretative guide in terms of sec 46(1)(c) of the Constitution. The same approach was reiterated in the recent case of *Zuma* (n 31) para 185. Sec 46(1)(c) of the Constitution's formulation is similar to sec 39(1)(b) of the South African

bodies are constitutionally obligated to interpret provisions of the Declaration of Rights, to the extent that its language reasonably permits, in harmony with international law. This is the purpose of taking into account international law, treaties and conventions to which Zimbabwe is a party, which is done to ensure that domestic rights jurisprudence reflects globally recognised legal principles.

The importance of section 46(1)(c) in facilitating the invocation of international law as an interpretative guide when interpreting the Declaration of Rights was endorsed by the Supreme Court in *Zimbabwe Homeless People's Federation*, where the Court stated the following:[106]

> Both the United Nations Convention and the African Charter have been ratified by Zimbabwe, the former on 11 September 1990 and the latter on 19 January 1995. Consequently, by dint of s 46(1)(c) of the Constitution, it is incumbent upon our courts to take them into account in interpreting the Declaration of Rights entrenched in Chapter 4 of the Constitution. This is reinforced by s 327(6) of the Constitution which dictates the adoption of any reasonable interpretation of domestic legislation that is consistent with any treaty or convention which is binding on Zimbabwe, in preference to any alternative interpretation that is inconsistent with that treaty or convention.

It must be clear that sections 46(1)(c) and 327(6) do not, in and of themselves, incorporate treaties into Zimbabwean domestic law. It is therefore important that a distinction must be made between using international law as a guide to interpretation and as a source of rights and obligations.[107] As an interpretative tool, the treaty is at all times subject to the requirements of the Constitution. What this means is that, although a treaty may be binding at the international level, its provisions, unless it is a self-executing treaty, do not create domestic rights and obligations that are capable of being invoked by litigants under the domestic legal order. The treaty would need parliamentary incorporation into the domestic legal order. It follows

---

Constitution which states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. In the case of *S v Makwanyane* 1995 (3) SA 391 para 35, the South African Constitutional Court interpreted the predecessor to sec 39(1)(b), stating that '[i]n the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.'

106 *Zimbabwe Homeless People's Federation & Others v Minister of Local Government and National Housing & Others* SC 94/2020 7. The Court further referenced the UN Convention on the Rights of the Child (1989) UN Doc A/44/49 and the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49, noting that 'Zimbabwe is a party to both of these instruments and, consequently, our courts are constitutionally bound to take them into account in interpreting the Declaration of Rights'; *Zimbabwe Homeless People's Federation* 36.

107 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 96 & 108.

that using treaties as a guide to interpretation under sections 46(1)(c) and 327(6) does not entail giving them the status of domestic law.

The Constitution's emphasis on international law as an interpretative guide when interpreting the Declaration of Rights and legislation signals the Constitution's openness to the norms and values of the international community as enshrined in treaties, customary international law and general principles of international law. The openness of the Zimbabwean Constitution to international law in the interpretation of the Declaration of Rights and legislation is in sync with a dialogic relationship between international adjudicative mechanisms and domestic courts and tribunals. International law provides useful normative insights on which constitutional and human rights adjudication can draw.[108] Interpreters of the human rights contained in the Declaration of Rights, therefore, have to seek guidance from international law in understanding the scope and content of some of the rights enshrined in the Declaration of Rights and legislation. There is little doubt that such transnational normative dialogues can strengthen the rule of law and assist domestic adjudicators to arrive at the best responses to shared problems.[109]

## 7 Conclusion

Zimbabwe's 2013 Constitution contains generous provisions entrenching the reception of international law norms in the domestic legal order. The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a delicate balance between sovereign imperatives and global cooperation. The reception of international law norms in the national legal order thus is a dynamic process shaped by the interaction of municipal legal systems with international legal principles, norms and institutions. Although international law is not prescriptive on how states are to implement their international obligations at the municipal level, it is important that the means adopted must be adequate and effective to enable compliance with a state's international obligations. The Constitution's emphasis on international law as both a source of rights and duties as well as an interpretative guide when interpreting the Declaration of Rights and legislation signals the Constitution's openness to the norms

108 GL Neuman 'International law as a resource in constitutional interpretation' (2006) 30 *Harvard Journal of Law and Public Policy* 177.

109 M Kirby 'Constitutional law and international law: National exceptionalism and the democratic deficit?' (2009) 98 *Georgetown Law Journal* 442.

and values of the international community as enshrined in treaties, customary international law and general principles of international law.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Munyai '(De)colonisation of beauty: A reflection on *Baba & Others v Clicks Group Limited & Another*' (2025) 25 *African Human Rights Law Journal* 431-451
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a16

# Recent developments

# (De)colonisation of beauty: A reflection on *Baba & Others v Clicks Group Limited & Another*

*Anzanilufuno Munyai**
Senior Lecturer, African Centre for Transnational Criminal Justice, Faculty of Law, University of the Western Cape, South Africa
https://orcid.org/0000-0002-8832-2842

**Summary:** *This discussion is a reflection on the decision on 28 February 2022 by the High Court of South Africa, Western Cape Division, sitting as an Equality Court, in the matter of* Baba & Others v Clicks Group Limited & Another. *On 4 September 2020 an unknown person posted an image of four women on social media. The circulation of this image caused an outcry on the premise that the image perpetuated racial stereotyping of black hair. Baba and 17 others subsequently brought an application to the Equality Court on allegations of contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. While the matter was dismissed, the case holds a different dimension within the discourse of decolonising beauty standards. This article argues that universal beauty standards were influenced by colonialism and continue to represent Eurocentric standards. This argument is premised on literature on texturism and colourism, coloniality of power and modernity. From this perspective, the article endorses a reflection on beauty hierarchies traced in Eurocentrism and the re-engineering of acceptable beauty aesthetics.*

* LLB (Venda) LLM LLD (North-West); amunyai@uwc.ac.za

**Key words:** *equality; discrimination; racism; colonialism; hair; beauty; texturism; colourism*

## 1 Introduction

Hair may be perceived as a symbol of social identity. African history demonstrates how people communicated through hair to represent status, age, wealth, rank in society, marriage, and so forth.[1] Regrettably, African hair has been racialised and categorised as inferior to Eurocentric beauty standards by forces of globalisation.[2] The impact of colonialism on African identity emphasises that this practice extended beyond economic and political dependence, but undermined African culture, traditions and beauty standards.[3] The power dynamics of colonialism have limited the universal expression 'beauty lays in the eyes of the beholder'. The historical reality is that colonial powers became the 'beholders' and perpetuated the narrative that Eurocentric standards are acceptable and valuable.[4] Global standards and trends on beauty sustain this narrative, thus highlighting that beauty continues to lay in the eyes of the colonisers' powers.[5]

The colonist values, attitudes, culture, traditions and beliefs imposed during the era of colonialism continue to hold power and exercise supremacy on the colonised.[6] This, therefore, suggests that the effects of colonialism and cultural imperialism continue to impact the identity of the colonised. Today, despite movements aimed at reclaiming natural hair beauty,[7] straightened silk hair is perceived as civilised and professional in comparison to afro-textured hair and dreadlocks.[8] Afrocentric beauty standards, past and present, are deeply rooted in oppression. Consequently, years

1 ME Montle 'Debunking Eurocentric ideals of beauty and stereotypes against African natural hair(styles): An Afrocentric perspective' (2020) 7 *Journal of African Foreign Affairs* 113.

2 M Nkimbeng and others 'The person beneath the hair: Hair discrimination, health, and well-being' (2023) 7 *Health Equity* 407.

3 See S Mady and others '"A whiter shade of pale": Whiteness, female beauty standards, and ethical engagement across three cultures' (2023) 31 *Journal of International Marketing* 69-89.

4 See Mady and others (n 3) 69-89.

5 L Donnella 'Is beauty in the eyes of the coloniser?' 2 June 2019, https://africana.cornell.edu/news/beauty-eyes-colonizer (accessed 28 March 2024).

6 AM Decena 'Identity, colonial mentality, and decolonising the mind: Exploring narratives and examining mental health implications for Filipino Americans' Master's dissertation, Smith College Northampton, 2014 6-8.

7 Eg, CA Jefferson *Reclaim natural beauty: How to grow, nourish, and strengthen natural, black hair* (2011).

8 See A Alexander 'Beyond the ballot: The politics of black hair' *Essence GU* (web blog) 23 August 2024, https://girlsunited.essence.com/beauty/beyond-the-ballot-kamala-silk-press-hair/ (accessed 24 March 2025).

of being conditioned that African aesthetics were inferior, people of African descent have yielded and continue to succumb to modify themselves to model Western standards.

The continued influence by the European coloniser on the colonised refers to what is termed 'colonial mentality'.[9] This may be understood as a deeply rooted ingenuine mindset towards one's own culture due to colonial historical influence.[10] It explains internalised oppression of the colonised to view their cultural and/or ethnic identity as inferior to Western culture, leaving one to abandon their indigenous roots, whilst learning, adapting to and embracing Eurocentric standards.[11] The long-term consequence is the identity erosion and psychological injury.[12] Decena highlights ways in which colonial mentality manifests, namely, through internalised cultural and ethnic inferiority, cultural shame and embarrassment, within-group discrimination, physical characteristics and colonial debt.[13]

Recognising the impact of colonial mentality on the African identity, it is imperative to consciously decolonise the African mind, reconnect and strengthen indigenous cultures, traditions and beauty standards in order to ground oneself.[14] Simply put, there is a need to reframe the narrative and claim power to redefine beauty and resist the imposition of colonial aesthetics. This is particularly important considering a number of cases on texturism, a systematic form of racism or discrimination based on hair texture on the premise that certain types of hair are more desirable than others. Texturism functions as systematic racism as it is premised on colonial racial hierarchies often immortalised by institutions. Consequently, addressing texturism requires more than widening the range of beauty standards; on the contrary, it requires dismantling the racial hierarchies.

This article discusses the case of *Baba & Others v Clicks Group Limited & Another*,[15] decided on 28 February 2022 by the High Court of South Africa, Western Cape Division, sitting as an Equality Court. While the dispute involved advertising and advertising standards, I posit that this case has also brought attention to the prevalence

9 RPE Roca and others 'Colonial mentality and diabetes self-management in Filipino Americans' (2025) 12 *Nursing Open* 1-2.
10 As above.
11 BJ Balogun & ET Woldegiorgis 'Combating colonial mentality within higher learning spaces: The case of sub-Saharan African universities' (2023) 12 *African Journal of Teacher Education* 101-102.
12 Decena (n 6) 9.
13 Decena (n 6) 10.
14 Decena (n 6) 17.
15 *Baba & Others v Clicks Group Limited & Another* 2022 (4) SA 141 (WCC) (*Baba*).

of hair discrimination, significance of representation in beauty industries, the role of media in reinforcing Eurocentric beauty ideals, and the need to decolonise beauty standards.

## 2 Synopsis of facts

On 4 September 2020, an unknown person posted a picture of four women on social media. The caption of the picture was 'dry and damaged hair'; 'frizzy and dull hair'; 'fine and flat hair'; and 'normal hair' for TRESemmé hair products. The hair of two black women was described as 'dry and damaged hair, frizzy and dull hair', whereas the hair of white women in the picture was described as 'fine and flat hair, normal hair'. This resulted in nationwide protest and a boycott of TRESemmé and Clicks retail outlets. The images of these women were cropped from an advertisement produced by Unilever, the second respondent, and published on the Clicks Retailers website.[16]

On 7 September 2020, the chief executive officer (CEO) of Clicks Group Limited (CGL) published an apology letter following the outrage. The apology letter, however, was condemned, which resulted in the cabinet minister, Khumbudzo Ntshavheni, urging for the removal of TRESemmé from Clicks shelves.[17] On or about 10 September 2020, the Economic Freedom Fighters (EFF) and Unilever reached a settlement whereby Unilever agreed that the advertisement was offensive and racist, and expressed remorse, particularly towards black women. Additionally, Unilever committed to an investigation, taking measures to redress the situation, to withdraw TRESemmé products for 10 days, and donate 10 000 sanitary towels and sanitisers to informal settlements that would be identified by the EFF. The settlement agreement was deemed to be final between the signatories.[18] However, on 20 September 2020, the applicants launched an application. In their founding affidavit, the applicants argued that the Court must declare the conducts of the respondents offensive to the dignity and repute of black women, and that their conduct contravened sections 7 and 12 of the Equality Act and sections 9 and 10 of the South African Constitution.[19]

16 *Baba* (n 15) paras 2 & 3.
17 *Baba* (n 15) para 6.
18 *Baba* (n 15) para 7.
19 *Baba* (n 15) para 9; and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

# 3 Arguments presented

## 3.1 Applicants' arguments

The applicants argued that the advertisement directly contravened sections 7 and 12 of the Equality Act[20] by contributing to racial inferiority and that the advertisement can reasonably be construed and/or understood as clearly and intentionally unfairly discriminating against a black person. Moreover, the applicants strongly believed that the respondents had a general duty of care when making or publishing an advertisement and their internal procedures must or should have complied with the Equality Act. In the end, the applicants concluded that, essentially, the advertisement was intentionally developed and published to offend black females.[21]

Buttressing on the impact of the advertisement, the first applicant submitted that hair is a crown and pride of women, and seeing the advertisement she felt demeaned, her self-esteem was attacked, she felt inadequate, and judged for her natural hair.[22]

Concerning the respondents' apologies, the applicants condemned the apologies, particularly that of the first respondent who referred to the black community as the 'black hair community'. According to them, the respondents failed to recognise, admit and address the hurt and discriminatory message of their advertisement. Moreover, the applicants submitted that the settlement between the respondent and the EFF did not send a sufficiently strong message to companies and the treatment of black people.[23]

## 3.2 First respondent's submissions

Aside from CGL submitting that the matter should be withdrawn and instituted afresh due to incorrect citing of the relevant company,[24] it (CGL) submitted that the first applicant did not make a case as to why the said advertisement was particularly offensive to her, distinct to other applicants, further arguing how her subjective feelings had 'no bearing on whether unfair racial discrimination had taken place or not in the publication of the TRESemmé advertisement'.[25] I take

20 Act 4 of 2000.
21 *Baba* (n 15) para 11.
22 *Baba* (n 15) para 12.
23 *Baba* (n 15) paras 13 & 14.
24 *Baba* (n 15) paras 15-17.
25 *Baba* (n 15) para 18.

issue with CGL's submission alluding to how the subjective feelings of one of the applicants is irrelevant. While it may factually be accurate, this submission overlooks the importance of social truth.[26] As a nation reeling with the legacy of apartheid, South Africa's racial issues are delicate, thus necessitating the recognition of social truth experienced by those who endured decades of oppression. The Truth and Reconciliation Commission defined social truth as 'the truth of experience that is established through interaction, discussion and debate'.[27] Moreover, it pointed out that establishments of the truth cannot be void 'from the affirmation of the dignity of human beings'.[28]

Reverting to the case, CGL denied a basis for the Court to declare the advertisement offensive, unlawful, racist and demeaning to black females in terms of the Equality Act. Lastly, it submitted that the applicants had not established a case of unfair racial discrimination as per the Equality Act.[29]

### 3.3 Second respondent's submission

In relaying the series of events, Unilever claimed that it and Clicks had entered into a digital marketing contract in November 2015 whereby it supplied Clicks with marketing material that will be put on its (Clicks') 'store-in-store' section of its website in order to represent the findings of the research on various hair types and haircare issues, and to show how these concerns could be managed by using TRESemmé hair products.[30] In describing this process, Unilever held the following position:

- It wanted to have different categories of haircare products. In doing so, it provided six different categories of hair or haircare concerns and aligned this with the relevant TRESemmé product. The hair categories were colour-treated hair, dry and damaged hair, fine and flat hair, frizzy and dull hair, normal hair and styling.
- Each hair category has a visual representation.
- The six images were lined to the six product categories to cater for the haircare needs with a description to assist a customer in navigating the best hair solution.

26 Truth and Reconciliation Commission of South Africa Report Volume 1 paras 40-42.
27 Truth and Reconciliation Commission of South Africa (n 26) para 40.
28 Truth and Reconciliation Commission of South Africa (n 26) para 42.
29 *Baba* (n 15) para 19.
30 *Baba* (n 15) para 22.

- Unilever observed that only pictures of white women were used, and this was viewed as being 'inconsistent with the objective of making the TRESemmé brand more inclusive'.[31] In response, it requested images of black women with healthy hair to be included. Thereafter, there was an inclusion of a black woman under the category 'dry and damaged hair' 'consistent with the market research conclusion'.[32]
- The revised product was thereafter shared with Clicks which went live on 15 May 2019.[33]

When the cropped image circulated in social media, Unilever contacted Clicks Retailers who confirmed that the images used were images from the advertisement on its website.[34] Essentially, according to Unilever, the image that circulated on social media was not the advertisement that appeared on Clicks Retailers' website. Unilever claimed that the advertisement in question was an image cropped by unknown person(s).[35] In buttressing its argument, Unilever submitted that the images only included four of the six product categories. Moreover, it did not reflect the TRESemmé Botanic banner that showed a black woman with an afro hairstyle next to a slogan that read 'the natural choice for moisturised hair'. Therefore, according to Unilever, the actual content of the published advertisement breached neither the Constitution nor the Equality Act, nor did the advertisement that appeared on the Clicks Retailers' website contravene the said legislation.[36] Additionally, it disputed the fact that the first applicant saw the disputed image on the Clicks Retailers' website.

Nevertheless, Unilever acknowledged that the applicant saw the cropped image that circulated on social media even though it was not a reflection of the actual advertisement as it appeared on Clicks' website. It submitted that the published advertisement was not in any way demeaning, attacking, hurting, racist or stigmatising.[37] Despite this, Unilever accepts mistakes in the process of creating the content, and how in attempting to promote diversity in its products, the said images were manipulated.[38] It emphasised its prompt response in making a public apology and undertaking internal

31 *Baba* (n 15) para 22.
32 As above.
33 As above.
34 *Baba* (n 15) para 23.
35 *Baba* (n 15) para 20.
36 *Baba* (n 15) para 24.
37 *Baba* (n 15) para 27.
38 *Baba* (n 15) para 25.

remedial measures.[39] In closing, Unilever submitted that CGL 'would never engage in a course of action that would offend or hurt black women'.[40]

## 4 Issues and jurisdiction

The Court needed to address various issues:

- What is the test in determining whether there has been unfair discrimination on the basis of race?
- Whether the TRESemmé advertisement unfairly discriminated against the applicants (or any other black woman) on the ground of race, and whether the advertisement published information that reasonably construed or understood as demonstrating a clear intention to unfairly discriminate against the applicants or any other black woman.
- Was it the TRESemmé advertisement as published on Clicks Retailers' website or the cropped images that appeared on social media that was the probable cause of the outcry?
- Did the respondents violate sections 7 and 12 of the Equality Act by creating and publishing the TRESemmé advertisement?

One cannot deny that South Africa's constitutional democracy is committed to societal transformation free from racial discrimination. This commitment is anchored in section 9 of the Constitution which provides that everyone is equal before the law. Following the mandate contained in the section for the enactment of a national legislation to prevent or prohibit unfair discrimination, the Equality Act was enacted.[41] The application before the Equality Court was brought in terms of section 20(1) of the Equality Act to which the applicants invoked sections 7 and section 12 of the Equality Act. Respectively, the provisions prohibit unfair discrimination based on race and the dissemination and publication that discriminates.[42] Considering the submission made by Clicks Group Limited that there is no basis for the Court to declare the said publication offensive, unlawful, racist and demeaning towards black women and provide remedies for such harms. In addressing the question on jurisdiction and citing *Manong and Associates (Pty) Ltd v Department of Roads and Transport Eastern Cape & Another*, the Court held that 'the Equality Court is a specialised court designated to hear matters relating to

39 *Baba* (n 15) para 26.
40 *Baba* (n 15) para 28.
41 *Baba* (n 15) para 30.
42 *Baba* (n 15) para 32.

unfair discrimination, hate speech and harassment. There is no doubt that this a matter that falls squarely within the jurisdiction of the Equality Court.'[43]

In addressing the applicants seeking to declare the TRESemmé advertisement as contravening and offensive in terms of sections 9 and 10 of the Constitution, while declaring that the application is brought before the Court in terms of section 20(1) and founded in terms of sections 7 and 12 of the Equality Act, the Court emphasised how the applicants went ahead and relied on the Constitution for declaratory relief.[44] Relying on *MEC for Education: Kwazulu-Natal & Others v Pillay*, the Court held that, based on the principle of subsidiarity, a litigant cannot bypass the legislation enacted to uphold the constitutional right by directly relying on the constitutional right.[45] The principle essentially provides that if an individual's constitutional right has been infringed, the individual has to rely on the legislation that protects their constitutional right, and not the constitutional provision directly. Thus, the Equality Act gives effect to section 9. In contrast, if an individual is calling on the court to examine the constitutionality of a legislative provision in order to declare it invalid, then direct reliance on section 9 will suffice.

## 5 Decision on the merits

For the Court, it was not clear whether the image referred to by the applicant in submitting that it was offensive, reference was being made to the image published on the Clicks Retailers website or the cropped image.[46] This may cause difficulties and problems, because essentially, it had to be determined whether the respondents can be held liable for the cropped images, which it did not publish.

It was clear to the Court that the applicant stated that although having seen the advertisement of the website of the first respondent, it was the cropped image, for which the respondents were not responsible, that prompted an outcry. Relying on the *Plascon-Evans* rule,[47] the Courts' primary determination, therefore, was that the

43 *Baba* (n 15) paras 38-39.
44 *Baba* (n 15) para 40.
45 *Baba* (n 15) para 41.
46 *Baba* (n 15) paras 54-55.
47 A rule whereby an order may be granted in an application proceeding when the facts outlined in the applicant's affidavit are admitted by the respondent to justify the order. See G Penfold & C Hoexter 'The treatment of facts in South African administrative law' in A Carter & J Tomlinson (eds) *Facts in public law adjudication* (2023) 185.

images that were circulated on social media, and not the respondents' advertisement, caused a public outcry.[48]

As emphasised by the Court, the constitutional democracy of South Africa is steadfast on departing from the injustices of the past, as evidenced in section 9 of the Constitution. Conceptually, the right of equality enshrined in this constitutional provision ensures complete and equitable enjoyment of all rights and freedoms.[49] From a general perspective, the complaint submitted against the advertisement is anchored on allegations of unfair discrimination based on race which, if true, it is against section 7 of the Equality Act, which prohibits unfair discrimination on racial grounds. Thus, according to the Court, it is a contravention of the principle of equality. Moreover, when individuals experience unfair discrimination, their dignity is compromised.[50] These constitutional provisions and the Equality Act seek to address the racial practices of the past that were rooted in the apartheid era. From this perspective, I concur with the Court's submission that any person calling out action of, for instance, a private entity or official, on equality grounds, reliance should be the Equality Act, thus reflecting the principle of subsidiarity.

In addressing the allegations of unfair discrimination by corporations against individuals, the Court had to determine whether the differentiation was fair, in other words, 'whether the advertisement differentiated between people or categories of people. If so, is the differentiation fair?' If this differentiation was not fair, then there is a violation of section 7 of the Equality Act. However, if it was fair, 'it might nevertheless amount to discrimination'.[51] Although the judgment does not provide an explanation on the differentiation and discrimination, differentiation often is acceptable for regulatory purposes, for example, differentiating people based on their income. For differentiation, often termed mere differentiation to be constitutional, it ought to be rational. When differentiation infringes on section 9(1) of the Constitution, it then takes the form of discrimination. In other words, differentiation may be fair and, therefore, constitutional. This interpretation is supported in the *Prinsloo* case.[52]

The Court emphasised section 13(2) of the Equality Act to the effect that, if discrimination occurred on the prohibited grounds

48 *Baba* (n 15) para 58.
49 *Baba* (n 15) paras 59 & 60.
50 *Baba* (n 15) para 61.
51 *Baba* (n 15) para 67.
52 *Prinsloo v Van der Linde* 1997 (3) SA 1012.

stipulated in paragraph (a) of the definition of grounds, that is, demonstrating unfair discrimination as defined by the Act, then such discrimination is unfair unless the respondents established that the discrimination was fair.[53] Furthermore, the determination of whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution, a two-stage analysis as set out in *Harksen*[54] had to be conducted. Stage one seeks to determine whether the said differentiation amounts to discrimination as set out on grounds in section 9(3) or analogous grounds, and stage two seeks to determine whether the discrimination was unfair.

Having considered the facts of the case, it was determined that the applicants neither proved that the advertisement imposed, whether directly or indirectly, any burdens on them or disadvantaged them, nor did they prove 'that benefits, opportunities or advantages were withheld from them because they were black', apart from arguing that the advertisement was offensive and hurtful.[55]

In determining whether the advertisement can reasonably be understood and/or considered intentionally unfair discrimination against black people, and whether the advertisement was commissioned intentionally to offend black women, the Court relied on the objective test as set out in *Qwelane*[56] on what amounts to the determination of an objective standard.[57] The Constitutional Court held that

> an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights. On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on 'a multiplicity of trivial actions by hypersensitive persons.[58]

According to the second respondent, it was true that TRESemmé was generally and ordinarily seen as a brand for Caucasian hair; however, efforts for diversity and inclusion were made.[59] This includes representation on hair texture, which was supported by market research, which findings prompted the second respondent to position

53 *Baba* (n 15) para 69.
54 *Harksen v Lane & Others* 1998 (1) SA 300.
55 *Baba* (n 15) para 70. In *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC), sec 16 of the Constitution was argued to create an objective standard on the determination of freedom of speech; whereas the subjective test or standard was argued to be grounded on sec 10 of the Equality Act.
56 *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC).
57 *Baba* (n 15) para 71.
58 *Baba* (n 15) para 99.
59 *Baba* (n 15) para 72.

TRESemmé for afro-textured hair and the creation of the impugned advertisement.[60] In responding to this, the applicants' response was 'that it was not only black women with dry and damaged hair' and, therefore, portraying non-black women as having better hair texture and black women with dry and damaged hair amounted to unfair discrimination as the experience of dry and damaged hair is not a 'phenomenon peculiar to black women'.[61]

Generally, hair relation issues are delicate. Nevertheless, the above submissions made by both the second respondent and the applicants are noteworthy. Responding to the respondent, TRESemmé indeed is often associated with Caucasian hair; similarly, to how Dark and Lovely empowers African women and embraces diversity of hair textures. It may be generally commendable that TRESemmé has made efforts to position itself to cater for afro-textured hair. However, does this stance open up opportunities for black-owned hair brands taking the lead in the textured hair industry in an attempt to address historical issues surrounding textured hair, and underrepresentation of such hair? Of course, all businesses are profit driven. However, the scale of profit, on the one hand, to exploring market ventures, on the other, must be balanced and further accompanied by the understanding and acknowledgment of one's contribution to speak up and make a difference on the dominance of Eurocentric beauty standards.

Ultimately, the Court held that the contentions of the applicants were not supported with a view of the disputed advertisement or image, and based on the six images on the banner, the different hair types and the inscription on the images of black women, it did not amount to unfair discrimination when the advertisement is viewed in its original context.[62] This was particularly premised on how the applicants did not establish that the advertisement discriminated against them. Moreover, it was clear to the Court that the advertisement did not intend to unfairly discriminate against black women or people. The matter, therefore, was dismissed.

## 6 Coloniality of beauty

The *Baba* case extends beyond advertising concerns. This case serves as an opportunity to confront narratives surrounding textured hair and persisting incidences of hair discrimination. Simply put, this case prompts a larger conversation on beauty standards. To effectively

60 *Baba* (n 15) para 73.
61 *Baba* (n 15) para 74.
62 *Baba* (n 15) para 75.

address these beauty concerns and/or standards and combat the persisting perpetuation of inferiorities, it is imperative to recognise underlying causes of such incidents. This entails acknowledging the historical impact of colonialism and its influence in shaping beauty norms and standards along racialised hierarchies.

European colonialism influenced global power structures. Aside from it being theoretically dismantled,[63] its successor, Western imperialism, exists and persists as a system that connects the social interest of dominant countries with countries with unequal power. In this stance of unequal power dynamics, this colonial structure systematised specific social discrimination tabulated as 'racial', 'ethnic', 'anthropological' or 'national', depending on the those involved and the historical context.[64] By virtue of the way in which Eurocentric colonial domination moulded these constructs, they were perceived and accepted as being objective and scientific instead of being seen as a consequence of the history of power. It is precisely why these colonial power structures continue to be the framework of social and class dynamics.[65] For Quijano, this is demonstrated by observing the global exploitation, social domination and distribution of resources and work among the world population. The observation often reveals that the vast majority of those exploited, dominated and discriminated against are seemingly and precisely those within the 'races', 'ethnise' or 'nations' of the colonised populations categorised by world power.[66] Simply put, European colonialism imposed a system that not only positioned European knowledge, systems, institutions or identity as being exotic or superior; but evolved to Western imperialism in order to secure the continuation of the domination through global economy and social systems. Consequently, the unequal power dynamics remain an evident demonstration of the extent of inequalities between the Global North and Third World countries.

The extent of the unequal power dynamics of the coloniser and the colonised may be argued to be reflected on how modern societies are linked to and emerge through colonialism. European colonisation resulted in European modernity/rationality, thus contributing towards the Eurocentric capitalist colonial power being hypothesised and formalised by the west.[67] This observation supports assertions that the European modernity is a direct reflection of the

63 See A Karibi-Whyte 'An agenda for decolonising law in Africa: Conceptualising the curriculum' (2020) 2 *Journal of Decolonising Disciplines* 1-20.
64 A Quijano 'Coloniality and modernity/rationality' (2007) 21 *Cultural Studies* 168.
65 As above.
66 Quijano (n 64) 169.
67 Quijano (n 64) 172.

European colonialism, making it possible for domination in cultural, intellectual and social systems. Reflecting on the legacy of colonialism and the relationship between colonialism and modernity, Mignolo and Walsh are of the view that modernity/coloniality/decoloniality are terms that are often utilised simultaneously and are intertwined. In other words, with no modernity, there is no coloniality, and decoloniality denotes demodernity. Similarly, modernity/coloniality engenders decoloniality.[68] In other words, acknowledging that modernity is founded on colonialism, Mignolo and Walsh refer to this as coloniality[69] (which could be argued to take the form of neo-imperialism). Consequently, the decoloniality process seeks to dismantle the colonial structures, that is, coloniality.

In the absence of separating the legacy of colonialism from modernity, the persistence of European culture and/or the perception of its access to power and desirability, the colonisers portrayed their method and patterns of knowledge production and meaning as ideal, thus contributing to cultural coloniality or domination.[70] Ultimately, this has led to European culture being imposed as a universal standard for cultural development captivating and persuading other societies and cultures to Europeanisation.[71] Amplifying this argument, modernity may be argued to be influenced by Eurocentric narratives. This is premised on how Eurocentrism as a universal paradigm of knowledge was perceived as valid, thus ignoring non-European perspectives.[72] This perception continued during the period of colonialism and the age of enlightenment whereby non-Western people where not considered equals.[73]

The dominance of the European norms and knowledge has led to submissions that knowledge is never impartial; that it (knowledge) is influenced by economic interests and power of the west, thus making knowledge function as a commodity exported from the west to the Third World. For that reason, knowledge from the Third World is constructed with political and economic interests of the west in mind. This narrative enabled historical western scholars to come forward and present their understanding of Eastern cultures as being objective.[74] This viewpoint emphasise how European dominance continue to shape the perception, narrative and understanding of

68 CE Walsh & WD Mignolo *On decoloniality: Concepts, analytics, praxis* (2018) 139.
69 As above.
70 Quijano (n 64) 169.
71 Quijano (n 64) 170.
72 Quijano (n 64) 172.
73 Quijano (n 64) 176.
74 AV Praveen 'Postcolonialism: Edward Said & Gayatri Spivak' (2016) 5 *Research Journal of Recent Sciences* 48.

the rest of the world. The extent to which colonial systems influence aspects of society is referred to as colonial totality. Developed from colonial modernity, the concept explains the legacy of European colonialism, the idea of a unified Western tradition and how former colonial powers exerted control politically and intellectually in order to model universal structures.[75] For Quijano, addressing this reality requires 'to liberate the production of knowledge, reflection and communication from the pitfalls of European rationality/modernity'.[76]

Aside from influence in political and economic structures, the persistent influence of colonial structures in contemporary societies can be described as coloniality of power. This concept emerged along the formation of America and Western Europe whereby the concept of race was utilised as a tool for social classification to reclassify cultural and traditional notions into hierarchies of biological and structural superiority and inferiority.[77] As delineated by Quijano, 'coloniality of power is based upon racial social classification of the world population under Eurocentred world power'.[78] Simply put, the consequence of European colonialism categorising and structuring the population of the world into racial categories established universal social hierarchies, where some are perceived as superior than others.[79] While this may be the perspective, it is equally imperative to appreciate that coloniality of power extends beyond racial classification. Thus, for example, it is capable of including social or economic domination leading to the continuation of colonial power configuring global inequalities.[80]

The present-day expressions of beauty and the dominance of Eurocentric beauty standards can be attributed to the legacy of European colonialism. Consequently, one may argue that although European colonisation did not obliterate indigenous expressions, cultural destruction was grave, thus denouncing the legitimacy of African cultures in the global cultural order.[81] History has evidence of hair discrimination on the colonised.[82] Caucasian supremacists and slave masters performed heinous acts against Africans and other people of colour for scientific evidence to promote racial hierarchy,

75 P Brooker *A glossary of literary and cultural theory* (2016) 284.
76 Quijano (n 64) 177.
77 Quijano 'Coloniality of power, Eurocentrism and Latin America' (2000) 1 *Duke University Press* 533. See also Quijano (n 64) 171.
78 Quijano (n 64) 171.
79 As above.
80 As above.
81 Quijano (n 64) 70.
82 SMF Knight & W Long 'Narratives of black women on hair in the workplace' (2019) 58 *Psychology in Society* 27.

and document literature on black inferiority.[83] Through this historical lens, history continues to shape beauty standards through a Eurocentric lens/paradigm.[84] For pre-colonial Africa, hair was a means for 'self-presentation, identity, beauty, power, culture … pride … cultural and spiritual significance'.[85] During the Transatlantic slave trade period, African hair and their designed hair styles were not only sophisticated, but carried out a message, demonstrated social status, and conveyed emotion and personality.[86] When African people were captured as slaves, their owners cut their hair, devastating not only their spirit, but also their culture and identity.[87] The slave owners referred to black hair as wool and forced them to straighten or cover their hair in order to resemble their white slave owners.[88]

The global ridicule, stereotype and stigma of those with textured hair continues.[89] Post-colonialism, the aftermath of racial categorisation and the use of skin colour as a tool for social hierarchy differentiation have contributed towards the indoctrination of beauty standards whereby skin colour, nose size and hair texture were utilised as apparatus to determine self-worth, intelligence, attractiveness and success, favouritism and the assessment of privilege.[90] This has led to straightened hair being perceived as more beautiful and African hair undesirable and at times less feminine.[91] Consequently, the normalisation of Eurocentric beauty standards, consciously or subconsciously, has a psychological, economic, social and political consequence for black women.[92] Additionally, the impact of colonial racial classification and promoted aesthetic biological hierarchies has contributed to the denial of or difficulty in confirming self-worth and overcoming alienation within the historically marginalised

83 Knight & Long (n 82) 28.
84 These standards include long and straight hair, light or fair skin, big eyes, small narrow nose, being tall and thin. See Knight & Long (n 82) 27 and Z Wilson 'Beauty and the beast of Eurocentric standards' *Daily Nexus* 13 February 2023, https://dailynexus.com/2023-02-13/beauty-and-the-beast-of-eurocentric-standards/ (accessed 19 March 2024).
85 J le Roux & TD Oyedemi 'Entrenched coloniality? Colonial-born black women, hair and identity in post-apartheid South Africa' (2023) 82 *African Studies* 200.
86 KL Rowe 'Tangle: Black hair and texturism in Ethnodrama' (2022) 22 *Cultural Studies Critical Methodologies* 7.
87 As above.
88 G Rakim '"Light skin is the right skin? And long hair don't care?": An investigation of colourism and texturism amongst black and Latina women' (2021) *Senior Projects Spring* 9.
89 Le Roux & Oyedemi (n 85) 200. See also JG Asare 'How hair discrimination affects black women at work' *Harvard Business Review* 10 May 2023, https://hbr.org/2023/05/how-hair-discrimination-affects-black-women-at-work (accessed 19 March 2024).
90 KM Kinuthia, E Susanti & SP Kokonya 'Afrocentric beauty: The proliferation of "texturist" and "colorist" beliefs among young women in Kenya' (2023) 36 *Masyarakat Kebudayaan dan Politik* 33.
91 As above.
92 Rowe (n 86) 8.

communities.[93] Following independence and the recognition of the impact of the inferiority narrative, the 'black is beautiful' cultural movement emerged in the 1960s celebrating Afrocentric features in order to promote, confirm self-love and worth following the damage of racism on the psyche of black people.[94]

For South Africa, it is widely known that apartheid was an institutionalised system of racial segregation creating a racial society premised on racial hierarchy. Apartheid in South Africa emerged and was supported following the concern of the endangerment of white supremacy by the increasing black population.[95] Consequently, in order to ensure racial purity, social order, surveillance and regulation, there was a need to systematise the movement of people and the reassertion of racial difference to ensure that everyone knew their 'proper' place economically, politically and socially.[96] Race was utilised as a tool to organise and allocate resources and opportunities, plan and spatially demarcate to establish a boundary for social interactions.[97] Moreover, race was accepted as having both cultural and biological markers, thus setting a foundation for the architects of apartheid.[98]

During the apartheid regime, the determinate of race was on various factors, including the texture of one's hair, language and clothing.[99] To succeed in racial classification, legislation such as the Representation of Native Act 12 of 1936 and the Population Registration Act 30 of 1950 was enacted. The Representation of Native Act defined a 'native' as not only a person with African origin, but included coloured people.[100] The Population Registration Act laid out racial categorisation in order to ensure everyday racialisation.[101] This Act divided societies into four categories: black, white, coloured and Asian. Aside from the Population Registration Act, the apartheid regime established the pencil test to determine racial identity.[102] In the pencil test, officials placed a pen or pencil through a person's hair. If the pencil fell or slid through, they were declared coloured; if the

93 S Fernando *Mental health, race and culture* (2010) 18.
94 Kinuthia and others (n 90) 32. See also Fernando (n 93) 18.
95 D Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 52.
96 As above.
97 As above.
98 Posel (n 95) 53.
99 Le Roux & Oyedemi (n 85) 201.
100 Sec 2(1). See also S Patterson *Colour and culture in South Africa* (2013) 363.
101 Sec 14(1). See Posel (n 95) 54.
102 The pencil test was a tool used to determine racial characteristics in order to bolster discriminatory legislative frameworks and policies. Moreover, the use of the test demonstrated how Eurocentric beauty standards were entrenched in law.

pencil was 'stuck', the person was categorised as black.[103] According to Fataar, hair texture for the coloured community, at times, was hierarchical whereby their hair can either determine one's racial inferiority or superiority.[104] Similarly, fair-skinned children of coloured parents passed as white, whereas coloureds who married into black families were categorised black.[105] Without a doubt, colonialism played a significant role in eroding African cultural lifestyles, leading to social and cultural inferiorisation of what is African.[106] As presented by Le Roux and Oyedemi and following this case, it is imperative to introspect whether 'the black identity with regard to hair and perceptions of hair changed in multiracial, liberated, post-apartheid South Africa'.[107]

Globally, the state of independence of various countries has not shielded historically marginalised groups from discrimination. In fact, black women continue to carry the weight of hair discrimination. To combat this, some countries, such as the United States of America, have made efforts through legislation to address the prevalence of hair discrimination. Enacted in 2019, the Create a Respectful and Open World for National Hair (CROWN) Act was enacted to protect against race-based hair discrimination.[108] The Act seeks to protect hair texture and protective styles that include braids, locks, twists and knots in the workplace and public schools.[109] Nevertheless, despite this, hair discrimination continues.[110]

Aside from national measures, it is equally imperative for institutions and corporations to be aware and understand the impact of hair bias. This understanding, accompanied by preventative measures to prevent hair discrimination and texturism, may occur through conversations on racial equity.[111] This is critical as societies and beauty industries continue to view textured hair as unattractive

103 AS Harris *Everyday identity and electoral politics race, ethnicity, and the bloc vote in South Africa and beyond* (2022) 99.
104 A Fataar *The educational pathways and experiences of black students at Stellenbosch University* (2023) 100, 101.
105 Posel (n 95) 54.
106 Le Roux & Oyedemi (n 85) 202.
107 Le Roux & Oyedemi (n 85) 201.
108 Creating a Respectful and Open World for Natural Hair Act of 2022, HR 2116, 117th Cong (2022). See also A McLeod 'What is in a policy: Government information resources to help inform policy analysis and research' in T Diamond & D Hallett (eds) *What can US government information do for me? Librarians explains the discovery and use of public data, documents, maps and images* (2023) 43.
109 Creating a Respectful and Open World for Natural Hair Act of 2022 (n 108) sec 2.
110 C Duster 'Congress reignites a bipartisan effort to ban hair discrimination' NPR 12 March 2025, https://www.npr.org/2025/03/12/nx-s1-5324544/crown-act-reintroduced-2025 (accessed 28 March 2025).
111 Asare (n 89).

and unmanageable. This reality should not be viewed in abstract. In other words, it is more than merely being hair discrimination and accepting it as a form of racial discrimination, but it is the realisation that unfair differential treatment on the basis of race or other factors associated with race or ethnicity continues despite the end of colonialism.[112]

Aside from accepting that systematic discrimination has led to colourism, skin bias continues to occur not only in institutions but also in interpersonal relationships.[113] This is evidenced in various studies and reports. Over the years, there are numerous reports of textured hair being seen as or declared to be either inappropriate or unprofessional. In 2019 an employee of a South African brewery company was informed that her dreadlocks were a safety hazard to her colleagues.[114] In a 2023 incident, a 13 year-old girl with natural dreadlocks was prevented and forcefully removed from class at the Crowthorne Christian Academy in Midrand, South Africa.[115] Similar incidences occurred in Trinidad[116] and London.[117] Hair bias has been documented in various empirical studies. For example, a study by Griffin examined how skin and hair affect black and Latina women, in order to determine the impact of colourism and texturism; and whether these biases are socialised within society and internalised by women.[118] The study revealed that colourism and texturism negatively impact those in the black and Latina communities;[119] additionally, that colourism and texturism are examples of within-group phenotype bias in black and Latina communities. This observation may be attributed to the emotional and psychological trauma experienced by these communities.[120] In another study, Kinuthia and others sought to understand colourism and texturism in Kenyan societies of women with different skin tones.[121] The study

112 Nkimbeng and others (n 2) 406.
113 Kinuthia and others (n 90) 33.
114 T Makhetha 'Lose your dreads or stay home' *SowetanLive* 2 April 2019, https://www.sowetanlive.co.za/news/south-africa/2019-04-02-lose-your-dreads-or-stay-home/ (accessed 24 March 2025).
115 M Magadla & N Sibiya 'Girl kicked out of school for her natural dreadlocks: Christian academy says its hair policy was offended' *SowetanLive* 16 August 2023, https://www.sowetanlive.co.za/news/south-africa/2023-08-16-girl-kicked-out-of-school-for-her-natural-dreadlocks/ (accessed 24 March 2025).
116 N Fraser '[Updated] Trinity students protest at grad: BAD HAIR RULES' *NewsDay* 28 June 2023, https://newsday.co.tt/2023/06/28/education-minister-hairstyle-issue-at-trinity-college-unfortunate-regrettable/ (accessed 24 March 2025).
117 T Thomas 'We need to push: Hair discrimination fight moves to UK workplace' *The Guardian* 28 October 2022, https://www.theguardian.com/world/2022/oct/28/we-need-to-push-hair-discrimination-fight-moves-to-uk-workplaces (accessed 24 March 2025).
118 Rakim (n 88) 15-16.
119 Rakim (n 88) 37.
120 Rakim (n 88) 13.
121 Kinuthia and others (n 90) 34.

sought to analyse the contribution of family and peers in colourism and texturism beliefs.[122] The study revealed that young black Kenyan women encounter colourism and texturism at home and school. Additionally, there are persistent occurrences of colourism in social institutions and colourist incidences within families and peers.[123] Aside from these studies demonstrating the effects of racial classification on the previously marginalised groups, the studies support the submissions that phenotype bias exists in black communities. Phenotype bias and prejudice were prominent social, and utilised to justify racially motivated practices, slavery, white supremacy and colonialism.[124] While this bias may be exercised by those historically classified as racially superior, the effects of internalised oppression, evidenced in these studies, have contributed to this bias also being exercised in black communities. Consequently, knowing the history of how phenotype bias and colour discrimination can be traced to colonialism, slavery and white supremacy provide an opportunity to reflect on how this narrative continues to affect people of African origin today.[125] Supported by Nkimbeng, reports and studies demonstrating hair discrimination or bias illuminate on how the inferiority perception of textured hair is traced to subjugation of people of colour.[126]

In these times of decolonisation, it is imperative to challenge the narrative and reclaim the power of natural hair 'as a symbol of power and identity'.[127] For Mignolo and Walsh, decoloniality is the decolonisation of knowledge and being: This process of decolonisation of knowledge cannot occur without one questioning the essence of Western epistemology, and the decolonisation of being cannot occur without one questioning the foundation of Western ontology.[128] In other words, in order to successfully decolonise, Western dominance ought to be dismantled. This implies seeing value in alternative knowledge and ways of thinking, and accepting humanity as diverse. Until this occurs, the process of decolonisation will be unsuccessful.[129] Additionally, Praveen offers insights into the decolonisation process. For Praveen, in acknowledging the consequences of European colonialism on societal and economic transformation of the colonised, it may be a Herculean task to attempt to restore a precolonial past. Rather, efforts should be placed on understanding the 'worlding of

122 Kinuthia and others (n 90) 41.
123 As above.
124 Rakim (n 88) 7.
125 Rowe (n 86) 7.
126 Nkimbeng and others (n 2) 407.
127 As above.
128 Walsh & Mignolo (n 68) 136.
129 As above.

the Third World'.[130] Worlding, a term coined by Spivak, is a process describing how colonisation was presented to the world as exotic and how the colonised were persuaded to accept domination.[131] For this reason, the process of decolonisation of beauty requires redefining beauty beyond Eurocentric models and grounding African aesthetics and epistemologies in the process.

## 7 Conclusion

There are two perspective emanating from this case. First, the judgment handed down by the Court rightfully ruled that the applicants had failed to establish the advertisement discriminated against them following their failure to determine how they were discriminated by it. Second, the case highlights the need to converse on various factors that impact the response of beauty trends. This is paramount considering how incidences of hair discrimination or remnants of colonial racial hierarchies persist. Extending beyond the *Baba* case, it is evident that colonial ideas of racial superiority and Western culture dominance influence not only corporate mainstream, but also the broader impact of universal beauty ideals.

130 Praveen (n 74) 49.
131 B Ashcroft, G Griffiths & H Tiffin *Key concepts in post-colonial studies* (1998) 241.

**THE CENTRE FOR HUMAN RIGHTS**
**UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.chr.up.ac.za or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810
chr@up.ac.za

**Centre team**

**Oluwatosin Adegun**
Doctoral candidate; Tutor

**Clement Agyemang**
Doctoral candidate; Tutor

**Razan Ali**
Doctoral candidate; Alumni coordinator

**Victoria Ameachi**
Assistant: Marketing and Communications

**Mansah Amoah**
Project Officer: Advanced Human Rights Courses

**Dennis Antwi**
Project Manager: Advanced Human Rights Courses

**Amon Aruho**
Doctoral candidate

**Abiy Ashenafi**
Manager: Migration Unit

**Landilani Banda**
Post-doctoral Fellow

**Dorcas Basimanyane**
Post-doctoral Fellow

**Samuel Chamboko**
Financial Manager

**Lydia Chibwe**
Post-Doctoral Researcher: Women's Rights Unit

**Rutendo Chinamona**
Project Coordinator: LLM (Sexual and Reproductive Rights in Africa)

**Shyreen Chirwa**
Doctoral candidate; Project Officer, Children's Rights Unit

**Busisiwe Crafford**
Graphic Designer: Communications and Marketing

**Isabeau de Meyer**
Publication Manager: *African Human Rights Law Journal*

**Merga Dibaba**
Doctoral candidate

**Hlengiwe Dube**
Manager: Expression, Information and Digital Rights Unit

**Ebenezer Durojaye**
Acting Director; Professor of Sexual and Reproductive Health Rights

**Elvis Fokala**
Associate Professor; Manager: Children's Rights Unit

**Charles Fombad**
Professor of Law; Director, Institute for International and Comparative Law in Africa (ICLA)

**Janet Gbam**
Research Assistant

**Ivy Gikonyo**
Doctoral candidate

**Lizette Hermann**
Manager: Pretoria University Law Press (PULP)

**David Ikpo**
Project Coordinator: Communications and Marketing

**Yumba Kakhobwe**
Doctoral candidate

**Simphiwe Khumalo**
Acting Manager: Marketing and Website Development

**Brian Kibirango**
Christof Heyns Scholarship holder; Doctoral candidate
Co-ordinator: Advocacy and Litigation Unit

**Magnus Killander**
Professor and Head of Research

**Bianca Knight**
Project Officer: Women's Rights Unit

**Henok Kremte**
Tutor; Doctoral candidate
Project Officer: Expression, Information and Digital Rights Unit

**Lloyd Kuveya**
Assistant Director

**Barbara Lamara**
Doctoral candidate; Tutor

**Matilda Lasseko-Phooko**
Manager: Women's Rights Unit

**Emily Laubscher**
Assistant Financial Manager

**Sydney Madhlophe**
General Assistant; Pretoria University Law Press (PULP)

**Bonolo Makgale**
Manager: Democracy and Civic Engagement Unit

**Sabeeha Majid**
Project Officer: Disability Rights Unit

**Rotondwa Mashige**
Programme Coordinator: LLM/MPhil (Human Rights and Democratisation in Africa)

**Mmanako Masipa**
Researcher: Children's Rights Unit

**Michelle Masiwisa**
Programme Manager: LLM/MPhil (Human Rights and Democratisation in Africa)

**Belinda Matore**
Doctoral candidate; Project Officer: Expression, Information and Digital Rights Unit

**Pumeza Matwa**
Office Manager: Institute for International and Comparative Law (ICLA)

**Tendai Mbanje**
Doctoral candidate; Project Officer: Expression, Information and Digital Rights Unit

**Tapiwa Mhuru**
Project Coordinator: Nelson Mandela World Human Rights Moot Court Competition

**Nathan Milanzi**
Researcher: SOGIESC Unit

**Palesa Mogosetso**
Researcher: Children's Rights Unit

**Tholoana Mosia**
Researcher: SOGIESC Unit

**Ntandoyenkosi Moyo**
Project Coordinator: LLM (Human Rights and Democratisation in Africa)

**Naledi Mpanza**
Doctoral Candidate; Research Assistant: SOGIESC Unit

**Dianah Msipa**
Manager: Disability Rights Unit; Post-doctoral Research Fellow

**Rutendo Mugabe**
Project Officer: African Coalition for Corporate Accountability (ACCA)

**Davina Murden**
Doctoral candidate; Moot Court Assistant

**Nkatha Murungi**
Human Rights Professor

**Tatenda Mushwaika**
Academic Associate

**Tinyiko Ngobeni**
Programme Coordinator: LLM (International Trade and Investment Law in Africa)

**Sindiso Nkomo**
Post-doctoral Fellow

**Nqobani Nyathi**
Doctoral candidate; Research Assistant: Children's Rights Unit

**Lassane Ouedraogo**
Doctoral candidate; Tutor

**Maryanne Obiogbaoso**
Doctoral candidate

**Lourika Pienaar**
Webmaster

**Sarita Pienaar-Erasmus**
Assistant Financial Manager

**Zelda Ramatsetse**
Junior Financial Officer

**Ahmed Sayaad**
Project Coordinator: Christof Heyns African Human Rights Moot Court Competition

**Seyitan Solademi**
Project Officer: Women's Rights Unit; Doctoral candidate

**Tamika Thumbiran**
SIDA Project Coordinator

**Chanel van der Linde**
Acting Manager: SOGIESC Unit

**Ruth Versfeld**
Project Officer: Advocacy and Litigation Unit

**Carole Viljoen**
Office Manager

**Frans Viljoen**
Professor: Human Rights Law

**Danielle Visser**
Doctoral candidate

**Molya Vundamina**
Doctoral candid ate

**Extraordinary/Honorary professors**

**Dan Kuwali**
Lawyer in private practice, Malawi

**Michael Stein**
Harvard Law School, United States of America

**Extraordinary lecturers**

**Adem Abebe**
Senior Advisor in Constitution and Peace Building at the International Institute for Democracy and Electoral Assistance (IDEA)

**Horace Adjolohoun**
Principal Legal Officer, African Court

**Japhet Biegon**
Amnesty International, Kenya

**Academic Programmes**

- LLM/MPhil (Human Rights and Democratisation in Africa)
- LLM (International Trade and Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual and Reproductive Rights in Africa)

- LLM/MPhil (Disability Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Alumni Association: LLM (HRDA)

**Projects**

- Advanced Human Rights Courses (AHRC)
- Christof Heyns African Human Rights Moot Court Competition
- Nelson Mandela World Human Rights Moot Court Competition
- Human Rights Clinics
- Human Rights Conferences
- Impact of the Charter/Maputo Protocol/African Children's Charter
- Implementation and Compliance Project

**Research and Advocacy Units**

- Business and Human Rights Unit
- Children's Rights Unit
- Democracy and Civic Engagement Unit
- Disability Rights Unit
- Expression, Information and Digital Rights Unit
- Freedom from Violence Unit
- Litigation and Implementation Unit
- Migration Unit
- Sexual Orientation, Gender Identity and Expression and Sex Characteristics Unit
- Women's Rights Unit

**Affiliated entities**

- Institute for International and Comparative Law in Africa (ICLA)
- International Development Law Unit (IDLU)

**Secretariat**

- African Coalition for Corporate Accountability (ACCA)

**Regular publications**

- *AfricLaw.com*
- *African Human Rights Law Journal*
- *African Human Rights Law Reports (English and French)*
- *African Disability Rights Yearbook*
- *African Human Rights Yearbook*

# AFRICAN HUMAN RIGHTS LAW JOURNAL

## GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:
idemeyer1@gmail.com

All communications should be sent to the same address.

Books for review should be sent to:
The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission must indicate that it has not already been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- Manuscripts will not be considered if the English is below standard. In case of doubt about the correct use of the English language, authors are advised to have their text checked by a native English speaker before submission.
- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors need to provide their ORCID identifier. ORCID provides a persistent digital identifier that distinguishes them from every other researcher and, through integration in key research workflows such as manuscript and grant submission, supports automated linkages between them and their professional activities ensuring that their work is recognised. If authors do not have such an ID, they can register at the website https://orcid.org/register.

- Authors should supply a summary of their contributions (setting out the main *findings* of the article) of between 250 and 300 words, and at least four keywords.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.
- The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:
  1
  2
  3.1
  3.2.1
- Do NOT use automatic page numbering in headings.
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.

- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or https://www.ahrlj.up.ac.za/submissions for additional aspects of house style.

## CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2024
Compiled by: I de Meyer
Source: http://www.au.int (accessed 31 May 2025)

| | **African Charter on Human and Peoples' Rights** | **AU Convention Governing the Specific Aspects of Refugee Problems in Africa** | **African Charter on the Rights and Welfare of the Child** | **Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights** | **Protocol to the African Charter on the Rights of Women** | **African Charter on Democracy, Elections and Governance** |
|---|---|---|---|---|---|---|
| **COUNTRY** | **Ratified/ Acceded** | **Ratified/ Acceded** | **Ratified/ Acceded** | **Ratified/ Acceded** | **Ratified/ Acceded** | **Ratified/ Acceded** |
| Algeria | 01/03/87 | 24/05/74 | 08/07/03 | 22/04/03 | 20/11/16 | 10/01/17 |
| Angola | 02/03/90 | 30/04/81 | 11/04/92 | | 30/08/07 | 08/06/21 |
| Benin | 20/01/86 | 26/02/73 | 17/04/97 | 10/06/14 | 30/09/05 | 28/06/12 |
| Botswana | 17/07/86 | 04/05/95 | 10/07/01 | | | |
| Burkina Faso | 06/07/84 | 19/03/74 | 08/06/92 | 31/12/98* | 09/06/06 | 26/05/10 |
| Burundi | 28/07/89 | 31/10/75 | 28/06/04 | 02/04/03 | | |
| Cameroon | 20/06/89 | 07/09/85 | 05/09/97 | 09/12/14 | 13/09/12 | 24/08/11 |
| Cape Verde | 02/06/87 | 16/02/89 | 20/07/93 | | 21/06/05 | 12/10/23 |
| Central African Republic | 26/04/86 | 23/07/70 | 07/07/16 | | | 24/04/07 |
| Chad | 09/10/86 | 12/08/81 | 30/03/00 | 27/01/16 | | 11/07/11 |
| Comoros | 01/06/86 | 02/04/04 | 18/03/04 | 23/12/03 | 18/03/04 | 30/11/16 |
| Congo | 09/12/82 | 16/01/71 | 08/09/06 | 10/08/10 | 14/12/11 | |
| Côte d'Ivoire | 06/01/92 | 26/02/98 | 01/03/02 | 07/01/03 | 05/10/11 | 16/10/13 |
| Democratic Republic of Congo | 20/07/87 | 14/02/73 | 31/01/17 | 31/01/17 | 09/06/08 | |
| Djibouti | 11/11/91 | | 03/01/11 | | 02/02/05 | 02/12/12 |
| Egypt | 20/03/84 | 12/06/80 | 09/05/01 | | | |
| Equatorial Guinea | 07/04/86 | 08/09/80 | 20/12/02 | | 27/10/09 | 11/07/17 |
| Eritrea | 14/01/99 | | 22/12/99 | | | |
| Eswatini | 15/09/95 | 16/01/89 | 05/10/12 | | 05/10/12 | |
| Ethiopia | 15/06/98 | 15/10/73 | 02/10/02 | | 18/07/18 | 05/12/08 |
| Gabon | 20/02/86 | 21/03/86 | 18/05/07 | 14/08/00 | 10/01/11 | |
| The Gambia | 08/06/83 | 12/11/80 | 14/12/00 | 30/06/99 | 25/05/05 | 11/06/08 |
| Ghana | 24/01/89 | 19/06/75 | 10/06/05 | 25/08/04* | 13/06/07 | 06/09/10 |
| Guinea | 16/02/82 | 18/10/72 | 27/05/99 | | 16/04/12 | 17/06/11 |

| | | | | | | |
|---|---|---|---|---|---|---|
| Guinea-Bissau | 04/12/85 | 27/06/89 | 19/06/08 | 4/10/21* | 19/06/08 | 23/12/11 |
| Kenya | 23/01/92 | 23/06/92 | 25/07/00 | 04/02/04 | 06/10/10 | 07/01/21 |
| Lesotho | 10/02/92 | 18/11/88 | 27/09/99 | 28/10/03 | 26/10/04 | 30/06/10 |
| Liberia | 04/08/82 | 01/10/71 | 01/08/07 | | 14/12/07 | 23/02/14 |
| Libya | 19/07/86 | 25/04/81 | 23/09/00 | 19/11/03 | 23/05/04 | |
| Madagascar | 09/03/92 | | 30/03/05 | 12/10/21 | | 23/02/17 |
| Malawi | 17/11/89 | 04/11/87 | 16/09/99 | 09/09/08* | 20/05/05 | 11/10/12 |
| Mali | 21/12/81 | 10/10/81 | 03/06/98 | 10/05/00* | 13/01/05 | 13/08/13 |
| Mauritania | 14/06/86 | 22/07/72 | 21/09/05 | 19/05/05 | 21/09/05 | 07/07/08 |
| Mauritius | 19/06/92 | | 14/02/92 | 03/03/03 | 16/06/17 | |
| Mozam-bique | 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 | 19/03/22 | 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 | 24/01/13 | 04/12/13 | | | 24/02/23 | 13/04/15 |
| Sudan | 18/02/86 | 24/12/72 | 30/07/05 | | | 19/06/13 |
| Tanzania | 18/02/84 | 10/01/75 | 16/03/03 | 07/02/06* | 03/03/07 | |
| Togo | 05/11/82 | 10/04/70 | 05/05/98 | 23/06/03 | 12/10/05 | 24/01/12 |
| Tunisia | 16/03/83 | 17/11/89 | | 21/08/07* | 23/08/18 | |
| Uganda | 10/05/86 | 24/07/87 | 17/08/94 | 16/02/01 | 22/07/10 | |
| Zambia | 10/01/84 | 30/07/73 | 02/12/08 | 28/12/22 | 02/05/06 | 31/05/11 |
| Zimbabwe | 30/05/86 | 28/09/85 | 19/01/95 | | 15/04/08 | 06/04/22 |
| **TOTAL NUMBER OF STATES** | **54** | **46** | **50** | **34** | **44** | **39** |

Ratifications after 31 December 2024 are indicated in bold

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid