This volume of essays, *A life interrupted: essays in honour of the lives and legacies of Christof Heyns*, honours Christof Heyns, renowned human rights lawyer, advocate, activist and educator, but also down-to-earth family man, friend and colleague. Christof's sudden and most untimely passing on 28 March 2021 deeply saddened those close to him but also evinced an outpouring of grief from the national and international human rights community. His passing brought a deep sense of loss, in part because, at age 62, he was fully engaged in contributing to the betterment of society and still had so much more to give. His is a life interrupted. But at the same time, looking back over the varied lives he lived, he had already left his mark in so many ways. His influences and impacts are manifold and magical. This collection not only testifies to the legacy that he has left us, but also to the ongoing efforts of many to continue building on his legacy.

This collection contains two sets of essays by family members, friends, colleagues, collaborators and students. Part A contains essays of a more reflective and personal nature, while the contributions in Part B link to the scholarly or academic themes Christof had worked on and explored, including international human rights systems, international law, the right to life, freedom of association, international humanitarian law, the impact of human rights treaties, constitutionalism and legal philosophy. However, a neat distinction between the personal and professional is not possible in respect of such a warm, generous and enthusiastic person as Christof. Most of the essays in Part A integrate some of Christof's professional and academic achievements, while many of the essays in Part B also reflect on Christof as a person.

The publication date of this book is 10 January 2022, which is the date marking 63 years since Christof's birth. The publisher is the Pretoria University Law Press (PULP), of which Christof was also a founder.

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A LIFE *INTERRUPTED*

Essays in honour of the lives and legacies of Christof Heyns

Edited by Frans Viljoen, Charles Fombad, Dire Tladi, Ann Skelton and Magnus Killander

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The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria (UP), 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.

The editors, all based at the Faculty of Law, UP, are colleagues and friends who worked closely with Christof. Frans Viljoen succeeded Christof as Director of the Centre for Human Rights. Christof was his doctoral supervisor, mentor and research collaborator. Charles Fombad worked with Christof at the Institute for International and Comparative Law in Africa (ICLA), and took over as ICLA Director after Christof's passing. Dire Tladi, an ICLA fellow, had his office just across from Christof in ICLA. As member of the International Law Commission, he shared with Christof high level engagement with the UN. While Christof served on the Human Rights Committee, his colleague Ann Skelton serves on the Committee on the Rights of the Child. Magnus Killander worked closely with Christof as co-author and co-editor. Christof was also his doctoral supervisor.

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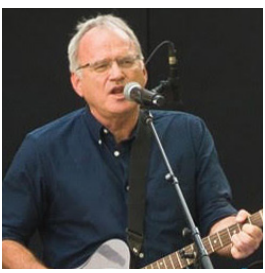



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Editors' introduction

Frans Viljoen, Charles Fombad, Dire Tladi,
Ann Skelton and Magnus Killander

Christoffel Hendrik (Christof) Heyns passed away in 2021. Christof's is a life 'interrupted'. His passing came suddenly and abruptly.

Although he accomplished an immense amount of feats in his lifetime, and had such a wide-ranging impact, much of his work is ongoing, and remains to be taken further by those he inspired, supervised and taught. He had initiated so much; he had devised so many plans and started so many projects that were at the time of his death and are still works-in-progress. It is therefore apt to talk of his 'legacies' (in the plural). He leaves behind not only what had been completed, but leaves behind frameworks and ideas and inspiration on which others will build to complement his legacy.

It is also apt to talk of his 'lives' (again, in the plural). There were multitudes of facets to Christof: the beloved husband, father, son, family man; the warm and compassionate friend and colleague; the musician, the writer, the adventurer, the rower and cyclist, the South African, the citizen of the world, the internationally renowned and inspiring human rights lawyer and legal educator, the academic, the thinker, the practitioner, the activist, the diplomat, the legend, and the approachable everyman … In a wonderous way, he fully inhabited each of these roles, was genuinely at ease in each of them, and was able to immerse himself in the 'here and now'. He lived deeply impactful lives, in each of them leaving legacies to last and grow.

Christof was born on 10 January 1959, in Cape Town, and passed away on 28 March 2021, aged 62, after suffering a heart attack while walking in the mountains at Stellenbosch. He is survived by his wife Fearika, son Adam, two daughters Willemien and Renée, grandson Isak Rust, and mother Renée. He has two brothers, Stephan and Jan-Dirk. He is also sorely missed by an inner circle of close friends.

His father was Johan Heyns (1928-1994), a well-known reformist theologian. Johan Heyns was professor in Dogmatics and Ethics at the University of Pretoria, and served as moderator of the General Synod of the Dutch Reformed Church (DRC) from 1986 to 1990. Until the 1980's, the DRC gave unequivocal theological justification for policies of racial discrimination. From the 1980s, Johan Heyns publicly opposed the pro-apartheid stance of his church. He was influential in writing *Church and Society*, a document that criticised apartheid and was accepted by the General Synod of 1986. In 1994, aged 66, he was shot at close range with a heavy calibre rifle in his Pretoria home. While it is widely

accepted that the shooting was linked to him being a controversial figure for his anti-apartheid stances, those responsible for his death were never apprehended.

Although the distinction is by no means watertight, this collection of essays is divided into two parts, the first dealing with reflections of a more personal nature, and the second containing contributions of a scholarly nature, linked to the various aspects of Christof's professional life. The various essays highlight the legacies he has left in all aspects of his life. Clearly, with a life as manifold and variable as Christof's, there is much that is just mentioned in passing or not at all. Christof's life as writer of short stories ('Begrafnis op Stilbaai'/'Funeral at Stilbaai'); his involvement in documentary filmmaking (including on the life of his father, and on Jan Smuts); and his role as enthusiastic band member of a group of musicians (bearing names such as the *Hip Replacements*, *die Outlaws*, and *Stadig die Somer*). As educator – and initiator of educational programmes – he was unparalleled. In addition to the programmes described in the book, Christof also helped to establish the LLM in International Trade and Investment Law in Africa because he recognised that, in order for Africa to experience sustainable and equitable development, it needed lawyers who have the knowledge and skills to be effective international trade and investment lawyers but who also understand how these areas of the law relate to human rights. His instrumental role in forging into being the Pretoria University Law Press (PULP) is also not covered in a separate chapter.

Life's stories

Part A of this collection of essays looks at the layered intersections of Christof's personal and professional lives. In this Part, Christof's wife, Fearika Heyns, and his eldest daughter and son, Willemien (Heyns, now, Rust) and Adam Heyns, pay tribute to 'Christof as husband and dad'. Long-standing and close friend Murray Hofmeyr uses five of Christof's favourite songs to give the reader a measure of 'Christof as friend'.

After matriculating from Afrikaans Hoër Seunskool in 1976, Christof studied law and philosophy. He obtained the degrees BA (Hons) (cum laude) in Philosophy (UP, 1982) and MA (cum laude) in Philosophy (UP, 1985). He was also awarded the LLB (UP, 1982), and completed the LLM at Yale Law School (1987). Christof was awarded the Doctor of Laws degree of the University of the Witwatersrand, Johannesburg, in 1991, based on a thesis titled *A jurisprudential analysis of civil disobedience*, completed under the supervision of Professor Johan van der Vyver, who in 'Christof Heyns and the "War against Terror"' provides personal reflections on various aspects of Christof's life, linking these to his 'times'.

With the exception of a short stint as public prosecutor (August to December 1984) and as State Advocate in the Office of the Attorney-General of the Transvaal, Pretoria (January 1985 to July 1986), Christof spent his professional life at and affiliated with the University of Pretoria. From August 1987 to February 1992, he was Senior Lecturer in the Department of Legal History, Comparative Law and Legal Philosophy; and later Associate Professor and Professor in the same Department. From January 1999 to October 2006, he held the position of Director, Centre for Human Rights. Indeed, Christof was one of the founders of the Centre for Human Rights, which was initially based in the Department of Legal History, Comparative Law and Legal Philosophy. The Centre was founded during the dark days of states of emergency in apartheid South Africa, with the head of department Professor (and later Constitutional Court Justice) Johann van der Westhuizen as its founding Director. During his years as Director, Christof advocated with persistence for the formal recognition of the Centre as an academic department in the Faculty of Law, which became a reality in 2007. He subsequently took on the Deanship of the Faculty of Law (November 2006 to December 2010). After stepping down as Dean, he became the founding co-Director, and later sole Director of the Institute for International and Comparative Law in Africa (ICLA).

Various contributors expand on Christof's manifold roles and contributions to the University of Pretoria. The current Principal and Vice-Chancellor, Professor Tawana Kupe, places Christof's life and contributions to UP in a broader context ('Christof Heyns: a Renaissance man's living legacies'). Professor Norman Duncan, Vice-Principal Academic, reflects on his role at the University of Pretoria, generally ('Christof at UP'). His impact as Dean of the Faculty ('Christof at the Faculty') is the topic for the consideration by the Dean who preceded him (Duard Kleyn,) and the two Deans who followed him (André Boraine and Elsabe Schoeman).

Within the Faculty of Law, it is at the Centre for Human Rights that Christof probably left the deepest footprints. The founding Director of the Centre, Johann van der Westhuizen, sets the scene ('The place of Christof Heyns in the history of the Centre for Human Rights'). Four of Christof's initiatives at the Centre are explored in greater depth by those intimately involved and working with Christof on these projects. Murray Hofmeyr, Prince Mbetse and Danie Brand write about the Southern African Student Volunteers (SASVO) ('Christof and SASVO'). Bongani Majola, Carole Viljoen and Khashane Manamela write about the Integrated Bar Project (IBP) ('Christof and the IBP'). Christof was pivotal in the establishment of the Master's in Human Rights and Democratisation in Africa (HRDA) programme. This innovative programme, which has now been offered for over 20 years, has provided

education as human rights professionals to over 600 African human rights professionals. Ademola Oluborode Jegede, Annette Lansink and Kwadwo Appiagyei-Atua, colleagues from HRDA partner universities, elaborate on the profound impact of this programme in the region ('Christof and the HRDA'). Frans Viljoen, Gift Kgomosotho, Nyambeni Davhana and Thompson Chengeta take stock of the various moot court competitions (the African Human Rights Moot Court Competition; the Nelson Mandela World Human Rights Moot Court Competition; and the National Schools Moot Competition, which was later extended to countries beyond South Africa, under the aegis of the Global Campus of Human Rights) that Christof initiated, sustained and supported ('Christof and mooting').

Christof became Director of ICLA in 2011. His successor to this position, Professor Charles Fombad, provides a comprehensive overview of the significant strides that ICLA has made under Christof's leadership ('Christof and ICLA').

As Danwood Chirwa, once a student and later a colleague, shows ('Christof as visionary, teacher, mentor and independent human rights expert'), it is impossible to neatly separate these dimensions of such a full and impactful life. Two aspects of his life are highlighted in separate essays. Over many years and to generations of students, Christof was an inspiring teacher and mentor. He supervised a number of doctoral candidates who are in their own right contributing as South African legal academics. Two of Christof's doctoral students, Frans Viljoen and Joe Kilonzo, take stock of and reflect on Christof's role as doctoral supervisor ('Christof as doctoral supervisor'). Magnus Killander, who worked closely with Christof on numerous publications, appraises Christof's considerable contribution in making materials related to human rights in Africa visible ('ch, the editor'). Christof was the founding editor-in-chief of the *African Human Rights Law Reports* and was the founding co-editor of the *African Human Rights Law Journal*.

Christof was also an internationalist. He considered it a privilege and inspiration to teach students across the world. From August 2004 to 2006, he was Academic Co-ordinator of the United Nations-affiliated University for Peace (Africa). Among the many places he taught over the years, three stand out. From 2001, he was an Adjunct Professor, Washington College of Law, American University, Washington DC, and taught on the Summer programme. Starting in 2005, Christof on an annual basis taught human rights law in the Masters' programme at Oxford; and was a Visiting Fellow of Kellogg College. Three colleagues based at Oxford, Nazila Ghanea, Andrew Shacknove and Kate O'Regan, remember his times and role at Oxford ('Christof in Oxford'). Christof has also since 2016 been teaching a course on the right to life and the right of peaceful assembly during transitions on the Master's in

Transitional Justice, Human Rights and the Rule of Law at the Geneva Academy of International Humanitarian Law and Human Rights.

It is within the UN that Christof made his biggest international impact, when he served as United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions from 2010 to 2016; and was a member of the UN Human Rights Committee from 2017 to 2020. While the various substantive aspects of these roles are taken up in Part B, the personal interaction, relationships and influences are foregrounded in the contribution by Cecile Aptel, Thomas Probert, Yuval Shany and Yasmin Sooka ('Christof at the UN').

Christof has published widely in the field of international human rights law. He leaves a deep footprint as academic and scholar and writer. He served on the editorial boards of academic law journals in South Africa, the United Kingdom, France, Brazil, The Netherlands, Turkey, Costa Rica and Uganda. His publications have appeared in English, Afrikaans, French, Spanish, Portuguese and Arabic. He received two Fulbright Fellowships (to Yale Law School and Harvard Law School) and a Humboldt Fellowship (to the Max Planck Institute for International and Comparative Public Law in Heidelberg, Germany), as well as the University of Pretoria's Chancellor's Award for Teaching and Learning. Christof was an accomplished academic, and in 2016 was awarded a B1 rating by the National Research Foundation (NRF). He was awarded the UP's Exceptional Academic Achievers Award on numerous occasions.

A life's work

Part B is a collection of essays on aspects linked to aspects of Christof's academic interests and ongoing academic and other projects, written by colleagues, collaborators and students. These contributions cover some of the various academic fields he covered during a lifetime as scholar. While they do not allow neat categorisation, we use eight broad circles of thematic conversion.

The first is 'International human rights systems'. After serving short stints at both the Inter-American and European systems at the beginning of his career, Christof retained life-long contacts with these systems. He was a UN adviser during the process of setting up the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights in Bangkok, Thailand. His initial focus fell on and his primary engagement was with the African human rights system. Frans Viljoen ('Trailblazer of institutional and normative pathways on the African human rights landscape') discusses Christof's important role in forging into existence the study of the 'African regional human rights system'. Christof always saw the African system as part of a much

larger landscape of regional systems, and was one if the first scholars to embark on 'comparative regional human rights'. In this volume of essays, Magnus Killander ('Legitimacy, cost and benefit of international human rights monitoring') expands on research undertaken with Christof in this field. Michael Addo ('The Addis Ababa Road Map, independent human rights experts and the realisation of human rights ideals') shows how Christof was ideally located to bridge the divide between global and regional human rights. Michael Addo was a member of the UN Working Group on Business and Human Rights, and served as a member of the Steering Committee of the Addis Ababa Roadmap between UN and AU special procedures mandate holders.

The second thematic circle is 'African international law'. Even if he operated on the world stage, and was a fervent internationalist, he remained located in Africa, and emphasised the need for full African participation in the development of international law. Against this background, two essays in this volume draw attention to the relationship between Africa and international law, in the spirit of nuanced and careful reflection that characterises Christof's thinking. Chris Maina Peter ('Africa: influencing aspects of theory and practice in international law'), maps the theoretical and practical influence of the African continent on the development of international law. He identifies the development of the concept of Exclusive Economic Zone in (in the Law of the Sea) and community-based appreciation (in international human rights law) as some of the momentous contributions by Africa to international law, and explores the conditions that made these contributions possible. Hennie Strydom ('The evolution of the UN-AU peace and security partnership') provides a historical overview of the evolution of the UN-AU partnership for peace and security, and focuses on the complex issue subsidiarity between the AU and the Regional Economic Communities in matters of peace and security. Dire Tladi, with John Dugard ('The African Union's right to intervene and the right to life: tension or concordance'), examines the intersection of the right to life and *jus ad bellum* within the framework of African international law. They explore the connections between the right to life and the right of the Union, under article 4(h) of the AU Constitutive, to intervene.

The third is the 'right to life'. In their contribution, mentioned above, Tladi and Dugard describe the right to life as the driving force in Christof's scholarship. As Special Rapporteur, Christof drew attention to cutting-edge issues such as the use of force by private security providers in the law enforcement contexts; the use of drones and autonomous weapons in armed conflict or counter-terrorism operations; and the role of forensic science in protecting the right to life. During 2016, he chaired the UN Independent Investigation on Burundi. Drawing on the deep wealth of his experience and knowledge, he also led the landmark UN

Human Rights Guidance on Less-Lethal Weapons in Law Enforcement the first UN document to provide guidance in this complex area. He also was a member of the Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa of the African Commission on Human and Peoples' Rights. He had been leading discussions at the level of the Commission on how to curb the excessive use of police force in Africa. Stuart Maslen ('Police use of force') reflects on Christof's contribution as Special Rapporteur to the principles governing the use of force by police as well as Christof's role in the revision of the Minnesota Protocol on the Investigation of Potentially Unlawful Deaths. In his essay ('Accounting for life: the role of counting in the protection of the right to life and the pursuit of safety') Thomas Probert describes the importance of accounting for life, both in the sense of providing an accurate evidence base for efforts to protect people from violence, but also in the sense that collecting statistics contributes to accountability for unlawful deprivation of life. Jay Aronson ('Science, technology, and human rights') looks at how the impacts of technology, both positive and negative, on human rights and how Christof's ability to walk a thin line recognising both the threats and opportunities to human rights provided by technology.

The fourth thematic cluster revolves around 'freedom of assembly'. Christof was the driving force behind General Comment 37 of the Human Rights Committee, providing authoritative interpretation of one of the most vital and relevant rights in our world today, the rights to freedom of peaceful assembly (article 21 of the International Covenant on Civil and Political Rights). A fellow UN Special Rapporteur, Clément N Voule, together with Ona Flores, reflect on this contribution ('Protecting the right to peaceful assembly for today and the future'). In their essay ('"Deal with me, here I stand!": presence, participation and the protection of online assemblies'), Michael Hamilton, Ella McPherson and Sharath Srinivasan examine General Comment 37 in respect of specific challenges and threats associated with online assemblies. In doing so, they chart Christof's pioneering model of consultation and engagement, and identify his indefatigable commitment to collaborative and inclusive human rights work as central to his legacy. Ann Skelton ('Children being civilly disobedient: peaceful assembly and international children's rights'), a UP colleague of Christof and member of the Committee on the Rights of the Child, describes the submissions of this Committee on the draft General Comment 37, and examines their impact on the final General Comment. A doctoral student on the 'Freedom from Violence' programme at ICLA, Beryl Orao, places the spotlight on the meaning of 'free assembly' to persons with disabilities ('Facilitating and protecting the right of peaceful assembly of persons with disabilities').

The fifth theme in the collection is international humanitarian law. Thompson Chengeta ('Is the Convention on Conventional Weapons the appropriate framework to produce a new law on autonomous weapon systems?') makes the case that new rules are required to address autonomous weapons system and considers whether the Convention on Conventional Weapons would be the appropriate framework to develop any such new rules. Sarah Mabeza ('Christof as Pan-African humanitarian lawyer') discusses the important contribution that Christof made to the international humanitarian law in Africa and makes an appeal for those left behind to carry the legacy forward.

One of Christof's abiding passions was to better track and understand the actual effect of international human rights on the reality of people's lives. This concern led him to devise a far-reaching study of the effect of the core UN human rights treaties in 20 UN member states, which culminated in the publication, *The impact of the United Nations human rights treaties at the domestic level* (Heyns and Viljoen, Kluwer Law International; 2002). This work has been described as 'seminal'. Christof energised a follow-up study, involving 20 country-based researchers or teams, to track and analyse the changes in impact over the subsequent 20 years. At the time of his passing, Christof was in Stellenbosch on a sabbatical, preparing for publication of the results of this study. Celebrating Christof's role in the reform of the UN human rights treaty bodies, Vincent Ploton ('"Digital shift": what have the UN treaty bodies achieved, and what is still missing?') draws attention to the extent to which these bodies have engaged in digitalisation, and the heightened urgency to speed up and improve the 'digital shift' occasioned by the COVID-19 crisis and the global lockdown. In her contribution, Rachel Murray ('The 'implementation' in 'National Mechanisms for Implementation, Reporting and Follow-up': what about the victims?') explores the establishment of National Mechanisms for Implementation, Reporting and Follow-up (NMIRFs), which is something Christof had earlier called for. Murray argues that NMIRFs are uniquely placed to keep victims of human rights violations informed on the progress of implementation of reparations awarded to them. While accepting that the impact of the views adopted by United Nations treaty bodies (UNTBs) is limited, Başak Çalı ('UN treaty body views: a distinct pathway to UN human rights treaty impact?') contends that the quasi-judicial nature of these views offer distinct opportunities for impact by humanising UN treaty law, by connecting the UNTBs to the victims of human rights violations, and by highlighting the plight of victims at the national level.

The seventh thematic area is 'constitutionalism'. Danie Brand ('Socio-economic rights in South Africa: the "Christof Heyns clause"') explores the role Christof played in the inclusion of section 184(3) in the

Constitution of the Republic of South Africa, 1996. Christof was adamant that, in addition to justiciability, the Constitution should mandate more programmatic means for the realisation of socio-economic rights, such as a 'domestic reporting mechanism'. Trésor Muhindo Makunya ('The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin') interrogates the role of national constitutional courts in the process of 'bringing home' regional human rights law. Analysing reliance by the Benin Constitutional Court on the case-law and soft-law instruments of the African Commission and African Court, he finds only occasional reliance that remains formalistic and lacking in substance.

The eighth and last theme harks back to one of Christof's great academic influences and loves – philosophy. Much of his scholarly work has strong philosophical grounding. His academic interests were varied, and included expounding on the 'struggle theory' of human rights, and exploring the life and times of Jan Smuts. Karin van Marle's contribution ('Struggle, refusal, narrative') contemplates her engagement with Christof's 'struggle theory' from when he first set it out twenty years ago, expressing respect for those, as Christof, who dare to be bold.

Remembering Christof

Christof's memory and legacies are kept alive in a number of ongoing initiatives within the Faculty of Law, spearheaded by the Centre for Human Rights and ICLA. These include the *Christof Heyns African Human Rights Moot Court Competition*, the *Christof Heyns Memorial Thesis Award*; the *Christof Heyns Scholarship*; a tree that has been planted close to where Christof spent most of his time at UP; and a memorial publication containing tributes to him.

The African Human Rights Moot Court Competition will from its 2022 edition be known as the 'Christof Heyns African Human Rights Moot Court Competition'. Professor Tawana Kupe, Vice-Chancellor and Principal of the University of Pretoria, presided over the renaming during the 30th African Moot Competition, held in Stellenbosch on 24 September 2021. Professor Kupe explained that the renaming was in memory and recognition of Christof's role the as the Moot's founding father and sustaining driving force over many decades.

The Memorial Thesis Award was introduced to honour Christof's memory as human rights scholar and educator. He was a founder of the PULP and took the initiative towards the introduction of this prize. This prize underlines his exceptional passion for promoting scholarship and a life devoted to initiating innovative ideas to make the world a better place for all. It recognises the enormous contribution that Christof has made to advancing scholarship, research and publication in Africa,

by Africans and on Africa. The criteria used by the panel include the inherent quality of the research, as well as the relevance of the topic to African challenges and the originality of the approach. The first Prize winner was announced on 11 November 2021. It was awarded to Dr Masengu, for a thesis titled 'What lies beneath the complex nature of appointing women judges in Zambia and South Africa', completed under the supervision of Professor Hugh Corder, University of Cape Town, and Professor Eva Brems, University of Ghent. The degree was awarded by the University of Cape Town. Two runners-up were also identified, Dr Satang Nabaneh and Dr Muhammad Bello.

The Christof Heyns Human Rights Scholarship has also been established to continue Christof's legacy by expanding human rights scholarships and giving opportunities to deserving but economically disadvantaged African students to undertake human rights related postgraduate studies in human rights at UP. The first recipient will undertake doctoral studies at UP in 2022.

In remembrance of Christof, the Centre for Human Rights held a tree-planting ceremony on 15 November 2021. A chestnut tree was planted between the Faculty of Law building and the ICLA house on the Hatfield Campus at UP. This tree grows at the intersection of the Faculty building and the ICLA house, the location where three aspects of Christof's professional life intersect: his position as Director of the Centre and Dean of the Faculty (with his office located in the Faculty of Law building) and as Director of ICLA (with his office based in the ICLA house).

Finally, copies of *Christof Heyns In Memoriam 1959-2021*, edited and designed by Yolanda Booyzen, containing a collection of tributes to Christof, was also on 15 November 2021 handed to family and friends. The publication was edited and designed by Yolanda Booyzen, at the time Communications Manager of the Centre, who for much of Christof's professional life worked closely with him.

1

Christof as husband and dad

Fearika Heyns, Willemien Rust** and Adam Heyns****

Fearika Heyns

I am extremely grateful for 35 years of married life to this special man that I loved so much. When Christof and I started dating, almost 40 years ago, my mother advised that I should be cautious of dating a law student – she said I would never win an argument. Of course I did not listen and dated quite a few law students.

I do not like conflict and I am always trying to steer clear of getting into an argument. Initially we had different views on many topics. Fortunately, not without humour. In the middle of an argument, Christof would say: why don't you rather say this ... or that! He would suggest better arguments for my side of the story. In this way we sometimes solved issues with the help of his alternative sense of humour.

Apart from how to win arguments, I Iearnt so much from Christof. Here are just a few examples:

- There are no easy answers to the big questions in life.
- Do not accept anything without critical consideration.
- Have utmost respect for words – both in writing and in speaking.
- I could be stronger than I thought I was.
- I could be more independent than I wanted to be.
- The state of the world might be a mess but that you can only complain about it if you spend time trying to fix whatever is under your control, big or small.
- If you can relieve suffering, do it.

And on a lighter note:

- If you go on a weekend or a holiday do not over prepare, rather enjoy the ride. It will be an adventure, that means things might turn out well or not so well. That is why it is called an adventure.
- You do not need so many things, have fewer possessions and try to travel light. If anything works out perfectly, it is not only because you worked hard for it, but that it remains, in a way, a miracle!

and ...

- If I needed a handyman, I should call one.

Lastly I want to thank him for opening up the world for us. My best memories are of our family living abroad – in the USA, in Germany, driving to Prague in a City Golf with three kids in car seats in the back – almost always against all odds. Later going to Oxford and Geneva and him always planning how to bring the whole family on the next trip. We used to get messages like: 'Pack your bags, we're moving to Oxford!'

My children are the first in our circle of friends to lose a parent and it is a huge adjustment for all of us. We are all lost. The children were Christof's greatest passion, Willemien, Adam, Renée, our child number four: Arné Rust, Willemien's husband, and more recently little Isak Hendrik Rust, our first grandchild.

If things were going well with all of them he was as happy as could be and could face any challenge. He believed so much in each of them. He was such a great dad, his expectation was never for the children to be exceptionally successful or educated but just for them to be happy in the choices they make in life.

Our grandson with whom he shares a middle name, brought new joy. He was invested in this little boy with the same admiration and love he had for our own children, he even changed a few diapers during lockdown! Christof always had beautiful dreams of the future and could not wait for Isak to be old enough so that they could walk to the UP experimental farm, gather pine cones and then go home and make a fire with them.

People did not always understand that I could function well when Christof was away for as long as he was. Early on in our relationship I realised that to keep him was to let him go – that I had to grant him space to try to make the world a better place. But we had a strong connection that reached over continents. It was not necessary to call each other every day or to send hundreds of messages. If something would go wrong on this side, he would leave everything to come home. The longer we were married, the more we were in sync with each other and agreed on most issues especially during difficult times.

We were very excited about the future, about the places that we wanted to visit and about the things we planned to do at our home in Stilbaai. The mouth of the Goukou River was his happy place. He spent the best times in this little coastal town, paddling, braaing, reading, walking, cycling and playing music with the family band over the December holidays. This was the only time in the year that he really switched off from work for two or three weeks.

I can think of many more things to thank him for, but I don't know how. Christof had an uncanny knack for remembering the lyrics to songs, so I think it is fitting that my emotions are best explained by the words of Koos du Plessis, a well-known Afrikaans singer, who died very young:

Jy hoor my nie meer nie, ek sê maar totsiens
Ek sal jou nie steur nie, ek loop ongesiens,
Want jy is in oorde waar drome nog blom,
Ek groet sonder woorde, want hartseer is stom.

I miss him dearly, every day.

Willemien Rust (gebore Heyns)

One would think that a person who achieved so much professionally would have little time or energy left for his personal life... this was certainly not the case with our dad. He was a devoted friend and family man. As his children we always felt valued and loved.

On a personal level, our dad made mundane activities like being dropped off at preschool extraordinary. A memory comes to mind: he would convince us that by eating our peanut butter sandwiches, at the precise moment he would instruct us to, the traffic light we were standing still at, would magically turn green … later we discovered his trick: he would give us the signal to start eating the sandwich when the opposite traffic light turned orange, and then red. This ensured that our traffic light would turn green at the exact right time of eating the sandwich! Thinking back to a moment like this, I realise that we were very lucky to be in his intimate company our whole lives. As a new mother, I also appreciate how many green lights he helped us children catch over the years.

As a young child I sometimes felt anxious about inviting a new friend over to my house because I really wanted the friend to have a good time … Luckily, I knew that I could always count on my dad to tell funny jokes at the dinner table, should my own efforts to ensure a memorable experience fail! My dad just had a superpower of being able to connect with people, regardless of their age, ability, or background.

In the same way that my dad knew how to tell a good joke, he also knew how to give a good lecture. Although his lecturing skills are celebrated on a great many international campuses, those given at home are remembered with a little less enthusiasm! Although I found this alternative form of discipline a bit annoying as an adolescent, most things he said during that time has stuck. When tackling an issue, he zoomed out, he explored the grey areas, he exhibited the bigger picture.

Furthermore, our father was passionate about his country of birth. He loved being home in Pretoria, surrounded by his family and best friends. I have wonderful memories of my childhood spent in Lynnwood with my parents and siblings – our parents were busy but

supportive, loving but firm, amongst many other things. My parents were each other's soundboards and pillars of strength. They enjoyed the same films, shows, wine, landscapes and company. And most heart-warmingly, they always laughed together.

Some of my fondest memories with him were the times spent in Stilbaai in the Western Cape. This was perhaps the only place where my dad could really relax! We did many things together in Stilbaai – we paddled, we peddled, we braaied, we went for walks, we made music together …

At the same time, he was very passionate about international travel and we were part of his plans whenever the logistics allowed. Staying in Heidelberg, Germany, broadened my perspective on life and communities in general. I became more open-minded and appreciative of different cultures over the years, as I saw how my dad's trips to Europe and other parts of Africa and the world impacted him on a personal level. He would come back with stories about the wonderful places he visited and the dynamic people he met. He would almost always come back with a strong desire to move to his most recent 'foreign find', and he would always want to take us along.

On a professional level, he inspired me to choose a career that I am passionate about. We shared the same love for teaching, for music, for writing, for performing, for collaborating … I only realise now how far-reaching his mentorship has been. Over the years he exposed us to good music, to thought provoking books, films, and interesting people.

My dad's last lecture and body of work was entitled: 'Peaceful (and not so peaceful) protests'. Perhaps we could try to think of his life in the same manner: it was a short (and not so short) time on earth. Everyone that knew him would have wanted him to be around for many more years. We all miss him terribly. Then again, his time spent was so intense and so meaningful, that it feels like he must have been here for more than 60 years to have achieved so much. He enriched the lives of so many 'small and big' people. His life is a reminder that it is possible to live a purposeful life, whether it be in the intimate company of family and friends, or within the international work context.

Thinking of him could go further than inspire those who knew him, it could go as far as to make us feel responsible, to pay, if only a fraction, of his generosity of mind and heart forward.

Adam Heyns

When I was younger I wrote stories with my dad. One of them was about a guy fishing salmon in the Alps. At the end of their life-cycles,

salmon swim upstream from the ocean. They navigate up the rivers to exactly the same place where they hatched, and there they re-spawn before they die.

One day the fisherman saw a frail old man in a heavy coat outside an apartment block, leaning against a car. The following day he hears that the old man passed away – he drove up from the coast to the town where he was born to visit one of his last living friends.

My father's death echoes this short story – except his wasn't as sad, it was mythical.

My dad was born along the coast. As a child he loved walking in the mountains of Stellenbosch, often with his brothers. His family moved when he went to high school. They ventured north, inland, and settled in Pretoria. There he matured, established himself, started a family and built a career that took him all over the world.

This year, at the age of 62 he returned to these same mountains of his youth. But that morning it was to breathe his last breath. This is agreeable symmetry. I remember when he edited my stories, that was always what he insisted on: the ending must mirror the beginning.

There is no doubt, his passing was unexpected and perhaps decades too soon. But he died in almost ideal circumstances. The area is literally called 'Paradise kloof'. He was surrounded by nature and accompanied by his brother. He was still at the height of his career. He lived to see his first grandson – if only for a year.

It was not in a dreadful hospital room. There was fresh air. It was not in some horrific car crash. There was some poise. He did not have to endure any prolonged suffering, it was swift.

It sucks for us, *the ones who are left behind. But I am going to try and convince myself that he was one of the lucky ones: his death was almost as epic as his life.*

* Christof's wife.
** Christof's elder daughter.
*** Christof's only son
1 You hear me no longer, l have to say 'so long', I will not trouble you, unseen I tread along, Since you dwell in places where dreams still bloom, I greet without words, since sadness is mute (editor's translation).

2

Christof as friend

*Murray Hofmeyr**

What are your five favourite songs? I asked my friend just before his 60th birthday, the man who could not have lived without music, and also not without paddling his surf ski. His advice to children was always that they should learn to play the guitar and surf – the rest will follow.

No 5: Hotel California

You can check-out any time you like,
But you can never leave!

I have known him since birth. His father was Dutch Reformed Minister of Ysterplaat and mine of Langa when we were born in the late 1950s. Ysterplaat was a working-class suburb of Cape Town and Langa a Black township. Our parents were friends. Our fathers were members of the remarkable class of 1952 at the Faculty of Theology, University of Pretoria. We left Cape Town before we could register memories and only reconnected in the Philosophy class at university – where aspirant lawyers and pastors often meet.

At his memorial service I read from Mark 1 verses 9 to 12:
From the opened heavens a voice was heard saying this is my beloved son with whom I am well pleased.

Christof was not a regular churchgoer. When he occasionally ventured church-ward, usually on Christmas morning, it was, as he put it, 'to hear the old-old story.' At least once a year he wanted to sing 'Focal point of our desires' with the Christmas congregation. He lived like someone who appropriated the blessing of being a beloved son. And he believed that this was true of all people – beloved sons and daughters with whom God was well pleased.

Infused with love and ever hopeful he had a deep understanding of what we have in common. His approach was to invite and entice, not to alienate and judge. Not that he was without strong opinions that could lead to intense differences. He always said, we must not be so open minded that our brains fall out.

No 4: Molberge (Mole Mountains)

His grandfather was a railway worker. That was his connection with Koos du Plessis. Mole Mountains: the disposition of people who are secure, even though they know that hereabouts the world is halfway hollow.[1]

Christof had a strong sense of the authenticity of situatedness and of how our specific circumstances and traditions make us real even if they also limit us. Struggling with limitation and then accepting the inevitability of being thrown into a specific time in history, and a particular culture with its language, traditions, life-affirming but also life-destroying qualities and challenges – working with what you have, making the most of it, in service of a universal idea, or an idea worthy for universality, transforming as you go along.

The right to life. An idea worthy of universality. An idea worthy of struggle, of intense focus, organisation and energy.

No 3: Stairway to Heaven

And it's whispered that soon, if we all call the tune
Then the piper will lead us to reason
And a new day will dawn for those who stand long
And the forests will echo with laughter
Remember laughter?

Christof discovered the struggle theory of human rights when working on his doctoral dissertation on civil disobedience. It takes as its point of orientation the difference between scientific truth and moral truth. Karl Jaspers illustrated this difference in reference to Galilei and Bruno. Galilei could recant – OK, the earth is flat, if you insist. He did not have to die for that fact. It would soon reveal itself, once more people could be afforded better instruments of observation and measurement. Bruno had to die on the stake. He died for the right to freedom of speech. Without his sacrifice, his struggle, this right, and most other rights, just do not exist.

This explains the intensity of Christof's devotion to the idea of human rights. His father chose the church as the institution through which to make his contribution. Christof chose human rights and all available institutions, existing ones, those to be transformed and others still to be invented.

Christof's devotion to the right to life, and his awareness of the contingency, with all its limitations and opportunities, of having been born in Africa, sparked the idea of Future Africa. He just loved walking. He got special permission to enter the University's experiential farm through a gate close to his house and would go walking almost every day. I accompanied him one morning when he pointed to Lynnwood

Koppie and said – how about a state-of-the-art green building facing North, housing cutting edge interdisciplinary-minded scholars devoting their brilliance to promoting the right to life, and therefore the conditions enabling abundant life, on the African continent and beyond? Vintage Christof. As Nick Grové wrote when Christof celebrated his 60th birthday: he reminded one of Alice in Wonderland. To have six impossible ideas before breakfast … Some of these were more mundane: the Follow-My-Leader bicycle add on, the 'Braai-In-The-Sky', the pulley system for lifting drinks to the roof at sunset. But today Future Africa is looking Northwards, and bright young minds are enticed to not just making contributions but to being contributions.

His appointment as professor at Future Africa was for Christof one of the best things that could have happened to him. At his 60th he asked for ten more years. Two years later, when he learned about his appointment, he said he needed ten more years. Fearika reminded him that he only had eight. He said he needed ten! He was given one last month at STIAS.

No 2: Famous Blue Raincoat

It was a beautiful month. He spent his primary school years in Stellenbosch and in recent times rediscovered an affinity with this town and its mountains. As STIAS fellow he could from time to time spend a month working there. The last month was used to work on a seminal study of the impact of the UN treaties. Many people visited. He and Adam went to a beach to watch the wind foilers. Christof said, leave everything and learn to do this! Renée spent her birthday there and they went for lunch on a wine farm. There is a family photo taken on that day with everyone waiting for Christof who can be seen working on his laptop in the background. Vintage Christof. Willemien took little Isak along so the grandfather since January 2020 could carry his grandson along on daily walks in the mountains. That is probably my most beautiful memory of my beautiful friend – the pure joy he radiated in his encounter with the mystery of life embodied in this little beginner.

I guess that I miss you, I guess I forgive you
I'm glad you stood in my way

No 1: Let It Be

Even when the night is cloudy there is still a light that shines on him

We shared many adventures, and stories of adventures. He did not come along on our epic motorcycle tour at the end of 1980. But before

we left he gave me a cassette with favourites, including Mike Batt's Ride to Agadir. It became our family's holiday song. We rode in the morning. In 1988 he gave me a cassette of a new Afrikaans singer who sang about a Boer in concrete. And in 1996 he played a song over the phone of a Mystic Boer:[2]

there were ravines in the distance
and the sun was still young
and grey birds watched us
as we nodded to each other under the morning…

From Germany I in 1994 received a CD by mail with Leonard Cohen's verse that speaks of democracy entering through a crack in the wall. The note read something akin to:

> It is four o' clock in the morning, the end of December, Heidelberg is cold, but we like where we are living, there is always the music …

There was also a track on the CD, sung by a guy with a very deep voice, comparing Tarzan and Superman. Clark Kent, a true gentleman, must have been tempted to join Tarzan in the forest, exhausted from changing clothes in dirty old phone booths when there was a crime to be stopped somewhere. But he persevered.

Before they left for Germany, where he was taking up a Von Humboldt Fellowship, the Heyns family visited us in Venda. It is remarkable when friends care so much that they travel to the corners of the country to spend time with you. Through the Thate Vondo Pass, in thick fog. There, in the forest, we sang German translations of Bob Dylan songs – and laughed a lot. Wie ein rollender Stein …

Fearika made a book for Christof when he turned 60. Friends were asked to contribute a paragraph or two. The golden threat is the fun, the laughter, the loyalty. As Johan Badenhorst put it: some flair, some nostalgia, always time for a joke. Life is serious, but never that serious. Others spoke of the sense of adventure, the enjoyment of the good things that life offers. The people whose paths crossed his experienced acknowledgement that they matter, that there are things that matter, things that we must make matter.

In 2018 Christof sent us an essay from Geneva, entitled 'In defence of a partial faith.' He referred to the Dunning-Kruger effect. Intelligence is often measured in relation to our ability to know our limitations. Those who lack in this regard might be tempted to be too confident in their world-changing projects and those who know that they don't know are oftentimes not courageous enough and that's why the world is what it is (we loved the T-shirt with the words 'The unlived life is not worth examining'). The wise realise that even the most intelligent amongst us can only reach a certain level of knowledge. In the words of John Lennon, another favourite, 'above us only sky.' Why something

and not nothing, why this and not that, why anything at all? … At that level we are all at a loss.

He referred to religions as reservoirs of answers developed through millennia. Myths that gained dominance are sometimes captured in holy writ. But religion is vulnerable – suffering does not stop and meaning cannot be coined. And science is relentless. The historical claims of religious stories do not stand the scrutiny of the search for verifiable and demonstrable knowledge. The rest of the message then becomes questionable.

'Above us only sky.' Nice song, wrote Christof, if only it was that easy. The problem is that the space above our ability is not a mere vacuum. Without a frame of reference, a point of departure, as for instance the values carried by religious stories, something even more irrational could fill that void.

Dataism, the religion of technology, makes it possible to calculate everything. Human rights, on the other hand, rests on the idea that every individual person is of immeasurable or eternal worth. The most basic interests of one person cannot be sacrificed in favour of another person, or of 'progress,' or any other goal. Christof, who was reading Harari[3] at the time, concluded: it is clear that the majority of the workforce will soon become 'useless people,' replaced by robots. 'Do not put your trust in robots,' was his adaptation of Psalm 146.

The point of departure that every individual life is of eternal value rests on a value judgement. And what informs that judgement? For centuries it was religion and other traditional value systems that with mother's milk moved us in that direction. Can faith in its traditional form carry that weight?

'In defence of a partial faith' makes a stand against the demand for total surrender that most faiths, including the one Christof grew up with, are known for. To have faith like a child … Not so easy, said Christof. We have eaten from the tree of knowledge of good and evil. We live courtesy of science. Yet, we won't give up the struggle for meaning. If we do, the available answers will be too easy, provided by people with cheap medicine for our wounds.

Where does this leave us? In the uncomfortable position that a famous philosopher called Thrownness – having been thrown into a society with its culture, myths and traditions. At the same time, we can be open for developments, for new designs. The religion we grew up with is full of stories. But they are not 'just' stories. They are designs of meaning. They come from the life and death experience of generations of ancestors who had to face the same void. We are the ancestors of tomorrow. The way we test our traditions in terms of our changing experience will leave a legacy.

To engage critically but seriously with one's tradition is a way of seeking. 'Restoring life to its original difficulty,' was a quote we often pondered. Christof called that faith – faith mixed with a good helping of salt. Without salt, in this case critical engagement, everything is without savour. But, said Christof, one cannot live from salt alone …

Above us only sky? John Lennon was a child of his time, revolting against an uncritical faith. Christof opted against checking only one box. He checked all three: partly agnostic, partly believer, partly unbeliever. And then devoting your life to discerning what fell in which category.

He anticipated that the John of Revelation would not have approved, he who spoke badly of being lukewarm. Let's take John also with a pinch of salt, was his advice. He was a child of his time. A time when the radical message was still new – that we humans could be kind to one another (Christof was a great fan of Bregman's book),[4] could even manage to make it together. We are also children of our time – with the task of finding the right fit for our experience.

At his 60th birthday I said I hoped that we will have many more adventures, and even new favourite songs. I also acknowledged that Leonard Cohen was dead and that we would more and more have to live from memories. I have a few really good ones. The Elephants River in flood with waves in the middle; snow at the top of Sani Pass, where it was full moon with De Wet at the wheel of the King's Mule; long walks along the Orange River in the Richtersveld; camping on an island in the Vaal near Parys; being manhandled by a wave too big for our surf skiing skill set at Still Bay. There were also the sad and difficult times – in these parts the earth is half hollow.

On 28 March the plan was that Christof and Fearika would join us at Fairview near Paarl for my daughter Heleen's graduation party. Heleen asked Christof to assist me in draping the red gown around her shoulders. We were in a festive mood and when the message came that they won't be joining us, I sent him a text saying that it was pleasant under the trees and that I hoped we would still see them. It was a lovely party, and I did not allow myself to be overly worried. We were having coffee after the lunch and speeches when I received the dreadful tiding. There is a photograph of him on my bookshelf. He is smiling. That smile that I loved so much – acknowledging the darkness, but grateful for the fire.

* Murray is National Director of the bursary and student mentoring organisation StudyTrust.

1 *Die gelantenheid van mense wat gerus is/ Maar bewus is/ Hierlangs is die wêreld halfpad hol.*

2 *… daar was klowe in die verte/ en die son was nog jonk/ en grys voëls het ons dopgehou/ toe ons onder die oggend vir mekaar geknik het …*

3 YN Harari *Homo deus. a brief history of tomorrow* (Vintage 2015).

4 R Bregman *Humankind: a hopeful history* (Bloomsbury 2020).

3

Christof Heyns: a Renaissance man's living legacies

*Tawana Kupe**

In this brief contribution, I portray Christof Heyns as a renaissance man because he had an indomitable spirit and will to change the world as he found it because of his deep love for humanity. Referencing his wife Fearika Heyns, he was on a whole big adventure to change the world as we know it and he put all of his efforts into it. He was on an adventure to make his family and personal life the best it could be, despite the fact that his family had to share it with the rest of the world. He lived ahead of his time and envisioned a just world that defied the reality of a world and humanity caught in multiple complications of seemingly endless injustice.

Many contributions in this volume and many obituaries after his passing called him a human rights or legal scholar. That is indeed correct. That was his primary identity and his legacy in human rights scholarship will live on. But Christof was more than a human rights and legal scholar. He was a transdisciplinary or interdisciplinary scholar. This positionality follows on him being a renaissance spirit full of incredible intellectual energies. Just as interdisciplinarity or transdisciplinarity subverts and transgresses to provide the new and better insights that can kind transformative change, Christof wanted to see something different from the world as it was. He saw the world as a terrible beauty, terrible in the things that happen that should not happen, that stifle our humanity but at the same time full of potential for change. He had the morality, integrity and ethics that said this must change and it ought to change now.

Christof Heyns was in a hurry but he was not impatient with fellow human beings. He was in a hurry to change the world. Renaissance persons want to change the world, they use their energies to change the world, they work across boundaries and borders, they work cross-generationally. A number of the students he trained testified at memorial ceremonies in this regard and the human rights programmes he set up in schools are just but many examples. He did not treat people as if they were of a specific generation, but rather as part of a broader humanity connecting us all. He believed that humanity can be beautiful. Christof Heyns was on a mission to make human beings realise their beauty.

He rebelled against the circumstances that distorted the beauty of humanity. His rebelliousness was imbued with humanity, with a greater spirit to advance justice. So, it is that he fought against apartheid (among many other crimes against humanity) and contributed to the writing of an exemplary constitution. His life's work to create a just society was endless and is energy visibly boundless.

So, as a renaissance man he built and created spaces, structures, institutions – centres, institutes, moods, an atmosphere. In all of this creativity he connected people because a renaissance person sees the links beyond the immediate and the disparate.

He saw, in the worlds of a line in a William Blake poem, 'the world in a grain of sand', and the world as a whole was for him a creative space for building a better future. He was a creator. That is why he loved music and played it. He created all of these spaces, created scholars, created in others or instigated, incited and invited others to join the renaissance and to change the world as we know it.

Although rooted academically as he was at the University of Pretoria (UP), he was not confined to UP. Rooted as he was in South Africa in the apartheid era and beyond, he was not confined to South Africa. He extended his efforts to our continent Africa. Rooted as he was to Africa, he did not confine himself to Africa. He extended himself to the whole world and that is why he worked with the United Nations (UN) and other global institutions. In that way he inspired a generation of people who also want to change the world. His contribution is the living legacies of a renaissance man, who was in a hurry, had an indomitable spirit, and wanted to leave world better than he found it.

Christof contributed to the sometimes gradual or quicker, chipping away at the terrible things that happen in the world and laid the foundations for the beautiful world that he wanted to see. For that his living legacies abound. He leaves behind immeasurable inspiration, immense influence and living impact.

There are likely many more, but I would like to draw attention to and celebrate four areas where Christof's hard work and dedication has created a legacy that will live on.

The first is his contribution to weaving the fabric of democratic South Africa. Justice Dikgang Moseneke, former Deputy Chief Justice of South Africa, says in his tribute that he personally knew Christof in the dark days of apartheid and colonialism. Unlike many others, he says, Christof opposed apartheid openly and embraced notions of an inclusive and socially just society. As a founding father of the Centre for Human Rights, at what was then a white conservative UP, his implementation of the Integrated Bar Project in the late 1980's, ensuring the access of black students to traditionally white law firms, as well as his passion for SASVO, the South African Student Volunteer

Organisation, which aimed to improve the quality of life in rural areas by working with community members on various projects, are just two examples of how he lived his motto, 'From human wrongs to human rights'. The alumni of the Masters' degree programme in Human Rights and Democratisation in Africa recall his optimism about a non-racial future for South Africa based on human rights and the rule of law, and how he worked tirelessly for a new democratic South Africa. His contribution towards the South Africa Constitution is notable not only as it is the supreme law, but even more importantly, it is an articulation of the values and spirit of humans in our country.

The second area where Christof lit little fires everywhere was in his tireless efforts in educating several generations of students to become accomplished human rights lawyers. Having been the Director of the Centre for Human Rights from 1999 to 2006, he served as Dean of the Faculty of Law for four years, before becoming the founding Co-Director of the Institute for International and Comparative Law in Africa (ICLA). He was also an adjunct professor at the Washington College of Law of the American University and since 2005 a Visiting Fellow at Kellogg College at Oxford University. His profound impact in kindling a passion for human rights is seen in the thousands of notes of appreciation from past and present students that have flowed in. A past student from UP's Moot Society writes: 'Only when I read his obituary did I fully realise how many of the experiences that shaped me I owed to Prof Heyns. He was behind everything, from my first international moot and the journal I was first published in, to my LLM programme and my first pay cheque. His legacy will be more than his achievements. It will be the many, many young lives like mine that he changed completely. I will always be grateful.' Another student writes: 'Prof Heyns was a mentor, an inspiration, a supporter, a giant. Generations of law students benefitted from the tradition that he has established, and his influence will resonate with many more over the years to come – especially those who use their skills to make the world a better place.'

The third sphere where Christof has left indelible footprints is in his role as an international activist. From 2010 to 2016, he was UN Special Rapporteur on extrajudicial, summary or arbitrary executions. His many important achievements in that role included a ground-breaking report on Lethal Autonomous Robotics and the right to life. He also played a key role in helping update the Minnesota Protocol on the Investigation of Potentially Unlawful Death, published in 2016, and in the same year chaired the UN Independent Investigation on Burundi. From 2017 he took on his most recent role of being a member of the UN Human Rights Committee. He led the drafting of the widely acclaimed General Comment 37 on the right of peaceful assembly, which was published in July 2020. He also led the team that drafted the UN Human Rights

Guidance on Less-Lethal Weapons in Law Enforcement, launched two months earlier in May 2020. These two documents provide important analysis and guidance on the international law and UN standards relating to peaceful and not-so-peaceful assembly, and their significance and relevance will long outlive their principal creator.

Lastly, and perhaps most profoundly, is Christof's legacy in having lived a life that was an embodiment of ubuntu, the ideology that says: 'I am only well if you are well.' The Botswana Centre for Human Rights shared that they were always struck by how genuinely respectful Christof was, reflecting this spirit. He was always keen to learn about the experiences of others, regardless of their age and experience. This is the basis of human rights, they say, respecting the dignity of all, above all else!

At the tribute hosted by the Faculty of Law, I spoke of the first time Christof and I sat together in my office and how, through his spirit of generosity, he agreed to assist me with some things. From then on, we were fairly close, and I asked for his advice on a number of occasions. He gifted me with a book recently, *Humankind: a hopeful history*, and we were due to meet up to discuss it. This is just a small example of how he genuinely cared for people, and while he may have been an international giant, it is likely that those who were privileged to meet him and know him, were most touched by his deep humanity.

Son of Africa, your untimely passing has left us in cold, dark grief. But let us be comforted by your unforgettable glow, and go on to shine brighter for having known you.

* Vice Chancellor and Principal, University of Pretoria.

4

Christof and the University of Pretoria

*Norman Duncan**

In Part 1 of *The Tibetan book of living and dying*, Sogyal Rinpoche introduces the frequently quoted statement, which reads as follows:[1] 'Death is a mirror in which the entire meaning of life is reflected.' Perhaps this is what the function of a eulogy is – to view dying, this important life event, which each and every one of us will experience, as one of the opportunities afforded those who had been close to us to affirm and celebrate life, particularly a life well lived, a life lived to the fullest, a righteous life. Reading Sogyal Rinpoche's statement certainly brings Christof's life, his life contributions and the value of his contributions to society into vivid relief.

In this contribution I refer only to Christof's contributions to the University of Pretoria and broader society that I am familiar with. I know that his significant contributions that I will not refer to in this contribution are broached by other contributors to this volume.

First, how did I come to know Christof Heyns? Well, many years ago, while I was still teaching at the University of Venda, I collaborated on various initiatives with someone who became a very close colleague and friend. His name is Murray Hofmeyr. When we first met (on the occasion of a collaborative event aimed at producing a volume of race and racism), Murray Hofmeyr spoke constantly of his close friend, Christof Heyns, and about the latter's work for the Centre for Human Rights at the University of Pretoria as well as his inspiring work for the Southern African Student Volunteer Organisation (SASVO), an organisation that he had established. Murray impressed upon me that Christof was an academic that I simply had to meet. Well, as impressed as I was with Christof's publications and the various civic initiatives in which he was involved, a few years passed before I eventually had the opportunity to meet Christof, first on a telephone call (some time before I had joined the University of Pretoria) about a matter that was being debated at UP at the time, and then later in person when I joined the University of Pretoria.

When I first met Christof, I realised that Murray had not exaggerated. I realised that I was engaging with, first and foremost, a razor-sharp intellect and a critical scholar of note. Of course, his extensive and impactful scholarly output, his scholarly legacy, attests to this. In our

first meeting, I also realised that, above all, I was in conversation with a person with boundless energy for initiating new ventures aimed at improving the learning opportunities provided to students; ventures aimed at advancing the interests of academia more broadly, as well as ventures involving international human rights and many other causes close to his heart.

During the course of our friendship, Christof drew me into various initiatives in which he was involved (as he did with many others, I know). For the purposes of this contribution, I single out three of these initiatives – because of their significance to my work, on the one hand, and what they illustrate about Christof, the scholar, academic activist and benefactor, on the other.

The first of these initiatives relates to a task assigned to me by the Executive of the University of Pretoria in 2016. At the time, various student formations made it known that they were unhappy about the absence of a policy on homophobia at the University of Pretoria. I immediately approached Christof for his assistance. In our subsequent discussions, we agreed that developing a policy dealing only with homophobia and then to add it to the University's policy dealing with racial discrimination would result in the University ultimately ending up with a patchwork of anti-discrimination policies. It was then agreed that we should rather develop an omnibus anti-discrimination policy that would address all forms of discrimination at the University of Pretoria. Christof immediately set to work on this project, with the assistance of a number of colleagues, including Anton Kok, Mary Crewe, Pierre Brouard, and myself, as well as student representatives from various student organisation. The current UP Anti-discrimination policy, which was finalised by the Registrar, Professor Caroline Nicholson, is a result of Christof's initial conceptualisation and input.

A second initiative in which I was involved with Christof is a reading group of sorts. Books written by Erik Brynjolfsson and Andrew McAfee,[2] Yuval Harari,[3] and Rutger Bregman[4] were among those that Christoff introduced to the group. It was our discussions on the implications of the arguments proposed by Brynjolfsson and McAfee, as well as Harari, in respect of the implications of the rapid technological changes the world will witness during the twenty-first century that influenced many of my endeavours in relation to my Teaching and Learning portfolio at the University of Pretoria. Our discussions certainly inspired me to encourage a greater future directedness in our teaching and learning programmes, an orientation that certainly stood the University in good stead these past two years.

The third initiative was an internship project aimed at offering UP students an opportunity to obtain practical work experience through exposure to the work of the African Union, the United Nations,

metropolitan governance structures and the higher education sector through an internship initiative. Due to the COVID-19 pandemic, this initiative has not yet come to full fruition. Certainly, this year we had taken a significant first step with this project through the creation of an internship project that allows for law students to offer legal assistance to faculties at the University of Pretoria while enhancing their work readiness competencies. However, much more will have to be done to fully actualise Christoff's aspirations in respect of this project.

Of course, I am keenly aware of Christof's many other important contributions to academia and society more broadly, including his contributions to the University of Pretoria as the Director of the Centre for Human Rights, then the Dean of the Faculty of Law, and most recently, as the Director of the Institute for International and Comparative Law in Africa (ICLA). I am also aware of and here wish to acknowledge his signally influential role in the African Human Rights Moot Court Competition (recently renamed the Christof Heyns African Human Rights Moot Court Competition) and his role in the establishment of the Nelson Mandela World Human Rights Moot Court Competition and the South African National Schools Moot Court Competition.

Christof's exceptional and seminal contributions to human rights internationally have been written about extensively and I will consequently not detail these here. Suffice it to state that, as Shenilla Mohamed, the Executive Director of Amnesty International South Africa, put it at the time of Christof's passing:[5]

> A mighty baobab has fallen … In Africa the Baobab tree is considered a symbol of power, longevity, presence, strength and grace. Professor Heyns was a baobab in the human rights world. A giant in his field, he fought hard for a just world.

On a more personal note, with the passage of time, I also realised that Christoff did not only care deeply for the issues that I mentioned, but that he also cared deeply about his family and friends. And anyone who spent any significant period of time with Christof would also have realised that he was remarkably caring and humble – a 'mensch', as Thuli Madonsela recently described him.[6] One of his former students, Patrick Eba, then UNAIDS Country Director for the Central African Republic, says of Christof: [7]

> He was a thought leader who embodied the values of excellence with ubuntu.

As most of us know, especially those of us who work in the field of psychology, that authentically and unconditionally caring for others in the way that Christof did, is very frequently reciprocated by a similar engagement on the part of those at whom this caring is directed. So, those who knew Christof invariably cared deeply for him.

The event for which this eulogy was prepared was meant to be a celebratory occasion. And while I fully endorsed this laudable intention on the part of the Faculty of Law, it will be remiss of me if I do not also acknowledge that celebrating the life of Christof Heyns comes on the back of a sense of intense loss on the part of those who cared deeply for him, particularly his family and close friends. It is largely in acknowledgment of this sense of loss (and perhaps in an effort – however inadequate – to assuage it) that I here quote a few lines from Maya Angelou's poem, *When great trees fall.*[8] Earlier I quoted Amnesty International's reference to Christof as a baobab tree. It was when I read this quote that I was reminded of Angelou's poem, *When great trees fall.* Here I present abstracts from the poem – specifically the first, third and fifth stanzas of the poem.

When great trees fall (Maya Angelou)

First stanza

When great trees fall,
rocks on distant hills shudder …

Third stanza

When great souls die,
the air around us becomes
light, rare, sterile.
We breathe, briefly.
Our eyes, briefly,
see with
a hurtful clarity.
Our memory, suddenly sharpened,
examines,
gnaws on kind words
unsaid,
promised walks
never taken.

Fifth and final stanza

And when great souls die,
after a period peace blooms,
slowly and always
irregularly. Spaces fill
with a kind of
soothing electric vibration.
Our senses, restored, never
to be the same, whisper to us.
They existed. They existed.
We can be. Be and be
better. For they existed.

I here urge the indulgence of you, the reader. I invite you to re-read this poem by Angelou. However, when you get to the last line above, replace the pronoun, 'they', with the name Christof Heyns.

* Vice-Principal: Academic, University of Pretoria; this contribution is based on a eulogy delivered on 16 April 2021, Faculty of Law, University of Pretoria.

1 R Sogyal *The Tibetan book of living and dying* (Harper 1992) https://www.rigpa.ie/the-tibetan-book-of-living-and-dying/ (accessed 31 March 2021).

2 E Brynjolfsson & A McAfee (2014) *The Second Machine Age: work, progress, and prosperity in a time of brilliant technologies* (WW Norton 2014).

3 YN Harari *21 Lessons for the 21st century* (Jonathan Cape 2018); YN Harari *Homo deus. A brief history of tomorrow* (Vintage 2016); YN Harari *Sapiens. A brief history of humankind* (Vintage 2014).

4 R Bregman *Humankind. A hopeful history* (Bloomsbury 2019).

5 S Mohamed 'Christof Heyns: a tribute to a giant of human rights' https://www.amnesty.org/en/latest/press-release/2021/03/christof-heyns-tribute/ (accessed 29 March 2021).

6 In M Heywood 'Professor Christof Heyns was a mensch devoted to developing leaders to advance democracy and human rights' *Daily Maverick* (accessed 29 March 2021).

7 P Eba *UNAIDS joins human rights community in mourning Christof Heyns, legal academic and expert*. UNAIDS https://www.unaids.org/en/resources/presscentre/featurestories/2021/ march/20210331_christof-heyns (accessed 31 March 2021).

8 M Angelou *The complete poetry* (Random House 2015). Also see https://africa.si.edu/2014/05/when-great-trees-fall%E2%80%A8%E2%80%A8-by-maya-angelou/ (accessed 29 March 2021).

5

Christof and the Faculty of Law

Duard Kleyn, André Boraine** and Elsabe Schoeman****

Introduction

Christof Heyns is one of the University of Pretoria's intellectual giants and the Faculty of Law was privileged to have been home to this man, who dreamed big and made sure that those dreams were turned into reality. He had a clear focus: to promote human rights for the betterment of humankind and, at the same time, to make sure that UP Law was catapulted to the top – in South Africa, Africa and globally. He did not believe or entertain mediocrity; there was only one way to go, and that was to the top!

In what follows, we (Duard Kleyn, whose deanship preceded that of Christof's; André Boraine, who succeeded Christof as Dean; and the current Dean, Elsabe Schoeman) provide our impressions of Christof and detail our academic and personal experiences with him.

Duard Kleyn (1998-2006)

Christof Heyns was my student, he was my colleague and he was my successor as Dean of the Faculty of Law but, above all, he was my friend, always the optimist, adventurous, good-natured and upbeat.

I remember Christof as a brilliant student and a multi-talented young man with an excellent pedigree. He turned into a solid academic, always full of ideas and initiative, always on the go and constantly thinking of new projects and things to do. He was driven by an ambition to give the Faculty of Law status and shine, he dreamt of uplifting the teaching of law all over the African continent and he strove to represent South Africa well in international human rights organizations and at the United Nations. He was all in one, he was the academic, he was the diplomat, the family man and …. my friend.

Human rights was Christof's passion in life, from his early life, when both of us were amongst the founders of the University's Center for Human Rights. When the Centre was firmly established and achieved

international acclaim, Christof moved on to focus on a new Institute for International and Comparative Law in Africa (ICLA).

He was passionate and full of fire about whatever he did in life, be it from behind his desk or on the water at his holiday home or with his guitar in hand bringing back memories and songs of days gone by. Nothing, no misfortune or setback could get him down. It is in this context that I think back, fondly, of the memory-lane show of evergreens he entertained us with on the occasion of his 60th birthday, close to the beach, the air filled with the salt of the sea he so loved, surrounded by fellow artists, family and friends just as he had done for years on end.

Passion, style, commitment and excellence directed whatever he did. I remember how we both travelled, as members of faculty, to the US to foster inter-university relations with the law schools of Yale, Harvard and the American University in Washington DC. I will never forget how Christof booked us both into the prestigious Yale Club in Manhattan and how he took me shopping to Brooks Brothers, world-renowned for its preppy look. Christof was always on top of any situation. When, on our first night in New-York, we discovered that our bank cards were useless to get dollars, Christof came to the rescue and popped out a German mark note to exchange, from somewhere deep in his pocket, well before the euro of course, so that we could have a meal and a couple of beers. Needless to say, he settled the card-problem in no time. In sum, one could always count on Christof. Dear friend that he was, he would, even years thereafter, never come back from any visit to New-York without bringing me something from Brooks Brothers.

Christof left an immense legacy of scholarly excellence, commitment and camaraderie to be carried on. There is hardly a day that I do not think of him. Maybe that is part of eternal life.

André Boraine (November 2011-October 2019)

I want to begin my tribute to Christof, our colleague, inspirational leader and, above all, our friend to express again my sincere condolences to Fearika, his children and all Christof's family members. Still, we are deeply saddened by his sudden and untimely passing!

Christof's achievements in his academic career and his endeavours on various national and international platforms and bodies to make the world a more humane and better place are well documented and well known. I will mention only that he was a highly-rated NRF-researcher and a respected academic locally and internationally. I will focus my tribute on Christof's contribution to the Faculty.

Reflecting on Christof's life, I remember him as my colleague for many years, my friend and advisor, a visionary and a high achiever but, above all, as a most decent person.

As a colleague, I knew Christof from the mid-1980s when both of us started our fulltime academic careers at the University of Pretoria.

The Christof I knew was an open-minded person who did not dwell on small matters – life is too short for such distractions, he would say.

He was a go-getter, a man with a goal and, most importantly, a man who could direct his ideas through to fruition. In this regard most of us can learn from Christof, since many have dreams and ideas, but few have the drive to see their ideas fully implemented.

It was not surprising that Christof rose rapidly up the academic ranks and ultimately served the Faculty of Law in the post of Director of the Centre for Human Rights, as Dean and finally as the Director of ICLA.

By his role as Director of the Centre for Human Rights the Faculty, our country and the whole of Africa benefitted from his innovative contribution. He took the Centre into a new sphere by elevating it to become a prime human rights and research entity; he had vision, but he also deployed his skill in brinkmanship to find the funds which translated his ideals into reality.

Christof did not leave a stone unturned in his mission to support the notion of human rights for all in an endeavour to make the world a better place; at which he worked tirelessly.

I served as head of a department during his term as Dean and can say that the leadership of the Faculty benefitted from his insight and foresight in positioning the Faculty both nationally and internationally.

As a member of the Faculty and as a colleague Christof displayed loyalty throughout his career; he cared deeply for the Faculty and its staff members.

He understood the value in positioning the Faculty so as not to be inward-looking but to consider its broader role in South Africa and the wider international community. As Dean already he engaged the Faculty at this level well before the University of Pretoria as a whole saw itself in the same international context. In line with his vision for a better life for all in Africa and beyond, he prompted the University executive to expand its focus; the concept of a Future Africa was his idea. He saw it as a platform that would serve mainly African students at an interdisciplinary level in finding solutions for the challenges on our continent.

Christof was competitive by nature; it was important for him that the Faculty should be at the top – he liked to associate with the best. As the Director of the Centre for Human Rights and later as Dean and

Director of ICLA he trailblazed the foundations for getting the Faculty at the top in South Africa, in Africa and beyond.

We recall he established the LLM in Human Rights and Democratisation, and he introduced the African Moot Competition, amongst others. These initiatives opened doors to a world beyond the confines of local and domestic interests. He was a true internationalist.

As a colleague Christof had a friendly personality; a person one could engage with – a sounding board and a mentor to many.

He set an example in not labelling people, he did not waste time speaking ill of others, and he had an open mind and kept an open door for all. Christof also found joy in the achievements of others. He grasped the 'halo' effect – that if a colleague shone the light was reflected on all of us. Live and let live was his motto, or, as his friend Murray Hofmeyr pointed out at his commemorative service, 'Christof believed in giving another person a gap too.'

As Director and as Dean he set an example as a strategic thinker and as an academic.

Christof believed in research being accessible and meaningful; research in action was the name of his game. No wonder the Pretoria University Law Press 'PULP' was his brainchild; putting an idea into action by providing books for Africa.

Christof never settled for sub-standard work and he expected people to excel – sometimes to make what seems impossible possible – and usually he got his way.

During my term as Dean he was always ready to assist by offering advice and serving as a sounding board, for instance he assisted me greatly in establishing the successful LLM programme in extractive industries and we planned ultimately to establish a chair in this important field as well.

Christof took a deep interest in the wellbeing of students and was involved in assisting students in their career development by creating opportunities for many to grow both scholastically and as individuals. He was actively involved in student bodies such as Law House and was a passionate participant in the annual Faculty Festival.

He led an active life outside the university.

Christof was also a family man, a true friend to many and had a host of interests outside academia and the field of human rights. He loved cycling, walking, rowing, music and writing – academic and creative. He was not a spectator but an active participant in life.

In friendship Christof was fun and charming to be with, always making plans to set up a concert or a party or a cycling or walking outing or just crack a beer or a glass of wine and, occasionally, a cigar!

I had the pleasure on a few occasions to accompany him on mountain bike rides and on a few of his walks at the 'proefplaas'. On

these occasions we would talk – never just idle chatter but always weaving a deeper discussion into the mix of work and play.

Christof was a good storyteller and had a great sense of humour. On the occasion of his 60th birthday two years ago which he celebrated with friends and family at his beloved 'Stilbaai', he opened his speech by remarking he and his mother now share the honour of both being senior citizens!

Christof loved life and lived it to the fullest – he was one of the few people I know who really got a twinkle in the eye at observing something funny or when telling a story.

His motto was to make the best of every opportunity or event; neither rain nor thunder would stop the party from going ahead.

After these brief remarks I end by mourning a great human soul that has left us and our world and the Faculty poorer. But his legacy is enormous, and I firmly believe he lit a fire of enthusiasm in many people in the quest to make the world a better place, in students, colleagues, collaborators and many others who crossed his path during his lifetime.

Christof – Hamba kahle – may your great soul rest in peace, we miss you and will do so for a very long time!

Elsabe Schoeman (current Dean)

I only knew Christof professionally for 18 months, but we shared a passion for and a firm belief in comparative research and scholarship as a tool for finding global solutions, as well as enriching and enhancing our own domestic legal system. We both valued the plethora of solutions offered through comparative methodology and the potential for approximation, harmonisation and unification of laws. We were excited about the new possibilities presented by research platforms created here at the University of Pretoria for inter- and transdisciplinary research and to be impactful on the African continent and beyond.

For Christof it was important to have impact, and he did, also on a global level. Over the past two years, he played key roles in the development of General Comment 37 on the right of peaceful assembly and the drafting of the UN Human Rights Guidance on Less Lethal Weapons, setting the international law standards and UN standards on peaceful and not-so-peaceful assembly.

But he also wanted the Faculty to have impact. He initiated various projects to measure our impact, for example establishing that most South African law academics had obtained their doctorates at UP and, lately, a project to track citations of UP law academics in court cases all over the world.

He was ahead of most with transdisciplinary research, having established research contacts in most faculties across the university, especially in his work on peace and justice. His international network stretched far and wide, as is evident from all the messages of condolence received. It remains a mystery to me how he managed to keep in touch with everyone, and he did, personally, not through an assistant. He was just about to embark on a new project, *Peace in our cities*, with no fewer than 22 international institutional partners.

Christof lived life in a hurry, there was no time to waste. He could be impatient, especially when starting on a new project and things were not happening quickly enough. He wrote all his emails and Whatsapps in lower case – I never asked him why; perhaps because there was no time for capital letters? And yet, Christof always found time to talk to people, despite his busy life. He understood the importance of those more informal, personal bonds that underlie and strengthen professional relationships. That was one of his frustrations during lockdown – virtual conferences did not provide those valuable and treasured opportunities to connect with people on a social level during coffee sessions, lunches and dinners.

We both became grandparents for the first time in 2020. That 'qualified' me to receive videos of his grandson and I reciprocated. Shared pride and joy in our offspring. Christof also told me how this little new life trumped everything else and inspired him.

We shared a love of music. During lockdown we would share videos or lines from songs – Leonard Cohen's dark songs and sharp wit quickly became the perfect soundtrack to lockdown. There were also other, more alternative artists … We agreed that songwriters were like scholars – not only did they have to write their own songs, they also had to perform – in effect, publish – them.

As pointed out by many other people, Christof was a peace maker. After a disagreement in a meeting the email would come, often late at night, to open up the discussion and give everybody the opportunity to join again. It was as if he knew life was short and that there were more important things to do.

Christof loved life and he loved interacting with people. He was open to different ideas and alternative views – in the words of Leonard Cohen, 'You were born to judge the world, forgive me but I wasn't'. Christof was not born to judge other people. It was this approach that allowed him to welcome so many diverse people into his life. He firmly believed in the innate goodness of people and was determined to find that in everyone. His last favourite book, *Humankind* by Rutger Bregman, was gifted to many – those who have not read it or finished reading it, you should.

As a Faculty we will honour Christof's legacy by carrying on with the work he started and we will remain inspired by the impact he had on a national, continental and global level.

Conclusion

To say that Christof was a remarkable intellectual, academic and scholar would be true. However, from the above tributes it is clear that he was much more than that. He was one of those rare human beings who had the gift of bringing together people from all over the world to become invested (through research, funding or otherwise) and united in his big plans and projects – he was able to empower and inspire, and persuade, people to share his dreams and pursue the realisation of those dreams. Christof left this world much too soon, but he left us with a clear road map for the future: chase your dreams, believe in yourself and others and, above all, make your contribution as a human being to the greater good of humankind.

* He was Dean of the Faculty of Law from1998 to 2006.
** He was Dean of the Faculty of Law from November 2011 to October 2019.
*** She started her term Dean of the Faculty of Law in 2019.

6

The place of Christof Heyns in the history of the Centre for Human Rights

*Johann van der Westhuizen**

In the beginning

The mid-1980s were dark days for human rights in South Africa. Apartheid was on its death bed. Perhaps for that reason the measures to keep it alive were at their most draconian: a state of emergency; police and soldiers in black townships; disappearances; and members of killer hit squads who barbequed meat and drank beer, disgustingly close to where they had blown up human bodies.

The University of Pretoria (UP) was known as 'the Voortrekker University'. On 4 April 1985 it awarded an honorary doctorate to apartheid president PW Botha. When I mentioned to a colleague in the Faculty of Law, the late professor Dawie Botha, that I was not planning to attend the ceremony, at which the Commissioner of Police and previous chief of the notorious Security Branch was the guest speaker, he replied in typical fashion with a frown on his Charles Bronson-like face: 'This f…g guy should not even be seen in public.'

This University unsuccessfully sought an interdict in the late 1970s to prevent the screening of an Afrikaans feature film, *Die Springbok*. It dealt with a talented young rugby player who studied at the University, played for the first team, was selected for the famous Northern Transvaal (now the 'Blue Bulls', or 'Bulls'), dated the attractive blonde daughter of a senior rugby administrator, but … was exposed as … 'coloured'! The University argued that it was defamed and would suffer financial loss because its ability to attract white students would be damaged. In the 1980s the Department of Philosophy organised a lecture series on 'dangers threatening the Afrikaner'. One such danger was 'liberalism'. The head of that department – a revered professor with at least two doctorates – tried, through another colleague, to recruit me to write an article in defence of the Immorality Act's criminalisation of mixed-race marriages and romantic relationships. This opportunity to please my seniors, I declined.

On the anti-apartheid struggle side things were heating up. Suspected police informers and those perceived to help them were killed by 'necklacing'. When an elderly frail *sangoma*, who allegedly used the

magic powers of traditional medicine to scare 'young comrades' away from a police officer who had to be eliminated, saw the activists coming for him, he fled. In the dusty street, he was caught. A tyre doused in petrol was put around his neck and set alight. In broad daylight onlookers saw how his eyes popped out and his body exploded before being reduced to black bones and ashes. His attackers, who regarded themselves as freedom fighters, received the death sentence.

As a young professor at 'the largest Afrikaans university in the world' (as UP liked to portray itself, light heartedly), I was wondering what we could do for our burning country; the struggle against apartheid; and human rights. In my Jurisprudence course I had been teaching human rights for almost ten years.

Earlyish in 1986 professor Niek Grove, a specialist in contract law, and I met in the parking space outside the Law Faculty building – and shared our depression. I asked what we could do at our conservative university that was perceived as one of apartheid's think tanks. He proposed a conference on a bill of rights for South Africa. If this was not the birth hour of the Centre for Human Rights, it was indeed the moment of conception – in the bright sunny heat on the concrete and tar of a parking space, *nogal*.

I chaired an organising committee. Several colleagues cooperated, not necessarily because of their political or philosophical convictions, but in the interest of the image of the University and some progress on the way forward for our country. We received about R30 000 from the American Embassy. As our financial manager, Professor Piet Delport watched over this. During the actual event, the later Dean, Professor André Boraine, not only managed but also actively took care of the hard logistics, by tirelessly transporting speakers to and from the airport, in a combi. An 'events organiser' was neither needed nor affordable. Professor Duard Kleyn – also a later Dean – provided valuable moral support. 'Why are you doing this?', he asked me while I was frantically calling speakers late one evening. Professor Henning Viljoen was a calm but determined influence.

I had to fill in forms to get permission for the presence of black speakers on campus. One of the questions on the form was whether they would use toilet facilities … The invited speakers included then advocates Dikgang Moseneke and Zak Yacoob, later Deputy Chief Justice and Constitutional Court Justice, respectively; Judge Laurie Ackermann, later a Constitutional Court Justice; Mathole Motshekga, later premier of Gauteng and prominent ANC Member of Parliament; Godfrey Pitje, an attorney in the law firm of Mandela and Tambo, who was once convicted for refusing to move away from the seats reserved for white attorneys in a court; and academics John Dugard, Marinus Wiechers, Dennis Davis and Hugh Corder. While a bill of rights was regarded as

liberal and even leftist in conservative circles, there was suspicion on the left. The apartheid regime had become interested in the concept of 'group rights', as a possible way to preserve white privilege in an inevitable new dispensation. Justice Minister Kobie Coetzee appointed Judge Pierre Olivier to head a commission to investigate human rights and group rights in particular, whom I also invited as speaker.

Naively, we arranged the conference to commence on 1 May 1985 – international Workers' Day! Young activists created an 'anti-bill of rights committee' and were very vocal at the event. In my own short talk, I stressed that what I at least was having in mind, was a fully-fledged bill of rights in a new constitution that could not go hand in hand with apartheid. Judge Johann Kriegler, later to head the Independent Electoral Commission for our first democratic elections and to serve on the Constitutional Court, spoke forcefully and movingly at the end of the conference. It turned out to be a huge success, as well as a milestone in the history of UP. The events caught the attention of the banned African National Congress (ANC) in exile and communication started.

At a lunch for the organising committee a few days later, we asked: 'What now?' Someone suggested that we start a centre. After much work and many meetings, the constitution of the new Centre for Human Rights Studies was passed in 1986 by the Board of the Faculty of Law and approved by higher structures. One of these formal developments is probably the actual birth date of the Centre. Professor Riel Franzsen designed a logo, with the peaceful colours, turquoise and blue. I was the first director.

The coming of Christof

Christof Heyns was my student. At the time when he was the chair of the new Law House for students, I was the coach of the rugby team. In 1986 he was studying for his master's degree at Yale University in the United States. Following what was happening, he sent me a letter with the phrase 'the warning voice from Pretoria' in it. This was a reference to an article titled 'The warning voice from Heidelberg: the life and thought of Gustav Radbruch' by the late professor Barend van Niekerk.[1] Van Niekerk applauded Radbruch for speaking out against Nazism. I regarded the much appreciated compliment as undeserved. Quite a number of South Africans of all races had by then voiced opposition to apartheid. Christof would later research international human rights law in Heidelberg.

Upon his return he was appointed in the Department of Legal History, Comparative Law and Legal Philosophy, which I headed. He joined the Centre, then virtually a club of non-paid volunteers in the Law Faculty. Eventually we obtained funding for administrative

support. Isabeau de Meyer and later Carole Viljoen joined and have rendered invaluable service over the years.

Christof's enthusiasm and energy soon kicked in. He persuaded me to drop the 'Studies' from the name of the Centre for Human Rights. Initially I decided on it in order to give our activities, which reactionaries regarded as political activism, a more or less academic look. Later, after my departure, Fearika Heyns used her considerable artistic talent to design a new colourful logo, with a butterfly resembling Africa, symbolising something like the awakening of the continent.

After being somewhat skeptical about my participation in the 1987 'Dakar Safari', organised by doctors Van Zyl Slabbert and Alex Boraine, Christof was invited – like I was – to meet with future President Thabo Mbeki and other ANC leaders in Harare. He was warned by someone close to him and high up in the Afrikaner hierarchy that his career could be jeopardised by going there. I was not happy, because his immediate senior at the university was me, as his head of department! He went, participated in rich discussions not only with future government ministers, but also influential thinkers from inside South Africa.

Christof enjoyed the experience tremendously – especially when several of us followed Thabo Mbeki and the late Steve Tswete toyi-toyiing into a large tent where the wedding celebration of the daughter of Stanley Mabusela, ANC representative in Harare, was taking place. We joined the event late. It was in full swing. Tswete was supposed to be the programme director and Mbeki a major speaker! African time? Christof remembered his school days when young white Afrikaners in the Voortrekker youth movement were taught at field camps to leopard crawl through bushes and tall grass at night, with teachers throwing clods at you when your buttocks was visible … all to prepare for battle against ANC terrorists and other communists.

Together we thought up projects and organised large conferences. One was on a new jurisprudence for South Africa. Christof proposed that we commission an artist to design an advertising poster. This resulted in a dramatic, controversial oil painting by the famous artist and chef, the late Braam Kruger. The painting was way beyond our poster expectations. Cecille van Riet, who was not only the Centre's Street Law coordinator at the time, but also a keen, energetic and very active public relations officer, purchased the painting. It is currently displayed in the Centre. Signed posters are still visible in offices across the country. Cecille contributed immensely to the success of the Centre in its early years. When she received a job offer from Lawyers for Human Rights, she left but remained a life-long friend of the Centre.

A large conference on *de facto* discrimination was the launch of an ongoing project on the topic. We realised that after centuries of colonisation and not only discrimination, but indeed the violation if

not denial of the human dignity of millions, a simple statement about equality and the prohibition of discrimination in a new constitution would not guarantee substantial equality. Many ways to continue with apartheid spatially, as well as in the workplace and business world, could easily be designed. While attending a short course on constitutional philosophy by professor Frank Michelman in the Harvard Law School, Christof and I researched and discussed indirect discrimination, disparate impact and related issues. Thereafter we biked in Vermont and around the whole of Martha's Vinyard Island. Before he left, we watched the stage production of Ariel Dorfman's play 'Death and the Maiden', on the truth and reconciliation process in Chile after the abuses of the Pinochet regime, in New York, with Hollywood actors Glen Close, Gene Hackman and Richard Dreyfuss. On questions around cruelty, suffering, retribution, forgiveness and justice it left a deep lasting impression on both of us.

The Centre hosted many foreign and South African speakers and attracted large audiences from several faculties at UP, as well as the wider community. After the unbanning of the liberation movements in 1990, then professor Albie Sachs and Penuel Maduna, the future Minister of Justice, visited. Security Branch agents came to see me in my office and invited me to secretly supply them with information about Albie Sachs and other ANC members. According to them, the information could help the government to speed up their reform initiatives, which were too slow. When I did not agree, they told me that it might already be known that I was in their company and that my reputation in progressive circles would be harmed.

I informed Christof, who received a similar offer during his time at Yale. A persuasive voice close to him advised him to accept. As a poor student he could earn some money and help to fight communism. A friend of his was indeed doing it. Christof declined, because it would undermine the entire purpose of academic discussion. So did I; and informed the agents that as members of the public they were welcome to attend any of our events and make contact with the speakers.

Right wing resistance was mounting. I held back on inviting Nelson Mandela, but a progressive student organisation did it. He accepted. Christof and I were sitting in the front row of the amphi-theatre. When Mandela appeared on stage, I mentioned his surprising and imposing length to Christof.

Mandela smiled and waved. Then the chair, art student Hedwig Barry, said: 'Let us sing the national anthem, 'Nkosi sikelel iAfrica'. Someone jumped onto the stage and proceeded towards Mandela. One of his two bodyguards stepped in front of this person. Their shoulders touched. Hell broke loose. '*'n Blanke is in gevaar*!' (A white person is in danger!) Christof later mocked the response of the right wingers.

Ever so slightly Neanderthal-looking hordes in khaki outfits stormed the stage and damaged the speaker system. Mandela's security staff grabbed both his arms and whisked him away. I ran around the building and caught up with them on the way to their vehicle. A bodyguard tried to stop me when I came close. I brushed him off and shook hands with Mandela. Christof was close behind me. Then we lamented in my office, with a few colleagues. Days later, at a conference in Durban, I spoke to Mandela. He understood better than I did.

When we then invited Thabo Mbeki to speak, we had reason to worry about security. Christof and I met with right wing students and promised them an opportunity to speak, if they do not disrupt the event. Christof fetched Mbeki and Stanley Mabusela in Johannesburg. On their arrival, ANC flags were being burnt, amidst much noise, outside the venue. At the end of the speech, we invited the protesting students to join. They marched in with their flags. Mbeki went down the line and greeted each one of them with a handshake. Only the last one had time enough to think and held his hand behind his back.

Then I invited conservative white South Africa's number one enemy, Communist Party leader Joe Slovo, together with Tony Leon and deputy minister Theo Alant from the National Party. We were nervous. This time the special riot control unit of the South African Police agreed to wait a block or two away. They had to protect the deputy minister, they said. Slovo fell ill and Essop Pahad stood in for him. Those who attended did not know in advance. When I arrived at the venue, Christof – with considerable concern – told me that the colours of the metal detector at the door were the orange, white and blue of the flag of apartheid South Africa. And, our totally innocent caterer and spouse of a professor thought it a good idea to decorate the tables for the function afterwards with napkins in the ANC colours of black, green and gold!

At Christof's instance, the Centre found financial support for a bursary for deserving students. We appointed as research assistants three African men and one white Afrikaans speaking woman. One of the men was an ANC activist, who later – with his family - was driven out of his job and indeed the Eastern Cape, for fighting corruption. One was a supporter of the Pan Africanist Congress (PAC). The third was apolitical.

A somewhat mad meeting was perhaps a definitive moment in the history of the Centre. I was at Yale University, Duard Kleyn in Germany, Christof somewhere in Europe and Riel Franzsen on his way to do research. We decided to meet to discuss the Centre's future. Amsterdam was the location. I very nearly missed my flight from New York after grossly underestimating the traffic. At the last minute, the hard pushed cab driver dropped me off in front of the desk of PANAM. Christof

indeed missed his train from Germany, after a good time with old friend Marc Leistner. We met Duard and Riel who were quite unwell after indulging in a very spicy Indonesian rice table the previous evening.

At our meeting in the Grand Hotel Krasnapolsky on *Die Dam* we discussed several issues. While crossing a street on the way back to our humble accommodation, Christof mentioned his ideal of an annual Southern African Moot Court Competition. I responded that – based on my experience in Senegal, Ghana, Burkina Faso and The Gambia – *it could never work*. The infrastructure did not exist. He did not accept my pessimistic response and we went ahead to arrange it to happen in Harare in 1992. The theme was 'From human wrongs to human rights'. To facilitate communication, Christof supplied the Law Faculty in Harare with a fax machine at our cost. A day or two before the event, the machine ran out of paper. And so on.

It was hugely successful. After a few such competitions, Christof wanted to make it an all-African event. When I told this to Albie Sachs, who enthusiastically supported the first moots, on an airplane, he said … *it would not work*. But it happened … and succeeded. Several other moot court competitions for students and school children followed, in the Constitutional Court, Geneva and elsewhere. To a considerable extent the moot courts are the most tangible manifestation of Christof's innovative thinking and perseverance against many odds, as well as of the Centre's change of focus from resistance to apartheid and the promotion of human rights in South Africa, to its role in the rest of our continent.

Christof Heyns contributed significantly to the constitution making process. During the drafting of the interim Constitution at Kempton Park in 1993 I co-chaired a committee that had to identify legislation that could impede fair and free elections the next year, to be abolished. It was an awful lot, from draconian 'security' laws in South Africa and the so-called 'independent' homelands of Transkei, Bophuthatswana, Venda and Ciskei, to the laws by which traditional leaders ruled rural communities, especially in KwaZulu-Natal. I appointed a number of experts onto the committee. Christof was one. Others included attorney Dumisani Thabata, Professor Johan van der Vyver and human rights lawyer Howard Varney. The start was chaotic and frustrating, but we concluded the task successfully.

From 1994 to 1996 I served on the 'Independent Panel of Recognised Constitutional Experts', assisting the Constitutional Assembly, chaired by Cyril Ramaphosa, in Cape Town. One of my particular interests was the committee that dealt with Chapter 2 of the Constitution, the 'Bill of Rights'. Without the inclusion of socio-economic rights, in addition to civil and political rights, the new bill of rights might have had little legitimacy amongst the vast majority of black and poor South Africans.

The right to freedom of expression in the fine arts would mean little to the grandmother who had to carry water and wood for a long distance to a modest rural hut or a plastic and corrugated iron shack in an informal settlement; and once a month collected pain tablets from a mobile clinic.

The fear was that rights that cannot be enforced would amount to empty promises. This could undermine all constitutional rights. Just like there might not be money for houses, hospitals and schools, an aspirant dictator could postpone elections on the basis of a lack of funding. Resulting from the hard work of the members of the academic panel advising the bill of rights committee, especially Professors Sandy Liebenberg and Halton Cheadle, the rights concerning housing, health care, food water, social security, education and the environment were included. Cautious wording from international human rights instruments were used. Thus, the Constitution realistically requires 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights. The fact that everything cannot happen overnight, cannot be an excuse for doing nothing at all. When President Mandela's Minister of Housing, Joe Slovo, stated in an interview with Pieter Dirk Uys' Evita Bezuidenhout that a million houses would be built in five years, Evita asked if he did not in fact mean that five houses would be built in a million years.

Christof proposed that the South African Human Rights Commission annually require organs of state to report on measures taken towards the achievement of these rights. I passed it on to the politicians and experts. But, the attitude of especially the ANC had changed since the drafting of the interim constitution. They were now the government and could be held responsible. When my colleague Zak Yacoob and I pushed for the inclusion of this requirement, ANC politicians resisted. They feared that opposition parties and civil society would use the Commission to embarrass the government. Prophetic, indeed. It is of course to be expected in a democracy where the ruling party has a large majority and is unlikely to be voted out of power soon that institutions like the Commission, Public Protector and even the courts will be used to expose failures and abuse. Yacoob mentioned to ANC Member of Parliament Willie Hofmeyr that the party must do something for poor people. Section 184(3) was included. What has happened since then, is dealt with in the contribution by professor Danie Brand to this publication.[2] Suffice it to say that millions of people are still without houses, health care and education. Has the 'empty promises'-ghost become real?

Christof also mooted the possible inclusion in the Bill of Rights of *duties* next to *rights*, in accordance with the African Charter on Human and Peoples' Rights. This one did not get far though. In a

speech, General Constant Viljoen, leader of the Freedom Front Plus, enthusiastically referred to the booklet distributed in this regard. A member of the panel assisting the bill of rights committee, Professor Ignus Rautenbach, stated that he would emigrate if duties were expressly included. The atmosphere at the time was not right for this idea. On the one side it played into years of conservative opposition to human rights, emphasising that one has the duty to work to own a house, as well as for other rights. On another side it evoked fears for much publisised African failures.

Many other Centre projects followed. After initial short courses and an postgraduate course on South Africa's new Bill of Rights, the LLM (Human Rights and Constitutional Practice), which I organised, the now famous LLM on Human Rights and Democratisation in Africa (HRDA) – as far as I remember also a Heyns brainchild – made the Centre hugely influential on the continent. Several other courses were offered over time. The Integrated Bar Project (IBP) and South African Student Volunteers Organisation (SASVO), led by Christof, are dealt with elsewhere in this book.[3]

Before my departure from UP to take up a judicial appointment in the High Court, I sought to persuade the then Vice-Chancellor, Professor Johan van Zyl, that the Centre could not continue as a time consuming unpaid hobby, that it had to become a fully-fledged academic department and that its director must be a full time professor carried by the University. Others, including Christof, worked on the same idea. So, it happened in 2007.

Both as a member of the Centre and as its Director from 1999 to 2006, Christof Heyns contributed enormously to its growth and success. He took it to heights way beyond the modest hopes and expectations of those of us who started it.

Life after Christof

Although this piece is about Christof and the Centre, the history of the Centre cannot be fairly narrated without paying tribute to his successor as Director, Professor Frans Viljoen. Frans was a student of Christof and me. In 1991 he joined the above-mentioned department which I headed, as well as the Centre. His impact was immediate, for example by coaching students for little plays to educate on human rights. In the LLM course on the Bill of Rights he taught on criminal procedure, a highly important area for the implementation of the Bill of Rights, then full of unanswered questions.

Frans toured through almost the entire rest of Africa, in a small Russian-made four by four. Because of the moot courts, in which he got deeply immersed, as well as other commitments, he has visited the vast

majority – if not all – countries in Africa. Recently, in Europe, I once again heard admiration and praise for his work, as I had often heard elsewhere.

His well-known qualities include his friendliness; fluency in several languages including French and German; immense work ethic and modesty. One of the reasons why it has been difficult to find a replacement for Frans, who has been director since 2007, is the fact that a job description based on his daily activities and responsibilities seems humanly simply undoable.

Without Frans Viljoen, the Centre which I started with a few colleagues and Christof built into a monumental institution, might no longer have existed.

Fame and future

The Centre for Human Rights is famous in many circles not only in Africa, but all over the world. In 2006 it was awarded the UNESCO Prize for Human Rights Education, based on the African Moot Court Competition and the HRDA programme. That was followed by the African Union Human Rights Prize in 2012.

Now it is facing a new future, unlike any previous future. What are its challenges and tasks, besides fundraising and sound financial administration and management? Some practical issues are obvious: inequality, poverty and greed in South Africa; the quality of and respect for the South African judiciary, the integrity of which is attacked from the far right, as from the self-styled left, when decisions do not suit them; discrimination and persecution based on an unwillingness to recognize equality based on sexual orientation in Africa; refugees in different parts of the world; suffering hungry children; and so on.

I do have another concern, on a perhaps more philosophical level. What is the global current health status of the very concepts of democracy and human rights? In the world's best known or at least most glamourised example of democracy and freedom, the United States of America (USA), democracy itself is struggling for survival. More than half of the Republican Party allegedly believe that the election decisively won by Joe Biden was stolen from Donald Trump. They believe it, because the narcissistic sociopathic Trump says so. Apparently, a significant number believe that the 6 January 2021 attack on the Capitol was staged or never happened. Under the banner of the right to freedom of expression bizarre lies and conspiracy theories are spread shamelessly and blamelessly. Under most modern constitutions all rights can be limited. But in the USA there is an inability or unwillingness to accept this with regard to the constitutional right to bear arms. Thus, teenagers buy machine guns in corner shops and go

on killing sprees in schools. These fatal attacks are merely fake news, argue some politicians and talk show hosts, protected by their right to free speech.

On the other side of the world we hear about 'the Chinese narrative of democracy and human rights'. Millions of people have allegedly been lifted out of abject poverty – a socio-economic rights success story. However, one party governs; national elections do not take place; protest is suppressed; courts are not independent; constitutional supremacy is unheard of; and whether the abuses of America occur in China we would not know because there is little or no freedom of expression. A tennis player who accused a prominent Communist Party member of sexual abuse is silenced and all but disappears.

We need to constantly rethink, revitalise and perhaps even re-invent theories of human rights. The Centre for Human Rights has a duty in this regard. Humankind likes to argue in terms of what great deceased leaders and thinkers like Jesus and Karl Marx would have done. It is unlikely to help the Centre to ask how Christof Heyns would have dealt with specific new problems. What he did do, is to show how far innovative thinking, hard work and perseverance can go.

* Founding Director of the Centre for Human Rights; former Justice of the Constitutional Court of South Africa.

1 (1973) 90 *South African Law Journal* 234.

2 See ch 36 D Brand 'Socio-economic rights in South Africa: the "Christof Heyns clause"'.

3 See chapters 8 and 9.

7

Christof at ICLA

*Charles Fombad**

Introduction

The Institute for International and Comparative Law in Africa (ICLA) was founded in 2011 by its co-directors, Christof Heyns and Erika de Wet. Christof was sole director for the last five years of his life. The fact that, within a decade of its existence, ICLA has become the leading research institute of its kind in Africa testifies to his visionary, creative mind and extraordinary ability to make things happen. Christof saw ICLA as a vehicle to strengthen our Faculty as a global institution. To that end, he tirelessly initiated projects and programmes in collaboration with local and international partners to facilitate research and advance the transfer of knowledge.

This short contribution can provide at best only a snapshot of how, before his untimely death on 28 March 2021, he conceived ICLA and positioned it, in spite of the disruption to his projects caused by COVID-19 pandemic, as a centre for research excellence. I look briefly at the goals that ICLA was set up to achieve, highlight the nature of the projects Christof initiated, and, by way of conclusion, describe how he positioned ICLA to play a leading role in advancing knowledge, research and publications in international and comparative law with an African focus. Other contributors to this volume will elaborate on the projects they undertook with him. Although it is already possible to discern the impact of some of Christof's projects, there is no doubt that the real impact of his work, and the new knowledge it generates, will endure for generations to come.

ICLA's beginnings and its mission

ICLA was conceived, and its establishment approved by the Executive Management of Senate of the University of Pretoria (UP), in 2010, while Christof was still Dean of the Faculty of Law. It opened its doors a year later, when Christof stepped down as Dean, to admit him as one of its two founding directors. To underscore its unique nature, ICLA was launched via an international conference held under the theme, 'African constitutionalism: Present challenges and prospects

for the future'. Professor Yash Ghai, one of Africa's most renowned constitutional scholars and former chairperson of the Constitution of Kenya Review Commission, delivered the keynote address, which was followed by an address by Andries Nel, then Deputy Minister of Justice and Constitutional Development. Later that evening, the dinner speech was delivered by Dr Naledi Pandor, then Minister of Science and Technology.

The mandate of ICLA was spelt out in a memorandum of understanding signed between its co-directors and UP management. The documents that describe ICLA's vision reflect the many grand ideas Christof often spoke of but never had the opportunity to actualise.

In the proposal to establish ICLA, its vision was to 'create new knowledge and develop research capacity across geographical, legal and linguistic divides in Africa, at the highest level, within the fields of international and comparative Law and to help integrate African legal developments with those in the rest of the world'. To achieve this, ICLA is required to do the following:

- develop a community of scholars from a wide range of countries and institutions that will initiate and perform research projects to ensure the effective enforcement of the rule of law in Africa;
- serve as the point of convergence and institutional memory for judicial and legislative reform across the continent;
- constitute a base from which the legal systems of African countries can be accessed by other regions and international organisations; and
- link African legal scholars with those in the rest of the world at the cutting edge of contemporary international and comparative research.

Scope and nature of Christof's work at ICLA

Christof's work at ICLA can be summarised under four loose categories: his global agenda; his African agenda; his international-organisations agenda; and, finally, other aspects. In looking at his work from these perspectives, it must be remembered that he had indicated that one of the purposes of ICLA was to provide technical assistance to African governments and international organisations engaged in legal reform as well as contribute towards stimulating stronger capacity in the field of law at African universities. This is indeed reflected in the various activities he carried out.

Christof's global agenda

Christof's first six years at ICLA coincided with his tenure as United Nations Special Rapporteur on extrajudicial, summary or arbitrary

executions (2010-2016), and this inevitably influenced the nature and focus of his work during this period.

Under what can be classified as Christof's global agenda, there were at least four main research projects. The first of these is the 'Pretoria UN human rights treaty impact study: Making the whole treaty system visible' project. This is a large-scale, long term project aimed at facilitating a better understanding of the dynamics involved in the processes through which the UN human rights treaty system makes, or fails to make, a difference at the domestic level. The project entails the comprehensive study of the impact of these treaties in 20 countries and updates a similar study of these countries which was published in 2002. The 2021 book shows how the system expanded dramatically in the past 20 years.[1]

The second project, 'Freedom from Violence in Africa/ SDG 16', is an initiative to establish a collaborative research network that brings together researchers from across the African continent focusing on evidence-based and human-rights-based approaches to the problem of violence. This is an umbrella project that covers a number of other different projects and is essentially a broadening out of Christof's work as UN Special Rapporteur that continues his work on police use of force, accountability, and violence-reduction in Africa. A doctoral programme designed to build a corps of African expertise in this area was incorporated into this project. The programme had 15 students, with most of them registered in the Law Faculty and under Christof's supervision (with Dr Thomas Probert and Prof Stuart Maslen as co-supervisors). Agenda 2030, particularly Goal 16, provided part of the framing for the Freedom from Violence project. In 2019, ICLA played a vital role in the University's broader contribution to the process, led by Statistics South Africa, of producing South Africa's first National SDG Report.

A closely related project is that on the regulation of peaceful assembly. Christof served as the Rapporteur for a new General Comment that the UN Human Rights Committee was developing on article 21 of the International Covenant on Civil and Political Rights (ICCPR) on the freedom of assembly. As a spin-off of this project, Professor Stuart Maslen developed two global online resources: one on the legal frameworks for the use of force by the police[2] and the other, on the legal framework for the regulation of peaceful assembly.[3]

Another important project was undertaken from 2014 to 2018 by a research team based at ICLA and closely supervised by Christof. A study of the 'impact of national commissions of inquiry in Africa', [4] it involved field work across seven African countries. The project was part of a broader research project examining how traditional African moral resources, such as ubuntu, continue to shape contemporary

governance. It was designed to reinforce the work of revising the UN's main resource on investigating suspicious deaths, the Minnesota Protocol on the Investigation of Potentially Unlawful Death. Besides playing a central role in the revision of the Minnesota Protocol, the study provided the basis for ICLA's being invited to take part in an EU-funded project in Kenya working with the country's Independent Police Oversight Authority and involving collaboration with the International Commission of Jurists on related studies.[5]

Christof's African agenda

It is not easy to separate the projects and other activities carried out under the global from the African agenda. Nevertheless, given that legal developments in Africa were at the heart of the establishment of ICLA, some of these important activities need to be highlighted. In fact, in the proposal for setting up ICLA, it was noted that there was currently no research institution on the continent in the areas of international and comparative law on the advanced level required. Hence, ICLA was conceived as a 'vehicle for advancing the rule of law and the role of law through linking the various sub-regions on the continent, each with its own linguistic and legal traditions'. Christof was instrumental in a number of projects designed to bridge the legal and linguistic divide in Africa through intra-continental and cross-systemic legal research.

One example was an arrangement with Oxford University Press (OUP) in 2011, under which ICLA undertook to coordinate African country-reporting for the Oxford Constitutions of the World Online.[6] Under this special arrangement, OUP allowed ICLA to publish and make available for free all the published reports on African countries.[7] A 2012-2015 project aimed at rebuilding constitutionalism in post-conflict societies through comparative analysis focused on Ethiopia, Kenya, South Sudan and Uganda. This involved three full-time and two part-time PhD students based at ICLA. Between 2014 and 2017, ICLA (in partnership with the UP Department of Political Science) participated as one cluster of a four-cluster university-wide project, which aimed at, inter alia, building a nuanced theoretical framework to unpack the idea of ubuntu as a viable philosophical concept.

Christof was instrumental in a number of important conferences being organised by ICLA. Some of these led to significant publications. These include a conference on the rule of law in Africa,[8] another on constitutional implementation in Africa,[9] and, more recently, one on the implications of COVID-19 pandemic regulations for human rights and the rule of law in eastern and southern Africa.[10]

Perhaps Christof's most significant achievement in his pursuit of ICLA's mission to promote a trans-systemic legal dialogue in Africa was his success in persuading the board of the Stellenbosch Institute

for Advanced Study (STIAS) to sponsor the annual seminars on constitutionalism in Africa.[11] As a result of his influence, ICLA has since 2013 played a leading role in organising in collaboration with STIAS the Stellenbosch Annual Seminars on Constitutionalism in Africa (SASCA). The SASCA programme has led to the publication by OUP of five major path-setting books on comparative African constitutional law.[12]

A critically important aspect of ICLA's mission was the goal of developing indigenous capacity in the long run. As noted earlier, the freedom from violence programme has, as a key aspect of its design, the aim to build an African knowledge base. This was again evident in the rebuilding constitutionalism in post-conflict societies project. Christof crowned this with a doctoral summits programme. It was initially designed for his freedom-from-violence students, but he made plans to extend it to the wider faculty and use it as a platform for an online exchange between doctoral students at different universities on the continent. In addition, a doctoral exchange programme sponsored by the David and Elaine Potter Foundation made it possible for exchange visits of lecturers and students between UP and the University of Cambridge in June 2012.

Christof's agenda for international organisations

Other contributors to this volume will deal with aspects of the enormous amount of work Christof did as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and later as a member of the Human Rights Committee. Here, it suffices to highlight a few of his contributions, first to the UN and secondly, the AU on one particular aspect of ICLA's foundation mission, namely, the provision of technical assistance to international organisations engaged in legal reforms. Both of these endeavours contributed towards advancing the rule and role of law in Africa and in the world at large. In a sense, this section summarises the major achievements in terms of the setting of standards and guidelines (soft law) that Christof directed or was involved in formulating to address a number of contemporary challenges. Many of these documents have been translated into other languages.

The main ones, at the level of the UN are: UN Human Rights Committee, General Comment No. 37 on the right of peaceful assembly;[13] UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (1017-2019);[14] UN Human Rights Committee General Comment No. 36 on the right to life (2016-2018);[15] UN Minnesota Protocol on the Investigation of Potentially Unlawful Death (2014-2016);[16] and the Human Rights Council's Joint Report of two Special Rapporteurs on the management of assemblies (2014-2016). It should be added that the UN Human Rights Committee is currently

developing a General Comment on article 21 of the ICCPR, on freedom of Assembly.[17]

At the level of the AU, Christof worked with the African Commission on Human and Peoples' Rights. This collaborative effort resulted in the African Commission on Human and Peoples' Rights General Comment 3 on the right to life (2014-2015).[18] ICLA coordinated the research for the development of a model law on the use of force in South Africa. This resulted in a Model Law which is regularly used by the African Policing Civilian Oversight Forum (APCOF) in its advocacy.[19] The Model Law was presented to the African Commission on Human and Peoples' Rights, which reached out to ICLA in 2020 to undertake a study on the use of force in law enforcement in Africa. In addition, ICLA has produced a resource pack and in early 2021 submitted a draft of the study.

Other aspects

Christof played a pivotal role in many other projects indirectly linked to ICLA. For example, he was one of the initiators of Pretoria University Law Press (PULP) and, for many years, the coordinator of its management committee. Just before his death, he initiated what the PULP management committee advertised as the 'PULP Thesis Prize.' A few weeks later, when he passed away, the board fittingly renamed it as 'The Christof Heyns Memorial Thesis Award'.[20]

As pointed out above, one of ICLA's goals was to link African legal scholars with those in the rest of the world at the cutting edge of contemporary international and comparative research. In this regard, Christof displayed his exceptional skills not only as a respected scholar who made it an essential part of his projects to provide opportunities for doctoral scholarships for to students, but also as the provider of an enabling environment for those who worked with him at ICLA. This conducive environment has served attract many outstanding scholars both from the faculty and other universities in the country, as well as from Africa and the rest of the world.

Christof's influence is reflected in the extraordinary research output and contribution to the development of the law by many of the fellows who became part of the ICLA family. One example is the contribution made by Prof Dire Tladi, an ICLA fellow who has been a member of the International Law Commission since November 2011 and who, since 2015, was appointed as the Commission's Special Rapporteur for the topic *jus cogens*. He was responsible for the 23 draft conclusions on *jus cogens* that the Commission adopted in 2019.[21] Christof brought in one of his former doctoral students, who benefited from the doctoral programme he initiated, Dr Thompson Chengeta, as a non-residential fellow of ICLA. During his tenure as UN Rapporteur extrajudicial, summary or arbitrary executions, he placed the issue of autonomous

weapons on the UN agenda. This has provided Dr Chengeta with an opportunity to become a member of the International Committee for Robots Arms Control and participate in numerous debates in international fora on the issue.[22]

Christof initiated the National Schools Moot Court Competition in South Africa and, in spite of its success, unselfishly handed it over to the South African Human Rights Commission to manage. Just before his demise, he made plans for a pilot project that will see similar national moot court competitions being held in other African countries.

Concluding remarks

There is no doubt that the enormous achievements of ICLA during the last ten years are testimony to Christof's extraordinary creativity and ability to transform into reality the grand schemes that most scholars only fantasise about. Under his guidance, the Institute has maintained a high national and international profile, one enhanced by strategic collaboration and cooperation with partners in South Africa, Africa and the rest of the world. His legacy has positioned the institution at the forefront not only of comparative legal research in general but of research of an intra-African cross-systemic nature.

On a personal note, Christof was to us at ICLA a generous, supportive and considerate colleague. His work was always characterised by flexibility, pragmatism, and the ability to see windows of opportunities and unselfishly share them with colleagues. His vision and ICLA's achievements leave a daunting task for his successors. Indeed, he was taken too soon, at a time when there is still so much to be shared, so much to learn from his inspirational leadership, and so much to do. Nevertheless, he has left a solid foundation on which ICLA can move forward to the next level.

* Prof Fombad is the current Director of ICLA.

1 See further, 'Pretoria UN human rights treaty impact study: Making the whole treaty system visible', available at http://www.icla.up.ac.za/research/impact-of-the-un-treaty-system-at-the-domestic-level (accessed 17 December 2021).

2 See further,www.policinglaw.info (accessed 17 December 2021).

3 See further, www.rightofassembly.info (accessed 17 December 2021).

4 See Impact of national commissions of inquiry in Africa, available at http://www.icla.up.ac.za/research/impact-of-national-commissions-of-inquiry-in-africa (accessed 17 December 2021).

5 The study also resulted in an edited book being published. See T Probert & C Heyns (eds) *National Commissions of Inquiry in Africa: vehicles to pursue accountability for violations of the right to life?* (PULP 2020).

6 Available to subscribers at, https://oxcon.ouplaw.com/home/ocw (accessed 17 December 2021).

7 These are available at http://www.icla.up.ac.za/african-constitutions-1 (accessed 17 December 2021).
8 The papers were published in 18(1) *African Human Rights Law Journal* (2018).
9 See Charles M Fombad *The implementation of modern African Constitutions: challenges and prospects* (PULP 2016).
10 The papers were published in (2020) 20 *African Human Rights Law Journal*.
11 He was, until his demise, a board member of STIAS.
12 These are: CM Fombad (ed) *Separation of powers in African constitutionalism* (OUP 2016) CM Fombad (ed) *Constitutional adjudication in Africa* (OUP 2017); Charles M Fombad & N Steytler (eds) *Decentralization and constitutionalism in Africa* (OUP 2019); CM Fombad & N Steytler (eds) *Corruption and constitutionalism in Africa: revisiting control measures and strategies* (OUP 2020); and CM Fombad & N Steytler (eds) *Democracy, elections, and constitutionalism in Africa* (OUP 2021).
13 See *The development of international standards and guidelines*, available at http://www.icla.up.ac.za/international-organisations/development-of-international-standards (accessed 17 December 2021).
14 As above.
15 As above.
16 As above.
17 As above.
18 As above.
19 See APCOF Annual Report, 2015 available at http://apcof.org/wp-content/uploads/apcof-annual-report-2015.pdf (accessed 17 December 2021).
20 See further, 'Press Statement: Thesis Prize Promoting African scholarship launched to honour memory of Professor Christof Heyns', available at https://www.chr.up.ac.za/latest-news/2482-press-statement-thesis-prize-promoting-african-scholarship-launched-to-honour-memory-of-professor-christof-heyns (accessed 17 December 2021).
21 See International Law Commission, available at http://www.icla.up.ac.za/international-organisations/international-law-commission (accessed 17 December 2021).
22 See *Autonomous Weapons*, available at http://www.icla.up.ac.za/research/autonomous-weapons (accessed 17 December 2021).

8

Christof and SASVO

Murray Hofmeyr, Prince Mbetse** and Danie Brand****

The Southern African Student Volunteers (SASVO), established by Christof Heyns in 1994, was one of his favourite initiatives. Three of the collaborators involved in the early years of the project each contributed their recollections of the origins, impact and spirit of this part of Christof's legacy.

Murray Hofmeyr: origins and first projects

The period between 2 February 1990 and 27 April 1994 was characterised by hope, despair and hope. On 2 February President FW de Klerk, who died on 11 November 2021, gave that famous speech in Parliament. I was driving down from Sibasa in the then Republic of Venda, where we lived in Block Q, the staff housing area of the University of Venda, to the campus in Thohoyandou. The winding road down the hill always reminded me of the Neue Weinsteige, the road down into the city of Stuttgart. In the mid-1980s I studied at the Eberhardt-Karls-University in Tübingen in the then West Germany and often travelled to Stuttgart. One could scarcely think of two greater opposites, Thohoyandou and Stuttgart, and yet, the winding road into the valley below always made my overseas student experience present there where I now was a lecturer at a young university in one of the so-called TBVC states.

I learned about constitutional democracy in Germany. When I returned in 1987 the South African situation looked bleak from that perspective. Yet, I could sense a shift in the conversations I had with influential South Africans, the captains of industry and leaders in church, culture and society. My own experience is far from normative, but this is the story I tell – that my further inquiry led to the conclusion that the presentations Clem Sunter and others were giving on the Mont Fleur scenarios had an effect. I got the impression that influential people were starting to prefer the 'Flight of the Flamingo' – inclusive democracy and economic growth – to the ostrich politics that was clearly going to end in collapse.

And there I was driving down the hill on 2 February 1990 and for the first time in my life heard the word 'rescinded'. I stopped at the side of the road, got out of the car and looked into the distance. I could not believe my ears and there were tears in my eyes.

In October 1993 Christof and family visited us in Venda where we were now living at the Thate Vondo Dam, in one of the most beautiful settings you can imagine. Christof and I went mountain biking in the lush sub-tropical forests. Near the top of the mountain, we stopped for a rest and continued our discussion on how we could contribute to the viability of the soon to be born 'new South Africa'.

Both of us participated in 'missionary work camps' when students at the University of Pretoria. Mine was on the Makhathini Plains, a part of South Africa that I never experienced before. A group of students boarded a bus (it broke down several times) with camping gear and building equipment and stayed for a week or two at a site constructing a small church building for a distant ward of the local Dutch Reformed Church in Africa congregation. It was just a wonderful experience – adventure, friendship, romance, learning basic skills like how to mix cement and how to project manage a building operation – supply chain, workflow, team building, task allocation according to skills, the works. There were also many fights – not all team members became friends for life – and valuable lessons learned about conflict resolution, how to cooperate with people with different personality types, and that '*we* doing it *for them*' was not a good idea.

Many years later, lying on the grass in the shade of a big tree, the idea came to us: how about a student volunteer organisation that will give young South Africans the opportunity to tangibly contribute to the building of our new democracy?

Christof was a man of the deed and soon after conception the idea had to be tested and popularised. The Centre for Human Rights at the University of Pretoria, of which Christof was the deputy director, soon hosted a conference on the prospects of a student volunteer initiative. I travelled to Pretoria in the company of the writer and poet Rashaka Ratshitanga, the narrator in the 1985 Mark Newman documentary *The two rivers*. The conference heard from various stakeholders and although it was a time characterised by mistrust and suspicion, the overall spirit was one of hesitant approval. That was enough for Christof and the first project of the Southern African Student Volunteers was to assist with voter education in the run-up to the 1994 elections.

In the period 1994 to 1995 SASVO was mostly for students from the University of Pretoria and the projects involved students going to township schools in the vast areas around Pretoria, offering extra lessons in Mathematics and Physical Science, and also hosting science demonstrations. We agreed that it was time to start planning for the

execution of the original idea. A pilot school renovation project was successfully completed at Makapanstad, Hammanskraal.

The next SASVO 'work camps' (we tried in vain to use a less loaded name) were held in Venda, by now re-incorporated into the Republic of South Africa as the Vhembe District of the Northern Province (soon to become Limpopo), during the April 1996 university holidays. I assisted Danie Brand, by now officially SASVO project coordinator, with project preparation. We selected three sites. The first was a primary school on the main road at the top of my 'Neue Weinsteige'. I happened to know the principal and she was eager to have her classrooms painted and new school gardens established. My student Dokotela Ravele was principal of Thate High School and the second project was to connect the school to a fountain higher up the mountain for running water, and to build the principal his own, separate office. The third project was to glaze and paint the classrooms of a school near Beuster, the seat of the Lutheran Dean, who at the time was an old friend from the SUCA days, Zwo Nevhutalu. He succeeded the colourful Dr Tshenuwani Farisani who was now a member of the first democratically elected South African Parliament. Zwo agreed that the volunteers could live at Beuster where there was ample accommodation for youth conferences, and we arranged that members of his congregation would cook for the students.

I also invited a number of University of Venda students to join the volunteers, who were still mainly from the University of Pretoria.

The SASVO project officers visited a few weeks before the arrival of the volunteers and we organised meetings with members of the three communities. A key experience for me personally was when I introduced the students to the community meeting at Thate. I spoke about the idea behind SASVO and that it was a historical occasion that this community was chosen as the first to host a student volunteer project. People were listening, looking down, and my enthusiasm found little echo. When the first project officer, Aaron Mogotsi, spoke, the atmosphere changed noticeably, and at the end of the meeting the community were on board. No more white man coming with good intensions to do things for us. 'Building Africa Ourselves' was by now the motto of the Southern African Student Volunteers.

The first three projects were a success. The student volunteers were empowered. They learned skills while having fun. They made friends. They gained confidence. And they felt part of something bigger. Every evening Danie Brand (whose father founded the Development Bank of Southern Africa) met with the team leaders to get progress reports. I was impressed by the leadership skills of the members of this new generation. When I many years later learned the concept 'the leader as convener' from Peter Block, I was reminded of those sessions. But Danie

got a scholarship to do a Masters at Emory University in Atlanta and what would happen after the June-July holiday projects that were now to follow the successful 'pilots'?

I had a sabbatical coming up and the university expected me to register a research project. I was convinced that I would be able to complete the project in less than the available time. This is how it came to pass that I arrived at the Centre for Human Rights on 1 October 1996 as SASVO Project Coordinator – while on sabbatical leave from the University of Venda.

We had less than two months to organise the December-January holiday projects and by now SASVO went national and regional. The recent introduction of email on all campuses made it possible for students to apply from all over. We were amazed – the response was overwhelming. It was clearly an idea for which the time had come. The 'Southern' in the name was real – we received applications, through Christof's African Moot Court Competition contacts, from students in Zambia, Tanzania, Botswana, Swaziland, Lesotho and Mozambique. The team of project officers dealt with the applications – too many for the projects we had available. That was going to be a serious constraint. We developed criteria for what would constitute a viable project. Community involvement was one and established local leadership to partner with. It was a great advantage if there was local sponsorship, too, apart from a safe place for students to live.

Entered Norah Tager and her PEACE Foundation. I think she called us and we had a meeting. We immediately hit it off. That 'can do' attitude, the 'when do we start?' Norah had a great network of live wires in remote rural communities. I will never forget people like Mr Paulus Mdluli, school principal in Kosi Bay. SASVO eventually built a computer lab at his school. That is how it happened that teams of student volunteers departed in early December 1996 and again in January and April 1997 for Ndumo, Nkandla, Manguzi, Keiskammahoek, Mphahlele, Unarine, Mukhumbani, Mankweng and even the Makhathini Plains. Other partnerships led to teams assisting with the building of houses in Alexandra in Gauteng and in Tanzania with Habitat for Humanity. There was also the establishment of an aquaponic food garden in Botswana and the building of a classroom for the Unidade II Secondary School near Maputo.

The latter project was close to my heart as it involved more than just the construction of the classroom. The Venda connection made possible the accompaniment of the team by the German sculptor Traugott Fobbe. He grew up at Georgenholz, the last Lutheran mission in Venda served by a German missionary. He was in Grade 11 when his parents' South African visas were revoked. Back in Germany, Traugott became an artist and teacher, specialising in participative artistic expression.

Having recently returned to South Africa, he went along on the Maputo trip and he taught welding skills to the learners at the school. They produced an impressive work from scrap metal (that was the idea but they could not find any in Maputo, so we had to buy steel for the project) expressing the aspirations of the Mozambican youth. The team brought the sculpture back with them and it had pride place in the Law Faculty. It ended up being stolen – possibly for scrap metal – but the memory of that successful project reminds me of what SASVO was all about in those heady first years.

Funding soon became a headache. It was a great relief when the United Nations Development Project (UNDP) appointed the SASVO project officers as United Nations Volunteers. The stipends volunteers received was not big but comparable to what a student assistant would receive at the University. A few South African and international foundations also made seed funding available. I remember the thousands of funding proposals we wrote and the few letters of gratitude. One evening we were working late again. A section of the Law Faculty library was allocated to me by way of an office. I was writing letters to funders and would take them in piles to Christof who would read them before signing them. He was somewhat of a control freak in such matters.

I was really fed up when we received a snotty negative response from one of South Africa's premier foundations – 'Thank you for your proposal but we do not fund jamborees …' or something like that. I then wrote back, telling the chairman of the fund exactly what he could do with his money. He should do it carefully, we do not want any injuries, but do it all the same. The letter was in the pile on Christof's desk. An hour or so later I heard laughter coming down the corridor. Christof could not stop laughing. We had our moments of comic relief.

It was becoming clear that the physical work that the volunteers did during the classroom and clinic building and renovation projects would not remain viable for long. We did involve trained tradespeople in the projects – as consultants and trainers of the students. But with high levels of unemployment in the areas where we were working, it was a matter of time before SASVO would be accused of taking away people's work opportunities. And, although the students loved the experience of actually erecting something tangible in two to three weeks, it was probably also not the optimum use of the talents of the leaders of tomorrow. Would it be possible to still do something practical that simultaneously involve more of the mind?

We were approached by the Gauteng Department of Education and the Nelson Mandela Children's Fund about a possible project in Gauteng schools during the 1997 Winter holidays. There were several planning meetings and eventually the idea of *Operation Zenzele* was born. Three schools per Gauteng education district were selected and 10 student

volunteers would spend 10 days at each school. They would work with learners to do basic renovation and gardening in the mornings, and in the afternoons they would teach various activities. A competition was planned and the winning teams in the various categories were to present their work on the final day to the MEC and other officials.

We submitted a funding proposal to the European Commission of Human Rights that would allow us to train the student volunteers for a week at the University of Pretoria before they embarked on the projects.

Let me not dwell on the funding challenges. Suffice to say that on the designated date hundreds of students arrived from all over South Africa and other SADC countries. They were housed in UP student residences and the training was delivered on campus. At least 2 members per team of 10 were trained in each of the following specialisations: Street Law, HIV/AIDS Awareness, Boalian Community Theatre, and Mural Painting (with a Human Rights theme).

My sabbatical and therefore my time at SASVO was coming to an end and the training workshops were the final part of my responsibility. Danie returned from Atlanta and I was handing over to him. And Christof and I managed to persuade Prince Mbetse to join the team of project officers in view of a possible future leadership role.

I knew Prince from the University of Venda where he was SRC President during the transition. He was a powerful leader. When the first University Council after liberation wavered on a matter of principle, Prince just told them that they were not legitimate and should resign. And they did. After completing a first Law degree at UNIVEN, Prince moved to UP for his LLB. A new Vice-Chancellor was appointed in 1996 and within a short period of his arrival on campus Prince and comrades staged a sit-in in the new VC's office. Christof had a great affinity with Prince and his sense of humour. He had a way of telling stories that would entertain us to no end. Prince was eventually persuaded that SASVO was a worthwhile initiative for his considerable powers.

On Friday 27 June 1997 the freshly trained student volunteers gathered in the large auditorium of the then Education and Law building for the send-off ceremony. In the parking lot outside were the buses – diesel engines already idling. Representatives from funders and partners were on the list of speakers. Christof was visibly moved when he spoke. Prince was the MC. When all was said and done, he closed the proceedings with these words: 'Comrades, we are returning to the very schools that we used to burn, this time to build!' Cheering students boarded the buses that would take them to the schools where they over the next ten days were to create magic.

I was already back in Venda when the then MEC, Mary Metcalfe, toured the projects on the final day to appreciate the winning murals and watch the plays that the learners staged under the direction of the

students. Christof went along and called me to say how sorry he was that I could not be part of the celebrations. Sometime in 1998 I received a call from one of the district officials. She said it was unbelievable – the three schools per district that hosted the student volunteers all showed a marked increase in matric results at the end of 1997. There was just something really uplifting about the energy and mindset of the SASVO students.

The period of my involvement with SASVO coincided with the establishment and first hearings of the Truth and Reconciliation Commission. The atrocities that were revealed and the subsequent mood was in stark contrast to the future-commitment of the student volunteers. Christof submitted a proposal in the wake of the TRC that SASVO should be made an official and permanent institution of restitution. Maybe the jamboree-guy was on the panel, but the proposal was not successful.

Two decades later, when #RhodesMustFall animated students, I could not help wondering what would have been different if SASVO survived. SASVO is connected to #FeesMustFall. When President Zuma announced in December 2017 that there was going to be free tertiary education for students from households with a combined annual income of below R350,000, he in essence ratified the proposal of Mukovhe Morris Masutha, now holding a PhD from Bath University in the UK. Mukovhe grew up in a village not far from where the SASVO volunteers of the three Venda pilot projects stayed in April 1996. Some years later he was a high school learner when another SASVO project team came to his area and his talents were spotted by one of the volunteers, today a medical doctor and still a good friend. She asked him what he was going to study as he was clearly intelligent. That was the first time ever that anybody spoke to him in such terms. Long story short, in 2010 he was SRC president of the University of the Witwatersrand and also the founder of a bursary programme for rural youth called Thusanani – Help Each Other. And, for the record, he is not really President Zuma's son-in-law. He did date a Zuma daughter but that was long ago. The press got that one wrong – deliberately or not we won't know.

We often spoke about 'reviving SASVO'. The idea was that we might be able to give such a project time and energy after retirement. Until then Christof felt that the School Moot Competition served a similar purpose. I found my own ways of being involved with student development.

What would a revived SASVO look like?

A week or so before the July 2021 looting and civil unrest Clem Sunter published his latest scenario book. As was the case with 9/11, the book reads like a feat of a latter-day Siener van Rensburg. He said South Africa only has two possible futures – the low road of increased

anarchy, looting and the deterioration of institutions, or the high road of creating a people's economy. For the latter an entrepreneurial revolution was a condition.

Sometime after becoming aware of Sunter's latest scenarios, I attended the 2021 Universities South Africa (USAf) Conference online. The sessions of the World of Work group were particularly interesting. In one of these I learned that several universities, like my old employer, the University of Venda, were explicitly referring to themselves as entrepreneurial institutions – 'not having but being an incubator'.

An entrepreneur in Afrikaans is someone with 'ondernemingsgees', someone having an enterprising spirit or disposition or mindset. Someone like Christof. Like the student volunteers of the 1990s.

How about we train teams of volunteer students in the fundamentals of being enterprising, enhance their critical thinking and creativity, their communication skills, ability to collaborate and commitment to add value and let them loose on schools and communities during the university holidays? What better way to rekindle the hope of unemployed graduates and other youth that linger in the streets of their townships and villages and through them the hope we all had in the 1990s of starting something new?

Prince Mbetse: recollections of a SASVO Project Manager

I joined SASVO in early 1997 as one of six UNDP sponsored project managers. Professor Christof Heyns had convinced the UN body that the SASVO project was within its own broader developmental goals. As project managers our job was to identify neglected and dilapidated school infrastructure around the country's nine provinces, with a view of improving their physical condition. These schools were mostly located in rural South Africa. However, Christof Heyns never looked at South Africa in isolation from the rest of the continent. Therefore, he insisted that the school renovation projects be inclusive of schools and students from countries in the broader SADC region. I use the term 'renovation' in its most basic sense within the context of what a group of unskilled teams of students could achieve in a three-to-four-week school holiday period and almost always under severely restrictive budgets.

Professor Heyns did not look at SASVO as a perfect model for schools' physical infrastructure upgrade and he understood the obvious shortcomings. Instead, he conceptualized it as part of a broader social transformation agenda that would condition the minds of participating students to be socially responsive citizens alive to the realities of their communities and to engender the spirit of voluntarism within

themselves and the communities in which they operated To this end, it was always a prerequisite for a qualifying school that the surrounding community be a part of the project and that they work hand in hand with the visiting students. Hence the slogan 'Building Africa Ourselves'.

Since Professor Heyns was a teacher first and foremost, SASVO was an extension of the classroom and not just a lesson in selfless community service. This project was also a platform that facilitated interaction between students from different backgrounds and different countries in a manner that could never be achieved in a classroom setting. Speaking for myself, it was through SASVO that I better understood the richness of the continent's diverse cultures and how its peoples viewed themselves. This came from long hours of intellectual engagements with students from universities located in the different African countries. In most instances, I found the experiences to be quite humbling to me as a South African who before then had never set foot outside the borders of the former 'Transvaal' and who had always seen Africa through the lens of what the global media had projected Africa to be. Such media-induced perspective had given me a false sense of intellectual superiority which was thoroughly modified by these interactions with other students from countries such as Mozambique, Ghana, Tanzania, and Uganda. It is my view therefore that those of us who were privileged enough to be a part of Christof's SASVO dream, eventually understood and shared in his fiercely pan-African world view.

Moreover, it could be argued that for secondary school learners who were living in far flung rural corners of the country, meeting and mingling with real life university students served as a source of inspiration which gave them hope that tertiary education was within reach. I know for sure that this is what it could have done for me. To see students from universities and what was then known as Technikons, most of them being as 'ordinary' as they themselves were, sort of demystified tertiary education and gave them a reason to believe it was possible. It helped a lot that Professor Heyns himself sometimes took time off his many engagements to visit the project sites and to interact with the local communities.

It is also my belief that the act of physically transforming the cosmetic looks of a school had a direct bearing on the learners' future perspective on what it meant to take ownership of their own circumstances. It is hard to imagine that learners who had spent days fixing their classrooms by replacing broken windows, mending cracks on the walls, repairing leaking roofs and applying fresh paint to walls and window frames could still participate in any vandalization of the same school infrastructure. Learners were left with a strong sense of pride in their own schools and had a fresh perspective that was more

about protecting and caring for their facilities as opposed to destroying them.

There was a school in Limpopo, near the area called Dendron, which I identified as one of those which were to be renovated. This school stands out in my mind as the most neglected that I had ever come across, which says a lot coming from someone who spent his primary school days learning under trees. At this school, there was not a single window that was intact, or a door that worked, or a roof that did not leak. I remember finding a stinking decomposed carcass of a long dead goat in one of the classrooms that nobody had bothered to remove. This same school also had the distinction of having been one of those which had achieved a zero matric pass rate the previous year. Together with the school's own learners and the local community, SASVO helped transform the school's facilities, leaving it more like a school than an abandoned single men's hostel. And in that very year, the school achieved some of their best matric results ever. A coincidence? Maybe. But for Professor Heyns and his SASVO team, this was a feel-good story that encouraged us to do even more. To him and to us, SASVO's activities were giving a practical meaning to the constitutionally guaranteed right to education.

When one looks at SASVO from the perspective of its founder, Christof Heyns, one realizes that he was a teacher through and through. He was an exceptional one who didn't just believe in disseminating legal theories in lecture halls, but one who strongly believed in teaching through doing and practical experiences that had real and tangible outcomes.

The eventual financially induced closure of the SASVO project was one of those things that Professor Heyns lamented for a long time. He was so passionate about SASVO that there was no doubt in my mind that if he had the means to do so himself, he would have funded the project from his own pocket, something which he had actually done on several occasions. Right to the end, whenever he and I met, he was still flirting with the idea of reviving SASVO, and even though he always said it jokingly, I wondered if he did not really mean it. SASVO, more than any of his numerous initiatives, exposed Professor Heyns' profound understanding of youth psychology. It was his understanding of the youth's endless desire for adventure, their yearning for something more than just sitting in a classroom and taking notes, that gave him the idea to channel this interest towards something the impact of which I still feel today, more than two decades after.

Danie Brand: the spirit of SASVO

I started my first fulltime job in January 1994 at the Centre for Human Rights at the University of Pretoria. I was appointed as a project coordinator, in part to work with Christof and others (Aaron Mogotsi, Lucas Maphosa, Jabu Maphalala, Mpho Matjila, Sello Ndlovu, Jacob van Garderen, Jan Bezuidenhout, Murray Hofmeyr, Prince Mbetse, Belinda Mogashwa, Derek Xaba, Nozipho Mbanjwa, Dikeledi Mathebula, Wendolene Bosoga) on the Southern African Student Volunteers – SASVO. I did so for the next year and a half, until September 1996, when I left for postgraduate study abroad. I again worked at the Centre and with SASVO from September 1997 until the end of 1998, when I got a teaching job at the Faculty of Law at the University of Pretoria.

In 2018 – twenty years after I left SASVO – I moved from the University of Pretoria to work at the Free State Centre for Human Rights at the University of the Free State in Bloemfontein. Three years later, it was here that the devastating news of Christof's death reached me.

When I first sat down to write this short piece on my involvement with SASVO to honour Christof's legacy, I did a Google search on SASVO to refresh my memory on facts and figures. The only return on my search was a newspaper opinion piece Christof wrote in March 2008, reacting to the events that unfolded at the University of the Free State after the notorious incident at the Reitz male student residence at the UFS. A group of white male students subjected a group of older black women workers to a degrading, racialized and sexualized 'initiation' practice. The incident, which was made public by one of the students posting a video of it on the internet, caused tremendous public outcry and set in motion a process of deep transformation of the University of the Free State that is still ongoing.

Christof ascribed the students' conduct to 'a kind of hopelessness … that results in criminal behaviour' that according to him was prevalent in our society at the time. He asked 'how … people who have to work out their futures in this country [can] escape from that hopelessness?' He provided (true to form) three answers: that one should strive to make yourself useful rather than complain about your predicament; that your skin should not be too thin (you should expect to be affected by the enormous changes that were (are) occurring in our society in ways that don't always seem fair); and you should try your very best to retain the hope that things could be different and perhaps even better. And then the kicker. In answer to the question what he was going to do himself to combat the feeling of hopelessness, Christof said the following: 'I'm going to revive SASVO. To get this bad taste out of my mouth. To revive

my hope that, despite everything, we can make something special of this country. To take it further and adapt a tradition in which the ideas of 'help one another' and 'let's make a plan' apply'.

The article took my breath away. Not only because it so viscerally reminded me of my time with SASVO 20 odd years ago and of the unique blend of enthusiasm, optimism, realism and practicality in the face of adversity that so characterised Christof; or that despite Christof's and others' best efforts, SASVO was eventually not revived. It did so because the place where I now work – the Free State Centre for Human Rights – is the University of the Free State's response to the Reitz residence incident and the feeling of hopelessness that engulfed us all afterward that Christof was writing about. It was established in cooperation with the South African Human Rights Commission, as an institution to work toward the transformation of the UFS campus, through human rights, to work through and hopefully disperse the legacy of the Reitz incident. I felt (feel) like I had come full circle, that it showed how one's past remains with you in unexpected and counterintuitive ways, but in the best possible way. It reaffirmed that, after all these years what I learnt working with SASVO (to try to be useful, despite setbacks and the overwhelming enormity of what needs to be done, and in this way to create and maintain hope, to broaden horizons and think new worlds) was still with me at a time when hopelessness again lurks.

To the sceptics, Christof's idea of SASVO embodying this spirit was, at least for me, proven to be true.

SASVO indeed did give the opportunity to me and many others (at the end of the 12 years of SASVO's existence, more than 9000 students) when we were crying out for something concrete to do to deal with what was (still is) happening in our country and region, to do something (small but) useful. It showed me and many others that we could do many things that we didn't know we could: we (students from all different disciplines and backgrounds) helped paint schools in Hammanskraal; fixed windows, water pipes and toilets in Venda; planted vegetable gardens and worked on bridges and roads in Limpopo.

Our worlds were indeed made larger, our horizons broadened. Through SASVO I saw places and met people that I would never have had contact with otherwise, some of whom have remained friends and collaborators for the rest of my life (I also met Nelson Mandela, Nadine Gordimer and, of all people, American actor Danny Glover!).

All of this happened despite numerous setbacks: funding problems, resistance and sometimes suspicion from some of the communities with whom we worked, motor car accidents, (huge) planning mishaps, and much else. We learnt to continue nonetheless.

In the process, we did in fact learn that hope can be created or revived, and then maintained by each of us, together doing just their bit; that we can create hope by acting.

Although there were many others who worked to create and then build and maintain SASVO, it was Christof, more than anyone else that saw in SASVO and then fostered this spirit of creating hope through doing small things that, to my surprise I learnt is today still with me (and, I am sure with many others). For this – and many other things – I will always remain indebted to Christof Heyns.

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9

Christof and the Integrated Bar Project

Bongani Majola, Carole Viljoen** and Khashane Manamela****

The pioneering years of young lawyer empowerment

The Integrated Bar Project (IBP) was conceived by Professor Michael Reisman of the Policy Sciences Center, Yale Law School, USA. This was in answer to the glaring inequalities in legal opportunities for 'non-white' law students. Prof Reisman had come to South Africa in the late 1980s to teach a course at the University of Pretoria. While here, after visiting many law schools, law firms and engaging with judges, lawyers and advocates, the idea of the Integrated Bar Project was born. This conception was born together with the late Prof Christof Heyns of the Centre for Human Rights, University of Pretoria. At the time, there were only about 500 qualified black attorneys and less than 50 black advocates; Nelson Mandela was still on Robben Island and South African politics seemed to have frozen.

At this time, education in South Africa, including access to higher education was significantly still divided on racial lines, with the majority of black law students compelled by the policies of the white apartheid government to study law at poorly resourced black universities, such as Fort Hare, Turfloop (officially the North), Zululand, Western Cape, Durban-Westville, and Venda, Transkei and Bophuthatswana (universities based in 'independent' homelands, pejoratively known as 'bush colleges'). Consequently, many law graduates from these institutions could not get articles of clerkship (or, apprenticeship) for training to become attorneys at law. At the time, Professor Bongani Majola, was a professor of law and dean of the Faculty of Law at the University of the North (now Limpopo). At some stage he was also President of the Society of South African University Teachers of Law. In all three capacities, he was very aware of this problem and had indeed tried his earnest to find a solution.

At that time, those law graduates admitted to articles of clerkship, did so mainly in law firms in general legal practice. As a result, many qualified only to gravitate towards then low-paying criminal law practice, servicing mostly indigent clients. They had virtually no

access to well-paying commercial practice. Part of the reason was that law graduates from the historically black institutions were seen as of inferior grade. Some law firms complained that it took longer to train them as the training itself had to even include the basics of the law expected to be known when they left law school. These were the days when affirmative action or employment equity were foreign concepts in South Africa.

By the end of 1992, the administrative base for the IBP was moved from the USA to the Centre for Human Rights as Prof Reisman no longer saw any justification to conduct an essentially South African programme from abroad. This is when the University of the North became a partner in the programme, in association with the Ministry of Justice and the Law Society of South Africa.

By this time, almost all of the top law firms in all major commercial centres of South Africa were participating in the project. Senior law students from all South African universities were invited to apply for a 3-week internship during the July university holidays. The internship was aimed at providing students with a chance to supplement their theoretical knowledge with practical experience and served as exposure to the opportunities within the legal profession, particularly in commercial legal practice. Simultaneously, the project availed for consideration to the firms involved, at no cost to them, the cream of the crop of the country's law faculties in a working environment, with a view to possible future employment.

In this first phase, the students were given an orientation on the manner of operation of large law firms. Thereafter the students were placed with a partner, professional assistant or candidate attorney at their respective firms, for involvement in the day to day matters of a sophisticated legal practice.

From 1994, a second phase was added to the programme. Up to 20 students from the first phase were given the opportunity to serve further internships with the Constitutional Court, the Supreme Court of Appeal or other High Courts, senior advocates or the legal departments of the country's largest commercial banks. In 1997, a third phase was introduced whereby 6 students from the 20 participants in the second phase, were selected to do 2-3 month internships with some of the largest law firms in the world, or with legal departments of international organisations, such as the African Union (then the Organization of African Unity). Each year almost 500 applications would be received. Selection of the students was done by a panel of representatives from a number of organisations. Among others, Christof Heyns and the Dean of the Faculty of Law at the University of the North played a critical role in the selection process.

At the same time and for a number of years, Christof travelled to more cities in the country to meet commercial law firms eager to be part of the IBP including those who were hesitant. With his usual and enduring zeal, he tirelessly explained the benefits of the project, not only to the law firms but also to law graduates themselves. He wasn't deterred by the fact that a law firm appeared to be or was indeed conservative. That is where he unleashed his persuasive talent and passionately convinced many to participate. The success of the IBP depended, on the one hand, on the availability of law students and their willingness to participate. On the other, it depended on the recruitment of an increased number of commercial law firms and convincing them to accommodate the students over a period of 3 weeks each year. It is at the convergence of these two elements that Christof played a pivotal role.

This does not mean that things were easy for him, his colleagues, the students or the commercial law firms. It must be remembered that in 1992, most law firms were very male, very white and, in Pretoria especially, very Afrikaans institutions. So, receiving a 'non-white' intern, who was often a woman as well, was not always something that these firms could be convinced was a good idea. Bringing some of them on board was therefore a challenge but one that gave Christof the energy to press on.

There were many other challenges. Carole Viljoen started at the Centre for Human Rights in 1992 and one of the first roles she had was to help manage the IBP. This was before the time of cell phones, internet and email. The first step was to send posters advertising the project to all the universities in South Africa, requesting the Dean's office to put them up.

The majority of the students chosen to participate lived in rural areas across South Africa. Letters had to be sent by post (today referred to as snail mail) to each student as well as to each firm, often not arriving at the provided address. We had to follow up telephonically. Many of the students had no access to landlines at the time. So often a neighbour's number was given and when we called to make arrangements with each student, they had to first rush across to the house next door and hopefully the student was home.

There were instances where the parents of the student did not understand English, so communication could be very difficult. Carole recalls sitting in the evenings writing out cheques in the name of each student and then sending those off by snail mail before the internships started, because this was the only way the students could cover the costs of transport and accommodation during the internships. There were no magical EFTs for sending the money within a day or two. This meant receiving the cheque, taking that cheque with your Identity

Document to the nearest bank and cashing it, also no mean feat in the rural townships and villages of South Africa.

None of the hardships put Christof off the ideals that he wanted to achieve. No matter how hard it was to arrange logistically, he was determined that this was going to be a success. Before long, all the major law firms in the country were fully on board and in many cases offered articles of clerkship to the students who had spent their 3-week IBP internships with them.

Christof was a true strategist. He was not content only with roping in more commercial law firms to support the IBP. Especially at the start of the IBP, there was real anxiety about whether the project would be a success. So, Christof insisted on getting regular feedback both from commercial law firms and, more importantly, from the students placed with those firms. He made it easy for the students to approach him and even insisted that they call him 'Christof' instead of 'Professor'. This enabled him to know of challenges early and to take corrective steps. Fortunately, the attractiveness of the IBP was sufficient motivation to the placed students to learn and to succeed. He also spent time calling partners in the law firms to find out how the students were doing, making it clear that the IBP was just a phone call away should the law firm need its assistance. His philosophy was to make it as 'easy' as possible on the law firm to take a law student for the period of three weeks.

Reflecting on the time she worked with Christof Heyns in the IBP, Tshidi Mayimele, then Deputy Director of the Centre, stated:

> My personal recollections was that Christof was passionate and persuasive about this project. His enthusiasm was infectious and he managed to convince even the sceptical and hesitant firms that this was a good project to get involved in. The reasons that you post … are all true as to why he started the project. Exposure for both the students and the firms. Changing minds about the 'quality and competence' of black graduates to the extent as you say that paths to articles and employment opened up. This of course proved that all that was needed was opportunity, the students once in there proved their 'merit' and got offers on their own. The project was conceived even before the Employment Equity Act of 1998, and therefore before there was a legal inducement for law firms to take in black graduates, and this programme surely prepared the ground for that eventuality. Changing the profile of staff in the big successful law firms was a goal of the project.

She continued and wrote:

> He was also good at ensuring that the internship became meaningful, and the exposure real, and for this he engaged constantly with the firms. For a couple of years I did the orientation for the students in order to prepare them for their placement, and kept a channel open for them to report back about how they were received and to report if intervention was needed with the firm. Christof would run interference if needed, luckily this was not common. I think somehow he managed to convince the firms he dealt

> with that this project was important to their firm, their image and their reputation, and this augured well for the students, mostly. The fact that black law firms predominantly only accessed criminal, labour, motor vehicle accident claims and political cases, was a major driver for Christof. Access to a wider spectrum of work and specializations for black graduates, and the opening up of the profession was a critical driver in our discussions. Talking about it was one thing, but this kind of demonstration through this project was a better exercise, driving awareness, opening up options, and demonstrating that capability and talent existed everywhere and needed to be given a chance.

Indeed, Christof's passion was boundless. There was nothing that he would not try and achieve as long as his vision told him that the initiative would be for the greater good. The running of the IBP required a lot of money to sustain the students placed with various commercial law firms. Many, if not most of those students, came from very poor backgrounds and could not spend three weeks, for example, doing the internship in a major city like Johannesburg or Cape Town without substantial financial assistance. In order to achieve this, Christof employed his fundraising skills to great success. The Project was quite well supported financially by entities like the Ford Foundation. As a result an increasing number of law students were accepted by big commercial law firms for the three weeks internships. Two or three requirements were critical with donors. First, donors wanted to know that their financial resources had been deployed for the agreed purposes. Second, that there was proper accounting for such resources. Third and most important, that their financial intervention was producing a change in the *status quo*. The IBP under the leadership of Christof passed or met all three requirements with flying colours. On the impact, more black law graduates were being absorbed in commercial law firms as articled clerks – a significant change to the previously existing situation. Bongani recalls that by 1994/95, there was so much interest that some *commercial law firms would phone him at the University of the North and ask him to 'book' them some of our top law students for either the three weeks or articles of clerkship*.' The gloom that he had found as the first Black dean of the law school suddenly changed as more opportunities for articles of clerkship opened for law graduates.

Talking about Christof as a leader, Grace Goedhart (Teixeira) SC, who worked with Christof at the Centre for Human Rights, describes him as follows:

> He did indeed have a profound influence on me and on my life. In fact, the Centre as whole did. He had ceaseless energy (he would've been a good advertisement for Duracel!), nothing was ever impossible for him and he had a passion for life, justice, our continent and human rights which was not only inspirational but infectious. I can't remember a single occasion

> that he lost his temper. You couldn't ever present Christof with a problem. You had to present him with the solution about the problem.
> We had a joke about the work done at the Centre which was 'jy kan eendag in die hemel rus' [literally, you will one day rest in heaven]. This joke was made at 2am in the morning when we were faxing the US for funding. There was no time on this earth to rest. There was way too much to do!
> The tributes to him from all over the world said it all. He lived Ghandi's famous quote: 'My life is my message'.

There is no doubt that in the 13 or so years that the IBP ran, it proved to be an unmitigated success. The number of students placed with commercial law firms grew from just 20 law graduates in 1989 to 153 by 2001. Certainly, by the end of the project, the vision, foresight and time that Christof had invested in the project had more than paid good dividends to all participants, especially the law graduates. This was further evidenced by more commercial law firms opening up to taking law graduates as the project grew each year. Some law firms were even asking why they were being excluded from participating. Lethargy or skepticism soon became a thing of the past.

By the time of his untimely death, there were many black or black-owned commercial and mixed law firms practising in both commercial, criminal or other types of law. This is to a very large extent thanks to the IBP and men and women who worked selflessly and tirelessly to make it a success, to the students who participated in it and to the partners in commercial law firms who opened their doors to Black law students. Judging from the narratives of IBP participants, below, these students grabbed the opportunities presented to them by the IBP with both hands, thereby justifying the investment involved, and dispelling the myth that law graduates from historically black law schools were of an inferior quality. Also the IBP should be credited for exposing white commercial law firms to the then hidden but rich black talent and diversifying the commercial legal practice. The IBP can therefore be credited with bringing about a seismic shift in the legal practice landscape in this country.

It took a long time for the legal landscape to change, but the IBP had, in some significant way, made a contribution to that change. A meaningful contribution of both human and financial resources. By the end of its lifetime, the IBP had placed over 1,500 students in law firms and had spawned a number of Black owned commercial and mixed-practice law firms.

Students/participants' experiences

Richard Baloyi, 2003 IBP participant[1]

I was placed with Manamela Marobela Incorporated Attorneys (then Manamela Damons Mbanjwa Inc), Mr Manamela having been an intern himself a few years before, now taking interns himself. There I was mentored by a candidate attorney, Mr M Ngobese, with Mr Khashane Manamela taking the managerial seat of my learning.

At times we wish that those responsible for our well-being and for our great learning experiences should live on and on and get to see the fruits we bear, in the hope that they would derive pleasure and gratitude therefrom.

The interrupted life of Professor Heyns would, I reckon, rejoice to see that the journey commenced in 2003 has gone a long way. The commencement thereof at Manamela Attorneys imparted to me the early ability to choose my preferred practice area – bar or side bar. My lessons at Manamela Attorneys commenced with reading of files and discussion of their contents with my mentor. Court attendances for filing of documents, delivery of briefs to Counsel, boardroom meetings wherein the art of practice was taught by Mr Manamela, how to handle files within and outside offices, the importance of legible file notes, the importance of correctly couching court pleadings, for he said these files live for years in court archives and I cannot imagine how embarrassing it may be to learn, later on in life, that what I filed ages ago was not accompanied by the best of me. I learnt how to push to timeously receive all information, from any entity or client by asking the relevant questions and addressing those responsible appropriately. To put this in practice, I was asked to obtain an accident report in one matter. I called the investigating officer involved and although he could not help me immediately, I persisted and subsequently, the accident report was availed to the office. I recorded my first practical success.

Mr Ngobese further taught me that preparation beats everything. He would take me with him on all office related errands, the courts, Master's Office etc. He added that good etiquette and rapport with Court officials can bear great fruits at times.

Today I am practising as an advocate, having undergone pupillage. The IBP went a long way and I am so thankful that Prof Heyns thought it good to have the Project run. I am further thankful that many made themselves available to participate in the Project from the attorneys' profession to make it work.

Many thanks also to Mr Manamela and Mr Ngobese, and the whole team at the firm for their valued support. This legacy will forever live in me, and I will not forget how it all started.

My final note is that the experience imparted was not meant to be personal to Prof Heyns, but for the good of the legal profession and a greater, perhaps best, service to humanity. That is how it has impacted on my life and practice as a lawyer.

Muvhango Lukhaimane, 1993 IBP participant[2]

When I was invited to say something about the legacy of Prof Heyns through the IBP, my initial instinct was to think that it was so long ago, I might not remember much. Upon reflecting, it dawned on me that in a way, this is the perfect time. Having added a lot more years to my life, I am able to appreciate that the opportunity offered by the IBP was a solid foundation to where I find myself today.

I joined the University of Pretoria (UP) in 1993 as a partial bursary holder of the Centre for Human Rights. Coming from rural Venda, joining UP as an institution was a venture into a whole new world for me. I was part of the last fully Afrikaans LLB intake in 1993. The Centre became my home away from home. They were determined to see us succeed whilst conscious of the difficult environment we were in.

I had the opportunity to be hosted at Couzyn Hertzog and Horak for the IBP. My principal for the three weeks involved me in all matters as if I was there as a full-time employee. I remember sitting in with clients, taking down notes, being asked for my opinion on matters. Of course, this went hand in hand with doing all the other 'runner' work that an intern does – research for your principal, uplifting and copying documents, filing documents in court and lugging documents to court on behalf of the seniors. The experience taught me that clients want reassurance more than anything. They need someone to answer their questions fully and promptly, return their calls and earn their trust. During breaks in meetings and over lunch, there was a genuine attempt at getting to know each other – in fact the reports we had to do afterwards was testament to the gratitude we felt. Above all, the experience demystified the practice of law for me.

The guidance did not end with our learning and development but extended to broader socialization. Prof Heyns and the others would sometimes invite us to small lunches and dinners when they hosted speakers / visitors of the Centre for Human Rights, which was part of a broader socialization that engendered confidence and networking.

My involvement in the IBP and the broader work of the Centre were defining moments, especially because they did not have to do this – but did it anyway and invested in it at a time when the country was going through huge transformation challenges. I remain indebted to the IBP and the Centre for planting the seeds of ethical behaviour, service, dedication and commitment to others that remain the driving force in my life today.

The support I was given as a student, including my involvement in IBP ensured that I completed my LLB in the prescribed two years, even though it was the first time I had to undergo tuition in Afrikaans. The ability to do business in Afrikaans really stood me in good stead throughout my career – I was able to commence a career within Sanlam's head office in Cape Town in 1999 where business was mostly run in Afrikaans. We were three black African students in that LLB class and to say it was intimidating, is an understatement. However, with the support, encouragement from the Centre's leadership, we could only succeed. Owing to the manner that we were nurtured as a group, we also learnt to rely on each other. We socialized together and up to today we are still friends, colleagues – we keep up with each other, assist each other in our current spaces and it is all because of a collaborative culture that we learnt at the Centre.

Khashane Manamela, 1992 IBP participant[3]

In 1991, Musa Masebenza, a friend and fellow student at the University of Venda participated in the IBP. He was placed with a Pretoria firm specialising in intellectual property law. He was full of awe and boastful upon his return to campus. We were all envious of his adventure. This coincided with the launch of a law students' newsletter where I was part of the editorial team. Musa's article was published and it included the following: '*These past holidays I was fortunate enough to have had a holiday job at a firm of attorneys in Pretoria. I was one of the 28 students chosen from 400 applicants throughout the whole country … I have taken a particular liking to trademarks and now consider it one of my career options … It is my sincere hope that the programme will continue on a broader basis and would like to commend the organisers for the successful programme.*'

In the winter of 1992 I was placed with Couzyn Hertzog and Horak, an Afrikaans Pretoria law firm. I remember that I was not particularly impressed with this. Not because of the language issue, but due to the size of the firm. It did not seem to be as big as that of Musa in 1991. There was also no sign of the fancy intellectual property law

or trade marks. But I was wrong. At the end of the programme after three weeks I wrote about my experience in a letter published in the *De Rebus* Attorneys Journal of September 1992. My raving included the following: '*When you have had a taste of paradise, back on earth it can feel as cold as ice* [from a then popular pop song] … *Although the time was very short for us to grasp a considerable range of legal practice, we gained a lot in those three weeks.*'

Prof Heyns was the one to first spot the published letter in *De Rebus*. He made time to quiz me on my experience at the firm. No-one was unimportant to Christof. I was at the time a bursary holder or 'researcher' at the Centre . We were encouraged to call everyone by first name. But coming from a rural village in Tzaneen I could only muster enough strength to call him Prof. Maybe Christof in his absence.

My time at Couzyn was very interesting indeed. I spent almost the entire three weeks with an energetic junior partner. Always as elegantly dressed as the attention he paid to his work. I remember going with him and a professional assistant to court. The whole route he discussed the matter and how he hoped the advocate could do better this time around. As fate would have it, the matter was settled – to my utter annoyance. I wanted to see the famous advocate at work. But this meant we could have time to spend at the coffee shop. So, the IBP presented not only a commercial opportunity, but a social or socialisation experience.

The IBP was to benefit me indirectly, as well. In 1995 I ceded my articles from a Johannesburg law firm to Couzyn, the same law firm where I did my IBP in 1992. They actually told me that they remembered me from the IBP.

A few years after starting a law firm, the IBP contacted me to reciprocate as a host firm. I remember giving an excuse of the size and age of my firm, but I eventually relented. It was such an honour to participate in the great project the IBP had become. Advocate Baloyi (IBP, 2003 group) narrated about his experience at my firm above.

Obviously, Christof was not the only person at the Centre or the IBP. There were very good and laudable other persons. For example, Carole Viljoen, also participating in this task, had for years tirelessly toiled beyond the normal calls of duty to make the IBP a success. But Christof was a very special person to all of us. I remember him hosting us at his house during my first weeks in Pretoria in 1992. It was very special. For me it was actually the first time I visited a house of a white person without looking for a 'piece job'. He also was a mentor and a pillar of support for the Students for Human Rights we established at the university, with the support of both the Centre and Lawyers for Human Rights.

After graduating, I kept in touch with him as I had remained in Pretoria. The experience of the IBP cannot be discounted from my

accomplishments. Apart from my small commercial law practice, I have been a member of the Companies Tribunal since 2012 and acting judge – on an *ad hoc basis* – since 2013. Christof would not take credit for these even when I told him about same. Always humble and never one to dwell on his own accomplishments. Perhaps he dwelled more on challenges. I saw him last in person when he had invited me to a ceremony to mark the receipt by the Centre of the 2006 UNESCO Prize for Human Rights Education.

Thabo Kwinana, 1991 IBP participant[4]

In 1991 as an intermediary LLB student at Rhodes University, I came across an advertisement for participation in the IBP administered jointly by the University of Pretoria and Yale Law School. It indicated that there would be some form of stipend payment. Full of youthful exuberance, I applied. In my zeal, I must have failed to realise that the invitation was for final year LLB students. The students were to be placed for vacation training with established law firms and I chose Johannesburg. I followed it up with a telephone call and the person on the other side was Prof Heyns who politely advised me that the programme was for final year students, so I did not qualify that year and I should apply the following year.

About a week later, I received a message at the Law Library (there were no cellular phones then, so my contact details were those of the Law Library in which I moonlighted) to call Prof Heyns. He mentioned that one of the final year students had withdrawn and because I had made a follow up, he is offering the opportunity to me. In June 1991 I was placed at Moss Morris Mendelow Browdie Attorneys in Johannesburg. True to the objective of the programme, I was offered articles from 1993 by the same firm on completion of my studies. I was trained mainly in commercial law and went on to be a commercial lawyer. The programme changed my life. I went on to have a full and amazing commercial law practice in Johannesburg.

After completing my articles, I could not be admitted as an attorney. I had not passed Afrikaans at University. Being from the former Transkei we never studied Afrikaans. So I approached Prof Heyns who lobbied the Association of Law Societies of South Africa. He assisted me in writing to then Minister of Justice, the late Honourable Dullah Omar. I still have a copy of the Minister's response and I am pleased to share the following extract from it:

> By direction of Mr AM Omar, MP Minister of Justice, receipt of your letter of 7 February 1995 is acknowledged. Mr Omar has noted the contents

> and has requested me to confirm that the amending legislation to abolish Afrikaans and English as requirements for admission to the Attorney's profession is in the process of being drafted. It is expected to be finalised soon after which the draft legislation will be published for public comment. Only thereafter would the Minister be able to introduce the legislation. This however depends on the nature of the comments and the approval of the Bill by the Cabinet.

Needless to say the Attorneys Act was amended to exclude Afrikaans as a compulsory qualification requirement. I was duly admitted as an attorney in 1996, instead of a year earlier in 1995.

The IBP became very successful. It even included qualified lawyers placed at various law firms in the USA for a period of at least (one) year. Prof Heyns and the Yale University Programme Director Ms Cherryl DeFilippo appointed me to the short-listing committee for the exchange lawyers. Some of the shortlisted candidates I can recall are the current Competition Commissioner Mr Thembinkosi Bonakele, Ms Ursula Fikelephi (Transnet Director), Adv Malesela Phukubje, Mr Mcebesi Maguga (lawyer), Ms Xolisa Beja (lawyer). The shortlisted candidates were interviewed by a panel headed by former Deputy Chief Justice, the Honourable Dikgang Moseneke.

Professor Majola also invited me to make motivational speeches to the recruits and encourage them. There would be over 100 candidates compared to just 10 or so in our days.

Writing this note about Prof Heyns, I realise that he had made such a big contribution in my life, yet I never physically met him. More importantly and something I greatly regret is that I never said thank you to him for his contribution to my career. I wonder whether Prof Majola's insistence on this essay is meant to be a Damascus call to errant and ungrateful recipients of Prof Heyns generosity like me. More than a memoir, this essay is a life lesson to me. A lesson to be grateful and not run to the sunset once one is literally okay.

Till we meet (again)……

1993 IBP participant: *Initially I thought that the mere fact that I obtained several distinctions at university meant that I would have it easy at the firm. Unfortunately I was proved wrong. Theory without practice is insufficient. I think I was really privileged to have had the opportunity to participate in the project.*

1997 IBP participant: *The IBP is a pathfinder for all participants. It serves as an in-service training academy and a marketing agency – the gains are*

enormous. Participating in the IBP presented me with an opportunity to discover the lawyer within me

1998 IBP participant: *The IBP provided the most valuable programme in my legal career yet I feel deeply indebted to the IBP, as it has deeply rooted a very refreshing perspective of the legal field, especially during this gradual period of transformation.*

2001 IBP participant: *The IBP has been one of the most inspiring experiences I have had. It opened a new door that I never knew existed. The theory of law is one thing, but practising it is a whole different ball game and for me, the best part of it.*

2004 IBP participant: *What I learnt in three weeks was more valuable than my entire university career and for this I am eternally grateful. Thank you for the opportunity of a lifetime.*

Webber Wentzel Bowens, IBP Host Firm, 1998*: The student showed keenness; arrive early, left late. Provided regular feedback on progress, was given research work which was completed impressively well, in that it was thorough and he used his initiative to find similar cases.*

MacRobert, De Villiers, Lunnon & Tindall, IBP Host Firm, 1993: *As the Supreme Court was in recess during the time of his visit, the student was unable to gain first-hand experience of trials in the Supreme Court. I have however arranged with him to contact me later in the year so that he can call at our offices at a time convenient for him to gain some experience in this field as well.*

ABSA Bank: *For our part, we were honoured to be able to participate in the project and we gained a useful insight into the level of expertise of completing law students. We would be delighted to participate again next year.*

Conclusion

All of the biggest law firms in major cities across the country eventually participated in the IBP, some of them even taking up to three interns. None of this would ever have been possible without the vision, passion and persistence of Christof Heyns. Christof never gave up on an idea once it was with him. He would wake at all hours of the night, make notes on serviettes, small pieces of scrap paper and arrive the next day at the office with so much enthusiasm, it was hard not to be caught up in his vision. His commitment to the causes he chose was unwavering

and even contagious. All these were critical ingredients to sustain a project as daunting as the IBP.

The IBP has touched so many lives and influenced the careers of those who participated. The narrations above are only but a fraction of the number of participants in the project. But yet they lay bare the varying experiences of those who took part. It was not only the interns whose lives were changed forever, but those of the host firms too. Notably some of these experiences consummated into more firm and longer relationships, when the interns were later offered articles by the host law firms.

But the legacy left by Christof, including through the IBP, would require multi-fold reams of paper if it was to be told in its full breadth and magnanimity. So this chapter represents only a modest attempt to place a milestone to mark this achievement in his life. For one cannot pretend to have the capacity to crisscross every contour of a life – although cut very cruelly short – but yet meaningfully and graciously lived, as Christof's. He will remain forever the real pioneer and champion of young lawyer empowerment, but we all know he would graciously refuse that tag.

* Chairperson, South African Human Rights Commission.
** Office Manager, Centre for Human Rights, Former IBP Coordinator.
*** Practising Attorney, Former IBP participant and director of an IBP host firm.
1 Advocate, Johannesburg Society of Advocates.
2 Pension Funds Adjudicator.
3 Practising Attorney, Pretoria.
4 Director, KMNS Attorneys.

10

Christof and the HRDA

Ademola Oluborode Jegede, Annette Lansink** and Kwadwo Appiagyei-Atua****

When Christof Heyns passed away those who had worked with him could immediately sense that a towering flag has been lowered in Africa and indeed the world. More than a towering flag in human rights, Christof was different. He listened to issues where many would not, felt where many were numb and saw what many could not see. He was a visionary whose choices and voices cut across diverse generations in Africa, that he represented wholeheartedly in a plethora of writings and, more importantly, through an impressive array of shining initiatives that will have enduring impact in years to come. His was an exemplary story of a remarkable man who did not suffer his ideas and insights to only rest in writings or in his mind. Seeing tomorrow before it becomes today, he turned concepts into tools of tangible change in the world, affecting even the lives of those who never crossed his path.

One area where Christof made special impact is with the international partnership Masters programme in Human Rights and Democratisation in Africa (HRDA), a project which was primarily conceived by him. In this regard, we reflect here on the conceptual imprint and driving values and the impact that this legal giant has made and will continue to make in the lives of future generations.

Conceiving an international partnership on human rights

The legacy of Christof Heyns on the international human rights partnership originated from his view that human rights education in tertiary institutions should take a new and different direction. South Africa on the eve of the new millennium was imbued by a spirit of optimism and desire to give form and shape to the African Renaissance. It was a time when former President Thabo Mbeki had expressed his wish to see an African continent in 'which people participate in systems of governance in which they are truly able to determine their destiny and put behind us the notions of democracy and human rights as peculiarly 'Western' concepts.'[1]

Earlier writings have pointed out the need for a new vision of tertiary education in Africa without concrete interventions. Knowledge production needed to shake off its colonial chains and embrace a new direction with its centre in Africa. Institutions should not only be 'built and sited in Africa', but be 'of Africa, drawing inspiration from Africa'.[2] This required transformation at institutions combined with academic and intellectual freedom so as 'to create the conditions for fruitful intellectual debates' thus leading to the production of new knowledge.[3] In the words of Mahmood Mamdani 'there can be no African Renaissance without an Africa-focused intelligentsia'.[4] Christof Heyns was an innovative thinker. His conceptualisation and pioneering works on the international partnership programme is not just a worthy response to these calls. It is the main anchor on which continues to rest the current direction of human rights education in tertiary institutions in Africa.

The HRDA is a unique, prestigious and intensive one-year advanced master's programme aimed at enhancing human resource capacity in Africa, increasing critical skills in human rights and democratisation, and attracting exceptional young men and women from across the African continent and beyond.[5] Stemming from the visionary mind of Christof, the flagship programme was launched in 2000.

The thinking that tertiary education should be transformational and not merely for a small elitist clique or group is evident in Christof's passionate sense of unity of purpose and collectivity of efforts. His sense that the unity of vision among tertiary institutions all over Africa is needed to transform tertiary education in human rights propelled him to hatch this partnership arrangement with three pioneering universities: University of the Western Cape, Makerere University and the University of Ghana. This partnership has now expanded to cover 12 universities across the continent of Africa, and includes besides the universities mentioned, Université d'Abomey Calavi (Benin), Addis Ababa University (Ethiopia), Université Catholique d'Afrique Centrale (Cameroon), Universidade Eduardo Mondlane (Mozambique), Université Gaston Berger de Saint Louis (Senegal), University of Mauritius, University of Lagos (Nigeria), University of Venda (South Africa) and University of Nairobi (Kenya). However, students for the programmes come from all universities across the continent. A few spaces are also given to non-African students to take part in the programme to enrich its international focus and diversity. As the then Director of the Centre for Human Rights, Christof accentuated the role of good universities and law faculties as indispensable elements of development and progress in societies.[6]

It then came as no surprise that the Centre for Human Rights was awarded the UNESCO prize for Human Rights Education in 2006, and in

2012 the African Union Prize in recognition of the Centre's contribution to the African Commission on Human and Peoples' Rights.

A continental and globally relevant human rights partnership programme

The HRDA programme has expanded beyond the Masters in Law (LLM) to a combined LLM and Master of Philosophy. The diversity and status of universities involved in the partnership programme further reinforce Christof's belief that no institution is self-sufficient; and, that each in its unique way can positively contribute and strengthen the voice of Africa in the ever-evolving terrain of global knowledge production and its politics. This is indeed beautiful as it reveals the rare intellect of Christof in believing that internal forces can drive positive changes, an approach that is Africa-centred and further reveals the true heart of an intellectual colossus.

Africa-centeredness is crucial. However, the philosophy behind the international partnership was much more. Christof recognised that while African resources must be pooled together to contribute to global knowledge production from the perspective of Africa,[7] the pluralisation of cooperation and knowledge that breaks hegemonies was just as important. His strands of thinking later inspired even a more comprehensive future of internationalisation of the HRDA programme through intellectual and resource interaction with other regional human rights master's programmes under the umbrella of the Global Campus of Human Rights, which was launched in 2012. The Global Campus of Human Rights spreads between seven regional master's programmes over five continents and includes more than one hundred universities.

The long-range reach of this programme bears testimony to how influential Christof sense of solidarity was with various networks within and outside Africa for the promotion of the very best in human rights education in tertiary institutions.[8]

A continuing harvest of impactful positives

Christof leaves behind the tangible evidence of impactful change he wanted to see in the HRDA partnership. There is no document more recent at illuminating the impact of this tangible evidence than the report on a survey of the impact of the Masters' programme in human rights and democratisation in Africa on partner universities.[9] The HRDA Study Report clearly demonstrates that what started as a seed in 2000 has not only grown in leaps and bounds, but that the HRDA programme keeps recording far-reaching impact on those who associate with it.[10] According to the report, key areas of impacts of the HRDA partnership

are on: curriculum development; reversal of academic brain drain and production of skilled personnel; networks for cooperation; enhancement of academic structure; and capacity development at African universities.[11]

The programme has impacted on the human rights curriculum in that it brings to the fore the discussion of topical issues of significance to human rights and governance enhancement in Africa. It makes those issues a proper focus of curriculum to boost rigorous local knowledge that relates better to the needs of students and the development challenges, while contributing to global knowledge production from the perspective of Africa.[12] These topical issues include conflict prevention and resolution; democratic transitions; civil society strengthening; institution building; and promotion of the rule of law.[13] Other issues addressed include sexual minority rights, HIV/AIDS, women's rights, disability rights, business and human rights, climate change, technology and human right that is central to human rights, governance and democratisation in Africa.[14] The importance of this array of topics cannot be overstated.

Since its inception, the HRDA programme has played a significant role in steadily overturning the academic brain-drain that is common in Africa. Earlier, Christof had expressed the hope that the programme would not only stem but also reverse the brain-drain when those in the diaspora would return to put 'their energies and talents into developing cutting-edge programmes and institutions on the continent'.[15] According to the finding of the HRDA Study Report 'many African scholars have left the continent to pursue studies and careers in other parts of the world, the clear majority electing not to return to Africa. This vicious cycle has entrenched itself over the years: capacity is eroded, leading to a fall in standards and an incentive for further exodus.'[16] The HRDA continues to develop capacity, expertise and skills needed to unlock the wealth of the continent for the 'benefit of its people and the world community.'[17] It addresses the skills and qualifications deficits, by producing 'leaders in the different areas relevant to the development of the continent, and by serving as reservoirs of expertise in their respective societies, sub-regions, and on the continent as a whole.'[18] The graduates of the programme go on to play different role in African's continental life as human rights experts and scholars. They work in government, intergovernmental organisations, civil society, and national human rights commissions, and serve as regular guest or part-time lecturers and research fellows at the partner universities.

An important project, also inspired by the idea of internationalisation and collaboration between universities expressed through the foresight of Christof is the African Human Rights Moot

Court Competition which, thus far, has been hosted in 19 African countries across all regions of the continent.[19]

The moot court competition has contributed to the transformation of legal education in African law schools by exposing law students from different parts of Africa to the regional human rights system and the potential of the African Court on Human and Peoples' Rights.[20] Through participation in the project, students develop their skills as advocates by arguing a case under conditions that simulate actual court proceedings.'[21]

Christof did not limit himself to moot court at the university level. He was responsible for initiating the South African National Schools Moot Competition. The goal of the competition is, among others, to create greater awareness in schools and communities in South Africa about the Constitution and the values that it embodies through active participation. This idea has spread to other countries in Africa, including Ghana and Kenya.

Christof's absence will be felt as long as human rights are mentioned on the continent of Africa. He left behind an incredible legacy, an indelible footprint on the human rights landscape. He climbed the ladder of academic brilliance, adopted the 'struggle approach' and made imprints on the hearts of many downtrodden and marginalised individuals and entities across the globe.[22]

In all, the legacy of Christof on internationalisation of the HRDA partnership cannot be captured in a few words. The geography of his influence on the partnership programme will remain a beaming beacon to many generations of Africa and beyond. Christof's ideas are reflected in the institutions, and his impact and unwavering commitment to human rights will live on in the minds and work of generations of students and in all others he inspired.

Mother Africa has painfully lost one of her best sons; while the HRDA partnership has lost a leading gem. Death has been so unkind. We find faith in the expression of the Akans of Ghana in their traditional 'adinkra' symbol for funeral called 'Nkonsonkonson' which translates as 'link' or 'chain'. This symbol goes with the proverb, 'We are linked together like a chain. We are linked in life, we are linked in death. People who share a relationship never break away from one another.' Indeed, Christof remains linked to us through the legacy he has left behind and we remain linked to him by the tribute we pay to him today and by building on his legacy.

Professor Heyns' ideas sustain us and his inspiration will continue to inspire new generations of students and scholars. He touched our

lives and we are humbled to have been part in some small way of his journey. May his soul live on.

* Professor of Law, School of Law, University of Venda.
** Former Dean, School of Law, University of Venda.
*** Professor of Law, University of Ghana.

1 T Mbeki 'Prologue' in WM Makgoba (ed) *African Renaissance:the new struggle* (Mafube/Tafelberg 1999).
2 TM Yesufu *Creating the African university: emerging issues in the 1970's* (OUP 1973).
3 M Mamdani 'There can be no African Renaissance without an Africa-focused intelligentsia' in Makgoba (n 1) 125-148 at 133.
4 Mamdani (n 3) 125-148.
5 See the K Appiagyei-Atua, Dr E Asaala & UM Assim 'Impact of the Master's Programme in Human Rights and Democratisation in African on Partner Universities' (31 July 2021) (Study Report). See also, the *Alumni Diaries 2000-2019*, https://www.chr.up.ac.za/images/publications/Alumni_Diaries/Alumni Diaries 2019 – web.pdf (accessed 17 December 2021); CCA Hagenmeier, A Lansink & GNK Vukor-Quarshie 'Internationalisation and African intellectual metissage: capacity-enhancement through higher education in Africa' (2017) 31(1) *Journal of Higher Education* 81-103 at 97.
6 H Visser & CH Heyns (eds) *Transformation and the Faculty of Law of the University of Pretoria* (PULP 2006), https://www.pulp.up.ac.za/component/edocman/transformation-and-the-faculty-of-law-university-of-pretoria (accessed 17 December 2021).
7 CH Heyns 'Regional master's programmes in Africa: case study and analysis' (2006) 5 *Journal of Educational Studies* 213-243 at 228.
8 The network of HRDA alumni is impressive, see the *Alumni Diaries* (n 5).
9 Study Report (n 5).
10 As above.
11 As above.
12 Heyns (n 7).
13 As above.
14 See https://www.chr.up.ac.za (accessed 17 December 2021).
15 Heyns (n 7) at 215.
16 Study Report (n 5).
17 As above.
18 As above.
19 Study Report (n 5). The African Human Rights Moot Court competition predates the HRDA as it started in 1992.
20 As above.
21 As above.
22 C Heyns (2001) 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (Springer 2001).

11

Christof as doctoral supervisor

Frans Viljoen and Joe Kilonzo***

Frans Viljoen

Among Christof's multiple and diverse responsibilities, doctoral supervision perhaps played a less prominent role, but nonetheless left a profound legacy comparable to that of his other academic pursuits.

His contribution came not only as supervisor, but also by stimulating doctoral studies in his capacity as Dean and as Director of ICLA. Christof supervised to completion ten doctoral graduates at the University of Pretoria (UP). In his term of Dean (2007-2010), he brought a greater focus on doctoral studies, and postgraduate studies, generally. His introduction of a full-time bursary programme for doctoral students, supported by funding that he was able to raise, sparked an increase in doctoral graduates in the years to follow. The Faculty awarded its first doctorate in 1940. In the 40-year period from 1940 to 1979, 19 doctorates were completed in the Faculty of Law. In the next two decades (1980 to 1989 and 1990 to 1999), the number grew to 30 and 31, respectively. In the decade that followed (2000 to 2009), during which Christof took the Faculty reins, the number enlarged to 42. Thereafter, the growth was phenomenal, with a total of 166 graduates being awarded doctorates in the Faculty of Law in the decade 2010 to 2019. When he became Director of the Institute of International and Comparative Law in Africa (ICLA), Christof made doctoral studies a core element of his new academic home. Coinciding with his two terms as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, he made the 'right to life' and 'freedom from violence' – surprisingly neglected or under-studied up to that time – the thematic anchor of doctoral studies in ICLA. At the time of his death, some 14 doctoral students were registered with him,[1] together with either Professor Stuart Maslen-Casey or Dr Thomas Probert as co-supervisor.

As supervisor, he left a deep impression on those he supervised, myself included. I embarked on doctoral studies in the early 1990s, and graduated in 1997. Initially, I was an erratic student, and took some time to find my way. When I proposed a sabbatical to undertake 'doctoral research' while taking a 'road trip' though the African continent,

Christof was my most enthusiastic backer. His interest in Africa and belief in its potential was boundless. At the time when I started working in earnest on writing up my thesis, I was taken aback and overawed by his perseverance, generosity, his work ethic and patience. Towards the end of the doctoral route, every few weeks I would hand-delivered a chapter, and he would, without fail, return it within days, with the most meticulous and insightful comments and insights. He seemed so at ease and in mastery of the process, I thanked my lucky starts to have such an accomplished and seasoned supervisor. It was only later that I realised I was Christof's first doctoral candidate.

The academic writer I am remains indebted to Christof's influence as supervisor. He inscribed in me a lasting sensitivity for clear, logical and coherent structuring, and the need to make that visible to the reader. His enthusiasm carried me along, and I treasure his shared joy at the emergence of every new worthwhile insight from the doctoral project. Combing through the 'acknowledgements' contained in the theses of the other nine graduates, a number of themes recur. Despite his busy schedule, Christof made time for this important academic task. He was exemplary in the speed and thoroughness of his comments. His engagement with the text, mostly during late night hours, was meticulous, ranging from suggestions about additional source references, substantive disagreements, and suggestions to clarify the structure, to detailed linguistic and stylistic guidance. For all, his vast knowledge and experience served them very well in their doctoral process. For many, Christof also opened their eyes to the importance of bringing academic rigour and creativity to bear on academic research.

Christof understood that his role as supervisor did not end on graduation day. He remained my academic cheerleader and guide, seeking opportunities and opening doors. For most of the supervisees, doctoral studies under Christof similarly opened doors, presented opportunities such as internships, visits, participation in high-level events, and access to financial support.

It is an important part of his legacy that seven of Christof's doctoral students today hold academic positions, mostly at universities in south Africa, but also beyond. Henk Botha ('The legitimacy of law and the politics of legitimacy: Beyond a constitutional culture of justification', who graduated in 1998) is professor of law at Stellenbosch University's Faculty of Law. Wessel le Roux ('Die estetiese Republiek: Kuns, reg en post-liberale politiek in Nietzsche, Arendt en Lyotard' (The aesthetic Republic: Art, law and post-liberal politics in Nietzsche, Arendt and Lyotard, 2002) is professor of law at the Faculty of Law, University of the Western Cape. Frans Viljoen ('The realisation of human rights in Africa through inter-governmental institutions', 1997) and Magnus Killander ('The role of the African Peer Review Mechanism in inducing

compliance with human rights', 2009) are professors in the Centre for Human Rights, Faculty of Law of the UP, and Bernard Bekink ('The restructuring of local government under the Constitution of the Republic of South Africa', 2006) and Willem Gravett ('To save succeeding generations from the scourge of war: Jan Christian Smuts (1870-1950) and the Genesis of International Organisation and Human Right', 2015) are professors in the Department of Public and Procedural Law, respectively, also at UP. Thompson Chengeta ('The challenges of increased autonomy in weapon systems: In search of an appropriate legal solution', 2015) in 2021 took up a teaching position at Liverpool John Moores University.

Even if the other three did not pursue academic careers, they too made a singular impact. The last graduate Christof supervised, Mumba Malila ('The place of individual's duties in international human rights law: Perspectives from the African human rights system', 2017), was – some time after Christof's death – appointed as Chief Justice of Zambia. The other two graduates are Waruguru Kaguongo (Kenya, 'Available resources and the realization of economic and social rights, with special reference to national budgets', 2010) (co-supervisor) and Alabo Ozubide (Nigeria, 'Extraterritorial use of force against non-state actors and the transformation of the law of self-defence', 2017) (co-supervisor).

As in many other domains, Christof saw the wisdom of collaboration in the form of co-supervision and co-authorship. Among the co-supervisors with whom he worked are: Profs George Barrie (for Bekink's thesis), Danie Brand (for Kaguongo's thesis), Benyam Mezmur (for Malila's thesis), Hennie Strydom (for Ozubide's thesis), and myself (for Le Roux's thesis). Professor Stuart Maslen-Casey and Dr Thomas Probert, who were co-supervisor for ICLA students, are two very knowledgeable and reliable co-supervisors. They also participated in other aspects of ICLA's work. Christof also published with doctoral students/graduates, both on themes arising from their theses, and more broadly. He worked closely with me and edited and re-edited one of the first close analyses of the actual performance of the African Commission on Human and Peoples' Rights,[2] in the second edition of the voluminous and ground-breaking *Law in Africa* series. Christof co-published numerous contributions with Magnus Killander, who remained one of Christof's closest academic collaborator for many years subsequent to completing his doctoral studies.[3] Christof co-published a seminal overview of constitutional human rights law in Africa, together with Waruguru Kaguango.[4] Based on their shared passion to understand the paradoxes of Jan Smuts' life, Christof and Willem Gravett co-published a notable article on Smuts and the UN Charter.[5] While undertaking doctoral studies, Thompson Chengeta participated

in research, meetings and consultations related to Christof's mandate, making him a logical co-author of some of Christof's seminal academic publications [6]

Joe Kilonzo

To some of the doctoral candidates at ICLA, before meeting Prof Heyns he always seemed larger than life. We were therefore constantly and pleasantly stunned by the attention and kindness of heart that guided our relationship. He was available to assist us at every stage of our research and writing, from the formulation of our research topics, to settling on the right methodology, discussion our progress, and presenting our findings.

Prof was a very calm, kind, and generous supervisor. He was very supportive, both academically and administratively. His style of supervision was unique, admirable, and inspiring because he would give one space to explore and explain ideas, without imposing his own, despite being a towering intellectual presence. This style and approach to supervision provided us a chance to be creative in our studies. It was so humbling to note that when Prof Heyns listened to you or read your draft, he was willing to be exposed to and benefit from new perspectives whenever there were any, notwithstanding his established academic stature.

By allowing us to explore and explain our ideas, he was encouraging us to find our voice as we undertook our studies. At the same time, he posed very thorough and careful intellectual challenge and providing formal guidance. He thus struck a neat balance between us students being the central writers of our theses, and him being a primary guide on the structure of our theses. His approach fostered a culture of inquiry which encourages creation and interpretation of knowledge through conceptualisation, interrogation, and answering relevant research question, thereby making substantive and original contribution in different areas of academic focus.

In addition, through supervisor-initiated reading group which we have had during our doctoral summits, Prof Heyns provoked us to develop skills in critical and independent thinking. Together with our co-supervisors, he encouraged us to share ideas among ourselves and with others within and beyond academic circles. Also, through supervisor-initiated reading groups Prof Heyns, Maslen and Dr Probert supported us to learn 'reading like a writer' practices that would be useful to unpacking various practices of scholarship.

Moreover, Prof Heyns was a visionary leader gifted with enormous wisdom and a love of humanity that shone through how he treated us as his students. As a supervisor, you felt taller after speaking to him because he was always positive and saw potential in all of us. Even to those of us who became his supervisees a couple of months before his passing, he was very reassuring, and we always felt safe and took comfort in the fact that he was going to walk us on our doctoral journey. He made us believe in the possibility of the journey.

Importantly, Prof Heyns did not pay lip service to ideas and language of human rights, he walked the talk. As stated by one of us, Dagnachew Wakene:

> When the inaugural class of LLD in Freedom From Violence (FFV) Programme, which is among Prof Heyn's countless milestone initiatives to the noble cause of human rights, kicked off in February 2018, I was the only student with physical disability. What I recall to this very day, and as long as I live, is the inclusive, non-judgemental, welcoming and genuinely encouraging ambiance of Professor Heyns. "We know you will do a sterling job" was one of his first remarks to me – remarks that meant so much coming from the towering figure of global human rights academia, Prof Christof Heyns, in an academic world evidently prejudicial to emerging scholars with disabilities.

Prof Heyns was a beacon of academic excellence and a human rights activist whose thinking and actions were far ahead of the current state of the world. Words cannot express how he shaped our thinking about the world we live in and how we view our agency in it. Largely, his thought leadership in the African human rights system influenced most of our research projects in certain ways. While discussing international human rights norms, we take a great deal of time and space to examine the African human rights system.

Prof as a supervisor was a like a father. In addition to teaching, correcting, sharing ideas, and listening, he looked out for our interests – beyond completing our theses. He wanted us to excel in our careers and make an impact. He noted our different potentials, pointed out opportunities and encouraged us to take bold steps and make the most of any opportunities that may come our way. Some of the opportunities came in the form of publishing, presentations during seminars and conferences, arranging sessions where we would present our work-in-progress, internships with human rights organisations, fellowships, and involvement in some of the engagements he had within the UN and African human rights systems. These opportunities came in handy considering that doctoral students often experience a degree of isolation both academically and socially.

Evidently, Prof Heyns offered us technical support, wider intellectual support, administrative support, and the personal support required to

bring out the best of our theses. He encouraged us to work towards ensuring that our work is of great quality and relevance, creation knowledge and having an impact in the society. Indeed, Prof Heyns was an unparalleled and amiable teacher, mentor, and supervisor. As noted in our tribute upon his passing on, each one of us can speak to his wisdom, gentleness, kindness, generosity, and thoughtfulness. We were absolutely privileged and honoured to have been supervised by him.

* Director, Centre for Human Rights, Faculty of Law, UP.
** Current doctoral candidate, ICLA/Freedom from violence.

1 Claire Adionyi (Kenya, digital open source evidence: enhancing state accountability for human rights violations through the courts in Kenya); Fikire Tinsae Birhane (Ethiopia, studying the right to life of children associated with non-state armed groups); Dennis Chipao (Malawi, analysing how the Malawi Police Service can take advantage of new technologies to monitor and improve its effectiveness and accountability); Alero Itohan Fenemigho (Nigeria, studying counter-terrorism policing in Africa under international law); Dumisani Gandhi (Zimbabwe, exploring the relationship between body-worn cameras and accountable policing in a South African context); Anne Ireri (Kenya, is doing her research specifically in relation to investigation of child abuse in Kenya); Jim Karani (Kenya, Domestic and international standards on the use of force in counter-poaching operations in Africa); Joe Kilonzo (Kenya, Adherence to normative international human rights standards in designing and implementation of Disarmament, Demobilisation and Reintegration (DDR) interventions in countering violent extremism in Africa); Brenda Mwale (Kenya, focusses on prevention and repression of cyber-terrorism in Africa) (co-supervised by Stuart Maslen); Steven Ndhlovu (Malawi, Gender based violence and limitations of the criminal justice system response in Malawi); Beryl Orao (Kenya, The right to freedom of assembly in the context of the use of force and firearms in law enforcement: towards accountability for rights violations by law enforcement officers in Kenya); Lily Oyakhirome (Nigeria, The role of social activism in pursuing accountability for police abuse of powers in Africa) (co-supervised by Thomas Probert); Seyitan Solademi (Nigeria, Inclusiveness and participation of women in the AU counter-terrorism frameworks); Dagnachew B. Wakene (Ethiopia, is working on violence against persons with disabilities).

2 F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa* 1997 (Kluwer Law 1999) 47-116.

3 See C Heyns & M Killander 'Towards minimum standards for regional human rights systems' in Cogan et al (eds) *Looking to the future: essays on international law in honor of W Michael Reisman* (Brill 2010) 527-558.

4 C Heyns & W Kaguongo 'Constitutional human rights law in Africa: current developments' (2006) 22 *South African Journal on Human Rights* 673-717.

5 C Heyns & W Gravett '"To save succeeding generations from the scourge of war": Jan Smuts and the ideological foundations of the United Nations' (2017) 39 *Human Rights Quarterly* 574.

6 C Heyns, D Akande, L Hill-Cawthorne, & T Chengeta 'The international law framework regulating the use of armed drones' (2016) 65 *International & Comparative Law Quarterly* 791-827.

12

Christof and mooting

Frans Viljoen, Keketso Kgomosotho,***
*Thompson Chengeta*** and Nyambeni Davhana*****

Introduction

'We are accused of trying to fix all the world's problems through moots', Christof would sometimes say in gentle self-deprecation, to some laughter. This statement underscores his combination of seriousness and lightness, and reflects his determination and optimism in the face of adverse realities. For him, mooting was indeed a means to an end: to spark in law students' (and learners') minds the acute understanding that human rights law can be a transformative tool to turn 'human wrongs' into 'human rights'. Mooting is a vote of confidence in human right education and youth.

Christof's mooting footprint is left on the global, regional, subregional and national levels. After 30 uninterrupted years, the African Human Rights Moot Court Competition (African Moot) is a continental landmark and institution. Starting off in 1992, with a subregional scope, as the Southern African Human Rights Moot Court Competition, it has in 2021 been renamed after its initiator, and is now known as the 'Christof Heyns African Human Rights Moot Court Competition' (Christof Heyns Moot). Christof's outstanding ability to identify gaps in legal education was not limited to the African continent. While the African Moot was founded to simulate an African Court on Human and Peoples' Rights (African Court) that was yet to be established, Christof like others contemplated the establishment of a world human rights court, a court that is yet to exist. Reflecting on such a world court, Christof came up with the idea of the Nelson Mandela World Human Rights Moot Court Competition (World Moot). Mirroring his own journey towards a greater focus on the local, bringing international human rights 'home', Christof also cultivated mooting at the national level, involving not law students at tertiary institutions but learners. The idea was to reach a much wider audience and to inculcate a constitutional culture at secondary school level. Turning the moot into an instrument of broad-based education at school level was perhaps the most significant innovation that Christof brought to the notion of mooting. It is telling that in the last years, the ownership of the National Schools Moot evolved onto the South

Africa's Departments of Basic Education and the South African Human Rights Commission, thereby providing an institutional anchor to this lofty ideal. The radiating effect of this innovation has, with Christof's resolute support, been extended beyond South Africa, to countries as far afield as Ghana and Nepal.

Christof Heyns African Human Rights Moot Court Competition

The Christof Heyns Moot, established as the Southern African Human Rights Moot Court in 1992, and expanded to the (All) African Human Rights Moot Court Competition in 1995, was the first initiative on the continent to bring together law students from across the African continent to engage pressing human rights issues that plague the region, in the spirit of community and collaborative sportsmanship – and fun. Christof spurred tall this into action. Throughout his life, Christof remained a key pillar to the Moot, providing direction, leadership and support in innumerable ways – often at his personal expense.

The African Moot celebrated its 30th anniversary in 2021. The African Moot is a creative way to engage the imagination of the next generation of leaders, judges and law lecturers. During its 30-year run, an estimated 1 610 teams from 50 African countries have participated in the African Moot. This means that around 3 220 law students and 1 610 law lecturers have participated in the African Moot, making it the largest gathering of law students, lecturers, researchers and experts of human rights in Africa

Beyond his imaginative conceptualisation of the African Moot, Christof also had a magnetic capacity to energise the often-fatigued organising team and the sleep-deprived law students who would have worked for months preparing the case; he was able to mirror back to us the bigger picture – the reason why the Moot exists in the first place. Thirty years ago, already, Christof had understood that 'the continuation of human rights as the global normative framework will depend on whether future generations will see it as a useful paradigm',[1] and that its acceptance must come from the ground level as well.

Participating students engage in simulated proceedings of the African Court, by arguing both sides of a set hypothetical case. The case involves a human rights issue topical to the continent, and requires the application of the African Charter on Human and Peoples' Rights and other African human rights instruments for its resolution. Academics, human rights lawyers, and members of the judiciary – including, subsequent to its establishment in 2005, actual Judges of the African Court – act as judges of the 'African Court' in these simulated proceedings. The presiding judges engage the students in the same way

as the judges would in the actual African Court. The teams from each African law faculty compete in a weeklong knock-out tournament, with the highest-scoring teams proceeding to the final round.

Of course, in 1992, the African Court did not yet exist. By postulating the possibility of this Court, which six years later in 1998 became a real prospect through the Protocol establishing the African Court on Human and Peoples' Rights, the African Moot's early history has a prophetic quality. To date, the African Moot remains the largest meeting on the topic of human rights in Africa.

Since then, the Moot boasts an impressive list of alumni who now hold key leadership positions in their home countries. These alumni include judges, prosecutors, legislators, and a range of advisors. This is the legacy of the Competition, and in many ways that of Christof as well. Considering complex human rights problems from both sides, a key feature of the Moot, trained many alumni the invaluable skill of being more open in their thinking.

The African Moot is a prime example of Christof's big ideas that have taken on a life of their own. This Moot revolutionised human rights education on the African continent;[2] it prepared the next generation of jurists to engage with the African human rights system, and to carry human rights values in their work in other areas of the law, too. What started as a simple, yet distant, idea, became a powerful force for human rights on the continent, leaving an indelible mark on the face of human rights education in Africa.

Nelson Mandela World Human Rights Moot Court Competition

Through the World Moot, students – both undergraduates and postgraduates – from across the globe move beyond abstract and theoretical human rights concepts to active, cooperative, affective and problem-based learning in human rights. Indeed, the World Moot captures the imagination of the next generation to bring new life to the human rights project in a way that enables it to withstand the current challenges it is facing globally. As a firm believer in the educational philosophy that acknowledges the link between human knowledge and human experience, Christof envisaged the World Moot as a critical and unique tool in global human rights education where students, lecturers, judges and human rights experts not only exchange knowledge on human rights but experience beautiful exchanges in culture, traditions, values and cuisine.

The first edition of the World Moot took place in 2009, and was held in at the University of Pretoria, presented by the Centre for Human Rights. Over time, it grew into a broader collaboration involving the

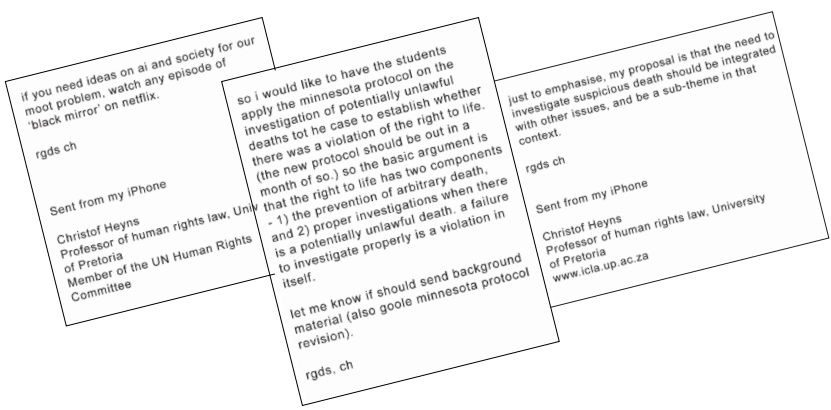
United Nations (UN) Human Rights Council Branch at the Office of the High Commissioner for Human Rights (OHCHR), the Academy on Human Rights and Humanitarian Law, American University, Washington College of Law and the Commonwealth Secretariat. When the World Moot was launched, it was simply called the World Human Rights Moot Court Competition and was held annually in South Africa between 2009 and 2013. In 2014, Christof was part of the team that strategised the moving of the World Moot from South Africa to Geneva, Switzerland, where it is held at the UN Headquarters, the *Palais des Nations*. Given that the Geneva is known as a global city and centre for diplomacy, with numerous international organisations, moving the World Moot there was a master stroke. Christof initiated the renaming of the Competition after Nelson Mandela, a renowned human rights champion known across the globe. The renaming coincided with the relocation of the World Moot to Geneva. This was a very important step and mark in the history of the World Moot. Indeed, Rolando Gomez, the Spokesperson for the UN Human Rights Council noted as follows: 'What is more fitting is that we host an event (the World Moot) honouring a man (Nelson Mandela) who continues to guide us in our work at the UN Human Rights Office.'[3]

Christof was instrumental in the growth of the World Moot which has become the biggest human rights moot court competition that is open to all law schools from across the globe. There is no other human rights moot that has a global reach like the World Moot. For this and other reasons, the World Moot is sometimes affectionately referred to as the 'Olympic Games of Human Rights'.

One would remember seeing a number of Geneva Public Transport buses moving around the city of Geneva with huge posters about the World Moot. Those in Geneva who had not heard about Nelson Mandela before started asking and talking about him. In human rights education, Christof was not only an academic and practitioner, but also a creative. He mastered the art of capturing attention to critical matters, even attention of those who would otherwise stand aloof. It was in that creativeness that Christof was part of the team that introduced video animations of the World Moot's hypothetical problems, making the World Moot the first and only international moot to use animations for the hypothetical cases.[4]

Christof's contribution to the World Moot was also critical in the drafting of hypothetical cases or problems. A hypothetical problem is the soul of a moot court competition. It is a simulation of real-world problems to which participants are invited to make arguments they would otherwise submit in a real court. Since its inception, the World Moot has explored a number of critical and topical human rights themes such as the impact of artificial intelligence technologies and robotics on freedom from violence, freedom from torture, the right to life, dignity, expression and to freedom of assembly – all themes close to Christof's heart.

It did not matter what time of the day or night, Christof would participate in the discussion of human rights themes to be included in the hypothetical problems of the World Moot. Sometimes, as early as 1 am, younger members of the drafting team would start discussions about possible themes to include in the hypothetical problems. Christof would join in the email exchanges, of course, with the Christof-emailing-style where all words were ever written in lower case, as if to signal his quietness in speech, even so, during heated exchanges on ideas and themes to include in the hypothetical problem.



An example would be an intense discussion about the 2014 hypothetical problem that started one early autumn morning of 2014 and extended to the afternoon of 8 April 2014. One of the themes in the 2014 hypothetical case related to the right to religion and culture in a fictious nation called Kopjestan. In view of the fact that the World Moot was due to be held for the first time in Geneva, Switzerland, a discussion ensued as to what extent the hypothetical problem should explore and dig into some of the most controversial cultural and religious sensitivities. While acknowledging the role of moots in pushing boundaries, Christof would note the very politicised environment of the UN in Geneva where every word weighs a ton and diplomatic language is the order of the day when exploring certain human rights dynamics when there is no convergence. In approaching such matters, Christof, in his inclusive style, would argue for a gradualist approach.

Christof's office at the Institute of International and Comparative Law in Africa (ICLA) was next to that of Thompson Chengeta, the drafter of the hypothetical problems of the World Moot. They would continue throughout the day, debating and refining the contents of the World Moot. In the drafting of the World Moot hypotheticals, one outstanding character of Christof was his ability to actively listen to other team members, and where convinced, change his positions. After these immense discussions on the 2014 hypothetical case, the former UN High Commissioner for Human Rights, Professor Zeid Ra'ad Al Hussein, would later comment on the final version of the 2014 hypothetical case's exploration of the themes of religion and culture as follows:

> The 2014 hypothetical case on the question of Kopjestan's culture and politics is, of course, a fictional argument. But it is also a very serious one. It involves the subjugation of women, of half the human beings on this earth; it involves the domination of a minority people and the outbreak of armed violence resulting in displacement of families. Virginia Woolf said: Fiction is like a spider's web, attached, ever so slightly perhaps, but still attached to life at all four corners. The events of Kopjestan are very solidly anchored in the reality of many countries. Human rights violations are not random, they are not accidents, they are generally the consequence of political, economic, social and cultural inequalities.[5]

Seven years later, in 2021, Professor Zeid's words were also sounded by Rolando Gomez, the spokesperson for the UN Human Rights Council, who noted that while the cases of the World Moot are hypothetical, they explore 'real issues affecting real people in real places, which we address daily at the Human Rights Council and the Office of the High Commissioner for Human Rights'.[6]

Christof's UN work as the UN Special Rapporteur and later as a member of the UN Human Rights Committee placed him at the centre of current and cutting-edge human rights issues. The team tasked with

drafting of the hypothetical cases of the World Moot benefited from Christof's experiences in these fora. A number of times, the World Moot's hypothetical problems explored the current themes that the UN Human Rights Committee and the UN Human Rights Council would be grappling with. For example, commenting on the 2021 hypothetical problem, Christof noted as follows:

> Every year we get together around a table and start to think about what should the problem be? – the hypothetical for the moot court for the next year. We try to come up with interesting scenarios and Thompson Chengeta and others eventually draft the moot problem and we all give our inputs. This year, we include an issue that deals with peaceful assemblies. I want to tell you the background to that [choice]. Over the last couple of years, I have worked for the UN. I was a member of the UN Human Rights Committee, the Treaty Body that monitors the International Covenant on Civil and Political Rights. So, as you may know, the Covenant has an Article 21 that protects the right of peaceful assembly. The UN Human Rights Committee every couple of years issue a General Comment, that is, a document that sets out our interpretation of a particular right. Previously, we did it on the right to life. The last one, General Comment 37, deals with the right of peaceful assembly. This turned out to be exactly at the right time as we had Black Lives Matter, and we had a lot of other demonstrations taking place worldwide. And then of course, we decided that we wanted to put this issue of peaceful assemblies in the moot problem because it then reaches you; it reaches students around the world, and [gets] people to take note of the work of the Human Rights Committee.[7]

As part of the organising Committee, Christof initiated the inaugural Annual Nelson Mandela Human Rights Lecture in 2019. This Lecture was delivered by retired Justice Albie Sachs, an apartheid struggle icon and former judge of the Constitutional Court of South Africa; with a reply from Her Excellence Michelle Bachelet, the current UN High Commissioner for Human Rights. In 2021, some months after his passing, the Second Annual Nelson Mandela Human Rights Lecture was held virtually, focusing on contemporary forms of racial discrimination, reflected on the 20th anniversary of the Durban Declaration and Programme of Action (DDPA), its achievements and continued challenges. The co-hosts of the lecture were the African Group of Ambassadors in Geneva and the South African Permanent Mission to the United Nations in Geneva. The panellists were: Ms Navi Pillay, the former UN Human Rights Commissioner; Dr Gay McDougall, former member of the UN Committee on the Elimination of Racial Discrimination; Ms Edna Maria Santos Roland, Chair of the Group of Independent Eminent Experts on the Implementation of the Durban Declaration and Programme of Action; and Ms Mona Rishwami, Chief Rule of Law, Equality and Non-Discrimination Branch, Office of the OHCHR.

It is fair to say that on account of Christof's prominent international profile, endearing personality in the UN community, the World Moot secured a number of critical partnerships. For example, such partnerships came in terms of final round judges who are always prominent international jurists. The World Moot would also not succeed without funding. Christof also played a role in current partnerships with the European Union through the Global Campus of Human Rights, the Permanent Mission of Switzerland to the UN Office and to the other international organisations in Geneva, the South African Permanent Mission to the UN Office in Geneva, and the Regional Office for Southern Africa of the OHCHR.

In view of some of the above-mentioned contributions by Christof to the World Moot, it is to no wonder that, Rolando Gomez, the Spokesperson for the UN Human Rights Council, in his 2021 appraisal of the World Moot said: 'Of course, it would be remiss of me if I did not mention our incredible collaboration throughout the years with Professor Christof Heyns whose energy and passion was the driving force to this important event (the World Moot)'.[8]

Schools Moot

The South African National Schools Moot Court Competition was established in 2011. The competition was founded as a joint initiative between South Africa's Departments of Basic Education and Justice and Constitutional Development, with the support of the South African Human Rights Commission, the Foundation for Human Rights, and the University of Pretoria (UP). This project started off as an idea, and at the centre of this was one man, in particular, Professor Christof Heyns, whose vision was the creation of an awareness of the Constitution of the Republic of South Africa, and the rights encompassed in the Bill of Rights. Christof realised that having a conversation on human rights in the abstract would most likely not mean much to a learner high school. In this regard, he understood it imperative that the content of the Competition speak directly to issues learners would be able to grasp. In ensuring that this was so, he thought it best to have learners engage with the content of the constitutional right to basic education, a right that spoke directly to them.

Having in mind that this would still need to be an academic exercise, he envisaged that the Competition would be composed of two legs: an oral and a written phase. Learners from all parts of the country would need to submit written essays based on a hypothetical case. After having done this, a central marking body would assess the essays and select the highest scoring teams, who would then proceed to the leg of oral arguments. The oral leg would begin at the provincial phase and

culminate in a national round hosted at UP, with the grand finale being held at the Constitutional Court of South Africa.

The Competition has now been in existence for more than 10 years and has grown from strength to strength. So massive was this growth that learners from South Africa were invited to the International Moot Court (IMC), held at the Hague, in The Netherlands. South Africa first participated in the IMC in 2012, and has since won it twice, first in 2016 and then again in 2020. This is a feat that would not have been possible without the support of Christof Heyns. He ensured that all learners receive training at the University's campus prior to embarking on their IMC journey. He roped in eminent human rights law experts and students to prepare 'Team South Africa' at every single occasion. He, too, would avail himself for this. All of his efforts speak to the humility he possessed.

Just as we thought that the smooth-running of the South African leg was enough, Christof thought the opposite. In his view, we could always do more. As a result, he pitched the idea of a world schools moot court competition to the Global Campus of Human Rights. This embodied the essence of Christof, he believed one could always do more and improve on any well-oiled machine. He was indeed a visionary. Today, other jurisdictions have adopted the model used in South Africa. These countries are Ethiopia, Ghana and Nepal, with the possibility of expanding the idea to more countries, including Argentina, Kenya, Uganda and Sri Lanka.

Oftentimes people would buy-into the idea of a project aimed at human rights education. However, funding was always the last thing on Christof's mind. He would always place emphasis on the idea itself and believed that somehow the money would come. True to his belief, the money would indeed come. If there was a door to knock on, Christof would make sure that we knock on that door, a million times, if needs be.

For some reason, he possessed the ability of making people commit to a project, this one not being any different. His optimism was unparalleled. Where a potential donor could not make an immediate commitment, Christof would ask if a commitment could be made for the following year, or the year after that. He just never gave up. He always had a sense of urgency about him.

He understood the value of having a project aimed at nurturing a society that would possess a human rights consciousness. Most people will lament the lack human rights education in some parts of the world and stop at that. Not him, he always believed in trying to find a solution. He believed there was always a solution to the problems we currently face, or encounter.

It goes without saying that human rights education was something very close to Christof's heart, and he always made sure that those around him knew that. So magnificent was the impact of this project that some learners who have participated in the past are now young legal professionals. I do not believe that those who have gone on to become young legal scholars and, or professionals, would have done so without having encountered the Competition, and by extension, Christof. This bears testament to the impact that this competition has had in the past, and will no doubt continue to have in the future. More importantly, Christof always envisioned a project without him, something that would still expand without him. It was never about him, but about those who stood to benefit.

Jessup Moot

Jessup is the world's largest moot court competition, with teams from roughly 700 law schools in 100 countries and jurisdictions across the world participating annually. While the African Moot mirrors the African Court, the Jessup simulates the proceedings before the International Court of Justice (ICJ), the judicial organ of the United Nations. Here, students engage a hypothetical international law dispute between countries, by preparing oral and written pleadings, arguing the position of both the applicant and respondent in the case.[9]

One consistent challenge that prospective participating African faculties have in common is a shortage of funding. Competing in the Jessup often requires sending a team to a National Qualifying Round, and potentially to the International Rounds hosted in Washington DC. Participating in these rounds is very costly. Indeed, the prohibitively expensive cost of participation is the key reason why African participation in the Jessup has been inconsistent, and on the decline, as more pressing funding needs arise for faculties.

At the University of Pretoria (UP), Christof became intimately involved in the Jessup Moot at a critical time when the Faculty, largely on account of a persistent lack of funding, was considering a de-escalation of its own participation in the Jessup Competition. This situation was exacerbated by the #feesmustfall demands on Faculty resources. In the years before, the Faculty's participation was often conditioned on students' ability to raise their own funds – a condition which, in Christof's mind, was prohibitive and unjust because it meant that poor students would not be able to participate on an equal basis.

Starting in 2016, Christof 'adopted' the Faculty's Jessup efforts, and took on the seemingly insurmountable responsibility of providing support to the Faculty's efforts to participate in the Jessup. (If you worked at the Faculty during this time, you will recall Christof's annual

email asking for more money for the Jessup.) Year after year, he opened his office, his home and at times, his own wallet, to provide institutional support to UP Jessup teams.

Through his office at ICLA, he created a home for the Jessup – a place where students could receive training, support, encouragement, and sometimes food. He often reminded teams that they, too, can perform as well as any 'Ivy League' school on the international stage. He often leveraged his international connections to get students some face time with international law experts. When these students performed well at the moot (and sometimes even when they did not perform so well) he would celebrate them, loudly and proudly, as a father would. It was on Christof's insistence that these teams are now recognised on a Jessup wall-of-fame on campus (Christof's ordered this in 2016), and on ICLA's website.[10]

When the Jessup dust settled (after the international rounds), Christof would speak to the participating teams about publishing their research, and about scholarships in international law, and about work opportunities they ought to consider. He connected them to the right people, he wrote reference letters for many of these students, found work for many, and encouraged them to in turn teach other young students the skills the Jessup had taught them. Christof managed to create a culture of excellence in moots at the Faculty. He empowered young African students to gain access to the international law community and worked to remove barriers to entry for many.

In his last years, Christof worked tirelessly to establish a more institutionalised Jessup experience for South African teams. Christof secured funding from the law firm White & Case for the South African National Qualifying Rounds, which in 2020 attracted a record number of law faculties in the 60-year history of the Jessup. Christof established a website for the South African Jessup experience to empower, inspire and connect local participants.[11] Christof had many more plans for the Jessup; in many ways his work here was interrupted. Yet to have achieved so much in such a short time perhaps best exemplifies Christof and his urgent sense of commitment to empowering and inspiring young people.

Cumulatively, these moots – largely the result of Christof's vision, leadership and industry – have left significant footprints on the globe, the continent and on many people. is so as. Long may his legacy live.

* Director, Centre for Human Rights, UP.
** Former participant in the African and Jessup Moot Court Competitions.
*** Reader in Law, Liverpool John Moores University; drafter of most of the World Moot hypothetical cases.
**** Former National Coordinator of the South African National Schools Moot Court Competition.

1 G Kgomosotho, CH Heyns & B Majola 'Notes from the field: bringing new life to human rights globally: the powerful tool of schools' moots' (2018) 2 *International Journal of Human Rights Education* 1 at 9 https://repository.usfca.edu/cgi/viewcontent.cgi?article=1037&context=ijhre (accessed 23 December 2021).
2 C Heyns, N Taku & F Viljoen 'Revolutionising human rights education in African universities: the African Human Rights Moot Court Competition in Advocating for human rights: 10 years of the Inter-American Moot Court Competition' (Raoul Wallenberg Institute New Authors Series 2018) https://www.wcl.american.edu/impact/initiatives-programs/hracademy/moot/ (accessed 23 December 2021).
3 UN Human Rights Council 'The Human Rights Council and the Nelson Mandela World Human Rights Moot Court Competition' (2021) available at https://www.youtube.com/watch?v=bumpP9E6Xfg (accessed 23 December 2021).
4 See 2021 World Moot Hypothetical Case animation available at https://www.youtube.com/watch?v=WSSZNKmfZeA (accessed 23 December 2021); 2020 World Moot Hypothetical Case animation available at https://www.youtube.com/watch?v=oawtKtpjFDU (accessed 23 December 2021); 2019 World Moot Hypothetical Case animation available at https://www.youtube.com/watch?v=LgSXKDsYgI0 (accessed 23 December 2021);2016 World Moot Hypothetical Case animation available at https://www.youtube.com/watch?v=fhZrzshrWKM (accessed 23 December 2021); 2015 World Moot Hypothetical Case animation available at https://www.youtube.com/watch?v=A_8rtvTYX8I (accessed 23 December 2021).
5 Professor Zeid Ra'ad Al Hussein, Former UN High Commissioner for Human Rights, in 2014 at the UN commenting on the 2014 World Moot Hypothetical Case. The 2014 World Moot can be accessed here http://www.chr.up.ac.za/images/moots/world_moot/2014/files/Hypothetical_case_for_the_2014_World_Human_Rights_Moot_Court_revised_23_June_2014.pdf (accessed 23 December 2021). Prof Zeid's video comment can be accessed here: https://www.youtube.com/watch?v=LALbC3VR50Y (accessed 23 December 2021).
6 UN Human Rights Council (n 3).
7 World Moot, video broadcast on World Moot Instagram handle @worldmoot published on 28 May 2021.

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ch, the editor

*Magnus Killander**

Christof wanted to make knowledge about human rights more widespread. He detested that the African regional human rights system was often overlooked, or misrepresented, in books about international human rights law.[1] However, Christof's main approach to deal with this ignorance and make materials more accessible was publications. Thus, in 1996 he published with Dutch publisher Kluwer Law International (later Martinus Nijhoff) an edited volume of mainly primary materials entitled *Human rights law in Africa 1996*. The volume had three parts: 1. United Nations human rights treaties in Africa; 2. The African Charter on Human and Peoples' Rights; and 3. Human rights provisions of the constitutions of African states. Christof envisioned *Human rights law in Africa* as a yearly publication and in 1998 published volume 2, *Human rights law in Africa 1997*. Volume 3, *Human rights law in Africa 1998,* followed in 2001, and volume 4, *Human rights law in Africa 1999*, in 2002. The aim of *Human rights law in Africa* was 'to contribute towards the development of an indigenous and effective African human rights jurisprudence; and a situation where the promises made by the law are given greater practical application'.[2] *Human rights law in Africa* included both primary materials, which were also made available on the Centre's website, and commentary by scholars.

Recognising that a yearly publication would not work, Christof decided to bring most of the materials collected in the yearly *Human rights law in Africa series* into a massive two volume publication, *Human rights law in Africa* published in 2004, with a picture of a lighthouse painted by Nelson Mandela on the covers. One volume focused on primary sources and commentary on human rights work of the United Nations and the Organization of African Unity/African Union and other intergovernmental organisations in relation to Africa and one volume on constitutional human rights provisions of African states, including commentary. Published in A4 format in hard copy, the two thick volumes came in at considerable weight and cost. Hard copies of the two volume *Human rights law in Africa* can still be bought from the publisher Martinus Nijhoff for 500 euro.[3] With most primary materials available on the internet, the relevance of big reference works like this may be less today than they once were. However, not everything is on

the internet and for anyone interested in the preparatory works of the African Charter on Human and Peoples' Rights, *Human rights law in Africa 1999*, is the easiest way to find them.

The two-volume *Human rights law in Africa* was the first publication that I started to work on when I came to the Centre for Human Rights as an intern in November 2002. A few years later Christof had the idea that it would be useful to have a more concise book for teaching purposes which led to the first edition of the *Compendium of key human rights documents of the African Union,* which we edited together. In the *Compendium* we brought together primary documents, some in extracts, including from decisions of the African Commission on Human and Peoples' Rights which we had started to publish in the *African Human Rights Law Reports* (*AHRLR*), another of Christof's initiatives which appeared in its first edition in 2004. In addition to decisions of the African Commission (and later decisions of the African Committee on the Rights and Welfare of the Child and the African Court on Human and Peoples' Rights), the *AHRLR* included selected judgments from domestic courts in Africa. Christof recognized the language barriers of the continent, so *AHRLR* also appeared in a French edition and the *Compendium* was published in French, Portuguese and Arabic editions. The last edition of the *Compendium* in English appeared in 2016 and we were busy considering what to put in and leave out in a new edition when Christof passed away.

In 2001 the first issue of the *African Human Rights Law Journal* (*AHRLJ*) was published with Christof and Frans Viljoen, who would later replace Christof as director of the Centre for Human Rights, as editors. Frans was the editor-in-chief, a role he has retained to date. The two brains behind what the Centre for Human Rights is today made a formidable editorial team. Eventually, Christof realised that as long as you have the right people in place to do the job you don't necessarily need to be hands on yourself. With so many ideas about everything that could and should be done and so little time in a day, Christof left the editing of *AHRLJ* in the capable hands of Frans and his team and became the chair of the *AHRLJ* advisory board.

In 2005 it was time to unveil another of Christof's initiatives. Pretoria University Law Press (PULP) was the first university press in South Africa dedicated to legal publishing. The first publication was *Socio-economic rights in South Africa* edited by Christof and Danie Brand, then a senior lecturer in the Department of Public Law of the University of Pretoria and a research associate of the Centre for Human Rights, who is now the Director of the Free State Centre for Human Rights. Among early publications of PULP were compilations like the *Compendium of key human rights documents of the African Union* and *Human rights, peace and justice in Africa: A reader* which Christof compiled (with

Karen Stefiszyn as co-editor) in his role as academic coordinator of the Africa programme of the University for Peace (UPEACE), one of his many academic roles around the globe. PULP's mission is to make legal research related to Africa more accessible which means all publications are freely accessible online. While some of his early edited works could realistically only be purchased by libraries, as indicated by the price for *Human rights law in Africa*, Christof took an increased interest in open access publication. Publication of *AHRLJ* was taken over by PULP from JUTA, a commercial South African publisher, in 2013, with JUTA agreeing that all the issues it had published would also be freely accessible on the journal's website.

Christof's scholarship will remain relevant for generations of students and scholars engaging with a wide area of topic related to human rights law. Equally important Christof created platforms for other scholars to make their voice heard and especially for the voice of Africa to be heard in the international exchange of ideas.

Christof always ended an email with 'rgds, ch', 'tx, ch' or 'best, ch'. I learnt much from this scholarly giant, not least as an editor. tx ch for all you did for me and for so many others.

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1 C Heyns and M Killander 'Africa in international human rights textbooks' (2007) 15 *African Journal of International and Comparative Law* 130.

2 C Heyns *Human rights law in Africa* 1998 (2001) vii.

3 https://brill.com/view/title/17685 (accessed 17 December 2021).

14

Christof Heyns as visionary, teacher, mentor and independent human rights expert

*Danwood M Chirwa**

Introduction

I wish the University of Pretoria (UP) were to rename its Centre for Human Rights the Christof Heyns Centre for Human Rights in recognition of the immense work he had done in promoting human rights in Africa and globally, and in recognition of the inseparable bond between Heyns and the Centre. No legal scholar I know has managed to fuse his own personal values into an institution and projected them on to the world stage as Christof Heyns has done with the Centre for Human Rights. With the Centre and other institutions he helped found, Heyns taught and inspired numerous young Africans from across the continent whose work in human rights will continue to reflect and execute his vision, goals and values. He remains a model legal scholar to be emulated by current and future generations of legal scholars.

In this short essay, I pay homage to Christof Heyns by highlighting some of the ways in which he impacted on students, alumni, colleagues, institutions and states. In doing this, I draw on my direct encounter with him as a teacher, mentor, legal scholar and independent human rights expert.

The inspiration of the Moots

My first encounter with Christof was via a letter dated 27 October 2000 (and sent by fax 30 October 2000). It was the first time I had received a letter from a professor. It contained two messages: first, of admission to the LLM programme in human rights in Africa offered by the University of Pretoria and, second, of a scholarship. Apart from the unspeakable joy the letter brought about, I was fascinated by the name of the author. I looked unusual for someone raised in the English colonial tradition. That letter changed everything for me, immediately; it brought about marriage, precipitated my resignation from legal practice, and marked the beginning of my academic quest. This is the testimony of many young Africans who have over the last 21 years received a similar letter from Christof Heyns and his successors at the Centre for Human Rights.

Later, I realised that I had seen Christof Heyns as an undergraduate student two years before I received the admission letter, in Maputo, Mozambique, at Eduardo Mondlane University, where the 1998 All-Africa Human Rights Moot Court Competition took place. The Moot brought together young students from across the continent to hone their legal and advocacy skills. The legal problem we were expected to resolve was cast in a wholly African context, complex and multi-layered, reflective of the human rights challenges prevalent on the continent at the time.

There were the first three days of intense competition. Each law school had to argue before four courts, presided by law professors from across the continent, two times as applicants and another two as respondents. The competition introduced to us a field of law then not taught at the undergraduate level by many of the participating universities. Within a space of a week, students were exposed to human rights at the level of detail and practicality that their own LLB programmes had not managed to do. The horizon of our small legal worlds was smashed, and from its shards was built a much larger world, we discovered, within which local legal problems could be understood and resolved.

Outside the moot court room, a cultural transformation was taking place almost simultaneously as the academic explosion was. In attendance at this event were also students from parts of Africa whose countries were still under military dictatorships or civil war. Maputo itself was a curious place to host the event, having just emerged from more than a two decades of civil war, the evidence of which still in plain sight throughout the city. I was particularly curious about Tanzania and Mozambique, Malawi's neighbours, about which Dr Kamuzu Banda's government had nothing good to say. I was astonished to hear from Tanzanian and Mozambican students the propaganda that their governments spread to their respective populations about Malawi and Banda. But all that propaganda could not prevent us from garrulously engaging in discussions. The interaction between students and professors went into overdrive on an excursion to Xai-Xai beach, which provided a relaxed and jovial atmosphere after tense three days of highly competitive oral arguments. There was just so much exposure, learning and growth that took place during one week in Maputo. Many of us came back from the Competition empty handed in terms of silverware, but teeming with inspiration and animus to strive for greater heights academically.

The man behind this unique cultural and academic transformation was Professor Christof Heyns. As Director of the Centre for Human Rights, he expanded what was a limited Southern African Moot Competition to a vibrant and now universally respected regional human rights moot

competition, at which the best students from law schools across the continent compete, connect and learn. No other region has such a long-running and widely participated academic competition. I have had the privilege of coaching and preparing University of Cape Town (UCT) students for the Jessup International Law Moot Competition. In 2006, my team went all the all to the semi-finals in Washington DC.[1] It was all about cut-throat competition, nothing more. Student and academic staff interaction ranged from minimal to non-existent, nor were there opportunities for inter-faculty student-student interaction. The African Human Rights Moot Competition – since its renaming in 2021, the Christof Heyns African Human Rights Moot Court Competition – is by far the richest and most profound in terms of exposure, learning and social interaction.

Professor Heyns believed absolutely in the infinite potential of young people from the continent. That potentiality, he believed, could be unleashed by moments of inspiration, brief as they may be. The Moot Competition, one of his favourite activities, has been hosted in all corners of the continent, defying all logistical complications of travel in Africa, exposing students and academics to the diverse legal and political systems of the continent. If Kwame Nkrumah is the father of political Pan-Africanism, Heyns can be seen as the founder of academic Pan-Africanism, understood as the belief that Africans can produce legal thinkers and legal knowledge that is responsive and relevant to their socio-political realities and that engages in dialogue with legal knowledge from elsewhere in the world. Indeed, throughout his life, Heyns promoted legal scholarship on Africa and worked untiringly to identify, nurture and inspire young talent on the continent. He did all of this without propounding any political doctrine or dogma.

So far, I have hinted at the great exposure that the Moot Competition offered to students. Of course, this had an impact on the performance of the participating students when they returned home, because they understood the law in different light. I certainly did. Many took this occasion as a springboard for further studies post-LLB. From the 1998 moot alone, Evarist Baimu from Tanzania became a member of the pioneer class of the Human Rights and Democratisation LLM programme at the Centre for Human Rights, from where he also obtained his LLD before joining the World Bank. William Olenasha, a Tanzanian of Masai heritage, also obtained an LLM from the Centre and later became Deputy Minister of Education and Member of Parliament in Tanzania. Leopordo de Amaral, from Mozambique and a member of the winning combined team of the 1998 Moot, worked for a considerable period at the Open Society Foundation for Southern Africa after he obtained his LLM at the Centre. These are just a few of scores of examples.

For academics, the Moot provided a rare opportunity for establishing links among law schools in Africa. The Centre itself drew upon these links to enhance its academic programmes and research agenda. Speaking for myself, some of my long-time academic friends and colleagues, such as Dr Tom Ojienda from Moi University, Professor Laurence Juma of Rhodes University, Professor Oyelowo Oyewo from University of Lagos, Professor Pierre de Vos, now my colleague at UCT, I met for the first time at the 1998 Moot or later African Moot Competitions.

Apart from the African Moot Competition, Christon Heyns played a central role in conceiving and marketing the Nelson Mandela World Human Rights Moot Competition. All law schools in the world are invited to participate, but only the top 10 teams, representing two from each United Nations (UN) region, compete in the finals held in Geneva. This is perhaps the most ambitious project Christof was involved in, where the Centre for Human Rights organises the Competition in collaboration with the Academy on Human Rights and Humanitarian Law of the American University, Washington College of Law, the Commonwealth Secretariat, and the United Nations Human Rights Council Branch (UNHRCB) at the UN Office of the High Commissioner for Human Rights.[2]

A senior human rights officer in the UNHRCB once told me that no one in the OHCHR took Heyns seriously when he was selling the World Moot Court Competition. Everybody thought it the project was too grand to work. They were pleasantly surprised when the first moot court took place within a year, presided by a most eminent panel of judges including then UN High Commissioner for Human Rights, Judge Navanethem Pillay.

The Competition is held in honour of Africa's most well-known and admired hero of freedom, Nelson Mandela. It is the first and, thus far, the only world-wide human rights competition. It exposes students to the workings of the international mechanisms for the protection of human rights, while also giving them an opportunity to establish international links that are critical to developing their careers in human rights. Above all, this Competition has shown the world that Africans can conceive, lead and sustain projects on a global scale.

Teacher and mentor

Although Heyns was involved in many regional and international projects and assignments, he was a teacher of law at heart. As a student of his I remember him teaching his favourite human rights topic, the struggle approach to human rights. He was not a traditional teacher. Heyns expected students to read tough material and engage with it. He loved and encouraged critical views from students. The academic

programmes he was involved in setting up all tended to encourage critical thinking, hard work and engagement with diverse views. Well before the decolonisation debate became fashionable in South Africa, Heyns had already challenged the European way of teaching human rights by creating an African focussed regional human rights programme which drew upon the resources on the continent and beyond. This had the effect of exposing students to a diverse array of views, unleashing their imagination far beyond parochial or dogmatic cleavages.

Many alumni of the Centre for Human Rights and other research centres associated with Professor Heyns have lost a hugely inspirational figure. I can personally testify to the support that Professor Heyns gave me throughout my career and offering advice whenever I needed it. Even when I became Dean, he was a constant source of support and advice. His counsel will remain a source of strength and direction for years to come.

Not many teachers of law have had so many outstanding graduates. Professor Heyns counts among his graduates many full professors of law at many universities in Africa and beyond, several Deans of Law, Ministers and Deputy Ministers, Judges of the High Courts and Supreme Courts, senior government officials, members of regional and international human rights monitoring bodies, leaders of civil society organisation, and a Judge of the International Criminal Court, to mention a few. This shows that to be a legal scholar and teacher is not just to be single-minded in publishing as much of one's own research as possible. It is also about inspiring and nurturing others and producing the next generation of researchers and teachers of law.

Independent human rights expert

The UN human rights system relies much on independent experts such as legal scholars and former state officials for it to work effectively. Unremunerated, such experts serve as special rapporteurs or as members of thematic working groups or committees.

Due to the UN requirement for regional representation, Africa has over the years contributed a fair share of independent experts to the UN human rights mechanisms. However, the reputation of African experts within the UN system, even accounting for some degree of racial prejudice in the narratives, is less than edifying. Some experts have not been experts at all, but retired politicians, sponsored by their governments as part of their domestic systems of patronage. Others have been known to miss critical meetings and to show interest only in receiving allowances. Others have gained notoriety for insisting on bizarre travel plans and abusing human rights officers attached to them.

Professor Heyns is one of the outstanding African independent experts who gave everything he had to the mandate he was entrusted with and flew the African flag very high. He enjoys phenomenal respect within the UN and the diplomatic community. Upon completing his term of office as Dean of Law at the University of Pretoria, he was appointed UN Special Rapporteur on extrajudicial, summary or arbitrary executions in 2010 and held the position until 2016.[3] Heyns was particularly suited to this position. Apart from having extensive experience in human rights as a legal scholar, he was a gifted diplomat. Naturally soft-spoken, Heyns had the gravitas and negotiation skills to push the human rights agenda among states and state officials much further than other mandate holders could. Both in his relations with staff at the OHCHR and with diplomats, he is remembered as a highly competent professional who was easy to work with and treated everyone with respect and dignity.

One of the thematic areas he took up in his mandate was the implications of the right to life on remotely piloted aircraft, armed drones and autonomous weapons systems.[4] To date, this remains an under-researched and under-explored area of human rights. As he was conducting research and developing his ideas on this theme, Heyns consulted widely and made presentations at various universities around the world. In doing this, he never forgot South African universities. I remember very well his presentation at UCT, which was both intellectually informative, stimulating and inspiring. In his 2014 report to the Human Rights Council, he highlighted the human rights issues raised by armed drones and autonomous weapons systems.[5] Aware that many of these issues required further engagement among states, he recommended that the Council develop standards interpreting the applicable international law to the use of remotely piloted aircraft and to engage with other UN bodies on the issue of autonomous weapons. This report elevated the human rights concerns about armed drones and autonomous weapons in the international sphere. Many states have now expressed a view on it and the UN is still working on appropriate responses.[6]

After serving two terms as Special Rapporteur, Christof Heyns was elected a member of the UN Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights.[7] He served two terms from 1 January 2017 to 31 December 2020. One of the notable achievements of his time on this Committee was General Comment 37 on the right to peaceful assembly.[8] Considered one of the traditional rights, this has become a neglected right even though it is so critical to democracies around the world. Heyns played a leading role in drafting the general comment and in promoting it around the world. Again, UCT was privileged to host an event at which

he presented the draft general comment and sought input. The General Comment 37 is one of the most lucid and precise of the Human Rights Committee's General Comments.

Conclusion

As his second term as a member of the Human Rights Committee was coming to an end, Professor Heyns told me that his wife had 'instructed' him to reduce his international travel. He agreed with her and was looking forward to spending more time with his family and in South Africa. This is precisely what he was doing at the time of his death, hiking in Cape Town. The entire human rights community, within the academia, civil society, the legal profession, domestic and international, and within the UN system, have lost an intellectual leader, a teacher, a independent human rights expert and mentor. As a consolation, there are so many scholars, activists and practitioners that Professor Heyns inspired, taught, supervised and mentored. The Centre for Human Rights remains a beacon of excellence in human rights regionally and internationally. There is so much more all of us can do in honour of Professor Christof Heyns and in pursuit of our own goals.

* Dean, Faculty of Law, University of Cape Town.

1 See 'The 2006 Philip C. Jessup International Law Moot Court Competition World Cup Championship Round', available at https://www.ilsa.org/Jessup/Jessup06/2006PhilipCJessupIntlLMoo.2-17.pdf (accessed 22 December 2021).

2 Information about this moot can be accessed on https://www.chr.up.ac.za/worldmoot.

3 See 'Mr. Christof Heyns, former Special Rapporteur on extrajudicial, summary or arbitrary executions', available at https://www.ohchr.org/EN/Issues/Executions/Pages/ChristofHeyns.aspx (accessed 22 December 2021).

4 See Christof Heyns 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', A/HRC/26/36, 1 April 2014.

5 Ibid. See, eg, paras 133-145.

6 See Human Rights Watch 'Stopping killer robots: Country positions on banning killer autonomous weapons and retaining human control' (2020), available at https://www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and (accessed 22 December 2021).

7 GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

8 HRC General Comment No 37 (2020) on the right to peaceful assembly (article 21), CCPR/C/GC/37, 11 September 2020.

15

Christof in Oxford

Nazila Ghanea, Andrew Shacknove** and Kate O'Regan****

Nazila Ghanea and Kate O'Regan

Professor Christof Heyns was an extraordinary colleague. It is astounding that he was able to give so much of himself to the International human rights law (IHRL) programmes in Oxford over so many years, considering the many other demands on his time, but he did so with unflinching loyalty and good humour.

He guided UN processes, advanced regional compliance, innovated academic partnerships, carried many responsibilities and yet was always ready to encourage and exchange with others. He effortlessly inspired our students with his passion for human rights. Whether in his seminars, talks or dissertation supervisions, his curiosity and dedication to human rights law was infectious.

As soon as we heard of the untimely passing of our dear colleague, mentor and friend, there was an outpouring of profound sadness and grief from the Oxford IHRL community around the world. There was also a profound sense of a greater loss to the international human rights community as a whole. 'Staggering loss' summarises the sentiments that were shared with us from the IHRL community in India, the UK, Canada, Kenya, Australia, and the US.

Many from around the world shared of their admiration of Christof as a great legal scholar, human rights champion, activist, dean, educator, and a deeply empathetic and warm character. For us in Oxford, he had been part of our IHRL programmes for over 13 years, as supervisor, assessor, course tutor and key enabler of our Commonwealth Scholarships. Those scholarships are now in their tenth year and have greatly enriched our cohorts with outstanding scholars. The partnership with the University of Pretoria, which Christof arranged, helped us reach many of those excellent applicants.

He'd been a little less present in Oxford in recent years due to his UN Human Rights Committee responsibilities, but we were looking forward to him teaching a full course for the Masters again in July 2021. Indeed, Nazila's predecessor Dr Andrew Shacknove had agreed with him to only

'let him go' to the UN on condition of his return as soon as possible to our Oxford summer masters residentials.

Prior to his appointment to the UN Human Rights Committee, he had been appointed as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, in 2010. His accounts to us on how he found himself carrying forward that mandate was shared with characteristic self-effacing humour. His contributions to that mandate were undoubtedly impressive. His convening power and marvellous ability to create a learning environment meant that his work benefitted from the latest expertise and insights of a wide range of actors.

At Oxford he would often present the germ of the ideas for his subsequent reports with such openness. He would present the challenge, raise the key legal questions and dilemmas, the range of views on the matter and then open the floor and allow everyone in the room to feel that their contributions would help shape that report. One of the seminars was on lethal autonomous robotics and emerging autonomous weapons systems – later his reports A/HRC/23/47[1] and A/HRC/26/36[2] to the Human Rights Council. He carried over his work as a Special Rapporteur on appointment to the UN Human Rights Committee in 2017 and advanced the Human Rights Committee general comment 36 on the right to life and another on the right to peaceful assembly in general comment 37. This not only showed his art as a seasoned educator and his confidence but also inspired students and colleagues to take forward research in related fields.

He was not just academically inspirational. He was incredibly personable too. He managed to enjoy great respect alongside his calm informality. He would jump at the opportunity to share his musical talents at our events, whether performing alongside professional musicians at formal dinners or jamming and singing Beatles music in a reception in a back garden. We had the pleasure of Fearika and Christof being in Oxford on their 30th wedding anniversary where everyone enjoyed brownies for the occasion, which they accepted with such warmth. On another occasion, he arrived out of breath at a garden party having cycled up a steep hill and quipped 'I didn't take the word 'hill' in the address seriously enough!'.

He would also take every opportunity to reach out on a personal level to ask how people are and support them. He would never forget the last conversation and would follow up. He would keep up with graduates around the world, meet them on his trips, and update us about them. As one student captured, Christof was not only an incredibly knowledgeable person but 'equally kind'. Or as a fellow faculty member stated in a way that resonated with so many of us: he had 'a big intellect, and a big heart'; he was 'a perfect example of the fact that one can be kind and gentle, and yet very strong'. That one

need not be in a constant 'crusading mindset … every once in a while being fun-loving is a perfect complement to seriousness'.

In processing the required 'Global Talent Visa' for him as a person of 'exceptional global talent', and in his characteristic good humour, he quipped just in the month before his passing that it was flattering to be certified by Oxford as a global talent and that he was looking forward to showing that to his mother. It is worth repeating what we put in the letter of support, as a token of the immense appreciation we had for him at Oxford:

> The main benefit to Oxford of Professor Heyns presence is that students will be learning from one of the leading figures in the field and, in particular, a figure who has helped to shape the field as it currently is. By drawing on the best expertise, the appointment helps maintain and build on the University's reputation as one of the leading universities in the world, thereby attracting the best students. We are fortunate to be able to attract such an outstanding scholar to Oxford and we support his application for the Global Talent visa in the strongest possible terms.

Of course, Christof's involvement with the University of Oxford went beyond the IHRL programmes. Christof Heyns was one of the first people the Bonavero Institute approached to join its Advisory Council when it is was established in 2018. He was a wonderful member of the Advisory Council: engaged, thoughtful and constructive, and he is much missed. But in addition to his work on the Council, he made a substantial contribution in the few short years of the existence of the Bonavero to its work.

First, we worked with Christof and his colleagues, Stuart Casey-Maslen and Thomas Probert, in establishing a series of non-credit research training programmes on human rights for Oxford students. The first series was on the lawful use of force and the second series on the right of peaceful assembly. The courses were convened over the years at the Bonavero by Dr Annelen Micus, the Bonavero head of programmes, and by the Bonavero research and programmes manager, Dr Christos Kypraios. Students undertook research to review the law in a range of jurisdictions governing either the use of force by law enforcement officials or the law practice relating to the right of peaceful assembly. The work of the students is now available on the two websites established by the Centre for Human Rights at the University of Pretoria to capture the research undertaken.[3] Second, Christof spoke at several events at the Bonavero on his work as a member of UN Human Rights Committee, and, in particular on the Committee's work drafting General Comment 36 on the right to life and General Comment 37 on the right of peaceful assembly. Indeed, shortly before he died so tragically in April, he had been engaged in a lively discussion with Marko Milanovic from the University of Nottingham,[4] a discussion which is still available

on the Bonavero YouTube site. Third, Christof also acted as an examiner of graduate research degrees of Oxford students.

Christof was an inspiring figure. Above all, his commitment to the project of human rights was unwavering. In addition, he was a kind and insightful mentor and teacher, a lively presenter, who did not shy away from disagreement or debate, but always engaged in it constructively, and an informed and wise guide on institutional strategy.

And we'll end our piece with the address of Dr Andrew Shacknove, Founding Director of the International Human Rights Programmes, University of Oxford. He shared these remarks at the University of Pretoria's symposium held in Christof's memory on 28 April 2021:

Andrew Shacknove

Fearika and Family, Rector, Frans and colleagues, Good morning. It is an honour to honour Christof. It is also easy to imagine him listening in now, though his modesty would cause him to struggle. Given his informality, and the informality of our friendship, he might well ask: 'Andy, what on earth are you doing in a gown?'

There are two answers, the narrow one and the broader one. The narrow answer is that Professor Richardson, our Vice-Chancellor, has asked that I express on her behalf and on behalf of this University her sympathies to Fearika and her family, to the University of Pretoria and to all of you who called this committed, talented and loving man your friend. You, generously and with sacrifice, shared your treasure with us and our students over many happy summers. So, the narrow answer is that, if you speak on behalf of the boss and the team, you wear the uniform. The broader answer you already know: each cultural group has it symbols of respect and shared membership. Every one of the dozens of tutors and hundreds of students Christof taught here would wear their gowns now too if they could. For all of us, Christof made learning a joy. His students prided themselves on their impersonations of his animated lectures. They went on to use his ideas in their own work in 100 countries.

Oxford can claim almost no role in the development of Christof's intellectual life or career. Following a well-established colonial practice, we were among the many free-riding beneficiaries in the North. For our students, tutors and for me, Christof offered us something unique: a combination of a commitment, generous spirit, sense of possibilities and legal skills coming from his life in South Africa with the capacity he developed in the United States to engagingly apply social science analysis to human rights problems. Christof often expressed his

gratitude and affection for Professor Reisman of the Yale Law School. Some people are good at first principles, or constructing a thematic and schematic structure, or quantitative analysis, or the strategies and tactics for implementation. Christof was good at it all, and in ever-expanding fields of expertise.

He no doubt contributed to your organizations and to you personally in similar ways. He moved fluidly between so many institutional settings, helping all of us. He had ambitious objectives and he achieved them often. He did so in part because he had the imagination and moral compass to see what was desirable and a shrewd ability to recognize the limits of what was possible. He has a clear conception of social change, his role in it and was a master innovator.

This gathering is a testament to how many types of institutions Christof understood and changed. Alongside each of us stand a great many students, colleagues and victims of human rights abuses his actions helped in life-changing ways. But, for a person who understood institutions so well, and was part of so many, he looked on them with a charming irreverence. For example, because of various requirements of our universities and donors, we agreed it was necessary each summer to hold an AGM of a respectable length. Christof thought two hours sounded about right also happens to be enough time to comfortably canoe up and back to Christ Church Meadows. He further suggested my Labrador retriever take the minutes, as confidentiality could be assured. This was the same stretch of river where Lewis Carroll rowed Alice and her sisters. Under any other business, which was most of the meeting, we compared the meanings of authority in international law and *Wonderland*. I may be the only one here whose fondest memories of Christof are at AGMs.

Fearika and family, Rector and colleagues, it was a privilege to be included in your lake-side service for Christof and for a moment to join your community. What you said helped, thank you. The service raised a question that I leave you with: why, apparently, is there no thoughtful, thematic book on the role of Afrikaners in the anti-apartheid and human rights movements? Kate O'Regan thinks it may have something to do with modesty. You will know the answer better than I. Perhaps one of your graduate students will write such a book and consider mentioning Christof in the dedication.

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** Founding Director of the International Human Rights Programmes, University of Oxford.
*** Director, Bonavero Institute of Human Rights, Oxford; former Judge, South African Constitutional Court.

1 https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf (accessed 17 December 2021).
2 https://ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc (accessed 17 December 2021).
3 See www.rightofassembly.info and www.policinglaw.info (accessed 17 December 2021).
4 Their conversation is recorded and is available on YouTube here: https://www.youtube.com/watch?v=N5ZGGpCHpnc&list=PLwj4-Geqxth_ww5LTXKFgsc0Vj0VK-CeK&index=23 (accessed 17 December 2021).

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Christof at the UN

Cecile Aptel, Thomas Probert,**
Yuval Shany*** and Yasmin Sooka*****

Considering Christof's many engagements in different regional and global human rights fora, his appointment in 2010 as the United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions surprised no one. He had already become a recognised champion of the cause of human rights across Africa, with his role at the helm of the Centre for Human Rights, his role as the founding editor of the *African Human Rights Law Journal* and the *African Human Rights Law Reports*, as well as his celebrated role in the conception of the Masters programme in Human Rights and Democratisation in Africa. In 2006 the Centre had been awarded the UNESCO Prize for Human Rights Education, with particular recognition of the Masters programme and of the Africa Human Rights Moot Competition, another of Christof's brainchildren. Navi Pillay, who was the UN High Commissioner for Human Rights when Christof was appointed, remembers fondly the appointment of her fellow South African and friend. She speaks for many when she comments that in the years that followed, building on this stellar reputation, 'Christof demonstrated that he had the right combination of expertise, commitment, gravitas, and political acumen to contribute in such a remarkable way to the defence and advancement of human rights. His contributions, first as Special Rapporteur and later as a member of the Human Rights Committee, were all deeply meaningful and will be long lasting. His impact will continue to be felt for many years to come.'

In this short piece, we attempt to provide an insight into the way in which Christof has also left an indelible mark on the United Nations human rights system. Christof's legacy shares many of the core characteristics of the human rights project: a commitment to the *universality* of human rights through the participation of the broadest possible range of stakeholders, at national, regional and global level, from students to police officers, medical doctors to robotic engineers. A contribution to the *indivisibility* of human rights, underlining the importance of economic, social and cultural rights in the enjoyment of a 'life with dignity', and also an insistence on the complementary protections offered to those rights by different legal regimes at the

national, regional and global level. And, throughout, a reminder of the importance of *accountability* to the protection of human rights, of the idea of violations having consequences, and of the failure to investigate being itself a violation of a fundamental norm.

As colleagues and friends of his, our overriding experience of the impression he made on the UN system was the dedication, warmth and curiosity that he brought to even the most procedural or technical dimension of any issue. Christof was deeply committed to defending and advancing human rights, but he was also mindful of the importance of pursuing them humanely. Not only did he selflessly contribute to human rights: he conducted his own life with utmost care for everyone's dignity.

Regional human rights systems

A persistent thread of Christof's time at the UN was his effort to lift up the role of regional human rights mechanisms. He would write in one of his reports to the General Assembly, of their role within the broader international system, that '[t]he universality of human rights cannot mean only that all people from all parts of the world are held to the same standards; universality also requires that people from all parts of the world have a role to play in determining what those standards are in the first place.'[1] Early during his mandate he played an important part in the adoption of the 'Addis Ababa Roadmap', which formalised the relationship between the special procedures of the Human Rights Council and those of the African Commission on Human and Peoples' Rights (African Commission).

Attending a subsequent session of the Commission in Yamoussoukro, Christof underlined the importance of thematic collaboration between focal-points of the regional mechanisms and their UN counterparts, and at that session the Commission adopted a resolution expanding the mandate of one of its oldest special procedure mechanisms, the Working Group on the Death Penalty, so as also to incorporate extrajudicial, summary or arbitrary killings in Africa.[2]

The death penalty was a thematic topic that regularly brought regional mechanisms and UN forums together – Christof often took up invitations to speak at such convenings, where several of the same focal points would join him. He established a constructive relationship on this basis with the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, ultimately contributing toward the right to life (and a moratorium on the death penalty) becoming the focus of the third Jakarta Human Rights Dialogue in 2014. Likewise, it had been at a meeting of the African Commission's Working Group focused on developing a protocol on the abolition of the

death penalty that the seeds of a more thoroughgoing collaboration to develop a General Comment on the right to life were first sown.

The death penalty

In addition to regional initiatives on the topic of the death penalty, Christof also confronted the thematic issue directly at UN level. In 2012, after convening several expert discussions of the topic during his visiting fellowship at Harvard, Christof submitted a thematic report to the General Assembly on the question of the death penalty. This was not the first time the mandate had addressed the issue, and as with those previous reports, Christof's first discussion of the topic focused on the safeguards provided for in international law, around the gravity of the offence, the fairness of the criminal proceedings and the protection of certain offenders.[3] However, even in this report, Christof drew attention to what would become central to his emerging view that international law was 'progressively abolitionist' – namely the narrowing scope of 'most serious crimes'. Drawing on the work of Bill Schabas and Roger Hood, he reminded the General Assembly that at the time of the adoption of the Covenant, states had expected the category of permissible capital offences to narrow over the coming years.[4] While lamenting the number of states that still applied the sentence for a broader range of offences, he asserted that the extent of that category had now shrunk to only those offences involving intentional killing. Throughout his term as Special Rapporteur he would underline this message, and once a member of the Human Rights Committee also ensure that it was reflected in the discussion of most serious crimes in General Comment 36.

The implication of this ever-diminishing foothold for the practice within international legal norms was – for Christof – that states needed to be taking steps along the path toward abolition. In his final report to the General Assembly he made clear that the obligation to comply with the safeguards was an immediate obligation, but that in addition to those restrictions, states should incrementally be diminishing the space for the death penalty, whether through the use of clemency, moratoria or legal reform. The same spirit was ultimately conveyed by the Human Rights Committee, when it said that those states who have not already abolished it 'should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future.'[5]

Fact-finding

In addition to these debates about the extent of the norms, Christof was equally engaged, almost from the first moments of his mandate, in the mechanics of human rights fact-finding, including in very challenging environments. An early, and very high-profile example of this was the case of Sri Lanka.

The work of Christof's predecessor as Special Rapporteur, Philip Alston, and then later Christof's own investigations would bring to the attention of the Human Rights Council significant evidence of violations of the right to life perpetrated during the latter phases of the civil war in 2009. Channel 4 footage which included images of extrajudicial executions allegedly perpetrated by Sri Lankan troops, captured on mobile phones, was made available to Alston. Thanks to the private investigation commissioned by Alston, the first ever to be carried out by Special Procedures, experts were able to confirm the reliability of the footage. Nevertheless, the Sri Lankan government maintained that the videos were doctored or staged and that they had not been taken on mobile phones. In 2010, Channel 4 shared a further five minutes of the extended video with Christof, (now Special Rapporteur). Christof commissioned further private technical reports, which confirmed both the authenticity of the events depicted – from a ballistic and other forensic perspectives – and also that the videos had been recorded on mobile phones. This process not only resulted in Special Procedures revisiting some of their procedures, but also inspired Christof to conduct further work on the potential of new technologies and social media to inform human rights investigations and accountability.

But at the time he also found himself embroiled in a political struggle in the Human Rights Council. Communicating with the Sri Lankan Government, he emphasized that he had not attributed responsibility to the Government of Sri Lanka but had focused on the right to life, highlighting credible evidence. He continued to assert that he was open to dialogue, even though the Sri Lanka government denied him a visa. Christof's work was hugely influential on the international community's perceptions of how the Government of Sri Lanka had conducted the final phase of the war. Until then, Sri Lanka had presented itself as the expert on dealing with asymmetrical conflict and combatting terrorism worldwide. Nothing could be further from the truth as would later be established in the damning report by the Secretary General's Panel of Experts on Sri Lanka, in whose deliberations and findings Christof's work played a critical role.[6]

Until his stint as Rapporteur, Christof had mainly dealt with human rights law, but this early investigation into Sri Lanka, as well as many

of the other issues he would confront as Special Rapporteur, dealt with the intersection between international human rights law (IHRL)and international humanitarian law (IHL), which impacted him profoundly. Unsurprisingly, in his report to the Human Rights Council in 2011, he declared that 'what is reflected in the extended video are crimes of the highest order – definitive war crimes,' although he stressed that further investigations needed to be carried out.[7]

Near the end of his term as Special Rapporteur, Christof would be appointed to another *ad hoc* Human Rights Council investigation into other shocking patterns of events, this time in Burundi. In early 2016, he was one of three experts appointed by the UN High Commissioner for Human Rights, then Zeid Ra'ad Al Hussein, to serve on the UN Independent Investigation on Burundi (UNIIB).[8] He would be working alongside Maya Sahli-Fadel, (with whom he had previously worked in her capacity as a member of the African Commission's Working Group), and Pablo de Greiff, who was at the time the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Christof and his colleagues embarked on an intensive journey that enabled them to prepare their final report to the Human Rights Council in less than six months, and to present it in September 2016.[9] Despite ultimately being declared *personae non gratae* in the country itself, they nonetheless documented hundreds of cases of summary executions, targeted assassinations, arbitrary detention, torture and sexual violence, and described abundant evidence of gross human rights violations, possibly amounting to crimes against humanity. Their prompt and effective work was deeply appreciated – even if questioned by the Government of Burundi – and contributed to clarifying responsibilities in the Burundian crisis, leading ultimately to the creation of a new international Commission of Inquiry.

Autonomous weapons

In addition to these direct fact-finding and investigative assignments, questions of the interplay between IHRL and IHL, and indeed issues of potential responsibility under international law for war crimes, were also central to Christof's contribution to the thematic debate with which his time as mandate-holder will most lastingly be identified – the issue of autonomous weapons. This again was an issue he inherited from his predecessor, Philip Alston,[10] but Christof reported to the Human Rights Council in 2012 that he perceived these technologies to be proliferating and under-studied from a human rights perspective, promising the Council that he would undertake to deepen and expand research and consultation in these areas.[11]

He reported back to the Council the following year reviewing the state of technological development and the announced postures of various leading military powers with respect to the concept of autonomous weapons. He raised questions about the capability of such a weapons platform to comply with the requirements of both IHL and IHRL, but acknowledged the possibility that technological advancement could reach a stage where compliance would be a technical possibility. He nonetheless raised other questions, including (as with his report later the same year on drones) that their availability might lower the political threshold for entering into a war, and – perhaps most fundamentally – the extent to which questions of accountability, such a core value of his approach to the mandate, were complicated by the possibility of opening up the use of force to autonomous systems.[12] He concluded that, even if the weapons could be developed so that, especially if used alongside human soldiers, they could comply with the requirements of the law, there was still a concern that they would 'denigrate the value of life itself.'[13]

His recommendation was that the Human Rights Council should ask the High Commissioner to convene an international expert panel and to undertake a major study on the question. But the issue was principally taken up by the UN in the disarmament sphere, with most discussions taking place in context of the meetings of the states parties to the Convention on Certain Conventional Weapons (the CCW). Christof was invited to participate in this process as a representative from the Human Rights Council, and his engagement with the process throughout the rest of his mandate ensured that there was a channel through which issues from the human rights space could be heard in the CCW, and the other way round.

Throughout these interactions, in addition to the questions concerning the use of lethal robots in war, Christof came also to emphasise the disturbing potential for the use of autonomous systems outside of armed conflict, including of those projecting less-lethal force. He also channelled a number of other human rights concerns in these debates – insisting on meaningful accountability, the implication of non-discrimination (including by emphasising the potential role of those states, including African states, not actively pursuing autonomous systems) and of concepts such as dignity.[14]

Clarifying norms

If the challenge of autonomous weapons was about applying longstanding norms to the specificity of new technologies, Christof was also at the forefront of sustaining and clarifying norms around far more well-established human rights issues – such as peaceful assemblies and death investigations.

With the 'Arab Spring' dominating international headlines at the time, Christof, who had written his doctorate on civil disobedience, dedicated his first thematic report to the Human Rights Council to the topic of peaceful demonstrations.[15] This report contributed to an emerging debate within the Council about the question of human rights protections for those engaged in peaceful protest. In the same year, the Council created a new mandate for a Special Rapporteur on the rights of freedom of peaceful assembly and association, and appointed Maina Kiai as the first mandate-holder. After a number of earlier resolutions, in 2014 the Council decided to mandate an *ad hoc* report focussed on producing practical recommendations for the management of protests. The resolution specified that two special procedure mandates should collaborate to hold a number of regional consultations and ultimately to produce a report.[16] For Christof, this presented an opportunity to hold further exchanges with all the relevant stakeholders in an assembly – from civil society organisers to human rights monitors, and from front-line police officers to municipal authorities. In his typically collegiate manner, he felt it would be important to broaden the number of more detailed inputs into the actual drafting of the report and suggested the creation of an Advisory Panel of nine experts from around the world.

As part of this two-year process, Christof, Maina Kiai, and their respective teams held regional consultations in Santiago, Pretoria, Istanbul and in Geneva. These culminated in a meeting with the Advisory Panel, hosted at the Geneva Academy, during which the lessons learned during the consultation, and the differing experiences of the two mandates in approaching the issue of managing assemblies could be teased out. Ultimately a very practical ten-point structure was adopted around which the report would ultimately be written.[17] Flowing from the principle of precaution that Christof did so much to advance, many of the recommendations underlined the importance of training and preparations, along with necessary domestic legal frameworks. The report also emphasised that, along with their duty to respect the right of peaceful assembly, law enforcement and other public officials have a responsibility to *facilitate* the right. The ten-point structure, translated and promoted both by OHCHR, the two Rapporteurs, and an engaged

network of civil society organisations, has guided a great deal of advocacy since then, and is regularly referred to by the UN and others.

Over a similar period of the mandate to when this joint report was written, Christof and his team were also undertaking another significant consultative exercise to clarify the norms relevant to his mandate, this time with respect to the issue of proper forensic investigations, with the revision of the Minnesota Protocol. Christof often attributed the idea of the revision to a conversation with a forensic pathologist during one of his country visits, to India in 2012, where he was told that the Minnesota Protocol was still used, and was a gold-standard reference point for exactly what constituted an extrajudicial, summary or arbitrary execution, but that it was also in needs of an update.

By the mid-point of his mandate, Christof had already become convinced that the central challenge for the protection of the right to life was not one of norms but one of facts. Nobody disputed that arbitrary killing was wrong, and there were few debates to be had about whether particular categories of killings were or were not arbitrary. Instead, the nub of the matter always came down to whether or not authorities had been implicated in a death, and if so exactly what the circumstances of the incident were. At the heart of the mandate, therefore, lay a reliance on effective death investigations.

Again, Christof was determined that such an important normative reference point should not be the result of only a small number of voices. As with the joint report of assemblies, he chose to formalise an Advisory Panel of experts to review and make inputs into the revision process at various points. But given the technical nature of much of the original text, and of the field in general, he realised the revision would also require a more hands-on team of drafters, and so created two Working Groups (one focussing on legal questions, guided by Sarah Knuckey, who had worked with Philip Alston as a special advisor to the mandate and been involved in a number of complex investigations, and one focussing on the issues of forensic science and investigative good-practice, guided by Morris Tidbal-Binz, at that time Head of Forensic Services at the ICRC).[18]

The result of the process was an updated document that provides an invaluable resource for capacity building with a wide range of stakeholders in the investigative and criminal justice sectors, but one that also served to underline the fundamental role of accountability: that the failure properly to investigate a suspicious death will amount – in itself – to a violation of the right to life.

Human Rights Committee

This conviction about the importance of accountability was one Christof would carry with him into his new role, when shortly after concluding his term as Special Rapporteur, and while he was still servicing on the UNIIB, he was extremely honoured to find himself nominated to become a member of the UN Human Rights Committee.

Christof joined the Committee as an already established international expert on the topics addressed in the general comment it was working on at the time. Indeed, during the last months of his term as Special Rapporteur he had taken the opportunity – informally and collegially as always – to engage with that General Comment's two rapporteurs, the late Sir Nigel Rodley and Yuval Shany, drawing attention to the normative developments of both the Minnesota Protocol and the African Commission's own General Comment on the right to life (adopted the previous year). As a result, from his first days on the Committee, he became a leading authority on limits on the use of lethal and less-lethal force in policing, on investigations of potentially unlawful deaths and on the use of lethal technology in policing and military contexts.

During the formulation of General Comment 36, Christof ensured that the positions of the Committee would be compatible with other international instruments on the right to life, in particular on use of force in policing. He was also heavily involved in the drafting of the paragraph on lethal autonomous weapons, which called for a moratorium on their use, until their compatibility with the right to life is fully established, and made significant contributions to other paragraphs – on conditions for use of lethal force by the police, investigation of cases potentially involving unlawful deaths, the relationship between the death penalty and due process violations and the interplay between article 6 and 7 of the Covenant in death penalty cases. Christof's interventions in the drafting process were characterized not only by their high professional quality and compact delivery, but also by their pragmatic nature and his keen awareness of the need to effectively communicate the normative outputs of the Committee to states – the principal target audience for its work.

This commitment to clarify and effectively to communicate norms around issues of vital concern also shaped an initiative Christof was working on outside of the Committee. In a 2014 report on 'less-lethal' weapons in law enforcement, Christof had recommended that OHCHR create an international group of experts to establish standards or at least good practice for their use.[19] Given their widespread use in crowd control, this recommendation was repeated in the joint report he wrote

with Maina Kiai.[20] Christof emphasised it again later in 2016 in the final report he drafted for the UN General Assembly.[21]

Always conscious of the importance of sustaining momentum around a normative recommendation, Christof seized the opportunity to build upon a pre-existing collaboration with the Geneva Academy to bring together the emerging network of 'right to life focal persons' from the different regional mechanisms and from relevant NGOs. Over a number of meetings held between 2017 and 2019, this 'academic working group' turned into a drafting group which OHCHR quickly realised provided an opportunity to act on the recommendations received from various quarters (including, by then, a resolution of the Human Rights Council) to produce a Human Rights Guidance on Less Lethal Weapons in Law Enforcement.

The Guidance was an exercise in codifying minimum standards about the use of certain weapons, and the general prohibition of others, and also a process-focussed instrument – articulating the responsibilities states have to be transparent in their procurement and testing of weapons to be used in law enforcement, to conduct appropriate training of officers, and to have in place robust monitoring systems to track the use of force and its impact on the rights of the general population.

The project also allowed Christof to remain engaged with a network of individuals working around the right of assembly, a group whose expertise he would come to embrace after he was appointed by the Human Rights Committee to take up the drafting of its General Comment on article 21 of the Covenant.

Whereas in the formulation of General Comment 36 Christof had been a constructive supporter, the next General Comment 37 on the right of peaceful assembly was wholly his brainchild. He prepared the first draft for the General Comment and shepherded with skill and acumen the complex discussions on subsequent drafts before the Committee, including inputs from governments, civil society and other human rights bodies, bringing the Comment to conclusion within a relatively short time (only two years, half the amount of time required for General Comment 36). Putting into effect his impressive organizational capabilities, Christof arranged ahead of the finalization of the text for a series of expert consultations and workshops and a Committee retreat, with a view to focusing minds, and informing and expanding the intellectual horizons of the members of the Committee.

General Comment 37 contains many important legal clarifications and innovations, which render it a landmark general comment. Among the elements which stand out, one may note the clear definition adopted by the Committee on the dividing line between protected peaceful assembly and unprotected assemblies characterized by widespread serious violence or unlawful incitement, the strong position

taken against legal regimes of *ex ante* authorization of assemblies (accepting, however, domestic laws requiring *ex ante* notification of non-spontaneous assemblies), the expectation that police would facilitate, not hinder, the holding of assemblies and the almost total ban on the use of lethal and less-lethal force in policing assemblies. The Comment also strived – following Christof's prodding – to 'future proof' itself, by referring to online assemblies as a growing medium for purposeful virtual 'gatherings' and to the increasing intertwining of offline and online activities around the organization and carrying out of assemblies. It is befitting that this impressive and comprehensive document, which was published in late 2020 and which has been received with almost universal acclaim, constitutes Christof's last major professional contribution to the development of international human rights law.

Continuity

While Christof decided that he would not stand for a second term on the Human Rights Committee, it was clear that his contribution to the UN human rights project was far from over. He had a great many ideas for initiatives and improvements.

In the late 1990s and early 2000s, at the request of the UN and in co-operation with the High Commissioner for Human Rights, Christof and Frans Viljoen had led a ground-breaking research collaboration involving 20 researchers, based in as many countries, in an effort to establish the impact of six different human rights treaties[22] at the domestic level. This resulted in the publication in 2002 of *The impact of the United Nations human rights treaties on the domestic level*.

With his usual dynamism and passion, 20 years later, Christof was ready to renew this initiative and reassess the findings, using the 2002 publication as a baseline to assess how much progress would have been made. He passionately presented his ideas to a number of staff of the UN Human Rights Office and managed to convince several to advocate successfully for this. The updated book will be finalised in 2022, but, as ever interested in the affordances of new technologies, Christof was also pursuing the potential for a more dynamic, 'living' impact study, using machine-learning to populate an Impact Database 2020+. The insights from such a resource could prove a vital resource as the Treaty Bodies currently consider a wide range of different potential reforms.

Meanwhile, as noted at the outset, for Christof, questions of human rights advocacy and agenda-setting at the international level had always been intimately tied up with questions of human rights education. The Centre for Human Rights in Pretoria had in many ways been a model for this mutually-reinforcing approach. Throughout his time at the UN

he had simultaneously been promoting endeavours such as the World Moot Court Competition, developing research partnerships between UN agencies and universities, and encouraging initiatives to have OHCHR take on more interns from the African continent.

The interconnection between these objectives became more explicit with the advent of the Sustainable Development Goals (SDGs). Christof had welcomed their development, and attempted to lend some weight to those advocating for clear target-setting with respect to violence reduction in SDG 16.[23] But after their adoption he also became a champion for mobilising around the synergy between Goal 16 and Goal 4, specifically the target related to human rights education. Both by discussing the potential of school- or other moots in international SDG conferences, or by taking the initiative in Pretoria and creating a new doctoral programme geared around the topics of SDG 16, Christof was committed to ensuring that there could be a new cohort of thematic experts to continue the debate, to strengthen the norms and to pursue the justice that he had been beginning over the past decade.

Conclusion

The legacy Christof leaves on the international stage is a massive and far-reaching one. The normative documents, Human Rights Council processes, and the reforms that he leaves behind will shape the debates around the protection of human rights, and especially the rights to life and of peaceful assembly, for many years to come. And this is to say nothing of the legacies his approach to his UN work has left in other places, whether in regional mechanisms (both the African Commission, the African Court and the ASEAN Inter-Governmental Commission), at national level (with reports that shaped national conversations in India and Mexico, as well as countless other places) or in other related areas of international law and policy, including IHL, disarmament, and international criminal law

He viewed the opportunity to conduct the work for the UN as a privilege and undertook it with pride. He also brought an incredible collegiality to the mandate, becoming incredibly popular with those UN staff working with him (and many who were not), with his fellow Special Rapporteurs, and later with his colleagues on the Human Rights Committee. Many would later recall how his generous, unpretentious and sometimes playful personality combined with his passionate determination and phenomenal work-ethic.

He was a champion of reform, both structural and technical, identifying and promoting the possibilities of new technologies and approaches. But he also approached these reforms, as well as his wider work, with an open mind about what might prove effective.

Christof was an expert on an intimidatingly vast range of subjects, but he was an expert who would often rather be listening than speaking. With respect to most of the topics he addressed over this decade, he ensured that before standing before the world he would first engage with as diverse a group of experts as possible, both through extensive reading and by physically convening them for a discussion. But when he did speak, he did so in a way that clarified. He cast a spotlight on serious abuses of human rights occurring in different parts of the world, as well as on thematic issues that otherwise might have gone unseen.

His vision of progress was wide-ranging and ambitious. His intellectual curiosity and deep commitment meant that he was constantly involved in new projects, partnerships and collaborations. His memory will inspire all of us fortunate enough to have worked with him and countless others, touched directly or indirectly by his many contributions.

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** Head of Research at Freedom from Violence, ICLA; former Research Consultant and Special Adviser to Christof as UN Special Rapporteur on extrajudicial, summary or arbitrary executions (2013-2016) and as Member of the Human rights Committee (2017-20).
*** Hersch Lauterpacht Chair in Public International Law at the Hebrew University of Jerusalem; former Member of the Human Rights Committee (2013 to 2020); Chair of the United Nations Human Rights Committee (2018-2020).
**** Former Executive Director of the Foundation for Human Rights in South; Chair of the Commission on Human Rights in South Sudan since 2016.

1 A/69/265, para 18.
2 Resolution on the expansion of the mandate of the Working group on Death Penalty in Africa, ACHPR/Res.227(LII)2012, October 2012. The African Commission had previously appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings in Africa (from 1995 to 2001).
3 A/67/275.
4 In the years following this report, Christof would delve deeper into the question of progressive abolition and its implications in a number of co-authored chapters. See C Heyns & T Probert 'The right to life and the progressive abolition of the death penalty' in *Moving away from the death penalty: argument, trends and perspectives* (United Nations 2015); C Heyns, T Probert & T Borden 'The right to life and the progressive abolition of the death penalty' in MM de Guzman & DM Amann (eds) *Arcs of global justice: collection of essays in honour of William Schabas* (Oxford University Press 2018).
5 General Comment 36, para 50.
6 One of the authors, Yasmin Sooka, served as a member of this Expert Panel from 2010 to 2011.
7 See A/HRC/17/28, Appendix, para 41.
8 UNIIB was established by the UN Human Rights Council through resolution A/HRC/S-24 of December 2015.
9 http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Pages/ListReports.aspx (accessed 8 January 2022).
10 Alston had flagged in his final report the potential impact of lethal autonomous robotics on the right to life. See A/65/321.
11 A/HRC/20/22, para 19.

12 A/HRC/23/47. On drones, see A/68/382, and, at greater length, C Heyns, D Akande, L Hill-Cawthorne & T Chengeta 'The international law framework regulating the use of armed drones' (2016) 65 *International and Comparative Law Quarterly* 791-827.
13 A/HRC/23/47, para 109.
14 This latter point built upon the idea of a dignified life developed especially by the African Commission. Christof elaborated on it later, see C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33 *South African Journal on Human Rights* 46-71.
15 A/HRC/17/28.
16 A/HRC/RES/25/38.
17 A/HRC/31/66.
18 Morris Tidbal-Binz replaced Agnès Callamard, Christof's immediate successor, to become the seventh mandate holder as Special Rapporteur on summary executions in April 2021.
19 A/69/25, para 88.
20 A/HRC/31/66, para 67(i).
21 A/71/372, para 61.
22 The Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social, and Cultural Rights, the Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child.
23 A/69/265, para 145.

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Christof Heyns and the 'War against Terror'

*Johan D van der Vyver**

Some time ago, the University of Pretoria made frontline news because of the standing of three of its faculty members in institutions of the United Nations Organization. What made it quite unique was the fact that the persons concerned did not only come from the same university, but actually served in the same faculty. Those dignitaries were (a) Professor Dire Tladi (1975-), professor of international law at the University of Pretoria who serves as a member (currently Vice-Chair) of the International Law Commission that was established by the General Assembly of the United Nations Organization in 1947 under article 13(1) of the Charter of the United Nations to 'initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification'; (b) Professor Ann Skelton (1961-), at the time Professor of Law and head of the Centre for Child Law of the University of Pretoria, who was appointed as a member of the United Nations Committee on the Rights of the Child; and (c) Professor Christof Heyns (1959-2021), who had been Director of the Centre for Human Rights (1999-2006) and Dean of the Law Faculty (2007-2010) of the University of Pretoria.

In 2006, the Centre for Human Rights received the UNESCO Prize for Human Rights Education in recognition of the LLM degree in Human Rights and Democatisation in Africa, and the Human Rights Moot Court Competition, orchestrated by the Centre under the leadership of Christof Heyns. Christof stemmed from a highly prestigious family with a strong commitment to human rights. His father, Professor Johan Heyns (1928-1994), was a professor in theology at the University of Pretoria and Moderator of the Dutch Reformed Church (*Nederduitse Gereformeerde Kerk*) in South Africa (1986-1990). In 1980, Professor Johan Heyns voiced publicly, for the very first time, critique against the government policy of apartheid and the pro-apartheid stance of the Dutch Reformed Church.

Within the United Nation structures, Christof served as the Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016) and as a member of the Human Rights Committee (2017-2020), the body that oversees implementation of the *International Convention*

of Human Rights, 1966. His commitment to extra-judicial executions is the main focus of this contribution in his memory.

Extra-judicial executions

The terrorist attacks of 11 September 2001 executed by the revolutionary Islamic group al-Qaeda and which destroyed the World Trade Center in New York, caused excessive damage to the Pentagon premises in Washington DC, and caused the death of close to 3000 people (2977 victims and 19 hijackers), sparked the American 'War on Terror'. It included an intensive manhunt (2001-2011) to find Osama bin Laden (1957-2011) responsible for planning the attack, which reached a dramatic climax on 2 May 2011, when American armed forces in the early hours of the morning attacked a dwelling in Abbottabad in Pakistan where Osama Bin Laden had been in hiding. Bin Laden was shot and killed in the attack.

The legality of the killing has been questioned by some analysts. For example, on 6 May 2011, Christof Heyns, in his capacity as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, and Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, issued the following joint statement:

> Acts of terrorism are the antithesis of human rights, in particular the right to life. In certain exceptional cases, use of deadly force may be permissible as a measure of last resort in accordance with international standards on the use of force, in order to protect life, including in operations against terrorism. However, the norm should be that terrorists be dealt with as criminals, through legal processes of arrest, trial and judicially decided punishment.
>
> Actions taken by States in combating terrorism, especially in high profile cases, set precedents for the way in which the right to life will be treated in future instances.
>
> In respect of the recent use of deadly force against Osama bin Laden, the United States of America should disclose the supporting facts to allow an assessment in terms of international human rights law standards. For instance, it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden.
>
> It may well be that the questions that are being asked about the operation could be answered, but it is important to get this into the open.[1]

In his report of 30 March 2012 to the Human Rights Council, Special Rapporteur Christof Heyns, referring to the killing of Osama bin Laden, stated:

> Human Rights law dictates that every effort must be made to arrest a suspect, in accordance with the principles of necessity and proportionality on the use of force. In cases where international humanitarian law may apply,

> the situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of an armed conflict.[2]

In a subsequent report, Professor Heyns lamented the fact that 'some information' provided by the United States that related to the killing of Osama Bin Laden 'did not provide adequate clarification of the exact circumstances insofar as issues of the use of lethal force are concerned'.[3]

The supposition that the killing of Osama bin Laden amounted to 'extrajudicial killing without due process of law' was also shared by some academics, such as Professor Nick Grief of Kent University.[4]

Harold Hongju Koh, at the time Legal Advisor to the US Department of State, in an address at the Annual Meeting of the American Society of International Law delivered on 25 March 2010 in New York gave assurances that '[i]n ... all our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law'.[5] In a subsequent statement, Harold Koh stated that Osama bin Laden was legitimately killed within the confines of international humanitarian law:

> Given bin Laden's unquestionable leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force ... Under these circumstances, there is no question that he presented a lawful target for the use of lethal force ... Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing forces to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against the belligerent, under the circumstances presented here.[6]

A fundamental distinction between the point of departure of American spokespersons such as Harold Koh on the one hand and Christof Heyns on the other hand was whether the killing of Bin Laden occurred in the course of an armed conflict (Harold Koh's assumption), or whether on the contrary it was an instance of extra-judicial execution (Christof Heyns' assumption). If Bin Laden was killed within the confines of an armed conflict and was a legitimate target, the only circumstance under which the killing could have been censurable is if it could be shown that he had surrendered or was at the time *hors de combat* through sickness, having been wounded, or in virtue of any other cause. This was most likely not the case and his killing was therefore fully justified under

the prevailing rules of international humanitarian law; that is, if one can assume that the American 'war against terror' is indeed an armed conflict within the confines of international humanitarian law.

The position taken by Christof Heyns in this regard subsequently derived support from refinement of the concept of 'armed conflict' in international law. Traditionally, 'armed conflict' was said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[7] The major focus was on distinguishing an armed conflict from violent acts that are no more than 'banditry, unorganized and short-lived insurrections, or terrorist activities,'[8] or as stated in the Statute of the International Criminal Court, 'situations of internal disturbances, and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.'[9] The key components that qualified acts of violence to become an armed conflict were (i) the intensity of the conflict, and (ii) the organisation of the parties to the conflict.[10]

In recent years another constituent element of the concept of 'armed conflict' has come to be emphasised, namely certain territorial confines, such as a war zone or battlefield as the precinct of combat. Emphasis on the territorial dimension of 'armed conflict' became a critical issue in the ongoing debate whether or not the 'Global War on Terror' ignited by the terrorist attacks of 11 September and intensified by the ISIS crises[11] is indeed an 'armed conflict'. Can the United States apply the rules of international humanitarian law to distant targeting of, and drones strikes against, suspected terrorists wherever they might be found, in which event the dictates of international human rights law must be observed, or is the targeting of suspected terrorists beyond the confines of a territorially defined war zone and therefore merely a matter of law enforcement (arresting suspected criminals)?

It might be noted that American courts have often used words and phrases denoting the territorial confines of armed conflicts. It has thus been decided that the President of the United States does not have the power to detain as an enemy combatant an American citizen arrested on American soil 'distant from the zones of combat.'[12] In another matter, Kennedy, J, delivering the opinion of the Court, referred to 'an active theater of war';[13] Hudson, J (dissenting) referred to the 'zone of battle';[14] while Sentelle, J, delivering the opinion of the Court in another case, had occasion to note that 'Afghanistan remains a theater of active military combat'.[15]

It is therefore safe to say that the 'Global War on Terror' is not an armed conflict since the American armed forces launched attacks through distant targeting of suspected terrorists wherever they could be found and did not confine their attacks to a defined battlefield or

war zone. Christof Heyns, therefore, had it quite right in his assessment that those perpetrators must not be killed but had to be arrested and brought to trial.

Homage to Mahatma Gandhi

Christof Heyns was awarded the Doctor of Laws degree of the University of the Witwatersrand, Johannesburg in 1991 based on a dissertation entitled *A jurisprudential analysis of civil disobedience*. It was a great honour in my own academic career that I was selected by Christof to serve as the supervisor of his dissertation, which included what can be evaluated as a homage to the Indian tycoon, Mahatma Gandhi (1869-1948).

Gandhi came to South Africa in 1893 and stayed in the country, practicing law, until 1915. His involvement in civil disobedience was sparked when during the night of 7 June 1893 he was thrown off a train in Pietermaritzburg for sitting in the first-class coach of the train reserved for whites. Gandhi defended his right to sit in that section of the train based on the Indian caste system that distinguished between the rights of an upper class and a lower class within the Indian community. He claimed that he had the right to travel in the first-class section of the train because he was not a 'coolie' (the working class) but belonged to the upper class. His philosophy on civil disobedience came to be depicted as 'passive resistance' – or as he preferred to call it, satyagraha (from satya, meaning truth, and grapha, meaning grasping, that is, grasping the truth, or holding on to truth). One must clearly demonstrate one's objections to injustices but without obstructing the daily livelihood of others. I remember as a child growing up in Durban seeing Indians holding banners at the side of the road but without interrupting the flow of traffic or the movement of pedestrians on the adjoining sidewalk.

Based on the caste system, Gandhi believed that 'the white race in South Africa should be the predominant race'.[16] However, civil disobedience executed on basis of passive resistance (*satyagraha*) became the main focus of his political directives in South Africa. When he returned to India, the caste system reminded him of apartheid practices in South Africa and he spent much of his time in India to abolish that system. In the closing chapter of his dissertation, Christof Heyns attributed as a unique contribution of Gandhi the fact that 'he was the first to perceive and to use the newly emerging opportunity to rally people under the banner of non-violent resistance',[17] but that the history of Gandhi in South Africa illustrates that 'some measure of human suffering appears to be unavoidable in the quest for a new and better world'.[18]

It is perhaps worth noting that the Secretary-General of the United Nations, Ban Ki-Moon on occasion of the International Day of Peace on 2 October 2008 in an address to the General Assembly proclaimed that Gandhi's legacy is more important today than ever; and that Chief Albert Luthuli (1899-1967), leader of the African National Congress, in 1958 became the first South African to receive the Nobel Peace Prize, which was based on his policy of bringing about peace and reconciliation in South Africa by peaceful means.

Concluding observations

Christof Heyns and I have come together ever so often as friends and colleagues, including during my annual stay at the University of Pretoria as an extraordinary professor in the Department of Private Law. We could also arrange his participation in a conference of the Center for the Study of Law and Religion of Emory University that was held in Franschhoek in South Africa in March 1997 on *The problem of proselytism in Southern Africa: legal and theological dimensions*. Christof Heyns and Danie Brand delivered a joint paper at the conference entitled 'The constitutional protection of religious human rights in Southern Africa'.[19] It contains an elaborate exposition of constitutional regulations of religion in countries such as Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. They argued that religious liberty is the fundamental basis for the general development of human rights law, and since religious rights are well protected in African constitutional systems the recognition of rights as basic human rights 'must surely enjoy a high level of probability'.

As a proponent of human rights in Africa and a voice calling for peaceful means of political change Christof Heyns has made his mark that will remain on the forefront of our thinking for many generations to come.

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1 Press Release, UN Office of the High Commissioner for Human Rights, Osama bin Laden: Statement by the UN Special Rapporteur on summary executions and on human rights and counter-terrorism (6 May 2011), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E; and see also Arabella Thorp, 'Killing Osama bin Laden: Has Justice been Done?' House of Commons Library, Standard Note SN/IA/5967, at 6 (16 May 2011); C Heyns & S Knuckey 'The long-term international law implications of targeted killing practices' (2013) 54 *Harvard International Law Jourbal* 101, at 106.

2 Human Rights Council, 12th Sess, Agenda Item 3, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns', para 77, UN Doc A/HRC/20/22/Add.3 (30 March 2012).

3 Human Rights Council, 12th Sess, Agenda Item 3, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Observations on Communications Transmitted to Governments and Replies Received', para 82, UN Doc A/HRC/20/22/Add.4 (18 June 2012).
4 See Osama bin Laden: US Response to Questions about Killing's Legality, *The Guardian* (3 May 2011).
5 Harold Hongju Koh, The Obama Administration and International Law, http://www.state.gov/s/1/releases/remarks/139119.htm.
6 Harold Hongju Koh, The Lawfulness of the U.S. Operation against Osama bin Laden, http://www.state.gov/s/l/releases/remarks/139119.htm.
7 See, for example, *Prosecutor v Duško Tadić* aka 'Dule' (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), Case IT-94-1-A, para 70 (2 October 1995).
8 *Prosecutor v Duško Tadić* (Judgment), Case IT- 94-1-T, para. 562 (7 May 1997); and see also *Prosecutor v George Rutaganda* (Judgment and Sentence), Case No. ICTR-96-3-T, para. 92 (6 December 1999); *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Muskliu* (Judgment), Case No. IT-03-66-T, para 84 (30 November 2005).
9 Statute of the International Criminal Court, art 8(2)(d). UN Doc A/Conf.183/9 (17 July 1998), reprinted in 37 ILM 1002 (1998) (ICC Statute).
10 *Prosecutor v Tadić* (n 8), at para 562; and see also see *Prosecutor v Slobodan Milošović* (Decision on Motion for Judgement of Acquittal), Case IT-02-54-T, para 17 (16 June 2004); *Prosecutor v Milošović* (n 2), at para 17; *Prosecutor v Limaj, Bala & Muskliu* (n 8) para 84.
11 See Johan D van der Vyver, 'The ISIS crisis and the development of international humanitarian law' (2016) 30 *Emory International Law Review* 531-563.
12 *Padilla v Rumsfeld*, 352 F.3d 695, 698 (2nd Cir. 2003); and see also *Padilla v Hanft*, 547 US 1062, 1064 (2006) (Ginsberg, J., dissenting, posing the question whether or not the President has authority to imprison indefinitely a United States citizen arrested on United States soil 'distant from the zone of combat').
13 *Boumediene v Bush*, 553 US 723, 770 (2008).
14 *Al-Marri v Wright*, 487 F.3d 160, 196 (4th Cir. 2007).
15 *Al Maqaleh v Gates*, 605 F.3d 84, 88 (DC Cir. 2010); and see also *Al Maqaleh v Gates*, 604 F. Supp. 2d 205, 220 (DDC 2009) (referring to battlefield as 'a theater of war'); Ex parte Quirin, 317 US 1, 38 (1942) (Stone, CJ, delivering the opinion of the Court, referring to 'the theater or zone of active military operations').
16 Cited by Heyns in his dissertation at 98.
17 At 721
18 At 726.
19 The paper was published in (2000) 14 *Emory International Law Review* 699-777.

18

The Addis Ababa Road Map, independent human rights experts and the realisation of human rights ideals

*Michael K Addo**

Introduction

The secretariats of the independent human rights experts of the African Commission on Human and Peoples' Rights (African Commission)[1] and the UN Human Rights Council[2] organised an official dialogue in Addis Ababa, Ethiopia, in January 2012 aimed at exploring ways of strengthening the work of experts. The outcome of this two-day meeting, attended by experts from both institutions,[3] as well as representatives of UN agencies[4] national human rights institutions and civil society

* Professor of Law, University of Notre Dame and Director of the London Law Program. Former member of United Nations Working Group on Business and Human Rights (2011-2018) and Member (with Christof Heyns) of the Joint Steering Committee of Addis Ababa Roadmap (2012-2013). I am grateful for the assistance of Ms Federica Donati at the UN Office of the High Commissioner for Human Rights (OHCHR) and Thomas Probert at the University of Pretoria. Any shortcoming are however entirely mine.

1 See, https://www.achpr.org/ (accessed 31 December 2021). On the African Commission, see R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015); M Ssenyonjo 'The African Commission and Court on Human and Peoples' Rights' in G Oberleitner (ed) *International human rights institutions, tribunals and courts* (Springer 2018) at 479.

2 See, on this, the UN Office of the High Commissioner for Human Rights (OHCHR) https://www.ohchr.org (accessed 31 December 2021) and I Seiderman 'The UN High Commissioner for Human Rights in the age of global backlash' (2019) 37 *Netherlands Quarterly of Human Rights* 5-13.

3 Nine experts from the UN Special Procedures, mandate holders for cultural rights (shaheed), extrajudicial, summary and arbitrary executions (Heyns), rights to freedom of peaceful assembly and association (Kiai), sale of children, child prostitution and child pornography (M'jid), torture and other cruel, inhuman and degrading treatment or punishment (Mendez), trafficking in persons, especially women and children (Ezeilo), foreign debt and related international financial obligations (Lumina), contemporary forms of racism, racial discrimination, xenophobia and related intolerance (Ruteere) and the situation of human rights in côte d'ivoire (Diène). The seven experts from the African Commission included experts on Prisons and Places of Detention in Africa (Kaggwa), Human Rights Defenders in Africa (Alapini-Gansou), Rights of Women in Africa (Maiga), Extractive Industries, Environment and Human Rights (Manirakiza), Refugees, Asylum Seekers, IDPs and Migrants (Fadel), Economic, Social and Cultural Rights and Death Penalty.

4 The UN Office to the African Union, UN Women, UNAIDS, UNDP, UNESCO, UNECA, UNHCR, ILO, UNFPA and UNICEF.

organisations,[5] is what has come to be known as the 'Addis Ababa Roadmap' (Roadmap).[6] The Roadmap has one primary objective: 'to enhance collaboration between the UN Special Procedure mandate-holders and African Commission Special Mechanisms in the discharge of their mandates'.[7] The outcome document identifies a variety of ways of achieving this objective including information sharing between the experts, bolstering peer to peer exchanges and learning as well as the consideration of joint actions including country visits, public statements, press releases, awareness raising events alongside the participation in each other's events and thematic research.[8] The activities under the Roadmap are managed by a joint group of representatives of experts from both sides with the support of their secretariats.

The 2012 Addis Ababa Roadmap raises many interesting issues of law, policy, process and identity which call for further reflection. The underlying ambition of the cooperation between the groups of experts is, in essence, the full realisation of the substantive human rights guarantees within the context of its key ideals of universality, indivisibility, interdependence and inalienability.[9] We know however that the realisation of these fine ideals in a world riddled with practices and cultures that do not always cohere with the human rights principles, poses a genuine challenge that may entail the adoption of unconventional strategies to overcome. This chapter will assess how effectively the Roadmap is able to navigate this dissonance between the ideals and reality of international human rights. In that context the chapter will enquire into whether the independent experts identify as governmental experts or as non-state actors and whether their relationship with the governments of the intergovernmental institutions that selected them is significant to the legitimacy and practical value of their work.

For this purpose, the article draws on the transnational legal process scholarship[10] to assess the effect, if any, on the normative

5 See OHCHR, Dialogue between Special Procedures Mandate-Holders of the UN Human Rights Council and the African Commission on Human and Peoples' Rights (Dialogue) (Addis Ababa. 2012) at 1. https://www.ohchr.org/Documents/HRBodies/SP/SP_UNHRC_ACHPRRoad%20Map.pdf (accessed 31 December 2021).

6 See https://defenddefenders.org/un-and-african-union-special-mechanisms-on-human-rights-adopt-a-roadmap-for-greater-cooperation/ (accessed 31 December 2021).

7 Dialogue (n 5) at 3.

8 As above.

9 See Preamble of the African Charter on Human and Peoples' Rights (1981); Vienna Declaration and Programme of Action (1993).

10 On this, see HJ Steiner & DF Vagts *Transnational legal problems* (Foundation Press 1986); N el-Khory 'Transnational legal process: theory and the effectiveness of international human rights treaties' in N el-Khory *Irrational human rights? an examination of international human rights treaties* (Brill 2021) 190; HH Koh 'Transnational legal process' (1996) 75 *Nebraska Law Review* 182; HH Koh

development, interpretation and application of international human rights law. When Harold H. Koh posed the question 'Why do nations obey international law'?,[11] he was seeking to analyse the motivation behind states' compliance with their international obligations and proposing as a platform for explanation, the transnational legal process which he defined as

> [t]he theory and practice of how public and private actors – nation states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.[12]

Dean Koh concedes that this approach to seeking to explain the compliance question in international law, that is to say, the realisation of the principle of rule of law (why nations obey international law) is 'untraditional'[13] and/or because it is 'non-statist'[14] primarily for the room it affords to all transnational actors to contribute to shaping the law. Of the many dimensions and effects of the transnational legal process on international law, the most captivating of the untraditional character is the fact that non-state actors have a role and contribute to the making of the law. Less significant in terms of verifiable evidence is how and the extent to which this process influences states' behaviour. That enquiry remains of continuing interest to scholars and policymakers alike.

International human rights law is represented as providing a relatively fertile ground for the transnational approach to international law[15] and so of interest in this chapter to assess its significance in norm development, interpretation and application. The first section, with a focus on the nature and character of the Roadmap, analyses its nature and origins as a part of the transnational legal process, followed by a section that is devoted to the assessment of the program of activities for the implementation of the Roadmap and the extent to which these contribute to the realisation of international human rights ideals of universality, interdependence and indivisibility through norm development, interpretation and application. The next section explores some challenges facing the Roadmap and, finally, some conclusions are offered.

'Transnational legal process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337 and HH Koh 'Why do nations obey international law?' (1996/1997) 106 *Yale Law Journal* 2599.

11 Koh 1996 (n 10).

12 Koh 1996 (n 10) 183-184.

13 Koh 2004 (n 10) 184.

14 As above.

15 See El Khory (n 10).

Nature and character

The record suggests that the Addis Ababa Roadmap was launched in January of 2012 under the auspices of the African Union (AU) and the UN Office of the High Commissioner for Human Rights (OHCHR) to bring together independent experts of the UN Human Rights Council (Special Procedure Mandate holders) and those of the African Commission on Human and Peoples' Rights.[16] This is true but this formal narrative does not quite capture the contextual knowledge that contributes to the full character of this initiative. In fact, prior to this formal launch of the Roadmap, there had been regular interactions, discussions and activities between the two groups of experts.[17] Indeed, the idea to formalise the relationship was at the behest of these experts, led by Christof Heyns who had prior professional dealings at both the United Nations and at the African Commission.[18] As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions at the time of the launch of the Roadmap, Christof Heyns had had a long association with the African Commission through the Centre for Human Rights at the University of Pretoria, which was made even more pertinent by the goals of his UN mandate that drew him even closer to the African Commission counterparts.

Independent experts as non-state actors

That the Roadmap is the brainchild of and managed by independent human rights experts makes it less of an official intergovernmental initiative. There is however a twist to the representation of the Roadmap as a non-state initiative due to the unique relationship between the group of experts and the two intergovernmental institutions from which they are drawn. It is true that the human rights experts involved in the Addis Ababa Roadmap hold their positions at the behest of the States that form the relevant intergovernmental organisations and the experts are usually elected by member states and given specific mandates the terms of which are defined by the states. For these and similar reasons, a casual observer may suggest that the experts are, at a minimum, embedded in the wider intergovernmental organisation and to that extent close to a state actor. However, in practice, the nature and character of these independent experts straddles across the state

16 Dialogue (n 5) 1.

17 See Christof Heyns was a member of the expert group on the WG on the Death Penalty. Also Sheila Keethraruth, at an earlier occasion, an expert on the Working Group on Extractive Industries.

18 As above.

and non-state identities but a lot more recognised as part of the latter (non-state) character than the former.

Admittedly independent human rights experts are not your traditional non-state actor, but then again, there is not a typical or standard non-state actor of which there are many groups ranging from individuals, social communities (such as indigenous peoples), private business enterprises, non-governmental organisations and in this instance independent experts. The distinguishing character of non-state actors is that they are not governmental agencies or state institutions although they maintain different levels of relationships with the state. Independent international human rights experts present among the group of non-state actors with a closer relationship with the state and yet not state actors. The most important characteristic in this context is that the experts are independent of the state with an autonomous responsibility that includes the power to call states to account for human rights shortcomings. The representation that compromises this character undermines the essence of their roles. Similarly, one that enhances the independence of the experts helps to achieve their mandates.

Independent human rights experts, of which there are many different categories,[19] have emerged to be one of the successful strategies to bridge the gaps generated by the dissonance between the ideals and reality of human rights. So much of the work that such experts undertake towards the realisation of human rights ideals is guided by the mandate set for them by the inter-governmental institutions in which they are situated. For this reason, it is arguable that the true independence of such experts may be limited or even compromised. However, careful reflection of the work of human rights experts suggests a greater reach than the basic and literal application of their mandates for the practical reason that the specific terms of the mandate are unable or unlikely to capture or foresee every aspect for the implementation of the mandate. The terms of the mandate are therefore usually drafted in general and broad terms that allow for the mandate holder to interpret them in a way that enables the achievement of the ideals of the mandate. Most of this additional reach of the work of independent human rights experts is justified in the inherent power to interpret the terms of their mandates.[20] This power to be the ultimate judges of the scope of their

19 At the United Nations, for example, the Special Procedure Mandate holders are different from the treaty body experts.

20 On this, see MR Ferrer 'The inherent jurisdiction and its limits' (2013-2014) 13 *Otago Law Review* 107; C Brown 'The inherent powers of international courts and tribunals' (2005) 76 *British Yearbook of International Law* 195; J Liang 'The inherent jurisdiction and inherent powers of international criminal courts' (2012) 15 *New Criminal Law Review* 325. See also, *Lord Devlin in Connelly v DPP* (1964) AC 1254; *Lord Bingham in Grobbelaar v News Group Newspapers Limited* [2002] 1 WLR 3024.

mandates is critical to the success of their work as independent actors, especially in the limited instances when independent experts act in quasi-judicial roles. In practice, the definition of priorities, the selection of partners and the actions to be undertaken in order to achieve the terms of the mandates, rests with the independent experts themselves.

With this ability to reconceptualise their roles, most experts are able to assert a level of autonomous action that places them apart from the intergovernmental institution that mandated them. The Addis Ababa Roadmap is a product of this elastic application of the mandates of independent human rights experts. Admittedly, this approach to international human rights practice can raise legitimacy questions and in the circumstances of their work, these ancillary activities undertaken by these experts have to be justified to and oversighted by the supervisory institution and therefore risk not being entirely secure. In addition, as the extra-mandate activities tend to sit outside the conventional program, it would be interesting to understand how and why they come about and whether they have real added value that cannot be gained in the normal processes.

Terms of reference

Although a review of the terms of reference (mandates) of the independent experts of the African Commission and the UN Human Rights Council do not reveal an express reference to the Addis Ababa Roadmap, this does not mean that the launch of the Roadmap and engaging in activities under that initiative are outside of the relevant terms of reference. Following the argument (above) concerning the inherent authority of mandate holders to interpret the scope of their mandates as part of their independence, it is reasonable to expect that the practical steps considered necessary for the implementation of their mandates, which would not always be so expressly foreseen by the text of the authorising instrument, would ordinarily be seen as an essential responsibility of the mandate holders. In addition, there is evidence that the program of activities under the Roadmap were envisaged, in very broad terms by the various terms of reference of the mandate holders. In order to appreciate the necessity and the foreseeability of the Addis Ababa initiative, it is essential to revisit some of the basic elements of the Roadmap.

First and foremost is one of the characterisation of the January 2012 event as a dialogue and its outcome as a 'Roadmap'.[21] The former marks the first rang in any exercise of collaboration for which the sharing of perspectives is essential in the search for a common ground. The idea of a dialogue suggests the absence of preconceived outcomes or

21 See Dialogue (n 5).

conclusions and therefore forward-looking in its outlook. Prior to the event, it is true that both groups of experts had been aware of each other's mandates and had even interacted and engaged on ad-hoc and informal basis but not with sufficient depth of appreciation of the priorities, working methods and challenges of each other's activities. The dialogue was therefore the most appropriate entry point for any future collaboration. The latter characterisation as a Roadmap is also significant for marking a means to an end rather than an end in itself. In this forward-looking respect, any of the potential areas of cooperation in the Roadmap are not prescriptive but illustrative only. This opens up the potential reach of the initiative to fields of activities that may not have been foreseen at the time of its adoption. This is therefore a flexible and dynamic Roadmap. This factor is especially useful for a subject – human rights – whose realisation requires adaptability.

The next important issue of interest is the nature of the initiative. Bearing in mind that this was convened under the auspices of intergovernmental institutions, it is arguable that it's character will be drawn from that. However, there is more to the Addis Ababa Roadmap than who convened it. The role of the State and State institutions cannot be ignored but it should not be exaggerated either. In effect, the role of the intergovernmental organisations is largely facilitative, firstly in conferring a formal place in their institutional nomenclature to the activities of the independent experts some of whose informal interactions with each other predated the formalisation. It is therefore no surprise that the focus of the interactions that sustain the initiative from its initial dialogue and subsequently remains with the independent experts and other non-state actors. Furthermore, a nuanced assessment of the specific department of the secretariat that facilitated the formalisation of the initiative supports the primacy of the independent experts. At OHCHR, for example, there is a dedicated branch – the Special Procedures Branch (SPB) – with the primary responsibility to support the work of the independent mandate holders, including safeguarding their independence. That it was this department, alongside the Africa Branch of OHCHR,[22] that facilitated the Addis Ababa dialogue is important to affirming the separation of the initiative from governmental influence.

Legitimacy: necessity and foreseeability

So far, the argument here suggests that this is a self-generated initiative by independent human rights experts operating under the umbrella of intergovernmental organisations that provide a formal framework but do not drive the workings of the initiative itself. It is argued further

22 The Directors of these two OHCHR branches, Ibrahim Wane from the Africa Branch and Jane Connors from the Special Procedures Branch supported the independent experts in the quest for the Roadmap.

that the status of 'independent experts' provides the mandate-holders a reasonable degree of autonomy to determine what is necessary for the effective implementation of their mandates and that some, if not all of the activities, may have been envisaged by the intergovernmental mandates and so conferring legitimacy on the initiative and its activities.

An effective analysis of the question whether the intergovernmental organisations could have foreseen the Roadmap and its activities requires an assessment both of the basis of such activities in norms and principles of general international law (the foundational mandate) as well as an assessment of the specific authority for the independent experts to engage in such activities

For the general and foundational mandate for the Roadmap, a good starting point is the Charter of the United Nations one of whose purposes is to 'achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character',[23] a principle that guides and underlies all the activities of the organisation.[24] Indeed, the principal organs of the organisation are required to promote and act in accordance with this principle of cooperation.[25] The principle of cooperation has provided the basis for a wide range of activities between the UN and the AU in matters of development, peace and security, the environment, human rights, terrorism, health etc from which the Roadmap can be said to draw its inspiration.[26] At the 2005 World Summit of the UN, for example, Member States expressly committed to cooperate to meet the needs of Africa through partnerships, capacity building, peacebuilding and integration into the international economic architecture.[27] This general commitment led to the adoption of a Declaration to enhance UN-AU cooperation between the UN Secretary-General and the Chairperson of the African Union Commission.[28]

Focusing on human rights, the mandate of United Nations Human Rights Council[29] foresaw that 'the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue',[30] requiring the work of the Council to be guided by principles

23 UN Charter, art 1(3).
24 Chapter 1 of UN Charter.
25 For the General Assembly, see UN Charter, art 13 and for the Security Council, see UN Charter, art 24(2).
26 See, for example, GA Resolution 60/1 - 2005 World Summit Outcome. UN Doc. A/RES/60/1 (October 2005)
27 See 2005 World Summit Outcome (n 26) from para 68.
28 See UN Doc. A/61/630 (December 2006) on Declaration Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity Building Programme for the African Union.
29 See General Assembly Resolution 60/251 (2006) – Human Rights Council.
30 See General Assembly Resolution 60/251 (2006), Preamble.

including 'constructive international dialogue and cooperation'[31], 'contribute, through dialogue and cooperation, towards the prevention of human rights violations'[32] and to 'work in close cooperation in the field of human rights with … regional organisations'.[33] Furthermore, the OHCHR, the section of the UN secretarial responsible for providing administrative support for human rights matters entered into a Memorandum of Understanding with the African Union Commission in 2010[34] to strengthen cooperation between the two institutions. This is complemented by another Memorandum of Understanding between OHCHR and the African Commission in 2019[35] in which the parties expressly recalled

> [t]he Addis Ababa Roadmap adopted by the Special Procedures of the United Nations Human Rights Council and those of the ACHPR in 2012 to strengthen cooperation between the international and regional human rights systems.[36]

The 2019 MOU specifically identified among the activities

> [s]upporting the joint actions between the international human rights bodies and the ACHPR, including its special mechanisms, inter alia, country visits, public statements, press releases, awareness raising events and participation in each other's events, thematic research and contribution in the development of international and regional jurisprudence, standards and guidance, as well as follow-up on the recommendations emanating from these bodies.'[37]

This was lifted verbatim from the Roadmap outcome document.

Finally, from the perspective of the African Union, support for the general mandate for the independent experts to undertake and engage with the Roadmap may be found in article 45(3) of the African Charter on Human and Peoples' Rights (African Charter), which invites the African Commission to 'cooperate with other African and international institutions concerned with the promotion and protection of human rights in Africa'.[38]

31 Preamble (n 30) para 4.
32 Preamble (n 30) para 5(f).
33 Preamble (n 30) para 5(h).
34 Memorandum of Understanding between the African Union Commission and the Office of the United Nations High Commissioner for Human Rights (2010), https://www.ohchr.org/EN/NewsEvents/Pages/OHCHR_AUCommissioncooperationAfrica.aspx (accessed 27 November 2021).
35 Memorandum of Understanding between the African Commission on Human and Peoples' Rights and the Office of the United Nations High Commissioner for Human Rights (2019 OHCHR-ACHPR MOU), https://www.achpr.org/public/Document/file/English/MOU%20ACHPR-OHCHR_EN.pdf (accessed 27 November 2021).
36 2019 OHCHR-ACHPR MOU (n 35) Preamble.
37 2019 OHCHR-ACHPR MOU (n 35) art 2(c).
38 African Charter on Human and Peoples' Rights (1981), file:///Users/mikeaddo/Downloads/banjul_charter%20(2).pdf (accessed 27 November 2021).

Next, is the assessment of the specific authority of the independent experts to adopt and engage in the activities of the Roadmap. Both groups of experts share the common vision of promoting the respect for human rights using similar working methods such as country visits, thematic reports and responding to communications.[39] However, the manner in which these tasks are to be achieved are different primarily because of the manner of their appointments. The expert mechanisms of the African Commission are members of the wider Commission and their work feeds into that Commission. Those of the United Nations on the other hand tend to be self-standing and not a part of another body. They prepare reports to the Human Rights Council and the General Assembly. The effect of this difference is that while the African Commission experts draw the terms of their mandate directly from the African Charter, those of the United Nations draw their mandates from the terms of specific resolutions of the Human Rights Council. These instruments therefore provide the basis for the Roadmap. While the Roadmap as a specific initiative could not have been foreseen by either institution, the activities arising from the Roadmap on the other hand may easily be justified under the terms of the mandates of these experts. Some of the justification such as the power to cooperate with others may be express, while other activities may be implied from their powers.

From the perspective of the African Commission experts, article 45 of the African Charter has already been mentioned as mandating cooperation with international institutions and this should be read in the wider context of the broader mandate of the Commission including the power to collect documents, undertake studies and organise seminars and workshops.[40] In addition, the power in the Charter to resort to any appropriate method of investigation and for this, hear from 'any person capable of enlightening it'[41] is relevant.

The mandate resolutions of the UN Special Procedure mandate-holders provide a mixture of express and implied authority that may

39 See, for example, for the UN Working Group on Business and Human Rights at https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnational corporationsandotherbusiness.aspx (accessed 31 December 2021), and for Special Rapporteur on extrajudicial, summary and arbitrary executions, see, https://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx (accessed 31 December 2021). For a full list of United Nations Special procedure Mandates, see, https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM (accessed 31 December 2021). For African Commission, see, Special Rapporteur on Prisons, Conditions of detention and Policing in Africa, see, https://www.achpr.org/specialmechanisms/detail?id=3 (accessed 31 December 2021); Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa, see, https://www.achpr.org/specialmechanisms/detail?id=4 (accessed 31 December 2021). For full list of Special Mechanisms, see https://www.achpr.org/specialmechanisms (accessed 31 December 2021).

40 African Charter (n 38) art 45(1).

41 African Charter (n 38) art 46.

cover the activities of the Roadmap. The mandate resolution of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in force at the time of the launch of the Roadmap[42] authorised the mandate-holder to

> continue to cooperate with the Committee against Torture, the Sub-committee for the Prevention of Torture and relevant United Nations mechanisms and bodies and, as appropriate, regional organizations and mechanisms, national human rights institutions, national preventive mechanisms and civil society, including non-governmental organizations.[43]

This power to cooperate which is evident in other mandate resolutions[44] is restated in every subsequent mandate renewal since, including the most recent renewal of that mandate in 2020.[45]

The mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions represents the example of authority that is not as express as the Torture mandate and yet significant. The relevant resolution at the time of the launch of the Roadmap[46] refers to cooperation with other UN mechanisms[47] but not to regional mechanisms. Instead what it provides for that may be implied as enabling the activities under the Roadmap is for the 'Special Rapporteur to … *collect information from all concerned, to respond effectively to information that comes before him or her, to follow up on communications* and country visits and to seek the views and comments of Governments and to reflect them, as appropriate, in the elaboration of his or her reports.'[48] (emphasis added). The resolution further requests the Special Rapporteur '[T]o continue to examine situations of extrajudicial, summary or arbitrary

42 Human Rights Council Resolution 16/23 – Torture and other cruel, inhuman and degrading treatment or punishment: mandate of Special Rapporteur (UN Doc. A/HRC/RES/16/23) 12 April 2011, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/127/41/PDF/G1112741.pdf?OpenElement (accessed 31 December 2021).

43 Human Rights Council Resolution 16/23 (n 42) para 3(f).

44 See, for example Human Rights Council Resolution 17/4 (2011) in relation to the Working Group on Business and Human Rights.

45 Human Rights Council Resolution 43/20. Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur (UN Doc. A/HRC/RES/43/20) 2 July 2020, https://undocs.org/A/HRC/RES/43/20 (accessed 31 December 2021), para 1(f).

46 Human Rights Council Resolution 17/5 - Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions (UN Doc. A/HRC/RES/17/5) 1 July 2011, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/142/92/PDF/G1114292.pdf?OpenElement (accessed 31 December 2021). See similar terms in the most recent renewal of the mandate in Human Rights Council Resolution 44/5. Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions (UN Doc. A/HRC/RES/44/5) 22 July 2020, https://undocs.org/en/A/HRC/RES/44/5 (accessed 31 December 2021), especially paras 7(a) and 9.

47 As above, para 9 that provides as follows: 'Welcomes the cooperation established between the Special Rapporteur and other United Nations mechanisms and procedures in the field of human rights, and encourages the Special Rapporteur to continue efforts in that regard.'

48 As above, para 6.

executions *in all circumstances and for whatever reason*, and to submit his or her findings on an annual basis, together with conclusions and recommendations, to the Human Rights Council.'[49] Ironically, it was one of these indirect directives to the Special Rapporteur to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment,[50] that provided his greatest inspiration for action under the Roadmap to work with colleagues from the African Commission to develop a General Comment on the right to life.[51]

Whether the authority to act under the Roadmap is seen as express or implied, it is also justifiable on the need as perceived by the individual mandate holder for effective action to implement the terms of the mandate. This is the necessity justification.[52] The broad and general nature of the terms of the mandate of independent human rights experts means that the practical realisation of the terms of that mandate depends not only on the subject matter but also on the selected priorities of the mandate holder. In determining the activities that would, in their opinion, support or lead to the effective implementation of the mandate, they may choose to cooperate with others who can make meaningful contributions to that effort. Unless, therefore, the mandates expressly prohibit the cooperation with others, this form of engagement is seen to lie within their terms. It is a necessary part of their work.

There is another reason why cooperation may be seen as a necessary part of the mandate of independent experts and that is because of the sheer enormity of their tasks. Each mandate holder carries the responsibility (often alone) of the practical realisation of the ideals of the subject of their mandate. Apart from working to streamline the many dimensions of the subject, they are also expected to implement the standards globally or across the continent, ranging from awareness raising, responding to communications, visiting countries, consultations and preparing thematic reports. In reality, this is an impossible undertaking unless independent experts seek and work with various partners, both governmental and non-governmental. The practice of seeking and working with partners has become a standard part of the tool-kit of mandate holders as to be considered good practice.[53]

49 As above, para 7(a) (emphasis added).

50 As above, para 7(e).

51 See below 'Collaboration on human rights themes'.

52 See A Brudner 'A theory of necessity' (1987) 7 *Oxford Journal of Legal Studies* 339; L Wolf-Philips 'Constitutional legitimacy: a study of the doctrine of necessity' (1979) 1 *Third World Quarterly* 98.

53 See, in relation to the UN Working Group on Business and Human Rights, 'Report of The Working Group on Business and Human Rights to the Human Rights Council', UN Doc. A/HRC/20/29 (2012) from 1.

In any case, working with other experts, especially from outside of the intergovernmental organisation of the mandate holder is a sure affirmation of the universality, interdependency and indivisibility of human rights.[54]

This is one sense in which the Addis Ababa Roadmap is not unusual in the work of independent human rights experts. Indeed the [preamble of the] Roadmap affirmed the importance and necessity of cooperation for all the reasons set out above.[55] This raises the question of how effective the initiative has been in the realisation of the ideals of human rights through norm development and application. This is the question to which we turn.

The Roadmap in practice

The 2012 Addis Ababa meeting between independent experts of the UN and the African Commission had one primary objective in mind, that is to cooperate and collaborate with each other in the discharge of their mandates[56] and for this the Outcome document proposes some 'practical measures to nurture, sustain and strengthen such cooperation',[57] including sharing information, actions to bolster peer exchanges, joint actions, such as country visits, press releases and the participation in each other's events.[58] Other equally important practical steps proposed for achieving the objectives of the Roadmap include undertaking collaborative research on thematic issues as well as working together on Commissions of Inquiry.[59] The extent to which these practical initiatives are able to contribute to the objectives of the Roadmap depends upon a variety of factors including opportunities, funding and the nature of the cooperation relationship.

Between its launch in 2012 and 2019, the Roadmap has generated considerable interaction and engagement between the United Nations and the African Commission, covering no less than over a hundred recorded activities.[60] This statistic is already an indication of success for the Roadmap. It is even more impressive to note that these activities have involved the breadth of UN and African mandate holders. Specifically, the

54 These international human rights ideals have both normative and practical dimensions. Their full effect includes the normative applicability of rights regardless of geography as well as the interrelatedness of different generations of rights but also their practical application across rights regimes and geographies.

55 See Dialogue (n 5).

56 Dialogue (n 5) at 3.

57 As above.

58 As above.

59 As above.

60 See OHCHR, Implementation Chart – Addis Ababa Roadmap 2012-2019 (hereafter referred to as Implementation Chart) on file at OHCHR.

activities have engaged at least 32[61] out of the UN's 58[62] mandates and, over the years, no less than 15 mandates of the African Commission.[63] Most of the experts who have been actively engaged in the activities of the Roadmap are predictable, including the holders of the four African country mandates (Burundi, Central African Republic, Eritrea and Côte d'Ivoire) and for the thematic mandates, intense activity in areas such as violence against women, human rights defenders, albinism, extra-judicial killing, discrimination against women, freedom of association and assembly, business and human rights is not surprising. This may be attributed to the importance of such issues in the region as well as the existence of corresponding mandates in both intergovernmental systems.

The reach of the Roadmap is however not limited to interests within the Africa Region only nor has it been limited to the UN Special Procedure and African Special Mandate systems. In fact, the Roadmap has also engaged the main intergovernmental institutions, including the African Union,[64] and the African Commission[65] as well as the UN Human Rights Council.[66] The participation of UN experts in the meetings of the African Commission (since the 52nd session)[67] alongside the participation of African Commission experts in meetings of the Human Rights Council (since the 20th session)[68] represent one of the largest areas of Roadmap impact, probably as much as the activities of the individual experts put together. UN experts have contributed to the judicial and quasi-judicial African institutions through the submission of *amicus curiae*.[69] Similarly, the Roadmap has also registered impact in other intergovernmental organisations including the Council of Europe[70] and the Inter-American Commission on Human Rights.[71] Within the UN, the Roadmap had drawn the expertise of the human rights treaty bodies, especially the Committee on the Elimination of Discrimination against

61 As above.
62 See https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx (accessed 31 December 2021).
63 See Implementation Chart (n 60).
64 See Implementation Chart (n 60).
65 As above.
66 As above.
67 Between 2012 and 2019, UN mandate holders had participated in no less than 22 activities of the African Commission.
68 Ten activities of the Human Rights Council.
69 See Implementation Chart (n 60).
70 As above.
71 As above.

Women (CEDAW),[72] the Committee on the Rights of the Child (CRC)[73] and the Committee on Enforced Disappearances (CED).[74]

Having said that, the lack of activities involving some mandates has been a surprise. That there is rather limited record of activity involving mandates such as African descent,[75] Disability,[76] Food,[77] Foreign debt,[78] Racism,[79] International Order[80] and International solidarity[81] is difficult to explain because one would have expected such issues to be of interest in the Africa region. The low engagement in these instances may be a consequence of the priorities set by the mandate holders. Similarly, the low engagement with the Mali and Somalia country mandates is puzzling.

Cooperation

The implementation of the Roadmap through cooperation and collaboration is interesting for both historical and aspirational reasons. Historically, this emphasis on collaboration is significant because it departs from the traditionally hierarchical relationship between the United Nations and its agencies on the one hand and those of the African Union on the other. That relationship often presented the African Union as the junior and less accomplished partner that needs, requests and receives the support of its apparently grander, wealthier and more sophisticated United Nations partner. This unequal relationship tended to be represented in terms of support, capacity building (for the AU) or financial and other forms of needs transfer.[82] For the integrity of the

72 As above.
73 As above.
74 As above.
75 See, https://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx (accessed 31 December 2021).
76 https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SRDisabilitiesIndex.aspx (accessed 31 December 2021).
77 https://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx (accessed 31 December 2021).
78 https://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/IEDebtIndex.aspx (accessed 31 December 2021).
79 https://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndexSRRacism.aspx (accessed 31 December 2021).
80 https://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx (accessed 31 December 2021).
81 https://www.ohchr.org/EN/Issues/Solidarity/Pages/IESolidarityIndex.aspx (accessed 31 December 2021).
82 The implementation of the World Summit Outcome resolution of the General Assembly (Resolution 60/1 (2005)) which although affirmed the importance of 'Meeting the Special Needs of Africa', that led to the adoption of the Framework Declaration for the Ten Year Capacity Building Programme for the African Union (Doc. A/61/630). See, Declaration Enhancing UN-AU Cooperation was in fact a Framework for the Ten Year Capacity Building Programme for the African Union. See also, the terms of reference for the United Nations Office to the African Union to provide, inter alia 'a full range of capacity-building support' (see Budget for the United Nations Office to the African Union, UN Doc. A/64/762, para 23). Similarly,

Roadmap, it is important that the cooperation and collaboration in this instance is of a different character and there is ample reason to believe that it can be so and that it is so.

A genuine collaboration is possible, in the first place, because the motivation for the Roadmap lies outside the regimented framework set by the two institutions. That the actors are independent of their intergovernmental organisations and acknowledged experts, sets the foundation for the appreciation of each other's contributions to the success of the Roadmap. In addition, there is a record of genuine collaboration between the experts prior to the formal launch of the Roadmap in which the experts continue to value the contributions that each of them is able to bring to the full realisation of the Roadmap. In reality, the Roadmap was launched by individuals, both as experts and in the two secretariats who are committed to the ideal of the genuineness of the collaboration.[83] In fact, all the leading actors, experts and diplomats involved in the process already knew and respected each other and were personally and professionally invested in the success of the project. It is therefore no surprise, and indeed an indication of the true nature of the cooperation that the initial meeting to consider the terms of the Roadmap was characterised as a dialogue.

Furthermore, as human rights experts, each one is aware of the enormity and complexity of the effort to realise human rights ideals, especially in their part-time roles. This makes the significance of a genuine and supporting partnership essential and in practice this has been appreciated by the experts and their supporting teams. Finally, the governance structure of the Roadmap, through a Joint Working Group made up of representatives of both groups of experts[84] and alternating chairs between the two institutions affirms the importance of a true collaboration.

Joint activities

One of the true essences of effective collaboration is to undertake tasks together. This is not the easiest endeavour in the international human rights field, especially when it involves independent experts, who, while they may share a common grand vision for an effective promotion and protection of human rights, can differ in their priorities and approaches. This can be compounded by political, logistical and legal barriers such as common availability and the often unhelpful responses of third parties like the governments under scrutiny. Despite these challenges,

the OHCHR and AU Commission Memorandum of Understanding (2019 MOU) for Human Rights in Africa aims to 'provide[s] for technical assistance, training, capacity building and mutual cooperation.'

83 See Dialogue (n 5).

84 As above.

the Addis Ababa Roadmap has been particularly successful in a variety of joint activities. Apart from the joint country visits and press statements that are examined below, the experts have participated in joint induction trainings,[85] organised joint awareness raising events, undertaken thematic studies together and co-authored letters to governments (to Angolan President a dos Santos) and legislators[86] (Tanzania – re Kampala Convention). There is great merit and strength in such joint action because they demonstrate a unified community of experts as well as the interdependence and indivisibility of rights especially when different experts are able to link their mandates to a common human rights theme. This is in addition to getting to know and share the priorities of the different experts through which to build a stronger community of experts.

Country visits

By its nature country visits represent one of the most dynamic tools in the toolkit for an independent human rights expert. It provides opportunities for every aspect of the expert's responsibilities including information gathering, awareness-raising, promotional and protective engagements. It is the only working method that brings the expert in-person to the victim and the alleged wrongdoer. In can be impactful also for the solutions that can be offered on the ground as well as the credibility that country visits command on account of having experienced the challenges in its social and cultural context.

However, country visits are not without challenges of their own. They can only be undertaken at the invitation of the governments under scrutiny by solitary experts who can only arrange to hear and see the human rights concerns of only a small proportion of those affected. Governments can therefore influence the process and its outcomes by who is invited and how they engage with them. This becomes less feasible when the visit is undertaken by more than one expert.

In late September to early October 2012, the Special Rapporteurs for human rights defenders at the UN, Margaret Sekaggya and the African Commission, Reine Alapini-Gansou, successfully undertook a visit together to Tunisia. Tunisia was in a transitional period after the violence of the Arab Spring and the government seemed open to such a visit. The UN Special Rapporteur, for example, concluded in her report:

> The legal framework is relatively favourable to the activities of human rights defenders, though some implementation gaps remain and restrictions on some fundamental rights, most notably freedom of expression, are yet to be addressed.
>
> The Government of Tunisia has taken positive steps towards ensuring an

85 See, Implementation Chart (n 60).

86 As above.

> institutional framework conducive to the protection and promotion of human rights, including the activities of human rights defenders.[87]

The two independent experts brought different emphasis and expertise to the visit and were able to travel far more widely and meet more people than would have been the case on their own. They were able to share information and reinforce common messages to the government. The impact of such a combined effort can be far reaching and sets a standard of review at a much higher level than normal. The visit did not result in a combined report as both experts prepared reports for their individual organisations for which they were able to emphasis aspects of their mandates considered of importance in that particular context. Such is the added value of the Addis Ababa Roadmap to have facilitated such a venture that the Tunisian country visit remains a reference point for improvement for human rights special mechanisms. That it was able to take place at all is a tribute to the quality of the cooperation arrangement but also a commendation to the astuteness of the experts involved.

Press releases

That the two groups of experts, taking account of the differences in their priorities, have been able to issue so many joint public statements and press releases is commendable.[88] These statements have tracked particular occasions (such as the designated international days – in support of torture victims, day against homophobia, transphobia an biphobia, international albinism awareness day, international migrants day and the launch of the Sustainable Development Goals (SDGs);[89] particular themes (reprisals against human rights defenders, detention of migrants, protection of journalists covering conflicts, human rights and terrorism and violence against women)[90] or particular events such as the abduction of school children in Nigeria, death sentences in Egypt or welcoming the landmark judicial decision concerning LGBT in Botswana.[91] The issuance of often a strong statement on some of the issues such as LGBT rights, the death penalty, human rights defenders and violence against women not only affirm the independence of these experts but offer clear indication of their universal significance in human rights protection.

87 United Nations, Country Visit to Tunisia: 'Report of the Special Rapporteur on the situation of human rights defenders'. UN Doc. A/HRC/22/47/Add.2 (25 January 2013) paras 95 and 96. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/103/63/PDF/G1310363.pdf?OpenElement (accessed 22 November 2021).

88 Between 2012 and 2019, over twenty statements and press releases were issued.

89 See Implementation Chart (n 60).

90 As above.

91 As above.

These press releases serve useful purposes of affirming human rights ideals or reacting (often critically) to events regionally or globally that affect these ideals. In addition, they are useful for assuring and reassuring victims of human rights abuse (human rights defenders, LGBT, torture, freedom of expression etc) that they are not alone. On other occasions, the press releases help to clarify misunderstandings about human rights and above all else, a powerful tool through which to hear the voice of the international community on important matters.

Every year since 2015, on the International Day against Homophobia, Transphobia and Biphobia, on the 17 May, the UN experts and experts of the African Commission have issued a statement urging tolerance, non-discrimination and the avoidance of violence. In 2017, the experts focused their statement on the rights of trans and gender diverse youth, who, the statement noted, are usually victims of official and unofficial discrimination as well as at risk of physical, sexual and psychological violence. These adverse treatments can in turn lead to exclusion from school, denial of medical facilities, employment and housing. This statement is remarkable for a variety of reasons, firstly for its reach. On this occasion the experts were also able to have the participation of experts from the Inter-American Commission and the Council of Europe. Secondly, securing the statement under the Roadmap gave it greater credibility and impact on a continent (Africa) where the abuse of trans people is endemic. Similar added value can be seen on the many other occasions and circumstances when joint statements have been issued under the Roadmap.

Most press releases are usually disseminated through the major press outlets whose reach is gradually shrinking in light of the growing social media. This is why it is no surprise that most intergovernmental organisations and their individual human rights experts have social media accounts through which they disseminate their views.[92] Of the many joint activities concerning thematic issues, one clearly stands out and that is the collaboration to elaborate the African Commission General Comment on the right to life.

Collaboration on human rights themes

Another good indicator of success in human rights collaboration is to be able to agree a common understanding of the scope of international norms. This is especially true of collaboration across political and geographical regimes that are often informed by different cultural and political priorities. The scope of seemingly uncontroversial guarantees against torture or the arbitrary loss of life can prove difficult to agree

92 See twitter handle for the Special Rapporteur on Extreme Poverty and Human Rights https://twitter.com/srpoverty and for Special Rapporteur on Freedom of Association at https://twitter.com/cvoule (accessed 31 December 2021).

amongst human rights experts.[93] This and other normative challenges demonstrate the enormity of the ambition under the Roadmap to address thematic issues and this has taken a variety of forms ranging from providing input into the preparation of thematic reports, undertaking joint studies,[94] organising conferences and other meetings to discuss specific themes including the human rights situation in African countries.[95]

When at its 52nd Ordinary Session in Yamoussoukro, Côte d'Ivoire, the African Commission expanded the mandate of its Working Group on the Death Penalty to include 'Extra-judicial, Summary and Arbitrary Killings in Africa',[96] it not only affirmed the relevance of all instances of unlawful killing under the African Charter but it also aligned its understanding of the right to life with international law. The adjusted mandate for the Working Group also brought it into a much closer working relationship with the UN mandate on Extrajudicial, Summary or Arbitrary Executions.[97] This made it a lot easier for a shared approach to their mandates under the Addis Ababa Roadmap.

In 2014, under its expanded mandate, the Working Group embarked on a project to draft a General Comment on the right to life in the African Charter and sought within the auspices of the Roadmap to collaborate with Christof Heyns, the UN Special Rapporteur on extrajudicial executions. The UN Special Rapporteur supported the process in a variety of ways including providing desktop research, a resource pack, a Framework discussion document outlining important ideas for the General Comment. A meeting in Kigali in 2015 to discuss this document[98] led to agreement of a draft text. The collaboration was officially characterised as 'technical assistance' for which the UN provided financial and other resources to facilitate a meeting of experts in Geneva in 2015 to discuss the terms of the General Comment.[99] The draft text was also placed on the website of the Commission with an invitation for comments from all interested stakeholders. The General

93 Compare on the right to life the African Commission General Comment 3 - https://www.refworld.org/docid/5e67c9cb4.html (accessed 31 December 2021) with UN Human Rights Committee General Comment 36 (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (accessed 31 December 2021).

94 On Freedom of Association for example, see, Implementation Chart (n 60).

95 Joint studies on the human rights situation in Eritrea and Central African Republic (CAR), see https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 31 December 2021).

96 See, ACHPR Resolution 227 (2012) https://www.achpr.org/sessions/resolutions?id=254 (accessed 31 December 2021).

97 See, https://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx (accessed 31 December 2021).

98 See, https://www.achpr.org/presspublic/publication?id=45 (accessed 31 December 2021).

99 On file at OHCHR, Geneva.

Comment (3 – The Right to Life – Article 4 of the African Charter)[100] was adopted by the African Commission at its 57th Ordinary Session (Banjul) in November 2015.

Article 4 of the African Charter provides as follows:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

This is a general statement of the right to life behind which encompasses a range of dimensions that the African Commission has to unravel through its promotion and protection activities. It is similar but not identical to other statement of the right in other international instruments[101] and so although these may provide inspiration to the meaning of the African Charter provision, they can only be secondary sources. In addition, the geographical and cultural context may affect the nature of the Commission's emphasis and so this General Comment seeks to clarify the nature of the right to life 'as recognised in article 4 of the African Charter'.[102]

The centrepiece original idea of the General Comment is the concept of a 'dignified life',[103] which informs the contextual considerations concerning the nature of the right to life and the distinct strategic themes that it proposes to be used to guide the interpretation and application of article 4. For this, the General Comment approaches the right through a broad lens[104] that requires states to take

> preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies. The State also has a responsibility to address more chronic yet pervasive threats to life, for example with respect to preventable maternal mortality, by establishing functioning health systems.[105]

This concept of dignified life also calls for extra attention for vulnerable groups[106] and for States to hold private individuals and corporations, including private military and security companies accountable for causing or contributing to the arbitrary deprivation of life.[107]

The approach to the right to life in this General Comment is genuinely forward-looking and responds well to the challenges in the

100 https://www.achpr.org/legalinstruments/detail?id=10 (accessed 20 November 2021).
101 See, for example art 6 of International Covenant on Civil and Political Rights (1966) (ICCPR) or art 2 of the European Convention on Human Rights (1950) ECHR.
102 See, Introduction to General Comment 3, para 1.
103 Introduction to General Comment 3 (n 102) para 3.
104 Introduction to General Comment 3 (n 102) paras 3 & 41.
105 Introduction to General Comment 3 (n 102) para 3.
106 Introduction to General Comment 3 (n 102) para 11.
107 Introduction to General Comment 3 (n 102) paras 18 & 38.

African context including the impact of private actors on the loss of life. It captures some of the topical debates concerning the responsibility of private corporations to respect human rights at the UN.[108]

Other activities

The strength of the Roadmap is as much in the qualitative contribution as in the breadth of activities the combined effect of which may be seen in the genuinely tangible steps towards the realisation of human rights ideals. Some of the other activities include the participation in each other's meetings and events and the Implementation Chart records *inter alia* meetings to jointly raise awareness of human rights situations or participation in the meetings of their intergovernmental bodies (the Human Rights Council and the African Commission), undertake training or participate in the annual meetings or to share expertise and experiences.[109] Such activities bring perspectives and dimensions that may be missed had the meetings been restricted to members of a particular intergovernmental group. In 2013, for example, at a side event organised during the 54th session of the African Commission, a member of the United Nations Working Group on Business and Human Rights made an intervention on the significance of the UN Guiding Principles on Business and Human Rights (UNGPs) on illicit capital flight.[110] Similarly, experts from both organisations participated in the Continental Conference on the Abolition of the Death Penalty,[111] the Annual Forum usually held in Geneva as well as the African Regional Forum on Business and Human Rights held in Addis Ababa in 2014 and also, numerous workshops.[112]

In respect of participation in meetings, the participation of African Commission experts in the Annual Meeting of UN Special Procedure Mandate holders is especially notable. This is the one and only opportunity for UN experts to get together and reflect on their performance as well as share the benefit of their experiences. Considering the fluidity of memberships, it provides an excellent opportunity for members to get to meet new colleagues and explore ways of working together. The presence of experts from the African Commission at these meetings (in attendance every year since 2012) adds important dimensions to give visibility to the Roadmap. It allows the experts from both organisations to explore better ways of implementing their mandates and to contribute

108 See, UN Guiding Principles on Business and Human Rights (2011). https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 31 December 2021).

109 See Implementation Chart (n 60).

110 As above.

111 SP on Extrajudicial, Summary or Arbitrary Executions.

112 See Implementation Chart (n 60).

to thematic discussions. Above all, such meetings represent tangible steps of the universality of human rights.

Other activities worth mentioning here include the peer support programs, submitting *amicus curiae* to the supervisory bodies, following up on each other's recommendations, contributing to Commissions of Inquiry, especially those that concern African Countries (Burundi and Cote d'Ivoire), working with civil society organisations and not to forget the engagement of their secretarial staff.[113]

Challenges

By any measure of assessment, the Roadmap has added considerable value to the realisation of human rights ideals, but this has not been the easiest of journeys. It is faced with challenges, the resolution of which would enhance its value. In the first place, despite the impact and value of the Roadmap, it lacks the full and complete status that would enable unrestrained functionality. As already argued,[114] the experts are entitled, in the interpretation of their mandates, to cooperate and collaborate with anyone they consider of assistance. The recognition that this relationship confers is limited and cannot readily command attention or resources. In effect, the experts are constrained to operate the Roadmap as part of their existing mandates, drawing on the personnel and financial resources available to them. There is no opportunity to request additional support in the name of the Roadmap. In the unusual situation, when additional funding was provided to the UN Special Rapporteur for extrajudicial executions to convene a meeting of experts under the auspices of the Roadmap to discuss the African Commission General Comment on the right to life, it was justified as technical assistance from the OHCHR to the African Commission. A formal recognition would confer an official status to the Roadmap, alongside its experts with opportunities for the intergovernmental bodies to list their activities on its agenda and to request and receive reports for its activities. Until a formal character is recognised, the Roadmap will continue to exist only vicariously through the goodwill of its experts.

The absence of a formal status also means the Roadmap can represent additional effort on the part of the experts and their secretariats. Without administrative support of its own, the activities have necessarily been added on to existing programs and so creating strains on the capacities of those involved. This means that the full potential of the Roadmap cannot be realised which is a real shame in light of the impact that even a limited form has been able to realise. These constraints on capacity are not helped by the occasional policy disagreements that can arise

113 As above.
114 As above.

between the experts. It is true that differences in policies, priorities and strategies are unavoidable in a relationship such as the Roadmap but the effect of such ordinarily acceptable differences can be acute when the opportunities to act are already constrained.

In addition, the fact that the Roadmap does not command the attention of all experts in both organisations is a major challenge. The Roadmap is essentially a voluntary initiative to which individual mandate holder choose to join and there may be many different reasons why an expert may choose not to participate, including the absence of a comparable mandate or differences in priorities between related mandates. One should also not omit to mention the effect of the absence of formal character and with that the lack of additional resources to undertake the activities. This not only raises questions concerning the credibility of the initiative, but it does not help with the efforts to affirm the universality, interdependence and indivisibility of human rights. In practice, this limited participation means the bulk of the effort to keep the Roadmap alive is left to a small group of dedicated experts and their administrative support teams. That is an unfortunate loss of opportunity.

Conclusions

It takes the vision, energy and dedication of a few people to make meaningful change and under the Roadmap, this came from leaders such as Christof Heyns and Reine Alapini-Gansou guided unflinchingly by Jane Connors, Ibrahim Wane and Moussa Gassama, formerly at the OHCHR. Others, not expressly named, have also contributed to the success of the collaboration initiative. Many lessons may be shared from the Addis Ababa human rights initiative but one that should not be overlooked is the role of non-state actors such as independent human rights experts in the realisation of human rights ideals. The Roadmap has confirmed the importance of the transnational approach to human rights in which the role of all actors is significant.

In 2012 when the initiative was launched, the Outcome document set out important goals but how these would turn out was totally unpredictable. With no official status or resources of its own, one would be forgiven for being pessimistic. Yet the tangible successes of the Roadmap can be said to exceed all expectations. The Roadmap has revealed, beyond doubt, the value of collaboration, especially across organisations, geographies and cultures. It has helped to reveal the reality of the universality and interdependence of human rights broadly interpreted. The initiative has demonstrated the importance of a common understanding as well as the value of joined participation across stakeholders. This has enabled the breaking of traditional

barriers to register many international human rights firsts including the joint country visit, coordinated contributions to Commissions of Inquiry, collaboration to elaborate normative standards such as the General Comment on the right to life, working together on thematic issues and the joint press statements on the scope of human rights standards. The Roadmap has enabled a better understanding of what it takes to achieve effective collaboration and its lessons are completely transferable.

This raises a predictable question: Where next with the Addis Ababa Roadmap? That the question has to be posed at all is an indication of the vulnerability of the initiative, especially in the absence of the original instigators of the process. Nevertheless, a bright and more impactful future is possible for the Roadmap. That it has immense potential is not in doubt and that there is and always will be human rights experts across the two organisations who are committed to continuing the collaboration is also not in doubt. In addition, there is, after less than a decade of cooperation, a tangible track record of success sustained by a dedicated secretariats that may serve as motivation to sustain the Roadmap. All of these possibilities would however be reassured if the Roadmap were to gain official recognition and through that the necessary resources to take the initiative to the next and higher level of activity.

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Legitimacy, cost and benefit of international human rights monitoring

*Magnus Killander**

Introduction

This contribution to the book in memory of my doctoral supervisor and mentor Professor Christof Heyns is a reflection on the current state of international human rights protection in light of two book chapters Christof and I wrote a decade ago, 'Toward minimum standards for regional human rights systems' (2011, *Minimum standards*)[1] and 'Universality and the growth of regional human rights systems' (2013, *Universality*).[2]

Despite spending the last decade of his career largely in the United Nations (UN) human rights system, Christof was a big proponent of regional human rights systems. He was often called upon as an expert to advise on new initiatives and was in particular actively engaged in expanding collaboration between the UN and regional systems.

In *Universality* we argued that 'the main argument for the legitimacy of human rights lies in its universality, reflected for example, in the name of the Universal Declaration of Human Rights'.[3] We highlighted the role of regional human rights systems in generating legitimacy by providing participation of various views in determining standards, institutions and procedures.

With regard to standards there are some regional variation. Since international human rights law is built around consensus, sometimes regional human rights law has gone further than what is the situation at the UN level. For example, the death penalty is outlawed by regional human rights law in Europe, while at UN level Human Rights Committee general comment 36 notes that where the death penalty has not been

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1 C Heyns and M Killander 'Towards minimum standards for regional human rights systems' in MH Arsanjani and others (eds) *Looking to the future - Essays on international law in honor of W Michael Reisman* (Brill Nijhoff 2011) 527-558.

2 C Heyns & M Killander 'Universality and the growth of regional human rights systems' in D Shelton (ed) *The Oxford handbook of international human rights law* (OUP 2013) 670-697.

3 Heyns & Killander (n 2) 670.

abolished it ' must not be applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits.'[4] Child marriage is outlawed by regional human rights law in Africa,[5] while there is no similar treaty provisions in the UN human rights system.[6]

Institutions and procedures also differ. In *Minimum standards* we set out common features and best practices among the regional human rights systems of Africa, the Americas and Europe and applied the proposed minimum standards we came up with to the fledgling human rights system of the Association of South East Asian Nations (ASEAN) and the Arab League.

In this chapter I link the legitimacy discussion in *Universality* to themes we discussed in *Minimum standards,* such as membership of inter-governmental organisations (IGOs), membership of monitoring bodies, supervision of implementation of judgments and available resources. I also attempt to link resources allocation to a modest attempt at a cost and benefit analysis of international human rights monitoring.

While the focus in *Universality* and *Minimum standards* was regional protection of human rights, in this chapter I consider the UN human rights system in addition to the three main regional human rights systems under the African Union (AU), the Council of Europe (CoE) and the Organization of American States (OAS). The important role of the European Union (EU) and the Organisation of Security and Cooperation in Europe (OSCE), with a geographical scope that includes the former Soviet republics in Central Asia, and sub-regional organisations in Africa such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC) must also be noted. Reference is made to the practices of these organisations where relevant in the chapter. Other regional organisations of relevance with fledgling human rights organs include the ASEAN with its Inter-Governmental Commission on Human Rights. Not all inter-governmental organisation are based on geographic proximity. The League of Arab States is a language-based organisation, which was established already in 1945 but only has a fledgling human rights system with a Arab Human Rights Committee and a yet to be established Arab Court of Human Rights, for which the League adopted a statute in 2014. There are also inter-governmental organisations which are largely built on colonial links such as the Commonwealth, mainly consisting of former British colonies,

4 UN Human Rights Committee General Comment 36 (2018) para 5.

5 African Charter on the Rights and Welfare of the Child art 21(2); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 18.

6 However, see 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 (2014).

and the Francophonie. Finally we have religious-based organisations such as the Organisation of Islamic Cooperation, which established the Independent Permanent Human Rights Commission in 2011.

This chapter starts with an overview of participation of states in intergovernmental organisations before considering the composition of monitoring bodies. It then considers the role of monitoring bodies in interpreting human rights instruments before considering the issue of implementation and impact. It finally discusses financial resources allocated for international human rights monitoring.

State participation

International law is built on the consent of states. Without state participation no human rights system can function effectively. In *Minimum standards* we proposed that '[m]embership of the IGO should be conditioned upon observance of human rights and democracy criteria, in terms of the admission and possible expulsion of member states or lesser forms of sanction.'[7] In this section I explore membership criteria of the UN and regional IGOs as well as the potential sanctions IGOs may impose against member states. I also discuss how states have broken loose from the human rights supervisory system.

The UN has a near universal membership. According to article 4 of the UN Charter, membership of the organisation is open to 'peace-loving states which accept the obligations contained in the present Charter, and in the judgment of the Organization, are able and willing to carry out these obligations'. In practice widely recognised new states have automatically been granted UN membership, whether 'peace-loving' or not. A newly formed state may fail to gain membership of the UN because the state of which it used to form part maintains that it still form parts of its territory and other states are not interested in changing the *status quo*. Taiwan, Kosovo and Somaliland are examples of *de facto* states which are not members of the UN, nor of regional intergovernmental organisations. No state has ever been expelled from the UN.

The AU has a member, the Sahrawi Arab Democratic Republic (Western Sahara), which is not a member of the UN. When Western Sahara was admitted as a member of the OAU in 1984, Morocco left the continental organisation. Morocco was allowed to re-join the AU in 2017, even though Western Sahara remains occupied by Morocco. Although readmitting Morocco was questioned by some AU member states,[8] its readmittance is in line with the AU Constitutive Act having

7 Heyns & Killander (n 1) 544.

8 S Allison 'Analysis: Morocco's big African Union win comes at the expense of Western Sahara and South Africa', *Daily Maverick*, 31 January 2017, https://www.

no membership criteria apart from a state being African.[9] No state has ever been expelled from the OAU/AU, but suspension of membership due to non-payment of financial contributions and as a result of military coups have been common. Thus, in 2021 Mali, Guinea and Sudan were suspended from the AU following military coups.[10] Sudan had previously been suspended from the AU from June to September 2019, following the toppling of President al-Bashir.

The OAS Charter only provides for 'independence' as a criteria for membership. All states in the Americas are members of the OAS. However, article 9 of the OAS Charter provides for suspension of states where a democratically elected government has been overthrown by force. Honduras was suspended from the OAS from 2009 to 2011 following a military coup. A 1962 suspension of Cuba from the Organization of American States was revoked in 2009.[11]

Article 3 of the CoE Statute provides:

> Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

Membership is by invitation. Almost all European states are members, although Belarus and Kosovo have not been invited to join the organisation. In the case of Belarus, the failure of the state to live up to minimal protection of human rights standards, and its retention of the death penalty, is the reason for non-membership. Not all CoE member states have recognised Kosovo as an independent state. The CoE Committee of Ministers can suspend member states in cases of serious violations of article 3. A member state can then withdraw or the Committee of Ministers can expel the state if the violation persist. Greece withdrew its membership after a military coup in 1967 and was readmitted when democracy returned. No state has been suspended from the CoE but in 2014 the Parliamentary Assembly of the CoE suspended the voting rights of the Russian delegation.[12] The Russian reaction to the suspension was to not pay its fees to the CoE.[13]

dailymaverick.co.za/article/2017-01-31-analysis-moroccos-big-african-union-win-comes-at-the-expense-of-western-sahara-and-south-africa/ (accessed 23 November 2021).

9 AU Constitutive Act art 29.

10 P Fabricius 'African coups are making a comeback' *ISS Today* 15 October 2021 https://issafrica.org/iss-today/african-coups-are-making-a-comeback (accessed 23 November 2021).

11 Heyns & Killander (n 1) 531-532.

12 G Reilhac 'Council of Europe readmits Russia, five years after suspension over Crimea', *Reuters*, 25 June 2019, https://www.reuters.com/article/us-europe-rights-council-russia-idUSKCN1TQ1VL (accessed 24 November 2021).

13 Netherlands Helsiniki Committee 'Russia's Continuation in the Council of Europe: Challenges and Chances for Human Rights', 23 December 2019, https://www.nhc.nl/russia-and-council-of-europe-challenges-chances/ (accessed 23 November

The EU has an elaborate process for prospective members which include measuring progress in relation to rule of law developments before membership negotiations start. The EU may also take action against existing members that fail to adhere to agreed principles. In recent years there has been much discussion around the failure of Hungary and Poland to adhere to basic democratic principles. However, actions such as limiting economic transfers could backfire as sanctioned member states could in turn exercise their veto over important policy developments.

The Commonwealth is an intergovernmental organisation made up mainly of former British colonies. Four member states have been suspended: Nigeria (1995-99), Pakistan (1999-2004, 2007-2008), Fiji (2000-01, 2006-2014), and Zimbabwe (2002-03).[14] Zimbabwe left the Commonwealth in December 2003.

For the first time in its history, ASEAN took action against one of its member states when the southeast-Asian bloc banned the military leader of Myanmar from attending the ASEAN summit in October 2021 for failure of implementing a plan agreed with ASEAN leaders in April 2021 for a 'peaceful solution in the interests of the people' following the military coup in February 2021.[15]

Separate from their membership of the intergovernmental organisation, states become members of treaties adopted by the organisation, including human rights treaties and sign up to be monitored by human rights bodies established under such treaties. States have committed themselves to normative instruments more widely than to optional mechanisms put in place to monitor their implementation. For example, there are 173 state parties to the International Covenant on Civil and Political Rights (ICCPR), but only 116 states are party to the Optional Protocol to the ICCPR, which allows individuals to submit complaints to the Human Rights Committee alleging violations of the ICCPR after exhaustion of local remedies. North Korea sent a notification of withdrawal from the ICCPR in 1997, leading to the Human Rights Committee issuing general comment 26 stating that withdrawal from the ICCPR is not possible.[16] Following cases finding violations in relation to

2021).

14 Commonwealth Network 'Withdrawals and suspension' https://www.commonwealthofnations.org/commonwealth/commonwealth-membership/withdrawals-and-suspension/ (accessed 23 November 2021).

15 'Chairman's statement on the ASEAN leaders' meeting' (2021) https://asean.org/wp-content/uploads/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf (accessed 28 October 2021); 'ASEAN summit begins without Myanmar after top general barred https://www.aljazeera.com/news/2021/10/26/asean-summit-begins-without-myanmar-after-top-generals-exclusion (accessed 28 October 2021).

16 E Evatt 'Democratic People's Republic of Korea and the ICCPR: denunciation as an exercise of the right of self-defence' (1999) 5(1) *Australian Journal of Human Rights* 215; LR Helfer 'Terminating treaties' in DB Hollis (ed) *The Oxford guide to treaties*

the death penalty in Caribbean states by the Human Rights Committee Jamaica, withdrew from the First Optional Protocol to the ICCPR in 1997, Trinidad and Tobago in 1998 and Guyana in 1999. Trinidad and Tobago and Guyana immediately reacceded with reservations to the Optional Protocol while Jamaica remains a non-party to the Protocol, thus no longer allowing for individual complaints to the Human Rights Committee.[17]

All AU member states except Morocco have ratified the African Charter but only 32 have ratified the Protocol establishing the African human rights court.[18] Of these only eight states have made a declaration under article 34(6) of the Protocol allowing for direct access to the court, after exhaustion of local remedies, which still stands: Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Tunisia.[19] Four other states, Rwanda (2017), Tanzania (2019), Benin (2020) and Côte d'Ivoire (2020), have withdrawn their article 34(6) declarations. In its annual report for 2020 the African Court noted that '[n]ot depositing the Declaration, let alone, withdrawing therefrom, deprives citizens of the ability to seek effective remedies for alleged human rights violations.'[20] However, it should be noted that cases against Rwanda and Tanzania can be submitted to the East African Court of Justice (EACJ) and cases against Benin and Côte d'Ivoire to the Court of Justice of the Economic Community of West African States (ECCJ). Cases against six of the eight states which still have article 34(6) declarations in place can also be submitted to the ECOWAS Court. The EACJ and the ECCJ courts even provide access without exhaustion of local remedies, though access to the EACJ is limited in relation to human rights cases and there are a number of procedural hurdles that have been put in place to limit access. These hurdles were put in place as a result of backlash against decisions of the court.[21] However, as opposed to the tribunal of the Southern African Development Community (SADC), the EACJ survived.

The most extreme form of backlash is the dismantling of the existing system for human rights protection, thus removing international protection not only from individuals in countries withdrawing from the

(OUP 2012).

17 N Schiffrin 'Jamaica withdraws the right of individual petition under the International Covenant on Civil and Political Rights' (1998) 92 *American Journal of International Law* 563.

18 'The African Court in brief', https://www.african-court.org/wpafc/basic-information/ (accessed 13 November 2021).

19 As above.

20 Activity report of the African Court on Human and Peoples' Rights – 1 January – 31 December 2020 para 40 https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2020/ (accessed 12 October 2021).

21 K Alter, JT Gathii & L Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 293.

system but for everyone belonging to the system. The only example of this so far is the abandonment of the SADC Tribunal in southern Africa following a campaign against it led by Zimbabwe.[22] It is noticeable that while the African Commission held that removing the Tribunal did not violate the African Charter,[23] national courts in South Africa and Tanzania has held that these two states violated national constitutional law in participating in the dismantling of the Tribunal.[24]

Only 23 of the 35 member states of the OAS are party to the American Convention. The United States, Canada and a number of Caribbean states have never ratified the Convention. Trinidad and Tobago withdrew from the Convention in 1998 and Venezuela in 2013. In 2019 Venezuela's opposition leader deposited an instrument of ratification which was accepted by the OAS but has been rejected by the Inter-American Court which considers Venezuela's withdrawal in 2013 still valid.[25] In 2020 the Inter-American Court delivered an advisory opinion dealing with withdrawal from the American Convention.[26] Other challenges to the Inter-American system include the reaction of Brazil following the Inter-American Commission's call on the country to stop the licensing process related to the Belo Monte dam hydroelectric project threatening indigenous communities. As a result of the Commission's decision, Brazil withdrew its ambassador to the OAS and stopped paying its dues to the organisation.[27] In November 2021 Nicaragua announced that it was withdrawing from the OAS following its criticism of the Nicaraguan elections.[28]

22 L Nathan 'The disbanding of the SADC Tribunal: a cautionary tale' (2013) 35 *Human Rights Quarterly* 870.

23 Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*, adopted at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013.

24 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018); *Tanganyika Law Society v The Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & The Attorney General of the United Republic of Tanzania*, Miscellaneous Civil Cause No 23 of 2014, High Court of Tanzania at Dar es Salaam (4 June 2019).

25 S Steininger, 'Don't leave me this way: regulating treaty withdrawal in the Inter-American Human Rights System' (*EJIL: Talk!*, 5 March 2021) https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/ (accessed 24 October 2021).

26 Inter-American Court of Human Rights Advisory Opinion OC-26/20 of November 9, 2020 requested by the Republic of Colombia - The obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States.

27 TM Antkowiak 'The Americas' in D Moeckli, S Shah & S Sivakumaran (eds) *International human rights law* (OUP 2018) 438.

28 'Nicaragua confirms withdrawal from OAS', MENAFN, 22 November 2021 https://menafn.com/1103226126/Panama-Nicaragua-confirms-withdrawal-from-OAS (accessed 22 November 2021).

Membership of monitoring bodies and staffing

In *Minimum standards* we suggested criteria for membership of regional human rights.[29] These criteria are equally applicable to UN human rights treaty bodies. We suggested a public, transparent system for appointment of members but this has not been adopted by regional human rights bodies nor in relation to UN treaty monitoring bodies. The national nomination procedure and the election by the Parliamentary Assembly of the CoE of judges of the European Court of Human Rights remains the most transparent procedure.[30] However, as discussed below, gender inequity remain a challenge for the European Court. ECOWAS in 2006 established an ECOWAS Judicial Council composed of Chief Justices of the member states, which recommends candidates for appointment to the ECCJ to the Authority.[31] However, the nomination process for membership of the African Commission and African Court lacks transparency and interest from member states to nominate members.[32] Boeglin commenting on the election of new members of the Inter-American Court in 2021 noted:[33]

> One might assume that the choice of persons to be appointed to the highest human rights body in the region would be subject to careful selection, in order to find the most suitable people, with the best preparation and commitment to the cause of human rights; and that in this selection process, a way would be sought to involve civil society organisations, universities and specialised human rights centres to present a final shortlist of candidates to the political decision-makers. Nothing could be further from the truth.

It is noticeable that the UN does not have any independence criteria for membership of monitoring bodies. Thus, for example, serving ambassadors are members of the UN Human Rights Committee.[34] In

29 Heyns and Killander (n 1) 545.

30 International Justice Resource Center 'ECtHR: Composition and election process', https://ijrcenter.org/wp-content/uploads/2020/07/ECtHR-EC-mini-guidefinal-1.pdf (accessed 22 November 2021). In 2010 the CoE established an Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, see https://www.coe.int/en/web/dlapil/advisory-panel

31 Supplementary Protocol A/SP.2/06/ 06.

32 Amnesty International 'The State of African Regional Human Rights Bodies and Mechanisms 2019-2020' (2020) 14–16.

33 N Boeglin 'The election of new members of the Inter-American Court of Human Rights in 2021: some reflections', 27 October 2021, https://www.pressenza.com/2021/10/the-election-of-new-members-of-the-inter-american-court-of-human-rights-in-2021-some-reflections/ (accessed 30 November 2021).

34 'Human Rights Committee - Membership' https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx (accessed 13 November 2021). The member from Egypt is a retired ambassador, the Ugandan member is the legal adviser to the permanent mission of Uganda to the UN, the Chilean member is a retired member of the Chilean foreign affairs department, the Togolese member is a senior civil servant in the ministry of justice of Togo.

contrast, government officials are precluded from serving as members of the African Commission or African Court. Also, '[m]embership on the InterAmerican Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission.'[35]

Equitable regional representation is a concern in the UN bodies. When Christof joined the Human Rights Committee in 2017, it had five members from Africa, one member from the Asia Pacific Region, two members from Latin America and the Caribbean, eight members from the Western Europe and others group and one member from the Eastern Europe Group. Clearly there was a regional imbalance. This regional imbalance was not unique to this year or to this treaty monitoring body.

Members of monitoring bodies are elected based on nationality, not where a person is based. Thus, some members of UN treaty monitoring bodies and special procedure holders are based outside their country of nationality. This is more common in relation to nationals of states in the Global South who are based at institutions in the Global North, making the geographical distribution of membership of UN bodies even more skewed than it appears on paper.[36] This bias towards the Global North becomes even more apparent when one considers where members of monitoring bodies were educated, with educational institutions in the Global North featuring prominently in the CVs of members of monitoring bodies from the Global South.[37] While education in the Global North is a prominent feature also among members of the regional human rights bodies in Africa and the Americas, members of the regional monitoring bodies are generally based in their regions.

One membership criterion in terms of which some improvement has been made over the years is the number of women on monitoring bodies. The first woman on the UN Human Rights Committee, established in 1977, was elected in 1984, the second in 1986 and the

35 Statute of the Inter-American Commission on Human Rights art 8.

36 For example, in relation to thematic special rapporteur mandates with country of nationality in parenthesis: based in the US: right to Food (Lebanon), toxics (Chile), international solidarity (Nigeria), racism (Zambia), sexual orientation and gender identity (Costa Rica); based in Europe: SR on freedom of expression (Bangladesh); SR on peaceful assembly (Togo); SR religion (Maldives); based in Australia: SR on extrajudicial executions (Chile)

37 Postgraduate study destinations outside of their home countries for members of the Human Rights Committee: Canada (members from Guyana, Tunisia) France (members from Chile, Greece Paraguay, Tunisia), Germany (member from Chile) Netherlands (members from Albania, Morocco, Slovenia) Spain (member from Paraguay), Sweden (member from Canada), (Switzerland (members from Egypt, Morocco, Slovenia), UK (members from Ethiopia, Guyana), US (members from South Korea and Uganda). Only the members from France, Japan, Portugal, Spain and Togo only have education from their home countries. Most members from the Global South undertook no postgraduate studies in their home countries and none of them in any other country in the Global South.

third in 1992. By the time Christof joined the Committee in 2017, eight of 18 Committee members were women. This number has dropped to seven as of November 2021.[38]

As of November 2021, five of the seven Commissioners on the Inter-American Commission on Human Rights are women. From 2016 to 2021 only one of the seven judges of the Inter-American Court of Human Rights was a woman.[39] However, the gender composition of the Court was significantly improved in the election announced in November 2021 for four new judges taking office from 2022 to 2027.[40] Four of the seven judges will now be women. As of November 2021, only 14 of 47 judges on the European Court of Human Rights are women.[41] This is despite Parliamentary Assembly of the CoE not considering national nomination lists with only men.[42]

The inequity in relation to geographical balance in membership of monitoring bodies is also evident in the staffing of the UN. Recruitment is organised according to a system of 'desirable ranges' in which nationals of states which makes the largest contribution to the UN's general budget are the ones who hold most professional posts with the organisation.[43]

Interpretation

In *Minimum standards* we noted:[44]

> The human rights systems of a regional IGO, in respect of countries that are also subject to other international human rights supervisory systems, should be geared towards complementarity. The general rule should be in favour of deference to global standards as minimum requirements. A regional system should not consider cases that have already been decided on the global level.

Elsewhere I have considered the approach of regional human rights bodies to interpretation and how there is a movement towards convergence

38 'Human Rights Committee - Membership' (n 34); For an overview of the issue of gender representation in the UN human rights system see: Human Rights Council Advisory Committee, 'Current Levels of Representation of Women in Human Rights Organs and Mechanisms: Ensuring Gender Balance' (2021).

39 'Composiciones Corte Interamericana de Derechos Humanos 1979-2019' https://www.corteidh.or.cr/docs/composiciones/composiciones.pdf (accessed 30 November 2021).

40 'Verónica Gómez Elected as One of the Judges of the Inter-American Court of Human Rights (2022-2027)' (*GlobalCampus of Human Rights - GCHR*) https://gchumanrights.org/news-events/latest-news/news-detail-page/veronica-gomez-elected-as-one-of-the-judges-of-the-inter-american-court-of-human-rights-2022-2027.html (accessed 14 November 2021).

41 European Court of Human Rights 'Composition of the Court', https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c (accessed 22 November 2021).

42 International Justice Resource Center (n 30).

43 A/73/372/Add.3

44 Heyns & Killander (n 1) 544.

driven by institutional dialogue.[45] This dialogue clearly also involves the UN human rights system and national courts and quasi-judicial bodies such as national human rights institutions (NHRIs). However, it is noticeable that, while UN treaty monitoring bodies may be influenced by developments elsewhere, they very rarely explicitly refer to such developments in the 'views' adopted on individual communications. National engagement with the interpretation by international human rights bodies varies significantly and is of course not only relevant in a judicial setting but also in development of legislation, policy and institutional frameworks.

Arguably policy guidance provided by international human rights law, whether UN or regional, is more important than outcomes in individual cases, though as noted below even when it comes to individual relief, a favourable judgment is but one of the tools in the national mobilisation for change.

All states should seriously considered the guidance that monitoring bodies provides. The International Court of Justice in *Diallo* noted as follows in relation to the interpretation of the ICCPR by the Human Rights Committee:[46]

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

The Court continued in relation to the relevance of the jurisprudence of the African Commission in relation to the interpretation of the African Charter on Human and Peoples' Rights:[47]

> Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.

45 M Killander 'Interpreting regional human rights treaties' (2010) 7 *Sur International Journal on Human Rights* 145.

46 *Affaire Ahmadou Sadio Diallo (République de Guinée c République Démocratique du Congo): arrêt du 30 novembre 2010* para 66.

47 Diallo (n 46) para 67.

Follow up on implementation

Implementation of judgments of international courts and decisions of quasi-judicial bodies remain a challenge. The 2020 Activity Report of the African Court notes:[48]

> One of the major challenges facing the Court at the moment is the perceived lack of cooperation from Member States of the African Union, in particular, in relation to the poor level of compliance with the decisions of the Court. Of the over 100 judgments and orders rendered by the Court, as at the time of writing this Report, only one State Party, that is, Burkina Faso, had fully complied with the judgments of the Court, one other State, the United Republic of Tanzania, has complied partially with some of the Judgments and orders against it, the Republic of Cote d'Ivoire has filed its compliance report but the Applicants dispute the facts, while the other States such as Benin, Libya and Rwanda, have not complied at all, with some openly indicating that they will not comply with the orders and judgments of the Court.

As noted by Stafford in relation to the European Court, '[i]f the system is to function effectively, judgments from the Strasbourg Court need to result not just in justice for the individual, but in the legal or practical reforms necessary to ensure that the same violation does not happen again in the society as a whole.'[49]

The CoE has an elaborate supervision procedure, with most judgments following the 'standard procedure' and an 'enhanced procedure' being 'used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases.'[50] It is notable that the CoE allocates a significant budget for effective implementation of the judgments of the European Court of Human Rights. For 2020, the budget for this was Euro 19,3 million compared to a budget of Euro 74 million of the operations of the European Court.[51] While serious concerns around implementation of judgments of the European Court remain, this focus on implementation and ensuring for example that compensation is paid out is one likely reason for the popularity of submitting cases to the Court.

48 African Court (n 20) para 37.

49 G Stafford 'The implementation of iudgments of the European Court of Human Rights: Worse than you think – part 2: The hole in the roof' (*EJIL: Talk!*, 8 October 2019) https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed 23 October 2021).

50 'Supervision of execution of judgments of the European Court of Human Rights' (*Committee of Ministers*) https://www.coe.int/en/web/cm/execution-judgments (accessed 23 October 2021).

51 'Council of Europe Programme and Budget 2020-2021' https://rm.coe.int/1680994ffd (accessed 13 October 2021).

Similarly to the European Convention, the Protocol establishing the African Court on Human and Peoples' Rights provides that the AU Executive Council shall monitor the implementation of the Court's judgments. The African Court provides information on the implementation of judgments in its annual reports. However, the AU Executive Council seemingly has taken little action to ensure implementation, not even calling for compliance with the judgments of the courts in its annual adoption of the activity reports of the Commission since its decision on the 2017 Activity Report in 2018.[52] This silence contrasts with the Executive Council's call for the implementation of the African Commission decisions in its 2020 activity report.[53] However, a framework for implementation of the judgments of the African Court is currently being considered by the AU political bodies and the Court is set to establish a Compliance Monitoring Unit.[54]

In the Inter-American human rights system, the Court itself plays an important role in monitoring compliance with its judgments, while the political bodies of the OAS are not involved in ensuring compliance.[55]

Of course impact is much broader than compliance. For example, Palacios Zuloaga has shown in relation to the Inter-American Court 'how civil society organizations value the declarative justice provided by the Court, how they mobilize around human rights litigation and how adept they are at deploying rulings in such a way as to produce impact beyond compliance and even in the absence of any compliance at all.'[56] This is in line with the importance 'to harness the treaty system to domestic forces – "domestic constituencies" – that will ensure its realisation' as highlighted by Christof and Frans Viljoen in their study on the impact of the UN human rights treaty monitoring bodies.[57]

52 Decision on the Activity Report of the African Court on Human and Peoples' Rights, Doc EX.CL/1258(XXXVIII). The last time the Executive Council called for compliance with the judgments of the Court was when it adopted the 2017 Activity Report of the Court: Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights, Doc EX.CL/Dec.994(XXXII)Rev.1, para 9.

53 Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), Doc EX.CL/1259(XXXVIII), para 8.

54 African Court (n 20) para 43.

55 Inter-American Court of Human Rights 'Learn about the monitoring compliance with judgment' https://www.corteidh.or.cr/conozca_la_supervision.cfm?lang=en (accessed 23 November 2021).

56 P Palacios Zuloaga 'Judging Inter-American human rights: the riddle of compliance with the Inter-American Court of Human Rights' (2020) 42 *Human Rights Quarterly* 392.

57 C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (Kluwer Law 2002) 6.

Resources

One common criticism expressed by international human rights monitoring bodies is the slow pace of national judicial/quasi-judicial processes. This criticism is equally valid for the monitoring bodies themselves. For example, in October 2021, the African Commission published a decision delivered in March 2020 finding no violation in relation to political participation of refugees in elections in Zimbabwe.[58] The complaint had been submitted in 2012 and the Commission refers to no procedural hurdles after the submissions of the parties on the merits in 2015. Why it took another five years to decide the complaint and another year and a half to make it public remains a mystery, especially considering that the Commission has a modest case load. However, regrettably, the long time to decide the complaint is in line with the Commission's established practice.

The European Court is drowning in applications. In 2020 the Court received 41,700 applications, which were allocated for judicial decision and 39,190 decisions made.[59] A significant number of 14,150 applications were disposed of administratively. Pending decisions stood at 62,000 at the end of the year. In comparison, the Inter-American Court received 23 new contentious cases in 2020 leaving it with a balance of 48 cases to decide at the end of the year. The African Court received 40 contentious cases in 2020 and one request for an advisory opinion.[60] At the end of the year it had 210 contentious cases and two requests for advisory opinion pending before it.

The slow moving machinery of international human rights monitoring is not only evident in relation to petitions. State reporting is a procedure under the African and UN human rights systems. Under the African Charter a state should submit a report on steps it has taken to implement the provisions under the Charter every second year. Hardly surprising, no state has submitted reports according to this timeline. The reason the Commission can consider the reports relatively soon after they have been submitted is that states combine reports so that most states submit a report every 6 to 10 years, although six parties to the African Charter have never submitted a report.[61] State reporting also poses a challenge for the UN treaty monitoring bodies. To cope

58 Communication 430/12, *Gabriel Shumba and Others (represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe*, adopted at the 27th extraordinary session, 19 February to 4 March 2020.

59 European Court of Human Rights, 'Analysis of Statistics 2020' (2020).

60 African Court (n 20) para 10.

61 African Commission on Human and Peoples' Rights 'State reports and concluding observations https://www.achpr.org/statereportsandconcludingobservations (accessed 30 November 2021).

most UN treaty monitoring bodies have adopted simplified reporting procedures where they request states to submit reports focusing on a specific list of issues and the Human Rights Committee has introduced a 'predictable review cycle … based on an eight-year cycle, which includes periods for the submission of reports and constructive dialogue with the Committee.'[62] Of course state reporting is not only a burden on the monitoring bodies but also on states with limited resources at their disposal.

Lack of resources is often singled out as the reason for the slow moving wheels of international justice, whether deciding on cases or considering state reports. One of the reasons for the resource constraint is the high cost of human resources for international human rights monitoring. This is linked to that international civil servants are more costly than most of their national equivalents. In the UN Secretariat the salaries of professional staff is determined according to the *Noblemaire* principle, that the salary of a UN professional staff member is set according to the highest pay level of a member state. This has so far been determined to be the federal civil service of the United States.[63] Remuneration in regional IGOs is similarly high compared to most national civil services.

With the exception of the judges of the European Court of Human Rights, members of monitoring bodies are generally not full time employees but are paid honoraria per day they are attending sessions.[64]

Comparing resources dedicated to human rights work between different IGOs is difficult. Here I will only provide a simplistic comparison between the regional courts based on the number of judgments delivered in 2020 and the budget provided for the respective court. The Inter-American Court delivered 23 judgments and had a budget of US$ 7,1 million, the African Court delivered 21 judgments (including one advisory opinion) with a budget of US$ 10,5 million (reduced from US$ 13,5 million US$ due to Covid-19) and the European Court delivered 872 judgments (381 chamber, 480 committee, 10 grand chamber, 1 advisory opinion) with a budget of 74 million Euros, corresponding to approximately US$ 85 million.[65] The cost per judgment was

62 Human Rights Committee 'The predictable review cycle' https://www.ohchr.org/EN/HRBodies/CCPR/Pages/PredictableReviewCycle.aspx (accessed 30 November 2021).

63 International Civil Service Commission, 'United Nations Common System of Salaries, Allowances and Benefits' (2021) 2 https://icsc.un.org/Resources/SAD/Booklets/sabeng.pdf (accessed 14 November 2021).

64 For example the honoraria per day for members of the Inter-American Commission and Court is US$ 300 per day. OAS 'Approved budget' http://www.oas.org/budget/2020/Approved Budget 2020.pdf (accessed 14 November 2021).

65 African Court (n 21) para 13 (judgments on jurisdiction, admissibility, merits, reparations and review); Inter-American Court *Annual Report 2020* 43 (19 judgments on preliminary objections, merits, reparations and costs; 4 judgments on interpretation); European Court of Human Rights *Annual Report 2020* 149. On

approximately US$ 10,000 for the European Court, US$ 300,000 for the Inter-American Court and US$ 500,000 for the African Court.

Of course there are many activities of the courts outside delivering substantive judgments. The number of judgments above leaves out both provisional measures decisions which is much more common at the Inter-American Court and African Court than the European Court and the extensive number of cases thrown out by the courts each year on jurisdiction and admissibility grounds. In 2020, the European Court struck out or declared inadmissible 36,261 applications.

In the African and European human rights systems less resources are provided for the wider mandates of the African Commission (6 million US$, compared to 13 million US$ for the African Court for 2020)[66] and the Council of Europe Commissioner of Human Rights (3,8 million Euro) than for the respective regional courts. The OAS on the other hand provides more resources for the Inter-American Commission than the Inter-American Court (5,3 million US$ for the Court and 10,6 million US$ for the Commission for 2020).[67] Despite this, the Inter-American Commission has experienced serious financial difficulties.[68]

Despite the seemingly high costs set out above, it is noticeable that the cost of the human rights mechanisms are relatively low compared to other aspects of the organisations. For 2020 the human rights work of the UN was allocated US$ 116,4 million,[69] or 3.7% of the UN budget. The 2020 budgets for the main regional IGOs were US$ 647,3 million for the AU, US$ 82,7 million for the OAS in 2020, and Euro 254 million for the CoE. The higher percentage allocated to the human rights bodies in the Inter-American system illustrates the more narrow mandate of the OAS as an IGO in the Americas compared to other regional IGOs. In the African context the political bodies have highlighted the importance that the human rights bodies are financed from internal resources. However, project funding by international donors remain common.

In *Minimum standards* we noted that '[t]he commissioners and judges should control the appointment of key staff.'[70] At its September 2020 meeting the Executive Council finally granted the African Commission 'the mandate to recruit its own critical staff with the assistance of the

the budgets see African Court (n 20) paras 23-24; OAS (n 64); CoE (n 51).

66 Amnesty International (n 32) 47.

67 OAS (n 64).

68 Antkowiak (n 27) 437.

69 UN Office of the High Commissioner for Human Rights 'OHCHRs funding and budget' https://www.ohchr.org/en/aboutus/pages/fundingbudget.aspx#:~:text=The%20initial%20regular%20budget%20appropriation,US%24105.6%20million%20in%202019 (accessed 17 December 2021).

70 Heyns & Killander (n 1) 545.

R10 Committee of Experts'.[71] In contrast, the OAS Secretary General in August 2020 refused to renew the contract of the Executive Secretary of the Inter-American Commission despite the Commission unanimously supporting an extension of his mandate.[72]

Conclusion

Legitimacy in the context of international organisations relates to how the organisation and its organs are viewed by government representatives, national courts, civil society and the general population of that state. Clearly not all of these would have the same views. However, the lack of even basic knowledge of the human rights systems on the part of most of these stakeholders may be a considerable legitimacy challenge. UN and regional human rights bodies are not well known beyond experts who are themselves engaged with the system. An exception is the European Court of Human Rights, which is well known among the general population of many European states, and among legal practitioners in particular. This level of knowledge may to some extent explain the big discrepancy in cases submitted to the European Court compared to other human rights bodies.

States' engagement with human rights bodies start with membership of intergovernmental organisations. Sanctions for failure to live up to membership criteria in relation to human rights are rare and mainly limited to military coups. A worrying trend is states disengaging with international human rights bodies following adverse decisions or criticism, with the dismantling of the SADC Tribunal as the most extreme example.

Monitoring bodies and their staff should be representative in terms of nationality and gender and measures taken to ensure that members of monitoring bodies are independent and committed to human rights. The overrepresentation of the Global North in UN human rights bodies and staffing is a matter of concern. The increasing number of women on human rights bodies is encouraging, but much remains to be done to fully ensure gender equality. Procedures for selection of members of human rights bodies could generally be improved.

Legitimacy further entails acceptance. Few states have fully accepted international human rights bodies as being the authoritative source on interpretation of the treaties they have been put in place. The

71 'African Commission on Human and Peoples' Rights 'Activity reports' (2021) para 9 https://www.achpr.org/activityreports/viewall?id=52 (accessed 13 October 2021).

72 Human Rights Watch 'OAS leader undermining rights body', 27 August 2020, https://www.hrw.org/news/2020/08/27/oas-leader-undermining-rights-body (accessed 23 November 2021).

judgments of international courts are binding but compliance is not automatic.

International human rights monitoring bodies have built an important corpus of normative standards. National legislators, policy makers and judges have engaged with these normative standards so that they are often reflected in national legislation and policy. In many instances national institutional frameworks have been put in place and resources allocated to make such legislation and policy a reality. In some countries these international norms have had little impact. There is no national legislation and policy reflecting them or where there is, no institutional framework or budgetary resources have been availed to ensure their implementation. However, the international norms are there and can be used by national civil society, supported by international NGOs, other states, and other actors, to push for change. Of course there would sometimes be disagreement on the details of the norms and there is room for different approaches between different states and also within states.

From the above it should be clear that there are benefits to international human rights law. The question is, do these benefits outweigh the significant costs, specifically the financial costs, of the international human rights system? States have limited resources but arguably their investment in international human rights monitoring is merited from the perspective of the policy guidance they receive. For individual victims of human rights violations international human rights bodies provide a last recourse to attain justice. Of course, even the most elaborate system for ensuring compliance with judgments will meet resistance where the state considers it in its interest not to comply. This is no different from when judgments that would go against the state are handed down at the national level.

There have been many initiatives to reform both UN and regional human rights protection. It is clear that international bodies cannot decide all cases but play an important role in guiding states that are interested in being given guidance and for civil society to engage the state. The international community should focus on strengthening what is in place. This may in some instances require additional financial resources, but much more importantly, may require a sincere engagement of states with the institutions they have created and introspection within the institutions themselves on steps they can take to improve their functioning within available resources.

20

Trailblazer of institutional and normative pathways on the African human rights landscape

*Frans Viljoen**

Introduction

While the most prominent part of Christof Heyns' career has been devoted to working within the United Nations (UN) human rights system, he also professionally and academically engaged with regional human rights systems and mechanisms. To him, regional systems localised and rooted global human rights, and brought it closer to and made it more accessible to people as they experienced life.[1] Although he had some exposure to the European and Inter-American human rights systems, as a South African, his deepest interest and commitment was to the African regional system. It was important to him to bridge the international (of which the regional is a notable part) and the national. During the process of the drafting of the Constitution of the Republic of South Africa, 1996, Christof introduced this question: 'Where is the voice of Africa in our Constitution?'.[2] He argued that, to be 'truly legitimate', to 'reflect the soul of our nation', the Constitution must 'be rooted in African soil'. This 'Africanness' could be achieved, he contended, by using the language of 'individual duties', one of the distinguishing features of the African Charter on Human and Peoples' Rights (African Charter), to frame the constitutional limitation clause.[3]

This chapter takes stock of Christof's role in forging institutional and normative aspects of the African regional system. Departing from a 2001 academic contribution he made to the debate on the derogation of Charter rights during states of emergency, different readings of the legal position related to this issue are undertaken. After a quick turn to

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1 See eg C Heyns & M Killander 'Universality and the growth of regional systems' in D Shelton (ed) *The Oxford handbook of international human rights law* (OUP 2013).

2 C Heyns 'Where is the voice of Africa in our Constitution?' Occasional Paper 8, Centre for Human Rights, February 1996 ('Voice of Africa), https://www.chr.up.ac.za/images/publications/centrepublications/occasional_papers/occasional_paper_8.pdf (accessed 31 December 2021).

3 Heyns (n 2): 'by acknowledging the existence of duties, society at large will be given a more balanced view of what citizenship entails'.

a wider perspective on the issue, some suggestions are made for more normative clarity.

Trailblazer

Christof was pivotal in establishing the African human rights system as a serious field of study and academic reflection. In retrospect, he may be called the 'father' of the 'Centre for Human Rights School of African Human Rights Law'. His trailblazing journey took five pathways.

First, Christof was pivotal in establishing the Master's degree programme in Human Rights and Democratisation in Africa (HRDA) at the Centre for Human Rights in the Faculty of Law at the University of Pretoria (UP). This programme, which has since 2000 been supported by the European Union, has grown into a flagship academic programme with continental reach, and established itself as a prized part of the seven programmess worldwide comprising the Global Campus of Human Rights. Boldly, the African regional human rights system lies at the academic heart of this programme. With around 30 students from across the continent graduating every year, this programme has contributed in no small measure to the pool of leading human rights professionals on the continent and beyond.[4] It is no wonder that HRDA alumni have held the positions of Chairperson of the African Commission on Human and Peoples' Rights (African Commission) and of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee), and in 2021, three of the four most senior legal officers at the African Court on Human and Peoples' Rights (African Court) were alumni of this programme. Not only was he a teacher to the HRDA students, but he also taught the African regional human rights system at the Summer School of the Washington College of Law, American University, Washington DC, and the International human rights law Master's programme at the University of Oxford, among many other programmes and universities.

Second, beyond formal legal education, Christof contributed to human rights education through his relentless advocacy of moot court competitions as experiential learning. His initiative to set up the African Human Rights Moot Court Competition was aimed at giving exposure to the African Charter and the jurisprudence of the African Commission, at influencing legal education at African law schools, and at stimulating reflection and discussion on the establishment of an *actual* African Court.[5] When the Moot Court Competition started in 1992 (at the

4 See *Alumni Diaries, 2000-2019*, https://www.chr.up.ac.za/images/publications/Alumni_Diaries/Alumni Diaries 2019 - web.pdf (accessed 31 December 2021).

5 See C Heyns, N Taku & F Viljoen 'Revolutionising human rights education in African universities: the African Human Rights Moot Court Competition' in *Advocating for*

Southern African level), the African Court did not exist. In fact, the legal instrument establishing the African Court was adopted only in 1998, and the Court started sitting only in 2005. His foundational and inspirational role in the Moot has been suitably captured in its renaming in September 2021 as the 'Christof Heyns African Human Rights Moot Court Competition'.

Third, Christof contributed as a scholar of 'African human rights law'.[6] While he was its Director, the Centre for Human Rights in March 2001 organised a conference not only to celebrate 20 years since the adoption of the African Charter in 1981, but also to consider the need and feasibility of treaty reform. On that occasion, Christof delivered a seminal paper setting the tone of the discussion.[7] In its 'Statement on the passing of Prof Christof Heyns', the African Commission acknowledged the 'large number of publications in leading academic journals on the work of the African Commission' from his pen, and its impact in 'making the African human rights system known to the world'.[8] His research and writing on the impact of human rights treaties also has relevance for Africa.[9]

Fourth, Christof cultivated scholarship on the African regional system. He did so as co-founding editor of the *African Human Rights Journal*, which has been published since 2001. The *Journal* is the first and still the only journal devoted to human rights in an African setting, with a pride of place given to the African regional system. He also made sources available and drew attention to the outputs and accomplishments of the African regional system at a time when scholarly pessimism towards the system largely prevailed.[10] Departing from the premise that the dim view of many scholars (particularly those not based in Africa) was rooted in their ignorance, reinforced by a lack of information about and access to relevant information, Christof

Human Rights (Brill Nijhoff 2008) 17-39.

6 See eg C Heyns 'African human rights law and the European Convention' (1995) 11(2) *South African Journal on Human Rights* 252-263; C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and People's Rights – the system in practice 1986-2000* (CUP 2002) 137-177; C Heyns 'The African regional human rights system: the African Charter' (2004) 108(3) *Penn State Law Review* 679-702; and C Heyns & M Killander 'Africa' in D Moeckli and others (eds) *International human rights law* (OUP 2017) 465-481.

7 C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-174. This article is one of Christof's most cited articles on the African regional system. (Google Scholar indicates 65 citations as at 9 January 2022.)

8 'Statement on the passing of Prof Christof Heyns', Commissioner Solomon Ayele Dersso, Chairperson of the African Commission on Human and Peoples' Rights, 29 March 2021.

9 See eg C Heyns & F Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (Brill 2021) (covering Egypt, Senegal, South Africa and Zambia).

10 See C Heyns & M Killander 'Africa in international human rights textbooks' (2007) 15(1) *African Journal of International and Comparative Law* 130-137.

embarked on one of his grandest and most influential projects – the compilation, publication and dissemination of documents relevant to the African regional human rights system.[11] It was a matter of serious concern to Christof that the African regional human rights system was not only neglected but often misrepresented in global human rights scholarship. This concern inspired him to introduce more readers and scholars to the African system. At a time when the internet was not yet widely accessible, when the African regional human rights system was largely unknown, and when the Commission's work remained hidden and did not travel well beyond its Secretariat in Banjul, The Gambia, he collected and published a number of volumes of texts and commentaries. In this way, he breathed life into an almost non-existent field of academic study. The collection *Compendium of key human rights documents of the African Union*, edited by Heyns and Killander (Pretoria University Law Press; various editions), has served – and still serves – as a source of reference to generations of students of African human rights law. It was also his passion to see others publish, and he was involved in the founding of the Pretoria University Law Press (PULP), which became an outlet for publications on 'African human rights', in particular.

Fifth, as human rights professional and expert, Christof was not a distant armchair critic, but a close, hands-on partner. He has served on several occasions as technical adviser on human rights to the African Union (AU) and the African Commission. In particular, Christof served as adviser to the African Commission in developing its influential General Comment 3 on the Right to Life, adopted by the Commission in 2015.[12] He also was a member of the Commission's Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa. Christof also took the initiative to establish and maintain close working relationships between the African Commission and the UN human rights system.

11 See C Heyns (ed) *Human rights law in Africa 1996 (vol 1)* (Kluwer Law 1996); C Heyns (ed) *Human rights law in Africa 1997 (vol 2)* (Kluwer Law 1999); C Heyns (ed) *Human rights law in Africa 1998 (vol 3)* (Kluwer Law 2001); C Heyns (ed) *Human rights law in Africa 1999 (vol 4)* (Kluwer Law 2002); C Heyns with M van der Linde (ed) *Human rights law in Africa vol 1* (Martinus Nijhoff 2004); and C Heyns with M van der Linde (ed) *Human rights law in Africa vol 2* (Martinus Nijhoff 2004). See also, for a French version of these, edited with P Tavernier: C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 1996-2000* (Bruylant 2002); C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 2000-2004 (Tome I)* (Bruylant 2005); and C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 2000-2004 (Tome II)* (Bruylant 2005). See also C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: a reader* (PULP 2006).

12 See the 'Preface' to the African Commission's General Comment 3: 'The African Commission is very grateful for the valuable contributions from members of the Working Group and experts to the text, in particular from Professor Christof Heyns'.

Derogations and states of emergency

Christof's interests in advancing the regional human rights system, on the one hand, and his passionate concern for the right to life and 'freedom from violence',[13] on the other, converge in a topic that has received attention since the adoption of the African Charter, namely, the possibility of derogating from human rights during periods of war, public emergency, other forms of turmoil, and political instability. Under circumstances of struggle for the very 'life' of the nation,[14] the lives of people ('civilians', in situations of armed conflict) within the national polity are at elevated risk. With national institutions under physical and psychological threat, the role of international (including regional) scrutiny or supervision becomes more pronounced. However, the assumption that the 'detached international judge' would necessarily be better suited to provide a robust but fair assessment is to some extent refuted by past practice.[15]

The position of the African regional human rights system on this issue has been a subject of considerable debate and discussion, mainly because the African Charter contains no derogation clause. The drafting process does not shed much light on the reasons for this 'omission'. An elaborate suspension clause, almost a word-for-word copy of the corresponding provision in the American Convention,[16] was included in the initial (Mbaye) draft.[17] However, this was not taken up in any further drafts – and the final version – of the African Charter. The lack of an extensive recorded drafting history makes it difficult to get into the minds of the drafters, but the sketchy details indicate that the drafters were not oblivious to contemporaneous comparative models.

In the 2001 conference organised by the Centre for Human Rights, Christof identified this omission as one of the problematic aspects of the African Charter.[18] Thus, he entered a deliberative space that has seen the emergence of four broad approaches to the implications of this omission. The first three approaches depend on and derive from the Commission's interpretation of the Charter. In the first, no derogation or suspension of rights is allowed. In the second approach, derogation is allowed as a *species* of limitation, and its validity is assessed against the same yardstick as 'ordinary limitations'. In the third, derogation

13 See various chapters in this volume.
14 Art 15(1) European Convention.
15 See, for example, F Ní Aoláin 'The emergence of diversity: differences in human rights jurisprudence' (1995) 19 *Fordham International Law Journal* 101.
16 Art 27 American Convention on Human Rights.
17 One of the sources through which this draft was given much exposure is *Human rights law in Africa* 1999 (n 11) 65-77.
18 Heyns (n 7).

is allowed, not based on the Charter but on general principles of international law (as mandated by the Charter).[19] The fourth approach takes the solution out of the Commission's hands, by trusting state parties to amend the Charter, so as to provide an unequivocal textual basis for derogation.

No derogation, ever

In terms of the first approach, the absence of a derogation clause is interpreted to mean that derogation is not allowed under any circumstances whatsoever, even during publicly declared or 'genuine' states of emergency. To Christof, such a wholesale impossibility of derogation would be 'unfortunate', since such a stance would mean that, in real emergencies, 'the Charter will be ignored and will not exercise a restraining influence'.[20] Ever the realist, he saw the following dilemma arising for states: 'States facing real emergencies could in practice be expected to ignore the Charter rather than succumb to the emergency, if those are the only two options available.'[21] Ouguergouz also finds this an 'extreme interpretation' that would be 'hard to defend'.[22]

Obviously, an omission or silence in any legal document can be interpreted with one of two legal maxims in mind: 'everything which is not (explicitly) prohibited is (by implication) allowed', or 'everything which is not (explicitly) allowed is (by implication) prohibited'. What would be the best approach to take in this particular instance? From the state party's point of view, it should be allowed to act within the scope of its sovereignty (that is, retain the discretionary competence to derogate when required) unless doing so would breach a contradictory obligation. From the rights-holder's perspective, what weighs heaviest is to have in place the most extensive level of rights protection. From the Commission's vantage point, the interpretation should ideally be guided by what fits best into the exercise of its general powers. Understood in this way, all three perspectives call for the application of the maxim 'everything which is not prohibited is allowed', since reading into the Charter a derogation clause would be compatible with maximising state sovereignty; it would enlarge the Charter's protective scope to the benefit of victims; and it would be in line with the Commission's general protective mandate.

19 Art 61 African Charter (The Commission 'shall … take into consideration, as subsidiary measures to determine the principles of law' … 'general principles of law recognised by African states').

20 Heyns (n 7) 162.

21 As above.

22 F Ouguergouz *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable development in Africa* (Martinus Nijhoff 2003) 425.

These viewpoints notwithstanding, the Commission adopted the position that no derogations are allowed. Full-stop. Commentators point to *Commission Nationale des Droits de l'Homme et des Libertés v Chad* as the clearest expression of the Commission's position on this matter.[23] It is undeniable that the Commission concluded that 'even a civil war cannot be used as an excuse' for violating Charter rights *because* the Charter 'does not allow for state parties to derogate from their treaty obligations during emergency situations'.[24] However, the precedent-setting nature of this decision for the question under consideration may be questioned. In this particular case, the government provided no 'substantive response' other than a 'banket denial of responsibility'.[25] The matter was therefore not fully ventilated before the Commission either as far as the law or the facts are concerned. The 'emergency situation' to which the Commission refers was not a formally-declared state of emergency, and the state made no attempt to argue that some basis for the derogation of rights existed. It should also be taken into account that this was one of the Commission's earliest decisions,[26] coming at a time when its style of reasoning was decidedly terse and not fully substantiated. Also, the Commission's actual finding on the merits is a violation of 'serious and massive violations of human rights', which under article 58 of the Charter requires referral to the Assembly of Heads of State and Government, the supreme political body within the Organisation of African Unity (OAU, now the AU). This element reinforces the impression that the decision does not contemplate answering a vexing legal question, but should rather be understood as an appeal to the political forum of African states, of which Chad forms a part, in response to a deeply troubling and unacceptable political situation.

The next Commission decision usually referred to is *Media Rights Agenda v Nigeria*.[27] In this finding, the Commission again notes that the Charter 'does not contain a derogation clause', and then concludes that 'limitations' on Charter rights 'cannot be justified by emergencies or special circumstances'.[28] As in the first case, the government in this instance did not make representations, although a visit by the Commission was allowed to be undertaken to Nigeria. The violations

23 (2000) AHRLR 66 (ACHPR 1995) (*Chad Massive Violations* case). See eg Heyns (n 1) 161; Ouguergouz (n 21) 425-426; and F Viljoen *International human rights law in Africa* (OUP 2012) 333.

24 *Chad Massive Violations* case (n 23) para 21.

25 *Chad Mass Violations* case (n 23) para 24.

26 It was contained in the Commission's 9th Annual Activity Report, and was taken in October 1995.

27 (2000) AHRLR 200 (ACHPR 1998) (*Media Rights Agenda* case). See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

28 *Media Rights Agenda* case (n 27) para 67.

occurred during the military government of Sani Abacha, following a military take-over. The Abacha government issued a series of decrees, including one suspending the Constitution,[29] and one dissolving political parties.[30] As in the earlier *Chad Massive Violations* case, the circumstances are so dire and the violations so flagrant that any argument by the newly established government justifying its actions as 'preserving the life of the nation' would have been entirely preposterous.

It is against this background that the Commission's approach starts to make more sense. To some extent, the Commission's lack of nuance and occasional over-stating legal requirements,[31] reflects a 'jurisprudence of exasperation', rather than careful analysis with a view to setting legal precedents.[32] In the forefront of its mind was the need to signal to African states, at a political level, that they cannot trample Charter rights by justifying their actions with reference to civil war, insecurity or popular dissent. It should be taken into account that the Commission does not only adjudicate 'communications', but also plays an important role to guide states in the performing their obligations under the Charter. In 2007, responding to the killing of at least 129 Guineans by government security forces cracking down on a nationwide strike protesting corruption and 'bad governance' in Guinea,[33] the Commission, in the name of its Chairperson, issued an 'appeal' in which it recalled that 'unlike other international human rights treaties, the African Charter does not allow for states to derogate' from Charter rights, and reiterated that the Charter provisions must be 'observed even during emergency situations'.[34]

The strongest argument for retaining the status quo as set out by the Commission (not allowing for derogation under any circumstances), is probably based on political expediency. In a context of grave political instability, which characterises many Africa countries, the risk of baseless reliance on derogation leading to abuse looms large. This

29 Constitution(Suspension and Modification) Decree 107 of 1993.

30 Political Parties (Dissolution) Decree 114 of 1993.

31 See eg *Media Rights Agenda* case (n 27) para 69, where the Commission states that limitations have to be 'strictly proportionate with and *absolutely* necessary for the advantages to be obtained' (emphasis added).

32 See K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39 (explaining that a jurisprudence of exasperation is the 'tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country, rather than on the basis of 'carefully thought out arguments based on the law's possibilities and limits).

33 Human Rights Watch, 'Dying for change: brutality and repression by Guinean security forces in response to a nationwide strike', 24 April 2007, https://www.hrw.org/report/2007/04/24/dying-change/brutality-and-repression-guinean-security-forces-response-nationwide (accessed 9 January 2022).

34 Appeal: The African Commission on Human and Peoples' Rights Concerned about the Situation in the Republic of Guinea, Salamata Sawadogo, Chairperson, ACHPR, Banjul, 16 February 2007.

absolute choice may however have the effect of encouraging these important issues to be dealt with 'extra-legally', thereby removing these questions from independent supervision. This 'all-or-nothing' approach may be presented as 'evidence of the steely resolve of the Commission not to allow deviations from human rights standards under any circumstances', Christof warned, but in truth it debases human rights by removing an important layer of scrutiny.[35] Another argument in support of this approach is that it is consistent with and gives impetus to an 'international trend of expanding non-derogable rights'.[36] However, this is a very optimistic view of the expanding floor of what constitutes non-derogable rights, for which there is inadequate support in state practice.

Derogation as limitation

A second approach is that, although it is not explicitly provided for, 'derogation' is possible as part of the 'limitation' of rights under the Charter. This approach is based on the underlying understanding that limitation and derogation both are forms of 'restriction' of rights, in the broadest sense. In this context, 'limitation' and 'derogation' have legally defined meanings, but the word 'restriction' is used in its ordinary language sense, that of: setting an 'official limit', or controlling something so that it does not exceed a particular level or that it is kept within specified bounds.[37]

From this point of view, 'derogation' and 'limitation' are located on a continuum according to the degree and modality of 'restriction'. The Human Rights Committee, in its 2020 Statement in the context of the COVID-19 pandemic, implicitly supports the view of the overlapping nature of 'derogation' and 'limitation' when it advises state parties not to *derogate* from ICCPR rights 'when they are able to attain their public health or other public policy objectives' by '*restricting*' rights by introducing 'reasonable *limitations*' on certain rights.[38]

In *Media Rights Agenda*, the Commission seems to adopt this approach, although it does not do so very deliberately and with accompanying substantiation or explanation. In its decision, the Commission immediately moves from stating that the Charter does not contain a 'derogation clause' to the following: 'Therefore *limitations* on the rights and freedoms enshrined in the Charter cannot be justified

35 Heyns (n 7) 161-162.

36 AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17(1) *Law, Democracy & Development* 78-110.

37 See definition of 'restriction' in the Cambridge and Collins English Dictionaries.

38 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2, 30 April 2020, para 2(c) (emphasis added).

by *emergencies* or special circumstances.'[39] Probably, the Commission would have been clearer if it stated that 'restrictions' (understood as covering both 'derogations' and 'limitations') cannot be justified by emergencies. Be that as it may, what is clear is that the Commission devises a single test to assess the justification of both limitations and derogations of rights. According to this test, which is based on article 27(2) of the Charter, to pass Charter muster the measures taken must be 'strictly proportionate with an absolutely necessary for the advantaged for which are to be obtained'.[40]

To Sermet, the Commission hereby introduced derogation as 'a sub-clause implied by the general clause on the restriction of human rights',[41] which can only be justified if it conforms with the principles of necessity and proportionality. To him, this approach is 'logical and legally sound'.[42]

Not all commentators agree. The argument against this approach is that the conflation of 'derogation' and 'limitation' fails to take account of the distinct differences between them.

In Ouguergouz's view, the Commission is wrong for trying to make the limitation clause play the role of a derogation clause.[43] For him, the differences between limitation and derogation are too fundamental, with each of these clauses playing a 'highly specific role':[44] 'imposing the role of a derogation clause' on limitation clauses 'in certain circumstances is to misunderstand their purpose'.[45]

It is undeniable that derogation and limitation were devised for different circumstances. Derogation releases the state from the obligation to observe a particular right, for a particular period, thus 'placing the right in abeyance'.[46] Limitation entails justifiably encroaching on individual rights in the normal application of the law, based on the principles of necessity and proportionality. The major differences lie in the elements of inviolability and temporality.[47] While limitations are applicable equally to all rights, derogations are not allowed in respect of certain categories of 'non-derogable' rights. While limitations are routinised, derogations have a particular temporal validity.

39 *Media Rights Agenda* case (n 27) para 67 (emphasis added).
40 *Media Rights Agenda* case (n 27) para 69.
41 L Sermet 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: a critical discussion' (2007) 7 *African Human Rights Law Journal* 142 at 152.
42 As above.
43 Ouguergouz (n 22) 434 (n 1529).
44 Ouguergouz (n 22) 437.
45 Ouguergouz (n 22) 434.
46 TR Hickman 'Between human rights and the rule of law: indefinite detention and the derogation model of constitutionalism' (2005) 68 *Modern Law Review* 655 at 658.
47 Sermet (n 41) 153.

The drafting history of the 1950 European Convention is of interest here. Up to a late stage of the deliberations, only 'limitations' were provided for. Having accepted that rights may be limited with reference to specific grounds (including public order), the inclusion of derogation clause seemed superfluous. However, it appears that delegates were swayed by the argument that extraordinary cases may arise that would not fall within the scope of the grounds justifying limitation. It would appear that the derogation saw the light of day not as an additional layer of protection of the individual, but as a way of appeasing states, in fact, to leave them more elbowroom.[48]

Derogation based on general principles of international law

A third approach is that the treaty-silence implies that derogation may be allowed – not based on the Charter but on general principles of international law. Here, the premise is that derogation should be permitted, but only if an applicable principle of international law allows it. One such possibility is the principle that no one could be required to perform a duty when it is impossible to do so ('impossibility of performance'). Article 61(1) of the Vienna Convention on the Law of Treaties (VCLT) allows for impossibility as a result of the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'. Ouguergouz shows convincingly that the 'object' here refers to a 'physical object', such as the drying up of a river,[49] and not, for example, to fluctuating political turmoil. Kombo asks whether the related theory of 'force majeur' could justify derogation. Analysing one of the African Court's judgments (*APDF and IHRDA v Mali*), she criticises the Court's superficial engagement with the vexing issue of the derogation from rights.[50] She concludes that the *force majeur* justification can only succeed if the limitation clauses in the Charter could be used to assess such situations. If the no-derogation position holds sway in the Commission's practice, *force majeur* would not be able to justify derogation.[51]

Another possibility basis under international law is a 'fundamental change of circumstances'.[52] Different to the 'impossibility of performance', no material impossibility is required. However, even if this avenue may look more promising as a basis to justify derogation,

48 See Ouguergouz (n 22) 435-436.

49 Ouguerzouz (n 22) 445.

50 BK Kombo 'Silence that speaks volumes: the significance of the African Court's decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389.

51 Kombo (n 50) 401.

52 See Ouguergouz (n 22) 447-468. See also art 62 VCLT.

the criteria are numerous and onerous, and largely correspond with the requirements for derogation under other treaties.[53]

Amending the Charter by adding a derogation clause

A final approach is the introduction into the Charter of a derogation clause through a formal process of legal reform (rather than 'quasi-judicial law-making'). The main problem with this proposal lies in the realm of strategy and tactics. Revision of the Charter requires a simple majority of state parties for the approval of amendments, and subsequently approval of the amendments by each state through its own domestic constitutional procedure.[54] This inevitably opens a door to political deliberations, which may have unpredictable consequences potentially detrimental to the African human rights project.

Twenty years ago, Christof sketched two opposing views on Charter reform. The one is that it should be avoided, because of the dangers it holds;[55] because the Commission's creative and progressive interpretation of the Charter shows that the defects can be remedied through interpretation; and because the 'overwhelming' support that the Charter enjoys may be whittled down.[56] The other view is that reform should be undertaken, so as to improve the 'impact and effectiveness of the system'.[57] To ensure predictability and certainty, the Commission's interpretive gains should ideally be formalised and anchored into treaty provisions. To 'retain its integrity', the Charter should 'say what it means';[58] this form of clarity would then make it easier to popularise the Charter.

When Christof wrote, he emphasised that wide acceptance of 'the idea of human rights' meant that 'more substantial support for significant reforms' could be counted on 'than is traditionally expected'.[59] Regrettably, 20 years later, it is difficult to argue that we live in an 'age of rights' or that human rights still is the 'idea of our time'. Domestic politics are seeped in populist demagoguery, and multilateralism is under constant threat of being eroded. Within Africa,

53 The coexistent obligations of states that are party to both the ICCPR and the African Charter is obviously a topic that needs to be explored in greater depth that can be done in this contribution.

54 Art 68 African Charter.

55 Heyns (n 7) 157: 'To now tamper with the system may create confusion, and provide an opportunity for some of the 'fish' that have already been caught to escape'.

56 At the time, the Charter had been ratified by all AU member states; in 2022, only Morocco is outside the fray.

57 Heyns (n 7) 157.

58 Heyns (n 7) 158.

59 Heyns (n 7) 173-174.

we have witnessed a slide back to illiberal democracies,[60] and recurrent unconstitutional changes of government.[61]

As in 2001, this is a time of AU reform. Institutional reform has been a dominant feature of AU debates and discussions for the last few years. Systemic AU reform received an impetus when the AU Assembly of Heads of States discussed the 'Kagame report' at a retreat and subsequently in 2017 adopted Decision 635,[62] which launched a comprehensive process of far-reaching institutional reform of AU organs and institutions. This reform is aimed at improving the ability of AU organs and institutions to deliver efficiently on their mandates. The aim is to leave no AU organs or institution untouched. The organs and institutions to be reviewed as part of these institutional reforms therefore include judicial and quasi-judicial organs bodies, of which the African Commission is part. In February 2021, the Assembly requested the AU Commission to finalise the remaining reform priorities for consideration by policy organs in early 2022.[63] To this end, the Institutional Reforms Unit, which is tasked with implementing the day-to-day activities to be delivered as part of the ongoing reform process of institutional reform within the AU, has been undertaking study visits to the various AU organs and institutions. Five key transformation challenges to be addressed as part of the review process are identified.[64]

This may not be an optimal time for reforming the African Charter. We are still living in the aftermath of the AU Executive Council's directive to the African Commission to rescind its decision to grant observer status to an African non-governmental organisation, and the Commission's eventual acquiescing to this demand.

60 By one measure (Freedom House annual reports), the number of African countries rated as 'not free' increased from 14 in 2006 and 2008 to 20 in 2021 (J Campbell & N Quinn "What's happening to democracy in Africa' https://www.cfr.org/article/whats-happening-democracy-africa (accessed 7 January 2022)).

61 *Coups d'etat* took place in Sudan (2019), Mali (August 2020 and May 2021), Chad (2021), and Guinea (2021); see P Fabricius 'African coups are making a comeback', 15 October 2021 https://issafrica.org/iss-today/african-coups-are-making-a-comeback (accessed 8 January 2021).

62 Assembly/AU/Dec.635(XXVIII) 28th Ordinary Session of the Assembly of the Union, 30 and 31 January 2017, Addis Ababa.

63 Assembly/AU/Dec.798(XXXIV) 34th Ordinary Session of the Assembly of the Union, 6 and 7 February 2021, Addis Ababa, Ethiopia.

64 'The Imperative to Strengthen our Union: Proposed Recommendations for the Institutional Reform of the African Union' (Annex to Assembly Decision on the Outcome of the Retreat of the Assembly of the African Union on Institutional Reform of the AU). The five areas are: the need for the AU to focus on key priority areas that by nature are continental in scope; operational efficiently and effectively; sustainable financing; institutional realignment for better service delivery; and the need to connect the AU with the African citizenry.

A comparative view

One of Christof's many talents was his ability to lift his gaze. Not allowing himself to get tied down by the weight of the immediate, Christof would try to adopt a contextual and holistic view. Even in his study of the 'African regional system', he soon branched out to place it in a comparative regional perspective.[65]

Of the three well-established regional human rights systems, the African is the only without a derogation clause.[66] Adopting a narrow gaze, one may be convinced that this in itself is a problem. However, if one extends the inquiry to the global level, one observes that only one of the UN human rights treaties, the ICCPR, contains a derogation clause. Two of the core UN human rights treaties mention the issue of 'derogation'. The Convention against Torture (CAT) is explicit that no 'exceptional circumstances whatsoever', including 'a state of war or a threat of war', may ever be 'invoked as a justification of torture'.[67] In other words, CAT identifies a particular right – the right not to be tortured – as not allowing for derogation, in line with the ICCPR, which has already identified that right as non-derogable.[68] The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) clarifies that treaty rights cannot be derogated from by way of private contractual agreements.[69] The remaining human rights treaties, including ILO Conventions, are silent on derogation. This is equally true for treaties predating the European Convention (such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) as for those adopted thereafter (such as the 1953 Convention on the Political Rights of Women and the 1990 Convention on the Rights of the Child).

What explains the discontinuity between the ICCPR and other core UN human rights treaties? Part of the explanation can lie in the extensive scope of the rights in the ICCPR (covering an extensive array of 'civil and political' rights of 'everyone' or 'all persons'), and its wide coverage (as one of the most ratified treaties).[70] In broad terms, the two

65 See C Heyns, D Padilla & L Zwaak 'A schematic comparison of regional human rights systems: an update' (2005) 5 *African Human Rights Law Journal* 308-320; C Heyns, D Padilla & L Zwaak 'A schematic comparison of regional human rights systems: an update' (2006) 3 *Sur-International Journal of Human Rights* 160-169; and Heyns & Killander (n 1).

66 1951 European Convention on Human Rights, art 15 1969 American Convention, art 27; see also the 2004 Arab Charter on Human Rights, art 4 (mirroring the ICCPR).

67 Art 2(2) CAT.

68 Art 4(2) read with art 7 ICCPR.

69 Arts 25(2) & 82 CMW.

70 By 31 December 2021, a total of 173 states have become party to the ICCPR

regional treaties share these features. In other words, the rights enjoyed by specific categories of persons ('women' (under CEDAW), 'children' (under CRC), 'persons with disabilities' (under CRPD) etc) need not be derogated from in relations to the specific category at stake, because they will all already be covered or 'subsumed' under any general (population-wide) derogation. Given its adoption contemporaneous with the ICCPR, the omission of a similar provision from International Covenant on Economic, Social and Cultural Rights (ICESCR) calls for an explanation. It has been suggested that the very nature of socio-economic rights, in so far as they relate to the minimum core content of health, nutrition, housing, and food,[71] makes the notion of derogation unsuited to this Covenant. It has also been suggested that the notion of derogation does not sit well with 'programmatic' rights, as the ICESCR was, initially at least, conceived.

The notion that derogation under a more expansive treaty makes derogation under a more specific treaties unnecessary or redundant is dispelled by the Council of Europe treaties. The European Social Charter, for example, both in its original (1961),[72] and revised (1996) iterations, allows for derogation during 'war' or 'public emergency',[73] alongside general limitations 'prescribed by law' that are 'necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'.[74] The 1977 European Convention on the Legal Status of Migrant Workers allows a state party to 'temporarily derogate' from its obligation to allow family reunification, based on 'receiving

(https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 31 December 2021).

71 See A Müller 'Limitations to and derogations from economic, social and cultural rights' (2009) 9 *Human Rights Law Review* 557 at 598-599.

72 Part V Article 30 – Derogations in time of war or public emergency 1 In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

73 Part V, Article F – Derogations in time of war or public emergency 1 In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

74 1961 Social Charter, art 31; 1996 Revised Social Charter, Part V, art G.

capacity'.[75] Although the 1977 Convention does not explicitly mention the European Convention, it stipulates safeguards quite similar to those in article 15 of the European Convention.

This analysis does not support the often-repeated charge of African exceptionalism, and inference that the African Charter somehow falls short because it has no derogation clause. In any event, all but two African UN member states are party to the ICCPR.[76] According to the UN Treaty Body Collection database, only four African states (Ethiopia, Namibia, Senegal and Togo) have since the outbreak of COVID-19 registered notifications of states of emergency, all of them invoking derogation from articles 12 (freedom of movement) and 21 (peaceful assembly) of the ICCPR, and two of them some other rights.[77] The Human Rights Committee observed that states generally have not complied with their duty of notification.[78] According to the same database, only seven African state parties – less than ten per cent of their total number – have ever made a notification under art 4(3) of the ICCPR. In addition to the four states mentioned earlier, Algeria, Burkina Faso and Sudan have also on at least one occasion done so.[79] The formal requirements under article 4 of the ICCPR are evidently no magic bullet.

75 Art 12(3) European Convention on the Legal Status of Migrant Workers.

76 Thye are: Comoros (which signed ICCPR in 2008) and South Sudan (which, arguably, is bound by Sudan's ratification) (UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 8 January 2022).

77 Ethiopia, notification of 9 June 2020, effective from 8 April 2020 for a duration of five months; additional derogation from art 18 (freedom of religion) and 'visitation rights of accused and convicted persons' (not specifically provided for under the ICCPR); Namibia, notification received 6 July 2020; Senegal, notification received 6 July 2020, state of emergency lifted 30 June 2020; Togo, notification received 17 May 2021, additional derogation from arts 9 (liberty of person) and 18 (freedom of religion).

78 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, UN Doc CCPR/C/128/2, 30 April 2020 (para 1: 'It has been brought to the attention of the Committee, however, that several other States parties have resorted to emergency measures in response to the COVID-19 pandemic in a manner seriously affecting the implementation of their obligations under the Covenant, without formally submitting any notification of derogation from the Covenant.')

79 Algeria (1991 (in response to 'disturbances' that had been 'fomented with a view of preventing the general elections to be held on 27 June 1991 and to challenge the ongoing democratic process'), 1992, 1993, and on 25 February 2011, informed the Secretary-General that the state has lifted the 1993 state of emergency); Burkina Faso (2019, state of emergency in 14 provinces in the country, in response to 'terrorist attacks' that have 'caused an enormous loss of human life, severe injuries to many people, and significant material damage'); and Sudan (state of emergency declared on 30 June 1989, notification received; notifications if renewals, 2001 and 2002; further state of emergency declared 22 February 2019, notification received 8 March 2019). Namibia has once before, in 1999, made a notification: (a 30-days state of emergency in response to 'public emergency threatening the life of the nation and the constitutional order' in the Caprivi region of the country; notification received 14 September 1999 of revocation of the declaration of state of emergency and emergency regulations in the Caprivi region), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 8 January 2022). See also Viljoen (n 23) 334.

Conclusion

Christof had great faith in the regional dimension of international human rights law, generally, and in the African regional system, specifically. He devoted a large part of his academic and professional life to raise awareness, contribute his expertise and explore ways in which people may benefit from being rights holders under the African regional human rights system. The vexing issue of the best legal approach to optimally protecting human rights during situations of conflict, public emergency, disaster and calamity has preoccupied Christof in various professional contexts. His voice is also indelibly part of the African discourse on this issue.

As far as the derogation of rights during periods of instability and threat is concerned, there is a need for the position under the African Charter to be clarified. The Commission has taken a positions on this matter that may appear contradictory and unclear. There is a distinct need for greater normative clarity, preferably not through an incremental process involving the occasional consideration of communications or the unpredictable examination of state reports, but through a normative instrument resulting from an informed, participatory and analytical drafting process. Issues to be considered include: under what circumstances may derogation be acceptable; what are the conditions for legitimate derogation; which Charter rights are non-derogable, with specific reference to social, economic and cultural rights, and peoples' rights; how do assessments of derogation and limitation differ if at all; how do the obligations of state parties to the Charter relate to their (apparently contradictory) obligations under the ICCPR and national law;[80] and how can better compliance with reporting requirements be assured?

In my view, the Commission should build on the second approach discussed above, 'derogation as limitation'. State measures to *restrict* rights, whatever the circumstances, should be assessed for their compatibility with reference to the principle of proportionality: In this balancing exercise, the nature of the right and the extent of its restriction, the purpose of the restriction, the rational link between the restriction of the right and its purpose, and the availability of less restrictive means, should all be accorded their appropriate weigh in the peculiar circumstances.[81] Under circumstances amounting to

80 The domestic law of many African states provide for the formal declaration of states of emergency, and some of them for derogation of rights and for enumerated non-derogable rights, see eg Ali (n 36) 94-97.

81 See also Müller (n 71): 'the principle of proportionality applicable to limitations and derogations alike ensures that, in practice, neither limitations nor derogations permit states to disregard their human rights obligations altogether'.

public emergency, the fact that a right is considered non-derogable in other treaty regimes will be an important factor to consider. So will the purpose of the limitation, which may be to 'preserve the life of the nation'. Adopting an adjusted proportionality test, wrought out of the Charter, and legitimated by both the Commission and the Court, may just be what makes best sense for the African regional human rights system. This suggestion is made, mindful that proportionality analyses have their detractors,[82] and that this approach may not be most suitable for all human rights systems or in all contexts. Dealing with states of emergency though a proportionality lense, in the same way that limitations are considered, would free the African system of the historical baggage that the derogation discourse brings.[83]

Fortunately, the Commission has already set in motion a process to develop this normative clarity. Within the African human rights system, the issue of derogation and states of emergency has largely been viewed through the prism of ongoing and widespread conflict, insecurity and terrorism. Responding to the criticism that it has not paid enough attention to such issues, including the intersection between the Charter and international humanitarian law, the Commission in 2016 resolved that a study on human rights in conflict situations in Africa be conducted, on which to base its strategy intervention.[84] The African Commission also appointed a Focal Point on Human Rights in Conflict Situations in Africa (Focal Point), a position that Commissioner Dersso has been holding since its inception. Like a chameleon, the issue of suspension of rights under dire societal pressures reappears in different guises over time, even if the core considerations remain constant. Over the last two years, the COVID-19 pandemic propelled the suspension of rights during a 'state of emergency' into renewed focus. In August 2020, the African Commission gave two tasks to its Focal Point.[85] On the short-term, it was to report and provide an assessment of emerging practice among African states on the matter. On the slightly longer term, the Focal Pont was asked to 'develop a normative framework in the form of Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring states of emergency or disaster'. In this process, the almost complete overlap between ICCPR and African Charter state parties has to be taken into consideration, to ensure a system of duality that is congruent and consistent.

82 See eg K Möller 'Proportionality: challenging the critics' (2012) 10 *International Journal of Constitutional Law* 709-731.

83 In the sense of 'derogation' being understood as 'the complete elimination of an international obligation' (Müller (n 71) 651).

84 Res 332 on Human Rights in Conflict Situations, ACHPR/Res.332(EXT.OS/XIX)2016, 25 February 2016.

85 Res 447 on upholding human rights during situations of emergency and in other exceptional circumstances, ACHPR/Res. 447 (LXVI) 2020, 7 August 2020.

Drawing on Christof's writing in 2001, the temptation to embark on far-reaching Charter-amending reform should be resisted. These are not the times for reopening the debates of 1981, but rather for consolidating and clarifying the scope of gains already achieved.

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Africa: influencing aspects of theory and practice in international law

*Chris Maina Peter**

> 'We have awakened. We will not sleep anymore. Today, from now on, there is a new African in the world! Our country's independence is meaningless unless it is linked up with the total liberation of the African continent.'
>
> Kwame Nkrumah

Introduction

This essay attempts to map the influence of the African continent in the development of international law at both theoretical and practical level. It is noted that in all the achievements made, Africa has not been working as a lone ranger but rather with other people from the developing world. This has mainly been through inter-governmental organisations. These include the Asian-African Legal Consultative Organization (AALCO); the Group of 77; the Non-Aligned Movement; the South Commission as well as working as part of the UN and its various institutions.

As it will be elaborated at length later, it was while working as part of the Asian-African Legal Consultative Organization (AALCO) that Africa was able to develop and come up with the concept of Exclusive Economic Zone (EEZ) in the course of the development of Law of the Sea. Again, it was in the process of fighting for self-determination and independence, the struggle led to the recognition of wars of national liberation as legitimate wars entitling those involved to prisoner of war status. At the same time, mercenaries involved in similar wars were not only denied prisoner of war status, but all their activities were declared illegal in the eyes of international law. The work goes on to examine the contribution of Africa to the appreciation of human rights beyond the individual to the wider community and the input of African culture in the process. Connected to the peoples,' group and solidarity rights is the recognition of gender rights in the continent[1] which surprisingly goes

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1 See Protocol to the African Charter on the Rights of Women in Africa, 2003 (Maputo Protocol).

beyond the celebrated United Nations (UN) Convention on Elimination of all forms of Discrimination Against Women (CEDAW), 1979.[2] Apart from the various theoretical contribution done by Africa to international law, this work also mirrors the influence of the continent in various global initiatives like those led by the Group of 77 and non-aligned movement and had its hand in the formulation of the New International Economic Order and its programme of action. Also, the continent had valuable contribution in the process leading to the adoption of the UN Law of the Sea Convention in 1982.

The work notes that there were conditions leading to these momentous contributions by Africa to international law. The personalities in leadership in the continent played a very pivotal role due to their standing at global, regional and national stages.[3] Africa lacks such visionary people at present. Therefore, it will take a while before the presence of the continent at international stage can be felt again. In the meantime, African academics, both at home and in the diaspora have continued to do marvellous work in terms of providing progressive interpretation of international law as it develops.[4] This is a very encouraging situation.

For me it is a great honour to be invited to contribute to this volume of essays in honour of Professor Christof Hendrik Heyns. I met Christof for the first time in Nairobi, Kenya in the early 1990s. Both of us and others had been invited as External Examiners at the then Faculty of Law of the University of Nairobi by Prof Kivutha Kibwana, then the Dean of the Faculty and now the Governor of Makueni County in Kenya. At that time the world had just opened the doors to South Africa in various areas including academics. Christof was warm, pleasant, friendly and very enthusiastic and with a lot of questions on what was happening in our Universities and the meaning and value of external examination exercise. I explained calmly and it attracted him. We also visited various bookshops in Nairobi which are well-stocked with up-to-date materials and he ended up spending most of his allowances on books.

2 See Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW).

3 This crop to leadership which brought Africans together, inspired them and cultivated the sense of unity and oneness include Haile Selassie of Ethiopia, Jomo Kenyatta of Kenya, Asagyefo Kwame Nkrumah of Ghana, Gamal Abdel Nasser of Egypt; Ahmed Ben Bella of Algeria; Julius Nyerere of Tanzania and others. On these popular first generation leaders in after and their work see eg JM Biswaro *The quest for regional integration in the twenty first century: rhetoric versus reality – a comparative study* (Mkuki na Nyota 2012).

4 The contribution Africans to the development of international law is well captured Professor Tiyanjana Maluwa, the former Legal Counsel of the then Organisation of African Unity (OAU) and now teaching at the School of Law of Pennsylvania State University in the USA. See T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties' (2020) 41 *Michigan Journal of International Law* 327.

We later met after he and his colleagues at the University of Pretoria had established the Centre for Human Rights and the popular LLM in Human Rights and Democratisation in Africa programme. He somehow liked Tanzania and always made sure that we had a slot or two in the programme. The students selected did not let him down. They did well and today they are Judges of the High Court and Court of Appeal and some are Ministers in the Cabinet. They fondly speak of him and the Centre whenever we bump into each other.

Later, we were to meet in Geneva, Switzerland almost on annual basis when he served as a Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016) and as a member of the Human Rights Committee (2017-2020). I was then a member of the UN Committee on Elimination of All Forms of Racial Discrimination and later the UN International Law Commission (ILC). Time allowing, he was part of the annual Nelson Mandela World Human Rights Moot Court Competition management team which organised the finals of the competition at the UN in Geneva. I remember us standing at the *Palais des Nations* Tram Station for hours allowing trams to go as we discussed many issues of common interest. There is no doubt that we are already missing him as he has just gone too soon.

Colonial objects

Africa, as a continent, was ignored for a very long period. It was a walking ground for those looking for places to loot and they did actually loot the continent with impunity. Under oppression, it was unthinkable for the continent to contribute anything and that is why legal luminaries coined the terms *subjects* and *objects* of international law. The subjects of international law were those with a say and the objects were those without any say in international law and could do nothing to influence its development. It is only in 1950s and later in 1960 that territories in African began trickling into the community of nations. It must be emphasised that this was not a lone journey. Africa was not the only area of the world which was colonised. This as soon to develop into a global phenomenon on which imperialism was built.[5] It follows logically that the anti-imperialist struggle was equally global in its reach. It touched all the empires of the colonial powers. Therefore, the contribution of the African continent to international law over the years has been influenced and assisted a close collaboration with the

5 On the characteristics of imperialism and its need see VI Lenin *Imperialism, the highest stage of capitalism a popular outline* (1917) (published later in Lenin's *Selected works (volume 1)* (Progress Publishers 1963); DW Nabudere *The political economy of imperialism: its theoretical and polemical treatment from mercantilist to multilateralism* (Zed Press 1977); & JL Kanywanyi 'The struggle against imperialism: a popular outline' (1976) Faculty of Law, University of Dar es Salaam.

others who had suffered the same fate. This will be illustrated clearly as we examine one contribution after the other. It has not been easy, but Africa has struggled had to maintain its place among the nations.

Liberation and struggle against colonialism

The first area where Africa made an important breakthrough in international law was in wars of national liberation and struggle against colonialism and the system of apartheid practised in South Africa. These struggles led to new thinking and appreciation of the laws of war which are technically referred to as 'international humanitarian law'.

Rivalries among colonial powers at times led to serious wars. These large-scale wars were at times given wrong names. For instance, world wars while they were actually not. However, they entailed shifting colonial subjects from occupied territories from one continent to another. During these wars, people met – all of them oppressed and suppressed but fighting for the same master. They exchanged ideas and their experiences. Thus, when they returned home, they were different people. A bug of liberation had entered them, and it was germinating. For most Africans and particularly those from former British colonies, Burma (today's Myanmar) is where the bug was picked. It is the soldiers from the campaigns in Burma who brought new ideas about freedom of their countries.[6] That was the genesis of the wars of liberation in the continent.

It is therefore not surprising that at its inception in May 1963, the Organisation of African Unity (OAU) set as it main priority liberation of the continent from colonialism and the racist system practised in South Africa and the then South West Africa.[7] A liberation committee was set up and based in Dar es Salaam, Tanzania,[8] with the single aim of liberation of the continent and particularly in southern Africa where Mozambique, Angola were still under colonial yoke and without prospects for independence and also Guinea Bissau, Cape Verde, Sao

6 See the narratives of Bildad Kaggia of Kenya and Ally Kleist Sykes of Tanganyika in K Bildad, *Roots of freedom 1921-1963: the autobiography of B Kaggia* (East African Publishing House 1975), and JV Mwapachu *A journey: my life, speeches & writings* (E & D Publishers 2021).

7 On South Africa and control of Namibia see WS Rayner & others *How Botha and Smuts conquered German West Africa* (Simpkin, Marshall, Hamilton, Kent & Co 1916); MH Park 'German South-West African campaign' (1916) 25 *Journal of African Society* 113, and CJ Johnston *The campaign in German South West Africa 1914-1915* (Government Printer 1937).

8 On the wars of national liberation in Africa see H Mbita *Southern African national liberation struggles* (Mkuki na Nyota 2014); H Othman *Sites of memory: Julius Nyerere and the liberation struggle in Southern Africa* (Zanzibar International Film Festival, 2007); and C Chachage & Annar Cassam (eds) *Africa's liberation: The Legacy of Nyerere* (Pambazuka Press & Fountain Publishers 2010).

Tome and Principe, Equatorial Guinea in West Africa[9] and Western Sahara in the North West Africa.[10]

Wars of liberation took guerrilla form due to the inferior capacity of those involved and the mighty fire power of the colonial powers assisted by the metropole. With time and gain in legitimacy, these wars were waged openly. International law could not ignore what was happening in the continent and it is not surprising that as international humanitarian law was being revised in 1977 to improve the four Geneva Conventions of 1949 Africa and what was happening in the continent was on the agenda.

Two issues were discussed, adopted and mainstreamed into international humanitarian law. Firstly, was the question of the status of wars of national liberation.[11] Before 1977 wars of national liberation were not recognised as legitimate wars which would attract protection of those involved under the law of nations. These wars were categorised as terrorism and those involved once arrested were not treated as legitimate fighters and thus never accorded prisoner of war status. This changed completely in 1977 following the adoption of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977:

> Article 1(4) provides that armed conflicts in which peoples are *fighting against colonial domination, alien occupation or racist regimes* are to be considered international conflicts. (emphasis added)

That was a major victory for Africa. Others had fought wars of this nature for years, but it is the continent that brought in sufficient heat that made a difference.

Another area which was addressed in the 1977 Geneva Protocols which is of relevance to Africa is in relation to the use of mercenaries. The colonial powers had left the continent reluctantly. Thus, they could not leave it in peace. They used their national intelligence organisations to destabilise the newly independent African states directly or through use of private mercenaries, popularly known as the 'hired gun', 'soldiers of fortune' or 'dogs of war' in 1960s and 1970s.[12] From the Comoros

9 Against Portugal alone the following guerrilla groups were at its neck: In Angola (People's Movement for the Liberation of Angola (MPLA), National Liberation Front of Angola (FNLA), National Union for the Total Independence of Angola (UNITA)), Mozambique (FRELIMO), Guinea-Bissau (PAIGC, FLING), and Cape Verde (PAIGC).

10 All these liberation struggle groups and their main players are discussed at length H Othman 'Mwalimu Julius Nyerere: an intellectual in power' in Chachage & Annar Cassam (n 8) 28.

11 See HA *Wilson International law and the use of force by national liberation movements* (OUP 1990).

12 On mercenaries and their use in Africa, see *Mercenary: Mike Hoare's personal story of his astonishing and horrifying experiences in the Congo as a mercenary* (Corgi Books 1967); AH Thobhani, 'The mercenary menace' (1976) 23 *Africa Today* 61; PC Maina 'Mercenaries and international humanitarian law' (1984) 24(3) *Indian*

through the Sudan up to Nigeria, mercenaries created havoc on the continent and they cared little save for their ill-gotten pay.[13] Though their status was suspect, they still enjoyed the backing of the former colonial powers and even international law was alleged to be contested in issues relating to them. That came to an end in 1977 through article 47 of the same Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The Protocol in article 47(2) defines a mercenary as a person who

(a) is especially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Meanwhile, article 47(1) is categorical that 'a mercenary shall not have the right to be a combatant or a prisoner of war'. That was the second positive result coming directly from liberation struggles in the African continent, namely, outlawing mercenaries in the laws of war at global level. Of course, the problem of mercenaries in wars across the world is far from over. They are coming back into the war scene in some other forms having been given legitimacy, blessings and full support by their own governments or those governments hiring them to indirectly fight for them in open combat.[14]

Journal of International Law 373; G Arnold *Mercenaries: the scourge of the Third World* (Palgrave Macmillan 1999); and E Lieblich 'The status of mercenaries in international armed conflict as a case of politicisation of international humanitarian law' (2009) 3 *Bucerius Law Journal* 91.

13 On German mercenary Rolf Steiner's campaigns in the Biafra War and with the Anyanya in Southern Sudan and the French mercenary Bob Denhard, who was all over the continent of Africa from Congo to the Comoros see P Baxter *Biafra: the Nigerian Civil War 1967-1970* (Helion & Co 2014); E O'Ballance *Sudan, civil war and terrorism, 1956-99* (Springer, 2003); S Weinberg *Last of the pirates: the search for Bob Denhard* (Pantheon 1995); and D Hebditch & K Connor *How to stage a military coup: from planning to execution* (Skyhorse 2017) at 136.

14 It is worth noting that all these efforts notwithstanding, mercenaries are coming afresh into the war field in another form. They are openly fighting in Iraq, Afghanistan and elsewhere as military contractors hired by private military companies commissioned and paid by foreign states waging wars in these territories. See PW Singer *Corporate warriors: the rise of the privatized military industry*

Africa and the law of the sea

It is in the development and organisation of the Law of the Sea that Africa has made an indelible mark. However, this major contribution to international law is the least known as very few people in Africa and beyond have interest in the sea and particularly its governance, notwithstanding the fact that the continent is surrounded in all parts by the sea.[15] For the majority, having fish on the dinner table is more than enough. However, the sea is more than fish and the blue water which many associate with it.

The sea covers about two-thirds of the surface of the earth while more than three quarters of the world trade is transported easily through the sea. This part of the globe is important for security, communication, as a source of food, minerals, oil, gas and other resources.[16] The discovery of manganese nodules on the surface of the ocean beyond national jurisdiction particularly on the Pacific Ocean enhanced the importance of the sea to the world community.[17] Notwithstanding its strategic importance, the sea has for many years been chaotically organised. This is mainly due to the existence of different interest groups depending on their affinity to the sea. These interest groups include coastal states, land-locked states, geographically disadvantaged states, island states, archipelagos and others.[18]

Africa has deep interest in the sea. It is actually surrounded by the sea on all sides. In the East it is the Indian Ocean and on the West side is the Atlantic Ocean on the northern side is the Mediterranean Sea which

(Cornell University Press 2004); RY Pelton *Licensed to kill: hired guns in the War on Terror* (Crown, 2006); K Fallah 'Corporate actors: the legal status of mercenaries in armed conflict' (2006) *International Review of the Red Cross*; J Scahill *Blackwater: the rise of the world's most powerful mercenary army* (Serpent's Tail 2007); and M Mancini *Private military and security company employees: are they the mercenaries of the twenty-first century?*, EUI Working Paper AEL 2010/5, European University Institute, San Domenico di Fiesole, 2010.

15 On an early analysis of the third UN on the Law of the Sea see NS Rembe *Africa and the international law of the sea* (Sijthoff & Noordhoff 1980). See also TO Elias *Africa and the development of international Law* (Martinus Nijhoff Publishers 1988), ch 14 on the Law of the Sea.

16 Importance of the sea, see DR Rothwell *The Oxford handbook on the law of the sea* (OUP 2021); and P De Souza & A Pascal *The sea in history* (Baydell & Brewer 2017).

17 Manganese nodules and seabed mining see O Sparenberg 'A historical perspective on deep-sea mining for manganese nodules, 1965-2019' (2019) 6(3) *The Extractive Industries and Society* 842; ME Borgese & PMT White *Seabed mining: scientific, economic and political aspects – an interdisciplinary manual* (International Ocean Institute 1984); and A Jaeckel 'Deep seabed mining and adaptive management: the procedural challenges for the international seabed authority' (2016) 70 *Marine Policy*, August 205.

18 All these different interests in the sea were to a very large extent accommodated in the 3rd UN Law of the Sea Convention, 1982. See United Nations *The Law of the Sea – UN Convention of the Law of the Sea – With Index and Final Act of the Third UN Conference on the Law of the Sea* (United Nations 1983).

drops into the Red Sea on the North-East. In such a strategic geographic place, Africa cannot ignore the sea.

The bone of contention has been access and control of the resources of the sea. Who should have what and how much. Although there had been discussions on how to handle the resources of the sea, the main impetus was brought about by the decision of the USA to extend its control beyond national jurisdiction. This was in two Presidential Proclamations made in 1945 by President Harry Truman.[19]

These two proclamations had far reaching international implications as they were extending the control of the US to areas of the sea and the seabed beyond US national jurisdiction. They provided as follows:

Proclamation 2667 – Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf dated 28 September 1945:

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Proclamation 2668 – Policy of the United States with respect to coastal fisheries in certain areas of the high seas of 28 September 1945:

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that

19 33rd President of the United States of America: 1945-1953. See H Truman *1945: year of decision* (New Word City Inc 2014) (first published 1955); and H Truman & RH Ferrell *The autobiography of Harry S Truman* (University of Missouri 2002) (first published 1980).

> corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

The decision by the United States to extend its jurisdiction seawards led to both panic and anger. The Latin American states meeting in Santiago, Chile, in 1952, came up with equally unprecedented measures. They proclaimed a 200-mile territorial sea.[20] The aim was to protect their anchovies. Although not recognised by many states, the unilateral decision by Latin America culminated in the calling of the first UN Conference on the Law of the Sea (UNCLOS I) in 1958.[21] Although four different Conventions were concluded during this meeting, this was not sufficient to regulate the seas of the world. Thus, a new conference was convened by the UN in 1960, called UNCLOS II, but it was less successful.[22]

However, African contribution in the area of the Law of the Sea came about during the Third UN Law of the Sea Conference (UNCLOS III) between 1973 and 1982. One of the heatedly contested issues was the control of the resources and the breadth of the area immediately after the territorial sea. On the territorial sea the contest was between the traditional 3-Nautical Mile favoured by developed and industrialised states and the radical proposal of 200-Nautical miles of the Latin American states.

It is Africa, working closely with Asia in the Asian-African Legal Consultative Organisation (AALCO) that came with the answer to this stand-off. In the course of the UNCLOS III, Dr Frank X Njenga from Kenya through AALCO coined the term *Exclusive Economic Zone (EEZ)*.[23] It was accepted and adopted by the Conference. Interestingly, very little is said, written or otherwise documented about this major contribution although it is a fact and it has never been disputed. This is a legal regime established by the UN Convention on the Law of the Sea, 1982, which shall not extend beyond 200 nautical miles from the baselines from

20 KF Brimah 'Latin American States and the Law of the Sea' 1976. Unpublished Master's thesis. 3481. https://thekeep.eiu.edu/theses/3481

21 The 1st UN Conference on the Law of Sea (UNCLOS I) was held in Geneva, Switzerland from 24 February to 27 April 1958. A total of 86 states attended. The main aim of the conference was to examine the technical, biological, economic, and political aspects of the law of the sea and to codify the results into one or more international conventions. The Conference adopted four separate international conventions. These were on The Territorial Sea and the Contiguous Zone; The High Seas; Convention of Fishing and Conservation of the Living Resources of the High Seas; and Convention on the Continental Shelf.

22 The 2nd UN Conference on the Law of the Sea in 1960 (UNCLOS II) did not result in any new agreements. Therefore, states remained guided by the Conventions reached in 1958.

23 Dr Frank X. Njenga was the Secretary General of the Secretary General of the Asian–African Legal Consultative Organization (AALCO) between 1988 and 1994.

which the breadth of the territorial sea is measured.[24] It was accepted and eventually agreed that in this area the coastal state shall have control over the resources of the sea while the other states retained the traditional freedoms such as the right of innocent passage. The African contribution working closely with Asian states salvaged UNCLOS III from collapse before being held ransom by the United States towards the end of the Conference on issues relating to sea-bed mining.[25] This is one of the achievements which Africa and Africans have made to international law which is still enduring and has become an important beacon to the law of the sea and yet it is not mentioned in many public international law textbooks. If others do not say it, it is for Africa and Africans to shout loudly about this major achievement.

Setting standards for gender equality

In comparison with developed parts of the world, in particular, gender equality came rather late to the African continent. This has been attributed to the culture of most of the people in the continent. There are similarities in some of the cultural attributes which have marginalised women in the continent. These include female genital mutilation; demand and payment of bride price for women at marriage; and societal gender based violence. By and large there have been serious attempts to build in a negative cultural context across most societies.

As the African Charter on Human and Peoples' Rights (African Charter) was being drafted in late 1970s, the same negative attitude towards women continued. Therefore, in the whole Charter women were mentioned only once in article 18. Even then, women were mentioned in the context of the family and in name only in a single sub-paragraph. The sole article states:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

24 Art 57 of the UN Convention on the Law of the Sea, 1982. See IM Bendera *Admiralty and maritime law in Tanzania* (Law Africa 2017) at 60.

25 Seabed mining became a thorn in the fresh and it led USA to blocking progress towards the UN Convention on the Law of the Sea, 1982, coming into force for 12 years up to 1994 with the relevant areas of the implementation highly watered down. See R Sharma *Deep-sea mining: resource potential, technical and environmental considerations* (Springer 2017); C Banet (ed) *The law of the seabed: access, uses, and protection of seabed resources* (Leiden: Brill, 2021); and E Egede *Africa and the deep seabed regime: politics and international law of the common heritage of mankind* (Springer 2011).

3. *The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.* (emphasis added).
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

It is understandable that the new African Union came out with a solution by adopting the Protocol to the African Charter on the Rights of Women in Africa of 2003 in Maputo, Mozambique (hence the name Maputo Protocol) to address the glaring deficiencies.[26] The Protocol is revolutionary in its own right and goes beyond what could have been imagined in the content. This is because it has gone beyond the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW), which for years has been regarded as the yardstick when it came to the rights of women across the world.

The rights guaranteed in the Maputo Protocol include elimination of discrimination against women and promotion of equality between women and men in all spheres of life;[27] the right to dignity inherent in all human beings;[28] right to life, integrity and security of her person;[29] elimination of harmful practices such as genital female mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other related practices;[30] freedom of and in marriage including retaining the maiden name and nationality and the right to retain personal property in marriage;[31] the right to retain the same rights as men in case of divorce, separation or annulment of a marriage;[32] and right of access to justice and equal protection before the law including access to legal aid in case of need.[33]

At a political level, women have the right to participate in political and decision-making processes including existence of affirmative action and equal representation at all levels of development and implementation of state policies;[34] the right to peace and peaceful existence and equal participation in promotion and maintenance of peace;[35] the right to protection during armed conflicts and particularly

26 On the background and history of this Protocol see F Banda *Women, law and human rights: an African perspective* (Hart 2005) at 66; and R Murray *Human rights in Africa: from the OAU to the African Union* (CUP 2004) at 134.
27 Art 2.
28 Art 3.
29 Art 4.
30 Art 5.
31 Art 6.
32 Art 7.
33 Art 8.
34 Art 9.
35 Art 10.

in relation to displacement, sexual exploitation and recruitment;[36] the right to education which goes hand in hand with elimination of stereotyping in textbooks and syllabuses and the media;[37] and right to economic and social welfare guarantees which will open equal opportunities in work and career advancement and other economic opportunities.[38]

At a personal level, the Protocol underlines the importance of health and reproductive rights including the rights of women to control their fertility and choice whether to have children or not and the number and spacing of children;[39] the right to food and food security and guarantee of access to clean drinking water and domestic fuel and land;[40] the right to adequate housing and acceptable living conditions in a healthy environment[41]; the right to a positive cultural context in the society they live in and participation of women in formulation of cultural policies at all levels;[42] the right to a healthy and sustainable environment; and the right to sustainable development.[43]

As to vulnerable women, the Protocol provides for the rights of widows to enjoy all human rights including retaining custody of their children and family property after the passing on of the husband;[44] the right to inheritance of the property of her husband and equitable share of the properties of their parents;[45] and protection of the elderly against attacks and discrimination due to age[46] with special care and respect being directed at women with disabilities;[47] and rights of women in distress particularly poor women and women heads of families including women from marginalized population or pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.[48]

This is an admirable catalogue not seen before at the global or regional level. Africa is therefore setting the pace in international law – something which cannot be denied.[49]

36 Art 11.
37 Art 12.
38 Art 13.
39 Art 14.
40 Art 15.
41 Art 16.
42 Art 17.
43 Art 18.
44 Art 20.
45 Art 21.
46 Art 22.
47 Art 23.
48 Art 24.
49 On these various rights see VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (PULP 2016); L Chenwi 'Protocol to the African Charter on Human and Peoples' *Rights on the Rights of Women in Africa* (Maputo Protocol)' in C Binder et al (eds) *Elgar Encyclopedia of Human Rights*

The child … the future

Africa has always been keen not to copy and paste when it comes to the adoption of the good practices developed and adopted by the international community. For a long period there was no instrument solely aimed at protecting the children of the world. However, everyday new and devious methods and means were being hatched to hurt our children. Quarrels within families leading to separation left the children highly vulnerable. Some children are pushed into destitution on our streets and we calmly call them street children without much thought while we know they all had mothers and fathers.

Warlords, who are not few in the continent, have also been very active abducting children of all ages and recruiting them into their armies. These innocent human beings are quickly introduced to drugs of all kinds and turned into very sharp killing machines for their masters.[50] Luckily, the international community has not left them to do as they like. They are being charged and convicted.[51] Again, the fertile minds and eyes of film makers have found an easy prey in our unsuspecting children and particularly those out of direct care of their parents. Thus, child pornography has developed into a multi-billion dollar illegal industry across the world.[52] In poor communities, the girl-child has not been allowed to develop her potentials through school and career. They are married early as an 'honour' to their parents who in return collect a bride price. This is a serious injustice which has been facilitated by the inability to define who is a child and who is an adult.

Therefore, the global community welcomed the timely move by the UN to come up with the UN Convention on the Rights of the Child (CRC) in 1989.[53] It is such a popular legal instrument that it came into

(Ghent, Belgium: Faculty of Law and Criminology, University of Ghent 2021); and K Kounte *Protocol to the African Charter on Human and Peoples' Rights 2003 – Simplified* (Aldus Press 2005).

50 See RA Dallaire *They fight like soldiers, they die like children: the global quest to eradicate the use of child soldiers* (Walker 2010); C Jesseman 'The protection and participation rights of child soldier: an African and global perspective' (2001) 1 *African Human Rights Law Journal* 140.

51 See the judgements of the International Criminal Court (ICC) in the cases of *The Prosecutor v Thomas Lubanga Dyilo (*ICC-01/04-01/06), 2006; *The Prosecutor v Dominic Ongwen (*ICC-02/04-01/15), 2015; and *The Prosecutor v Bosco Ntaganda,* ICC-01/04-02/06-2359, 2019.

52 The CRC has a Protocol covering pornography. This is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002. Though optional in nature, the Protocol is popular with 177 parties currently.

53 See CRC (adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990). On this Convention and its application see, S Detrick

force in less than a year. At present it is ratified by all countries of the world except the United States of America. A number of people attribute this feat to the fact that all of us were once children and remember how vulnerable we were. However, it is rather sad that the CRC made a minor but important compromise on the definition of the child. In article 1 the Convention states:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier* (emphasis added).

The problem with this definition is the proviso at the end … unless under the law applicable to the child, majority is attained earlier. This proviso allows children to be declared adults before they are eighteen years of age by the domestic law. The consequences of this possibility are alarming. It is now easy to marry a girl of 12 or below without violating the Convention.[54] And some will justify it through religion or culture and get away with it notwithstanding the existence of the CRC.

It is in relation to this provision that Africa came and made a timely intervention. In the African Charter on the Rights and Welfare of the Child, 1990, the definition of the child was very definitive. Article 2 of the Charter says: 'For the purposes of this Charter, *a child means every human being below the age of 18 years*.' (emphasis added)

That is a very comforting provision which does not allow children to get into danger *under the law*.[55] With that the Continent had done its duty to humankind and very timely. It was not done by sheer opportunism. It came out of experience on the way Africans themselves deal with children across the continent.[56] In many societies in Africa the child in highly valued. This is because the child is the future of a

A commentary on the UN Convention on the Rights of the Child (Martinus Nijhoff 1999); N Van Oudenhoven & W Rekha *Newly emerging needs of children: an exploration* (Garant Publishers, 2006); and RV Makaramba *We owe the child the best: children rights in Tanzania* (Friedrich Ebert Stiftung, 1997) at 6.

54 In the countries where age of marriage has been lowered child marriage and prevalent and with it comes widows. See M Watson *Child marriage and child widows in the Women, Peace and Security Agenda and Humanitarian Response* (Geneva: Action on Child Early and Forced Marriage 2021); and Magoke-Mhoja, Monica Elias, *Child widows silenced and unheard* (Author House 2008).

55 See CM Peter & AM Ummy *African Charter on the Rights and Welfare of the Child* in AA Yusuf & Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organisation* (Leiden and Boston: Martinus Nijhoff Publishers, 2012) p. 477; M Gose *The African Charter on the Rights and Welfare of the Child: an assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (Bellville, South Africa: Community Law Centre, 2002); and D Olowu 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of the Children's Rights* 127.

56 See J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (Ashgate Publishing 2008); and J Sloth-Nielsen and BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7(2) *African Human Rights Law Journal* 330-353.

family and the group and thus guarantees continuity. That is why in many African communities, children are deemed to belong to the whole community and can be disciplined by any member of the community for misbehaviour. Not having children in a family is taken as a calamity or disaster and the couple, apart from seeking medical advice will go into adoption or where the situation allows, adding a wife into the family.[57]

Therefore, with the adoption of the African Charter on the Rights and Welfare of the Child, 1990 the continent was hitting two birds with a single stone.[58] That is correcting the shortcomings of the 1981 African Charter, which had largely ignored the African child, and correcting the 'slip of the pen' so to say in the CRC, which exposed the child to danger. This was a well-aimed single shot which is highly appreciated. There is no doubt that it is a major contribution to the development of international law from the continent.

The people and their rights

The most significant contribution of Africa in international law is in the area of human rights. This may be said to arise out of violation of these rights in the continent for a very long time. It should be remembered that during the long period of colonisation the only aspect of 'development' which was left back in the metropole was human rights and freedoms. These two items were never exported to the underdeveloped world.

Torture and mistreatment of the 'Natives' was an everyday affair in order to ensure that the main needs of the colonial project, that is, labour, raw materials and markets were ensured without fail. Therefore, stories of harsh conditions of the local people are rampant in all phases of colonialism across the continent. Discussions about human rights came about in late 1950s when it became clear that colonialism was no longer viable as a vehicle for controlling Africa and other territories under the colonial yoke. The turning point was the speech made by

57 Even to the extent of the culture allowing women to marry other women for purposes of procuring children for them. This has led to women to women marriages which have been recorded in a number of African countries as part of customary law. These include Botswana, Kenya and Tanzania. In the Mara Region in Tanzania for instance, the Kuria people practice same-sex marriage among the women. It is called *Nyumba ntobhu* or house without a man. In this arrangement an older woman 'marries' a younger women who is supposed to bear children for her (through a man of her choice) in order to maintain her lineage. The older woman pays bride price for the young bride. This form of relationship is becoming popular among the Kuria people. See AN Sikira 'Women to women marriages (*Nyumba Nthobhu*): violence among infertile women in Mara Region, Tanzania' Volume 12 *Tanzania Journal of Development Studies*, 2012. All these are efforts to have children and underlines their importance.

58 On the evaluation of the effectiveness of the African Charter on the Rights and Welfare of the Child, 1990 see DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

the then British Prime Minister Harold Macmillan to the South African Parliament in Cape Town on 3 February 1960. In this historical speech, Macmillan underlined that a wind of change was blowing through this continent and change was inevitable due to the growth of national consciousness that was growing.[59] What followed was emphasis on the incorporation of Bills of Right in the constitutions of the colonies moving into independence.[60] Not so much out of newly found love for the 'Natives' but to protect what had been accumulated during the colonial period and the subjects of the Empire who would be remaining at the end of colonialism. However, the Bills of Rights also provided breathing space to the citizens in the newly independent states. At the same time, it has effects on how international law generally was being viewed due to these new developments.[61]

Having lived under colonial rule and some having been prison 'graduates' the majority of the first phase African leaders were extremely careful, nationalistic and focused to change the continent. However, they were wary of their existence in power. This explains the enactment of laws providing the leadership with extensive powers to detain individuals without good cause or the need to give reasons.[62] The climax of this new tendency was the rise of dictators in the continent violating fundamental rights and freedoms of their citizens at will and

59 See D Horowitz 'Attitudes of British conservatives towards decolonization in Africa' (1970) 69 *African Affairs* 15; C Young *The African colonial state in comparative perspective* (Yale University Press 1994) at 182; E Lawrence-Floyd *Losing an empire, losing a role?: the Commonwealth vision, British identity, and African decolonization, 1959–1963*, unpublished PhD Thesis University of Kansas, 2013; and H Nissimi 'Mau Mau and the decolonisation of Kenya' (2006) 8(3) *Journal of Military and Strategic Studies* 25.

60 In the negotiations for independence, mostly held at the Lancaster House, London, most of former British colonies accepted the incorporation of the Bill of Rights in their independence constitutions. A rare exception was Tanganyika which refused outright to incorporate a Bill of Rights in its Independence Constitution of 1961. See SJ Read 'Bills of Rights in the Third World – some Commonwealth experiences' (1973) 6 *Verfassung und Recht in Übersee* 21.

61 See K Ginther 'Re-defining international law from the point of view of decolonisation and development and african regionalism' (1982) 26 *Journal of African Law* 49; and TO Elias *New horizons in international law* (Sijthoff & Noordhoff 1979).

62 Over time these laws went by different names including Preservation of Public Security Act (Kenya); State Security (Detention of Persons) Decree, 1984 (Nigeria); Internal Security Act, 1982 and Public Safety Act, 1953 (South Africa); Preventive Detention Act, 1962 and Deportation Ordinance, 1921 and Expulsion of Undesirable Persons Ordinance, 1930 (Tanzania); Preservation of Public Security Act, 1960 (Zambia); Detention Order, 1978 (Swaziland) etc. But the overall aim was to deny rights and freedoms without being questioned. See CM Peter 'Tanzania' in A Harding & J Hatchard (eds) *Preventive detention and security law: a comparative survey*, (Martinus Nijhoff 1993) 247. Also relevant and informative is J Hatchard *Individual freedoms and state security in the African context: the case of Zimbabwe* (Baobab Books, Ohio University Press & James Currey 1993); R Martin *Personal freedom and the law in Tanzania: a study of socialist state administration* (OUP 1974); and T Lissu *Remaining in the shadows: Parliament and accountability in East Africa* (Konrad Adenauer Stiftung 2020) 210.

without cause.[63] It is the rise of dictators that gave the continent the opportunity to come up with its own brand in human rights. Over and above individual rights associated with the western countries, Africa in formulation of its human rights charter brought up a more communal based rights. These were characterised as peoples', group, solidarity etc. rights.[64] Although there is a tendency of underplaying this new development in international law, there is no doubt that this was a serious intervention by the continent spearheading a new approach to human rights.[65]

The African Charter was a major break-through in human rights circles.[66] It completely changed the focus and shone the light beyond civil and political rights; and economic, social and cultural rights. Rights which could be enjoyed by individuals as part of the community became the new focus. These included the rights and freedoms of the people as a collective which were guaranteed freedom from domination by another people;[67] right to existence and the inalienable right to self-determination;[68] freedom from bonds of domination;[69] right to freely

63 The list of dictators is endless. The most notorious include Jean-Bédel Bokassa, of Central Africa; Idi Amin Dada Oumee of Uganda; Francisco Macías Nguema of Equatorial Guinea; and Yahya Abdul-Aziz Jemus Junkung Jammeh of the Gambia.

64 See T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183.

65 On peoples' rights see R Gittleman 'Peoples' rights: a legal analysis' (1982) 22 *Virginia Journal of International Law* 667; P Kunig et al, *Regional protection of human rights by international law: the emerging African system* (Baden-Baden: Nomos Verlagsgesellschaft, 1985); RN Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80; J Crawford (ed) *The rights of peoples* (Oxford: Oxford University Press 1988); and F Reyntjens 'Peoples' rights' in the Banjul Charter: a short note on an elusive concept' in African Law Association (ed) *The African Charter on Human and Peoples' Rights, context, significance* (Marburg: ALA 1991) 225; and CM Peter *Human rights in Africa: a comparative study of the African Human and Peoples' Rights Charter and the new Tanzanian Bill of Rights* (New York/Westport, Connecticut and London: Greenwood Press Inc. 1990) 53.

66 See UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 911; K Mbaye 'Human Rights in Africa' in K Vasak & P Alston (eds) *The international dimension of human rights* (Paris: UNESCO 1982) 583; E Kannyo 'The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (Albany: State University of New York Press 1984) 128; and KJ Partsch 'Recent developments in the field of peoples' rights' (1986) 7 *Human Rights Law Journal* 2. See also JB Marie 'Relations between peoples' rights and human rights: semantic and methodological distinctions' (1986) 7 *Human Rights Law Journal* 195; and P Kunig 'The role of 'Peoples' Rights' in the African Charter of Human and Peoples' Rights' in K Ginther & B Wolfgang (eds) *New perspectives and conceptions of international law: an afro-European Dialogue* (Wien and New York: Springer-Verlag 1983) 162.

67 Art 19.

68 Art 20(1). On this right see A Kiss 'The peoples' right to self-determination' (1986) 7 *Human Rights Law Journal* 165; and BSK Nyameke 'Changing perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147. Also interesting is A Cassese 'The self-determination of peoples' in L Henkin (ed) *The International Bill of Rights*, (New York: Columbia University Press, 1981) 96.

69 Art 20(2).

dispose of their wealth and natural resources;[70] right to economic, social and cultural development;[71] right to national and international peace and security;[72] right to generally satisfactory environment favourable to their development.[73] This was a powerful statement of solidarity among Africans as a people.[74]

These rights have not been left idle. The decision to establish the Centre for Human Rights at the University of Pretoria in 1986, just five years after the adoption of the African Charter, in 1981, and while South Africa was still under the apartheid system was a strong statement and a timely one too. This Centre has become the rallying point for promotion of human rights in the continent. Students from across Africa are admitted into the human rights programmes of the Centre on a very competitive basis. The majority of them have become human rights ambassadors not only in the continent but elsewhere too. Some are working for the international institutions like the World Bank; some are Ministers in their countries; and some are top notch academics in their own right across the world. What is important is that they are spreading the human rights gospel. When the history of this Centre is eventually written, there is no doubt that the name of Christof Heyns will not only form a chapter but will be a cross-cutting theme in the whole book.

The Nelson Mandela World Human Rights Moot Court Competition, which was established by the Centre for Human Rights in 2009, in its own right is a major contribution to international law. Students and their professors from around 50 Universities in the world take part in this premiere competition which is multi-lingua and thus allowing as many Universities as possible to participate. Apart from introducing and cementing the interests of the youth in human rights and international law, the Moot Court has caught the attention of all major players in the field and particularly the UN, which hosts the finals in Geneva, Switzerland. It is gratifying to note that the Nelson Mandela World Human Rights Moot Court Competition has not allowed even the mighty COVID-19 pandemic to stand on its way. In the last two years (2020 and 2021) it has been held virtually and very successfully too. The future of public international law belongs to the youth of this world

70 Art 21(1).

71 Art 22(1). On this important right see M Bedjaoui 'The right to development and *jus cogens*' (1986) 2 *Lesotho Law Journal* 93; De V Mestdagh 'The right to development' (1981) 38 *Netherlands International Law Review* 30; and RY Rich 'The right to development as an emerging human right' (1983) 23 *Virginia Journal of International Law* 287.

72 Art 23(1).

73 Art 24.

74 See OC Eze *Human rights in Africa: some selected problems* (Macmillan 1984); and M Nowak 'The African Charter on Human and Peoples' Rights: introduction and selected bibliography' (1986) 7 *Human Rights Law Journal* 2.

and the Centre has managed to work with the youth globally and thus contributing to the promotion of the law of nations.

Contribution of Africa to international law in context

The contribution of Africa to international law can only be understood if examined in context. That is in terms of the period which these contributions were made and the types of political alliances that were taking place. It is obvious from the examination of the situation in 1950s onwards there were very close relationships among developing countries due to common experience of oppression and exploitation. These countries therefore organised themselves in groups with common interests and in so doing they were able to make an impact at the international level.

A good example is the Group of 77 (G-77) which was established by 77 developing countries in 1964 to enable them to collectively articulate issues affecting them as a group in various international forums and particularly at the UN and to promote co-operation among them. Among their success was the ability to sponsor a Special Session of the UN(S-VI) in May 1974 to discuss the New International Economic Order (NIEO).[75] This meeting managed to come out with a Declaration and a Programme of Action for the New International Economic Order.[76]

The co-operation among these developing countries was not a theoretical matter. It was a commitment which had to be justified among their people so that they could voluntarily make a sacrifice in order to free others and for the common good. For instance, in order to successfully prepare a good UN Special Session, President Houari Boumediene of Algeria hosted a Non-Aligned meeting in Algiers in 1974.[77] Also, when Tanzania was requested to host a major G-77 in

75 See B Gosovic & JG Ruggie 'The new international economic order: origin and evolution of the concept' (1976) 28(4) *International Social Science Journal* 639; W Gillian 'A new international economic order?' (1976) 16(2) *Virginia Journal of International Law: Symposium on the New International Economic Order* 323; JK Nyerere *Freedom and a new world economic order: a selection from speeches 1974-1999* (OUP 2011).

76 On the New International Economic Order and its Programme of Action of 1974 see M Bedjaoui *Towards a new international economic order* (Paris/New York and London: UNESCO and HM Holmes & Meier Publishers 1979) K Ginther 'The new international economic order, african regionalism and sub-regional attempts at economic liberation' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law: an Afro-European dialogue* (Springer-Verlag 1983) 59; and JF Rweyemamu *Third World options: power, security and the hope for another development* (Tanzania Publishing House 1992).

77 The Special Session of the UN General Assembly managed to adopt two Resolutions, Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974 containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order. See R Kesseiri 'Algeria's self-determination and third worldlist policy under President Houari Boumediene' a review of A Getachew *World making*

1979 the government had to put up a brand new pre-fabricated hotel called Hotel Seventy Seven to host the delegates.[78]

Also, at times, there have been harder sacrifices to make. For instance, when the UN declared apartheid a crime against humanity, countries in southern Africa voluntarily put their countries and their resources at the disposal of freedom fighters. Botswana, Zambia and Tanzania were at the forefront of this undertaking.[79] They provided land, travel documents and other facilities such as Radio Programmes to groups such as the African National Congress and Pan Africanist Congress of South Africa or South West African People's Organisation (SWAPO) of Namibia before independence.[80] In the same vein falls huge projects such as Tanzania-Zambia Railway Authority (TAZARA) built to divert cargo to and from Zambia and other southern African states from apartheid South African ports.[81]

All these examples indicate that the contribution of Africa to international law has not been only theoretical but practical with both political and economic sacrifices fuelled by belief of doing what is good and right.

Co-operation among developing countries continued in many global initiatives and always ensured a common position and success. For instance, they worked closely during all the nine years of the 3rd UN Conference on the Law of the Sea (UNCLOS III) between 1973 and 1982 when eventually the UN Convention on the Law of the Sea was adopted. Therefore, all the various contributions made by the Continent

after empire: the rise and fall of self-determination (Princeton University Press 2019) in *British International Studies Association* 30 September 2021. See also B Gosovic & JG Ruggie 'On the creation of a new international economic order: issue linkage and the Seventh Special Session of the UN General Assembly' (1976) 30(2) *International Organization* 309.

78 See JK Nyerere 'Unity for a new economic order' in JK Nyerere *Freedom and a new World Economic Order: a selection from speeches 1974-1999*, 55.

79 There was actually a loose coalition of countries in southern Africa established in 1960s to fight colonialism and apartheid in the region. They focused on South Africa, Rhodesia, Mozambique, Angola and Namibia. In 1970s it was recognised as a Committee of the Heads of State of the Organisation of African Unity (OAU). In later years it included Angola, Botswana, Lesotho, Mozambique, Tanzania, Zambia and Zimbabwe. It was wound up in 1994 following the election of Nelson Mandela as the President of South Africa. For many years the group was chaired by President Julius K Nyerere of Tanzania. See D Martin 'New role for frontline states' in *Southern Africa News Features* 30 June 1994; and S Chan *Robert Mugabe: a life of power and violence* (IB Tauris & Co 2003).

80 See C Horace 'The decolonisation process in Namibia' in ISR Msabaha & MS Timothy (eds) *Confrontation and liberation in Southern Africa: regional directions after the Nkomati Accord* (Westview Press and Gower 1987) at 33.

81 On the mammoth construction of the Tanzania Zambia Railway Authority see JK Nyerere 'TAZARA: From a caricature of a "Chinese" railway to "our" railway' in JK Nyerere *Freedom and liberation: a selection from Speeches 1974-1999* (Oxford University Press 2011) at 95; and Department of Policy Planning, Ministry of Foreign Affairs of the People's Republic of China *A monument to China-Africa friendship: first hand account of the building of the TAZARA* (World Affairs Press 2014).

are somehow associated with co-operation with other developing countries. This was at the global, regional and sub-regional levels.

Therefore, the contribution by Africa to international law should not be seen only in theory only but also in practical politics and joint position taken on various important issues of common interest not only to the continent but the developing world as a whole. All these initiatives were successful because there was a common problem namely, history of being ruled, oppressed and exploited by a global system. Also, those at the helm of these countries had practical experience and this cemented their commitment.

However, at the moment it is almost impossible to record anything positive coming from Africa and developing countries in general. Not that the old leadership did not pass the baton to the younger generation. Time has taken away the memory and the unity of purpose and thus Africa and developing world is no longer speaking as one. While developed countries of the West are no longer fighting 'World Wars' but rather strategically organising to continue controlling and dominating the world, we are drifting away from each other.

At international level, developing countries no longer work together. They are easily divided and some feel proud when praised by their counterparts from the developed world and thus failing to concentrate on their interests and priorities. In the UN, for instance, when it comes to occupation of positions in different commissions and committees, instead of organising themselves tactfully, they fight over the available slots.[82]

Lack of leadership, politicising issues and bad faith

As it can be noted, much of the contribution by Africa to the international system was made in the early years of independence of most African countries. The leadership in Africa were inspired by what they had achieved and wanted to consolidate their independence and thus worked closely with other people from across the world with the same experience.[83]

Things have changed now. Africa is getting rulers without history and by persons with suspect legitimacy. It is not easy to link their agenda

82 A good example is in the UN International Law Commission (ILC). In 2016 there were 8 slots allocated to Africa out of the 38 members forming the Commission. Notwithstanding the fact that the African Union at its Summit in February 2016 had met and endorsed the 8 candidates it would support, during the elections in November of the same year there were 16 candidates. That is not only chaos but lack of strategic planning as a continent and it will not get anyone anywhere. See https://legal.un.org/ilc/ (accessed 31 December 2021).

83 The Charter of the Organisation of African Unity (OAU) is a good reflection of this world outlook. See JM Biswaro *Perspectives on Africa's integration and cooperation from OAU to AU: old wine in new bottle?* (Tanzania Publishing House 2006).

and the people from whom they are highly alienated. It is therefore not surprising to realise that other than worrying about the problems and plight of their people they are busy looting their countries and hiding the loot in banks in Western countries and buying villas in France; Switzerland; Dubai; Singapore and elsewhere.

Therefore, when a regime falls in Africa, two things happen. One, those in power unanimously rally behind their fallen colleague. Two, what comes to light is embarrassing. Rulers who have been busy preaching to their people about the need to love their country, the need to tighten their belts etc. are found in weird situations. Walls of their bedrooms are found to be lined up with secret shelves holding hoard of banknotes. Not of their currency but Dollars, Euros, Pounds and many others. Pictures of the bedrooms of President Zine El Abidine Ben Ali of Tunisia,[84] Omar El-Bashir[85] where the Central Bank had to install a Dollar counting machine are still haunting us. As for Yahya Jammeh of the Gambia[86] money was not enough. As a compromise to force him to leave the Gambia, his colleagues in Economic Community of West African States (ECOWAS) had to allow him to leave with government limousines, bought with public funds. That is how low Africa has sunk and that is the typical picture of an African 'leader' who cares little for the welfare of his people and least of all, of their educational system. With this type of thuggery going on left, right and centre across the continent and with directionless rulers, how is Africa expected to produce Nobel level type of theories? Can Africa be expected to contribute to the development of international law?

Yet, in Germany, we witness the out-going Chancellor Angela Merkel having lived in the same apartment she used to live before being elected 16 years ago. She has been doing her own shopping and doing all her household work with her husband and without any house servants. She does not own a villa, a swimming pool or a garden.[87] Yet she was at the forefront giving aid and assistance to developing countries – aid which at times never reached the common person on the streets or villages. That comparison speaks volumes. It is therefore

84 See J Elvers-Guyot, N Naumann 'Zine El Abidine Ben Ali: The Robber Baron of Tunisia' Bonn: DW 19 September 2019.

85 The Sudanese strongman Field Marshal Omar Hassan Ahmad al-Bashir who ruled Sudan between 1989 and 2019 when he was overthrown due to public protests in the whole country is still under custody and there are requests to surrender him to the International Criminal Court (ICC) in the Hague. His fate is still being considered by the current rulers. See T Achraf 'Sudan: why the ICC is at a crossroads with *Omar al-Bashir*' case' *The Africa Report*, 2 July 2021.

86 M Soumaré 'Gambia: will former President Yahya Jammeh (ever) go on trial?' *The Africa Report*, 9 June 2021.

87 On Chancellor Angela Merkel see A Crawford & T Czuczka *Angela Merkel: a Chancellorship forged in crisis* (John Wiley & Sons & Bloomberg Press 2013); and M Qvortrup *Angela Merkel: Europe's most influential leader* (Duckworth Overlook 2017).

not surprising that on 1 February 2021, the 80 million Germans she led with competence, skill, dedication and sincerity for years stood outside their balconies and gave her a six-minute long national applause. Very close to that would be President Julius Kambarage Nyerere of Tanzania, who at his voluntary retirement in 1985 did not have a single vehicle registered in his name and did not even have a pension. The newly enacted Parliament of the United Republic of Tanzania had to meet urgently to enact a new law to provide him with a pension.[88]

Now, Africa has a new type of ruler who will grab anything on sight while their people have no running water or medical care and children are dying of malnutrition. The above picture of the African ruler does not promise much to the international community. It will take time until the glory of 1960s and 1970s can revisit the continent again and in the process contribute to the development of international law.

The image of the African rulers has not been helped by their attempt to leave the International Criminal Court (ICC) in favour of their own international criminal system through the Malabo Protocol of 2014.[89] It has just reinforced their alienation from their people and fear of transparency and accountability. Therefore, the future is not bright at all.

Futility of using the international legal system

If Africans have to make a difference at the international level, they have to do it in conjunction with people from the developing world. Cooperation or collaboration with developed world using the existing institutions is proving elusive and without genuine desire to move forward. Experience indicate clearly that the rules of the game are not fair and do not provide equal and level playing ground. This is discernible in all institutions and organs of most global institutions. For instance, at the International Law Commission (ILC) where the rules of international law are crafted by 34 of the best legal minds in the world, it is very difficult for any member from an African country to make it as a Rapporteur whatever the subject he or she wants to take up.[90] Also, any topic addressing Africa or the developing world is shot even

88 See the Specific State Leaders Retirement Benefits Act, 1986 (Act 2 of 1986). This Act covers former President; former Vice President; and former Prime Minister.

89 African states through the African Union declared their desire to establish their own mechanism to address serious crimes through the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, adopted at Malabo, Equatorial Guinea. This mechanism would have assisted to depart from the Rome Statute, 1998 establishing the International Criminal Court (ICC). Surprisingly, to date this Protocol has 15 signatures and no ratification. That is not a sign of seriousness.

90 You are brought down through legal technicalities. It is veiled and an undeclared ideological war.

before landing on the plenary meetings of the Commission for debate.[91] Sophisticated objections will be raised and supported just to allow an adjournment and discourage those involved.

African members of the Commission, who come up with viable topics and are appointed Rapporteurs are constantly confronted by discouraging comments from the members from the Western countries. The same trend is discernible in the United Nations' Sixth Committee to which the ILC reports go. To date, very few Africans have managed to be appointed Rapporteurs.[92] The same could be said for topics which are viewed as sympathetic with the interests of the developing countries. They are discouraged right from the beginning. Salvation lies in joining hands with some of the members from the developed world which does not advance the agenda of African or developing countries. Though one cannot say with certainty, but one cannot avoid reading some form of discrimination in what is happening.[93] But more importantly, this is one avenue closed for Africa and Africans to contribute to the development of international law.

Therefore, Africa and Africans are strongly advised to work closely and with determination with the rest of the developing countries to come up with rules of international law which affect a larger section of the globe and not the few powerful states. In academic circles, training institutions and particularly high education ones should popularise the teaching of the different branches of international law. It is in these institutions that we expect experts in the Ministries of Foreign Affairs to go and speak for the continent at global level.[94] In order to be effective, the people in government should work closely with the academia in order to be able to mix theory and practice. If this is done, we might be able to relive the 1960 and 1970s again.

91 See for instance the topic of Universal Criminal Jurisdiction being proposed by Professor Charles Chernor Jalloh of Sierra Leone is finding it hard to be adopted properly in the work of the International Law Commission.

92 Between 1949 and 2016 only 7 out of 61 rapporteurs have been from Africa. These are: Mohammed Bedjaoui (Algeria); Mohammed Bennouna (Morocco); Christopher John Robert Dugard (South Africa); Abdullah El-Erian (Egypt); Maurice Kamto (Cameroon); Doudou Thiam (Senegal); and Dire D Tladi (South Africa).

93 Racism was more openly exhibited at the World Economic Forum in Davos where five young women went there to canvas for climate change. To their surprise, a photo taken for promotion taken by *Associated Press*, without good cause cropped her out Ms Vanessa Nakate from Uganda who describes herself as 'a fighter for the people and the planet.' It is only after her protest that the original picture in which she is in was restored. See Kenya Evelyn, 'Outrage at whites-only image as Ugandan climate activist cropped from photo,' *The Guardian* (UK), 25 January 2020; and Dahir, A Latif, 'Erased from a Davos photo, a Ugandan climate activist is back in the picture,' *The New York Times*, 7 May 2021.

94 As it has been correctly noted, you cannot survive alone in the world today. See AK Nyuon, JM Biswaro & SS Wassara (eds) *Revamping African foreign policies in the 21st century: ingredients, tools and dynamics* (Africa World Books 2006).

Conclusion

Africa has enormous potential to contribute to the development of international law. Over the years, the continent has managed to turn its disadvantages to opportunities to create change. This work attempts to show the various initiatives taken by Africa which have had positive impact on the development of international law. This has been at theoretical as well as in practice and particularly in international dialogue between states. It has been indicated that in all these initiatives Africa has not acted alone. It has closely collaborated with other developing parts of the world and it has not been in vain.

It is noted that there have been conditions which have encouraged this positive development. However, these conditions are no longer in place in the continent. Particularly missing is serious leadership that can lead the continent to the lost past glory. To achieve this, establishment of democratic institution which can empower the people to be able to take their fate in their own hands is necessary. Unfortunately, autocratic tendencies are on the rise as more and more rulers, some of whom came to power through the ballot are changing their minds. The illegal change of Constitutions to allow incumbents to extend their stay in power has become almost a routine. Though ruling with an iron fist, in some of these countries people are slowly becoming impatient and strangely indicating preference for military rule to the so-called autocratic civilian rule. With this confusion going on, it is difficult to think of the possibility of the continent and its allies in the developing countries influencing change at international law at the moment. However, the people are not giving up. Not yet.

22

The evolution of the UN-AU peace and security partnership

*Hennie Strydom**

Introduction

Since the deployment in 1956 of the United Nations (UN) Emergency Force to address the Suez Crisis, UN peacekeeping missions have undergone significant changes. Over time these changes, brought about by the escalation in the number of internal armed conflicts since the 1990's and the need for multidimensional peacekeeping missions with enforcement capabilities, caused the UN to not only reconsider its traditional concept of peacekeeping but to develop a framework for cooperation between the UN and regional agencies to ensure greater efficiency in peacekeeping operations.

Two landmark policy developments illustrate the depth and scope of the new orientation towards peacekeeping. The first was the 1992 Agenda for Peace Report,[1] and its 1995 supplement,[2] which specified the four global objectives for future UN peace missions, namely conflict prevention, peace-making, peacekeeping, and post conflict reconstruction. The second was the 2015 Comprehensive Review of UN Peacekeeping Operations in All its Aspects,[3] which endorsed the concept of 'partnership peacekeeping' which would require a 'bold new agenda … to build a strong global-regional framework to meet those challenges through responsible and principled strategic partnerships'.[4]

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1 United Nations Security Council (UNSC) 'An agenda for peace, preventive diplomacy, peace-making and peace-keeping, report of the secretary- general pursuant to the statement adopted by the summit meeting of the Security Council on 21 January 1992' Forty-seventh session 17 June 1992, UN Doc A/47/277 – S/24111.

2 UNSC 'Supplement to an agenda for peace: position paper of the secretary-general on the occasion of the fiftieth anniversary of the United Nations' Fiftieth session 25 January 1995, UN Doc A/50/60 – S/1995/1.

3 UNSC 'Identical letters dated 17 2015 from the Secretary- General addressed to the President of the General Assembly and the President of the security council' Seventieth session 17 June 2015, UN Doc A/70/95/ - S/2015/446.

4 UNSC (n 3) at 53.

However, in the case of Africa the partnership or cooperation idea predates these developments. Already at the time of the Organization of African Unity (OAU) UN cooperation with the OAU reached a level of formalisation, albeit in a limited way and mostly in respect of economic and social development. When the African Union (AU) replaced the OAU in 2000 the partnership arrangement expanded with peace and security issues assuming a far greater importance, which, in no small measure was necessitated by the AU's newly developed peace and security architecture and the urgency of responding more effectively to the armed conflicts on the continent.

Under the UN's revised policies to provide for multidimensional peace-keeping operations human rights and international humanitarian law objectives have become integral to and an important part of a UN-led peace mission's mandate. Even though these aspects are not the main focus of this chapter I hope that the broader peace objective of the subject-matter will in some way pay tribute to the extraordinary work and vision of Christof Heyns, a friend and colleague, whose contributions to the African human rights project are unsurpassed. His untimely death has terminated his involvement in still to be completed projects but those he inspired, supervised and taught are many and they will carry his work forward.

This essay starts with an historical overview of the evolution of the UN-AU partnership for peace and security since the days of the OAU. It then deals with the subsidiarity issue which still lacks clarity and which is responsible for much of the uncertainty and confusion when it comes to the relationship between the AU and the Regional Economic Communities (RECs) in matters of peace and security. To an extent this part foreshadows the next section which covers the Joint UN-AU Framework for Enhanced Partnership in Peace and Security and the main obstacles the partnership is faced with. To further illustrate this, the substantive part of the chapter ends with three case studies, namely the conflicts in Mali, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR).

Historical background

This part firstly describes the nature and scope of the initial cooperation attempts between the UN and the OAU, how they evolved over time, and the OAU's first multinational peacekeeping endeavours in the 1980's in Chad and why they failed. It then covers the changes effected by the AU's Constitutive Act and related instruments as well as the weaknesses the AU system, like its predecessor, is still to overcome, and which are elaborated on in the subsequent parts of the chapter.

The OAU era

The formalisation of cooperation relationships between the UN and the OAU first occurred in 1965, two years after the inauguration of the continental body. To this effect an agreement was signed on 15 November 1965.[5] Although the scope of cooperation was broadly framed as 'all matters of common interest' the prevailing sentiment of the agreement at the time was the economic and social development of Africa.[6] This emphasis is further evident from the prominent role assigned to the United Nations Economic Commission for Africa (ECA) in giving effect to the agreement. The ECA was established in 1958 by ECOSOC as a regional agency for the promotion of economic integration and development in Africa.

Conspicuously absent from the agreement is any specific mention of peace and security issues which makes sense if viewed from the urgent need at the time to get the newly independent and fragile African states economically and institutionally on their feet. Even a cursory reading of the ECA's early economic reports on Africa,[7] containing the organisation's programmes of work and priorities, illustrates the glaring absence of even the most basic modalities of statehood that would be required to build modern, prospering economies and to enable African states' effective participation in international trade and commerce.

Even so, at the time there were several incidents that forewarned of a looming peace and security dilemma on the continent. They include the Algerian war against France (1954-1962); the Algerian-Moroccan border war (1963); the first Sudanese civil war between North and South Sudan (1955-1972); the Angolan war of independence (1961-1974); the Mozambican war of independence (1964-1974); the first Tuareg rebellion in Mali (1962-1964); the Congo crisis (1960-1965); the civil war in Chad (1960's-1980's) and the Eritrean war of independence (1961-1991).

In time these and future incidents would expose the continental body's incapacity to even modestly restore peace and stability in conflict areas. Many of the obstacles peace missions were confronted with during this historical period still exist which the AU, the successor to the OAU, is still to overcome and which frustrate effective peacekeeping even under UN-AU cooperation agreements in this area.

5 United Nations Treaty Series 'Treaties and international agreements registered or filed and recorded with the secretariat of the United Nations' 548 (614) (Part II) New York, 1967 (1965 UN-OAU agreement).

6 1965 UN-OAU agreement (n 5) Preamble, arts 1, 3 & 6.

7 United Nations Economic Commission for Africa, https://repository.uneca.org/handle/10855/41975/discover?rpp=10&etal=0&query=economic+reports&group_by=none&page=2&search_bitstreams=all (accessed 10 August 2021).

Illustrative in this regard is the OAU's first multinational peacekeeping attempt in Chad in the 1980's where, under its Charter-based 'self-fix' policy, the OAU aimed at bringing an end to a twenty year-old civil war at a time when the OAU 'lacked the military experience for such operations and displayed a history of not being able to carry out resolutions due to the lack of financial resources and political will of its members'.[8] Following the failure of Nigeria's unilateral attempt at a peaceful solution in Chad and the inability of the rival political factions to agree on the formation of a transitional national union government, the OAU, in July 1980, decided, in its resolution on Chad, to 'make one further attempt to find an African solution to the crisis'.[9] For this purpose the OAU requested African states to 'provide peacekeeping forces at their own expense'[10] for the establishment of a neutral OAU peacekeeping force already agreed upon in the 1979 Lagos Accord. The Accord determined that the neutral force must be composed of military contingents from countries not sharing a border with Chad which eventually led to the acceptance of contingents from Benin, the Congo and Guinea.[11] In its resolution on Chad, the OAU, apparently realising that there was little prospect in obtaining funding for the peacekeeping mission, kept a backdoor open and determined that in case of it not being successful in this regard, the UN Security Council will be requested to provide assistance.[12]

It did not take long for the mission to fall apart. Transport and other logistical problems prevented Guinea and Benin to deliver troops as arranged while the only remaining force from the Congo left within a few months when they came under attack in their own barracks and suffered one casualty.[13] Furthermore, and not surprisingly, the OAU members failed to commit financial contributions to the mission and requests for financial assistance from external funders were either inadequately complied with or not at all.[14] While the OAU had to content with these adverse conditions pertaining to the fielding of the mission, the internal political situation in Chad deteriorated even further to the

8 TM Mays *Africa's first peacekeeping operation: the OAU in Chad 1981-1982* (Praeger 2002) 4.

9 'Resolution on adopted by the Assembly of Heads of States and Government of the Organisation of Africa Unity' Meeting in its Seventeenth Ordinary Session in Freetown, Sierra Leone 14 July 1980. AHG/Res. 101 (XVII), at 5.

10 AHG/Res. 101 (XVII) (n 9) at 9.

11 Mays (n 8) 46. All attempts to find a copy of the Lagos Accord came to nothing. Hence, my use of the source in this footnote.

12 XXX at 6.

13 Mays (n 8) 49.

14 For an extensive account of the financial woes of the OAU generally and more specifically for purposes of the Chad mission see Mays (n 8) ch 7.

extent that cooperation between the government and the OAU mission became impossible.[15]

Even with its first mission in tatters, the OAU in June 1981 adopted another resolution on Chad establishing a second multinational peacekeeping force with the aim of assisting the transitional national union government to maintain peace and security in Chad and the establishment of a Chadian integrated armed force following the end of hostilities in December 1980.[16] In this instance the 'Neutral OAU Force' was to be replaced by a 'Pan-African Peace Force' whose composition would be subject to approval by the transitional government.[17] This resulted in combat battalions accepted from Nigeria, Senegal and Zaïre for the peacekeeping operation, joined by military observers from Algeria, Guinea- Bissau, Kenya and Zambia, and assistance provided by the US, Great Britain and France on a bilateral basis.[18] As with the 1980 resolution the OAU in the 1981 resolution sought financial assistance from the United Nations, member states of the OAU and all international organizations in aid of the establishment of the force and the rebuilding of Chad's national economy.[19] OAU members refused to contribute and a few foreign powers were only prepared to commit to small amounts. When hostilities resumed and attempts to force a ceasefire on the government and the rebel movements failed, the writing was again on the wall for the ill-equipped OAU peace mission in Chad. In June 1982, the forces of Hissène Habré, backed by the US and France, took control of the capital and ousted President Goukouni, a staunch ally of Lybia's Muhammar Gaddafi and whose influence in the affairs of Chad and the region was at variance with American and French foreign policy in the region. This marked the beginning of Habré's oppressive and violent rule as president of Chad until he was deposed in 1990. In 2016, he was found guilty of gross human rights violations by the Extraordinary African Chambers of the Senegalese Courts and sentenced to life imprisonment. Commenting on the OAU's second peacekeeping attempt in Chad, Mays observed that 'the OAU departed Chad with a negative feeling toward the concept of peacekeeping and did not attempt another such operation until 1993, with the fielding of the Neutral Military Observer Group I in Rwanda'.[20]

15 Mays (n 8) ch 5.

16 Organization of African Unity Assembly of Heads of State and Government, Eighteenth Ordinary Session 'Resolutions adopted by the eighteenth assembly of heads of state and government' 24-27 June 1981 OAU Doc AHR/Res. 102 (XVIII) (OAU Res 102).

17 OAU Res 102 (n 16) at 3.

18 TM Mays *Historical dictionary of multinational peacekeeping* (Rowman & Littlefield 2010) 209.

19 United Nations Treaty Series (n 12) at 5, 7.

20 Mays (n 18) 207.

In 1990, the 1965 cooperation agreement between the UN and the OAU was replaced by a new agreement.[21] Small changes separate the two agreements. In the title of the 1990 agreement there is no reference to the ECA and the text itself does not assign any function to the ECA. Clearly, the new text envisaged cooperation to take place by means of direct consultations between the two main parties. Areas of cooperation are slightly more specific than the 'all matters of common interest' in the 1965 agreement in that the fields of cooperation are labeled as political, economic and social, and scientific and cultural.[22] Again, there is no specific reference to peace and security matters.

However, if this agreement, through an extensive interpretation of its terms and conditions, had any relevance for cooperation on peace and security matters, it was rendered redundant by subsequent developments. In 1991, the UN General Assembly was apprised of a report, submitted by a Special Committee, which led to the prioritisation of peace and security issues, including the enhancement of cooperation between the UN and regional arrangements in the maintenance of international peace and security, which were to form an integral part of the proposals for strengthening the role of the UN in all its aspects.[23]

In 1995 the General Assembly approved a declaration on the enhancement of cooperation between the UN and regional organizations in the maintenance of international peace and security in recognition of the peace and security role assigned to such organizations under Chapter VIII of the UN Charter.[24] Some form of basic framework for cooperation emerged from the Declaration. First, the functions and responsibilities to be performed by the UN and a regional agency, respectively will depend on their respective mandates, scope and composition and should take place in ways suited to each specific situation;[25] second, individual states participating in regional arrangements must increase their efforts in maintaining at the regional level international peace and security in accordance with the UN Charter;[26] third, preventive efforts of the UN must be strengthened at the regional level by the establishment or improvement of early warning systems;[27] fourth, closer cooperation between the UN and regional agencies must be aimed at in the areas of preventive diplomacy, peacemaking, post-conflict peacebuilding,

21 United Nation Treaty Series 'Treaties and international agreement registered or filed and recorded with the Secretariat of the United Nations' 1580 (1044) Part II, New York 1990 (1990 UN-OAU agreement).

22 1965 UN-OAU agreement (n 2) art I.

23 GA Res 46/58 (1991) para 4(a). See also GA Res 47/38 (1992) para 3(a) and 48/36 (1993) para 3(a).

24 United Nations General Assembly Forty ninth session, resolution adopted by the General Assembly 17 February 1995 UN Doc A/Res/49/57.

25 UN Doc A/Res/49/57 (n 24) at 4.

26 UN Doc A/Res/49/57 (n 24) at 6.

27 UN Doc A/Res/49/57 (n 24) at 8.

and peacekeeping; and fifth, the UN Security Council must, where appropriate utilize regional arrangements for enforcement action pursuant to the Council's authorization.[28]

Against this background, a UN Secretary-General report in 1999 focused specifically on cooperation between the UN and the OAU.[29] However, apart from mentioning the establishment of a UN trust fund for conflict prevention and peacekeeping and an OAU peace fund for building Africa peacekeeping capacities,[30] general statements on cooperation, consultation and exchange of information fill the rest of the report at the expense of concrete facts and outcomes. Between 2000 and 2002 a few General Assembly resolutions followed, calling for closer cooperation between the UN and the OAU in the area of peace and security and singling out the development of an early warning system, conflict prevention, peacekeeping, peacemaking, post-conflict reconstruction, and peace-building.[31] By this time these resolutions had lost their significance for the OAU who was about to be replaced by the AU, but they still served as thematic instruments for the UN's future cooperation with the AU as successor institution.

The AU era

Unlike the OAU Charter, the 2000 Constitutive Act of the AU paid far more attention to peace and security issues which in no small measure emerged from the epic failures of both the OAU and the UN to prevent or stop the genocide in Rwanda in 1994, which a report on an inquiry into the actions of the UN described as 'one of the most abhorrent events of the twentieth century'.[32] While the inaction of the UN and some individual members, in particular the United States, France and Belgium, was scrupulously exposed in the report, the OAU's own investigation pleaded poverty, institutional weakness, lack of expertise and resources, and the organization's Charter rules on member state sovereignty and non-interference in internal affairs, which incapacitated the OAU's own Mechanism for Conflict Prevention, Management and Resolution, established in 1993, to effectively respond to the emergence of internal armed conflicts in Africa.[33] A telling assessment of peace-making at the time in the OAU report is that

28 UN Doc A/Res/49/57 (n 24) at 1(d).

29 UN Doc A/54/484 (21 October 1999).

30 UN Doc A/54/484 (n 29) at 19.

31 GA Res 54/94 (28 January 2000); 55/218 (6 March 2001), especially para 6(a); 56/48 (23 January 2002) especially paras 5 and 8(a).

32 Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, UNSC 'Letter dated 15 December 1999 from the Secretary- General addressed to the President of the security council' UN Doc S/1999/1257 at 3.

33 'Rwanda: The Preventable Genocide, International panel of eminent personalities' (Rwanda panel report), https://www.refworld.org/pdfid/4d1da8752.pdf (accessed

> much of the history of the 1990's is the story of well-meant initiatives, endless consultations, incessant meetings, commitments made and commitments broken. These frenetic activities reflected the real world of the OAU Secretariat, which has no capacity to make decisions independent of its members, to force any parties to do its bidding, or to punish anyone for ignoring its wishes. What the OAU can do is call meetings, hope the invited attend, facilitate agreements, and hope that the participants abide by their word.[34]

What the AU Constitutive Act achieved was at least the removal of the self-imposed limitations of the OAU Charter and the setting up of a peace and security architecture which signified a forward leap in thinking regarding the continental body's responsibilities when peace and stability are threatened in a member state. Clearly permissible now, as of right, are forceful interventions by the AU in a member state in the case of war crimes, crimes against humanity and genocide,[35] or when requested by a member to restore peace and security.[36]

Pursuant to article 5(2) of the Constitutive Act, the AU brought into being the AU Peace and Security Council whose powers and functions derive from the 2003 Protocol Relating to the Establishment of the Peace and Security Council (PSC Protocol). Mindful in the Preamble of the need to forge closer cooperation and partnership between the UN, other international organisations and the AU in the maintenance of peace and stability in Africa, the Council is envisaged as a standing decision-making organ for the prevention, management and resolution of conflicts. As such it is intended to function as a collective security and early warning arrangement,[37] and hence, responsible for the prevention of conflicts, peace-making, peace-building and post-conflict reconstruction.[38] Subject to authorisation by the Assembly of the AU, the Council will be entitled to resort to forceful intervention in a member state in the circumstances provided for in the Constitutive Act and pursuant to its own Protocol.[39]

The success of preventative action, sorely needed on the African continent, depends on the proper functioning of a continental early warning system. Such a mechanism is provided for in the Protocol,[40] which will be responsible for data collection and analysis in respect of developments on the continent and for recommending the best

16 August 2021) ch 11.
34 Rwanda panel report (n 11) at 19.
35 AU Constitutive Act art 4(h).
36 AU Constitutive Act art 4(j).
37 PSC Protocol art 2(1).
38 PSC Protocol arts 3(a) & (b) & 6, 7.
39 PSC Protocol art 4(j) & (k).
40 PSC Protocol art 12.

course of action in response. In resolutions adopted following the establishment of the AU, the UN General Assembly, in requesting the UN to intensify its assistance for strengthening the institutional capacity of the AU, mentioned, in particular, assistance for the development of the AU's early warning system and for cooperation between the two organisations' early warning systems.[41] In 2006, the AU, in an attempt to speed up the operationalization of its early warning system, adopted a framework to that effect[42] to ensure that the system will be fully operational by 2009.[43] However, when in 2012, the system failed to provide early warning in the case of the military coups in Guinea-Bissau and Mali – both countries known for political instability and weak state institutions – questions were raised about the capacity of the AU and the international community to reliably prevent conflicts on the African continent. At the time, a roundtable discussion hosted by the International Peace Institute found that despite the framework proposals and recommendations for ensuring full operationalization of the system, the effectiveness of the system was still hindered by a limited capacity in terms of staff, expertise, material and technical equipment.[44] Seemingly, this is only part of the problem. In 2017, the Institute for Security Studies reported that denialism plagued Africa's early warning system in that the Peace and Security Council turns a blind I to certain conflicts in Africa. This lack of political will is linked to negative reaction by countries which are the subject of early warning investigation and who do not shy away from lobbying their allies within the PSC to avoid being placed on the agenda, despite early warning alerts issued by the system.[45]

In concluding this section, the African Standby Force warrants mention as an integral part of the AU's peace and security architecture. Provided for in article 13 of the Protocol, the Standby Force is mandated to inter alia perform peace support and peace-building missions, intervene pursuant to articles 4(h) and (j) of the AU's Constitutive Act, and prevent conflicts from escalating. AU member states are obligated to establish standby contingents ready for deployment on

41 GA Res 57/48 (20 January 2003) para 7; 59/213 (3 March 2005) para 8.

42 'Framework for the operationalization of the continental early warning system as adopted by governmental experts meeting on early warning and conflict prevention held in Kempton Park (South Africa)' 17-19 December 2006 (Kempton Park framework), https://www.peaceau.org/uploads/early-warning-system-1.pdf (accessed 18 August 2021).

43 Kempton Park framework (n 42) at 30.

44 International Peace Institute 'Preventing conflicts in Africa: early warning and response', https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_preventing_conflicts.pdf (accessed 18 August 2021).

45 'South Africa Last month again placed the tricky issues around early warning on the agenda of the PSC', https://issafrica.org/pscreport/psc-insights/denialism-plagues-africas-early-warning-system (accessed 18 August 2021).

request by the Peace and Security Council. The force was declared fully operational in 2016 although the subregions were still at different levels of readiness.[46] However, the Force's deployment for purposes of peace enforcement and in the context of asymmetrical situations is still the subject of debate.

The subsidiarity issue

Even under the OAU, the political and socio-economic integration of the African continent was an important objective.[47] Under the AU this has assumed greater urgency and it is common cause that the achievement of the integration objective in terms of the AU Constitutive Act[48] is first and foremost dependent on the successful promotion of closer cooperation among the regional economic communities (REC's) and on defining the relationship between the AU and the REC's.

An important step in this direction was taken in 2008 with the adoption of the Protocol on Relations Between the AU and the REC's.[49] Concerning peace and security, which falls within the scope of the Protocol,[50] the parties undertake to harmonize and coordinate their activities to ensure that these activities are consistent with the objectives and principles of the Union and those of the REC's, to ensure an effective partnership between them, and to determine the modalities of the relationship through a Memorandum of Understanding between the Union and the REC's.[51] A peculiar aspect of the Protocol is that the preamble identifies the need for defining the role of the Union and that of the REC's according to the principle of subsidiarity without clarifying what it means or referring to it again in the operative part of the Protocol.

46 Institute for Security Studies 'Is the African standby force any closer to being deployed?', https://issafrica.org/iss-today/is-the-african-standby-force-any-closer-to-being-deployed (accessed 18 August 2021).

47 African Union Treaty Establishing the African Economic Community 3 June 1991 (Abuja Treaty).

48 Constitutive Act arts 3(c) & 3(l).

49 'Protocol on relations between the African Union (AU) and the regional economic communities (RECS)' https://archives.au.int/bitstream/handle/123456789/1621/Protocol_Relations_AU_RECs_E.pdf?sequence=1&isAllowed=y (accessed 19 August 2021). The following REC's are signatories to the Protocol: Economic Community of West African States (ECOWAS); Common Market of Eastern and Southern Africa (COMESA); Economic Community of Central African States (ECCAS); Southern African Development Community (SADC); Intergovernmental Authority for Development (IGAD); Community of Sahel-Saharan States (CENSED); and Eastern African Community (EAC). Although recognized by the AU, the Arab Maghreb Union is not a signatory to the Protocol. In 2019, a Draft Protocol to amend the 2008 Protocol emerged from the AU's 1st Mid-Year Coordination Meeting. The proposed changes are non-substantial and as far as could be established the 2019 version has not come into force and effect yet.

50 PSC Protocol art 2.

51 PSC Protocol art 30(1).

According to article 16 of the Protocol establishing the AU Peace and Security Council, the AU has primary responsibility for peace and security in Africa. This position was confirmed, and its scrupulous observance accepted, in a 2008 Memorandum of Understanding between the AU and REC's on cooperation in the area of peace and security.[52] At the same time the parties undertook to adhere to the principles of subsidiarity, complementarity, and comparative advantage.[53] Without further clarity on the relationship between the AU's primary responsibility and the subsidiarity principle for instance, the division of labour between the AU and the REC's in the case of actual threats to peace and security is bound to end in confusion and dissent among the different actors on who should take responsibility for what.

It was only a decade later that the AU Assembly, at its 2018 extraordinary summit on institutional reforms, mandated the AU Commission to develop a proposal on an effective division of labour among the AU, REC's and member states 'in line with the principle of subsidiarity'.[54] In 2020, at the 2nd Mid-Year Coordination Meeting of the AU, it was decided to postpone the finalization of the proposal to the 35th Ordinary session of the AU Assembly in 2022.

Pending this outcome there is also no guidance provided by the key instruments of those REC's with a clear peace and security mandate, such as ECOWAS and SADC; their silence on the primary function of the AU, and on the relationship between the AU and the REC's, may indicate that they view a crisis in one of their member states as falling exclusively within their jurisdiction. This would amount to a rigid application of the subsidiarity rule which usually denotes a differentiated division of labour, or decision-making power, between central and local authorities.

The peace and security dilemmas that could confront the AU and the REC's in the absence of a clear division of labour and clarity on the application of the subsidiarity principle, are illustrated by the Palma insurgency in northern Mozambique on 24 March 2021, which led to grave atrocities against civilians[55] committed by Islamic State-linked insurgents in Cabo Delgado. Responding to the incident the Chairperson of the AU Commission announced that the 'African Union Commission,

52 'Memorandum of understanding on cooperation in the area of peace and security between the African Union, the regional economic communities and the coordinating mechanisms of the regional standby brigades of Eastern Africa and Northern Africa' (MOU) art IV (i) & (ii), https://www.peaceau.org/uploads/mou-au-rec-eng.pdf (accessed 19 August 2021).

53 MOU (n 52) art IV(iv).

54 Assembly of the African Union, Eleventh Extraordinary Session 17-18 November 2018 Addis Ababa, Ethiopia Ext/Assembly/AU/Dec.1 (XI) at 54.

55 Amnesty International 'What I saw is death: war crimes in Mozambique's forgotten Cape', https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4135452021ENGLISH.pdf (accessed 23 August 2021).

through its relevant organs, stands ready to support the Region and its mechanisms to jointly address this urgent threat to regional and continental peace and security'.[56] What followed this announcement was the usual AU paralysis, presumably caused by a misdirected belief that SADC would rush to the scene on the wings of Mozambican approval. But SADC was in no hurry, it only decided to respond with sending a technical team to Mozambique on 8 April,[57] and postponed an Extraordinary Meeting of the Ministerial Committee of the Organ on Politics, Defence and Security, scheduled for 28 April 2021, when the Committee were to deliberate a report of the technical team on the situation in Mozambique. Mozambique on the other hand, who failed to demonstrate the requisite political will to effectively deal with a four-year-old crisis in the area, rejected, at least initially, military assistance from SADC on the basis of sovereignty, and chose, on what it termed the country's 'own terms and conditions' to make use of private military companies and other forms of bilateral assistance.[58]

Only some months after the insurgency, on 23 June 2021 at an Extraordinary Summit did SADC approve a mandate for the SADC Standby Force mission to be deployed in support of Mozambique to confront terrorism and acts of violent extremism.[59]

Seemingly, SADC's Regional Early Warning System also malfunctioned. Provided for in the 2001 SADC Protocol on Politics, Defence and Security Cooperation,[60] it was initiated in 2003 and officially launched in 2010. It could hardly claim that the March insurgency in Mozambique was unsuspecting or unpredictable. Since 2017, insurgent activities were gathering force in northern Mozambique and in May 2020, SADC was officially briefed by Mozambique on the security situation in the area, leading to the Extraordinary Organ Troika Summit calling on SADC member states to support Mozambique in its fight against terrorists and armed groups in some districts of

56 'Statement of Mr Moussa Faki Mahamat, Chairperson of the African Union commission, on the terrorist attacks in Mozambique', https://au.int/en/pressreleases/20210331/statement-chairperson-terrorist-attacks-mozambique (accessed 20 August 2021).

57 'Communique of the extraordinary double troika summit of heads of state and government of the Southern African development community Maputo, Republic of Mozambique' 8 April 2021 at 8 https://www.sadc.int/files/5216/1789/4471/Communique_of_the_Extraordinarty_SADC_Double_Troika_Summit_8_April_English.pdf, (accessed 23 August 2021).

58 Institute for Security Studies 'Limited legal options for SADC military action in Cabo Delgado', https://issafrica.org/iss-today/limited-legal-options-for-sadc-military-action-in-cabo-delgado (accessed 23 August 2021).

59 'Communique of the extraordinary summit of SADC head of state and government' Maputo, Mozambique 23 June 2021, https://www.sadc.int/files/3916/2446/8466/Communique_of_the_Extraordinary_SADC_Summit_of_Heads_of_State_and_Government_23_June_2021_-ENGLISH.pdf (accessed 23 August 2021).

60 SADC Protocol art 11(3)(b).

Cabo Delgado.[61] Moreover, an analytical report of the UN Sanctions Committee on developments in 2020,[62] forewarned of the acquisition by ISIL affiliates of enhanced capabilities, training and financial support in East Africa and their growing presence in the southern parts of Tanzania. This development, the report noted, coincided with attacks and the takeover of towns and villages in Cabo Delgado by means of sophisticated operational capabilities with the intent to expand operations into other areas using coordinated, simultaneous attacks in different localities. But it is not only SADC who has a case to answer. On the face of it, individual member states in the region, including Mozambique on whose territory it was taking place, were incapable of signalling an early warning and to marshal a credible response to the threat. There could be many reasons for this inaction, including Mozambique's inapt reliance on state sovereignty. Whatever the case, it brings into sharp focus the international law debate on the responsibility to protect and the commitments states have undertaken to comply with this responsibility at the adoption of the 2005 World Summit Outcome document.[63]

The Joint UN-AU Framework for Enhanced Partnership in Peace and Security

Since the establishment of the AU, growing support emerged within the UN and the AU for closer cooperation and coordination in matters of peace and security. What necessitated this move were the complex security challenges posed by contemporary conflicts in Africa within equally complex political contexts which required a multifaceted response by international, regional and national stakeholders. As clearly stipulated in the Framework, the imperative for close coordination and cooperation in such circumstances must be based on the parties' 'respective comparative advantage and complementarity in peace and security, and burden-sharing on the basis of collective responsibility

61 'Communique of the extraordinary organ Troika plus Republic of Mozambique summit of heads of State and government Harare-Zimbabwe' 19 May 2020 at 6, 9, https://www.sadc.int/files/9315/8991/2199/Communique_of_the_Extraordinary_SADC_Organ_Troika_Summit_held_on_19_May__2020.pdf (accessed 23 August 2021).

62 UNSC 'Letter dated 21 January 2021 from the chair of the security council committee pursuant to resolutions 1267(1999), 1989(2011) and 2253 (2015) concerning Islamic state in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the security council' 3 February 2021. UN Doc S/2021/68 at 38-41; 42-47.

63 United Nations General Assembly (UNGA) 'Resolution adopted by the General Assembly on 16 September 2005' Sixtieth session 24 October 2005 GA Res 60/1 at 138, 139.

to respond early, coherently and decisively to prevent, manage, and resolve violent conflict'.[64]

The focus areas jointly identified by the parties for collaboration in terms of the partnership are early warning and conflict prevention, engagement across the range of possible responses, i.e. mediation, peacekeeping, peace support operations, and peacebuilding, addressing the root causes of the conflict, and continuous review of the partnership.[65] Much of this is not new. Since the days of the OAU, these issues were repeatedly mentioned in UN documents and resolutions and they have assumed greater importance since the establishment of the AU in view of the organization's expanded peace and security mandate and the emergence of complex security threats and asymmetrical situations such as terrorism and organised crime on the continent.

Hailed as 'one of the most important relationships, particularly in the domain of peace and security', a UN Security Council requested[66] assessment report in 2020[67] on the implementation of the joint Framework exposes the areas of tension and obstacles in collaboration which may cause the realization of the partnership's objectives a 'hard row to hoe', as the old saying goes. What follows are some of the main findings by the assessment team which are dealt with under the following categories as per the report.

Evolution of the partnership

While there was consensus that the partnership functioned as an important instrument for deepening cooperation between the UN Secretariat and the AU Commission on peace and security challenges in Africa, the assessment indicated that the need has arisen for focusing the implementation of joint efforts and initiatives at the country and regional levels.[68] There was also evidence of instances of exemplary collaboration at the sub-regional level (REC's) where UN regional offices in west and central Africa have demonstrated a comparative advantage in the timely harmonisation of positions between the UN, the AU and

64 United Nations-African Union Annual Conference 'Joint United Nations-African Union framework for enhanced partnership in peace and security' New York, 19 April 2017 (2017 UN-AU framework) https://unoau.unmissions.org/sites/default/files/signed_joint_framework.pdf, 1 (accessed 24 August 2021).

65 2017 UN-AU framework (n 64) at 3 and further.

66 UNSC 'Security council unanimously adopts resolution 2320(20160, welcoming cost-sharing proposal, stronger cooperation between United Nations, African Union' 7816th Meeting (AM) 18 November 2016 SC Res 2320 at 11.

67 UNSC 'Letter dated 15 October 2020 from the Secretary-General addressed to the President of the Security Council' 16 October 2020 (Letter to SC President). UN Doc S/2020/1020 at 1.

68 Letter to SC President (n 67) at 1.

the REC's[69], which suggest that a decentralised approach has a better chance of making the UN-AU collaboration more effective.

While efforts at preventing conflict have failed, as is widely known, the assessment showed that the UN-AU collaboration in respect of peace support operations was effective in the deployment of such missions in countries such as Burundi, Darfur, Somalia, Mali and the Central African Republic.[70] At the same time the report mentioned 'unprecedented challenges' the partnership faced in this regard and intimated that the challenges had to do with the lack of a general framework for joint planning, mandating compliance and oversight of AU peace support operations, as well as an increase in ad hoc security arrangements. These arrangements comprise coalitions of states making available military forces to stabilize conflict zones in sub-regions such as the G-5 Force in the Sahel, which will be dealt with later on, and the Multinational Joint Task Force to combat Boko Haram. Collective self-defence coalitions of this kind operate outside regional frameworks and the assessment team voiced the following concerns: [71]

> The assessment team affirmed that these coalitions posed particular challenges for the United Nations and the African Union as they operate largely in their own territories and have the potential to conduct cross-border operations in hot pursuit; were established outside of the geographical boundaries of the African Union regional standby force; were based on voluntary contributions, which challenged command and control by the United Nations or the African Union; and had no reporting or accountability to either the United Nations Security Council or the Peace and Security Council of the African Union, despite having been authorised by both.

In response to these concerns, it must be pointed out that the coalitions in question were established to counter security threats which neither individual states, nor the UN, AU or a REC could effectively get under control. And since they received the blessing of both the UN and the AU, command and control issues should have been resolved at the time of their establishment. More so, since the UN is familiar with command and control issues associated with multidimensional missions of which the UN Multidimensional Integrated Stabilization Mission in Mali[72] is but one example; and in 2015, the AU Peace and Security Council put in place a number of structures to respect command and control and coordination of the activities of the Multinational Joint Task Force

69 Letter to SC President (n 67) at 2.
70 Letter to SC President (n 67) at 2.
71 As above.
72 Established pursuant to UNSC 'Resolution 2100 (2013)' adopted by the Security Council at its 6952nd meeting, 25 April 2013. SC Res 2100.

(MNJTF),[73] established for conducting military operations against Boko Haram.

Key factors affecting the partnership

This is arguably the more important and revealing part of the assessment report, especially if some reading between the lines and behind the diplomatic language is applied.

The report starts off by affirming that the UN-AU partnership 'was affected by several structural factors and organizational culture' and noted that 'despite a decade of discussions and annual meetings' the engagement between the two organizations 'still had room for improvement', and that the challenges 'centred on the working methods governing the engagements' of the UN Security Council and the AU Peace and Security Council.[74] The resultant differences, the report noted, were 'rooted in mutual misperceptions regarding the roles and responsibilities' of the two Councils, and a 'perceived disregard for the views of the Peace and Security Council'.[75]

We also learn that achieving strategic convergence between the two Councils is not only difficult but may even 'continue to affect the cooperation between the two organizations' and that joint operations to prevent and respond to conflict 'is complicated by ambiguity over the application of the principle of subsidiarity' between the two organizations and the AU's REC's.[76] Peacebuilding is another affected area. In this instance the report mentioned a lack of joint integrated analysis and planning which is undermining the coherence of multilateral peacebuilding efforts and frustrated the expectations of the AU in respect of playing a more prominent role in peacebuilding.[77] Whether the AU has the capacity for a more prominent role in peacebuilding is of cause an entirely different issue.

The remedial action recommended by the assessment team provides further evidence of what weighs down on achieving the objectives of the partnership. Only some will be alluded to. In the case of conflict prevention, cooperation and collaboration between regional desks at UN Headquarters and UN regional offices, REC's mechanisms and the AU Commission were still failing expectations, which the assessment team addressed by recommending the establishment of more fully fledged UN regional offices to facilitate prevention and mediation efforts.[78]

73 African Union Peace and Security Council 'Communique' 489th Meeting , Addis Ababa, Ethiopia, 3 March 2015 AU Doc PSC/PR/2.(CDLXXXIX) at 15.
74 UNSC (n 67) at 3.
75 As above.
76 As above.
77 As above.
78 UNSC (n 67) at 5.

In making peace support missions more effective a support model was recommended which would enable the UN to be a partner as well as a service provider for AU peace support operations. Additional requirements were the development of consultative decision-making, financial management, AU adherence to compliance frameworks in respect of international humanitarian law, human rights, and troop discipline, and assistance to the AU in the development of policies and strategic guidance on the conduct of peacekeeping operations and pre-deployment planning and training requirements to ensure adequate operational readiness and command and control.[79]

On the evergreen subsidiarity issue the assessment team recommended a clear and predictable application of the subsidiarity principle to be facilitated by including the heads of REC's in UN-AU high level meetings and engagement by the UN with both the REC's and the AU to ensure cohesion and adequate coordination.[80]

The above factors and other circumstances affecting the implementation of the partnership are on the one hand the result of unresolved issues concerning the mandate of the AU in the context of its relationship with the REC's and individual AU members as far as peace and security are concerned. On the other they are a function of the dynamics of the relationship between the UN and the AU. In this instance commentators have pointed out that the relationship is defined by an 'overriding tension' as a result of the 'fundamentally unequal' situation between the two organizations as regards their 'powers, authority, resources and political status'.[81] While under the UN Charter the UN Security Council is also entitled to claim a primary responsibility for peace and security in the world, which may add to the tension, the argument that the AU feels up to the task as a result of its 'growing political legitimacy and agency position … as a driver of the continent's peace and security agenda', [82] is not unproblematic.

In reality, there is simply no credible evidence that the AU has arrived at this point. Whether by design or default, the initiative, it seems, has shifted to the REC's, individual AU members and in some instances even to coalition forces on the continent. Take for instance AU Assembly decision 677 of January 2018 adopted at the 30th AU Summit. On the agenda for discussion at the time were conflicts or crises in Somalia, Sudan/South Sudan, the DRC, CAR, Burundi, Guinea-Bissau, Mali, the Lake Chad Basin (Boko Haram), Côte d'Ivoire, and Libya. Except for the

79 As above.

80 As above.

81 D Forti & P Singh 'Toward a more effective UN-AU partnership on conflict prevention and crisis management' International Peace Institute. 1 October 2019 at 3, https://www.ipinst.org/2019/10/effective-un-au-partnership-on-conflict-prevention (accessed 30 August 2021).

82 As above.

first two, the AU played no clear leading role in any of the others. So, while on paper its agency position as a driver of the continent's peace and security agenda may be unambiguous, in real conflicts and crises a disparate picture emerges. What is becoming increasingly evident is that the AUPSC is experiencing a gradual loss of influence and credibility on the continent partly because its peace and security prerogative has become contested by the interventions of individual states, bilateral arrangements and parallel multilateral operations and partly because the subsidiarity issue remains unresolved.[83] As long as this situation prevails the peace and security mandate of the AU will depend on unpredictable and opportunistic ad hoc arrangements or interventions at the expense of what the UN-AU partnership is all about, namely a systematic, effective and results-oriented collaborative effort in conflict management, from early warning to post-conflict reconstruction.

Lessons from three case studies

The case studies in this section were selected for various reasons. Firstly, the countries involved and/or the regions in which they are located have histories of political tension and instability and experienced a fragile or deteriorating security situation; secondly they are characterised by weak state institutions and deficient law enforcement capabilities; thirdly, service delivery is poor as a result of a lack of economic resources, endemic corruption and inadequate infrastructure; fourthly, government legitimacy is contested as a result of the marginalisation of certain groups, human rights abuses, and/or election fraud; fifthly, they all require a reconfigured political dispensation; and sixthly they all invited a multidimensional conflict solution strategy involving the UN and an assortment of regional arrangements.

Mali and the Sahel

In January 2012, Tuareg rebels[84] took control by force of northern Mali and in March of the same year the democratically elected Malian government was ousted by a military coup.[85] The instability that ensued, worsened an already problematic situation, creating what commentators refer to as a 'regional conflict system' or an 'archetypal conflict ecosystem'.[86] This was hardly surprising; the Sahel suffered

83 Forti & Singh (n 81) at 5.

84 This was the fourth Tuareg rebellion. Following independence from France in 1960, the first three Tuareg and Arab rebellions by the north against the south occurred in 1963, 1991, and 2006, respectively. On this history see G Chauzal and others 'The roots of Mali's conflict' 2015, https://www.clingendael.org/sites/default/files/pdfs/The_roots_of_Malis_conflict.pdf, (accessed 22 September 2021) at 8-11.

85 Chauzal and others (n 84) at 10 and further.

86 SA Zyck & R Muggah 'Conflicts colliding in Mali and the Sahel', http://doi.

longstanding political, economic and humanitarian vulnerabilities as a result of corrupt, underperforming and weak state institutions, environmental degradation, and a deteriorating security and law enforcement situation exploited by criminal networks, marauding armed bands, and terrorist groups, a situation that was significantly aggravated by the aftereffects of the 2011 Libyan crisis.[87]

Presumably concerned about the domestic consequences of a deteriorating security situation following the Tuareg insurgency and subsequent developments, the transitional authorities of Mali, on 18 September 2012, requested a UN authorized deployment under Chapter VII of the UN Charter of an international military force to assist the armed forces of Mali to recover the occupied regions in the north.[88] A month later, ECOWAS endorsed its Strategic Concept for the Resolution of the Crisis in Mali which was adopted by the AU PSC on 24 October 2012. This was followed by an ECOWAS authored, and an AU PSC endorsed Joint Strategic Concept of Operations for the International Military Force and the Malian Defence and Security Forces in November 2012.[89]

This formed the basis for considering a regional request for, and authorising the deployment, by the UN Security Council acting under Chapter VII of the UN Charter, of an African-led International Support Mission in Mali (AFISMA) in December 2012.[90] AFISMA was given a broad mandate, namely to assist in rebuilding the Malian defence and security forces, in recovering areas in the north under the control of terrorists and extremist armed groups, in protecting the civilian population, and in the delivery of humanitarian assistance.[91]

Before long this mandate became a poisoned chalice for ECOWAS and the AU and was, not surprisingly, passed back to the UN. Originally, AFISMA was scheduled to begin executing its mandate in September 2013, more than a year and a half after the insurrection in Mali. But unexpected southward advances by rebels in January 2013 and a

org/10.5334/sta.bf (accessed 22 September 2021). UNSC 'Resolution 2056 (2012)' Adopted by the Security Council at its 6798th meeting, on 5 July 2021. S/RES/2056.

87 For a more comprehensive account of the root causes of the crisis in Mali and the Sahel see World Peace Foundation, African Politics, African Peace, https://sites.tufts.edu/wpf/files/2017/07/Mali-brief.pdf (accessed 9 September 2021). See also UNSC 'Resolution 2085 (2012)' Adopted by the Security Council at its 6898th meeting, on 20 December 2021. SC Res 2085 (2012) preamble: '*Remaining seriously concerned* over the insecurity and the significant ongoing humanitarian crisis in the Sahel region, which is further complicated by the presence of armed groups, including separatist movements, terrorist and criminal networks, and their increased activities, as well as the continued proliferation of weapons from within and outside the region that threaten peace, security, and stability of States in this region'.

88 SC Res 2085 (n 87) Preamble.

89 As above.

90 SC Res 2085 (n 87) at 9 and further.

91 As above.

subsequent Malian government request for military assistance from France, the former colonial power, caused ECOWAS to hastily assemble a military contingent from the sub-region for immediate deployment. On 11 January French troops arrived and succeeded, with the assistance of AFISMA, to repel the southward move of the rebels and to regain control of occupied territories.

It is not inconceivable that the AFISMA initiative was a windfall for the Security Council in the form of an opportunity to avoid the establishment of a UN mission in response to the request by the Malian transitional authorities referred to earlier. However, if there were any feelings of relief among the members of the Security Council, they were short lived. Barely four months after AFISMA's establishment, the ECOWAS Commission, supported by the AU, on 7 March 2013, requested the transformation of AFISMA into a United Nations Stabilization Mission. On 25 April 2013, the Security Council acceded to this request and established the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).[92]

The request for AFISMA's transformation into an UN-led multi-dimensional mission is hardly surprising. The complexity of the situation in Mali and the larger Sahel region and the obstacles to be overcome simply exceeded the capacity of both ECOWAS and the AU. In particular is this the case with the post-conflict rebuilding part of the mandate assigned to AFISMA. The AU, and for that matter the sub-regional communities such as ECOWAS, has never succeeded in developing an effective post-conflict peace-building capacity beyond mere policy frameworks and recommendations. This is despite the fact that already in 2006, recognizing that responses to post-conflict situations in the past remained fragmented and ineffectual, the AU developed a comprehensive policy on post-conflict reconstruction and development (PCRD) with the objective to consolidate peace and prevent a relapse of violence; address the root causes of the conflict; fast track planning and implementation of reconstruction activities; and enhance complementarities and coordination between and among diverse actors.[93] In 2014, the then chairperson of the AU Peace and Security Council (PSC), in addressing an open session of the PSC on enhancing AU efforts in implementing its post-conflict reconstruction and development policy, stated that the policy is still underpinned by capacity deficits and limited resources, that the policy needs to be translated into concrete programmes, and that the African Solidarity Initiative, which is responsible for the mobilization of resources within

92 UNSC (n 72) 7. See also UNSC (n 3) 53-57.

93 Peace, dignity and equality on a health planet, www.un.org/en/africa/osaa/pdf/au/policy_postconflict_dev_reconstruction_2006.pd at 3 (accessed 2 October 2018).

Africa in support of post-conflict reconstruction, remains weak.[94] In 2017, during the AU Peace and Security Council's 670th meeting on 22 March 2017, the Council acknowledged that its PCRD dimension remains the weakest link within the implementation processes of both the African Peace and Security Architecture (APSA) and the African Governance Architecture (AGA).[95]

Not much has changed since the 2017 meeting. A communique adopted by the AU PSC on 23 October 2020 merely reiterated the need to redouble efforts for the implementation of the AU's post-conflict reconstruction and development (AU-PCRD) policy and for the immediate and full operationalization and capacitation of the long-awaited AU-PCRD Centre[96] in Cairo.[97] In August 2021, the AU Commission deployed an assessment mission to Cairo to prepare for the official launch of the Centre, which, according to the Egyptian Foreign Ministry, would become a reality before the end of 2021.[98]

What the Mali situation has also illustrated is that the continental and REC early warning systems were unreliable to anticipate let alone prevent conflicts. This is despite the fact that their operationalization came under review already in 2006 by AU member states and representatives of REC's which included the Community of Sahel and Sahara States and the agreement reached at the time that the AU Commission must take all necessary steps to ensure that the continental early warning system is fully operational by 2009.[99]

94 Statement by Mull S Katende, Ambassador/Permanent Representative of Uganda and Chairperson of the PSC for the month of June 2014 'Open session of the peace and security council of the African Union (PSC) on emhasising African Union efforts in implementing post-conflict reconstruction and development in Africa' http://www.peaceau.org/uploads/open-session-of-the-peace-and-security-council-of-the-african-union.pdf (accessed 2 October 2018). See also https://issafrica.org/pscreport/addis-insights/spotlight-on-post-conflict-reconstruction-and-development-in-africa (accessed 3 September 2021).

95 'The 670th meeting of the peace and security council, an open session dedicated to the theme: post-conflict reconstruction and development(PCRD) in Africa', https://reliefweb.int/report/world/670th-meeting-peace-and-security-council-open-session-dedicated-theme-post-conflict (accessed 3 September 2021). See also S Ncube 'Collective security since an agenda for peace: implications for regional security in Africa' unpublished LLD thesis, University of Johannesburg, 2017 at ch 8.

96 The decision to establish the Centre was already taken in 2011. See Assembly/AU/Dec.35 (XVI), January 2011.

97 African Union Peace and Security Council 957TH 'Communique' Meeting Addis Ababa, Ethiopia 20 October 2020. AU Doc PSC/PR/Comm. (CMLVIII).

98 African Union commission undertakes an assessment mission to Cairo, Egypt, to prepare for the official launch of the African Union centre for post-conflict reconstruction and development' 30 August 2021 available at https://reliefweb.int/report/world/african-union-commission-undertakes-assessment-mission-cairo-egypt-prepare-official (accessed 4 September 2021).

99 'Framework for the operationalization of the continental early warning system as adopted by governmental experts meeting on early warning and conflict prevention held in Kempton Park (South Africa)' 17-19 December 2006 available at https://www.peaceau.org/uploads/early-warning-system-1.pdf (accessed 4 September 2021).

Following the establishment of MINUSMA, the role of the AU, and for that matter also ECOWAS, became obscure. Some clarity on the AU's own perceived role emerged from a letter dated 7 March 2013 circulated by the AU Commissioner for Peace and Security to the UN Secretary-General with an adopted revised concept of operations for AFISMA.[100] There it was stated that the AU PSC was of the view that the soon to be established UN operation (MINUSMA) should be given a 'peace enforcement mandate' with the objective to restore the authority of the Malian government over its entire territory, which would also mean the dismantling of the terrorist and criminal networks in the north. Equally important, according to the letter, was for the UN mission to support the 'critical political role' of ECOWAS and the AU, which, apparently, has demonstrated 'exemplary dynamism in the management of the crisis in Mali'.[101] What this means is anybody's guess.

In any event, from the revised strategic objectives carved out for AFISMA it is evident that once MINUSMA becomes operational AFISMA would step into a supporting role for the Malian Defence and Security Forces and the Malian authorities to restore state authority, preserve Mali's national unity and territorial integrity, protect the civilian population, reduce threats by terrorists and criminal networks, and assist with the implementation of the political roadmap.[102] Since all these objectives would eventually fall under the mandate of MUNISMA, the part AFISMA would play, and actually played, remains a mystery. Noteworthy is that the achievement of objectives of the revised concept of operations was made subject to certain assumptions, such as the continued provision of funding, training and equipment by AU member states and international partners.[103]

The ambiguity about the AU's role in Mali as the continent's primary peace and security agency deepened when in 2017 the G5 Sahel Joint Force, involving Burkina Faso, Mali, Mauritania, Niger and Chad, was formed to conduct cross border join military operations to bring a deteriorating security situation under control. The G5 Force was mandated by a resolution[104] of the constituent countries' Heads of State who also expected a clear mandate from the AU as well as from the UN which never materialized.

100 UNSC 'Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council' 15 March 2013 S/2013/163.

101 UNSC (n 100) at 2.

102 UNSC (n 100) at 7.

103 UNSC (n 100) at 8 para 12.

104 Resolution No 00-01/2017 Relative a la Creation d'une Force Conjointe du G5 Sahel (6 February 2017) available at https://www.g5sahel.org/wp-content/uploads/2017/04/images_Docs_Resolutions_force_conjointe__05_02_20171.pdf (accessed 4 September 2021).

On 13 April 2017 the African Union Peace and Security Council *endorsed* the formation of the G5 Sahel Joint Force[105] and in June 2017, the UN Security Council *welcomed* this initiative and urged the G5, the French forces and MINUSMA to ensure adequate coordination of their operations within their respective mandates.[106] It also soon became clear that the French forces and the G5 were relied upon to assist MINUSMA to fulfill its mandate especially in regard to the security aspects thereof.[107] Presumably, these developments signaled the voluntary departure of the AU and ECOWAS from a state of affairs which the UN Security Council continues to classify as a threat to international peace and security as a result of the continued deterioration of the political, security and humanitarian situation in Mali.[108] A clear indication of this are the post-2017 applicable Security Council resolutions which contain no references to the AU or ECOWAS anymore while relying heavily on the assistance of the G5 Sahel Force, the French forces and the European missions in Mali.[109]

The DRC

Since 2010, UN peacekeeping in the DRC, especially in the eastern parts of the country faced a daunting task. Continuing cycles of violence fuelled by a multitude of rebel forces with shifting alliances and assisted by powerful neighbours such as Rwanda and Uganda in a security vacuum left by ineffective and weak state institutions exposed civilians to gross human rights and international humanitarian law violations with impunity, causing civilian mortality rates to reach staggering proportions. To respond to these challenges and others, such as the illicit exploitation and trade of natural resources and trafficking of arms, the UN Security Council realised that a new phase of the conflict-ridden DRC's transition towards peace consolidation would require a strong partnership between the UN and DRC government. This resulted in the establishment, under Chapter VII of the UN Charter, of the United Nations Organization Stabilization Mission in the DRC (MONUSCO).[110]

105 African Union Peace and Security Council 'Communique' 679th Meeting, Addis Ababa, Ethiopia 13 April 2017. AU Doc PSC/PR/Comm.DCLXXIX (13 April 2017). This development originated from the Nouakchott process launched in March 2013 by the countries in the region and consolidated in an implementation plan to address the political and security situation in the region during a first summit of the participating countries that took place in December 2014.

106 UNSC ' Resolutions 2359 (2017)' Adopted by the Security Council at its 7979th meeting, on 21 June 2017 SC resolution 2359 at 1, 5.

107 UNSC 'Resolutions 2364 (2017)' Adopted by the Security Council at its 7991st meeting, on 29 June 2017. SC resolution 2364 at 37, 42.

108 For the latest resolution on this see UNSC 'Resolution 2584 (2021)', adopted by the Security Council at its 8809th meeting, on 29 June 2021. SC res 2584.

109 UNSC 'Resolution 2423(2018)' Adopted by the Security Council at its 8298th meeting, on 28 June 2018. SC Res 2423 .

110 UNSC 'Resolution 1925 (2010)' adopted by the Security Council at its 6324th

The mandate given to MONUSCO was to give priority to the protection of civilians and for that purpose to 'use all necessary means'.[111]

MONUSCO's and the DRC government's failures to effectively execute this mandate, coupled with the M23 rebel group's military successes in 2012 in the eastern DRC, brought about the involvement of the members of the International Conference on the Great Lakes Region (ICGLR) in the form of a proposal for the establishment of an Intervention Brigade, initially conceived as a neutral intervention force mostly made up of soldiers from the SADC countries, to conduct offensive operations to protect civilians and neutralize rebel forces. However, the deployment costs and a lack of experience with the deployment of such a force ruled out a regional-led operation. But since this was a regional initiative backed by regional consensus, the proposal found approval with the UN[112] and in 2013 the UN Secretary-General, after consultations with regional bodies including the AU, proposed the establishment of an intervention brigade within and under the command of MONUSCO for carrying out targeted offensive operations to bring a deteriorating security situation under control.[113]

A month later, the Security Council adopted a Chapter VII resolution providing, in an unprecedented move, for the establishment of the Brigade 'on an exceptional basis and without creating a precedent, or any prejudice to the agreed principles of peacekeeping … under direct command of the MONUSCO Force Commander' with the objective of reducing the threat posed by armed groups to state authority and civilian security by means of targeted offensive operations.[114] The Brigade was entirely composed of SADC troops from South Africa, Tanzania and Malawi and in 2013 they successfully accomplished their first mission by defeating the M23 rebels but failed to replicate this achievement in the case of the other smaller and more mobile rebel forces who, unlike the M23 rebels, operated over large areas without a

meeting, on 28 May 2010. SC Res 1925 at 1. MONUSCO replaced the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) which was to facilitate the implementation of the 1999 Lusaka Ceasefire Agreement between Angola, DRC, Namibia, Uganda, Rwanda and Zimbabwe.

111 SC Res 1925 (n 110) at 11, 12.

112 International Peace Institute, 'Issue Brief: the UN Intervention brigade in the Democratic Republic of the Congo' July 2013 at 5, https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_un_intervention_brigade_rev.pdf (accessed 6 September 2021).

113 UNSC 'Special report of the secretary-general on the Democratic Republic of the Congo and the Great Lakes Region' 27 February 2013. UN Doc S/2013/119) at 60, 61.

114 UNSC 'Resolution 2098 (2013) (on extension of the mandate of the UN organization stabilization mission in the Democratic Republic of the Congo (MONUSCO) until 31 March 2014)' March 2013, SC Res 2098 (2013) at 9, 12.

unified command and control structure and conducting asymmetrical military operations.[115]

These failures, the high financial costs in sustaining the Brigade and the increasing unpopularity of the Brigade's joint operations with the DRC defence forces, who were accused of serious human rights violations, were among the reasons for a re-think of the Brigade's suitability for achieving MONUSCO's objectives in the DRC.[116] In 2019, coinciding with plans for an exit strategy for MONUSCO on condition of a minimum transition period of three years, the UN Security Council raised the need for improving the effectiveness of the Intervention Force Brigade to 'ensure effective, timely, dynamic and integrated protection of civilians and the neutralisation of armed groups'.[117]

In the light of the above, a 2019 strategic review of MONUSCO's mission recommended that for the whole of the transition period MONUSCO should maintain an independent quick reaction capability to respond to major threats to civilians and to enhance more effective mobile capacity.[118] In this context, the review considered two options for the Intervention Brigade both of which would create security concerns, the report noted. Briefly, the two options were: firstly, to withdraw the Brigade if a dedicated peace enforcement capability would emerge from discussions between Burundi, the DRC, Rwanda and Uganda on the establishment for a joint or bilateral enforcement mechanism, and secondly, to maintain the Brigade with capabilities to play a supporting role in DRC Defence Force-led offensive operations.[119] Important to note is that the review report was disinclined to support the first option for the reason that the presence of non-UN forces in the same area of operation, but with different rules of engagement and under a different chain of command 'would create a confusing situation with possibly negative implications for the protection of civilians'.[120] Interesting that no such concerns emerged with the G-5 Sahel Force in the case of Mali.

The proposal for a re-alignment of the Force Brigade to provide for Quick Reaction Forces was accepted by a SADC Extraordinary Organ Troika Summit in November 2020.[121] Shortly thereafter the UN Security

115 Institute for Security Studies, 'Reinventing the force intervention brigade' 4 December 2020, https://issafrica.org/iss-today/reinventing-the-force-intervention-brigade (accessed 7 September 2021).

116 United Nations University 'The best defence is no offence' https://unu.edu/publications/articles/why-cuts-to-un-troops-in-congo-could-be-good-thing.html (accessed 7 September 2021).

117 UNSC 'Resolution 2502 (2019)' adopted by the Security Council at its 8692nd meeting, on 19 December 2019. SC Res 2502 at 42, 46.

118 UNSC 'Letter dated 24 October 2019 from the Secretary-General addressed to the President of the Security Council' 25 October 2019. UN Doc S/2019/842 at 180, 181.

119 UNSC (n 118) at 185, 189.

120 UNSC (n 118) at 186.

121 'Communique of the extraordinary organ Troika summit plus force intervention

Council adopted a resolution under Chapter VII of the UN Charter mandating MONUSCO to carry out, in support of DRC authorities, 'targeted offensive operations' through a 'reconfigured and effective Force Intervention Brigade … that includes additional combat units from additional TCCs,[122] functioning as quick reaction forces … able to cope with asymmetric warfare … under the authority, command and control of MONUSCO Force Commander'.[123] Seemingly, this development also signalled an end to the initial SADC composed Intervention Brigade.

The CAR

Since its independence the Central African Republic (CAR) has experienced recurring cycles of violence and instability.[124] For current purposes the focus is on the December 2012 insurgency by a largely Muslim alliance of armed groups who commenced an offensive against the government which led to an unconstitutional seizure of power and the ousting of President Bozize. The ensuing general breakdown in government authority,[125]inter-religious tension, a deteriorating security situation, rampant violence and widespread human rights abuses evoked a range of regional and international responses.

In May 2013, the Council for Peace and Security in Central Africa, a creation of the Economic Community of Central African States (ECCAS), agreed to send 1,300 troops to the CAR and to deploy the ECCAS Mission for the Consolidation of Peace in the CAR (MICOPAX).[126] In June, the AU PSC decided to support, in principle, the establishment of an African-led International Support Mission in the CAR (MISCA) with its core comprising the contingents serving under MICOPAX, and in July the AU PSC authorized the deployment of MISCA for an initial period of six months. The mandate given to MISCA focused on assisting with the protection of civilians and the restoration of law and order; the restoration of government authority; reform of the defence and security sector; and the provision of humanitarian aid.[127] That this collaborative

brigade- troop contributing countries, the Democratic Republic of Congo and the Republic of Mozambique' 27 November 2020 SADC/EO-OTS Plus/2/2020/1C at 7.

122 Troop contributing countries.

123 UNSC 'Resolution 2556(2020)' adopted by the Security Council on 18 December 2020 SC Res 2556 (2020) para 29(e).

124 For an historical overview see Violence in the Central African Republic, https://www.cfr.org/global-conflict-tracker/conflict/violence-central-african-republic (accessed 8 September 2021).

125 This was caused by the incapacity of the security forces to confront the security threats and high levels of desertion during the crisis as well as the near-total absence of state administration and services across the country. See UNSC 'Report of the Secretary-General on the Central Republic submitted pursuant to paragraph 22 of Security Council resolution 212 (2013)' 15 November 2013 UN Doc S/2013/677 at 7, 8.

126 UNSC 'Report of the Secretary-General on the situation in the Central African Republic' 5 August 2013 UN Doc S/2013/470 at 13.

127 UNSC 'Report of the Secretary-General on the Central African Republic submitted

effort between ECCAS and the AU to transform MICOPAX into MISCA could only work with outside assistance, is clear from a request by the AU PSC at the time that the UN, the EU and other partners will have to provide the necessary financial, logistical and technical support.[128]

On 5 December 2013, the UN Security Council, under a Chapter VII resolution, authorized the deployment of MISCA for a period of twelve months[129] and on 19 December the transfer of authority from MICOPAX to MISCA took effect.[130] However, like in the case of AFISMA, the MISCA initiative would face termination before long. Two assessment reviews of MISCA's capabilities in November 2013[131] and March 2014,[132] respectively, a deteriorating security situation,[133] and a UN Human Rights Council resolution on human rights atrocities in the CAR[134] sealed the fate of the regional initiative as a peacekeeping/ enforcement operation.

Already in the 2013 assessment report the transformation of MISCA into a UN peacekeeping operation was listed as one of five options for addressing a rapidly deteriorating situation in the CAR.[135] It is also clear from the report that the consideration of all five the options, apart from the deteriorating security situation, was also informed by a number of concerns relating to logistical deficiencies at the strategic and operational levels of MISCA.[136] This certainly raised questions about the capacity of the regional initiative to effectively deal with the developments on the ground. Noteworthy is that both the AU and ECCAS have indicated that they would support the transformation into a UN mission[137], which may have resulted from their own realisation of MISCA's lack of capacity.

pursuant to paragraph 22 of Security Council resolution 212 (2013) 15 November 2013.UN Doc S/2013/677 at 14, 15.

128 UNSC (n 127) at 15.

129 UNSC 'letter dated 19 December 2019 from the chair of the Security Council committee established pursuant to resolution 2127 (2013) concerning the Central African Republic addressed to the President of the Security council' 20 December 2019 SC res 2127 (2013) para 28.

130 African Union Press Release ' Transfer of authority from Micopax to Misca' https://www.peaceau.org/uploads/auc-misca-com-19-12-2013.pdf (accessed 8 September 2021).

131 UNSC (n 127).

132 UNSC 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolutions 2127 (2013) 3 March 2014 UN Doc S/2014/142 .

133 In January 2014 the Secretary-General of the United Nations, Ban Ki-moon, described the situation in the CAR as a 'crisis of epic proportions' and told the UN Human Rights Council that the 'CAR is in freefall'. Available at https://news.un.org/en/story/2014/01/460042 (accessed 9 September 2021).

134 A/HRC/RES/S-20/1 (21 January 2014).

135 UNSC (above 127) at 40 & following.

136 UNSC (above 127) at 20, 22-24.

137 UNSC (above 127) at 46.

Several factors caused the March 2014 assessment report to recommend only one option, namely the transformation of MISCA into a UN Peacekeeping Mission.[138] First, since the November 2013 report the security, human rights and humanitarian situation deteriorated even further causing a serious protection crisis.[139] Second, notwithstanding a swift deployment by MISCA forces, significant operational capacity gaps remained which required the deployment of French, US and EU military contingents with the aim of restoring minimum security conditions.[140] Third, a January 2014, request by the CAR Minister of Foreign Affairs for the establishment of a UN peacekeeping operation, reiterated in February by the Head of the Transitional Government of the CAR.[141]

This paved the way for a Chapter VII Security Council resolution establishing the United Nations Integrated Stabilization Mission in the CAR (MINUSCA)[142] and determining that transfer of authority from MISCA to MINUSCA will take place on 15 September 2014.[143] Some five years later a certain measure of progress concerning the re-establishment of state authority and administration could be reported while progress with the implementation of the peace agreement, human rights violations, security sector reform, and effectiveness of the UN mission in certain areas remained problematic.[144]

Just how complex, unpredictable and fluid conflicts of this kind can be is illustrated by the 2021 Panel of Experts' Report on the CAR.[145] It appeared that the country has entered a new phase of violent conflict following the establishment in December 2020 of a new coalition of rival armed forces comprising the most powerful armed groups whose military objectives included the expectation of a military coup against the incumbent government and who showed a callous disregard for human rights and humanitarian law principles.[146] It also became evident that so-called Russian military instructors who assisted the

138 UNSC 'Report of the Secretary- General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127 (2013)' 3 March 2014. UN Doc 2014/142 at 52.

139 UNSC (n 138) at 3.

140 UNSC (n 138) at 43-47.

141 UNSC (n 138) at 53.

142 UNSC 'Resolution 2149 (2014)' adopted by the Security Council at its 7153rd meeting, on 10 April 2014. SC res 2149 (2014) at 18.

143 UNSC (n 142) at 21.

144 UNSC 'Unanimously adopting resolution 2552(2020), Security Council authorizes one-year mandate extension of United Nations stabilization mission in Central African Republic' 8776th Meeting, 12 November 2020. SC res 2552 (2020). See also, UNSC Central African Republic, Report of the Secretary-General 12 October 2020 UN Doc S/2020/994.

145 UNSC 'Letter dated 25 June 2021 from the panel of experts on the Central African Republic extended pursuant to resolution 2536 (2020) addressed to the President of the Security Council' 25 June 2021. UN Doc S/2021/569.

146 UNSC (n 145) at 7 & further.

CAR security forces in terms of a bilateral arrangement were not only actively participating in combat operations, but sometimes even taking leading positions. Moreover, evidence provided to the Panel of Experts linked some of their actions to humanitarian and human rights law violations and to the supply of arms in contravention of a 2013 arms embargo imposed by the UN Security Council in Resolution 2127.[147]

Conclusion

What the three case studies illustrate is that enforcement action may be par for the course when multidimensional peacekeeping mandates in complex security situations are implemented. From the UN's perspective it may require a departure from its usual reluctance to explicitly resort to such a measure when circumstances require it. Even in the case of the DRC the UN was resolute in making it clear that the Force Brigade was an exceptional measure, and that the intention was not to create a precedent or to prejudice the agreed principles of peacekeeping. Seemingly, it is less problematic when regional arrangements decide to resort to enforcement action if a security situation is getting out of control as the UN's stance towards the G5 Sahel Force illustrates.

More generally, in respect of joint peace-keeping operations in terms of the UN-AU partnership or cooperation agreement, the performance of the AU and/or the REC's suffers from persistent weaknesses and lack of capacity. This is clearly the case in the areas of early warning and conflict prevention which were problematic even in the days of the OAU and which still suffer from a lack of effective monitoring and evaluation capabilities under the AU. Another is post-conflict reconstruction which is still in need of proper operationalization and implementation after more than a decade of policy statements and recommendations. In the case of both these issues the gap between rhetoric and reality have remained large with no credible evidence yet that significant changes are under way.

Finally, as far as the multidisciplinary peace operations are concerned there is much uncertainty about the actual role and contribution of the AU, and its REC's for that matter, following their short-lived self-help interventions and their subsequent integration into or transition to a UN-led multidisciplinary mission. This is not to question that they performed certain functions, but what these functions were and whether concrete results were achieved are matters that remain obscure in most instances.

The need for resolving the above issues has again become apparent following two recent developments. The first is Security Council

147 UNSC (n 145) at 64 & further, 72 & further.

resolution 2436 of 2018 which sends out a strong message for the development of a comprehensive and integrated performance policy framework that facilitates the effective and full implementation of peacekeeping mandates.[148] Effective implementation of peacekeeping mandates, the Council points out, is the responsibility of all stakeholders which is contingent upon factors such as well-defined, realistic, and achievable mandates, political will, leadership, performance and accountability at all levels, and adequate resources.[149]

The second development is the endorsement in September 2018, by more than a hundred and fifty UN members, of a Declaration of Shared Commitments on UN Peacekeeping Operations.[150] Among the endorsing states are forty African countries.[151] In the context of the issues identified in this chapter, and mindful of restrictions on available space, only the following commitments are singled out. The parties affirm the primacy of politics in the resolution of conflicts and commit themselves to stronger engage with political solutions at the national and regional levels within their respective mandates and responsibilities. Underscoring this commitment is the recognition that meaningful progress in strengthening security must be replicated in national reconciliation, the rule of law, human rights, and sustainable development.[152] In respect of partnership peacekeeping the endorsing states committed themselves to the enhancement of collaboration and planning between the UN and regional and sub-regional organisations. The AU is specifically mentioned in this regard including for support in capacity building, financing and compliance with peacekeeping norms and standards.[153]

An online survey, conducted a year later, on the implementation of the commitments attracted comments from 38 states with responses that varied in substance.[154] A matter worth following will be the steps taken by African states to implement the 45 commitments they endorsed in 2018.

148 UNSC 'Resolution 2436 (2018)' adopted by the Security Council at its 8360th meeting, on 21 September 2018. SC Res 2436 (2018) para 1.

149 UNSC (n 148) at 2.

150 'Action for peacekeeping: declaration of shared commitments on UN peacekeeping operation', https://peacekeeping.un.org/sites/default/files/a4p-declaration-en.pdf (accessed 14 October 2021).

151 United Nations Peacekeeping 'Action for peacekeeping (A4P), https://peacekeeping.un.org/en/action-for-peacekeeping-a4p (accessed 14 October 2021).

152 'Action for peacekeeping: declaration of shared commitments on UN peacekeeping operation' (n 150) at 3, 4.

153 'Action for peacekeeping: declaration of shared commitments on UN peacekeeping operation' (n 150) at 18.

154 'Secretary-General's Initiative on action for Peacekeeping', https://www.un.org/en/A4P/dashboard.shtml (accessed 14 October 2021).

23

The African Union's right to intervene and the right to life: tension or concordance?

Dire Tladi with John Dugard***

Introduction

As one with such a long and fulfilling career in legal academia, Christof Heyns had many research interests. His research interests included legal philosophy, the right to dignity, the right to peaceful assembly and of course his interest in the life and contribution of Jan Smuts. But it is probably fair to say that the right to life was the driving force to Christof's academic pursuits. He has referred to the right to life as the supreme right.[1] His work as United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary execution and his participation in the work of the Working Group on the Death Penalty and Extrajudicial, Summary or Killings in Africa of the African Commission on Human and Peoples' Rights (African Commission) both exemplify this interest in the right to life. Indeed, even his work on the right of assembly was inspired by his commitment to the protection and sanctity of life.[2] The freedom

* Professor of international law, South African Research Chair in International Constitutional Law, Faculty of Law, University of Pretoria; and member and since 2021 First Vice-Chair of the International Law Commission. Dire Tladi knew Christof first as a teacher, then as a senior colleague and later as a friend and mentor. Through many conversations, often over a glass of beer or wine, Christof shared his life philosophies (emphasis on plural) and many of those rubbed off, influenced and shaped the course of his career.

** Professor of international law; a member of the International Law Commission between 1997 and 2011; and from 2001 to 2008, UN Human Rights Council special rapporteur on human rights in the Palestinian territories. John Dugard watched Christof grow in stature from a young scholar to an internationally acclaimed human rights lawyer, whose early commitment to ending apartheid was later transformed into a wider concern for human rights in Africa and beyond. He greatly admired Christof's innovative and creative mind and his ability to put his ideas into practice. In large measure this was due to the power of his intellect and the warmth of his personality.

1 See C Heyns & T Probert 'Casting fresh light on the supreme right: the African Commission's General Comments No. 3 on the right to life' in T Maluwa, M du Plessis & D Tladi (eds) *The pursuit of a brave new world in international law: essays in honour of John Dugard* (Brill 2017).

2 See for connection between the right to peaceful assembly and the right to life, C Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (A/HRC/17/28), para 24 (Peaceful assembly report).

from violence project at the University of Pretoria was Christof's way of bringing all these different strands of the security of the human being together and can be seen as the culmination of Christof's pursuit of the promotion of the 'supreme right'.

The right to life is ubiquitous in international law. It is contained in all the important human rights treaties[3] and is generally regarded as forming part of customary international law. In the African context, article 4 of the African Charter on Human and Peoples' Rights (African Charter) provides that everyone 'shall be entitled to respect for his life'. While the right to life has not been included in the various lists of peremptory norms of general international law produced by the International Law Commission (ILC), it is difficult to argue against the right to life, or at least the prohibition of the arbitrary deprivation of life, as being part of *jus cogens*. According to the Fourth Report of the Special Rapporteur on peremptory norms, the right not to be arbitrarily deprived of life is accepted and recognised as a peremptory norm of general international law.[4] Christof himself has described the prohibition of arbitrary deprivation of life as well established 'in the rules of *jus cogens*'.[5]

At the same time, many of the other rules of international law that are accepted as *jus cogens* can be described as rules designed to promote freedom from violence which generally implicate the right to life. These include the prohibition of crimes against humanity, the prohibition of genocide and the prohibition of grave breaches, or more broadly war crimes.[6] The prohibition on the use of force, which is also *jus cogens*, is different from other rules of *jus cogens* since, unlike other generally recognised *jus cogens* norm, it is not directed at the protection of the rights and dignity of the human being but rather on the right of states. Yet, it also has an impact on life. Although directed at another state, the use of force as understood in *jus ad bellum* leads to the loss of life.[7]

Against this background, the topic of this chapter sits at the intersection of the right to life and *jus ad bellum* within the framework of African international law. The right of the African Union to intervene in its member states under the AU Constitutive Act implicates the law on

3 The 1966 International Covenant on Civil and Political Rights (art 6); 1948 Universal Declaration of Human Rights (art 3); 1950 European Convention on Human Rights (art 2); 2004 Arab Charter on Human Rights (art 5).

4 D Tladi *Fourth Report of the Special Rapporteur on peremptory norms of general international law* (Jus Cogens) (A/CN.4/727), at paras 128-130 (Fourth Report).

5 See C Heyns & T Probert 'Securing the right to life: a cornerstone of the human rights system' *EJIL Talk* 11 May 2016.

6 On some norms of international law generally accepted as constituting jus cogens, see J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard's international law: a South African perspective* (Juta 2018) at 50.

7 See C Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (A/HRC/23/47), para 57.

the use of force, *jus ad bellum*, while article 4 of the Charter implicates the right to life. While Christof himself had not (or perhaps had not yet) focused his work on *jus ad bellum*,[8] the topic of this chapter addresses an area that Christof may have found interesting because of its implication for the right to life. In the next section, the chapter provides a broad account of the right to life in international law, in particular under the African system. The chapter then directs itself to the right of the Union to intervene, and explore, in particular, its connections to the right to life.

The right to life in African international law

General

The right to life is provided for in all the major international human rights instruments. It is enumerated as the first right in the International Covenant on Civil and Political Rights (ICCPR).[9] The ICCPR provides that '[e]very human being has the inherent right to life' and that '[n]o one shall be arbitrarily deprived of his life.' Similarly, the Universal Declaration on Human Rights provides that '[e]veryone has the right to life'.[10] Synthesising these two instruments, Christof, as Special Rapporteur on extrajudicial, summary or arbitrary executions, expressed the view that what was essential was the 'inherent' nature of the right to life (a word which appears in the ICCPR), noting that it 'underscores the fundamental importance of this right'.[11] In his view, the right to life requires not only that the state protects individuals from deprivation of life from other members of society but that, in addition, the agents of the state also respect the right.[12] Christof then emphasises that what is prohibited under these instruments is '"arbitrary" deprivation of life' and that the deprivation of life that is 'non-arbitrary' is not covered by the ICCPR.[13]

The notion of arbitrary deprivation thus provides the threshold for what is permissible taking of life and what falls foul of the rules of international human rights law. In describing arbitrariness, the Human Rights Committee has noted that 'any substantive deprivation of life must be "prescribed by law," and must be defined with sufficient precision'.[14] The notion of prescribed by law itself is understood as

8 For a notable exception, see Heyns (n 7) para 57.
9 ICCPR art 6.
10 Universal Declaration art 3.
11 See Peaceful assembly report (n 2) para 44.
12 As above.
13 As above.
14 Human Rights Committee General Comment 36 (Article 6: The Right to Life) (CCPR/C/GC/36), para 19.

including both domestic and international law.[15] Christof himself observed that the word 'arbitrary' did not simply mean contrary to law,[16] since such a narrow interpretation would deny the protection of any objective content. To this end, General Comment 36 of the Human Rights Committee states that the deprivation of life may 'be authorised by domestic law and still be arbitrary'.[17] In particular the General Comment states that the

> notion of 'arbitrariness' is not to be fully equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process, as well as elements of reasonableness, necessity and proportionality.[18]

According to Christof, the right to life is the 'fountain from which all human rights spring', observing that its infringement was 'irreversible'.[19] The Human Right Committee has described the rights contained in article 6 of the ICCPR as having attained peremptory status.[20] While the ILC has not included the right to life in its list of peremptory norms, the report of the Special Rapporteur on peremptory norms did identify that right to life, or the right not to be arbitrarily deprived of life, as *jus cogens*.[21] For this proposition, the report relies on state practice,[22] in the form of domestic court cases and treaty practice in the form of the application of non-derogation clauses to the right to life in human rights treaties,[23] and outputs of regional human rights bodies such as the Inter-American Commission.[24]

15 As above, para 12.
16 Heyns and Probert (n 1) at 49.
17 General Comment 36 (n 14) para 12.
18 As above.
19 Heyns & Probert (n 1) at 46.
20 See General Comment 36 (n 14) para 68 ('Reservations with respect the peremptory and non-derogable obligations set out in Article 6 are incompatible with the object and purpose of the Covenant').
21 Tladi *Fourth Report* (n 4) para 128.
22 *RM v Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, [2006] EKL ('On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of *jus cogens* as outlined above and its current classifications it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life.') and *Nada (Youssef) v. State Secretariat for Economic Affairs*, Judgment of the Swiss Federal Court of 2007 of 22 April 2008 ('*Allgemein werden zum ius cogens elementare menschenrechte wie das Recht auf Leben* [In general, fundamental human rights such as the right to life become jus cogens]')
23 See, for example, ICCPR art 4; European Convention on Human Rights art 15.
24 See *Victims of the Tugboat '13 de Marzo' v Cuba,* Case 11.436, Decision of the Inter-American Commission on Human Rights of 16 October 1996, Report 47/96, para. 79 ('Another point that the Inter-American Commission on Human Rights must stress is that the right to life, understood as a basic right of human beings enshrined in the American Declaration and in various international instruments of regional and universal scope, has the status of *jus cogens*. That is, it is a peremptory rule of international law, and, therefore, cannot be derogable. The concept of *jus cogens* is derived from a higher order of norms established in ancient times and which cannot

The right to life under the African human rights system

In addition to the global instruments referred to above, the right to life is also provided for in regional human rights treaties, including the European Convention,[25] the American Convention[26] and the Arab Convention.[27] The right is also protected in article 4 of the African Charter, which provides as follows:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

In a number of decisions on individual complaints, the African Commission has described the right to life as the 'fulcrum of all other rights' and as the 'fountain through which other rights flow'.[28] The African Commission has further described the right to life as the 'supreme right of the human being'.[29] In particular, for the Commission, the prohibition of arbitrary deprivation of life means that 'the law must strictly control and limit the circumstances in which a person may be deprived of his life'.[30]

In 2015, the African Commission adopted General Comment 3 on the right to life under the African Charter, to which Christof was a significant contributor.[31] While the General Comment is, of course, not binding, it does serve an important guide for the interpretation of Article 4 of the African Charter.[32] According to Heyns and Probert,

be contravened by the laws of man or of nations.)

25 Art 2(1) of the ECHR states: 'Everyone's right to life shall be protected by law'.

26 Art 4 of the American Convention on Human Rights: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life'.

27 Art 5(1) of the Arab Charter on Human Rights provides that '[e]very human being has the inherent right to life', while art 5(2) provides that the right to life 'shall be protected by law' and that '[n]o one shall be arbitrarily deprived of his life.'

28 See, for example, *Gabriel Shumba v Zimbabwe,* Communication 288/2004, Decision of 2012, para 130. See also *Forum of Conscience v Sierra Leone,* Communication 223/998, Decision of 2000, at para 20 and *Interights and Ditshwanelo v Botswana,* Communication 319/06, Decision of 2015, para 20.

29 *Gabriel Shuma* (n 28) para 130.

30 As above.

31 See African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 2015. On the acknowledgement of Christof's contribution, see the Preface, by the Chairperson of the Working Group that prepared the Comment ('The African Commission is very grateful for the valuable contribution from members of the Working Group and experts to the text, in particular from Professor Christof Heyns, the UN Special Rapporteur on extrajudicial, summary and arbitrary executions.')

32 See para 7 of the Commentary to Draft Conclusion 13 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *Report of the International Law Commission at the Seventieth Session* (2018) (A/73/10). See also *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v United Arab Emirates),* Judgment of the

general comments are 'official interpretations of legal obligations' and are 'an important part of international human rights law.'[33] While the contribution states that the general comments are 'official' and 'part of international human rights law', this does not mean that they are binding. Heyns and Probert do state that the status of general comments 'remains a subject of academic debate'.[34] More importantly, they describe these interpretations as 'persuasive', suggesting that the African Commission ought to be seen as 'more persuasive' given the Commission's broad mandate.[35] General Comment 3 itself describes its role as being 'designed to guide the interpretation and application of the right to life under the Charter'.[36] It is intended to promote 'the coherent application … including [the implementation of the right] at the domestic level'.[37]

The General Comment describes the right not to be arbitrarily deprived of life as 'part of customary international law' and a right that is 'recognised as a *jus cogens* norm, universally binding at all times.'[38] Consistent with consequences for *jus cogens*,[39] the General Comment states that the right to life 'should not be interpreted narrowly' but should be interpreted in such a way as to promote the realisation of other rights in the Charter 'particularly the right to peace.' The emphasis on the right to peace is interesting given that, under the Charter, the right to peace is not, as such, an individual right, but rather a collective right of peoples, nations and states.[40]

Article 4 does not prohibit all deprivations of life. It is only arbitrary deprivation of life that is prohibited. According to the General Comment, a 'deprivation of life is arbitrary if it is impermissible under international

International Court of Justice of 4 February 2021, para at 101, in which the Court recalled that under its jurisprudence, it ascribes 'great weight' to interpretations of expert bodies but that it was 'in no way' bound by such interpretations.

33 Heyns & Probert (n 1) at 47.

34 As above.

35 As above.

36 General Comment 3 (n 31) para 1.

37 As above.

38 General Comment 3 (n 31) para 5.

39 See Draft Conclusion 20 of the ILC Draft Conclusions on Peremptory Norms of General International Law, *Report of the International Law Commission at the Seventy-First Session* (A/74/10) ('Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'). The corollary of this interpretative rule is that *jus cogens* norms have to be given their full effect including through a generous interpretation.

40 See art 23(1) of the African Charter on Human and Peoples' Rights which provides that all 'peoples shall have the right to national and international peace and security', noting that the principles of solidarity and friendly relations are to govern 'relations between States.' In this context, art 23(2) recalls states shall ensure that their 'territories shall not be used as bases for subversive or terrorist activities against the people of any other State party'.

law, or under more protective domestic law provisions'.[41] This standard, by laying emphasis on 'international law' rather than domestic, provides a more objective test for arbitrariness, precluding the possibility of viewing 'arbitrariness' as based on the discretion of domestic law. Domestic law, under the standard put forward by the Commission, is relevant only if it provides greater protection than international law. In addition to providing a more objective standard, by basing the test for arbitrariness on consistency with international law, the test also permits a more evolutive standard which can shift as the standards of international law continue to evolve. More concretely, the General Comment states that 'considerations such as appropriateness, justice … [and] reasonableness …' are relevant for determining proportionality.[42]

The obligations of states under article 4 of the Charter include to 'take steps to prevent arbitrary deprivation of life'.[43] The General Comment is, for the most part, directed at the use of force under domestic law. While the General Comment does address the use of force under international humanitarian law,[44] it does not address, at least not directly, *jus ad bellum*, which is the subject of article 4(h) of the Constitutive Act of the African Union. This intersection, the right to life under article 4 of the African Charter and *jus ad bellum* in the form of article 4(h) of the Constitutive Act, is explored in the next section, both in terms of concordance and tension.

The right to life and the right (of the Union) to intervene

The concordance

The first point of concordance between the right to life and the right of the AU to intervene under article 4(h) is that, like the right to life, the acts for which the AU has the right to intervene, namely, crimes against humanity, genocide and war crimes, all have *jus cogens* status.[45] The acceptance and recognition of the prohibition of genocide, for example, as *jus cogens* was first implicitly acknowledged by the International Court of Justice (ICJ) in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.[46] The Court, relying

41 General Comment (n 31) para 12.
42 As above.
43 General Comment (n 31) para 7.
44 General Comment (n 31) paras 32 to 35.
45 See for a more detailed discussion of the *jus cogens* status of crimes against humanity, war crimes and genocide than is possible here see Dire Tladi *Fourth* Report (n 4), at paras 78-83 (prohibition of genocide), paras 84-90 (crimes against humanity) and 116-121 (war crimes).
46 *Reservations to the Convention on the Prevention and Punishment of the Crime of*

on that advisory opinion, later explicitly described the prohibition of genocide as *jus cogens*.[47] It is unsurprising that the prohibition of genocide has been constant in the list of norms of recognised by the ILC as possessing the character of *jus cogens*.[48]

In addition to recognising the peremptory character of crimes against humanity in the Draft Conclusions on Peremptory Norms,[49] the ILC has also recognised the peremptory character of the prohibition of crimes against humanity in the Articles on the Prevention and Punishment of Crimes against Humanity.[50] The prohibition has also been recognised in the jurisprudence of the ad hoc tribunals and in domestic jurisprudence as *jus cogens*.[51] With respect to the prohibition of war crimes, there is admittedly some divergence of views as to what elements of war crimes constitute *jus cogens*. It may, for example, be argued that only the 'grave breaches' under the Geneva Conventions constitute *jus cogens*, or, that any violation of international humanitarian law constitutes *jus cogens*. Notwithstanding this divergence of views, there is generally acceptance that some core of 'war crimes' constitutes *jus cogens*. In this respect, the ICJ described 'many rules of international humanitarian law applicable to armed conflict' as being 'so fundamental to the respect of the human person and the "elementary considerations of humanity" …[that] they constitute intransgressible principles of international law'.[52]

The concordance between the right to life in article 4 of the African Charter and the right of the Union to intervene in members states under article 4(h) of the Constitutive Act also underlies the objective of both provisions. Article 4(h) of the Constitutive Act provides for

> the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

Genocide, Advisory Opinion, *ICJ Reports* 1951, p.15, at 23, where the Court described the prohibition of genocide in the following words: '"a crime under international law" involving a denial of the right to existence of entire human groups, a denial which shocks the conscience of the mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations … the principles underlying the Convention are principles which are recognised as a civilised nations as binding on States, even without any conventional obligation ..'

47 See, for example, A*pplication of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia),* Judgment, *ICJ Reports* 2015, p.3 at para 87

48 See, for example, Draft Conclusion 23 and Annex of the Draft Conclusions on Peremptory Norms (n 39).

49 As above.

50 See Preamble, 2019 Articles on the Prevention and Punishment of the Crimes against Humanity, *Report of the International Law Commission,* Seventy-first Session (A/74/10).

51 See, e.g. *Prosecutor v Zoran Kupreškić,* Judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, para 520.

52 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, *ICJ Reports* 1996, p. 226, at para 79.

The Constitutive Act makes plain the centrality of human rights in general, and the right to life in particular. Article 3 of the Constitutive Act includes, as an objective of the Union, the promotion and protection of 'human and peoples' rights 'in accordance with the African Charter … and other relevant human rights instruments.'[53] It also provides that in the pursuit of its objectives, the AU should function in accordance with a number of principles including the 'respect for … human rights',[54] and the 'respect for the sanctity of human life'.[55] The 'grave circumstances' identified in article 4(h) of the Constitutive Act all implicate threats to life.

The definition of 'genocide', for example, consists of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group' and include 'the killing members of the group' and 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole'.[56] The act of genocide has the potential to deny not only individuals of their right to life, but 'entire human groups'.[57] Werle and Jessberger describe the various episodes of genocide, what they call 'systematic annihilation of entire groups of people', and the loss of life resulting from those episodes.[58]

Similarly, crimes against humanity often involve loss of life and very often on a massive scale. The Rome Statute defines 'crimes against humanity' as acts committed 'as part of a widespread or systematic attack directed against any civilian population'.[59] The particular acts constituting crimes against humanity when meeting the threshold just mentioned, include murder, extermination, persecution, torture, and other inhumane acts,[60] all of which are acts which either result in the loss of life, or constitute a threat to life. This definition is, in the main, reproduced in the International Law Commission's Draft Articles on the Prevention and Punishment of the Crimes against Humanity.[61] Werle

53 See AU Constitutive Act art 3(h).

54 AU Constitutive Act art 4(m).

55 AU Constitutive Act art 4(o).

56 See art II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See also art 7 of the 1998 Rome Statute of the International Criminal Court.

57 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (above note 46), at 23 ('The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups'). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 47) at para 63, emphasising the intent to physically destroy a group, in part or in whole. See Dugard and others (n 6) 252.

58 G Werle & l Jessberger *Principles of international criminal law* (OUP 2014) at 289-291.

59 See art 7(1) of the Rome Statute (n 56).

60 As above.

61 Draft art 2 of the 2019 Articles on the Prevention and Punishment of the Crimes against Humanity, *Report of the International Law Commission,* Seventy-first Session

and Jessberger consider that the two acts most clearly and definitively connected with the loss of life, namely, killing and extermination, are the most 'serious cases' of crimes against humanity.[62] Moreover, they point out that crimes against humanity 'target fundamental human rights, in particular life'.[63]

The same pattern is true for war crimes – the third basis for intervention under article 4(h) of the AU Constitutive Act. The various categories of war crimes, as defined under the Rome Statute, have a clear connection with the taking or threatening of life.[64] For example, in respect of 'grave breaches of the Geneva Conventions',[65] particular acts that constitute the taking or threat of life include wilful killing, torture or inhuman treatment and wilfully causing great suffering, or serious injury.[66] Under the category 'other serious violations of the laws and customs applicable in international armed conflict',[67] particular acts that are identified as involving the taking of or threat to life include intentionally directing attacks against the civilian population, intentionally directing attacks against personnel involved in humanitarian assistance or peacekeeping missions and intentionally launching attacks in the knowledge that such attacks will cause incidental loss of life to civilians and the killing or wounding of combatants having laid down their arms.[68] The Statute also identifies particular gases and weapons the use of which constitute war crimes.[69] As with crimes against humanity, the protected rights in the prohibition of war crimes include the right to life and bodily integrity.[70]

Finally, it is worth recalling that the duty on states in respect of the right to life is not only for the state itself not to take life arbitrarily but also to take steps to prevent the arbitrary deprivation of life.[71] This refers primarily to steps that a state must take within its own territory.[72] Nonetheless, there is no *a priori* reason why this cannot apply to the prevention of arbitrary deprivation of life abroad *when the steps in question are taken collectively under legitimate multilateral action.*

(A/74/10).

62 Werle & Jessberger (n 58) at 238.

63 Werle & Jessberger (n 58) at 333.

64 See art 8 of the Rome Statute.

65 Art 8(2)(a) of the Rome Statute.

66 As above.

67 Art 8(2)(b) of the Rome Statute.

68 As above.

69 As above.

70 Werle & Jessberger (n 58) at 409.

71 General Comment 3 (n 31) para 7.

72 In this respect, Heyns & Probert (n 1), at 66, in describing the duty to prevent, argue that this duty requires States to take measures 'within their territory or other areas under their control'.

Tension

While there is some obvious concordance between the right to life in article 4 of the African Charter and the right of the Union to intervene in response to acts of genocide, crimes against humanity and war crimes, there are also areas of tension. At the outset, even before the areas of tension are described, it is worth pointing out that these two provisions operate in two different areas of international law. While article 4 of the African Charter operates in the area of international human rights law, article 4(h) of the AU Constitutive Act falls squarely within *jus ad bellum*. The intersection between international human rights, including the right to life, and international humanitarian law has certainly been considered, including in Christof's work.[73] Yet, the intersection between international human rights law and the *jus ad bellum,* unlike the *jus in bello*, has not been a major focus of consideration.[74] Moreover, it may be argued that there is no intersection between the two areas, since the duty to prevent the arbitrary deprivation of life might be seen as territorially bound. In this respect, Heyns and Probert have noted that while the right to life implies not only 'the duty to refrain from' arbitrarily taking life but also the duty 'to protect [life]' through various measures, these measures relate to guaranteeing 'that the right to life is respected within their territory or other areas under their control'.[75] Yet, this quotation from Heyns and Probert does not mean, or need not necessarily mean, that extraterritorial action to prevent the loss of life is always prohibited. It really only means that the right to life does not create *the obligation to act extraterritorially*. Whether states are *permitted* to act to prevent the arbitrary deprivation of life is dependent on other considerations.

Against this background, a tension between the right to life and the right of the Union to intervene forcibly is that the right to intervene militarily might itself lead to the loss of life, not only of the those guilty of war crimes, crimes against humanity and genocide, but also of innocent people caught up in the crossfire. Of course, in these circumstances, the principles of proportionality under the rules of international humanitarian law can serve to mitigate the loss of innocent life in the event that intervention does take place.[76] Thus, once a decision to intervene under article 4(h) of the Constitutive Act (or for that matter under any rule of international law permitting intervention)

73 See Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* (2012) (A/HRC/20/22), at paras 65-70. See also Heyns & Probert (n 1) at 63-66.

74 Exceptionally, see Heyns (n 7) at para 57-62.

75 Heyns & Probert (n 1) at 66.

76 See J Dugard *Confronting apartheid: a personal history of South Africa, Namibia and Palestine* (Jacana, 2018) at 204.

and 'foreseeably inflicting excessive incidental casualties' would be contrary to the law of armed conflict and thus unlawful.[77] Thus, the rules of international humanitarian law, while not enough to prevent innocent loss of life, would serve to minimise it.

While the rules of international humanitarian law can address the conduct of hostilities, they cannot address the question whether the intervention itself – the decision to intervene – is lawful. As described above, arbitrariness as the standard for the lawfulness or not of the deprivation of life, is to be assessed on the basis of, among other factors, whether the deprivation is consistent with law.[78] This includes not only domestic law, but also international law.[79] This means that, if an intervention undertaken pursuant to article 4(h) of the AU Constitutive Act is prohibited under international law, then any deprivation of life resulting from that intervention would be arbitrary and, as a consequence, a breach of the right to life. This constitutes, perhaps, the main area of tension between article 4 of the African Charter and article 4(h) of the AU Constitutive Act.

Different views have been expressed about the consistency with international law of article 4(h) of the Constitutive Act and, in particular, the consistency of any act of intervention undertaken thereunder with the prohibition on the use of force.[80] As with the right to life and the prohibition of the acts referred to in article 4(h) as forming the basis of the right of the Union to intervene, the prohibition on the use of force is *jus cogens*,[81] making the question of the intersection between article 4 of the African Charter and article 4(h) of the AU Constitutive Act all the more intriguing. Of course, the right to intervene under article 4(h) is, itself, not *jus cogens*. It is therefore apposite to ponder its lawfulness under international law.

As mentioned above, there are different views on the consistency with international law of article 4(h) of the Constitutive Act. At one end of the spectrum, there is a view that any action pursuant to article 4(h) which is not endorsed or approved by the UN Security Council falls foul of the prohibition on the use of force and would be thus be unlawful and a violation of *jus cogens*. Any resulting loss of life would consequently amount to arbitrary deprivation of life and thus would

77 Dugard (n 76) at 64.

78 See General Comment 3 (n 31) para 12.

79 As above.

80 For a comparison of different views see T Maluwa 'African state practice and the formation of some peremptory norms of general international law' in D Tladi (ed) *Peremptory norms of general international law* (jus cogens): *disquisitions and disputations* (Brill, 2021) 291-299 and O Corten & V Koutroulis 'The *jus cogens* status of the prohibition on the use of force: what is its scope and why does it matter?' in D Tladi (ed) *Peremptory norms of general international law* (*jus cogens*): *disquisitions and disputations* (Brill, 2021) 646-651.

81 See Tladi *Fourth Report* (n 4) paras 62-68.

be breach of international law. This perspective is based on a strict reading of the law of the Charter on the prohibition of the use of force which foresees only two exceptions to the prohibition, namely self-defence and authorisation of the UN Security Council. At the other end of the spectrum, intervention under article 4(h) may be seen as a new exception to the prohibition on the use of force or even an evolution of existing exceptions, whether through evolutive interpretation of the Charter or evolution of state practice and *opinio juris*.

A possible (middle of the road) view is that intervention under article 4(h) is permissible under the law of the Charter on the basis of Security Council endorsement of such intervention *but that in the absence of an affirmative decision to the contrary,* the Council *is deemed* to have endorsed any action under article 4(h) if duly authorised by the AU Assembly. This alternative view would be dependent on the interpretation of article 53 of the Charter, which provides that the 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council'.[82] The phrase 'without the authorisation of the Security Council' would seem to imply the necessity of a positive decision by the Council before any action under article 4(h) could be undertaken. Nonetheless, it is not inconceivable, if there is sufficient practice (and acceptance of that practice) for that language to be read as permitting intervention in the absence of an affirmative decision to the contrary. After all, under the language of the Charter abstention by a permanent member should be read as a veto,[83] yet due to practice and the acceptance of that practice, abstentions do not prevent the adoption of resolutions.[84] Given that the rule in question in the current case – the prohibition on the use of force – is *jus cogens*, it would be necessary, in addition to showing the consistent practice accepting the intervention without an affirmative endorsement, that the rule emanating from that practice is

82 Art 53(1) of the UN Charter.

83 Art 27(3) of the Charter provides as follows: 'Decisions of the Security Council … shall be made by an affirmative vote of nine members *including the concurring votes of the permanent member* ' (emphasis added).

84 *Legal Consequences for States of the African Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, *ICJ Reports 1*971, p.16, at para 22, responding to South Africa's argument that UN Security Council resolution was improperly adopted because France and the United Kingdom had abstained from the vote: 'However, the proceedings of the Security Council extending over a long period time supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions … This procedure followed by the Security Council, which has continued unchanged … has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation'.

accepted and recognised as peremptory as well.[85] Yet, this too is not an insurmountable hurdle given that the purpose of that practice (and possible rule) would be to prevent atrocities, the prohibition of which is considered *jus cogens*. Whether the law has reached this state (or whether it will in the future) is not at all certain, but it does seem clear that ultimately the proper relationship between article 4 of the African Charter and article 4(h) of the AU Constitutive Act will be dependent on the permissibility of intervention under general international law of intervention undertaken pursuant to article 4(h) of the Constitutive Act.

Conclusion

The intersection between the right to life under article 4 of the Charter and the right of the Union to intervene under article 4(h) of the Constitutive Act raises an intriguing question. It is a pity that Christof never brought his remarkable mind to bear on this intractable question. After all, at the heart of the question is the centrality of those rules of international law that Christof arguably cherished more than any other – the right to life and the sanctity of life.

Christof's reverence for life was not purely academic. It was also very much personal. He also believed not just in ensuring that life was lived but that it was lived fully. Christof's son, Adam, shared with us a profound sentiment that his father left him, which captures the reverence for a life well and fully lived. It is appropriate to end this chapter in honour of Christof, about Christof's most cherished rule, with that sentiment: '*Jy het net een kans. Eendag sal die ligte uitgaan.*'[86]

85 See generally Mehrdad Payandeh 'Modification of Peremptory Norms of General International Law' in Tladi (n 80).

86 Own translation: You have just one chance [at life]. One day the light will go out.

24

Police use of force

*Stuart Casey-Maslen**

Introduction

I first met Christof in late February 2014 as he was preparing his annual report to the United Nations (UN) Human Rights Council on the use of force in law enforcement. In preparation for the report, which also considered the legality of drones and autonomous weapons in international law, he had organised a meeting of legal experts in Geneva to discuss some of the key issues. In chairing that meeting, he evidenced many of the traits for which, I would soon come to understand, he was already internationally renowned – he was at all times calm and pensive, while in probing complex issues with the group he possessed a remarkable penchant for a collaborative approach to the work.

I thought at the time that the 2014 submission to the Council would be one of his most important reports as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and so it has proved. But it would be far from his last major contribution to international law in that role. He would go on to lead standard setting in crucial areas of the law of law enforcement, as this chapter discusses. His subsequent appointment onto the Human Rights Committee and his ongoing work for the benefit of the African Commission on Human and Peoples' Rights (African Commission) furnished him with influential fora within which he would continue to promote the fundamental principles governing police use of force. To the understanding and application of each of the five fundamental principles that governs police use of force – legality, necessity, proportionality, precaution, and accountability – Christof has made an enduring contribution. His legacy in this field is one of immense intellect, dedication, humanity, and clarity of thought: a potent cocktail.

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Use of force in the 2014 Report of the Special Rapporteur

Given the centrality of police use of force to the mandate, it is perhaps surprising how little time and space (in relative terms) the previous Special Rapporteurs on extrajudicial, summary or arbitrary executions had accorded to addressing the use of force by law enforcement officials under international law. At the least, it was not a regular thematic issue in their reports. Moreover, there were areas of vagueness or legal imprecision with respect to police use of force that demanded greater clarity. Christof had resolved to remedy this lacuna in our collective understanding. While his April 2014 report[1] gave particular space and attention to the issue of legality – the need for States to implement international standards on use of force by law enforcement officials in domestic law – the report covered all five of the core police use of force principles.

The principle of legality

The first step of securing the right to life is, as Christof wrote in his 2014 report to the Council, 'the establishment of an appropriate legal framework for the use of force by the police, which sets out the conditions under which force may be used in the name of the State'.[2] The laws of each state 'remain the first line and in many cases effectively the last line of defence for the protection of the right to life'.[3] As such, he pointed to the 'strong need to ensure that domestic laws worldwide comply with international standards', for it is simply 'too late to attend to this when tensions arise'.[4] He called for domestic laws regulating the use of force by law enforcement officials to be brought in line with international standards, urging that the failure of a state to put into place an adequate legal framework to be 'identified as a violation of the right to life itself'.[5]

This is a work in progress. While some states have improved their national legislation and policy on police use of force in recent years, most have still to do so. Indeed, it is remarkable how many laws in decolonised nations retain the brutal permissiveness of their colonial-era laws, some dating back to the early twentieth and even the late nineteenth century. Instead of authorising minimum necessary force

1 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' UN doc A/HRC/26/36, 1 April 2014 (2014 Report).
2 2014 Report (n 1) para 26.
3 2014 Report (n 1) para 29.
4 As above.
5 2014 Report (n 1) paras 121, 118.

in pursuit of a law enforcement objective, for instance, the formulation in a number of states is for 'as much force as is necessary', determined subjectively and without limitation.

Even prior to the finalisation of the report, Christof had been working with colleagues and students at the University of Pretoria (UP) to identify national laws governing police use of force around the world. But he would not stop the effort once the report was submitted such was the significance he accorded to the endeavour. The *Law on police use of force worldwide* website[6] that he established with myself and Dr Thomas Probert is, we believe, the only one of its kind in the world. It describes how every state in the world (totalling 197, in the view of the UN Secretary-General) regulates the use of force by its police and other law enforcement agencies; grades them according to a simple traffic-light system; and identifies what they need to do to comply with international law and standards. It continues to be updated, enjoying more than 5,000 hits every month.

The principles of necessity and proportionality

Force is adjudged, at the instant of use, according to the twin cumulative principles of necessity and proportionality. That much is agreed. But the interpretation and application of these principles are often contested, much misunderstood, and sometimes deliberately miscast. Seeking to remedy this, Christof expounded briefly on the qualitative and quantitative elements of the principle of necessity as it restrains police use of force: avoid the use of force wherever reasonably possible; use force only for a legitimate law enforcement objective; and do not use more force than is strictly necessary in the circumstances.[7] Critically, too, he gave appropriate meaning to the notion of an 'imminent' or 'immediate' threat when firearm discharge is countenanced, defining it as 'a matter of seconds, not hours'.[8] This is the correct test. Many states would prefer far greater latitude, but the cost would be counted in the loss of even more lives.

Restrictions on the use of firearms under the law of law enforcement are also central to the application of the principle of proportionality. Proportionality balances how much force may be used by reference to the threat posed by the criminal suspect. As Christof explained in the 2014 report: 'If necessity can be visualized as a ladder, proportionality is a scale that determines how high up the ladder of force one is allowed to go. The force used may not go above that ceiling, even if it might otherwise be deemed "necessary" to achieve the legitimate aim.'[9] Thus,

6 See https://www.policinglaw.info (accessed 21 December 2021).
7 2014 Report (n 1) paras 59, 60.
8 2014 Report (n 1) para 59.
9 2014 Report (n 1) para 66.

even if, in the prevailing circumstances, a suspect can only realistically be stopped from fleeing or an individual prevented from committing a crime by recourse to firearms, in the context of law enforcement proportionality sets boundaries on when such *necessary* force is also *lawful* force. In particular, the use of firearms purely to protect property is always unlawful; shooting the escaping, unarmed thief cannot be accepted. Potentially deadly force may be only be employed to save human life or limb.[10] The notion of proportionality, and its application in the law of law enforcement, is thus clearly distinct from its understandings in *jus ad bellum* or *in bello*.

Firearms may be lawful where their use is strictly necessary in the circumstances in order to confront an imminent threat of death or serious injury, whether that threat is to a member of the public or a law enforcement official.[11] In such an instant, the aim is to stop the threat and prevent the crime, not to kill the suspect. In any event, as the 1990 UN Basic Principles on the Use of Force and Firearms stipulate, intentional lethal use of firearms may only occur when this action (that is, 'shooting to kill') is strictly unavoidable in order to protect life.[12] This ultimate balancing Christof termed the 'protect life' principle – whereby a life may be taken intentionally only to save another life – describing it emblematically as 'the guiding star of the protection of the right to life'.[13]

The principle of precaution

Not only did Christof's 2014 report to the Human Rights Council bring clarity to the rules that apply at the instant when force is used, it also put due emphasis on the upstream principle of precaution. First introduced into the protection of the right to life by the European Court of Human Rights in its 1995 Grand Chamber judgment in the *McCann* case, the principle dictates that a law enforcement operation must be planned in a manner that minimises the risk of the police having resort to potentially deadly force.[14] For, as Christof wrote in his 2014 report:[15]

> Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead, in order to save lives, all possible measures should be taken 'upstream' to avoid situations where the decision on

10 2014 Report (n 1) paras 67, 70.

11 Human Rights Committee 'General Comment No 36: Article 6: right to life' UN Doc CCPR/C/GC/36, 3 September 2019 (General Comment 36), para 12.

12 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 1990. United Nations General Assembly Resolution 45/166, adopted without a vote the same year, welcomed the Basic Principles and called on States to respect them in their domestic law and their law enforcement operations.

13 2014 Report (n 1) para 70.

14 European Court of Human Rights, *McCann and Others v United Kingdom* Grand Chamber Judgment (1995) 21 EHRR 97 (*McCann* case) para 194.

15 2014 Report (n 1) para 63.

> whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.

The *McCann* case concerned Irish Republican Army (IRA) operatives who had travelled to Gibraltar to place a bomb. The United Kingdom (UK) security forces knew who they were and watched them enter the British Overseas Territory. Rather than stop them and arrest them, they allowed the three to proceed towards their objective, putting at risk a deadly outcome both for the IRA operatives and for the public in Gibraltar. Rejecting the UK government's protestations that delaying arrest would enable them to prosecute, convict, and then incarcerate the three operatives for a far longer period, the European Court of Human Rights stated that it was obliged to 'carefully scrutinise ... not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the antiterrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force'.[16]

Christof would strive to ensure that the precautionary principle was duly reflected in General Comments on the right to life by both regional and global human rights treaty bodies. In 2015, the African Commission, in its General Comment on the right to life under the African Charter, whose drafting he led, would declare that the state 'must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations'.[17] Then in its General Comment on the right to life under the 1966 International Covenant on Civil and Political Rights (ICCPR),[18] concluded in 2018 under the rapporteurship of Yuval Shany, the Human Rights Committee would identify the need for 'procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life'.[19]

In 1995, in the wake of the judgment by the European Court of Human Rights in *McCann*, a member of the UK Government derided the European Convention on Human Rights as a 'terrorists charter'. By 2011, the Manual of Guidance on Police Use of Firearms published by the Association of Chief Police Officers in England and Wales was not

16 *McCann* case (n 14) para 194.

17 African Commission, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: Article 4, the Right to Life', adopted in November 2015, para 27.

18 International Covenant on Civil and Political Rights; adopted at New York 16 December 1966; entered into force 23 March 1976.

19 General Comment 3 (n 11) para 13.

only citing the precautionary principle – 'Is the operation being planned to minimise, to the greatest extent possible, recourse to the use of lethal force?' – it was even citing the judgment in *McCann* as evidence.[20]

The principle of accountability

Hand in hand with the principles of legality, necessity, proportionality, and precaution goes the principle of accountability: a system of responsibility for cases in which the limits laid down by the international standards are transgressed.[21] The procedural component of the right to life requires that states first investigate apparently unlawful or arbitrary killings and then, where evidence of criminal wrongdoing is uncovered, prosecute the offenders. This is both consonant with, and an integral element of, the right to a remedy under conventional and customary international human rights law.[22] The failure of the state to properly investigate cases of death following the use of force is thus cast as a violation of the right to life itself.[23]

Independent, external oversight of police is, Christof's 2014 report declared, 'a best practice'.[24] But, he explicitly recognised, the 'mere establishment' of an external oversight body is in and of itself 'insufficient'.[25] 'An effective external police oversight agency requires the necessary powers, resources, independence, transparency and reporting, community and political support, and civil society involvement'.[26] Accordingly, the Law on Police Use of Force Worldwide website devotes a section on each country profile to not only the existence of an external oversight agency but also its powers, independence, and effectiveness. A 'high degree of transparency' is required, the 2014 report added, to ensure the agency's 'long-term success'.[27]

But any accountability framework worthy of the name must include a combination of criminal, administrative, and disciplinary sanctions. 'Modes of criminal accountability must include command or superior responsibility', the report recalled.[28] While respect for the principle of legality is a prerequisite for accountability, the general existence of laws 'is not enough to ensure accountability of State officials – special

20 *Manual of Guidance on Police Use of Firearms* (3rd ed) Association of Chief Police Officers, London, 2011, https://bit.ly/3rkeWvh (accessed 21 December 2021), para 1.23.
21 2014 Report (n 1) para 26.
22 2014 Report (n 1) para 78.
23 2014 Report (n 1) para 79.
24 2014 Report (n 1) para 84.
25 As above.
26 As above.
27 As above.
28 2014 Report (n 1) para 82.

measures are needed to ensure that those in office are held responsible'. 'Many States', Christof observed, 'lack such mechanisms'.[29]

The revision of the Minnesota Protocol on the Investigation of Potentially Unlawful Death

Inherent to any coherent system of accountability is also, as the 2014 report had recalled, an effective investigation. It was to this issue that Christof next turned in his work as Special Rapporteur on extrajudicial, summary or arbitrary executions. During a mission to India in 2012, he encountered the application of the so-called Minnesota Protocol (more correctly entitled the UN Manual on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions). The Manual, which had been elaborated thanks to work by a civil-society organisation in Minnesota and forensic experts, especially in the United States, was originally published in 1991.[30]

Two decades later, in mortuaries in India, medical personnel involved in autopsies emphasised to the Special Rapporteur the importance of the Protocol, but pointed out that, since its conclusion, it had become materially outdated. Forensic science, as well as the international legal standards represented in the Manual, had evolved significantly. The duty to investigate had taken on an autonomous existence, especially in jurisprudence in the Strasbourg court.[31] With respect to the science, when the original Protocol had been drafted, DNA evidence had barely been heard of, the first digital cameras had only just entered the market, and computerised tomography (CT) scanning machines were a long way from being standardised. Technology since then had revolutionised the processes and procedures for investigations.

Consulting with experts around the world, it became clear that the Minnesota Protocol had been a critical normative reference, but that if it were to remain so in the future, it would need major revision. Christof took the initiative, setting about the task thoughtfully and in a structured framework. Working with the Office of the UN High Commissioner for Human Rights (OHCHR) and on the basis of the collaborative approach that typified his work, a team of several dozen international

29 As above.

30 The Protocol was so-named not because of its international legal connotations but rather as a set of procedures in the medical sphere. It was derived from the Principles on the investigation of extra-legal executions endorsed by the UN General Assembly in 1989.

31 For instance, a few of the international standards incorporated in the new Protocol were the 1990 Basic Principles on Use of Force and Firearms, the 2004 Arab Charter on Human Rights, the 2005 UN Principles on Action to Combat Impunity, the 2005 Basic Principles on the Right to a Remedy, the 2006 Convention against Enforced Disappearance, the 2015 Nelson Mandela Rules, and the 2015 African Commission's General Comment on the Right to Life.

legal, human rights, investigation, and forensic experts set out to revise and update the Protocol.[32] The new Protocol was elaborated over the course of two years with support from a high-level advisory panel from around the world. The aim was to produce a document that would set out international law on investigations in a holistic manner and outline good practice in investigation in compliance with that law and in light of the many advances in forensic science. Input was also sought from States, international organisations, and UN treaty bodies, and incorporated into the text before it was finalised.

Published by the OHCHR in 2017 (and now available in all six official UN languages), the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)[33] offers detailed guidance to States as well as other subjects of international law on how to conduct a human-rights compliant investigation into a suspicious death or enforced disappearance. It is first and foremost a tool to enable better investigations, but it is also a standard by which investigations can be judged. As the then High Commissioner for Human Rights said in his Foreword to the Protocol, the updated version of the Protocol provides 'a comprehensive and shared platform for forensic investigators, pathologists, law enforcement officials, lawyers, prosecutors, presiding officers and NGOs to make accountability a worldwide reality'.

The Protocol describes the international legal framework, including the triggers for an investigation (which do not demand an official complaint). It depicts the character that an investigation must have if it is to comply with the right to life: it must be *effective and thorough, prompt* (but not rushed), *independent and impartial* (meaning, for instance, that police and military units cannot investigate themselves or their colleagues), and as *transparent* as the demands of justice will allow. A new section on professional ethics in the revised Protocol confirms that forensic doctors have obligations to justice (not to the police or the State, even though these entities may be the ones directly contracting them), as well as, of course, to the relatives of the deceased.

In articulating how an investigation should be conducted, the Protocol brought together domestic and regional approaches for the first time in an in-depth international standard. Detailed guidelines are incorporated into the extended Protocol on the management of the crime/death scene(s), the conduct of interviews, the excavation

32 See, for example, C Heyns, S Casey-Maslen, T Fisher, S Knuckey, T Probert & M Tidball-Binz 'Investigating potentially unlawful death under international law: the 2016 Minnesota Protocol' (2019) 52(1) *International Lawyer* 47. Morris Tidball-Binz is now the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.

33 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), OHCHR, Geneva/New York, 2017 (Minnesota Protocol), https://bit.ly/3aH8Yh7 (accessed 21 December 2021).

of graves, the organisation of an autopsy, and the analysis of skeletal remains. They are not tantamount to standing operating procedures (SOPs) but they clearly light up the path towards them.

Naturally, the importance of ensuring the chain of custody for evidence is especially accentuated in the Protocol, as is the role of the autopsy. As the Protocol makes explicit, investigations must, at a minimum, take all reasonable steps to: identify the victim or victims; recover and preserve all material probative of the cause of death, the identity of the perpetrator(s), and the circumstances surrounding the death; identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; determine the cause, manner, place, and time of death, and all of the surrounding circumstances;[34] and determine who was involved in the death and their individual responsibility for the death.[35] It will 'almost always be the case', the Protocol confirms, that these aims 'will be materially assisted in some way by the performance of an autopsy. Accordingly, a decision not to undertake an autopsy should be justified in writing and should be subject to judicial review'.[36]

The Protocol has already become the new international reference for the conduct of death investigations. The Human Rights Committee, in its General Comment 36 on the right to life, decrees that investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including, explicitly, the Minnesota Protocol.[37] Moreover, the Protocol can and should be used at all times, including in situations of armed conflict.[38] Indeed, in its Grand Chamber judgment in *Hanan* v. *Germany* of February 2021, the European Court of Human Rights specifically cites the paragraph from the Protocol pertaining to investigations of deaths resulting from the conduct of hostilities as part of the relevant international law and practice.[39]

34 In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide, and homicide.

35 Minnesota Protocol (n 33) para 25.

36 As above.

37 General Comment 36 (n 11) para 27.

38 This is even though, as is well known, the rules governing the use of force in the conduct of hostilities differ materially to law of law enforcement rules, being generally and significantly more permissive.

39 European Court of Human Rights *Hanan v Germany* Judgment 16 February 2021 para 88.

The United Nations Guidelines on the Use of Less-Lethal Weapons

The 2014 report to the Human Rights Council on the law of law enforcement had made a number of important recommendations. In addition to those noted above, Christof had singled out the need for detailed guidance on less-lethal weapons in law enforcement. In 2016, in the joint report with the Special Rapporteur on the rights to freedom of peaceful assembly and of association, a call had been made to the UN High Commissioner for Human Rights to convene an expert group to examine the application of the international human rights framework to less-lethal weapons, including with a focus on their use in the context of assemblies.[40]

The 1990 Basic Principles on the Use of Force and Firearms had exhorted States to develop and use so-called 'non-lethal incapacitating weapons'[41] with a view to reducing police recourse to firearms.[42] The Basic Principles had also called for the development and deployment of such weapons to be 'carefully evaluated in order to minimize the risk of endangering uninvolved persons', and for their use to be 'carefully controlled'.[43] But there was no dedicated international framework of standards by which to do so. Clear and appropriate international standards were, the 2014 report to the Human Rights Council justly averred, badly needed.[44] To be effective, this called for the elaboration of 'independent guidelines on the development and use of these weapon technologies, over and above standards that may be set by individual police forces or the manufacturers'.[45]

Once again, Christof seized the mantle, convening and leading a process of expert meetings with the OHCHR involving law enforcement officials, diplomats, weapons experts, and human rights lawyers. The meetings, which over the course of one year the Geneva Academy of International Humanitarian Law and Human Rights hosted with the support of the Swiss Government, enabled a detailed set of guidelines to be elaborated for consideration by the OHCHR. A careful balance had

40 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies' UN Doc A/HRC/31/66, 4 February 2016 (Joint report), para 67(i).

41 This term is no longer widely used as it is understood that all weapons can be lethal in certain circumstances. United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement OHCHR Geneva (2020) (Guidance on Less-Lethal Weapons) at v.

42 Principle 2, 1990 Basic Principles on the Use of Force and Firearms.

43 Principle 3, 1990 Basic Principles on the Use of Force and Firearms.

44 2014 Report (n 1) para 105.

45 2014 Report (n 1) paras 105, 106.

to be struck between the aspirations of civil society and the desire to remain grounded in international law so that weapons manufacturers and law enforcement agencies would not be able to ignore or dismiss the guidelines. As ever, Christof's seemingly endless patience and his almost infinite ability to find a path acceptable to all won the day. Following their internal review within the Office, the United Nations Human Rights Guidance on Less-Lethal Weapons was published in its final edition in 2020.[46]

The guidelines offer both general and specific guidance on the design and production, legal review, testing, and procurement, and use of less-lethal weapons.[47] They identify weapons that should not be used in law enforcement, notably spiked batons, lasers designed to cause permanent blindness, and directed energy weapons liable to cause serious injury.[48] With respect to other weapons, States are called upon to ensure that, prior to their procurement, a legal review is conducted to ascertain whether they would in any circumstances be prohibited by any rule of international or domestic law, in particular human rights law.[49] The Guidance emphasises that testing should be conducted independently of the manufacturer and should be based on impartial legal, technical, medical and scientific expertise and evidence. Testing should evaluate the effects of 'all reasonably likely or expected' uses of the weapon(s) being reviewed.[50]

The use of specific less-lethal weapons and related equipment is considered in detail, looking systematically at their utility and design, the circumstances of potentially lawful use, the specific risks resulting from their use, and the circumstances of potentially unlawful use in each case. Weapons given such detailed consideration are police batons, hand-held chemical irritants (for example, pepper spray), chemical irritants launched at a distance (tear gas), conducted electrical weapons ('Tasers'), kinetic impact projectiles (such as plastic bullets), dazzling laser weapons, water cannon, and acoustic weapons.

With respect, for example, to tear gas – the 'go-to' weapon for many States in public order management – the Guidance observes that if chemical irritants are deployed behind a group of violent individuals,

46 At http://bit.ly/367c0ac (accessed 21 December 2021).

47 Less-lethal weapons are defined in the Guidance as: 'Weapons designed or intended for use on individuals or groups of individuals and which, in the course of expected or reasonably foreseen use, have a lower risk of causing death or serious injury than firearms. Less-lethal ammunition may be fired from conventional firearms. For the purpose of th[e] Guidance, the term includes conventional firearms when they are used to discharge less-lethal ammunition, but not when they are used to discharge conventional bullets or other ammunition that would be likely to result in life-threatening injuries.' Guidance on Less-Lethal Weapons (n 41) Section 9, p 45.

48 Guidance on Less-Lethal Weapons (n 41) para 5.1.

49 Guidance on Less-Lethal Weapons (n 41) para 4.2.1.

50 Guidance on Less-Lethal Weapons (n 41) para 4.2.2.

this may prompt them to move towards law enforcement officials and agencies, thereby increasing the risk of a violent confrontation.[51] A stampede may result when irritants are used against a crowd in an enclosed area.[52] In any event, projectiles should not be fired at the head or face, owing to the risk of death or serious injury from impact trauma.[53] In general, chemical irritants should not be used in confined spaces, such as prison cells, where there is no viable exit or adequate ventilation, owing to the risk of death or serious injury from asphyxiation.[54]

In July 2021, the Human Rights Council adopted a resolution on the 'promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers'.[55] Under the resolution, the Council decided to establish an international independent expert mechanism in order to further the agenda towards transformative change for racial justice and equality in the context of law enforcement globally. The resolution further noted the importance of international standards on police use of force, specifically recommending that domestic legal regimes on the use of force by law enforcement officials be brought into line with appropriate international standards, including the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the 2020 United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement.[56]

Facilitating the right of peaceful assembly

The right to assembly peacefully, defined as 'the non-violent gathering by persons for specific purposes, principally expressive ones',[57] is a 'fundamental right in a democratic society', in the words of the European Court of Human Rights.[58] States not only have an obligation to refrain from violating the rights of individuals involved in an assembly, but must also ensure the rights of those who participate in, or are affected by

51 Guidance on Less-Lethal Weapons (n 41) para 7.3.4.
52 Guidance on Less-Lethal Weapons (n 41) para 7.3.3.
53 Guidance on Less-Lethal Weapons (n 41) para 7.3.6.
54 Guidance on Less-Lethal Weapons (n 41) para 7.3.7.
55 Human Rights Council Resolution 47/21, adopted without a vote on 13 July 2021, para 10.
56 Human Rights Council Resolution 47/21, para 5.
57 Human Rights Committee, 'General Comment No 37 (2020) on the right of peaceful assembly (Article 21)', UN Doc CCPR/C/GC/37, 17 September 2020 (General Comment 37), para 4.
58 This statement, made in its 2003 judgment in the *Djavit An* case, has been reiterated by the Court on a number of occasions since. European Court of Human Rights, *Djavit An v Turkey* Judgment 20 February 2003, para 56.

an assembly, including by facilitating an enabling environment within which the assembly can proceed peacefully.[59] But in reality abuses by law enforcement officials frequently occur in the context of assemblies such as public demonstrations and protests. Although police forces are supposed to serve the public impartially, without fear or favour, in many States they are effectively instrumentalised by the regime. Suppressing peaceful protest is all too often one of the tasks with which they are charged by those in power.

In March 2014, Human Rights Council Resolution 25/38 called upon the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai) to elaborate and present a compilation of practical recommendations for the proper management of assemblies. In their joint report, submitted to the Council in 2016, the two Special Rapporteurs affirmed that force 'shall not be used unless it is strictly unavoidable, and if applied it must be done in accordance with international human rights law'.[60] In reiterating the core principles governing use of force in law enforcement, they also identified rules specific to assemblies, including that firearms 'should never be used simply to disperse an assembly' and declaring that 'indiscriminate firing into a crowd is always unlawful'.[61]

The report noted the constraints placed by international law on dispersal, which may be considered 'where violence is serious and widespread and represents an imminent threat to bodily safety or property, and where law enforcement officials have taken all reasonable measures to facilitate the assembly and protect participants from harm'. Before countenancing dispersal, however, the report recommended that law enforcement agencies 'seek to identify and isolate any violent individuals separately from the main assembly and differentiate between violent individuals in an assembly and others', which might allow the assembly to continue.[62] International law, the authors stated, 'allows for dispersal of a peaceful assembly only in rare cases'.[63] Once again, Christof's talent for standard setting and clear interpretation of international human rights law were advancing the cause of protection.

Christof's expertise in assemblies would again be employed when he became a member of the Human Rights Committee in 2017. He accepted the task entrusted to him by the Committee to lead the drafting of the widely acclaimed General Comment 37 on the right of peaceful assembly. After only two years of drafting and review, ably

59 Joint report (n 40) para 13.
60 Joint report (n 40) Best Practice (E).
61 Joint report (n 40) para 60.
62 Joint report (n 40) para 61.
63 Joint report (n 40) para 62.

supported by Dr Probert, the new General Comment was accepted by the Committee in July 2020.[64]

The General Comment emphasises that the basic approach of the authorities should be, as and where necessary, to seek to *facilitate* peaceful assemblies.[65] For many, this demands a sea change in philosophy and policy. Legality for any police use of force is a key starting point. As is observed: 'Domestic law must not grant officials largely unrestricted powers, for example to use "force" or "all necessary force" to disperse assemblies, or simply to "shoot for the legs". In particular, domestic law must not allow use of force against participants in an assembly on a wanton, excessive or discriminatory basis'.[66]

The General Comment also stresses the precautionary nature of the obligation on law enforcement agencies: 'Where the presence of law enforcement officials is required, the policing of an assembly should be planned and conducted with the objective of enabling the assembly to take place as intended, and with a view to minimizing the potential for injury to any person and damage to property'.[67] This calls for the development of generic contingency plans and training protocols by relevant law enforcement agencies, especially for the policing of spontaneous assemblies that may affect public order.[68]

Appropriate less-lethal weapons should be deployed and used, consonant of course with the UN Human Rights Guidance.[69] Firearms are not an appropriate tool for the policing of assemblies and must never be used simply to disperse an assembly.[70] Containment ('kettling'), where law enforcement officials encircle and close in a section of the participants, 'may be used only where it is necessary and proportionate to do so'. 'Necessary law enforcement measures targeted against specific individuals are often', the General Comment provides, 'preferable to containment'.[71]

With respect to accountability, the State is 'ultimately responsible for law enforcement during an assembly' and, as such, may delegate tasks to private security service providers 'only in exceptional circumstances'. In such cases, however, the State remains responsible for the conduct of those service providers. This is an important normative statement given the widespread use of private security in managing public assemblies.

64 General Comment 37 (n 57).
65 General Comment 37 (n 57) para 74.
66 General Comment 37 (n 57) para 80.
67 General Comment 37 (n 57) para 76.
68 General Comment 37 (n 57) para 77.
69 General Comment 37 (n 57) para 78.
70 General Comment 37 (n 57) para 88.
71 General Comment 37 (n 57) para 84.

Concluding remarks

The examples given in this chapter of Christof's work only scratch the surface of his work with respect to police use of force, but they do give a sense of his tremendous achievements in both normative development and promotion of implementation of the law and associated standards. He never tired of either task. The revised Minnesota Protocol on the Investigation of Potentially Unlawful Death and the United Nations Human Rights Guidance on Less-Lethal Weapons would not exist if it were not for his farsightedness and dogged commitment. The Human Rights Committee's General Comment on the right of peaceful assembly might exist, but it is inconceivable that it would be anything like as good as it is.

Writing in January 2021 the foreword to a book I had authored, Christof observed that the modern focus of human rights law on the individual 'has led to an emphasis on the recognition of the equal value of each individual life, and resistance against the idea that the life of any person can be sacrificed in the pursuit of any other social objectives'.[72] Nowhere is this more true than in adjudging police use of force. Our understanding of how international law controls and restricts that use of force has been immeasurably advanced by Christof's work, his intellect, and his humanity.

At the time of his tragic passing, Christof was leading with Dr Probert preliminary research for a study into the use of force by African nations mandated by the African Commission in March 2020.[73] Not yet complete as of writing this chapter, once finalised the Commission's study should prove to be one more building block in Christof's astonishing legacy: a selfless career dedicated to legal precision in the protection of others, and one that ended far, far too soon.

72 Foreword to *The right to life under international law: an interpretive manual* (CUP 2020) at ix.

73 African Commission, Resolution 437, Resolution on the Need to Prepare a Study on the Use of Force by Law Enforcement Officials in Africa – ACHPR/Res. 437 (EXT.OS/ XXVI1) 2020, adopted on 4 March 2020, https://bit.ly/3eA0B8O.

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Accounting for life: the role of counting and data in the protection of the right to life and the pursuit of safety

*Thomas Probert**

Introduction

As Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof was responsible for investigating and reporting to the United Nations (UN) on some of the most extreme forms of violence, predominantly violence inflicted by the state upon its own people, sometimes inflicted by a state extra-territorially upon other people, and sometimes inflicted by non-state actors upon each other. This was work that he undertook with great passion and diligence, and work with which I was extremely honoured to assist him. But it is also work that one does not have to undertake for very long before realising that no matter how broadly one casts the net, or how scrupulously one attempts a neutral balance, one will always end up selectively presenting only a narrow sub-set of those cases in which the right to life has been violated. This does not necessarily compromise the significance of the UN work – the purpose of the mandate, after all, is not to provide a quantitative account of the level of violations around the world, but rather to cast a spotlight upon concerning patterns of abusive state practice and to develop thematic reports on complex issues of interest. Nonetheless, while undertaking the work, a stark parallel question was brought into focus when reviewing the scholarship and policy processes that were becoming prevalent at the same time and that were both interested in reviewing levels of violence in societies around the world in a more comparative manner.[1]

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1 Christof's time as Special Rapporteur overlapped with the period during which the content of the UN's development agenda from 2015-2030 was being negotiated. It had already been recognised that the failure of the Millennium Development Goals (from 2000-2015) to address the significant impediment to development posed by violence had been a serious omission, but the exact character of what would become

It was with a view to better understanding this broader picture, and situating the mandate's work within it, that during 2013 and 2014 we undertook a number of research projects and engagements that would ultimately be reflected in Christof's 2014 report to the General Assembly.[2] This involved collaborating with the UN Office of Drugs and Crime (UNODC) in Vienna, which at that time was working on an iteration of its *Homicide* report, and the World Health Organisation (WHO)'s Violence Prevention Unit, which was partnering to convene a landmark conference on violence reduction in Cambridge in 2014.

In his report to the General Assembly, Christof presented the broad contours of the picture that emerged from these two global bodies – UNODC's comparison of reported homicides, and the WHO's analysis of violent deaths based on health records. Both approaches, he noted, highlighted that Latin America and Sub-Saharan Africa were regions of concern, both in the sense of having higher levels of violence than the rest of the world, and in the sense that unlike the rest of the world, the level of violence in those regions appeared to be *increasing*.

These statistical pictures were of course presented with a significant caveat regarding the extent and quality of national reporting, which Christof noted was often weakest in areas where it was needed most. As he pointed out, 'Governments either have the information and choose not to share it through health or crime surveys, which is a problem, or they simply do not know how people are dying within their jurisdiction, which is arguably worse'.[3]

In this way it was made clear that the exercise was not about some utilitarian calculus of weighing and contrasting deaths in different places or circumstances, or about establishing some kind of acceptable thresholds for interpersonal violence. The dignity and infinite value inherent in each human life was a central tenet of Christof's approach to the mandate and to the broader human rights project. His contention was that a vital component of that dignity had to continue after death. This would be a theme he would return to during the work on the updating of the Minnesota Protocol, but in this General Assembly report he simply reminded member states that,

Sustainable Development Goal 16 was still up for debate. Meanwhile, Christof was also intellectually interested in provocative books such as Steven Pinker's *The better angels of our nature* (Viking 2011) or more recently Rutger Bregman's *Humankind: a hopeful history* (Little, Brown & Company 2019) with their discussions of whether an urge to violence is an innate or acquired characteristic of the human psyche.

2 Christof Heyns, *Report of the UN Special Rapporteur on extrajudicial summary or arbitrary executions*, 6 August 2014, A/69/25. In addition to this, the research collaboration between the Centre for Human Rights in Pretoria and the Centre of Governance and Human Rights in Cambridge bore fruit as the study *Unlawful killings in Africa* (CGHR 2014).

3 A/69/25, para 136.

> [w]hile protecting the right to life is thus not merely about counting bodies, without reliable statistics it will in many cases not be possible to ensure that sensible policies are followed in the pursuit of prevention of and accountability for violations of the right to life. The contention here is that accounting for life, both in the sense of keeping count of life and death and in the sense of holding to account those responsible for violations, is a central part of the State's responsibility with regard to the right to life.[4]

The report made the case that there were three broad categories of benefit that could arise from having access to better statistics about the prevalence of violent death around the world: an *analytical* benefit, of better understanding the character of threats posed in different context, a *programmatic* benefit, of being able better to craft policy responses that might mitigate those risks in an appropriate manner, and (as a report from a human rights rapporteur might be expected to stress as the most important) a *normative and procedural* benefit of the counting process itself, which 'serves to make the point that all lives are of equal value, transcending national and other divides' and which underlines how in order effectively to protect life 'States must have knowledge of when and how lives have been lost and, where applicable, hold the perpetrators to account'.[5]

In what follows I shall begin with these three categories—the normative being about the world as we think it should be; the analytic being about understanding the world as it is; and the programmatic being about trying to effect change to bring the latter closer to the former—before turning again to the question of why the process of accounting for life should be thought of as central to efforts to safeguard the right to life.

Normative values

Collecting accurate information about the causes of deaths is a corollary of the duty to investigate – a duty which is a well-established component of the right to life and many other human rights. However, it is a corollary that has arguably not been followed through to the extent that could make significant contributions to protection.

There are contexts in which the obligation to count seems particularly clear, in the sense that there is recognised to be a direct reporting obligation about the death to either an internal or external party. Generally, these are contexts in which a state agent has been directly responsible for causing a death (outside of a situation of armed conflict) or where a death has occurred in a context where a state agent

4 A/69/25, para 115.
5 A/69/25, para 119.

exercised particular control over the deceased (such as in a custodial facility). Even during an armed conflict, a number of international humanitarian law provisions create obligations to record and to share information about persons dying in the power of the enemy or as a result of hostilities.[6]

In the sphere of policing, for example, the Basic Principles on the Use of Force and Firearms provide that law enforcement officials must promptly report internally to their superiors any incident in which an injury or death is caused by police use of force,[7] indeed any incident in which a firearm is used (regardless of its consequence).[8] The Basic Principles moreover require external reporting, stipulating that in cases of death and serious injury, 'a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control'.[9]

In a custodial setting, the reporting obligations are equally explicit. The Nelson Mandela Rules require that, notwithstanding any internal investigation, any custodial death, disappearance or serious injury must be reported without delay to judicial or other competent authority that is independent of the prison administration.[10] On the African continent, the Luanda Guidelines go further, requiring that, '[g]iven the control that the State exercises over persons held in police custody or pre-trial detention, States shall provide a satisfactory explanation, and make available information on the circumstances surrounding custody or detention, in every case of death or serious injury of persons who are deprived of their liberty'.[11]

More recent soft law, the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement – guidance that Christof called for on numerous occasions and ultimately played a vital role in facilitating – has gone into more detail on the steps required beyond internal or external reporting and discussed an obligation to make such information public. This Guidance makes clear that states must monitor the use and effects of all weapons used for law enforcement purposes.[12] This should

6 Geneva Convention I, art 16; Geneva Convention II, art 19; Geneva Convention IV, arts 129 and 131; Additional Protocol I, art 33. Also see the ICRC's discussion of Customary Rule 112.

7 Basic Principles on Use of Force and Firearms by Law Enforcement Officials (1990), Principle 6.

8 Basic Principles on Use of Force and Firearms by Law Enforcement Officials (1990), Principle 11(f).

9 Basic Principles on Use of Force and Firearms by Law Enforcement Officials (1990), Principle 22.

10 UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2015) (A/RES/70/175, Annex), Rule 71.

11 African Commission on Human and Peoples' Rights, Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2014), s 20.

12 UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (2020), s 4.3.1.

include collecting contextual information about the circumstances of their use, and data about persons against whom force is used (disaggregated, for example, by age, sex/gender, disability and ethnic group).[13] Importantly, the Guidance establishes that the results of this monitoring should be made public, including as a minimum national statistics on deaths and serious injuries relating to different categories of less-lethal weapons.[14]

However, even that minimum standard of data about deaths related to law enforcement activities is not widely respected around the world.[15] In the absence of official data, various civil society sources of information have sprung up, as a means both of supplying important data and shaming official mechanisms into doing a better job. As one high-profile such initiative, the 'The Counted' collaboration between the *Guardian* and *Washington Post* newspapers aimed at collating information about lethal police shootings in the United States, began to gain traction, the Director of the FBI remarked to a Department of Justice summit on violent crime that it was 'ridiculous – embarrassing and ridiculous' that people could find details about the box-office ticket-sales of a popular movie, or that the Centre for Disease Control could count cases of the flu, with greater accuracy than the US Government could count the number violent encounters between US police officers and civilians.[16]

But the significance of 'accounting for life' is to cast the net wider than this. Of course, to say that the duty to investigate is particularly strong in certain cases is also to say that it is comparatively less important in others. This is where the human rights project (in contradistinction to the public health project) struggles to view all life as equal, all deaths as comparably deserving of explanation.

The Minnesota Protocol attempted to straddle this divide. After defining its scope – a potentially unlawful death – as primarily those

13 UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (2020), s 4.3.2.

14 UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (2020), s 4.3.2. The Guidance notes (s 4.4.2) that the anonymity of law enforcement officials and/or victims may be preserved where necessary and appropriate, but it cautions that the imposition of legitimate limitations on details should not be used as a justification for suppressing the publication of aggregate data.

15 See A Osse & I Cano 'Police deadly use of firearms: an international comparison' (2017) 21(5) *International Journal of Human Rights* 629. After Anneke Osse's untimely death in 2019, several colleagues and friends, including Christof and myself, contributed to the creation of an international comparative project 'Lethal Force Monitor' (www.lethal-force-monitor.org), which continues this work, attempting to collate available information about official and unofficial national reporting on deaths following police contact.

16 'FBI chief: 'unacceptable' that Guardian has better data on police violence' *Guardian* (8 October 2015) available at: https://www.theguardian.com/us-news/2015/oct/08/fbi-chief-says-ridiculous-guardian-washington-post-better-information-police-shootings (accessed 31 December 2021).

situations where the death had been caused by the acts of a state agent, the death had occurred when a person was detained in some way by the state, or the death had occurred where the state may have failed to act with due diligence to protect life, the Protocol then further noted that '[t]here is also a general duty on the state to investigate any suspicious death, even where it is not alleged or suspected that the state caused the death or unlawfully failed to prevent it.'[17] The implication seems to be that the standards of good practice set out in the Protocol for a death investigation would still apply in these cases.

In its General Comment on the Right to Life, the African Commission underlined that '[t]he failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right'.[18] The Commission did not clarify what was meant by 'suspicious' in this context, but it seems broader than the scope of 'potentially unlawful' in the Minnesota Protocol.

The language in these examples is designed to highlight those cases where the state is suspected to be directly culpable, but nonetheless also to require some kind of action to deal with the proverbial 'body in the street with a knife in its back.' In those cases, some form of death investigation at the scene is a bare minimum. An investigation that also contributes information about the death into a broader body of knowledge about the circumstances of death is the beginning of a system of accounting for life.

The presentation and discussion of disaggregated statistics about violent death during human rights reporting of various kinds, whether before UN or regional treaty bodies, or during the Universal Periodic Review, is a practice that ought to be encouraged and enhanced. Meanwhile, beyond the sphere of human rights, as Christof highlighted in his 2014 report, the two broad areas of international affairs in which states are already required – or at least encouraged – to share such information are international public health (via the WHO's Global Health Estimates) and criminal justice (via the UN Survey of Crime Trends and Operations of Criminal Justice Systems, the UN-CTS). These global data-collection efforts are sustained as much by international communities of professional practice as they are by binding or even non-binding state commitments, but it is worth noting that, in the health sphere, recurring resolutions of the World Health Assembly since the mid-1990s have underlined the importance of the collection

17 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para 2.

18 African Commission on Human and Peoples' Rights, General Comment 3 on the Right to Life (2015) para 15.

and, as appropriate, dissemination of comparable and disaggregated data on the magnitude, risk and, protective factors, types, and health consequences of violence.[19] Meanwhile criminal justice data collection and sharing has been trying to reach the same position of an agreed classification according to which to compare and contrast crime data, through the process of finalising the International Classification of Crime for Statistical Purposes.[20]

Global health reporting is currently more developed than international criminal justice data-sharing, but even there, as the COVID-19 pandemic has made cruelly evident, levels of state capacity to count deaths and to collect relevant data, as well as levels of compliance or cooperation with international reporting procedures, remain extremely uneven. But the principle that they *ought* to be collecting and sharing it is by and large more widely recognised for these population-level violent death statistics than for the more politically-sensitive 'right to life' cases.

Analytic potential

The information collected in this way at global level allows bodies such as the WHO and UNODC to undertake periodic assessments of the overall burden of lethal violence around the world. The WHO estimates that 1.25m people died violent deaths in 2019, slightly more than those who died of tuberculosis or who died in road traffic accidents.[21]

From this global picture two striking patterns emerge: Firstly, more than half of these violent deaths were the result of self-inflicted injuries: suicide represents a frequently under-acknowledged proportion of violence around the world. The WHO has produced public health guidance on suicide-prevention, but there is also a clear connection with the state's duty to protect the right to life, especially in certain contexts.[22] Secondly, of the remaining, non-self-inflicted, violent deaths, another striking fact is the contrast between the number of deaths that

19 The seminal resolution recognising violence prevention as a public health priority was World Health Assembly Resolution WHA49.25 (1996). More recently Resolution WHA67.15 (2014) and Resolution WHA69.5 (2016) have urged the building up of national capacity within health systems to address these questions. With respect to health estimate reporting more broadly, see Gretchen Stevens et al. 'Guidelines for Accurate and Transparent Health Estimates Reporting: the GATHER statement' (2016) 388 *Lancet* e 19-23.

20 See, for example, ECOSOC Resolution 2015/24 [E/RES/2015/24] (2015)

21 Based on data available in the WHO's 2019 Global Health Estimates, https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates (accessed 31 December 2021).

22 WHO *Preventing suicide: a global imperative* (2014). For an analysis of suicide prevention (in a custodial context) and right to life jurisprudence of the European Court, see G Cliquennois, S Snacken & D van Zyl Smit 'The European human rights system and the right to life seen through suicide prevention in places of detention: between risk management and punishment' (2021) *Human Rights Law Review* 1.

result from interpersonal as opposed to 'collective' violence. It cuts against many people's intuition to find that a significant majority result from 'ordinary' criminal homicide rather than from large-scale armed violence or civic unrest.[23]

In addition to these insights about the type of events that make up the overall burden of violence, the global data also informs about geographic variation in the intensity of violence. As noted above, basic comparisons between different regions of the world can have a certain value in contextualising information about specific episodes of violence; meanwhile, longitudinal comparisons can play an important role in conversations about violence at all levels, from grassroots up to international policymakers. But the variances which emerge also serve to make a more fundamental point: that violence is not an immutable fact of life, but rather a symptom of social, economic, cultural, and political context in which it occurs.

This insight, which in public health discourse is referred to as the socio-ecological model of violence, leads to the consideration that these drivers of violence are themselves inherently susceptible to public policy intervention (which will be discussed below, under programmatic insights). But in order to design those policies effectively and sensitively, a very granular understanding of the context is required.

Over the past fifteen years, (since the Geneva Declaration on Armed Violence and Development was adopted in 2006) international organisations, NGOs and other practitioners have focussed attention on this analytic work. The contributions of agencies such as UNODC, UNDP, and the World Bank, and of NGOs such as the Small Arms Survey, Action on Armed Violence, and Saferworld have highlighted an analysis of interpersonal violence within both peacebuilding and development spheres.

But it has been with the adoption of the Sustainable Development Goals (SDGs), and the inclusion of a series of targets related to interpersonal violence, access to justice and the institutionalisation of human rights and good governance within Goal 16, that the review of salient information at local, national and international levels has been fully mainstreamed.

Because of the complexity and interconnectedness of the development agenda, information about violent deaths is not collected in isolation but rather is expected alongside data about other forms of vulnerability, data about the criminal justice system, and data about

23 The proportions fluctuate year on year, and one cannot be as confident of this distinction as one could be of the distinction between self-inflicted and non-self-inflicted violence. It should also be underlined that the burden of 'collective violence' would only include direct 'battle deaths' rather than the full lethal toll of an armed conflict that could include deaths resulting from conflict-induced famine, disease or migrations.

the perceived legitimacy of governance institutions. Moreover, the structure of Goal 16 itself (along with Goal 17) underlines that an effective path to achieving peace, justice and effective governance must include developing capacity to account for life.[24]

It should be recalled that, set against many of these other factors, dead bodies are relatively easy to count, which is why we tend to privilege lethal violence as a proxy indicator for broader levels of violence within societies. But there are many forms of violence that are not so readily quantified. Allowing our analysis of the problem of violence to be reduced to the counting of bodies would significantly skew our understanding, and it is to the credit of the SDGs' indicator framework that it also attempts to collect information about other forms of violence (measured by victimisation surveying rather than reported crime data), and to review more subjective issues such as public perception of safety.

It is also worth underlining, given that the obligation to protect the right to life should be understood broadly so as not only to require measures to address direct threats to life but also other factors that prevent individuals from enjoying their right to life with dignity,[25] that the SDGs also address a host of issues aside from crime and violence that can have an impact on the right to life and about which the collection and analysis of appropriate data can play a vital role. To take just one example, the most recent UN Sustainable Development Report includes the example of policymaking around where to allocate additional pre- and neo-natal healthcare services in Mongolia, based on available data about infant mortality in different regions of the country.[26]

The possibilities raised by such analysis for the greater protection of the right to life can be generalised as being the recognition of observable patterns of risk. The expectation is that states account for these risks – that they are capable of recognising them (the analytic part) and putting in place policies to attempt to avoid them (the programmatic part that will be discussed below). But the identification of the patterns themselves must accentuate the obligation to protect. The African Commission, for example, has noted that states are

24 The SDGs include two targets directly related to 'accounting for life' both at the beginning and end of life, with SDG Target 16.9 focused on birth registration, and Target 17.19 focused on international partnerships to support statistical capacity-building, measured in part by the effectiveness of both birth and death registration.

25 Human Rights Committee, General Comment 36 on the right to life, para 26.

26 UN, Sustainable Development Goals Report 2021, https://unstats.un.org/sdgs/report/2021/The-Sustainable-Development-Goals-Report-2021.pdf (accessed 31 December 2021) at 5.

> responsible for killings by private individuals which are not adequately prevented, investigated or prosecuted by the authorities. These responsibilities are heightened when an observable pattern has been overlooked or ignored, such as is often the case with respect to mob-justice, gender-based violence, femicide, or harmful practices. States must take all appropriate measures effectively to respond to, prevent and eliminate such patterns or practices.[27]

Programmatic insights

Analysis of the data can show where action is most needed, and information about the drivers of different forms of violence can suggest potentially effective interventions. The fields of criminology and public health both share a methodological preference for the controlled trial as a means of assessing the impact of such an intervention. Over the last twenty-five year a rapidly growing evidence base has been accumulating about '*what works to prevent violence?*' In more recent years this expertise and scholarship has been mainstreamed into the field of international development, converging with that sector's emphasis on monitoring and evaluation.

The intuition underlying Christof's 2014 report, and our subsequent work on 'freedom from violence', was that there are valuable lessons that could be learned from this field of evidence-based violence reduction. That the human rights approach of focussing retrospectively on individual cases and particularly on those where the state was proximately involved could be supplemented by the public-health or developmental approach of focussing prospectively on population-level drivers of violence and thinking about the broadest possible range of stakeholders. In what follows I highlight just a few examples of programmes designed from this broader viewpoint, focussing on those that draw upon careful and shared data-collection, or counting.

At the international level it may be seen that criminal justice and public health data is collated separately by different institutions (UNODC and WHO). That is not in and of itself problematic – those with an analytic research interest in the results can take the time to compare and contrast and draw different kinds of conclusion from the different datasets. However, more problematic is when the same disconnect occurs at a more operational level on the ground. Research conducted during the 1990s in the UK and in Denmark showed that between two-thirds and three-quarters of violence that resulted in hospital treatment was not known to the police.[28] It is a well-known

27 African Commission on Human and Peoples' Rights, General Comment 3 on the Right to Life, para 39.

28 C Florence & others 'Effectiveness of anonymised information sharing and use in health service, police, and local government partnership for preventing violence

and frequently caveated point that criminal justice data will under-represent the true burden of violence because many victims of violent crime choose not to report their victimisation, for a whole host of reasons ranging from stigmatisation to lack of trust in the police. Those issues of perception of and access to justice are themselves concerns for human rights advocates. But, in the meantime, there are still potentially valuable insights about the character of violence in a given location that are not contributing to law enforcement's prevention strategies.

In the UK, the 1998 Crime and Disorder Act placed a legal obligation on police, local government, and the National Health Service (NHS) to collaborate to develop and implement joint crime reduction strategies. A particularly dynamic example of such a partnership was created in the city of Cardiff. What has become known as the 'Cardiff Model of Violence Prevention' sought to address the information gap by ensuring that anonymised data about violence – concerning the precise violence location, time, weapon and numbers of assailants – was shared between emergency health departments and crime analysts, allowing a Violence Prevention Board, with stakeholders from both health and criminal justice sectors, to make informed decisions about violence prevention strategy.[29] Police strategies could include adjustments to patrol routes, employing more police in the city rather than the suburbs, targeting problematic areas, and informing the public of the use of closed circuit television (CCTV). In an evaluation of the impact of the initiative against a number of comparison cities in the UK over the same period, it was found that the Cardiff programme was associated with an estimated 42% fewer woundings recorded by the police four years after implementation.[30]

The Cardiff example is particularly striking because the whole logic of the intervention is geared around the collection and sharing of relevant information about violence – about institutionalising the process of accounting for life and threats to life. But there are many other examples of policies or projects that have directly addressed a specific driver of violence.

A frequent example of such a public policy relates to the better regulation of alcohol. This had been studied in various ways in places where alcohol was already significantly controlled, and it had been shown that changes can have a noticeable but not dramatic impact on levels of violence. However, in the early 2000s an opportunity

related injury: experimental study and time series analysis' (2011) 342(3313) *British Medical Journal* at 2.

29 A short policy briefing concerning the core elements of the Cardiff model can be found here: https://www.cardiff.ac.uk/__data/assets/pdf_file/0012/1034130/VRG-Cardiff-Model-Briefing-WEB2-002.pdf (accessed 31 December 2021).

30 Florence & others (n 28) at 8.

existed to study the effect of a move to regulate the sale of alcohol in a developing context where it was previously relatively uncontrolled.[31] Diadema, an industrial city of 360,000 close to São Paulo, in 1999 had one of the highest murder rates in Brazil (103 per 100,000), of which police statistics estimated 65% were alcohol-related, and most occurred in or close to bars between the hours of 11pm and 6am. Concerned by the high murder rate, in 2002 the Mayor introduced new legislation that enforced the closure of all bars in the city at 11pm, ending what until then had been the practice of most establishments to remain open 24 hours a day. The results were almost immediately felt (and subsequently documented in a peer-reviewed study) – with levels of homicide dropping by nearly a half. There were also noticeable decreases in traffic accidents, assaults against women, and alcohol-related hospital admissions.[32]

Other projects have not relied upon a change of public policy but have instead sought to affect behaviour at a more local level. Some of the most impressive initiatives in this space have been aimed at better understanding what programmes can be shown to be effective in reducing sexual and gender-based violence against women and girls.[33] These have included community-level activism, couples' interventions, economic empowerment initiatives, school-based programmes, individual self-defence or other skills building.

Programmes and policy initiatives conceived, trialled and eventually implemented on the basis of this 'what works?' philosophy can range across the spectrum from questions of early childhood development to municipal service delivery. The role of the police as only one among many potential agents of change has been recognised within the emerging community of practice around crime and violence prevention.[34] This has also overlapped with a trend within police departments around the world to seek to improve their effectiveness in respect of a wide range of outcomes with reference to controlled trials and experimentation, with 'Evidence-Based Policing' becoming the

31 The summary that follows is taken from the impact study undertaken into the new legislation, see S Duailibi & others 'The effect of restricting opening hours on alcohol-related violence' (2007) 97(12) *American Journal of Public Health* 2276.

32 Duailibi (n 31) 2277f. Duailibi and his colleagues show that the impact on homicide is statistically significant regardless of whether underlying trends (such as socio-economic drivers of crime) are controlled for. Moreover, the impact seems to have been greater than the (also identified) impact of Brazil's national firearms control legislation of 2004.

33 A flagship programme in this regard has been funded by the UK Department for International Development (DFID). See generally R Jewkes & others *Effective design and implementation elements in interventions to prevent violence against women and girls* (January 2020) https://www.whatworks.co.za/documents/publications/373-intervention-report19-02-20/file (accessed 31 December 2021).

34 South Africa's 2016 White Paper on Safety and Security is an example in this regard at national level. At regional level, in 2018 SADC adopted Regional Guidelines on Crime and Violence Prevention which adopted a similar philosophy.

latest organisational objective. Perhaps the archetypal example of an evidence-based policing initiative, and one that, like the Cardiff model, relies upon accurate and granular counting of crime in specific places, is the idea of hot-spot policing. This is based on the insight that crime can be a highly clustered phenomenon, and that by focussing policing resources on those few locations authorities can achieve significant reductions of crime, importantly without displacing the crime into surrounding areas.[35]

Combating impunity

Accountability, as Christof and I conceived of it, essentially consists of asking three kinds of question: (i) what happened and who was responsible? (ii) who suffered and how can their suffering be remedied? and (iii) what can be done to prevent this from happening again in the future?[36] Evaluating the processes and considering the results of the pursuit of accountability in specific cases makes up a significant proportion of the work of any international system for the protection of human rights. But by highlighting the responsibility to account for life, the system can emphasise the importance of asking all three of these questions in the broadest possible way.

Moreover, the public sharing of data about these questions itself ensures another form of accountability, that is the accountability of transparency and comparability. Bringing together all the available information – whether about the death penalty, or about legislation on the use of force or peaceful assembly – and allowing policymakers, civil society practitioners, journalists and scholars to draw upon that information, was a form of accountability to which Christof was extremely dedicated.[37] Ensuring that every violent death (and indeed any other kind of death recognised to be of international concern) is recorded and that information about them is collated both at national and international level is a natural extension of this project.

Answering the 'what happened?' and 'who was affected?' questions in a transparent fashion also allows a range of stakeholders to weigh in on the 'what should be done?' questions. This might take the form of programmatic design, as discussed above, or, in a more abstract way, may involve the setting of targets. Ultimately Christof's recommendation

35 For a systematic review of the significant literature on hotspot policing, see Anthony Braga & others 'Hot spots policing of small geographic areas effects on crime' (2019) 15 *Campbell Systematic Reviews* 1046.

36 See T Probert & C Heyns (eds) *National commissions of inquiry in Africa* (PULP 2020).

37 The two global databases that he and Stuart Casey-Maslen have designed, www.policinglaw.info and www.rightofassembly.info, were models of this, but drew inspiration from the example of www.deathpenaltyworldwide.org.

that SDG 16 should be drafted so as to include an ambitious numerical target with respect to violence reduction was not acted upon by member states.[38] However, as noted above, the broad character of Goal 16 and its indicator framework does establish a pattern of good practice with respect to the kind of information that ought to be considered when pursuing the objective of greater safety.

This broader objective of community safety will itself contribute toward greater enjoyment of the right to life, but there is also the tantalising prospect of using the same kind of translation from analysis to programming with respect to deaths that would more classically be thought of as extrajudicial killings. That is, to adopt the development practitioner's approach to a question such as the use of force in law enforcement, and to ask 'what works to prevent excessive force?' One can see these questions becoming more salient within human rights practice, both with the possibilities of new technologies and with a greater focus on impact assessments and understanding exactly how initiatives such as human rights trainings are effective in shaping attitudes and behaviour.

Of course, none of this is to argue that the human rights system does not already care about the body in the street with a knife in its back, or that it stops caring once it has been established that it was not a state agent that did the stabbing. There is a natural subsidiarity principle at play: with a commodity as precious as international attention, it is important to focus on those cases where there are the greatest asymmetries of power. But a strong potential shorthand for understanding the state's obligation with respect to the right to life is to say that they have to *care* about life. The state is not expected to prevent every death: in situations where their own agents are involved they are expected to take all possible precautionary measures to avoid causing a death; where they knew or ought to have known about a threat to life they are expected to take steps reasonably within their power to prevent it; in other situations where they find out about a death, they are supposed to investigate to find out what caused it. In this sense every death should be a matter of state concern even if not of state responsibility.

One of the key legacies of Christof's time as mandate-holder was his emphasis on the importance of death investigations of all sorts, and on accountability – the idea that the failure to investigate a suspicious death amounts *in and of itself* to a violation of the right to life, because

38 At the time of Christof's 2014 report there was a proposal to frame Target 16.1 as halving levels of violent death. See A/69/265 paras 141 and 145. Also see M Eisner & A Nivette 'How to reduce the global homicide rate to 2 per 100,000 by 2060' in R Loeber & BC Welsh (eds) *The future of criminology* (OUP 2012).

of this failure to care about whether or not life had been adequately protected.

The African Commission, in their General Comment quoted above, make this point very clearly. As Christof noted after the passage of that document, when there is a systemic failure on the part of the state to fulfil its positive duties by investigating any and all suspicious deaths, 'the result can be a deterioration into a culture of impunity'.[39]

Impunity with regarding the right to life is often conceived of with reference to the exemplary case where, because of their proximity to state power, an identified individual is able literally to get away with murder. With his insistence that the state's responsibility to 'account for life' is central to its protection of the right to life, Christof was attempting to highlight another pernicious quality of impunity, which is related not to punishment in specific cases but to a wider failure to recognise that many deaths have taken place at all. As we pursue the SDGs, with their mantra of 'leave no one behind', the values of human equality and dignity make Christof's basic assertion, that every body should count, a vital guide.

39 C Heyns & T Probert 'Casting fresh light on the supreme right' in T Maluwa & others (eds) *The pursuit of a brave new world in international law: essays in honour of John Dugard* (Brill 2017) at 53.

26

Science, technology, and human rights

*Jay D Aronson**

Introduction

Unlike most of the contributors to this volume, I am neither a human rights practitioner or lawyer by training, nor am I a family member or close friend of Christof Heyns. Rather I am a scholar of science, technology, and society who developed an interest in human rights as it became clear that science and technology were having a massive impact on our most fundamental rights in the 21st century. Few human rights practitioners have engaged more deeply in the positive and negative implications of science and technology on our most basic right – the right to a dignified life – than Christof. I first became familiar with him nearly a decade ago through two strands of his work: first on his efforts to verify evidence of war crimes at the end of the Sri Lankan Civil War that appeared in a video shown on British television; and second, his investigation of the ways that international law might be used to govern and regulate armed drones and autonomous weapons systems (AWS) both in the context of war and domestic law enforcement. I was fortunate to get to know him personally during an expert consultation associated with the Special Rapporteur's Report on the role of Information and Communication Technologies (ICTs) in the Protection and Promotion of Human Rights, as well as the process of revising the Minnesota Protocol, officially known as the *United Nations (UN) Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. Since then, we met less formally over lunch or coffee when I was visiting University of Pretoria to give lectures to the Masters programme on Human Rights and Democratisation in Africa or through email and videocalls. I am truly sad that those exchanges will no longer take place and that our friendship will not have the opportunity to develop further.

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What struck me most about Christof, other than his warm persona and brilliant mind – two recurring themes throughout this volume – was the profound sense of humanity that pervaded his analysis of complex technical, legal, and ethical issues. Few human rights scholars of his generation are as attuned to the importance of understanding the human rights implications of science and technology as he was. This awareness seems to have emerged as much from his curiosity about the world around him as it did from the realities of carrying out human rights investigations in the era of widespread smartphone adoption and increased accessibility of the internet and social media. As he noted in his 2015 Special Rapporteur's Report on ICTs and human rights, he was increasingly dependent upon 'information mediated through technology' in evaluating the claims that he was receiving about unlawful killings as a result of his role at the UN.[1] He was also aware that journalists and human rights advocates were also turning to technology to document rights abuses or verify claims received through other sources.

Technology and human rights documentation

Although he was trained in the methods and approaches of the first and second generations of human rights documentation, he was very much at the core of scholars and practitioners making sense of documentation possibilities brought about by new information and communication technologies – the so-called third generation of documentation practices (the first being intergovernmental investigations, the second being NGO-led documentation, and the third being more accessible digital-based documentation by a much wider variety of actors). His hope was that this third generation of documentation practices would open up, and ideally democratise, human rights fact-finding – providing ordinary people with a platform to share their experiences and engage with the global community in ways that had previously only been possible for the largest NGOs physically located in proximity to power. In order for this future to be realised however, Christof recognised that people simultaneously needed to be able to access these new communications technologies and also be shielded from the surveillance risks that were manifest in a technology that had the ability to track one's every move in the real world and online. Looking back on his work on this topic, it was fascinating to see that Christof was especially aware of the fact that technology, and the new people it brought into the human rights space, would be most effective when integrated into networks with

1 C Heyns 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Use of information and communications technologies to secure the right to life' (24 April 2015) United Nations General Assembly Human Rights Council A/HRC/29/37, 6.

existing institutions and organisations that had significant experience mobilising people, documenting rights violations, seeking redress for them, and advocating for change. Christof implored the international community to pay attention to the work being done on the ground by ordinary people and smaller organisations so that their efforts would not be in vain.

Christof's interest in new forms of documentation emerged from his work with forensic, ballistics, and video metadata experts to verify the contents of a horrific five-minute video provided to him by the British television station Channel 4 in November 2010, which seemed to show summary executions of Tamil prisoners (at least one of whom may have been a journalist) by government forces in 2009 in graphic detail, acts which the Sri Lankan government initially denied had occurred.[2] The government argued that the video in question had been fabricated – initially staged and shot with a high-quality camera and then altered to appear as if it had been filmed on a low-quality cellphone camera by another soldier – in order to discredit the government.

Building on work done by his predecessor Philip Alston earlier that year to investigate the authenticity of a shorter one-minute clip that briefly documented the killings, Christof and his team of experts determined that the longer video was in fact authentic and resolved certain questions that emerged from analysis of a shorter video that was included as a segment in the longer video.[3] The video provided convincing evidence that several individuals had been summarily executed by government soldiers with high-powered automatic weapons at close range and with many of the victims blindfolded with their hands behind their backs. The video also provided convincing evidence that at least some bodies, including two female victims, were treated in an undignified manner after death. Based on this evidence, Christof, in his capacity as Special Rapporteur, requested that the government of Sri Lanka reopen their investigation into the killings, this time taking the crimes depicted in the video seriously and not simply seeking to undermine the credibility of this evidence. This investigation foreshadowed the emergence of kinds of open-source investigations that are now a routine a decade later.

Christof was willing to criticise big players in the human rights space when necessary. Indeed, he was quite critical when describing the technological capacity of the very body he reported to: the UN

2 'Sri Lanka: UN expert calls on Government to probe executions captured on video', UN News, 31 May 2011, https://news.un.org/en/story/2011/05/376912 (accessed 29 October-2021); Christof Heyns, 'Report of the Special Rapporteur on extrajudicial summary or arbitrary executions, Addendum: Summary of information, including individual cases, transmitted to Governments and replies received' (27 May 2011) United Nations General Assembly Human Rights Council A/HRC/17/28/Add.1.

3 Heyns (n 2).

Human Rights Council. In his report on ICTs, he noted that 'many Human Rights Council mechanisms encourage individual contact through insecure generic email addresses, with no warnings concerning security or suggestions of alternatives'.[4] This 'ignorance' of the basics of digital security could have had significant implications if not corrected. He was further critical of the Council's lack of capacity for engaging with digital evidence in its special investigations, which could, in the long term put it at risk of becoming isolated from the broader human rights community. This critique applied to international organisations more broadly. He wrote: 'technological advances in gathering evidence remain only as effective, in real terms, as the accountability mechanisms to which they contribute and which are, in large part, external to the technology.'[5] In that sense, the improved information streams offered by ICTs are necessary, but not sufficient, for better protection of human rights, including the right to life. That underlines the importance of international human rights mechanisms, including the Human Rights Council and its special procedures, being able to fully integrate this information into their proceedings and investigations. Some human rights NGOs – the so-called 'second generation' – are keeping pace with the innovations of the 'third generation.' It is vital that the 'first generation' catch up.[6]

In keeping with what one would expect from Christof, his conclusions about the impact of ICTs on human rights were nuanced and cautionary, while at the same time recognising the tremendous value that technology could bring to the work when implemented appropriately. Such proper implementation included both training for human rights practitioners and coordination among human rights groups, transnational organisations, and funders. He was concerned about highlighting the limits of technology – especially that one should not assume the comprehensiveness of digital information streams and that these streams should be seen as complementary to traditional human rights reporting and advocacy, not a replacement. He also highlighted what has become a central tension in human rights documentation since the publication of this report: the private ownership and control of the platforms through which digital information about human rights are shared. Thus, private, profit-driven corporations were in control of an important transnational quasi-public space that ordinary people, human rights advocates, governments, and international actors all depended on to advance the public good.[7] While some of the challenges

4 Heyns (n 1) at 19.
5 Heyns (n 1) at 22.
6 Heyns (n 1) at 22.
7 As above.

that Christof identified have been addressed, most remain as relevant today as they were when the initial report was published in 2015.

Drones and autonomous weapons

Christof became aware of the need to investigate the use of armed drones in conflict through his work as the Special Rapporteur on extrajudicial, summary, or arbitrary executions. He took over that position in 2010 as the Obama administration was dramatically ramping up the drone capabilities of the United States military and using them extensively for targeted killings in the global 'war on terror'. Like many other human rights scholars, he did not see the use of armed drones to kill as an inherent violation of human rights, but argued that they must be deployed in a way that respected international humanitarian law. More than anything, though, he worried about the ways that advances in artificial intelligence (AI) might one day facilitate autonomy in robotic weapons systems to the point that they were no longer under meaningful human control. It was this potential future that required immediate consideration, study, and action.

In 2016, he wrote in the introduction to a volume on the law, ethics, and policy of AWS that one of the core challenges of the modern era was to ensure that computational systems and AI 'enhance and do not undermine human objectives'.[8] Christof was not alone in being concerned about this challenge, but his writing and thinking on the subject always struck me as getting right to the heart of the matter in a clear and concise manner.

In that same introductory chapter, he noted that the 'increased autonomy in weapons release now points to an era where humans will be able to be not only physically absent from the battlefield but also psychologically absent,' as well.[9] He was not distracted by the complexity or the novelty of the actual mechanism used to kill, but rather on how the decision to engage a target was made. AWS, he noted, 'whether used in armed conflict or law enforcement, are weapon platforms, and any weapon can in principle be fitted onto an AWS. Therefore, the important distinguishing feature between different kinds of AWS is not the weapons they use but, rather, how they take their decisions – their levels of autonomy.'[10] For Christof it was also crucial to understand not only the decision-making process, but why militaries, police forces, and technologists were seeking to remove humans from

8 C Heyns 'Autonomous weapons systems: living a dignified life and dying a dignified death' in N Bhuta and others (eds) *Autonomous weapons systems: law, ethics, policy* (CUP 2016) at 3

9 Heyns (n 8) at 4.

10 Heyns (n 8) at 6.

the immediate area of use or to automate aspects of the process so that humans are increasingly less involved in the lethal use of force.

Christof acknowledged the novelty of autonomous weapons, especially the violation of the 'implicit assumption of international law and ethical codes that humans will be the ones taking the decision whether to use force, during law enforcement and in armed conflict', but insisted that existing legal regimes were capable of governing them – even if that law dictates that certain autonomous actions not be taken under any circumstances.[11] For instance, while AI might one day be able to make reasonable decisions about who to target, what the intentions of that person or group are, and how much force is proportionate, we might still not want to allow autonomous targeted killings because allowing non-human entities to determine whether or not a person should live or die might violate the fundamental dictates of human dignity, that is, the inherent and incommensurable value of each and every human being. In his view, to 'allow such machines to determine whether force is to be deployed against a human being ... may be tantamount to treating that particular individual not as a human being but, rather, as an object eligible for mechanised targeting.'[12] He cautioned against '[d]eath by algorithm,' which, he reasoned

> means that people are treated simply as targets and not as complete and unique human beings, who may, by virtue of this status, deserve to meet a different fate. A machine, which is bloodless and without morality or mortality, cannot do justice to the gravity of the decision whether to use force in a particular case, even if it may be more accurate than humans.[13]

The weapon had in a sense become the warrior, and for Christof, this was unacceptable, in large measure because he was concerned for the human dignity of even those individuals who were legitimate targets of lethal force under international law.[14] The weapon must always remain a tool in human hands in order for the use of force to remain within the bounds of human dignity. While belligerents in an armed conflict might voluntarily put their lives on the line, their opponents were still required to respect their dignity even if they could be legitimately killed in battle. He wrote that '[w]ar without on-going human reflection is mechanical slaughter.'[15] He further likened the development of autonomous weapons to making a decision to kill someone 'in advance, in the abstract, and based on hypothetical scenarios'. [16] We would find

11 Heyns (n 8) at 8.
12 Heyns (n 8) at 11.
13 Heyns (n 8) at 11.
14 Heyns (n 8) at 58; C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33 *South African Journal on Human Rights* 46 at 51.
15 Heyns (n 14) at 60.
16 Heyns (n 14) at 61.

this unacceptable in the context of a mandatory death penalty in which a legislature predetermined who in a criminal justice system would live or die in the criminal justice system without recourse to a judge or jury. This moral challenge was certainly recognised by other scholars and commenters, but Christof went a step further, pointing out that the dignity of the people in whose name autonomous weapons systems were being deployed might also be impacted by this decision. He recognised that this deployment might be seen as an abdication of moral responsibility to 'bloodless agents' in a way that being represented by human combatants would not. Part of the problem, he noted, is that a lack of systems to ensure accountability for violations of the right to life is in itself a violation of the right to life. By deploying technological systems that cannot be held accountable for their actions, we run the risk of (at least in theory) violating the right to life even if no one is actually ever killed. This is one reason why we might not want to deploy AWS even when there is the potential to save at least some lives that would be lost if they were not in action. This is not necessarily a satisfying conclusion, but it one that Christof came to:

> The notion of the indivisibility and interdependence of all rights militates against the idea of an absolute hierarchy of rights, because it would mean that if there were a clash of rights – when it really matters – the one right would always trump the other. Dignity, if it is to assume its position as a meaningful right, must in some cases be able to trump other rights, including the right to life.[17]

Thus, even where lives may be saved, the right to dignity – including a dignified death – has to be considered as well. In a paragraph about the existential harm of autonomous weapons that continues to stick with me, Christof wrote:

> The realities of modern warfare are, of course, such that someone who is about to be targeted in many cases does not have a real chance of appealing to the humanity of the person on the other side. However, the hope that this may be possible has so far not been completely excluded. With the introduction of autonomous weapons, there is no such chance. Having autonomous weapons as a legal and legitimate part of the world in which we live can undermine an important part of our hard-wiring: namely, hope. Psychologists have long emphasised the importance of a measure of optimism in human beings. An emphasis on hope indeed underlies many religious and other world views, as well as philosophical traditions. For machines to have the power of life and death over human beings may change some of our deep-seated assumptions about the world in which we live, and the extent to which we experience it as a place in which empathy, redemption, and mercy may be found. Where it is legally or even ethically permissible to use force, humans may decide not do so because something holds them back. This possibility is excluded when autonomous weapons are used.

17 Heyns (n 14) at 62.

> This is the classical situation where a decision-maker says 'It's lawful, but it's awful' – and as a result not do it.[18]

This clarity extended to his core interest in how international law applied to new technological threats to human life. It was important for Christof to get to the heart of the matter and not to get lost in technical details or overwhelmed by the speed at which new technologies seem to develop. In evaluating new technologies, one must always 'ask oneself at the outset what it is that one wants to protect and develop one's approach around that answer'.[19] It will be no surprise to anyone who knew Christof that he saw human rights as the most meaningful framework to think through the impact of AI and computing technologies on humanity.[20] Christof's analysis applied to other applications of autonomous decision making in society. In his view,

> the way we respond to autonomous weapons is a pivotal test case for the role of science in the future. The stakes cannot be higher – they are literally life and death – and how we deal with autonomous weapons will be the tone for how we deal with computers in general.[21]

And we should make technology evolve to satisfy the rights regime we have in place and not vice versa:

> In a world dominated by computers and where power is legitimised by algorithms, the logical response to errors on the battlefield may be to call for technical improvements rather than traditional concepts of human accountability. Given the fact that accountability is an element of the protection of the right to life, this would entail a fundamental change in our understanding of the right to life.[22]

For Christof, our analyses of new technologies must always be grounded both in the fundamental right to life and in human dignity. The goal is to ensure that humans have the most meaningful and dignified lives possible. Merely preserving 'biological' life is not enough.

Christof was technologically savvy when taking this approach and he was by no means a technophobe – he simply recognised the complexity of building artificial intelligence systems that upheld human dignity and the right to life. At a time when debates around AWS have increasingly become centered on the notion of 'meaningful human control' (MHC), he warned us that it is 'an open-ended concept, and much will depend on the contents that it is given … Much work is still required to give the concept application in the real world.'[23] In his view, it was crucial to develop and institutionalise an understanding of MHC that was both

18 Heyns (n 14) at 63.
19 Heyns (n 8) at 13.
20 Heyns (n 14) at 49.
21 Heyns (n 14) at 48.
22 Heyns (n 14) at 57.
23 Heyns (n 1) at 14.

meaningful and enforceable and centered on the use of technology to supplement human decision making rather than replace it.

Christof turned the rhetoric of proponents of AWS who focused on their surgical precision on its head. If AI enabled weapons with 'surgical precision,' then 'surgical standards' of evaluating their efficacy and legality ought to apply. Specifically, he made the following observation:[24]

> the 'protect life' principle applies to all uses of force by law enforcement officials, though temporary exceptions are made in the case of armed conflict. However, if the circumstances that justify such a more permissive approach no longer exist, it seems logical to accept that the 'protect life' principle demands a more rigorous approach. That is, if technology allows states more control over long-distance use of force and lifts the fog of war, it could be argued that states should be held to higher standards – there is less of a justification for the lower standards posed by IHL and more reason to resume the default position of human rights law. For example, where smart bombs, or other technology that allows for better targeting, are available there should be less tolerance for collateral damage. Moreover, should technology be developed that makes capture, rather than kill, possible, it should be used. Those who use advanced technology should also expect to be held to higher standards as far as accountability and transparency are concerned – as is the call already from many human rights groups in the context of armed drones.

Revision of Minnesota Protocol

I had the honour of being involved in small way in Christof's efforts to revise the *UN Manual on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions* along with an amazing group of experts in international law, human rights advocacy, criminal investigation, and forensic science.[25] The goal was to update the manual, originally written in 1991, in light of significant advances in law and forensic science, as well as a much deeper appreciation for the rights and needs of families of people who go missing in times of war, conflict, and political unrest or die unlawful deaths at the hands of the state. Since other contributors focus on updates to the legal and psychosocial aspects of this manual, which is colloquially known as the Minnesota Protocol, here I focus briefly on revision to the scientific and technical dimensions.[26]

Christof found the revision of the Minnesota Protocol so meaningful because it was the document that set the standards for the investigation of potentially unlawful killings by state and non-state actors. Without

24 Heyns (n 1) at 16.

25 Minnesota Protocol II.

26 C Heyns & others 'Investigating potentially unlawful death under international law: the 2016 Minnesota Protocol' (2019) 52 *International Lawyer* 47.

effective means to determine the fate of the missing, perpetrators cannot be held accountable, families do not know what happened to their loved ones, and impunity for the violation of the right to life reigns in communities and nations. Ultimately, the failure to investigate a potentially unlawful death is regarded, in itself, as a violation of the right to life. Widely agreed upon standards form a baseline for countries to incorporate into their laws and investigatory protocols, provide cover for government investigators and forensic scientists undertaking inquiries into politically contentious unlawful or suspicious deaths, and provide a metric for outside observers to use when determining the extent to which the state is living up to its obligations to respect the right to life and human dignity of its citizens and subjects.[27]

Soon after taking on his role as the Special Rapporteur it became clear to Christof that the document needed to be thoroughly revised, especially with respect to new methods of documenting crime/death scenes, recovering human remains, determining cause and manner of death, and indentifying remains through DNA profiling. While the impetus for the revision emerged from the concerns of the forensic and medical practitioners who used it most often, Christof and his collaborators decided to use it as an opportunity to bring the legal sections up to date and further develop them in order to solidify the manual's approach using death investigation to support to the right to life. The revision clarified what circumstances trigger a state's legal obligation to investigate potentially unlawful deaths and what those states must do in this context.[28]

Christof commissioned a noted forensic scientist, Dr Morris Tidball-Binz, the Head of Forensic Services at the International Committee of the Red Cross (ICRC), to undertake the revision of the sections on investigatory practice and brought in a wide variety of experts to consult on this process (including me). In addition, Christof and his collaborators sought input from governments and people with an interest in the investigation of unlawful and suspicious killings or disappearances. In keeping with standard practices in international standard-setting, the revised Minnesota Protocol includes both minimum requirements that must be followed without deviation and recommended actions that should be put into place whenever possible. While governments are the parties most responsible for investigations into potentially unlawful killings and disappearances, the manual is also meant for civil society organisations that conduct these investigations after the fact when

27 As above.
28 As above.

governments are unwilling or unable to do so, or when governments explicitly request non-governmental assistance.[29]

Of particular concern during the revision process was the development of explicit guidance for the management of crime scenes and the recovery of evidence in a way that preserved its scientific and legal value while at the same time ensuring that the needs of families were respected. As Christof and his collaborators noted, developments in DNA analysis have made it possible to identify even the smallest and most damaged bits of human tissue and bone, and advances in forensic archaeology and pathology have dramatically improved the ability of investigators to determine when and how a person died. This had led to changes in norms associated with investigations of potentially unlawful deaths:

> While, controversially, some early investigations carried out by the international criminal tribunals for the former Yugoslavia and Rwanda focused on gathering evidence for prosecution over the needs of families to have their loved ones identified, forensic scientists examining the dead are now expected to seek to identify remains as a matter of principle and to advance the rights of families. The 2003 Conference on The Missing and Their Families, organized by the ICRC, concluded that it is wrong to investigate the dead from armed conflicts or disasters if this investigation is focused exclusively on documenting the cause and manner of death and does not include efforts to identify the victims. In addition, the duty of medico-legal experts to protect the dignity of the dead has evolved since the publication of the first edition of the Protocol to become a universal requirement. In consideration of these developments, the new Protocol advocates for an integrated and scientifically sound approach to using forensic evidence. It calls for forensic human identification in every case of potentially unlawful death, outlining the general principles and the scientific approach required to reliably identify single or multiple bodies.[30]

In addition to guidelines for states and civil society organisations, the 2016 revision of the Minnesota Protocol also included a new section that speaks directly to Christof's own integrity and his desire to ensure the integrity of the human rights field more broadly. This section on professional ethics of investigators begins from the fundamental principle that scientists and medical professionals should not just be beholden to the law or to the norms of their specific disciplines. Rather they bear special ethical responsibilities toward victims, their families, and the broader community of people impacted by the investigation. In addition to seeking truth through effective investigation practices, they must also work 'to advance the goals of justice and human

29 As above.
30 Heyns & others (n 26) at 74-75.

rights.'[31] Thus, no matter who contracts forensic specialists to work on the investigation, they must maintain their independence – especially when state actors are alleged or suspected to have been involved in the death. They must also work to ensure the safety, privacy, well-being, and dignity of anyone affected by the investigation and respect their cultures and customs. They also have a special obligation to minimise additional trauma to family members, to respect their needs and wishes as much as possible, and to uphold the fundamental dignity of the dead.

Conclusion: Upholding the right to protest

I would like to conclude this chapter in honour of Christof by briefly describing the direction of our more recent conversations about the role that technology might play in upholding the right of all people to peacefully protest. As many of the other contributors to this volume will surely attest, Christof was a passionate supporter of the right of all people to peacefully assemble to express themselves, air grievances, or celebrate things that matter to them. Throughout his career he has spoken out in support of protesters around the world – most recently during the Black Lives Matter movement that flourished in the United States in the months before his untimely death.

Christof also recognised that it was sometimes necessary for public officials to place some limits on protests and demonstrations in the name of public safety, although he argued that public safety should not be used as an excuse to shut down protests entirely. We spent a significant amount of time in our most recent conversations focusing on two issues in particular: the right of people to record law enforcement and military responses to protests; and the role that simulation technology might play in helping law enforcement officials respond to protesters in ways that de-escalated potential violence rather than increased the prospects for the use of force in such confrontations. By preserving the right to peacefully assemble and protest, and curbing violent state responses to such actions, Christof clearly hoped to preserve a space in which social change might take place through deliberation and discussion rather than violence and repression.

Christof hoped to use the latest developments in AI and virtual reality to create immersive environments in which law enforcement and military personnel could be desensitised to the feeling of the need to use violence to control crowds of demonstrators and trained to deescalate such situations instead. I played the skeptic in these conversations – pointing out that most available technology could not mimic the conditions that state agents would actually find themselves

31 Minnesota Protocol II, para 41.

in, that there wasn't much evidence that these sorts of training systems actually reduced the use of force, and that it was hard to use computing technology to rehumanise groups of people that might be seen as less worth of empathy or forbearance by state agents. Christof understood all of these things, but wanted to use any and every available tool to protect the right of assembly. He was not enamored with virtual reality in the way that a gamer or technophile might be; rather he wanted to know if there was any possible way to use it for the benefit of humanity.

This viewpoint typified Christof's overall approach to science and technology. It was never about innovation solely for the sake of being innovative, but rather about focusing on particular human rights goals and figuring out the most effective way to get there, which may or may not involve extensive reliance on science and technology. This is exactly the approach that I think is the right one, and one of the main reasons why I loved engaging with Christof, even when we did not see something the same way. I will miss him. Visits to Pretoria will not be the same without him.

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Protecting the right to peaceful assembly for today and the future

Clément N Voule and Ona Flores***

Introduction

The last two decades have witnessed an explosion of protests and demonstrations around the world. From protests in opposition to the war in Iraq in 2003 and the 'Arab Awakening' to the anti-austerity protests across Europe and the climate change global protests, the 21st century has been marked – at least thus far – by mass protests. In this period, the number and frequency of demonstrations have continuously increased,[1] with more people taking to the streets every year to demand systemic social, political, and economic changes and challenge the status quo.[2] Even though the COVID-19 pandemic has increased the barriers and risks to holding public demonstrations, the wave of protests has not subsided. In fact, 2020 saw the largest protest recorded in history: India's workers' strike, in which an estimated 250 million protestors participated.[3]

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1 I Ortiz and others *World protests: a study of key protest issues in the 21st century* (2021) 201, page 3, https://link.springer.com/content/pdf/10.1007%2F978-3-030-88513-7.pdf. See also, S Brannen & others *The age of mass protests: understanding an escalating glbal trend* (2020) 42, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke (accessed 22 November 2021).

2 According to the Carnegie Endowment for International Peace's 'Global Protest Tracker', over 230 significant anti-government protests have taken place worldwide since 2017 (https://carnegieendowment.org/publications/interactive/protest-tracker (accessed on 20 November 2021). Also: E Chenoweth and others, 'This may be the largest wave of nonviolent mass movements in world history. what comes next?' *The Washington Post*, 16 November, 2019, https://www.washingtonpost.com/politics/2019/11/16/this-may-be-largest-wave-nonviolent-mass-movements-world-history-what-comes-next/ (accessed 22 November 2021).

3 'Shutdown across sectors, as over 25 Crore workers join one of the biggest strikes ever', *Newsclick* (India) 26 November 2020, https://www.newsclick.in/Shutdown-Across-Sectors-as-Over-25-Crore-Workers-Join-One-of-theBiggest-Strikes-Ever (accessed 22 November 2021).

The rise in the number of protests has been linked to increased access to digital technologies.[4] As recognised by the United Nations (UN) Special Rapporteur on the rights to freedom of peaceful assembly and of association, digital technologies – including the internet, social media platforms, and smartphones – have proved enormously useful for those seeking to exercise the right to peaceful assembly, vastly expanding their capacities to organise and mobilise to advance common interests, including human rights and democracy.[5] Social media platforms particularly have lessened the barriers to the formation of protest movements, by expanding the ability of individuals to connect and coordinate with others, capture media attention, and generate greater public engagement around certain issues.

These technologies not only serve as means or tools that facilitate the exercise of the rights of assembly offline, but also as virtual spaces where protests themselves can be carried out, demonstrating a critical interplay between the so called offline and online spheres.[6] This was explicitly recognised by the Human Rights Council during the COVID-19 pandemic, when it stressed that digital technologies 'create space for the holding of assemblies online and may facilitate and enhance the involvement and participation of those often marginalised as well as support the proper management of assemblies and increase transparency and accountability'.[7]

However, for all the good that digital technologies have brought to the exercise of the right to peaceful assembly, these technologies have also enabled new and more pervasive forms of repression. Along with internet shutdowns, social media is used to spread misinformation, deploy government sponsored trolling, and mobilise pro-government counterdemonstrations. Digital tools and platforms are now routinely subjected to government surveillance, allowing governments to monitor, infiltrate, and hamper protests movements on a scale and intrusiveness before unimaginable.[8]

International human rights mechanisms have made increased efforts over the last decade to ensure that the world's digital transformation does

4 E Chenoweth and others, 'This may be the largest wave of nonviolent mass movements in world history. what comes next?' *The Washington Post*, 16 November 2019, https://www.washingtonpost.com/politics/2019/11/16/this-may-be-largest-wave-nonviolent-mass-movements-world-history-what-comes-next/ and S Brannen & others *The age of mass protests: understanding an escalating glbal trend* (2020) 42, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke (accessed 22 November 2021).

5 Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'The rights to freedom of peaceful assembly and of association in the digital age' 17 May 2019 (A/HRC/41/41).

6 As above.

7 Human Rights Council Res 44/20 of 23 July 2020.

8 Voule (n 5).

not hinder human rights and, rather, empowers all individuals, without discrimination, to achieve their highest potential. The most recent efforts have paid particular attention to the right to peaceful assembly, examining what governments and key stakeholders' obligations to ensure this freedom is respected, protected and fulfilled both online and offline. This essay examines the impact of digital technologies in the enjoyment of the right to peaceful assembly, drawing attention to the digital acceleration set off by the COVID-19 pandemic and the ways by which digital technologies both enabled and curtailed protest action across the world during the health crisis. The authors provide an overview of how international human rights law has responded to these challenges. In particular, it studies the protection afforded to 'online assemblies' by UN human rights mechanisms and analyses emerging threats. The aim of the article is to highlight the need for international law and mechanisms to preserve the right to peaceful assembly to ensure it is protected today and in a future of profound digital transformations.

This essay focuses on state actions and obligations under international human rights law. However, the authors recognise that in the digital era, the right to peaceful assembly is also impacted by the services provided by tech giants. Their impact goes far beyond their role as 'gatekeepers' and determining who can connect and communicate on their platforms. The products, algorithms and policies of these companies, which continue to be largely unregulated, are undermining some of the basic tenets of our democracies, deeply affecting civic space. The authors hope that by laying out states' international human rights law obligations in this field, this article contributes to discussions regarding how to best regulate and make companies accountable.

The power of the 'digitally mediated' protest

In the 21st century, protest and digital technologies have become inseparable. Certainly, these technologies have made it easier, more accessible and affordable to organise and mobilise people in peaceful assemblies for various interests. Online social media platforms and their various capabilities have become essential tools for coordinating and publicising demonstrations, especially for decentralised and leaderless movements. Their role in modern revolutions and social movements, helping participants amplify their narratives and gather domestic and international support, has been largely acknowledged.

The smartphone, as well as photo and livestreaming capabilities, in particular, have enabled individuals to document human rights abuses and government wrongdoings and quickly spark spontaneous and large-scale demonstrations. Some digital tools have also provided important spaces in which civil society can build and strengthen their

networks and connect with like-minded people, a prerequisite for the formation of protest movements.[9] Other recognised capabilities include improved security of messaging and social networking platforms that use encryption technology. End-to-end encryption 'enhances the security of civil society groups' digital communication, while also providing tools specifically geared to network organising at the grass-roots level'.[10] As indicated by Turkish American sociologist Zeynep Tufecki:[11]

> Digital technologies are so integral to today's social movements that many protests are referred to by their hashtags – the Twitter convention for marking a topic: #jan25 for the Tahrir uprising in January 25, 2011, #VemPraRua ('Come to the streets') in Brazil, #direngezi for Gezi Park protests in Istanbul, Turkey, and #occupywallstreet. Activists can act as their own media, conduct publicity campaigns, circumvent censorship, and coordinate nimbly.

The Armenian #velvet revolution of 2018 that led to the resignation of the Prime Minister Sargsyan and the election of Nikol Pashinyan is a clear example of the potential of digitally mediated protests to achieve political reform and advance democratic values. During his visit to Armenia in 2018, the Special Rapporteur of the rights to freedom of peaceful assembly and of association heard multiple accounts of how social media platforms, live-streaming tools and communication apps had played a key role in the revolution.[12] On 31 March 2018, Pashingyan, then Member of Parliament, initiated a campaign in opposition of the nomination of then Prime Minister Sargsyan, who had been in power since 2007 and had removed constitutional limits to prime minister's terms. Pashinyan announced on Facebook that he would walk 200 km to Armenia's capital Yerevan to protest Sargsyan's nomination and called others to join the movement #mystep (#Im Kayl). He posted daily updates and livestreamed the march and was soon joined by hundreds of people. After the movement reached the capital, more demonstrations took place, and the movement grew quickly. Protestors across the country turned to Telegram to communicate and coordinate demonstrations, stressing the importance of ensuring a peaceful movement. According to one account,

> the movement communicated mainly information on time, forms and places of action. It enabled protestors to simultaneously protest in diverse places instead of all meeting in a single spot, making it difficult for the police

9 Office of the Hight Commissioner of Human Rights, 'Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests' 24 June 2020 (HRC/44/24) (OHCHR), paras 7 & 8.

10 OHCHR (n 9) para 8.

11 Z Tufecky *Twitter and tear gas: the power and fragility of the networked protest* (2017) 360.

12 Voule (n 5) para 22; Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'Vist to Armenia' 13 May 2019 (A/HRC/41/41/Add.4), para 65.

> to stop protests. Information was also shared on behavior that was not acceptable or which should be avoided. Mantras like 'revolution of love and tolerance' were repeated daily.[13]

Using hashtags such as #velvetrevolution or #rejectserzh, protesters livestreamed demonstrations, including instances of police repression or other critical moments. Pashinyan's release on 23 April 2018, after a weekend detention, was livestreamed increasing social media engagement and sparking street demonstrations. Hours after, Sargsyan resigned. Pashinyan was appointed the new Prime Minister of Armenia on 8 May.[14]

Some of the most visible social movements over the last few years – the #Black Lives Matter movement, #NiunaMenos, the #MeToo movement, and #FridaysForFuture – have reached millions of supporters globally mostly with the support of social media tools. While beginning in the US, the #BlackLivesMatter protest movement for racial equality spread in many countries around the world, including Nigeria, France, and Indonesia, following the murder of George Floyd by a Minneapolis police officer on 25 May 2020. The murder was filmed and posted on social media by a bystander, ensuing large-scale and transnational protests in 4,446 cities and towns across the world.[15]

Digital technologies' capabilities are constantly advancing, allowing protesters to continually innovate and shape their tactics to achieve impact.[16] The spread and impact of the protest performance 'Un violador en tu camino' (A rapist in your path) by Chilean feminist collective 'Las Tesis' would have been impossible or at least much harder to accomplish without the availability of social media and its video and virality capabilities.[17] This was a deliberate effort by *Las Tesis*, whose mission is to make feminist theory available to wider audiences:[18]

> The original performance in Chile and its subsequent enactments went viral on social media, and also succeeded in attracting significant attention

13 J Lindner 'Armenia's #VelvetRevolution: towards freedom and future' 13 February 2019 https://wpmu.mah.se/nmict191group4/2019/02/13/armenias-velvetrevolution-towards-freedom-and-future/ (accessed 20 November 2021).

14 Freedom House *Freedom of the net 2018 Armenia country report* https://freedomhouse.org/country/armenia/freedom-net/2018 (accessed 22 November 2021).

15 https://www.creosotemaps.com/blm2020/ (accessed 22 November 2021).

16 E Mitchelstein & others 'la protesta hoy: los cuerpos, las calles y los medios digitales' *INFOBAE* 19 May 2020 https://www.infobae.com/america/opinion/2020/05/19/la-protesta-hoy-los-cuerpos-las-calles-y-los-medios-digitales/ (accessed 22 November 2021).

17 G Hinsliff 'The rapist is you!: why a Chilean chant is being sung around the world' *The Guardian*, 3 February 2020, available at https://www.theguardian.com/society/2020/feb/03/the-rapist-is-you-chilean-protest-song-chanted-around-the-world-un-iolador-en-tu-camino (accessed 22 November 2022)

18 P Serafini, 'A rapist in your path: transnational feminist protest and why (and how) performance matters' *European Journal of Cultural Studies* 20 April 2020 https://journals.sagepub.com/doi/full/10.1177/1367549420912748 (accessed 22 November 2021).

from major media outputs. This can in part be attributed to the spectacular value of the performance – large groups of women singing and dancing in unison at landmark locations across the world. But the spectacular quality of the action must not be considered as detrimental or contradictory to its prefigurative value. Rather, this performance action could be thought of as a case of 'ethical spectacle' (Boyd and Duncombe, 2004), in which artists and activists appropriate the communication tools of an intensely mediated society while maintaining processes and values that allow the action itself to be participatory, contextualised and emancipatory.

Online protests and the COVID-19 pandemic

Digital technologies have not only facilitated street demonstrations or in-person gatherings. An 'assembly' has been defined by the mandate of the Special Rapporteur on the rights to peaceful assembly and of association as an intentional and temporary gathering in a private or public space for a specific purpose.[19] An assembly occurs when individuals 'come together and collectively express, promote, pursue and defend common interests'. Digital technologies have allowed for these assemblies to happen in online or among people who are not physically near, in ways before impossible.

Just as street demonstrations, online assemblies have taken multiple forms, depending on protestors' capacity to innovate and harness the capabilities afforded by digital technologies. On social media platforms such as Facebook or Twitter individuals come together to show and promote support for a cause through features such as 'hashtag'. Over a short period of time, these social media conversations can create large networks of communities that would be quite unlikely to occur anywhere offline at that scale. Network maps or hashtags visualisations give us an idea of the size and scale of these online gatherings, much like the photograph of a crowd take by a drone. For example, the #Metoo movement sparked online assemblies of users sharing personal stories of harassment and discussing the entertainment business. A network graph created by social media researcher Erin Gallagher shows how #Metoo tweets on 16 October 2017 reached 24,722 and created 10,709 communities.[20]

Some online protests predate social media. The first online blackout as a form of protest was organised on 8 and 9 February 1996 in opposition to the Communication Decadency Act (CDA) in the United

19 Special Rapporteur on the rights to freedom of peaceful assembly and of association, M Kiai, 'Best practices related to the rights to freedom of peaceful assembly and of association' 21 May 2012 (HRC/20/27), para 24.

20 24,722 #MeToo tweets – 16 October 16 to 18 October 2017, https://erin-gallagher.medium.com/metoo-hashtag-network-visualization-960dd5a97cdf (accessed 22 November 2021).

States, which was later found unconstitutional.[21] The 'Turn the Web Black' or the 'Great Web Blackout', as the protest was called, was organised by a coalition of free speech advocates and was joined by approximately 1,500 websites who altered their webpages to white text on a black background calling on users to help stop the Act. The blackout also included major online platforms at the time, such as Netscape and Yahoo!, who prevented access to their usual content and replaced it with a black screen and information about how to oppose the CDA.[22] 'Website blackouts' as a form of protest took place again on January 2012 against two major bills in the United States: Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA).[23] Approximately 10,000 online platforms and websites participated in the SOPA/PIPA protests.

While the COVID-19 pandemic did not stop people from taking to the streets to protest, the health crisis did accelerate the world's use of digital tools to carry out essential life activities online, including protests.[24] Video conference apps such as Zoom, Skype and Facebook Live provided critical space for work, education and democratic participation and protesters have embraced them to express their demands. In Israel, for example, more than 500,000 people joined a Facebook Live protest against Prime Minister Benjamin Netanyahu's decision to adjourn the parliament, which was seen as preventing effective oversight over the government's management of the coronavirus crisis.[25] Similarly, in the United States the Poor People's Campaign organised a full scale virtual rally to protest racism, poverty and inequality in America on June 2020, complete with speakers and live music broadcast.[26] In Hong Kong, activists joined the popular online multiplayer game 'Animal

21 https://en.wikipedia.org/wiki/Black_World_Wide_Web_protest (accessed 22 November 2021)

22 NI Kozak 'Fighting for the Internet: online blackout protests and Internet legislation in the United States, 1996-2018' (2018) 21(3) *Media/Culture Journal* https://doi.org/10.5204/mcj.1415 (accessed 22 November 2021).

23 Wired 'A SOPA/PIPA Blackout Explainer' 18 January 2012, https://www.wired.com/2012/01/websites-dark-in-revolt/ (accessed 22 November 2021).

24 E Chenoweth & others 'The global pandemic has spawned new forms of activism – and they're flourishing' *The Guardian* 20 April 2020 available at https://www.theguardian.com/commentisfree/2020/apr/20/the-global-pandemic-has-spawned-new-forms-of-activism-and-theyre-flourishing, Amnesty International 'Activism in times of Covid-19' 29 May 2020, available at https://www.amnesty.org/en/latest/campaigns/2020/05/activism-in-times-of-covid-19/; https://www.usip.org/publications/2020/03/nonviolent-action-time-coronavirus (accessed 22 November 2021).

25 J Judah 'Israelis take protests online for a digital demonstration against Knesset adjournment' *The Jewish Chronicle* 22 March 2020, https://www.thejc.com/news/israel/israelis-take-protests-online-for-a-digital-demonstration-against-knesset-adjournment-1.498343 (accessed 22 November 2021).

26 C-Span 'Poor people's campaign holds a nationwide virtual rally' 20 June 2020, https://www.c-span.org/video/?473188-1/poor-peoples-campaign-holds-nationwide-virtual-rally (accessed 22 November 2021).

Crossing' to join together and express their demands for democracy. In Indonesia, organisers of the Kamisan protest, a silent human rights and social justice demonstration held weekly in front of the presidential palace, conducted gatherings on social media, including livestreaming events on Instagram.[27]

The global climate movement, who had been very active on the streets during 2018 and 2019, also moved online during the first months of isolation and strict social distance requirements.[28] Every Friday, the strikers post photos of themselves holding a sign with a message about the climate crisis along with #DigitalStrike or #ClimateStrikeOnline, and they congregate in large Zoom calls, often with more than 100 people. Activists are also using the digital strikes to create Twitter storms, bombarding companies and people in power with tweets at a set time.[29]

The opportunities discussed above, however, rely on the ability to access and use the necessary digital tools and platforms. Effective exercise of the rights to peaceful assembly in the digital era requires States to ensure accessibility in terms of affordable, secure, reliable, and ongoing access to internet services and various platforms, to counter the digital divide.[30]

States around the world have made continuous progress to ensure global internet accessibility and use. In developing countries, for example, internet usage has grown from 7.7 per cent in 2005 to 44 per cent at the end of 2019. The International Telecommunication Union (IUT) estimates that at the end of 2020, only 51 per cent of the global population were using the Internet, but this proportion increases to over 69 per cent among youth (aged 15-24 years).[31] Despite these rapid improvements, digital divides persist. The gap reflects gender

27 T Oktavianti 'Online Kamisan: activism goes digital during COVID-19 pandemic' *Jakarta Post* 23 April 2020, https://www.thejakartapost.com/news/2020/04/23/online-kamisan-activism-goes-digital-during-covid-19-pandemic.html (accessed 22 November 2021).

28 R Vinter 'Climate protesters gather in person and online for Fridays for future' *The Guardian* 19 March 2021, https://www.theguardian.com/environment/2021/mar/19/climate-protesters-gather-in-person-and-online-for-fridays-for-the-future (accessed 22 November 2021) and J Murray 'Climate strikes continue online: "we want to keep the momentum going"' *The Guardian* 22 April 2020, https://www.theguardian.com/environment/2020/apr/22/climate-strikes-continue-online-we-want-to-keep-the-momentum-going (accessed 22 November 2021).

29 Murray (n 28).

30 This is reflected in the Agenda 2030 for Sustainable Development, which is committed to 'significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020' (SDG 9.c) and 'enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women' (SDG 5.b).

31 International Telecommunications Union *Fact and Figures 2020*, https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2020.pdf (accessed 22 November 2021).

inequalities, and disparities between and within countries, with Africa remaining the region with the lowest rate of internet use. The consequence is that many individuals and communities are excluded from the opportunities brought by digital technologies in ways that help them exercise the right to peaceful assembly, which – in an increasingly digital future – threatens their ability to defend other human rights and uphold the effective functioning of participatory democracy.

This was made strikingly evident during the COVID-19 pandemic, when physical gatherings were severely restricted and access to and use of the internet became indispensable.[32] The digital divides also increased inequality in the education during COVID-19 as children coming from poor families with no internet facilities had very limited access to online courses, demonstrating that the internet is a prerequisite for enjoyment of human rights today.

Persistent and new forms of repression

Unsurprisingly, these past decades also featured some of the fiercest brutality against peaceful protests. Because these movements can be so powerful and persistent, governments are responding with ongoing violent crackdowns and protest criminalisation efforts. And it is precisely because digital technologies have been so successful in motivating people to be engaged politically and join protests that governments are increasing restrictions against them.

Indeed, many protest movements have been met with increased state repression. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has documented several trends in violation of human rights of individuals seeking to organise and join peaceful protests offline and online. The most immediate threat continues to be violence and attacks. The use of excessive and arbitrary use of force by security forces, including live ammunition, during peaceful protests is all too common. Security forces from across the world are responsible for killing hundreds and seriously injuring thousands of protestors every year. For many of these protests, the government deployed the military to disperse protesters, increasing the risk of human rights abuses. In Sudan, for example, human rights experts estimate that security forces killed dozens of people during the June 2019 protests.[33] In Iran, credible reports indicate that as many as

32 Special Rapporteur on the rights to freedoms of peaceful assembly and of association, CN Voule 'States responses to COVID-19 threat should not halt freedoms of assembly and association' April 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E (accessed 22 November 2021).

33 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24689&LangID=E (accessed 22 November 2021).

304 people were killed in November 2019, yet unconfirmed reports totaled the deaths to 1,500 people. The violent crackdown against the protests in Myanmar during 2020 resulted in over 500 people killed by security forces.[34] Accountability for these atrocities has been either slow or non-existent. When not using live ammunition, protestors face risks of being severely injured by the indiscriminate use of less lethal weapons, with reports of protestors and journalists losing sight when impacted with rubber bullets in countries such as Brazil, the United States and Chile.[35] Mass arrests without charge and mistreatment, including rape, are sadly a frequent police tactic to intimidate people and communities into silence. Chillingly, security forces are not the only actors promoting state violence. Paramilitaries forces or counter protestors that act with state support also engage in attacks against demonstrators, further obscuring accountability.

States have for long resorted to criminal law and censorship to suppress dissent, adapting to new contexts and technological innovation to exert control over the free flow of information. In the digital era, these efforts are directed at curtailing the access and use of internet and digital technologies. For example, during the last decade we have seen more and more laws restricting the access and use of digital tools -social media platforms and messaging apps in particular – being adopted and used globally. These laws are often drafted in vague and ill-defined terms, risking arbitrary or discretionary application. They also impose heavy penalties, including prison sentences. Cybercrimes laws in particular, have been invoked to open investigations against demonstrators for allegedly spreading false propaganda or hate speech online.

Internet shutdowns – or the intentional disruption of digital communications rendering them inaccessible to people and communities living in a particular area – are also growing globally, becoming one of the major threats to peaceful protests in the digital era. The #KeepItOn Coalition has recorded at least 768 government-ordered internet disruptions in about 63 countries since 2016, with a total of about 242 internet shutdowns directed at suppressing peaceful assemblies and elections.[36] But it is not only the growth in the number of internet shutdowns during demonstrations that is a concern. Shutdowns are

34 Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'Ending Internet shutdowns: a path forward' 15 June 2021 (A/HRC/47/24/Add.2), para 35.

35 B McDonald 'A bullet to the eye is the price of protesting in Chile' *The New York Times* 19 November 2019 https://www.nytimes.com/2019/11/19/world/americas/chile-protests-eye-injuries.html (accessed 22 November 2021); M Kelly & others 'Partially blinded by police' *The Washington Post* 14 July 2020 https://www.washingtonpost.com/investigations/2020/07/14/george-floyd-protests-police-blinding/ (accessed 22 November 2021).

36 Voule (n 34) para 23.

also increasing in length, scale, and sophistication. The year 2020, for example, saw the longest shutdowns ever registered, with Bangladesh adopting a mobile internet blackout for 355 days in the Cox's bazar refugee camps, in retaliation against Rohingya refugees for staging a peaceful demonstration commemorating the anniversary of the Myanmar military's ethnic cleansing campaign in Rakhine State. More and more governments are implementing harder to detect and targeted network disruptions, such as bandwidth throttling, which deliberately reduces Internet speeds, making the internet effectively unusable for protest activity, preventing the circulation of photos and videos.[37]

Some states have also harnessed digital technologies themselves as tools for curtailing peaceful protests. A discernible trend is the targeting of activists and protest leaders with increasingly sophisticated surveillance tools or spyware capable of hacking into and watching in real-time their communications, location and activities. Detection and attribution of responsibility for this kind digital surveillance is extremely difficult. Thus, the extent of their use by governments around the world is still largely unknown. Well-documented reports by civil society and media, for example, have shed light on states' use of Pegasus spyware suite to place activists under surveillance.[38] The Pegasus spyware suite has been linked to operations against human rights defenders in countries such as Azerbaijan, Bahrain, Hungary, India, Kazakhstan, Mexico, Morocco, Rwanda, Saudi Arabia, Togo and the United Arab Emirates (UAE).[39]

Documented trends in state surveillance also involve the targeting of congregations or movements of people in public spaces, including demonstrations. Uses of biometric and face recognition technology in public spaces is suspected to be increasing in many countries, yet the public is often unaware. By using these technologies, states treat all individuals moving in public spaces as potential suspects, subverting principles by which prior authorisation on specific targets is needed before surveillance.[40] Some governments have extended these surveillance programs on the guise of controlling the pandemic's spread, giving the world a glimpse of what the future might entail if the design, sale and use of these technologies by states are left unregulated.[41]

37 Voule (n 34) paras 25 & 34.

38 https://www.amnesty.org/en/latest/press-release/2021/07/the-pegasus-project/ (accessed 22 November 2021).

39 B Marczak & others (The Citizen Lab) 'Hide and seek: tracking NSO Group's Pegasus Spyware to Operations in 45 countries' 18 September 2018 https://citizenlab.ca/2018/09/hide-and-seek-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/ (accessed 22 November 2021).

40 Voule (n 5) para 56.

41 ICNL, *COVID-19: the surveillance pandemic* https://www.icnl.org/post/analysis/covid-19-the-surveillance-pandemic (accessed 22 November 2021).

International norms and standards

The increased role played by digital technologies in peaceful protests and the rise of state measures limiting the access and use of these technologies by protestors have raised many questions about the extent to which the right of peaceful assembly (article 21 of the International Covenant on Civil and Political Rights (ICCPR)) applies in the digital space. Does the right to peaceful assembly protect 'online assemblies'? Does it protect the use of digital technologies for planning, organising and advertising assemblies or the use of mobile phones and other devices to record assemblies? If so, what distinguishes that protection from that afforded by other related rights such as freedom of expression? What are the state's obligations when it comes to protecting these activities? Do states have an obligation to facilitate 'online assemblies' and access to the internet for assembly purposes? Can states impose restrictions on access to and use of digital technologies to prevent violence during protests? Do participants in peaceful assemblies (online and offline) maintain their right to privacy? What kinds of surveillance might be allowed? Can law enforcement use face recognition surveillance systems during demonstrations? What is the role of private companies that develop, sell or own the technologies being used?

In recent years, international human rights law has strived to provide guidance to governments and other key stakeholders in answering these questions. The following section explores these developments.

A right to online assembly?

Since 2012, the Human Rights Council has repeatedly underscored that the same rights that people have offline must also be protected online.[42] Most importantly, in 2013 the Council explicitly recognised that 'States' obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, apply online as well as offline'.[43] The Council emphasised 'the important role of new information and communications technologies in enabling and facilitating the enjoyment of the rights to freedom of peaceful assembly and of association, and the importance for all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries'.[44]

42 See Human Rights Council resolution 20/8 of 5 July 2012 and resolutions 32/13 of 18 July 2016, and 38/7 of 17 July 2018.
43 Human Rights Council resolution 24/5 of 8 October 2013.
44 As above.

Yet, it was not until 2018, in a resolution on the promotion and protection of human rights in the context of peaceful protests,[45] that the Council acknowledged that traditional conceptions of what constitutes an 'assembly' were being transformed by the realities of the digital age. The Council recognised that,

> although an assembly has generally been understood as a physical gathering of people, human rights protections, including for the rights to freedom of peaceful assembly, of expression and of association, *may apply to analogous interactions taking place online*.[46]

This recognition by the Council was the result of years of advocacy efforts by digital rights activists, human rights experts, individuals from marginalised and at-risk communities and the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, which in previous reports stressed that information and communications technology 'is both a *means* to facilitate fundamental rights offline and a *virtual space* where the rights themselves can be actively exercised'.[47] For many, however, questions still remained: Can gatherings that take place online qualify as an 'assembly' under article 21 of the ICCPR? Or do such activities find better protection under related rights, such as freedom of expression? Does it matter if the space where the gathering occurs is privately owned?

In his 2019 report to the Council, the current Special Rapporteur on the rights to freedom of peaceful assembly and of association (and co-author of this article), Clément Voule, rejected a restrictive interpretation of an 'assembly' as only those that take place in-person or in a physical space. Rather than focusing on complex theoretical discussions like how to define an online gathering, the report looked at practices on the ground and the capabilities being afforded by digital technologies to people seeking to gather. The goal of the report is to provide evidence of how people were innovating and using digital technologies as a space to gather together for specific purposes, including expressing solidarity and protest, thus engaging the right to peaceful assembly. The report concluded that,

> by serving both as tools through which these rights can be exercised 'offline' and as spaces where individuals can actively form online assemblies and associations, digital technologies have vastly expanded the capacities of individuals and civil society groups to organize and mobilize, to advance

45 Human Rights Council Res 38/11 of 16 July 2018.

46 As above, emphasis added.

47 Special Rapporteur on the rights to freedom of peaceful assembly and of association, M Kiai – Addendum – Mission to Oman (A/HRC/29/25/Add.1), para 53 (emphasis added).

human rights and to innovate for social change.[48]

The advantage of focusing on how rights are being exercised in practice rather than on conceptual dilemmas is especially obvious in the context of rapid and unprecedented digital transformation. The digital revolution just began, and its implications on our lives and human rights might not be immediately clear. Thus, it is more useful to look at the dynamic nature of assemblies and recognise the different locations – whether that space is public or private, and physical or virtual – and forms that they take, depending on the levels of internet connectivity in the country, the capabilities of the technology being used and the participants' innovation and tactics. The report recognises that our interpretation of the right to peaceful assembly should be capable of evolving with the historic change under way, in order to ensure the right is protected today and for future generations. As affirmed in the report, 'international law protects the rights of freedom of peaceful assembly and of association, whether exercised in person, or through the technologies of today, or through technologies that will be invented in the future'.[49]

A year later, the COVID-19 pandemic and its accompanying digital acceleration settled any remaining doubts about how to understand 'online assemblies'. Just months after the pandemic was declared by the World Health Organization, the UN unequivocally recognised that the right to peaceful protests covers its 'online' versions. The Human Rights Council 2020 resolution on the promotion and protection of human rights in the context of peaceful protests explicitly acknowledged that digital technologies 'create space for the holding of assemblies online',[50] and the Human Rights Committee's landmark General Comment 37, on the right to peaceful assembly extended protection to 'online assemblies'. Of course, this breakthrough was ably steered by Christof Heyns, who led the drafting of the General Comment.

The Committee provided clear standards protecting this fundamental freedom for years to come. First, that the right of peaceful assembly 'is more than just a manifestation of freedom of expression'.[51] It constitutes an individual right that is exercised collectively, with both associative and expressive elements.[52] Second, the Committee clarifies that 'online assemblies' are protected under 21 of the ICCPR on the right to peaceful assembly: 'Although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, article 21 protection also extends to remote participation in, and

48 Voule (n 5).
49 As above.
50 Human Rights Council Res 44/20.
51 Human Rights Committee General Comment 37, para 99.
52 As above.

organisation of, assemblies, for example online.'[53] Third, that article 21 also protects associated activities of an assembly that happens online or otherwise relies upon digital services. These associated activities include

> actions such as participants' or organizers' mobilization of resources; planning; dissemination of information about an upcoming event; preparation for and travelling to the event; communication between participants leading up to and during the assembly; broadcasting of or from the assembly; and leaving the assembly afterwards.[54]

Fourth, that understandings of the legal framework under article 21 must evolve over time to ensure effective and long-lasting protection of the right to peaceful assembly. As explained by the Committee,

> the way in which assemblies are conducted and their context changes over time. This may in turn affect how they are approached by the authorities. For example, given that emerging communications technologies offer the opportunity to assemble either wholly or partly online and often play an integral role in organizing, participating in and monitoring physical gatherings, interference with such communications can impede assemblies. While surveillance technologies can be used to detect threats of violence and thus to protect the public, they can also infringe on the right to privacy and other rights of participants and bystanders and have a chilling effect. Moreover, there is increased private ownership and other forms of control of publicly accessible spaces and communication platforms. Considerations such as these need to inform a contemporary understanding of the legal framework that article 21 requires.[55]

Finally, that gatherings in private spaces, including privately owned digital platforms, fall within the scope of the right of peaceful assembly. According to the Committee: [56]

> The extent to which restrictions may be imposed on such a gathering depends on considerations such as whether the space is routinely publicly accessible, the nature and extent of the potential interference caused by the gathering with the interests of others with rights in the property, whether those holding rights in the property approve of such use, whether the ownership of the space is contested through the gathering and whether participants have other reasonable means to achieve the purpose of the assembly, in accordance with the sight and sound principle.

53 General Comment 37 (n 51) para 13.
54 General Comment 37 (n 51) para 30.
55 General Comment 37 (n 51) para 10.
56 General Comment 37 (n 51) para 57.

State obligations to facilitate online assemblies

While the right to peaceful assembly is not absolute, restrictions imposed must be provided by law and be necessary 'in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.[57] The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it. If imposed, states must ensure that administrative or judicial review that is prompt, competent, independent and impartial are available.[58]

Internet shutdowns, for example, fail to meet these requirements. They have been found to be in clear violation of international law and cannot be justified in any circumstances.[59] In this regard, the Human Rights Committee indicated that States must not 'block or hinder Internet connectivity in relation to peaceful assemblies.'[60] Restrictions to privacy or the use of encryption or security technologies must also comply with the above-mentioned requirements. The Committee stressed that the participants of an assembly do not lose their right to privacy because the assemblies are carried out in public, and recognised that the right to privacy may be infringed by the use of surveillance technologies.[61] The Human Rights Council affirmed that

> technical solutions to secure and protect the confidentiality of digital communications, including measures for encryption and anonymity, can be important to ensure the enjoyment of human rights, in particular the rights to privacy, to freedom of expression and to freedom of peaceful assembly and association.[62]

States not only have a negative obligation to abstain from unduly interfering with the right of peaceful assembly but also have a positive obligation to facilitate and protect this freedom in accordance with international human rights standards. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association has stressed that this positive obligation includes efforts to ensure connectivity and 'to bridge the digital divides, including the gender digital divide, and to enhance the use of information and communications technology, in order to promote the full enjoyment of human rights for all'.[63]

57 Voule (n 5).
58 HRC Res 44/20.
59 Voule (n 34).
60 General Comment 37 (n 51) para 34.
61 General Comment 37 (n 51) para 62.
62 Human Rights Council Res 38/18.
63 As above.

The obligation to protect also requires that positive measures be taken to prevent actions by non-state actors, including businesses, that could unduly interfere with the rights. The Human Rights Committee affirmed, for example, as follows: 'States should ensure that the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants.'[64] If their right to peaceful assembly online is infringed, the victims should be able to exercise their rights to an effective remedy and obtain redress. In this respect, the Human Rights Council has called on states to 'ensure effective remedies for human rights violations, including those related to the Internet, in accordance with their international obligations'.[65]

Way forward

The challenge ahead is to ensure that the human rights norms and standards for the protection of the right to peaceful assembly online are respected, including by digital technology companies, and to bring to account those responsible for their violation. In these efforts, the Special Rapporteur on the rights to peaceful assembly and of association has placed emphasis on the following: First, he emphasised that closing the digital divides and ensuring universal access to internet goals should be met within the 2030 Agenda. States should promote and facilitate access to digital technologies, and should not put restrictions on their use for the exercise of the rights to freedom of peaceful assembly and of association. Policies and practices should address equal access to the Internet and digital technologies, the affordability, and participation in the digital age for all, so as to bridge the digital divide.

Second, the Special Rapporteur drew attention to the importance of ensuring access to internet and mobile services are maintained at all times, including during times of civil unrest, elections and peaceful protests. This includes both refraining from shutting down, throttling, or blocking the internet, and repealing any laws and policies that allow for internet shutdowns, while enacting legislation prohibiting and punishing these measures.[66] Notable decisions in this regard are those of the ECOWAS Court of Justice regarding the 2017 shutdowns in Togo[67] and the Indian Supreme Court,[68] while addressing the months'

64 General Comment 37 (n 51) para 34.
65 HRC Res 44/20 (n 58).
66 Voule (n 34).
67 ECOWAS Court of Justice *Amnesty International Togo, L'Institut des Medias pour la Democratie et les Droit de L'Homme, la Lantere, Action des Crechretiens L'Abolition de la Torture, Association des Victim De Tortut Au Togo, Ligue des Cosnommateurs de Togo, L'Association Togolaise pour l'Education aux Droits de l'Homme et la Democratie, Houefa Akpeda Kouassi v The Togolese Republic* (25 June 2020).
68 *Anuradha Bhasin v Union of India*, WP (C) 1031/2019 (Supreme Court of India,

long internet shutdown in Kashmir. The Supreme Court of India, for example, held that the indefinite imposition of internet shutdowns is unconstitutional and that internet shutdowns cannot be ordered to suppress dissent.

Third, another of his priorities is ending the securitisation of the internet as the main driver shaping regulation of the digital technologies. This includes revising and amending cybercrime and antiterrorism laws and bringing them into compliance with international human rights norms and standards and promoting and protecting strong encryption. State should also ensure that any new regulation place human rights front and center.

Fourth, he dealt with reigning in the surveillance industry. This includes establishing clear and transparent rules for the development, sale and use of surveillance technologies, including spyware and biometric surveillance technologies. In the meantime, states have to move forward with an immediate moratorium on the export, sale, transfer and use of surveillance technology. An important development in this is field is the decision of the US government to add Pegasus spyware maker NSO Group to the entity list of Malicious Spyware, recognising that the company 'developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers'.[69]

Fifth, the Special Rapporteur placed emphasis on establishing mandatory due diligence requirements. States have to move decisively to **a**dopting and enforce laws and policies creating mandatory requirements for digital technology companies to exercise due diligence in addressing any human rights impacts, including on the right to peaceful assembly, of their business services and products.

Last, it is of particular importance to the Special Rapporteur that those responsible be held accountable. National and international judicial mechanisms must hold states and private sector accountable for violations of human rights online, including the right to peaceful assembly online.

2020).

69 US Department of Commerce 'Commerce adds NSO group and other foreign companies to entity list for malicious cyber activities' 3 November 2021 https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list (accessed 22 November 2021).

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‘Deal with me, here I stand!’: presence, participation and the equal protection of online assemblies

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Introduction[1]

‘Deal with me, here I stand!’ were words that Christof Heyns used to convey the drama inherent in many forms of assembly and protest. Central to so much of Christof’s work – including his doctoral research on civil disobedience in South Africa and his captivation with the example of Mahatma Gandhi in struggles against injustice and colonialism – was the sense of urgency, even of crisis, that such principled action can usher forth against the seeming unassailability of state power in all its forms.

Given that social action is today increasingly mediated by information and communication technologies (ICTs), this chapter reflects upon what it means to stand, or to take a stand, in a digitally mediated world. In particular, the chapter overviews some of the ideas that fed into Christof’s ground-breaking work as the United Nations (UN) Human Rights Committee’s Rapporteur in drafting General Comment 37 on the right of peaceful assembly.

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1 This chapter draws extensively on a submission made to the UN Human Rights Committee in February 2020 written collectively by the authors and Suzanne Dixon and Jennifer Young (University of East Anglia) and Eleanor Salter, Katja Achermann, Camille Barras, Allysa Czerwinsky, Bronwen Mehta and Muznah Siddiqui (Centre of Governance and Human Rights, University of Cambridge): Hamilton and others ‘The Right of Peaceful Assembly in Online Spaces: A Comment on the Revised Draft General Comment No. 37’ (2020) https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/ACADEMIA-Hamilton-Dixon-Young-McPherson-Srinivasan-Elean.docx (accessed 7 January 2022).

Premised on a recognition of the blended and hybrid nature of online and offline activity, the General Comment ultimately recognised that the right of peaceful assembly enshrined in article 21 of the International Covenant on Civil and Political Rights (ICCPR) should not only protect gatherings in physical spaces (whether publicly or privately owned), but should also afford protection to assemblies in online, or digitally mediated, spaces.[2]

This chapter outlines the journey that led to this highly significant advance. It charts the model of consultation and engagement that Christof pioneered during his human rights work with the UN, and which characterised the drafting of the General Comment. It then flags two particularly salient aspects of the right of assembly in online spaces, recognising that these remain highly relevant to the future development and interpretation of the Covenant in this context – first, threshold questions relating to the notions of presence and participation, and second, challenges relating to the protection of assemblies deriving from the particular logics of online spaces and the corresponding threats that may inhibit or prevent assemblies from materialising, for some groups more than others. We turn, in closing, to one particular hallmark of Christof's enduring legacy – his indefatigable commitment to collaborative and inclusive human rights work.

Online assemblies and the drafting of General Comment 37

In October 2018, the UN Human Rights Committee announced its decision to focus its next General Comment on the right of peaceful assembly under article 21 of the Covenant – something that had long been advocated.[3] Christof was appointed as the Committee's Rapporteur to lead the drafting process. Over the course of the process, there were three published iterations of the text – the first draft published in June 2019,[4] the revised draft later that year (as adopted by the Committee

2 UN Doc CCPR/C/GC/37 'General Comment No 37 on the right of peaceful assembly (article 21)' 17 September 2020 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=en (accessed 7 January 2022): para 6 – 'Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof'; para 10 – 'given that emerging communications technologies offer the opportunity to assemble either wholly or partly online …'; and para 13 – 'Although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, article 21 protection also extends to remote participation in, and organization of, assemblies, for example online.'

3 I Jaques, 'Peaceful protest: a cornerstone of democracy: how to address the challenges?' (Wilton Park Conference WP1154, 26-28 January 2012) 2, para 5.

4 'General Comment No 37 Article 21: right of peaceful assembly. Draft prepared by the Rapporteur, Christof Heyns' https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/DraftGC37.docx (accessed 7 January 2022).

following its First Reading in November 2019),[5] and the final text adopted in July 2020.[6] Viewed in isolation, these documents belie the painstaking process through which the Comment was crafted, with every word and sentence dissected and debated.

Since global headlines are so often dominated by the violent suppression of peaceful demonstrations, it seemed somehow incongruous that the Human Rights Committee had never before attempted to elaborate upon the meaning of this foundational democratic right. Notably, this pattern of protests and their suppression continued as the Committee worked to finalise the text of the General Comment in 2020 – even against the backdrop of the COVID-19 pandemic. The Carnegie Endowment for International Peace's Global Protest Tracker, for example, counted one protest every four days in April 2020 and found that for most of the year the monthly number of protests in 2020 exceeded those in 2019. Protests burgeoned across the globe, from Lebanon, to Chile, to Hong Kong, to Iran, and addressed injustices such as those related to elections, corruption and the pandemic itself.[7] Another major theme of protests world-wide was police brutality. Documented instances of police violence fuelled the Black Lives Matter movement, for example, which coalesced in many and various assemblies, including those linked by the #BLM hashtag and marches on the streets.

In the years leading up to General Comment 37, manifestations of assembly in predominantly-online and hybrid physical-digital situations also multiplied. So did the challenges of assembling online, driven in part by the intensification of how assemblies were being technologically mediated across time and place, the proliferation of assemblies in privately-owned, profit-driven spaces such as social media platforms, and the permanence of digital traces with their concomitant risks for participants.[8] Gatherings that were either partly or wholly online risked not being recognised by states either as assemblies or as activities that were integral to assembling and thus deserving of protection under article 21. Examples of this lack of recognition included the banning of

5 'General Comment No 37 Article 21: right of peaceful assembly. Revised draft prepared by the Rapporteur, Mr Christof Heyns' as adopted on First Reading during the 127th Session of the Human Rights Committee (14 October – 8 November 2019) https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/ENGLISH_GC37.docx (accessed 7 January 2022).

6 UN Doc CCPR/C/GC/37 (n 2).

7 B Press & T Carothers 'Worldwide protests in 2020: a year in review' Carnegie Endowment for International Peace: 21 December 2020 https://carnegieendowment.org/2020/12/21/worldwide-protests-in-2020-year-in-review-pub-83445 (accessed 7 January 2022).

8 E McPherson and others 'Right to online assembly research pack' (Centre of Governance and Human Rights, University of Cambridge: November 2019) 26 https://www.cghr.polis.cam.ac.uk/system/files/documents/right-to-online-assembly.pdf (accessed 7 January 2022).

the video link to the Turkish President Erdoğan at a rally in Germany in 2016[9] and the fining of Singaporean activist Jolovan Wham for holding an unauthorised indoor assembly featuring a Skype call from Hong Kong activist Joshua Wong in 2016.[10]

In addition to the urgency of understanding these novel challenges facing assemblies, there was a need in intellectual terms to map the autonomous sphere of the right of peaceful assembly and to distinguish it from the cognate rights of expression and of association. A number of scholars had sought to impress the importance of articulating what is valuable and unique about assembly without falling back on its purported expressiveness.[11] In other words, the right of peaceful assembly should not merely be regarded as coextensive with, let alone be subordinated to, the rights to freedom of expression or association. The right of peaceful assembly protects a form of social action of distinctive importance to how citizens participate in society and politics. While assemblies may sometimes have an avowedly expressive purpose and inevitably involve associating with others (with varying degrees of proximity and organisation), an assembly might not aim at expression and may involve amorphous and transient gatherings (absent the characteristics of more formally constituted groups). The fluid boundaries between these interdependent rights are especially important to recognise in the context of assemblies mediated through digital means.

In terms of normative standard-setting, therefore, a General Comment on article 21 had much to offer in terms of guidance to individual complainants. Additionally, it would help bring coherence and consistency to the Committee's jurisprudence and Concluding Observations on state party reports. Finally, the General Comment would be a resource for regional and state actors of various kinds, giving them access to clear and authoritative guidance on their obligations. The likely longevity of any adopted text also meant that the General Comment, whose drafting Christof was leading, needed somehow to be reasonably future-proof. In this regard, as Manfred Nowak has noted,

9 'Turkey condemns German court for banning Erdoğan video link to rally' *The Guardian* 31 July 2016 https://www.theguardian.com/world/2016/jul/31/erdogan-supporters-cologne-germany-turkish-rally (accessed 7 January 2022).

10 'Singapore charges activist for holding public assemblies, including a Skype talk with Joshua Wong' *Hong Kong Free Press* 28 November 2017 https://www.hongkongfp.com/2017/11/28/singapore-charges-activist-for-holding-public-assemblies-including-a-skype-talk-with-joshua-wong/ (accessed 7 January 2022).

11 M Hamilton 'The meaning and scope of "assembly" in international human rights law' (2020) 69 *International & Comparative Law Quarterly* 521 529-30 citing CE Baker 'Scope of the first amendment freedom of speech' (1978) 25 *UCLA Law Review* 1011 1030-1; JD Inazu 'The forgotten freedom of assembly' (2010) 84 *Tulane Law Review* 567; A Bhagwat 'Assembly resurrected' (2012) 91 *Texas Law Review* 364; A Bhagwat 'Liberty's refuge, or the refuge of scoundrels? The limits of the right of assembly' (2012) 89 *Washington University Law Review* 1383-84.

an evolutive interpretation of the term 'assembly', in keeping with the interpretative approach set out in article 31 of the Vienna Convention on the Law of Treaties, would have entailed that it '…be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional right'.[12]

In this regard, the Human Rights Committee had previously recognised the benefits of adopting an open and inclusive approach to determining the scope of rights within the Covenant. A decision, for example, was taken to not expressly include particular forms of expression in the text of General Comment 34 'on the understanding that the list of forms of expression must always be an open one …'[13] In like manner, the European Court of Human Rights had sought to 'avert the risk of a restrictive interpretation' of the right to freedom of peaceful assembly, refraining 'from formulating the notion of an assembly … or exhaustively listing the criteria which would define it …'[14]

Some commentators urged the Committee to follow this open-ended approach and to exercise caution in recognising a right to assemble online:

> [F]urther thought is needed before the Committee concludes that Article 21 is the proper home for this topic, and much more work is needed before the Committee could articulate rules that govern state behavior in regulating an "assembly" that takes place entirely online … [T]he Committee should not be afraid to adopt a General Comment that explicitly leaves an important future dimension of its subject open.[15]

Over the course of the drafting process – and certainly at its outset – those involved in the discussion had divergent views about whether or not digital platforms, devices and infrastructures could or should be conceived as spaces for assemblies (rather than merely as a tool for organising assemblies in physical spaces). Christof himself, in his former role as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a joint report in 2016 with Maina Kiai (then UN Special Rapporteur on the rights to freedom of peaceful assembly and of association) in which they rather guardedly suggested 'that human rights protections, including for freedom of assembly, may apply to

12 WA Schabas *UN International Covenant on Civil and Political Rights: Nowak's CCPR commentary* (NP Engel 2019) 484, para 5.

13 M O'Flaherty 'Freedom of expression: article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627 648.

14 *Navalny v Russia* ECHR [GC] (2018) 15 November 2018, para 98.

15 G Neuman 'The draft General Comment on freedom of assembly: might less be more?' *Just Security* 4 February 2020 https://www.justsecurity.org/68465/the-draft-general-comment-on-freedom-of-assembly-might-less-be-more/ (accessed 7 January 2022).

analogous interactions taking place online'.[16] Similar phrasing was then used in the revised draft text of General Comment 37 adopted by the Committee in the First Reading of the General Comment in November 2019:

> ... although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, comparable human rights protections also apply to acts of collective expression through digital means, for example online.[17]

These cautious approaches reflect questions over what makes digitally mediated activity comparable or analogous to physical assemblies offline, and thus protected by the right of peaceful assembly, and indeed what the consequences of such a direct comparison might be. The answers are far from straightforward.

One could certainly begin to draw out the analogy in terms of particular facets of an assembly, but not without challenges. For example, the conceptualisation of 'peacefulness' or the lack thereof in the context of online spaces may implicate different modes and forms of behaviour (including trolling, hacktivism, DoS/DDoS attacks and other acts of service disruption that target – for example – corporate, government or military websites). Some such activities might normally fall outside the protective scope of either expression or assembly, but, to the extent that they involve intentional gatherings, may on occasion be viewed as analogous to sit-ins and occupations. As such, it might be argued that the attendant disruption of internet traffic (whether this is to flows of information, data or finance) ought to be afforded some level of toleration and should not be equated with non-peacefulness (such as would exclude it from the scope of the right).[18]

Despite this cautious approach to comparison in academic and policy circles, we often hear from politicians, as Jan-Werner Müller has observed, that 'social media platforms are increasingly serving as today's town squares'.[19] These rather tenuous assertions of normative equivalency between offline and online domains lack persuasive force – a point recently well-made by Dafna Dror-Shpoliansky and Yuval Shany.[20] Although online assemblies share many characteristics of face-

16 UN Doc A/HRC/31/66, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 February 2016, para 10 (our emphasis).

17 General Comment 37, Revised draft (n 5) para 15.

18 A Calabrese 'Virtual nonviolence? Civil disobedience and political violence in the information age' (2004) 6(5) *Info* 326.

19 JW Müller 'What spaces does democracy need?' (2019) 102 (2-3) *Soundings: An Interdisciplinary Journal 203 204.*

20 D Dror-Shpoliansky & Y Shany 'It's the end of the (offline) world as we know it: from human rights to digital human rights – a proposed typology' (2020) *Hebrew University of Jerusalem Legal Research Paper*.

to-face assemblies, these may be altered by digital mediation across place and time. For example, digital mediation may afford more and/or different distortions, forms of surveillance, discrimination and chilling effects; less and/or different cues to support the interpretation of communication within the assembly; and more and/or different external logics that inflect the nature of the assembly in question, particularly commercial logics governing the often privately-owned spaces of online assemblies. Unsupported assertions of equivalency can operate to obscure distinctive attributes and particular forms of interference and thus dilute protections for both.

A more analytical approach – one that doesn't start from a position of assumed equivalency – takes as fact that assemblies can occur online and then asks to what extent, if at all, do the definitions, doctrines and duties that apply in respect of face-to-face assemblies translate to forms of assembly online? Such an approach recognises that to insist upon the 'analogous' or 'comparable' nature of online and offline assemblies risks a dangerous fungibility of these different kinds of interaction and may unduly suggest that one can easily function as a substitute for the other. This could serve to encourage a pernicious extension of 'alternative channels' reasoning by state authorities or courts whereby restrictions on an in-person demonstration could conceivably pass constitutional muster if the authorities were able to point to an 'equivalent', 'analogous' space online (an alternative channel) where the assembly could be directed to take place instead.[21]

With risks such as these in mind, several human rights actors, institutions and civil society organisations advocated for stronger recognition of a right of peaceful assembly online – a point raised in many of the submissions to the Committee in response to the revised draft text of the General Comment.[22] Moreover, the global events of 2020 brought dramatic developments in both the context and the content of assemblies, and abruptly made the recognition of assemblies

21 Wording to this effect had been included in the Revised Draft of General Comment 37 (n 5) para 15: '… the fact that people can communicate online should not be used as a ground for restrictions on in-person assemblies.' Ultimately, this wording was omitted from the final adopted text (para 13).

22 For example, the submissions https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx (accessed 7 January 2022) by: Article 19: 'the scope of the right of peaceful assembly should not be unnecessarily tethered to limited understandings of physical, public space'; the International Center for Not-for-Profit Law (ICNL): 'use of the word "comparable" suggests that gatherings through digital means are not protected by art. 21, and furthermore are not protected to the same extent as physical gatherings, without clarifying the source and scope of any applicable protections.'; and Amnesty International: 'we caution against referring to the protection of such digital assemblies as "comparable human rights protections." … [W]e fear the present form of words … could be interpreted to mean that comparable protection is provided by other rights standards, and not by article 21. We take the view that in order to be "future proof", the General Comment should be clear that digital assemblies may be protected by the right to freedom of peaceful assembly itself.'

in online or digitally mediated spaces more critical than ever before. The COVID-19 pandemic forcibly limited so many usual opportunities for in-person assembly, whether through stay-at-home orders, restrictions on the number of people that could gather together or closures of physical places. For so many of us, if we wished to assemble, it had to be online – or face the new risks of physical assemblies arising from disease and emergency regulations. Such arguments were also obtaining traction in other quarters of the Human Rights Council.[23] There was thus a historic opportunity, and palpable necessity, for General Comment 37 to chart a course for addressing the right of peaceful assembly online. The manner in which Christof took this task on, exemplifying his ethical commitments and professional approach to normative human rights work, deserves further elaboration.

A model drafting process

In the drafting of any normative text addressing complex matters of global significance, the task of capturing this complexity whilst also rendering the document intelligible (and within UN word count limitations) is hugely challenging. Particularly difficult are the imperatives of inclusively representing diverse stakeholders, including civil society actors, and the need to take seriously the views of state parties (whose conduct would inevitably be implicated by the terms of the General Comment).

In late 2017, the European Center for Not-for-Profit Law (ECNL) designed an advocacy strategy with the goal of persuading the Human Rights Committee to draft a General Comment on the right of peaceful assembly.[24] This work involved analysing the Committee's jurisprudence and Concluding Observations where these touched upon the right of peaceful assembly, mapping key principles that were already well-established as well as important tensions and gaps in the Committee's prior consideration of this right.[25] With the support of the Office of the High Commissioner for Human Rights, ECNL convened a meeting in Geneva with Committee members, its Civic Space Initiative partners and the UN Special Rapporteur on freedom of assembly and association

23 Eg UN Doc A/HRC/44/24 'Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests: Report of the United Nations High Commissioner for Human Rights' 24 June 2020, paras 13 and 51. See more generally the UN Resource Hub for Human Rights and Digital Technology: https://www.digitalhub.ohchr.org/ (accessed 7 January 2022).

24 European Center For Not-For-Profit Law (ECNL) 'The path towards General Comment No 37 on article 21, ICCPR (right of peaceful assembly): A role model for the future' https://ecnl.org/sites/default/files/2020-09/briefer-and-chronology.pdf (accessed 7 January 2022).

25 M Hamilton 'Towards General Comment 37 on article 21 ICCPR' (2019) https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/MichaelHamilton.pdf (accessed 7 January 2022).

at which it presented a draft of its advocacy report, seeking to evidence the important contribution that a General Comment on article 21 of the ICCPR could make.

Perhaps the Human Rights Committee had already decided, perhaps such advocacy helped the Committee reach its decision – but the Committee ultimately agreed that it was time to draft a General Comment on article 21 and, moreover, that Christof should be at the helm. ECNL offered to provide whatever logistical support Christof felt he could utilise without compromising in any way the integrity and autonomy of the Committee's drafting process. Christof deployed his own tested methodology to do this. One might say – as Christof's longstanding collaborator throughout his work with the UN, Thomas Probert, has said – that this methodology was itself an assembly of sorts. The authors were fortunate to be involved in this process with ECNL – focusing in particular on how best a General Comment might address the question of digitally mediated assemblies. A student group (with students from Cambridge University and the University of East Anglia) was formed and the work coalesced around an expert workshop that we collaboratively convened at the University of Cambridge in December 2019. Here we wish to make special mention of the student group which exemplified the inclusive way that Christof assembled views and experiences around the topic of the freedom of assembly online.

Involvement of the student group

During his time as Special Rapporteur on extrajudicial, summary or arbitrary executions and as a member of the UN's Human Rights Committee, Christof engaged the student group model, made up of student researchers led by academics, on a number of occasions. Christof would first liaise with lead academics, who would then put out a call for student volunteers – the more disciplines and backgrounds represented, the better. The group would meet regularly with the aim of producing a research pack as a backgrounder for an expert meeting. In the case of the right of peaceful assembly online, the three of us were delighted to work with our excellent student research group, who provided clear insights into a nebulous and challenging topic. The team was composed of postgraduates across a range of diverse fields, departments and our two universities. Led skillfully by Eleanor Salter (Sociology, Cambridge), the team comprised Katja Achermann (Law, Cambridge), Camille Barras (POLIS, Cambridge), Allysa Czerwinsky (Criminology, Cambridge), Bronwen Mehta (POLIS, Cambridge), Muznah Siddiqui (POLIS, Cambridge), Suzanne Dixon (Law, University of East Anglia) and Jennifer Young (Law, University of East Anglia). We convened the expert workshop across Cambridge's Centre of Governance

and Human Rights, the University of East Anglia Law School and the European Center for Not-for-Profit Law.

Meeting often and working together closely, the student research group produced a detailed Research Pack in a matter of weeks. The interdisciplinary spirit of the students' collaboration with us was invaluable in distilling the many debates on the right of peaceful assembly online – be they legal, technical, political or sociological. For all of us, this research was something special, as we knew it was going to feed into a formative policy-making process that would shape how the right of assembly is understood and protected globally for the foreseeable future. It is not often that members of the academy, whether scholars or students, can so directly connect their work to processes supporting justice and social change. We marveled often at our inclusion in this project; yet, while it was unique for us, it was not at all unusual for Christof but rather typical of his generosity and inclusivity. As our student leader, Eleanor, put it so well in her remembrance of Christof:

> In the brief time that I spent with Christof at the workshop last year, I found him to be an incredibly kind man. Although we had assembled a high-level meeting to discuss freedom of assembly online with experts across the field, he treated all of us alike – whether old friend, professional specialist or student. The equal worth he attributed to each of us was accompanied by a consideration of all ideas put before him, an openness that is rare and highly valuable.[26]

To Eleanor's point, Christof's inclusive spirit meant that it was a real pleasure to work with him, both in the thought-provoking sense and in the fun sense. It also fueled his work, in that his thinking and ideas – on General Comment 37 as on so many of his projects – were all the better for his wide and egalitarian consultation and his consideration and incorporation of the experiences and views of others. Our student group's work on online assemblies benefited from this methodology of assembly as well, and we distilled the research pack into our own comment on General Comment 37, which formed part of the larger Human Rights Committee consultation and from which several ideas in this text are drawn.[27]

Across the wider group working on the right of assembly online, thinking developed in relation to these new and dynamic forms of collective action and the corresponding imperative of anchoring their protection within the existing matrix of human rights protections. Indeed, Christof himself, with characteristic humility, recalled just shortly after the adoption of the General Comment in July 2020:

26 Centre of Governance and Human Rights 'In memory of Professor Christof Heyns (1959-2021)' 31 March 2021 https://www.cghr.polis.cam.ac.uk/news/memory-professor-christof-heyns-1959-2021 (accessed 9 January 2022).

27 McPherson and others (n 8); Hamilton and others (n 1).

> People came to Cambridge, and we then addressed the question whether peaceful assemblies should also cover online assemblies as well … I can say for myself, initially, I was skeptical about it. But as we went further, I became more and more convinced that many of the interactions that previously were held in person, now take place online. And one would be missing a very large part if one does not recognize that peaceful assemblies can take place online as well.[28]

In conducting research on the question of whether the right of peaceful assembly should apply to online and digitally mediated spaces, the research team organised its work and outputs around a number of key questions. Two of the most important questions are given focus in the remainder of this chapter: First, in the section immediately below, we consider how notions of presence and participation apply in online spaces. Second, in section 4, we explore what kinds of protections of the right are implied by the logics of assemblies in often-privatised online spaces and how these logics impact groups unequally. Before proceeding, it is worth simply noting several of the other questions also addressed by the research: How do online spaces relate to the distinct purpose of what this right protects – namely, 'an individual right that is exercised collectively', distinct from expression and association? How do assumptions around temporariness and the contemporaneousness of assembly relate to online spaces where communications are often asynchronous yet also leave permanent digital traces? And how does the conceptualisation of 'peacefulness' translate in the context of online spaces? Detailed discussion of all the questions is contained in the research pack produced by the student team, while, in this chapter, we turn to presence and participation next.[29]

Presence and participation in assemblies online

Digital technologies have generated new spaces and ways of taking a stand, often enabling greater accessibility and ease of action.[30] The range of information and communication technologies is evolving rapidly, so any consideration of these is best informed not by what these technologies are in terms of specific characteristics, but what they do, broadly understood as digital mediation across place and time, as well as the effects that this mediation has and the uses people make of these technologies.

28 'Interview with Christof Heyns by Elizabeth 'Betsy' Andersen, Executive Director of the World Justice Project, *Just Security* (29 July 2020): https://www.justsecurity.org/71736/interview-with-christof-heyns-unhrc-general-comment-37-on-the-right-of-peaceful-assembly/(accessed 7 January 2021).

29 McPherson and others (n 8).

30 WL Bennett & A Segerberg 'The logic of connective action' (2012) 15 *Information, Communication & Society* 5.

Intuitively, presence is a necessary and vital practice of assembling. An assembly requires the presence of 'a number of individuals'.[31] That said, presence is not the same as participation, and the distinction is important. In most elaborations of the right to peaceful assembly, the protected individuals are referred to as participants. However, the terms 'participant' and 'participation' lack clarity[32] and allow for different degrees of involvement, activity and commitment. This undoubtedly has implications for understanding what actions are protected both online and in-person, and indeed, in terms of distinguishing between whether the rights of assembly and/or expression are engaged on the particular facts of a case.

For example, a journalist, observer or bystander may be present at an assembly without being a participant in it. In this light (and see further the discussion of Christof's individual opinion in the case of Tikhonov v Kazakhstan below) participation can be regarded as the sine qua non for the engagement of the right of peaceful assembly (whereas presence is not). But even if it is inconclusive as to the constitution of an assembly, presence is nonetheless a vital precursor to participation – it constitutes the material act of taking a stand.

Digital mediation obfuscates whether an individual is actively present and if so, whether they might be considered to be participating. Given, however, that the protection afforded to face-to-face gatherings is not contingent on the level of commitment that individual participants may demonstrate, it would be difficult to establish a higher threshold for participation in an assembly online.

Questions arise as to whether participation is constituted by, for example, the use of hashtags, registering for or joining online gatherings or meetings (which may or may not convey a message to an external audience), liking an online page or being a non-active member of an online group. The right to freedom of expression is evidently in play, but should the definition of participation in an assembly be expanded to include, for example, Facebook page likes or adopting profile badges or hashtags? Defining thresholds on what constitutes participation appears fraught.

Due to the affordances of digital technologies, participants are distributed across time and space, leading to difficulty in determining both the duration and the synchronicity of participation (with further implications for our understanding of presence). For example, participants can post to a social media platform in seconds, and it is not possible, from the perspective of a viewer of the posts (though it may

31 OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly* (2nd edition, 2010) 15, paras 1.2 and 29.

32 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule (17 May 2019), A/HRC/41/41.

well be possible from inside the social media company), to be sure that more than one person is ever present in a social media thread at the same time. From the individual's perspective, however, the intention to assemble in a proximate temporality, in a proximate place and with a proximate purpose may nevertheless be strong.

Given these context-specific idiosyncrasies, where exactly the minimum bar for participation should be drawn could not have been conclusively resolved in a document such as General Comment 37. Participation in assemblies is likely to take new and different forms using digital means, requiring an expansive interpretation of individual acts amounting to participation. But setting aside these threshold questions of presence and participation, the crucial point is this. Many of the words we use to describe online assemblies misleadingly connote a dichotomy between online and offline spaces, rather than the hybridity in which these spaces are inhabited and used. These words, such as virtual and cyberspace, also connote a disembodiment of the assembly that can have harmful effects through disassociating it from the bodies and materials involved in the assembly. This connotation of immateriality can obscure the very real physical risks to those participating in online assemblies, as well as the ways in which assemblies might be interfered with, such as through the blocking or destruction of internet infrastructure. Julie Cohen, for example, has argued that to regard cyberspace as somehow existing apart from real space 'denies the embodied spatiality of cyberspace users, who are situated in both spaces at once'. Such false dichotomies also overlook 'the complex interplay between real-space geographies of power and their cyberspace equivalents'.[33] Cohen's emphasis on embodied experiences online suggests alignment with Judith Butler's performative theory of assembly since Butler similarly recognises that 'the body is not isolated from all those conditions, technologies, and life processes that make it possible'.[34] In this regard, Butler emphasises the performative value of assemblies – casting the right as a 'right to appear, one that asserts and instates the body in the midst of the political field, and … delivers a bodily demand for a more liveable set of economic, social, and political conditions'.[35]

General Comment 37, because of Christof's leadership, implicitly recognises the value of these material aspects of being present, of occupying space, of taking a stand irrespective of whether the places in which we assemble are online or offline and increasingly likely to be

33 J Cohen 'Cyberspace as/and space' (2007) 107 *Columbia Law Rev* 215; Z Papacharissi 'Affective publics and structures of storytelling sentiment events and mediality' (2016) 19(3) *Information, Communication & Society* 308 310; JD Inazu 'Virtual assembly' (2013) 98 *Cornell Law Review* 1093 1112.

34 J Butler *Notes toward a performative theory of assembly* (Harvard University Press 2015) 129, 131-2.

35 Butler (n 34) 11.

both. Indeed, the places in which we assemble (by choice or otherwise) reveal something about the relationship between these spaces and the kinds of assembly they elicit and make possible. In the next section we therefore turn to consider the particular logics that characterise these online spaces.

The challenges of protection given the particular logics of online spaces

All spaces are imbued with particular logics that reflect and give effect to functional priorities (such as flow and passage, quietude or commercial profitability). Such logics also often operate to exclude unruly or undesirable uses (vagrancy, revelry, protest etc) and to incentivise narrowly 'beneficial' purposes (consumption, movement, recreation, education, debate etc.).[36] The regulation of assemblies cannot afford merely to reinforce these inherent logics, particularly where they might undermine the right to assemble. Moreover, the future interpretation of article 21 in respect of online assemblies ought to take account of these particular logics, including the opportunities that digitally-mediated spaces allow for the entrance of state logics such as surveillance as well as – crucially – commercial, profit-driven logics that shape many privately-owned digital technologies.

In digitally mediated spaces, these logics can interfere with the nature and modalities of assembly, including at the stages of the production, transmission and reception of any communicative elements (whether expression or interaction). For example, at the production stage, the profit logic rewards particular types of communication with algorithmically-determined or paid-for visibility, and some of these communications create a context hostile to particular groups.[37] At the transmission stage, social media newsfeed algorithms determine what is visible to whom – and who and what are invisible. At the reception stage, the model of surveillance capitalism also sets the stage for easy eavesdropping by external parties, both commercial and governmental.[38] Consequently, profit and state logics can distort or inhibit online assemblies in at least two ways: restrictions on access and chilling effects on potential participants, experienced unequally.

36 H Fenwick & M Hamilton 'Freedom of protest and assembly' in H Fenwick & R Edwards (eds) *Fenwick on civil liberties* (Routledge 2017) 554 at 601.

37 SU Noble, *Algorithms of oppression* (NYU Press 2018).

38 S Zuboff *Surveillance capitalism* (Profile Books 2019).

Online assemblies face particular restrictions on access

Access to affordable and independent internet services is not only important for the exercise of the right of peaceful assembly online, but also considerably facilitates the exercise of this right offline. As Frank La Rue, the former UN Special Rapporteur on the right to freedom of expression, has observed, the internet has become 'an indispensable tool for full participation in political, cultural, social and economic life'.[39] And while the Rapporteur's call for internet access to be maintained even in times of political unrest was made with respect to freedom of expression, it is thus arguably equally pertinent with regard to the right of peaceful assembly.[40] In past instances, states have restricted access to online spaces through various mechanisms, and the logics and design of privately-owned commercial technologies have sometimes facilitated this.

One example is the use of internet switch-offs, such as in Egypt, Libya and Syria in 2011[41] and, more recently, in Sudan in 2021 and Kazakhstan in early 2022.[42] It has been argued that 'using communications "kill switches" (that is, shutting down entire parts of communication systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law'.[43] Other examples include the blocking of websites or of some social media platforms in favour of others that can be more easily controlled by the state, such as China's state-licensed and censored platforms.[44]

39 UNGA Doc A/66/290 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (10 August 2011), para 63; the UN Human Rights Council since adopted a non-binding resolution condemning the states that intentionally disrupt citizens' access to the internet: UN Doc A/HRC/32/L.20 Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (27 June 2016); see also D PoKempner (2013) 'Cyberspace and State Obligations in the Area of Human Rights' in K Ziolkowski (ed) *Peacetime regime for state activities in cyberspace: international law, international relations and diplomacy* (NATO OCCD COE: Tallinn: 2013) who argues that access to information online is a necessary condition for the fulfilment of many human rights and should thus itself be considered a human right.

40 UNGA Doc A HRC/17/27 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (16 May 2011) paras 78-9.

41 See A McLaughlin 'Egypt's big internet disconnect' *The Guardian* 31 January 2011 https://www.theguardian.com/commentisfree/2011/jan/31/egypt-internet-uncensored-cutoff-disconnect; P Beaumont 'The truth about Twitter, Facebook and the uprisings in the Arab world' *The Guardian* 25 February 2011 http://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya (accessed 7 January 2022).

42 https://twitter.com/netblocks/status/1478694849440358400 (accessed 7 January 2022).

43 UN Special Rapporteur on freedom of opinion and expression et al 'Joint Declaration on Freedom of Expression and Access to Information' (1 June 2011) https://www.osce.org/fom/78309?download=true (accessed 7 January 2022).

44 J Zeng, C Chan & K Fu 'How social media construct "truth" around crisis events:

Another example relates to hashtag activism, which has alternatively been understood as a manifestation of the freedom of expression or the freedom of assembly. Interference with hashtag activism might include flooding a hashtag with tweets generated by bots – which may (or may not) have happened in the 2014 trending of the #YaMeCansé hashtag in Mexico. This bot interference makes it difficult for participants to sustain interactions with each other. It may also trigger the hashtag's automatic suppression – not, as intended, to the detriment of the bot deployers but rather to the detriment of those expressing or assembling via the hashtag.[45]

A more recent example of how logics of online spaces shape access to assembly arises in Facebook's vision of the future of online interaction. In 2021, Facebook CEO Mark Zuckerberg made the headline-grabbing announcement that the company was rebranding as Meta. Meta's vision is focused on the 'next evolution of social connection', which the company refers to as the 'metaverse'. The metaverse is made up of virtual reality- and augmented reality-enabled '3D spaces [… that] will let you socialize, learn, collaborate and play in ways that go beyond what we can imagine'.[46] As Zuckerberg introduced his company's conceptualisation of the metaverse, he talked about how its 'defining quality' would be:

> … a feeling of presence – like you are right there with another person or in another place. Feeling truly present with another person is the ultimate dream of social technology.[47]

The extensive video introduction to Meta sidesteps politics in its enumeration of the metaverse's utilities, focusing instead on almost anything but, or what it calls 'almost anything you can imagine – get together with friends and family, work, learn, play, shop, create'.[48] The questions the metaverse raises, however, for the right to assemble peacefully, which is so often exercised in the name of politics, are apparent. Beyond what it means to be present at an assembly in the metaverse, we have to wonder about who will govern the metaverse, according to what standards, and when so much of it is private rather than public. The emphasis on private rather than public, and commerce rather than the commons, is apparent down to the places that can be

Weibo's rumor management strategies after the 2015 Tianjin blasts' 9(3) *Policy & Internet* 297.

45 L Daniel 'Rise of the peñabots' *Data & Society: Points* 25 February 2016 https://points.datasociety.net/rise-of-the-penabots-d35f9fe12d67 (accessed 7 January 2022).

46 *Meta* 'Welcome to Meta' 28 October 2021 https://about.facebook.com/meta (accessed 7 January 2022).

47 M Zuckerberg, 'Founder's Letter, 2021' *Meta* (blog) 28 October 2021. https://about.fb.com/news/2021/10/founders-letter/ (accessed 7 January 2022).

48 *Meta* (n 46).

created within the metaverse, which, according to the launch materials, seem to currently centre on private spaces for consuming and working: 'Horizon Home' and 'Horizon Workrooms'; spaces that are more public and non-profit, available through 'Horizon Worlds', are, at the time of writing, limited to gatherings of 20 people or less and only available in the US and Canada.[49] As mentioned above, an assembly is made up of both participants and place, and these brief examples demonstrate how much access to assembly can be curtailed by the logics of state and corporate actors who govern these spaces.

Chilling effects, experienced unequally

While much of the preceding section has been with reference to individuals who are participating or trying to participate in online assemblies, thought must also be given to those who do not feel comfortable participating because of the logic of the place in which they are assembling. For example, the commercial logics of mainstream digital platforms may create hostile contexts that disproportionately affect minorities or marginalised groups, as demonstrated in Safiya Noble's finding that racist search results are a direct outcome of search engines' advertising structures.[50] In another example, Amnesty International found that a cohort of 778 female journalists and politicians in the UK and US received one abusive or problematic tweet every 30 seconds, and that Black women received 84 per cent more of these tweets than white women.[51] Individuals who restrict their participation in assemblies because of toxic online environments are denied their right to assemble at a much earlier stage – that of the decision about whether or not to participate in the first place.

The threat of surveillance capitalism[52] and its enablement of state surveillance is also silencing due to the risk that one will be identified and tracked, with subsequent consequences.[53] The UN Human Rights Council has recognised that 'privacy online is important for the realisation of the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association'.[54] It accordingly emphasised that 'technical solutions to

49 *Meta* (n 46); A Heath 'Meta opens up access to its VR social platform horizon worlds' *The Verge*, December 9, 2021 https://www.theverge.com/2021/12/9/22825139/meta-horizon-worlds-access-open-metaverse (accessed 7 January 2022).

50 Noble (n 37).

51 Amnesty International, *Troll Patrol*, available at: https://decoders.amnesty.org/projects/troll-patrol/findings (accessed 7 January 2022).

52 Zuboff (n 38).

53 E McPherson 'Risk and the pluralism of digital human rights fact-finding and advocacy' in MK Land & JD Aronson (eds) *New technologies for human rights law and practice* (2018) 188.

54 UN Doc A/HRC/38/L10/Rev1 Human Rights Council 'The promotion, protection and enjoyment of human rights on the internet' (4 July 2018) preamble; cf.

secure and protect the confidentiality of digital communications, including measures for encryption and anonymity, can be important to ensure the enjoyment of human rights, in particular … to freedom of peaceful assembly and association'.[55] The ability to communicate and associate with others without identifying oneself is a necessary requirement to exercise one's freedom of assembly, speech and privacy.[56] Like online discrimination, surveillance is not an equal opportunity silencer, but one that disproportionately impacts potential participants who, because of their identities and the way these identity groups have been treated by their governments or dominant social groups in the past and present, are most wary of being monitored.[57]

Conclusion: Reverberating Legacies

Examining the substantive debates around and model of work behind General Comment 37 on the right of peaceful assembly and the Comment's recognition of the right's extension to online spaces, this chapter looks through the lens of a significant and recent example of Christof's inspirational contributions to international human rights to recognise his unique legacies. In conclusion, we reflect on the early reception of General Comment 37 and its relevance to contemporary developments in assembly and protest around the world, as well as (in 5.2) on how Christof's unique model for collaborative human rights work, exemplified in our experience with General Comment 37, should be of wide and lasting significance.

The legacy of General Comment 37

It is still too early to ascertain the lasting legacy of General Comment 37 on human rights thought and practice, but the initial signs are very positive. Many have recognised it as ground-breaking, and the process of how it was adopted has been considered a model for the future. As one commentator noted after praising General Comment 37, Christof's approach 'is a model of intellectual and professional engagement that other drafters, across the UN treaty bodies, would be well-advised to emulate'.[58]

G Rona & L Aarons 'State responsibility to respect, protect, and fulfil human rights obligations in cyberspace' (2016) 8 *Journal of National Security Law & Policy* 503 513.

55 Human Rights Council (n 54).

56 As above.

57 Noble (n 37).

58 M Scheinin 'UN Human Rights Committee General Comment No 37 on freedom of assembly: an excellent and timely contribution' 30 July 2020 https://www.justsecurity.org/71754/u-n-human-rights-committee-general-comment-no-37-on-freedom-of-assembly-an-excellent-and-timely-contribution/ (accessed 7 January 2022).

Substantively, the Human Rights Committee's recognition in the Comment that the right of peaceful assembly extends to online spaces is considered to have settled this important matter. This is a major breakthrough. The UN Special Rapporteur on the rights to freedom of peaceful assembly and association, Clément Voule, praised the Comment for its 'truly landmark affirmation that protection of the right to peaceful assembly extends to remote participation, including online assemblies'.[59] Voule added: 'By focusing extensively on the intersection of digital technologies and the right to peaceful assembly, General Comment 37 sets out a clear framework to protect this fundamental right in the digital era.' Voule noted the timeliness of the General Comment in this regard in the context of the COVID-19 pandemic, when so much activity had moved online. Indeed, in the context of lockdowns and constraints on physical movement and gathering, meeting online, including to manifest forms of assembly, became a 'new normal' of sorts. And yet, from Black Lives Matter to Kazakhstan and Sudan, recent years have also seen growing street protests worldwide, despite the pandemic. In this time of emergency, and the exceptional constraints on liberties and freedoms that often accompany emergency, General Comment 37 is a precious resource for activists and human rights defenders globally.

An important intellectual legacy of General Comment 37 is its elaboration of the constitutive elements of the distinctive protection of the right of peaceful assembly, as contrasted with cognate rights concerning expression and association. Christof emphasised what was unique about assembly, including its collective expression, its audience (within 'sight and sound'), and its political power. Assembly, then, is concerned with allowing for the expressiveness of the body politic beyond individual expression and besides more formal association. In turn, we should take care not to extend the right of peaceful assembly in ways that dilute this unique importance.

A particularly notable (post-General Comment 37) example of the risk of dilution is the case of *Tikhonov v Kazakhstan*.[60] In this case, a journalist had been requested by a newspaper editor to report on a spontaneous demonstration. He was subsequently prosecuted and fined for violating the Law on the Organization and Conduct of Peaceful Assemblies. The Human Rights Committee found violations of both article 19(2) and article 21 ICCPR, but, in his individual opinion, Christof challenged what he viewed as the problematic elision of assembly and expression. What, on the facts, would engage article

59 'UN expert welcomes landmark protection for online assembly' 29 July 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26134&LangID=E (accessed 7 January 2022).

60 CCPR/C/130/D/2551/2015 (views adopted 5 November 2020).

21? The journalist's presence at an assembly? The importance of media coverage to an effective right of peaceful assembly? The author's claim that the interference was a violation of article 21? The state party's treatment of him as a participant in the assembly? Christof argued that the scope of article 21 extends only to 'participants' (pointing to the deliberate and carefully chosen wording of General Comment 37 which, at paragraph 30, states that journalists 'are entitled to protection under the Covenant' (but not specifically under article 21). The more we value what article 21 uniquely protects, the more we bring it out from under the shadows of expression and association to be given distinctive attention – and the more we must also take care to not apply it where its constitutive elements are not evidently present. As regards the extension of the right to online spaces, it is precisely this risk that is yet to be fully navigated.

A model for collaborative and inclusive human rights work

Our work with Christof during the consultation and drafting of General Comment 37 is a dear memory alongside many other fond recollections, yet reminiscence must not and will not be enough. The model of work that became Christof's signature in human rights circles must endure and should be embodied in the work of all of us who took inspiration from Christof, and many others besides. For this model, crucially, lives the values it seeks to protect and advance in the world: Integrity, inclusivity, patience, pluralism, respect and determination. Christof's model of work has good cause to be his greatest legacy.

The inclusiveness of the drafting process for General Comment 37 came naturally to Christof and was borne of a commitment to intellectual struggle and a refusal to settle for easy assertions or lazy reasoning. Solidarity is a noun that requires hard work. The fundamentally social and relational interests that underlie the right of peaceful assembly were integral to the way in which Christof approached scholarship and praxis.

The General Comment does not pretend to be the last word on the matter. Much still needs to be done. Christof said repeatedly that he sought to 'futureproof' the General Comment, but by this he meant that it must be resilient in providing guidance in times yet to come, not firmly and dogmatically fixed. The interpretation and reinterpretation of specific aspects of article 21 as contexts and circumstances evolve is anticipated as not merely necessary but precisely what shall strengthen its relevance and value to protecting peaceful assemblies of the future.

29

Children being civilly disobedient: peaceful assembly and international children's rights

*Ann Skelton**

Introduction

Christof Heyns and I were both appointed to serve on United Nations treaty bodies (UNTBs) in 2016, and we started our terms of office – he on the Human Rights Committee, which oversees the International Covenant on Civil and Political Rights (ICCPR), and I on the committee that oversees the UN Convention on the Rights of the Child (CRC) in 2017. We often met and exchanged reflections about our experiences, most often at the Faculty of Law at the University of Pretoria (UP), or informally in Pretoria, and sometimes in Geneva on rare occasions when our sessions there coincided.

A subject that engaged the interest of both Committees around the same time was the right to peaceful assembly. In 2018, the Committee on the Rights of the Child (CRC Committee) held a Day of General Discussion on the theme of children as human rights defenders. This led to increased attention by the Committee to the subject of civil disobedience by children, and their right to engage in peaceful assembly. In the same year, the Human Rights Committee decided to draft its General Comment 37 on article 21 (right to peaceful assembly) of the ICCPR.

Christof was an expert on civil disobedience, which was the subject matter of his doctoral thesis.[1] Human rights and peaceful protest was a subject he had written about and worked on extensively. As Thomas Probert has noted, Christof was appointed as Special Rapporteur on extra-judicial, summary or arbitrary executions at around the time of the 'Arab Spring', when there was a wave of protest action in different parts of the world.[2] During the term of his mandate, he focused on the use of force in the context of protest, and wrote a joint report with the

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1 CH Heyns 'A jurisprudential analysis of civil disobedience in South Africa' (LLD thesis, University of Witwatersrand, 1993).

2 T Probert 'Christof Heyns: South African scholar who left his mark on the world's human rights systems' *The Conversation*, 8 April 2021.

then Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, which offered normative and practical guidance on the proper management of assemblies.[3] That background led to Christof being an obvious candidate to lead the Human Rights Committee's drafting of General Comment 37.

It is the practice of treaty bodies to have a phase of consultation on draft General Comments, during which state parties and members of civil society are able to make written submissions.[4] Draft General Comment 37 attracted a large number of submissions from a broad range of actors. Nine of them were from children's rights organisations and advocates.[5] In an unusual move, the CRC Committee submitted a formal written submission. I led the drafting of that document, and of course, had many off the record discussions with Christof about it. This chapter describes the submission of the CRC Committee on the draft General Comment, and examines the final General Comment to detect the impact of this submission.

Background to international children's rights and peaceful assembly

Children's involvement in protests or assemblies is not new. Examples from Western history include child labourers who took part in protests against unfair labour practices in the 1800s, notably in response to the industrial revolution in the United Kingdom,[6] and the newsboys' strikes in New York in the 1880s and 1890s. Civil disobedience initiated by children sporadically continued throughout the 1900s.[7] In 1911 there were spontaneous school strikes in many towns across England as

3 Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and association and the Special Rapporteur on extra-judicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 2016.

4 At the 27th meeting of Treaty Body Chairs held in Cost Rica in 2015, the Chairpersons acknowledged the importance of consultation for the 'transparency, legitimacy and publicity of general comments'. It was observed that posting draft General Comments on the OHCHR website and inviting comment from state parties, NGOs, NHRIs, UN Agencies and other interested bodies and persons was to be the general practice going forward. Submissions will be taken into account but the final responsibility for drafting rests with the Committees (A/70/302, 2015, paras 21-25).

5 Equal Education Law Centre, Child Rights Information Centre Moldova, Girls Advocacy Alliance, Children Rights International Network, Plan International, Child Rights Connect, Anita Danka (independent expert) and two NHRIs: Defensora de los Derechos de la Ninez de Chile, The Commissioner for Children's Rights Office, Cyprus.

6 J Waller *The real Oliver Twist: Robert Blincoe* (Icon Books Ltd, 2005) 286-7; H Sutherland 'Children's strikes, school walk-outs, and youth political activism' (2018) available at https://doinghistoryinpublic.org (accessed 4 January 2022).

7 S Cunningham & M Lavalette *School's out: the hidden history of Britain's student strikes* (Bookmarks 2016) 30.

children protested, primarily against the use of the cane.[8] Strikes by school children again shot to prominence in the 1960s, allied to the broader civil rights movement. A high profile example was the 'children's campaign' in Birmingham, Alabama.[9] In his doctoral thesis,[10] Christof Heyns describes the impact of the *Tinker v Desmoines Community School Districts* case,[11] in which the United States (US) Supreme Court ruled that school children's right to wear black arm bands in protest against the Vietnam War was protected by the First Amendment to the Constitution regarding free speech.

In South Africa, the struggle against apartheid is often iconically depicted in the photograph of Hector Pieterson, fatally wounded by police, which was taken in June 1976 during the Soweto uprising in which school students protested against an authoritarian education system.[12] Children were also key participants in the First Intifada in the Occupied Palestinian Territories that broke out in 1987.[13] The first decade of the 21st century saw protest action in the US regarding immigration rights and social expenditure cutbacks in the United Kingdom (UK).[14] Since 2018, there has been a wave of protest action by children regarding the climate emergency, emblemised by the rise of the 'Fridays for Future' movement.[15] In India, children have prominently participated in protests related to citizenship,[16] and in Chile,[17] South Africa[18] and Spain,[19] children have mobilized to gain access to or improve conditions in schools.

8 W Baker 'Explaining the outbreak and dynamics of the 1911 school strike wave in Britain' (2010) 6(1) *Reflecting Education* 25.

9 S Levingson 'Children have changed America before, braving fire hoses and police dogs for civil rights' *Washington Post*, 23 March 2018.

10 Heyns (n 1) 550.

11 393 US 503 (1969).

12 F Wilson & M Ramphele *Children on the frontline: the impact of apartheid, destabilisation and warfare on children in Southern and South Africa* (UNICEF 1987) 58. The authors recorded that school boycotts were widespread in 1976, 1980 and 1984.

13 See generally, S Mansour *Children of the Infitada* (Institute for Palestinian Studies 1990).

14 A Daly 'Article 15: the right to freedom of association and freedom of peaceful assembly' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (Brill Nijhoff 2016) 4.

15 A Danka 'The right of children to be heard through peaceful protests' (2019) *European Yearbook on Human Rights* 405-415.

16 S Misra 'Protecting children's right to protest', *The Hindu*, 18 February 2020.

17 J Franklin 'Chilean girls stage occupation of their own school in education rights protest', *The Guardian*, 7 October 2011.

18 F Veriava & N Ally 'Legal mobilisation for education in the time of Covid-19' (2021) *South African Journal on Human Rights,* published online 9 December 2021, DOI: 10.1080/02587203.2021.2004919.

19 'Starting in 2018, N.S. had campaigned for more than two years with other children in the same situation, demonstrating weekly in front of the Ministry of Education in Melilla to fight for their right to education', see 'UN Committee welcomes Spain's decision to allow Moroccan child to attend public school' (28 May 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?

The surge of children's participation in mass protests in recent years appears to coincide with the 'Arab Spring', and with rise of social media. In late 2011 and early 2012, 15 year old Ali al-Nimr and 16 year old Dawood Hussain Al-Marhoon participated in a number of anti-government protests in Saudi Arabia. They were arrested, tortured, made to sign 'confessions' and upon being found guilty of *herabah* (banditry) they was sentenced to death. Two letters, signed by four special rapporteurs Maina Kiai, Mónica Pinto, Christof Heyns and Juan Méndez,[20] were sent from the Office of the High Commissioner for Human Rights (OHCHR), on 21 September and 19 October 2015, to the Saudi Arabian mission in Geneva. The letters expressed the Rapporteurs' grave concern about the treatment of Ali and Dawood, stressed that their sentences were contrary to international law due to them being below the age of 18 years at the time they committed the alleged crimes. They urged the government to halt the executions, annul the death penalty, order retrials and investigate the allegations of torture. On 29 October 2018 the CRC Committee, together with several Special Rapporteurs, issued a statement calling on Saudi Arabia to halt the execution of six young men who had been children at the relevant time, including Dawood and Ali.[21] According to the statement, '[t] hey were arrested and sentenced to death for charges that the experts previously have considered to represent criminalization of the exercise of fundamental rights, including freedom of expression, when they were aged less than 18 years old'.[22] If Christof had lived to see it, he would have been pleased to note that the government of Saudi Arabia commuted the death sentences of Ali al-Nimr, Dawood al-Marhoon and Abdullah al-Zaher to 10 years imprisonment and indicated that the time already served would be taken into account. Ali al-Nimr was released in October 2021.

The Day of General Discussion on children as human rights defenders

An awareness of the burgeoning civil action by children prompted the CRC Committee to hold its Day of General Discussion in 2018

NewsID=25908&LangID=E (accessed 6 January 2022).

20 At the time of signing the letter they were, respectively, the Special Rapporteur on the right to freedom of assembly and association; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture or cruel, inhuman and degrading treatment or punishment.

21 The other named individuals were Abdullah al-Zaher, Mutjaba al-Sweikat. Salman Qureish and Abdulkarim al-Hawaj.

22 UN experts call on Saudi Arabia to halt death sentences on children https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23795&LangID=E (accessed 15 December 2021).

on the theme of 'Protecting and empowering children as human rights defenders'. 2018 also marked the 20th anniversary of the UN Declaration of Human Rights Defenders, and the 70th anniversary of the Universal Declaration of Human Rights, and the CRC Committee decided to contribute to this landmark year 'by highlighting the importance of promoting respect and support for the activities of human rights defenders of all ages'.[23]

The CRC Committee holds a Day of General Discussion (DGD), usually every second year. It is an opportunity for the Committee to focus on a particular article in the Convention, or a selected theme relating to an article or articles, and aims to guide normative development and implementation of the Convention. This allows for in-depth discussion which can shed light on the content of the CRC within the current context. The DGD also provides an opportunity to hear the views of stakeholders, including those of children themselves. It results in an outcome document, and often leads to the Committee drafting a General Comment on the chosen subject. The selection of the theme 'Protecting and empowering children as human rights defenders' indicates that the Committee considered this to be a contemporary issue that required normative debate and development, and the choice of theme was no doubt driven by an awareness of the growing number of children involved in human rights work, including protest action. In fact, the Committee's first General Comment, on the aims of education, rather far-sightedly included an acknowledgement of the role of children as 'promoters and defenders of children's rights in their daily lives'.[24] Furthermore, the Committee's DGD in 2016 on children's rights and the environment had revealed to the Committee that children were active as child rights defenders in that sphere. Consequently, the Committee issued a recommendation in the outcomes report from that DGD that 'States should provide a safe and enabling environment for activists defending environmental rights, and owe a heightened duty of care to activists below the age of 18'.[25] The outcome document for the DGD on protecting and empowering children as human rights defenders underscores that 'there is no minimum age to act for the protection, promotion and fulfilment of human rights', and that children who take

23 United Nations Committee on the Rights of the Child *Day of General Discussion (DGD) 2018: Protecting and empowering children as human rights defenders report* (2018) 5.

24 UNCRC General Comment 1 article 29(1): The aims of education (2001) CRC/GC/2001/1.

25 United Nations Committee on the Rights of the Child *Day of General Discussion (DGD) 2016: Report of the 2016 Day of General Discussion: Children's rights and the environment* (2016) 34.

actions to achieve their own rights or the rights of others are human rights defenders.[26]

Human Rights Committee's process of drafting General Comment 37 on article 21

The Human Rights Committee made a decision during the later part of 2018 to draft a General Comment on article 21 of the ICCPR, the right to peaceful assembly, and designated Christof Heyns as the Rapporteur to lead the process. To get the drafting process started, the Committee held a half day of general discussion on 20 March 2019. The background document, drafted by Christof, mentioned gender as a special issue, but did not mention children. Despite that, South African civil society organisation Equal Education Law Centre (EELC) made a submission at this early stage of the drafting process, entitled 'Children and the right to peaceful assembly'.[27] The submission recommended that the draft General Comment 'should recognise and reiterate that children are bearers of the right to peaceful assembly, which is inextricably linked to the right of children to freedom of expression and to participation in social and political life'. Their submission outlined positive and negative obligations resting on the state when developing measures regulating and giving effect to peaceful assembly. EELC focused in particular on prior notification requirements, and urged that these should not result in penalties that have a restrictive effect on children's participation. EELC's interest in this area of the law had been developed through their work involving 'equalisers' who are primarily high school students who participate in various forms of peaceful assembly, and had been honed through the organisation's involvement as an *amicus curiae* in the South African Constitutional Court case *Mlungwana v State*,[28] the judgment of which was handed down on 19 November 2018, only months prior to the half day of general discussion In that case, children were among protestors who were arrested for failing to give adequate notice of a gathering. The Court found the law that criminalised the failure to give notice to be unconstitutional. EELC, in their submissions to the Human Rights Committee's half day of general discussion, quoted the following paragraph from the judgment: [29]

> In particular, it must be emphasised that for children, who cannot vote,

26 n 23, 5.

27 Equal Education Law Centre 'Children and the right to peaceful assembly' (2019), https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/TheEqualEducationLawCentre.pdf (accessed 7 January 2022).

28 (CCT32/2018) [2018] ZACC 45 (19 November 2018) (*Mlungwana* case). The Special Rapporteur on the right to peaceful assembly was also an *amicus curiae* in this case.

29 *Mlungwana* case (n 28) para 72.

> assembly, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in live the importance of the section 17 rights [to peaceful assembly] has special significance for children who have no other realistic means of expressing their frustrations.

The submission also pointed out that the Constitutional Court had stressed that exposing children to the criminal justice system is traumatic and must be a measure of last resort.[30] The EELC argued that these concerns are not abstract, they quoted children who had attended an assembly in 2017. Despite it being a peaceful protest and although there had been compliance with the prior notice requirement, the police had used teargas to disperse the gathering. As one grade 11 equaliser said: 'I felt threatened when a lot of police came because I don't know what teargas does to people. When police arrive, I should feel safe, but I did not because they were angry and threatened me and EE members. I felt really scared and imagined myself at a police station or prison'.[31] Another organisation that made submissions for the half day of general discussion was the Consortium for Street Children.[32] Their submissions focussed on understanding 'peaceful assembly' as a key feature of living in street situations, and they also highlighted how children's rights were being infringed through harassment and roundups of children on the street, children on the street being charged with status offences and being managed through anti-social behaviour and nuisance measures. These submissions also highlighted the CRC Committee's General Comment 21 on children in street situations,[33] which recognised that public spaces are 'integral' to the lives of children in street situations and called on states to ensure that children on the streets 'have access to political and public space in which to associate and peacefully assemble is not denied in a discriminatory way'.[34]

The interest of children's rights organisations in the HRC's process of drafting General Comment 37 had been piqued. Child Rights Connect, a Geneva-based organisation that works closely with the CRC Committee, decided to conduct a survey of children's opinions on General Comment 37. Opinions were gathered from 91 children, aged 10-18 years old, from 15 different countries, across five regions (East Asia and Pacific, Latin America and Caribbean, Sub-Saharan Africa,

30 EELC submission (n 27) 13, referring to the *Mlungwana* judgment at para 89.

31 n 27, 13.

32 Consortium for Street Children 'Submission for the preparation of a General Comment on article 21 (righto peaceful assembly) of the International Covenant on Civil and Political Rights' (2019) https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC37.aspx (accessed 12 December 2021).

33 Committee on the Rights of the Child General Comment on children in street situations (2017) CRC/C/GC/21.

34 Consortium for Street Children submission, n 33 at 2, referring to the CRC General Comment 21 at para 36.

Europe, and Central Asia, Middle East and North Africa), and these were included in a submission to the Human Rights Committee.[35] The quotes from the children's inputs in the submission bring to life the very real engagement of children in protests, and the challenges they face due to barriers placed on their participation, and in many cases, harsh consequences from law enforcement.

CRC Committee's comments on the Human Rights Committee's draft General Comment 37

The Committee on the Rights of the Child took the opportunity to present a written submission on the draft General Comment. This will be discussed in some detail in the following sections of this chapter.

The views of child human rights defenders

The Committee applauded the efforts made by the Human Rights Committee to hear from children through its partnership with the civil society network partner, Child Rights Connect, who conducted a survey of children's opinions on the General Comment. The very process of consulting with children on a General Comment was an important recognition of their right toexpress their views. As the CRC Committee observed in its General Comment 12 on children's right to participation, the concept of participation is 'the starting point for an intense exchange between children and adults on the development of polices, programmes and measures in all relevant contexts of children's rights'. The CRC Committee referred to the submissions of Child Rights Connect, and encouraged the HRC to consider the views of children captured in that submission and take them into serious consideration in the finalisation of their General Comment.

The Committee noted that children are increasingly expressing their views on issues that concern them such as access to services, including education, as well as climate change. With regard to the latter, the Committee drew attention to its own public statement, which had been issued in September 2019, indicating its support for children's right to engage in peaceful assembly:

> The CRC Committee said it was 'inspired by the millions of children and adolescents who marched for climate change last week', the Committee – which has regularly addressed the environment, climate change and the degradation of the planet in concluding observations – welcomed 'the

35 Joint submission by Child Rights Connect and Anita Danka on the revised General Comment 37 on article 21 (right of peaceful assembly), https://childrightsconnect.org/wp-content/uploads/2020/02/submission_gc27_child_rights_connect.pdf (accessed 6 January 2022).

active and meaningful participation of children, as human rights defenders, in relation to issues of concern to them along with everyone else'.[36]

Article 15 of the CRC

The CRC Committee's submission then set out article 15 of the CRC on children's right to association and assembly, and pointed out that the formulation bears similarities to the Universal Declaration and differences from the structure of the of the rights in the ICCPR. Article 15 of the CRC is similar to article 21 of the ICCPR. However, like the Universal Declaration (and different from the ICCPR), it includes freedom of association and freedom of assembly within one clause. Nevertheless, the wording of sub-article 2 on restrictions on the freedom of peaceful assembly does not differ, it is identical to the wording of article 21 of the ICCPR. Therefore, there should be no additional restrictions on children than there are on adults in the context of freedom of peaceful assembly. The CRC Committee observed in its submissions on the draft General Comment 37 that the difference in structure was not fundamental, and concluded that children have the same rights as adults when it comes to both association and assembly. The Committee added that children's capacity to participate in such activities of their own volition develops as they mature, in line with the concept of evolving capacity.[37]

Article 15 is one of a cluster of rights in the CRC, which the Committee's reporting guidelines refer to as 'civil rights and freedoms' (arts 7, 8, and 13-17). These, briefly stated, are the rights to a name and nationality, preservation of identity, freedom of expression, freedom of thought, conscience and religion, privacy, access to information. It is also apparent that article 12 – the freedom to express views on all matters concerning them, and that those views are to be given due weight, often referred to as the principle of participation – is closely allied to the other civil freedoms, including article 15.

Children participating in peaceful assemblies

The CRC Committee's submission pointed out that children who participate in peaceful assembly may do so in a variety of different situations. In some instances, they accompany their parents who are participating in peaceful assembly, including peaceful protests, and in others they participate of their own volition and by themselves (with

36 UN Child Rights committee voices support for children campaigning on climate change, 27 Sept 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25068&LangID=E (accessed 6 December 2021).

37 Evolving capacity is included in art 5 of the Convention, while art 12 requires the views that a child who is capable of forming views must be able to express their views freely and that their views should be given due weight in accordance with the child's age and maturity.

or without parental approval). This may take place in actual physical assemblies such as strikes, sit-ins or marches, or in the 'virtual' context of on-line participation. The submission elaborated on these different contexts.

Children participating in peaceful assembly with their parents

Children are in many instances 'brought along' to protests by their parents or other adults. In some cases this is due to the fact that the parent is the caregiver and has no option to leave the child in the care of another. In other situations the parents may consider participation in protest as part of a child's development of civic awareness.

The CRC Committee underscored that children have the right to be present at peaceful assemblies with their parents or other adults. It was acknowledged that parents bear some responsibility for the care and protection of children in such situations. However, the state has a positive duty to protect children's rights[38] and must at all times act with an awareness that children are present at the assembly, and protect them from the harm that may be caused by others as well as any harm that might be occasioned by law enforcement actions. The CRC Committee observed that banning children from being brought to such assemblies is not a solution to the problem. More nuanced measures must be taken to balance the need to permit the freedom recognised in article 15 of the CRC and at the same time ensure that all reasonable efforts are made to protect children from violence, detention and other negative effects. The state should not take a negative or punitive approach to parents involving their children in peaceful assemblies, even those that turn violent.

Children participating in peaceful assemblies as individuals or groups, separate from their parents

Children often have difficulty in participating in assemblies as they often face first-line resistance from caregivers and teachers, and then also from the state. Indeed, the CRC Committee recorded that it has had to point out to some states during state party reviews that children have a right to associate, to express views and to be involved in peaceful assembly activities.[39] The important features of their recommendations to states may be summarised as follows:

38 Daly (n 14) 31-2.

39 See for example the CRC Concluding Observations to Australia: 'The Committee expresses its concern and disappointment that a protest led by children calling on government to protect the environment received a strongly worded negative response from those in authority, which demonstrates disrespect for the right of children to express their views on this important issue' (CRC/C/AUS/CO/5-6 2019, para 40). See also the Concluding Observations to Hungary: 'Ensure that children enjoy their right to freedom of expression including when participating in peaceful demonstrations, and do not suffer negative consequences, such as charges of petty

- Children have a right to participate in peaceful assemblies, and civic education needs to ensure that children, parents and teachers all understand this.
- Children may, in fact and in law, have an enhanced right to participate in peaceful assemblies because they are unable to vote, and therefore peaceful assembly is their only means to bring about change.[40]
- There are certain risks to being involved in peaceful assemblies, especially public protest actions that take place in parks, streets or public places, because they can turn violent. Civic education should thus ensure that children are made aware of these risks so that they can make informed choices on whether to participate or not.
- Facilitation of peaceful protest is the best means to ensure that it remains peaceful, and thus parents, teachers and law enforcement officials should take pro-active steps in this regard.
- Children should never be punished for participating in peaceful assemblies. Even if such assemblies turn violent, children should not be subjected to group punishments, random arrests or detentions.[41] If they are reasonably suspected, as individuals, of having perpetrated violence themselves, they should be dealt with in child justice systems in processes that conform to articles 37 and 40, in line with the CRC Committee's General Comment 24 on the rights of children in child justice systems.

The Committee stressed that children, particularly adolescents, would be likely to exercise their freedom of association and assembly online. Children participating in the DGD on Children as Human Rights defenders said that the digital environment is an integral part of their activities. They noted that online activities can be very empowering, but social media involved risk such as being harassed, bullied or victimized

offences by the police' (CRC/C/HUN/6 2020, para 29).

40 As found by the South African Constitutional Court in *Mlungwana v S* (CCT32/18) [2018] ZACC 45, at para 72.
'In particular, it must be emphasised that for children, who cannot vote, assembling, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right has special significance for children who have no other realistic means of expressing their frustrations. Indeed, this is internationally acknowledged in instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which specifically protect the child's right to express its views and to participate in public life'.

41 See for example the CRC Concluding Observations to Chile: 'The Committee is deeply concerned about the repressive manner adopted by the State party to address the 2011-2012 demonstrations by students demanding changes in the education system and the abusive use of detention measures. The committee recommends that the State party develop and monitor the implementation of police protocols and procedures on dealing with public protests that are compliant with human rights standards and the Convention in particular' (CRC/CHL/CO/4-5 2015, para 36).

for their opinions or their work. However, they were clear that these risks can be managed and that states should not restrict online space for children for children expressing their views.[42] The Committee listed the most important issues in relation to this context, as set out in the final report of the DGD,[43] namely that states should provide a safe and enabling online space for child human rights defenders, including access to safe online platforms, and training on online safety. States should also ensure internet providers and companies to facilitate connectivity and accessibility to all children and that safety settings should be clear and accessible, including for children with disabilities. Finally, states should encourage information and communication technology businesses to involve children in the development and monitoring of initiatives and tools for the online protection of children.

Positive obligations on states regarding peaceful assembly in relation to children

The Committee's submission indicated that states need to take pro-active steps to ensure that children can exercise their right to freedom of assembly fully and safely. States should ensure a legal framework for peaceful assembly that complies with international human rights standards, including the rights of children. Laws and rules should be communicated in language and in places that are accessible to children. States should ensure that children are provided information on their right to peaceful assembly, and should be encouraged to discuss the benefits and risks so that they can make informed decisions about their participation. Teachers and other relevant persons with whom children might have such discussions, would also need education about the issue. With regard to the role of the state in managing public assembly situations, the Committee expressed the view that officials need to be trained on children's rights in public assembly situations,[44] and that their rights should be considered at all stages of the relevant planning and decision-making by law enforcement authorities.[45] The Committee stressed that children should be actively protected from any harm in the context of public assemblies, through nuanced and innovative approaches rather than through restriction or unnecessary limitation of their rights, including in the digital environment.

In the event of breaches of children's rights to peaceful assembly, states should provide mechanisms for complaints, provide assistance to

42 UNCRC DGD 2018 Protecting and empowering children as human rights defenders: Report (DGD 2018), para 15. https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2018/crc_dgd_2018_outcomereport_en.pdf (accessed 5 January 2022).

43 As above, para 34.

44 Concluding Observations to Syria (CRC/C/SYR/CO 3–4 2012, para 47).

45 Danka (n 15) 412.

the complainants, and ensure appropriate remedies where breaches of rights are found to have been violated.

Limitations on peaceful assembly in relation to children

Children's right to peaceful assembly must be recognised and promoted, but at the same time, the CRC requires that their best interests be considered (factoring in their views, according to their evolving capacity), and that they are protected from all forms of violence. This leads to a reasonable concern about whether there are grounds to set a higher level of limitation on the rights of children to participate in peaceful assemblies, as it is understood that such assemblies may turn violent. The Committee's stated its position that there is no need to place additional limits on children's rights to association and assembly, over and above any that may be placed on adults.[46] The Committee drew attention to the practice of states which do place additional restrictions on children regarding freedom of association and freedom of assembly, and the Committee provided various examples of concluding observations in which it has criticised certain states that have done so, including Costa Rica, Vietnam, Ukraine and Hungary.[47]

Are age limits preventing children from participating a reasonable limitation?

The CRC Committee reiterated its position that placing age limits that bar children below a certain age from being at a protest is not an acceptable form of limitation, even if it is done for the protection of children. The Committee has recommended to a considerable number of state parties that they should amend laws that prevent persons below 18 years from forming associations,[48] or laws that prevent persons

46 See Daly (n 14) 107, and the references to the CRC Committee's jurisprudence provided there.

47 Concluding Observations to Costa Rica (CRC/C/15/Add.266 2005, para 23); Concluding Observations to Vietnam (CRC/C/VNM/CO/3-4 2012, paras 41-42); Concluding Observations to Ukraine (CRC/C/UKR/CO/3-4 2011, paras 39-40); Concluding Observations to Hungary CRC/C/HUN/6 2020 para 29).

48 For example, Concluding Observations to Ukraine (UN Doc No CRC/C/UKR/CO/3-4, 2011, paras 39-40); Concluding Observations to Kuwait (CRC/C/KWT/CO/2, 2014, para. 40); Concluding Observations to Hungary (CRC/C/HUN/6 2020, para 29).

below a certain age from organising outdoor meetings,[49] as such laws are contrary to the rights promoted by article 15.[50]

Are blanket rules about notice periods prior to assembly a reasonable limitation for children?

According to the CRC Committee, this kind of limitation is more disproportionate for children than it would be for adults, as they may have less knowledge of the requirements – unless the authorities can show that children in the particular State have been educated on the rules in this regard.

The Committee cited the South African Constitutional Court in this regard, which found that notice requirements were a particularly problematic limitation for children, especially if they were linked to criminal liability. The Court held that that the limitation was egregious because it did not distinguish between adult and child convenors. In the words of the Court: [51]

> This means that children – who may not even know about the notice requirements in the Act or have the resources to adhere to the notice requirement – are indiscriminately held criminally liable if they fail to give notice before convening a gathering. This Court has acknowledged how exposing children to the criminal justice system – even if diverted under the Child Justice Act is traumatic and must be a measure of last resort. To expose children to criminal liability, as section 12(1)(a) does, therefore severely exacerbates the extent of the limitation. Accordingly, to subject children to the full rigour of the penal sanction for which section 12(1)(a) provides, given their vulnerability and lack of self-restraint in comparison to adults, cannot be justified on any rational basis.

Recommendations for amendments to revised draft General Comment 37

The CRC Committee expressed a concern that the draft General Comment did not refer specifically to children. The Committee did acknowledge that including a specific group, such as children, might pose difficulties because there would likely be other specific groups who would also need to be considered, and the Committee could foresee that the Human Rights Committee might find it difficult to make such an inclusion. Nevertheless, the CRC Committee proposed certain possible additions. It was suggested that at paragraph 2, which mentioned 'disenfranchised members', could be changed by deleting that word so

49 For example, Concluding Observations to Turkey (CRC/C/R/CO/2–3 2012, para 38). See further Daly (n 14) 77.

50 Daly (n 14) 78 notes that the Special Rapporteur on the right to peaceful assembly has made reference in positive terms to a 1996 judgment of the Constitutional Review Chamber of the Supreme Court of Estonia which found legislation banning under 18s from forming or leading associations was incompatible with CRC art 15.

51 *Mlungwana v S* (CCT32/18) [2018] ZACC 45, at para 89.

that the sentence would read: 'It can be of particular importance to marginalised members of society, particularly persons who do not enjoy the right to vote, such as children'.[52] With regard to paragraph 6, which listed types of peaceful assemblies, it was proposed that 'school strikes' should be included.

The CRC Committee also proposed the addition, after paragraph 28, of the following proposed substantive paragraphs:

> States should act on the recognition of children's right to freedom of association and freedom of peaceful assembly by creating an enabling environment for such activities. This includes supporting children's associations, including child-led associations, ensuring that teachers, parents and children themselves are educated about the right to peaceful assembly, and providing support to whose children are involved in peaceful assembly to assist them in their role of protecting and empowering children.
>
> The law and policy frameworks should include specific provisions relating to children's rights. Laws and rules regarding peaceful assembly should be widely communicated in a manner that is accessible to all children. Children should be actively protected from any harm in the context of public assemblies, through nuanced and innovative approaches rather than through restriction or unnecessary limitation of their rights, including in the digital environment. Law enforcement authorities should be trained and plan for children's participation in demonstrations
>
> States should refrain from setting age limits below which persons are banned from participating fully in the right to peaceful assembly, and notice requirements must be applied flexibly in relation to children. Breaches of rules should not result in criminal sanctions or other punishment of children or their parents, and where children are charged for incidents such as violence or damage to property, they must be dealt with in child justice systems compliant with articles 37 and 40 of the CRC.

Children's rights in the final version of General Comment 37

The Human Rights Committee adopted its General Comment 37 at its 129th session (29 June to 24 July 2020).[53] The outcome for children's rights to protest was meagre. The Human Rights Committee did not include any of the changes proposed the CRC Committee. The difficulty lay in the fact that by mentioning one specific group, such as children, the Committee would face calls for other groups to be included. This is understandable, although one might ask why listing specific groups is particularly problematic, other than it adding to the word count (which is a factor that has to be considered, as there are strict rules

52 The draft para 2 read as follows: 'It can be of particular importance to marginalised and disenfranchised' members of society'.

53 CCPR General Comment 37 on the right of peaceful assembly (article 21) (2020), CCPR/C/GC/37.

in the treaty body system regarding the length of documents). One way that the Human Rights Committee tried to accommodate children in the General Comment was by underscoring the importance of protest for 'marginalized individuals and groups'.[54] Another instance was in the non-discrimination clause, where 'age' is included in the list of bases on which discrimination is impermissible, and where it is stated that '[p]articular efforts must be made to ensure the equal and effective facilitation and protection of the right of peaceful assembly of individuals who are members of groups that are or have been subjected to discrimination, or that may face particular challenges in participating in assemblies'.[55] The word facilitation was a 'win' for the child rights sector as some submissions had highlighted the positive obligation on the state to create an enabling environment for children's involvement in protest.[56] The only specific mention of children is in the paragraph which deals with training of enforcement officials: 'Training should sensitize officials to the specific needs of individuals or groups in situations of vulnerability, which may in some cases include women, children and persons with disabilities, when participating in peaceful assemblies'.[57]

The problem with the perspective offered by General Comment 37 is that it depicts children only as marginalized, vulnerable and having specific needs. While this may cover some aspects of children's rights in the context of assembly, this image is at odds with the CRC Committee's recognition of children as human rights defenders, and frankly, at odds with what is plain for all to see – children are organising and acting to promote and defend their own rights and the rights of others, and there is documented evidence, discussed above, that they have been doing so since the 1800s.

Conclusion

The 'Arab Spring', rise of social media and activism have contributed to a context for a burgeoning role being by children in contemporary human rights debates. The CRC Committee's days of general discussion on climate change in 2016 and on children as human rights defenders in 2018 drew attention to the activism of children. The CRC Committee's approach to children's right to freedom of assembly encompasses protection and autonomy, and recognises the balance that needs to be struck. States should ensure that children are not only permitted to participate in non-violent protest action, but are actually enabled to

54 CCPR General Comment 37, CCPR/C/GC/37, para 2.
55 CCPR General Comment 37, CCPR/C/GC/37, para 25.
56 Joint submission of Child Rights Connect and Anita Danka, n 36.
57 CCPR General Comment 37, CCPR/C/GC/37, para 80.

do so in line with their evolving capacities. On the other hand, special measures need to be taken to ensure their protection at protests, especially where these turn violent, or in the face of violent law enforcement activities. The Human Rights Committee's consultative process of drafting General Comment 37 quickened the interest of children's rights groups, as evidenced by the range of submissions on the subject of children's rights to peaceful assembly, and by the participation of children themselves. While the text of General Comment 37 was ultimately disappointing for child rights activists, the process of drafting and the interest it engendered has opened up new avenues of interest. In December 2021, UNICEF launched an expert group, of which I am a member, to develop guidance on policing assemblies involving children.

To end this chapter, I recall that working on General Comment 37 and children's rights within that, led to Christof and I co-authoring an op-ed for *The Daily Maverick* in September 2020, to deplore the deaths of two children caused by police in South Africa.[58] One of the children was 9 year old Leo Williams who was caught by a stray bullet when police opened fire on protestors. The article made reference to the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement, which Christof had been instrumental in drafting. The article reiterated that children have the right to protest and that they are highly likely to be directly or indirectly involved in the more than 12,000 protests that take place in South Africa every year, or to be in the vicinity. We concluded that 'police will have to adjust their way of operating, so that they can secure the safety of children in and around demonstrations'. The UNICEF initiative, partially inspired by General Comment 37, appears to be an important step towards detailed guidance in this regard.

58 A Skelton & C Heyns 'Children's deaths as a result of police action: An unacceptable failure of international and constitutional obligations', *The Daily Maverick*, 3 September 2020, https://www.dailymaverick.co.za/article/2020-09-03-childrens-deaths-as-a-result-of-police-action-an-unacceptable-failure-of-international-and-constitutional-obligations/ (accessed 6 January 2022).

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Facilitating and protecting the right of peaceful assembly of persons with disabilities

*Beryl Orao**

Introduction

The right of peaceful assembly is guaranteed in article 21 of the International Covenant on Civil and Political Rights (ICCPR or Covenant),[1] as well as in many other international human rights instruments.[2] It has been said to be a particularly important participatory tool for disenfranchised and vulnerable groups.[3] For voices that have traditionally been silenced, peaceful assembly could provide one of the most effective means of capturing the attention of authorities and the public generally. For example, in 1990, persons with disabilities in the United States staged a protest that came to be known as the 'Capitol Crawl' and the objective was to push the US Congress to pass the Americans with Disabilities Act of 1990.[4] During the protest the participants abandoned their assistive devices and crawled up the steps of the Capitol Building, bringing into sharp focus the challenges faced by persons with disabilities, and catalysing the passage of the Americans with Disabilities Act.[5]

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1 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

2 See for example, art 20 of the Universal Declaration of Human Rights, art 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS. No. 5, and art 11 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1981) 1520 UNTS 217.

3 UN Human Rights Committee, General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, CCPR/C/GC/37, para 2.

4 L Lantry, 'On 30th anniversary of disability civil rights protest, advocates push for more,' *ABC News*, 12 March 2020, https://abcnews.go.com/US/30th-anniversary-disability-civil-rights-protest-advocates-push/story?id=69491417 (accessed 31 December 2021).

5 As above.

Being part of the larger society, persons with disabilities can also take part in assemblies that pursue other causes that do not exclusively involve issues touching on persons with disabilities. While assemblies are generally understood to be physical gatherings, they may also occur exclusively online, or there may be those that have both online and offline aspects.[6] In all cases, persons with disabilities may not be able to enjoy their right of peaceful assembly on equal terms as the rest of the society unless an enabling environment is created for them. The question then is: How can states ensure that persons with disabilities exercise their right of peaceful assembly on equal terms with others?

This essay seeks to answer this question. It focuses on the state obligation to facilitate and protect the right of peaceful assembly of persons with disabilities. It starts by highlighting the scope of state obligations in relation to the right of peaceful assembly generally. This exposition is followed by an explanation for the need for enhanced state obligations in respect of persons with disabilities. Thereafter, there is a discussion on the barriers to the effective exercise of the right of peaceful assembly by persons with disabilities and lastly, a discussion on measures states can put in place to ensure their right of peaceful assembly.

The scope of state obligations

Article 21 of the ICCPR requires states to recognise the right of peaceful assembly and prescribes the limits of the restrictions that may be imposed. In addition, article 2(1) of the Covenant states that '[e]ach State Party to the … Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the … Covenant, without distinction of any kind'. These duties have both positive and negative aspects.

The duty to respect requires states not to interfere with the exercise of the right of peaceful assembly.[7] This means that states should allow peaceful assemblies to take place unhindered and only impose restrictions in conformity with the requirements of article 21. As the United Nations (UN) Human Rights Committee has often emphasised, whenever states impose restrictions, they should be guided by the objective of facilitating the exercise of the right and not disproportionately limiting it.[8] The obligation not to interfere should

6 *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Clément Voule, UN Human Rights Council, A/HRC/41/41, 17 May 2019, paras 10-11. Also see General Comment 37 (n 3) para 6.

7 General Comment 37 (n 3) para 8.

8 See, for example, *Turchenyak et al v Belarus*, Communication 1948/2010, Views adopted 10 September 2013, CCPR/C/108/D/1948/2010, para 7.4.

also be guided by the principle of content neutrality,[9] in the sense that states should not interfere with assemblies even where the assembly participants pursue controversial ideas. Neither should they attempt to limit the ideas of assembly participants, provided that they are not prohibited under article 20 of the Covenant.[10]

In spite of the fact that the right of peaceful assembly is guaranteed in the domestic laws of 184 states, some states frequently violate the right by imposing disproportionate restrictions, and also through the use of force.[11] It is true that in order to balance the rights of assembly participants and those of other members of the public, states need to regulate the conduct of assemblies, a role mainly played by law enforcement officials. However, as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns observed in his reports to the Human Rights Council, the use of force and firearms in the context of assemblies can have devastating consequences to the right to life and bodily integrity.[12] The duty to respect thus requires states to enact laws and regulations that constrain the powers of law enforcement officials to use force. In his review of the laws on the use of force and firearms by law enforcement officials, Heyns noted that most states have general laws that apply in all contexts where the use of force becomes necessary.[13] He identified the problem with such laws as their imprecise nature, which may allow law enforcement officials to stretch the circumstances under which force or firearms may be used in the context of assemblies.[14] Therefore, in order for the duty to respect to be adequately complied with, the laws on the use of force and firearms in the context of assemblies should be precise enough to regulate the conduct of law enforcement agents. A case can be made for even more precise guidelines in relation to the use of force against persons with disabilities.

The duty not to interfere extends to the digital space where assemblies also take place wholly or partially. In their joint report on the

9 General Comment 37 (n 3) para 22.

10 Art 20 of the ICCPR prohibits propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

11 The UN Human Rights Council has in the past adopted various resolutions calling on states to refrain from using excessive force in the context of assemblies. See for example Resolution 38/11, *The promotion and protection of human rights in the context of peaceful protests*, A/HRC/RES/38/11, UN Human Rights Council, adopted 6 July 2018, preamble.

12 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* Christof Heyns, A/HRC/17/28, UN Human Rights Council, 23 May 2011 (2011 Report). Also see *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* Christof Heyns, A/HRC/26/36. UN Human Rights Council, 1 April 2014.

13 2011 Report (n 12) paras 96-7.

14 2011 Report (n 12) para 98.

proper management of assemblies, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns noted that the protections for physical gatherings could be extended to similar interactions online.[15] Consequently, states should refrain from interferences such as internet shutdowns, the blocking of online content, and government sponsored trolling of activists.[16]

In addition to the obligation to respect, states also have the obligation to ensure which requires states to take positive measures to give effect to the rights under the Covenant.[17] An important way of giving effect to the right of peaceful assembly is by adopting domestic laws and other measures that guarantee the enjoyment of article 21.[18] Such laws should provide both substantive and procedural guarantees for the right. In addition, they must be in conformity with international standards. This has been emphasised by the Human Rights Committee in its Views and Concluding Observations. For example, in relation to an Act in the Netherlands which allowed authorities to prohibit assemblies for which a notification was not issued, the Committee recommended that the law in question be reviewed '…with a view to removing the prohibition on demonstrations due to a lack of prior notification and to bringing the Act in line with article 21 of the Covenant and other relevant international standards.'[19] The Committee further recommended that the Netherlands provides law enforcement officials and local administrative authorities '…with clear guidance on dealing with demonstrations so as to ensure a safe and enabling environment to exercise the right to peaceful assembly'.[20]

In addition to legislative measures, the duty to ensure further requires states to protect assemblies.[21] Thus, states must take all feasible measures to protect the rights of assembly participants against violations by both state actors and private individuals or entities. The fact that there is a likelihood of assembly participants being attacked owing to their controversial views is not sufficient reason to prohibit an assembly

15 *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies,* Maina Kiai, Christof Heyns, UN Human Rights Council, A/HRC/31/66, 4 February 2016, para 10.

16 A/HRC/41/41 (n 6) paras 29-57.

17 For an explanation on the nature of the obligation to ensure, see W Schabas *UN Covenant on Civil and Political Rights: Nowak's CCPR commentary* (NP Engel 2019 at 42, para 24.

18 Art 2(2) of the ICCPR.

19 Concluding Observations, Netherlands (CCPR/C/NLD/CO/5), March 2020, paras 60-61.

20 As above.

21 Schabas (n 17).

or impose other restrictions.[22] In exceptional circumstances where an assembly has to be prohibited, states must demonstrate that they would not be able to protect the assembly participants from a grave threat to their safety 'even if significant law enforcement capability were to be deployed'.[23] In cases where violations are committed in spite of all attempts to prevent them, states have an obligation under article 3 of the Covenant to ensure that persons whose rights have been violated have access to a remedy.

States should also facilitate the exercise for the right of peaceful assembly.[24] This means they should take positive measures to enable an assembly to take place peacefully. Facilitative measures may include clearing traffic, providing spaces within which the right can be exercised, ensuring availability of medical assistance, among other measures. The obligation to facilitate applies even in the context of spontaneous demonstrations or other assemblies where notification requirements under domestic laws were not complied with. Understandably, the extent of facilitation of spontaneous or non-notified assemblies may not be the same as those for which the authorities had prior notice and time to prepare. However, spontaneous assemblies are not unusual occurrences and therefore authorities should always have contingency plans in place to be able to appropriately respond to them.

With respect to persons with disabilities, states have obligations under both the ICCPR and the Convention on the Rights of Persons with Disabilities (CRPD).[25] Although the CRPD does not have a specific provision guaranteeing the right of peaceful assembly of persons with disabilities, it has a number of provisions relevant to the exercise of the right of peaceful assembly. Article 3 of the CRPD sets out the general principles of the CRPD which include non-discrimination and full and effective participation and inclusion in society. In addition, article 19 calls on state parties to 'recognize the equal right of all persons with disabilities to live in the community, with choices equal to others' and to 'take effective and appropriate measures to facilitate … their full inclusion and participation in the community, including by ensuring that 'community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.' Further, article 29 of the CRPD explicitly recognises the rights of persons with disabilities to participate in political and public life. It requires States Parties to create an enabling environment for the full and effective participation of persons with disabilities in public

22 General Comment 37 (n 3) para 52.
23 As above.
24 General Comment 37 (n 3) para 8.
25 Convention on the Rights of Persons with Disabilities (CRPD) adopted on 13 December 2006 UN Doc A/61/611 (entered into force 3 May 2008).

affairs. In her report to the Human Rights Council, the UN Special Rapporteur on the rights of persons with disabilities recognised that the right of peaceful assembly is a means of public participation by persons with disabilities.[26] Read alongside the ICCPR, the provisions of the CRPD cited above require the protection of the right of peaceful assembly of persons with disabilities.

Of importance also is the CRPD's principle of reasonable accommodation which means 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[27] Under the CRPD, the denial of reasonable accommodation is itself a form of discrimination.[28] States should therefore ensure that measures are taken to reasonably accommodate the needs of persons with disabilities exercising their right of peaceful assembly.

The case for enhanced state obligations in relation to persons with disabilities

Literature in the UN human rights system strongly supports the position that state obligations should be enhanced in relation to certain vulnerable groups, including persons with disabilities. In their joint report on the proper management of assemblies, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies recognised that 'particular effort should be made to ensure equal and effective protection of the rights of groups or individuals who have historically experienced discrimination'.[29] They further noted that authorities may be required to take additional measures to protect and facilitate the exercise of the right to freedom of assembly by such groups.[30] This position was reiterated in the Committee's General Comment 37 on the right of peaceful assembly, which in addition states that the interpretation and application of laws governing the conduct of assemblies must not lead to discrimination on any ground, including on the basis of disability.[31]

26 *Report of the Special Rapporteur on the rights of persons with disabilities,* Catalina Devandas Aguilar, A/HRC/31/62, UN Human Rights Council, 12 January 2016, para 18.

27 Convention on the Rights of Persons with Disabilities (n 25) art 2.

28 As above.

29 *Joint report on the proper management of assemblies,* Maina Kiai, Christof Heyns (n 15) para 16.

30 As above.

31 General Comment 37 (n 3) para 8.

It is important to note that in relation to the interpretation and application of laws, discrimination may result from applying laws equally without considering the particular circumstances of persons with disabilities. For example, in *HM v Sweden*[32] where Swedish authorities neutrally applied the provisions of a law and on that basis denied the author the permission to adapt her residence to her needs as a person with disability, the Committee on the Rights of Persons with Disabilities (CRPD Committee) held that the neutral application of the law resulted into the discrimination of the author.[33] It also concluded that Sweden had denied the author reasonable accommodation, contrary to the provisions of the CRPD.[34] Although this case did not concern the right of peaceful assembly, the interpretation of the CRPD Committee on the neutral application of laws can also be applied in the context of interpretation and application of laws governing the conduct of assemblies.

In relation to the use of weapons in the context of public order operations, persons with disabilities may be more greatly affected by the use of certain weapons compared to other members of the public. Consequently, it has been stated that law enforcement officials should exercise a higher level of precaution with respect to persons with greater vulnerabilities.[35] For example, while the effects of teargas on persons who can quickly flee to a safe distance would be generally minimal, a person whose mobility is limited may likely suffer more adverse effects.

Persons with disabilities may also be victims of police violence in cases where they fail to heed police commands or warnings due to an inability to hear or comprehend the instructions, or where they are simply unable to run. In 2017, for example, Angolan police were condemned for attacking peaceful protesters in wheelchairs and beating one of them until he fell off his wheelchair.[36] Similar incidents have happened in other countries.[37] In all cases where force is used, the principles of legality, precaution, necessity, proportionality, non-discrimination and accountability must be applied. However, as stated

32 *HM v Sweden,* Communication 3/2011, CRPD/C/7/D/3/2011 (19 April 2012).

33 *HM v Sweden* (n 32) para 8.4.

34 As above.

35 OHCHR, UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement (2020) para 2.11.

36 Human Rights Watch, Angolan Police Attack Protesters in Wheelchairs, 25 April 2017, https://www.hrw.org/news/2017/04/25/angolan-police-attack-protesters-wheelchairs (accessed 31 December 2021).

37 For example, during the anti-coup protests in Myanmar in 2021, a physically and mentally disable person was attacked by military officials while he was helping other protesters clean up a site after a protest. While the other protesters managed to run, he couldn't. See 'Viral Protesters with Disabilities Beaten, Myanmar Military And Police Reap Condemnation', *VOI News*, 20 February 2021, https://voi.id/en/news/34371/viral-protesters-with-disabilities-beaten-myanmar-military-and-police-reap-condemnation (accessed 31 December 2021).

before, greater precaution should be exercised in relation to persons with disabilities.

Barriers to effective participation of persons with disabilities in peaceful assemblies

In spite of the understanding that states have an enhanced obligation to facilitate and protect the right to peaceful assembly of persons with disabilities, in reality they hardly ever enjoy the right on equal terms with others. Generally, the obstacles to the exercise of the right of peaceful assembly cut across all groups, and they are numerous. In his first thematic report to the Human Rights Council in 2018, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association identified a number of factors that affect the exercise of this right.[38] Among those he listed are: retrogressive laws that restrict the exercise of the right of peaceful assembly; criminalisation of participation in assemblies; excessive use of force by law enforcement officials during assemblies; repression of social movements; reprisals against members of the civil society; restrictions targeting particular groups; and restrictions and interferences in the digital space.[39]

Aside from these barriers which cut across all groups, persons with disabilities face other challenges specific to their situations. In terms of the language of the CRPD, disability results from 'the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society'.[40] Barriers have in turn been defined as factors in a person's environment whose absence or presence limit functioning and create disability.[41] A wide range of barriers may affect the ability of persons with disabilities to fully and effectively exercise their right of peaceful assembly. Selected issues are discussed in the next section.

Legal and procedural barriers

Public order laws in most states provide for either notification or authorisation procedures which must be complied with before an assembly lawfully takes place. In the absence of legal provisions that accommodate the specific needs of persons with disabilities, challenges

38 *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* Clément Voule, UN Human Rights Council, A/HRC/38/34, 26 July 2018.

39 As above.

40 Convention on the Rights of Persons with Disabilities (n 25) Preamble para (e).

41 World Health Organization, International classification of functioning, disability and health (2001) at 222, http://apps.who.int/iris/bitstream/handle/10665/42407/9241545429.pdf;jsessionid=FCA8B18D1599EDD5A9F993CE48E0B030?sequence=1 (accessed 31 December 2021).

in lodging notifications or seeking authorisations may be experienced. At the same time, if public order laws are not available in accessible formats or platforms, some persons with disabilities may not know what is required of them in terms of compliance. The domestic laws of most states consider assemblies that are held contrary to the requirements of their public order laws as unlawful.[42] The implication is that law enforcement officials may interfere with such assemblies even if they are peaceful. Unless mechanisms are put in place to ensure that persons with disabilities have adequate access to compliance procedures, they will either not hold assemblies at all or law enforcement agencies may easily justify interfering with assemblies organised by persons with disabilities.

Further, public order laws and laws governing the use of force and firearms by law enforcement officials may not incorporate specific guidance that enhance protection of persons with disabilities. Consequently, the impact of the use of force against them may be greater compared to other participants. The potential for violence from law enforcement or other members of the public has a significant chilling effect on the ability of persons with disabilities to enjoy their right of peaceful assembly.

Physical barriers

Article 9 of the CRPD requires state parties to take appropriate measures to ensure that persons with disabilities have, on an equal basis with others, access to the physical environment, transportation, information and communication systems and other facilities or services open or provided to the public. In-person assemblies present a variety of difficulties to persons with disabilities. For example, buildings or physical spaces that are not designed to accommodate the needs of persons with disabilities may not be accessed by them.

An important aspect of the effective exercise of the right of peaceful assembly is that participants must be able to hold their assembly within the sight and sound of their target audience.[43] If a particular site is of significance to the objectives of an assembly, the sight and sound principle is defeated if the site is inaccessible to persons with disabilities. While authorities may designate alternative spaces, the objectives of the assembly may still be diminished if the accessible site is not within the reach of the target audience. Organisers of assemblies may fail to

42 See for example, Kenya's Public Order Act (1950), Cap 56, Laws of Kenya. Section 5(2) of the Act provides that any gathering held without a prior notice having been issued is unlawful and the participants may be arrested and prosecuted for taking part in an unlawful assembly.

43 General Comment 37 (n 3) para 22. Also see *Strizhak v Belarus,* Communication 2260/2013, CCPR/C/124/D/2260/2013, views adopted 1 November 2018, para 6.5.

take measure to ensure that other assembly participants do not conduct themselves in a way that limits the participation of assembly participants who have disabilities. For example, wheelchair and cane users may experience difficulty in navigating crowded assemblies. Further, in the event of violence from the public or the police, the safety of persons with disabilities can be seriously compromised both by the police and the assembly participants who may knock them over while running for safety. These obstacles would likely make persons with disabilities avoid participating in in-person assemblies.

Accessibility of transportation may also have an impact on the participation of persons with disabilities in assemblies. Unless deliberate efforts are made to provide accessible transportation services, they may be left behind.

Communication barriers

Communication barriers exist during the planning phase of an assembly, at the actual assembly and even after the assembly. In relation to the planning phase, accessing information about planned assemblies has been a major concern for some persons with disabilities, especially those with hearing and visibility impairments.[44] Further, organisers of assemblies do not always involve persons with disabilities during planning. Without their involvement during the planning process, their needs may not be given due consideration.

As for communication during in-person assemblies, the participation of persons with hearing impairments is limited unless sign language interpreters are available. At the same time, the communication barrier between them and the police may expose them to violence from police officers who may mistake their unresponsiveness to commands for defiance. Technological platforms that are not adapted to the requirements of some persons with disabilities also limit their participation in online assemblies.

Like other assembly participants, persons with disabilities may be arrested following events at an assembly. In the absence of measures to facilitate effective communication between persons with disabilities and law enforcement officials, they may be exposed to numerous human rights violations. Their participation in criminal proceedings may equally be inhibited to their detriment.

44 D Bora & others (2017) 'ActVirtual: making public activism accessible' in *Proceedings of the 19th International Association for Computing Machinery's Special Interest Group on Accessible Computing* (ACM SIGACCESS) Conference on Computers and Accessibility. New York, USA at 307-308.

Attitudinal barriers

Societal attitudes towards persons with disabilities may also hinder their participation in assemblies, and other aspects of public life. In particular, persons with mental disabilities face greater stigma both from the public and the authorities.[45] Stereotypes about persons with mental disabilities being violent may lead to their isolation, and even them being subjected to violence.[46] As such, they enjoy extremely limited state protection of their right of peaceful assembly. These limitations also apply to persons with other disabilities, although not to the same extent. It has been stated that states must ensure that the voices of persons with disabilities, including those with psychosocial disabilities are heard.[47]

Enhancing the full and effective participation of persons with disabilities in assemblies

The CRPD Committee in General Comment 7 on the participation of persons with disabilities specifies that 'full and effective participation … in society refers to engaging with all persons, including persons with disabilities, to provide for a sense of belonging to and being part of society. This includes being encouraged and receiving appropriate support … to participate in society, and being free from stigma and feeling safe and respected when expressing oneself in public.' [48] As a means of enhancing the monitoring and implementation of the CRPD, the CRPD Committee further emphasises the need for enabling environments to be created for persons with disabilities to exercise their rights under articles 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association) of the ICCPR.[49] States therefore have a duty to ensure that they facilitate the full and effective exercise of the right of peaceful assembly by persons with disabilities. Bearing in mind the barriers discussed above, there are a number of measures that states, and organisers too, can put in place to ensure more inclusive participation of persons with disabilities in peaceful

45 M Waltz & A Schippers 'Politically disabled: barriers and facilitating factors affecting people with disabilities in political life within the European Union' (2021) 36(4) *Disability & Society* 517 at 525.

46 *Report of the Special Rapporteur on the rights of persons with disabilities*, Catalina Devandas-Aguilar, UN Human Rights Council, A/HRC/40/54, 11 January 2019, para 27.

47 A/HRC/31/62 (n 26) para 60.

48 UN Committee on the Rights of Persons with Disabilities, General Comment 7 on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November 2018, para 27.

49 General Comment 7 (n 48) para 29.

assemblies. The CRPD's principle of reasonable accommodation should also be adhered to where the right of peaceful assembly of persons with disabilities is engaged. However, what would it look like in practice?

To begin with, states have to ensure that laws on assemblies provide reasonable accommodation for the specific needs of persons with disabilities. For example, public order laws should leave room for flexibility in their interpretation and application of their requirements to persons with disabilities. For example, some laws provide specific guidance on the use of force and firearms against children, with the restriction being more narrowly drawn than restrictions on the use of force against adults.[50] Similar guidance would enhance the protection of persons with disabilities participating in assemblies.

Where states have notification regimes, the procedures for issuing the notices should be accessible to persons with disabilities. Accessibility here means physical access of relevant authorities as well as providing documents in accessible formats, or allowing the lodgment of notifications through digital means. There should also be flexibility in the enforcement of notification requirements. Thus, a failure to notify should not be the sole basis for interfering with an assembly, or not facilitating it. In relation to states that have authorisation regimes, the Human Rights Committee has stated that such regimes should operate as notification regimes[51] whose purpose is to enable state authorities to prepare in advance to facilitate an assembly.

It was stated earlier that in the context of assemblies, persons with disabilities are generally at a greater risk of violence than others. To ensure their safety while taking part in in-person assemblies, there is need for protective interventions from the security agencies against disruption of the peaceful assemblies by third parties. At the same time, the police should also refrain from using specific less-lethal weapons such as tear gas against persons with certain disabilities, or assembly participants generally if doing so would have disproportionately adverse effects on persons with disabilities participating in an assembly.[52] In general policing tactics should as much as possible be adapted to cater for the needs of persons with disabilities. Understandably, police officers may not always be able to adapt their tactics to the peculiar needs of all individuals participating in assemblies. However, one of the principles that guide the use of force by law enforcement officials in any context is the principle of precaution which requires them to plan their operations in a way that reduces the need for them to resort

50 For example, in Kenya the National Police Service Act, 2011 provides that 'police officer shall make every effort to avoid the use of firearms, especially against children.' See National Police Service Act, 2011, Sixth Schedule, Part B, para 3.

51 General Comment 37 (n 3) para 73.

52 Guidance on Less-lethal Weapons in Law Enforcement (n 35) paras 2.7 and 2.11.

to the use of force.[53] In the context of an assembly, in order for the police to effectively adapt their tactics to ensure protection of persons with disabilities, while still discharging their obligation to ensure public order and safety, prior engagements with organisers of assemblies is necessary. This would enable the police to take measures 'upstream' to minimise the likelihood of using force that may have disproportionate impacts on persons with disabilities participating in an assembly.

The UN Special Rapporteur on the rights of persons with disabilities has noted that due to the belief that persons with psychosocial disabilities are prone to violence, the nature of their disability can heighten discrimination against them.[54] The belief that they are dangerous can also influence how much force law enforcement officials use against them. In its General Comment on the right to life, the Human Rights Committee has stated that persons with disabilities are entitled to 'specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others'.[55] In addition, specific measures must be taken 'to prevent unwarranted use of force by law enforcement agents against persons with disabilities'.[56] It is therefore necessary for states to adequately train law enforcement officials on the proper management of assemblies and human rights, generally. At the same time, law enforcement officials should be equipped with appropriate crowd control weapons and receive training on their use. Training acts as a precautionary measure that can reduce the likelihood of police officers resorting to force in unwarranted circumstances.

For organisers, practical measures such as selecting sites that can be easily accessed by persons with disabilities can go a long way in enhancing their participation. For example, if a disability-friendly private property is close enough to a public space that is inappropriate for persons with disabilities, the private space may be used. Questions may arise about the right of the public to access and use private property without the owner's consent. The Human Rights Committee, citing the case of *Appleby v United Kingdom*,[57] decided by a chamber of the European Court of Human Rights has set out a number of factors to be considered when balancing between the rights of owners of private property and the right of peaceful assembly of those seeking to use the private space. Among the factors to be considered are: whether the private space is ordinarily accessible to the public, the nature

53 S Maslen & S Connolly *Police use of force under international law* (CUP 2017) at 95.

54 *Report of the Special Rapporteur on the rights of persons with disabilities,* UN Human Rights Council, A/HRC/40/54, 11 January 2019, para. 27.

55 UN Human Rights Committee, General Comment 36: Article 6 (The Right to life), 2018, CCPR/C/GC/36, para. 24.

56 As above.

57 European Court of Human Rights, *Appleby and others v United Kingdom,* Application 44306/98, Judgment of 6 May 2003.

and magnitude of interference with the rights of the property owner, whether the ownership of the property is itself being contested by the assembly participants; and whether there are alternative sites that can equally achieve the objectives of the assembly.[58] In the *Appleby* case which concerned the freedom of expression, the European Court held that states must regulate private property rights in a way that does not hinder the freedom of expression.[59] This view can also be applied in the context of the right of peaceful assembly. Where an assembly can only be held at a site with historical significance and which is inaccessible to persons with disabilities, they should nevertheless be involved. Since assemblies can be held virtually and in-person simultaneously, the digital space offers a useful alternative for them to participate. Experience has shown that assemblies held in online spaces can be just as effective as offline assemblies, or they may greatly enhance the effectiveness of in-person assemblies.[60]

Importantly, involving persons with disabilities in the planning phase can also help in addressing many of their needs. Many protests are now held entirely or partially through digital platforms which provide arguably safer platforms for persons with disabilities to participate, if well adapted to their needs. Organisers should ensure that digital communication is shared in accessible formats. Where possible, if the assembly is a protest march, organisers can plan to get wheelchairs for participants with mobility impairments who do not have them and Sign Language interpreters for those with hearing impairments. Admittedly, organisers may not always have funds to be able to secure assistive devices for persons with mobility or other challenges.

An example of good practice for organisers and state authorities is the accessible march for the #BlackLivesMatter[61] movement held in Milwaukee, US, in June 2021.[62] Noting that persons with disabilities hardly participated in the #BlackLivesMatter protests, three members of Milwaukee's disability community organised an accessible march for persons with disabilities.[63] The organisers took care to select a route that was more disability-friendly, ensured that there were American

58 General Comment 37 (n 3) para 57.

59 *Appleby and others v United Kingdom* (n 57) para 47.

60 Take for example the #BlackLivesMatter Movement in the US and across the world, and Nigeria's #EndSARS protests which occurred both online and offline.

61 #BlackLives Matter is a social movement founded in 2013 in the United States in response to the acquittal of a police officer who killed Trayvon Martin, an African American male. See https://blacklivesmatter.com/about/ (accessed 31 December 2021).

62 R Linnane 'People with disabilities lead hundreds in a more accessible protest against police violence in Milwaukee' *Milwaukee Journal Sentinel*, 7 June 2021, https://www.jsonline.com/story/news/2020/06/07/milwaukee-people-disabilities-lead-accessible-protest-police-brutality-george-floyd/3173136001/ (accessed 31 December 2021).

63 As above.

Sign Language interpreters and arranged for frequent rest stops. Since the march took place in the midst of the COVID-19 pandemic and some persons with disabilities have compromised immune systems, the organisers ensured that participants wore masks and kept a safe distance from each other.[64] There was also no report of any interference with the march by State authorities. This inclusive approach can be used by other organisers of assemblies, whether or not they have disabilities.

Conclusion

This essay aims to explain how states can facilitate and protect the right of peaceful assembly of persons with disabilities. It first sets out the state obligation in relation to the right of peaceful assembly generally, and explains why states have enhanced obligations in relation to the protection of the right of peaceful assembly of persons with disabilities. It notes that the international human rights system generally recognises that states have enhanced obligations in relation to vulnerable groups, such as persons with disabilities. It also notes that although the CRPD does not expressly guarantee the right of peaceful assembly, it nevertheless has provisions that require states to ensure full and effective participation of persons with disabilities in public life. Thus, the obligation of states to ensure the right of peaceful assembly of persons with disability stem from both the ICCPR and the CRPD. Unfortunately, due to several barriers which were discussed in this paper, persons with disabilities rarely get to enjoy their right under article 21 of the ICCPR on equal terms with others. Some of the barriers are state-imposed, for example through domestic laws that are not responsive to the needs of persons with disabilities, or imprecise laws on the use of force by law enforcement officials that leave too much room for justifying the use of force against persons with disabilities. Structural barriers such as communication challenges or difficulties in physical accessibility also impede the right of peaceful assembly. It shows that the barriers can be reduced or eliminated if certain measures are taken, such as providing specific guidance to law enforcement on the use of force against persons with disabilities, adopting flexible approaches in the interpretation and application of public order laws, and training law enforcement officials. It was also shown that aside from states, organisers, such as those in the Milwaukee example, can take practical steps to enhance participation of persons with disabilities in assemblies. Much remains to be done to bridge the gap between participation in assemblies by persons with disabilities and participation by others.

64 As above.

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Is the Convention on Conventional Weapons the appropriate framework to produce a new law on autonomous weapon systems?

*Thompson Chengeta**

Introduction

For the past nine years, states, scholars, civil society and other stakeholders have been discussing the challenges that are posed by autonomous weapon systems (AWS). One of the main questions under consideration is whether existing international law is adequate to govern AWS.[1] On one hand, many states and organisations, including the International Committee of the Red Cross (ICRC), take the view that existing law is inadequate and, as such, states must adopt a new treaty on AWS. However, a small number of states, including the United States, Russia, Israel, Australia, the United Kingdom, have disagreed, arguing that existing international law, particularly, international humanitarian law (IHL), is sufficient to govern the challenges raised by AWS. On account of these and other disagreements, states failed to reach consensus on the way forward on AWS during the recently concluded meetings of the United Nations (UN) Group of Governemental Experts on Lethal Autonomous Weapon Systems (2-8 December 2021)[2] and the Sixth Review Conference of the Convention on Conventional Weapons (13-17 December 2021).[3]

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1 See A/HRC/23/47, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, paras 47 & 114(d); CCW/MSP/2014/3, Report of the 2014 informal Meeting of Experts on Lethal Autonomous Weapons Systems, para 28; CCW/MSP/2015/3, Report of the 2015 Informal Meeting of Experts on Lethal Autonomous Weapons Systems, paras 23, 54, 60; Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems, paras 16, 47, 50; CCW/GGE.1/2017/CRP.1, Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems, paras 5, 6, 7, 49; CCW/GGE.1/2018/3, Report of the 2018 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, paras 8, 39, 46, 53.

2 See the third session of the 2021 Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems (LAWS), 2-8 December, 2021, Palais des Nations in Geneva, Switzerland, https://indico.un.org/event/35599/ (accessed 19 December 2021).

3 See the Sixth Review Conference of the Convention on Conventional Weapons, 13-17 December 2021, https://meetings.unoda.org/meeting/ccw-revcon-2021/ (accessed 19 December 2021).

Yet, even if we were to proceed with the view held by the majority of states, a big question that remains to be answered is, on which legal framework should the new treaty on AWS be based? Since AWS are already being discussed under the framework of the UN Convention on Conventional Weapons (CCW), this essay considers the question whether the CCW framework can produce a new law whose scope of application is sufficiently wide to deal with all the challenges that are raised by AWS in all circumstances.

Background

The current CCW discussion on AWS followed the submission of a 2013 AWS Report to the UN Human Rights Council by the then UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the late Professor Christof Heyns (Heyns report).[4] Unlike the CCW framework that has been focussing on the use of AWS in the context of armed conflict, the UN Human Rights Council considered the human rights violations that may occur both in war and peace time when AWS are used.[5]

While there is no agreed definition of AWS, AWS are generally defined as 'robotic weapon systems that, once activated, can select and engage targets without further intervention by a human operator'.[6] According to the Heyns report, the crucial element of the definition is that 'the robot has an autonomous "choice" regarding selection of a target and the use of lethal force'.[7] In line with this definition, in 2019, states agreed that what is of core interest in the discussion are 'autonomous functions in the identification, selection or engagement of a target'.[8]

The Heyns Report noted a number of legal concerns regarding the use AWS, in particular that AWS may not be able to comply or be used in compliance with international humanitarian law (IHL) and international human rights law (IHRL).[9] The other concern expressed in the Heyns Report is that in the event of AWS violating IHL or IHRL, it may be difficult if not impossible to hold specific persons legally responsible.[10]

4 A/HRC/23/47 (n 1).

5 As above.

6 A/HRC/23/47 (n 1) para 37; see also International Committee of the Red Cross (ICRC) 'ICRC position on autonomous weapon systems' (2021) 5, https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems (accessed 10 December 2021).

7 A/HRC/23/47 (n 1) para 37; see also ICRC position on AWS (n 6).

8 CCW/GGE.1/2019/CRP.1/Rev.2, Report of the 2019 Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, para 19(a).

9 A/HRC/23/47 (n 1) paras 63 & 85.

10 A/HRC/23/47 (n 1) para 77; T Chengeta 'Accountability gap: autonomous weapon

In the AWS debate, this is often referred to as the accountability gap challenge.[11] The Heyns Report also noted ethical concerns, questioning for example, whether it is ethical to give machines or robots the power over life and death.[12] In this regard, it was considered that the development and use of AWS may violate the right to human dignity.[13]

On the way forward, the Heyns Report recommended the establishment of a High-Level Panel on AWS whose mandate included, among other things, an 'assessment of the adequacy or shortcomings of existing international and domestic legal frameworks governing [AWS]'[14] and 'propose a framework to enable the international community to address effectively the legal and policy issues arising in relation to [AWS]'.[15] The question on the adequacy of the existing legal framework to govern AWS has been raised by a number of states throughout the years that the UN has been engaged in AWS discussions.[16]

The recommendation to establish a High-Level Panel on AWS was realised in 2016, when, following three UN informal meetings, the state parties to the CCW decided to form the UN Group of Governmental Experts on Lethal Autonomous Weapon Systems (UNGGE).[17] Part of the mandate of the UNGGE is to consider 'possible options for addressing the humanitarian and international security challenges posed by emerging technologies in the area of lethal autonomous weapon systems'.[18]

The need for new law

Whether new rules on AWS are necessary is dependent on whether the current law is adequate.[19] Arguments on why existing law is inadequate

systems and modes of responsibility in international law' (2016) 45 *Denver Journal of International Law and Policy* 1-50.

11 Human Rights Watch 'Mind the gap: Lack of accountability for killer robots' (2015) 4.

12 A/HRC/23/47 (n 1) para 95; See in general, P Asaro 'On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making' (2012) 94 *International Review of the Red Cross* 687-709; A Krishnan *Killer robots: legality and ethicality of autonomous weapons* (2009) 150; ICRC position on AWS (n 6) 8.

13 C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33 *South African Journal on Human Rights* 57-66; See also T Chengeta 'Dignity, ubuntu, humanity and autonomous weapon systems (AWS) debate: an African perspective' (2016) 13 *Brazilian Journal of International Law* 460-502; ICRC 'Ethics and autonomous weapon systems: An ethical basis for human control?' Geneva, 3 April 2018; ICRC position on AWS (n 6) 8.

14 A/HRC/23/47 (n 1) para 114 (d).

15 A/HRC/23/47 (n 1) para 114 (c).

16 A/HRC/23/47 (n 1) para 114 (d); CCW/MSP/2014/3 (n 1) para 28; CCW/MSP/2015/3 (n 1) paras 23, 54, 60; CCW/GGE.1/2017/CRP.1 (n 1) paras 5, 6, 7, 49; CCW/GGE.1/2018/3 (n 1) paras 8, 39, 46, 53.

17 See UNGGE https://www.unog.ch/80256EE600585943/(httpPages)/5535B644C2AE8F28C1258433002BBF14?OpenDocument (accessed 30 December 2021).

18 CCW/GGE.1/2019/CRP.1/Rev.2 (n 8) para 11(5)(e).

19 See T Chengeta 'Is existing adequate to govern autonomous weapon systems' (2019)

and why new law is needed have been addressed elsewhere.[20] For purposes of this essay, it is sufficient to state that the ICRC – an organisation considered to be the 'guardian' of IHL – also points to the insufficiency of existing law.[21] In 2021, in its highly publicised position on autonomous weapon systems, the ICRC noted that as follows: [22]

> In the view of the ICRC, existing IHL rules do not hold all the answers to the humanitarian, legal and ethical questions raised by AWS. New rules are needed to clarify and specify how IHL applies to AWS, as well as to address wider humanitarian risks and fundamental ethical concerns. New legally binding rules would offer the benefits of legal certainty and stability. The ICRC is concerned that without such rules, further developments in the design and use of AWS may give rise to practices that erode the protections presently afforded to the victims of war under IHL and the principles of humanity.

The above ICRC position notwithstanding, states have expressed diverging views on the question whether existing law can adequately address the challenges posed by AWS 'or if further norms, regulations, rules or clarifications were needed'.[23] In that consideration, some states[24] and non-governmental organisations[25] suggested that an additional legally binding instrument is needed while others posited that a 'faithful compliance with already existing obligations under applicable international law' can suffice.[26]

In its 2021 submission to the UNGGE, Russia noted that it considers 'existing legal regulation to be sufficient' and that 'restrictions and principles deriving from IHL apply to all types of weapons without exception, including LAWS [Lethal Autonomous Weapon Systems].'[27] Similar sentiments were expressed by the United Kingdom which noted that 'IHL and the existing regulatory framework for the development, procurement and use of weapons systems are capable of sufficiently regulating new capabilities'.[28] This position is similar to that of the

http://ceur-ws.org/Vol-2540/FAIR2019_paper_9.pdf (accessed 5 December 2021).

20 As above.

21 See ICRC position on AWS (n 6); ICRC, *Artificial intelligence and machine learning in armed conflict: A human-centred approach*, 6 June 2019.

22 ICRC position on AWS (n 6) 11.

23 UNGGE, Chair's non-paper: Conclusions and Recommendations, 21 August, morning, para 17(c), available on file (Chair's non-paper).

24 These states include Austria, Brazil, Cuba, Finland, and African Group of States.

25 See the Campaign to Stop Killer Robots, available at www.stopkillerrobots.org (accessed 21 December 2021).

26 Chair's non-paper (n 23) para 17(e).

27 See 'Russia's Considerations for the report of the Group of Governmental Experts of the High Contracting Parties to the Convention on Certain Conventional Weapons on emerging technologies in the area of Lethal Autonomous Weapons Systems on the outcomes of the work undertaken in 2017-2021' (2021) 2.

28 See United Kingdom, 'written contributions on possible consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems' (2021) 1.

United States.[29] Other states like France and Germany suggested non-binding solutions such as a political declaration; guidelines, principles or codes of conduct.[30]

However, many states have taken the position that existing law is inadequate and that new law is needed.[31] As such, of the policy options that have been suggested in the UNGGE, the majority view supports a new legally binding instrument on AWS.[32] In their 2021 joint statement submitted to the UNGGE, Costa Rica, Panama, the Philippines, Sierra Leone and Uruguay noted that 'a legally-binding instrument would strengthen the existing framework of international law'[33] and that 'anything short of this, including a political declaration or voluntary applicable guidance, can only be acceptable as an intermediary and/or complementary step towards a legally-binding instrument'.[34]

Likewise, the Non-aligned Movement (NAM) made it clear that 'different proposals on a political declaration, code of conduct and other voluntary measures, including national weapons review process, confidence building measures (CBMs) as well as the establishment of a committee of experts, …. cannot be a substitute for the objective of concluding a legally-binding instrument stipulating prohibitions and regulations'.[35] Thus, this essay proceeds on the view that AWS raise complex legal, ethical and operational issues that are outside the arm's reach of existing law – issues that can only be resolved by an additional legally binding instrument or treaty. The critical question, as stated earlier, is which legal framework should produce new rules on AWS? Can the CCW framework produce a new law whose scope of application is sufficiently wide to cover all possible contexts within which AWS can be used?

29 See USA Submissions, CCW/GGE.1/2017/WP.6, 10 November 2017.

30 See Germany-France proposed political declaration https://www.unog.ch/80256EDD006B8954/(httpAssets)/895931D082ECE219C12582720056F12F/$file/2018_LAWSGeneralExchange_Germany-France.pdf (accessed 21 December 2021).

31 Chair's non-paper (n 23) para 17(c); See also CCW/GGE.1/2019/1/Rev.1, at 1.

32 Suggested by 28 states in the GGE. Also, the United Nations Secretary General, Antonio Guterres, also stated that there should be new international law to ban 'machines with the power and discretion to take lives without human involvement', see *Secretary-General's message to Meeting of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems,* 29 March 2019.

33 See 'Joint Working Paper Submitted by the Republic of Costa Rica, the Republic of Panama, the Republic of the Philippines, the Republic of Sierra Leone and the Eastern Republic of Uruguay' (2021) 5.

34 As above.

35 See Working Paper of the Non-Aligned Movement (NAM) and Other States Parties to the Convention on Certain Conventional Weapons (CCW), Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems Geneva, 28 June-5 July 2021, at 4 para 19.

Contextualising use of AWS

In order to correctly frame the scope of application of new law on AWS, it is important to understand the contexts within which AWS may be used and the applicable laws. There are basically three contexts within which AWS may be used: use of AWS in situations of armed conflict; use of AWS in counterterrorism operations outside armed conflict and use of AWS in law enforcement situations.

Use of AWS in armed conflict and jus in bello

The Heyns Report indicates that one of the obvious context within which AWS may deployed is that of armed conflict.[36] AWS may be used in the context of both international armed conflict (IAC) and non-international armed conflict (NIAC) to which *jus in bello* or IHL applies.[37] In June 2021, a UN Report indicated that AWS were deployed in Libya in the context of armed conflict where combatants were 'hunted down and remotely engaged by the unmanned combat aerial vehicles or the lethal autonomous weapons systems such as the STM *Kargu*-2 and other loitering munitions.'[38] Further, the UN report also noted that 'the lethal autonomous weapons systems were programmed to attack targets without requiring data connectivity between the operator and the munition.'[39]

Indeed, in the current AWS discussions in the CCW, stakeholders have generally focussed on the context of armed conflict, that is, the potential use of AWS in times of war and whether AWS can be used in compliance with IHL.[40] Basically, many stakeholders regard the technology of AWS as typical conventional weapons whose use is restricted to armed conflict.

Whether used in the context of IAC or NIAC, AWS raise similar concerns.[41] It is important to note that AWS may be used by both states

36 A/HRC/23/47 (n 1) paras 63-74.

37 See the Geneva Conventions of 1949 and their Additional Protocols.

38 See S/2021/219, Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, (2021) para 63, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/037/72/PDF/N2103772.pdf?OpenElement (accessed 21 December 2021). Note, however, that the Turkish company that developed the drone, regardless of describing the system as autonomous, countered the UN report noting that 'autonomous technologies are advancing so fast, but we are not there yet. At STM, we always think ethically a human should be involved in the loop'. See S Tavsan 'Turkish defense company says drone unable to go rogue in Libya' (2021) https://asia.nikkei.com/Business/Aerospace-Defense/Turkish-defense-company-says-drone-unable-to-go-rogue-in-Libya (accessed 21 December 2021).

39 As above.

40 See CCW/GGE.1/2019/CRP.1/Rev.2 (n 8).

41 A/HRC/23/47 (n 1) paras 63-74.

and non-state actors. In the context of armed conflict, because AWS lack human judgment, it will be difficult for them to be used in compliance with rules of IHL.[42] Recently in June 2021, in its widely publicised position on AWS, the ICRC noted that because 'unpredictability is inherent in the effects of using all AWS due to the fact that the user does not choose, or know, the specific target(s), and the precise timing and/or location of the resulting application(s) of force',[43] they pose a serious challenge to compliance with IHL rules.[44] Where there is no compliance with IHL rules such as distinction and proportionality, the lives and well-being of protected persons such as civilians – who ought to be protected at all times – are placed at risk.[45]

Without a doubt, and as will be discussed under the scope of application section below, the CCW framework is suited to deal with use of weapons, including AWS, within the context of armed conflict. In other words, if the concerns raised by AWS were only limited to contexts of armed conflict, the CCW framework would be capable of producing a comprehensive new law to deal with the challenges they raise. However, as shown below and as was indicated right from the beginning in the Heyns Report, AWS may also be used outside the context of armed conflict.[46]

Counterterrorism operations and jus ad bellum

Closely related to the potential use of AWS in situations of armed conflict is the context of inter-state use of AWS in counterterrorism operations. Just like how armed drones have been used by a number of states to target suspected terrorists located in the territories of other sovereign states[47], there is also a potential that AWS will be similarly used in counterterrorism operations. While counter-terrorism operations are conducted by states, it is also important to note that AWS may end up in the hands of terrorist and presenting a formidable risk to domestic and national security.[48]

42 A/HRC/23/47 (n 1) paras 31 and 55; T Chengeta 'Measuring autonomous weapon systems against international humanitarian law rules' (2016) 5 *Journal of Law & Cyber Warfare* 103.

43 ICRC position on AWS (n 6) 7.

44 ICRC position on AWS (n 6) 7; See also V Boulanin & others 'Autonomous weapon systems and international humanitarian law: Identifying limits and the required type and degree of human–machine interaction' (2021) *SIPRI*.

45 Human Rights Watch 'Losing humanity: The case against killer robots' (2012) 30, https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots (accessed 21 December 2021); art 51 of Additional Protocol I to the Geneva Conventions of 1949.

46 A/HRC/23/47 (n 1) paras 82-85.

47 C Heyns & others 'The right to life and the international law framework regulating the use of armed drones' in D Akande and others (eds) *Human rights and 21st century challenges: poverty, conflict, and the environment* (OUP 2020) 158.

48 CCW/GGE.1/2019/3, Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons

The use of force through emerging technologies such as armed drones and AWS in counterterrorist operations has implications for *jus ad bellum* – the law governing inter-state use of force. Article 2(4) of the UN Charter prohibits the use of force by one state against the territorial integrity of another state. The prohibition of the threat or use of inter-state force is part of customary international law.[49]

Already, there are a number of scholars who argue that the use of emerging technologies, new means and methods of 'warfare' in the wake of terrorism make the current legal classification of conflicts inadequate. Traditionally, there are three broad classifications in use of force and respective legal regimes applicable: *jus ad bellum* relating to the general prohibition on the inter-state use of force; situations of armed conflict to which *jus in bello* is the *lex specialis* and use of force in peace time to which IHRL is the governing regime. Yet, in the wake of terrorism, counterterrorism and use of emerging technologies, some scholars have argued for the creation of another classification, the so-called *jus ad vim*, 'the just use of force short of war'.[50] Of course, the idea of *jus ad vim* has been hotly debated, with those in favour arguing that it will 'shift away from mechanised slaughter of modern warfare towards more calibrated applications of force'[51] while those against it indicating that 'it may encourage greater profligacy on the part of states in respect of the recourse to arms'.[52]

Along the same lines, the Heyns Report, notes that AWS may aggravate the idea of expanding the battlefield beyond IHL contexts where 'terrorists are targeted wherever they happen to be found in the world, including in territories where an armed conflict may not exist.'[53] The danger of this *jus ad vim* proposition is that 'the world is seen as a single, large and perpetual battlefield and force is used without meeting the [armed conflict] threshold requirements.'[54] Thus, in the context of inter-state use of force and concerns about situations of aggression, it

Systems, p.13, Guiding Principle (f).

49 Heyns & others (n 47).

50 CN Braun '*Jus ad vim* and drone warfare: a classical just war perspective' in C Enemark (ed) *Ethics of drone strikes: constraining remote control killing* (Edinburgh University Press 2021) 31; See also D Brunstetter '*Jus ad vim*: a rejoinder to Helen Frowe' (2016) 30 *Ethics and International Affairs* 131-6; H Frowe 'On the redundancy of *jus ad vim*: a response to Daniel Brunstetter and Megan Braun' (2016) 30 *Ethics and International Affairs* 117-129; SB Ford '*Jus ad vim* and the just use of lethal force-short-of-war' in F Allhoff & others (eds) *Routledge handbook of ethics and war: just war theory in the 21st century* (Routledge 2013) 63-75; M Walzer 'On fighting terrorism justly' (2007) 21 *International Relations* 480-484; ME Vaha 'The ethics of war, innocence, and hard cases: a call for the middle ground' in C Navari (ed) *Ethical reasoning in international affairs: arguments from the middle ground* (Palgrave 2013) 182-202.

51 As above.

52 As above.

53 A/HRC/23/47 (n 1) para 83.

54 As above.

has been indicated that the development and use of AWS risk lowering the threshold on the use of force.[55] AWS will make it too easy for states to resort to use of force and has a potential of increasing cases of inter-state uses of force.[56] States have thus noted the concern that the advent of AWS may jeopardise world peace and security.[57]

The potential inter-state uses of force through AWS in contexts of counterterrorist operations is critical for a number of reasons. First, this context is very important because such uses has far-reaching implications for state sovereignty and the protection of fundamental rights such as the right to life. As noted by Heyns *et al* in relation to use of armed drones, the law on the use of inter-state force not only protects state sovereignty but also protects the important 'right and interest of the state to have the lives of its citizens and inhabitants protected from acts of aggression.'[58] It is also important to contextualise the identity of the likely victims in this regard. A number of UN reports have indicated that where inter-state force is used in the context of counterterrorism – even so, through emerging technologies such as armed drones – civilians in the Muslim communities, including women and children, are disproportionately affected.[59]

Second, the potential inter-state uses of force through AWS is also critical to states who are often on the receiving end when it comes to aggression or unlawful use of inter-state force. Contending with the challenges raised by AWS from the *jus ad bellum* lens is thus important because the technology of AWS is not necessarily neutral. It is important for stakeholders to interrogate the issue through the lens of critical theories such as decolonial theory and critical race theories.[60] These critical theories are social theories that critique society and culture in order to dig beneath the surface, uncover and challenge power structures that shape not only society and geopolitics but technological inventions such as AWS. Indeed, science has been instrumental in creating systems that are oppressive to certain peoples, reproducing social structures of authority, hierarchies of race and oppressive geopolitics.

The *jus ad bellum* lens and context give a broader view on use of force through AWS than the *jus in bello* which does not concern itself with whether a particular war is just or not. To overly or exclusively focus on the use of AWS in the context of armed conflict and the application of

55 A/HRC/23/47 (n 1) para 58.
56 As above.
57 CCW/GGE.1/2019/CRP.1/Rev.2 (n 8) para 24(a).
58 Heyns & others (n 47).
59 See for example, A/75/18, Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5-29 August 2019), 100th session, (25 November-13 December 2019), para 22.
60 S Mohamed & others 'Decolonial AI: decolonial theory as sociotechnical foresight in artificial intelligence' (2020) *Philosophy and Technology* 659.

jus in bello is to approach the technology of AWS as if it was a neutral technology. AI technologies like AWS are neither a simple matter of algorithms nor a mere case of great man's imaginations in pursuit of science but rather, such technologies are shaped by specific political and ideological projects of the powerful that permeate geopolitics.[61] Studies have already noted that racialised AI military technologies will lead to algorithmic coloniality, algorithmic oppression, exploitation and dispossession of those who have been historically oppressed.[62] It is, therefore, important to emphasise the social context of AWS and confront epistemic forgeries where AI technologies like AWS are presented as if they are neutral technologies that are free from social context. Some scholars have argued that, AI technologies like AWS 'come from a rather specific, White, and privileged place' and are 'racialised, gendered, and classed models of the self.'[63]

In view of the above, focussing on the context of armed conflict alone is to equally adopt a non-contextual and ahistorical approach to a technology that is likely to be deployed more in certain contexts such as counter-terrorism operations. *Who*'s developing *what*, and *where* will it be deployed and against *who*? What has been the historical experience on use of force through emerging technologies such as armed drones? Where have they been deployed? It is critical for stakeholders to contend with these questions and with this context because excluding them may result in the adoption of a new law on AWS with a very narrow scope of application.

As indicated above, the debate on AWS is currently occurring within the CCW framework. The relevant question – to be discussed under the scope of application section of this essay – is whether the CCW framework can produce a new law on AWS that sufficiently addresses issues that are raised by AWS under *jus ad bellum* or the law governing inter-State use of force, particularly, in counter-terrorist operations.

Use of AWS in peace time and IHRL

The Heyns Report notes that AWS may also be used in situations outside the armed conflict context such as law enforcement situations.[64] Noting that 'the experience with UCAVs (armed drones) has shown that this type of military technology finds its way with ease into situations outside recognized battlefields'[65], the Heyns Report notes that AWS

61 Y Katz *Artificial whiteness: politics and ideology in artificial intelligence* (Columbia University Press 2020) 3-13.

62 See A Birhane 'Algorithmic colonisation of Africa' (2020) 17 *Scripted* 2; Mohamed & others (n 60) 659.

63 Katz (n 61).

64 A/HRC/23/47 (n 1) paras 82-85.

65 A/HRC/23/47 (n 1) para 82; See also Heyns & others (n 47) 181; C Enemark 'Armed drones and ethical policing: risk, perception, and the tele-present officer'

'could be used by states to suppress domestic enemies and to terrorize the population at large, suppress demonstrations and fight 'wars' against drugs.'[66] It further notes that 'the possibility of [AWS] usage in a domestic law enforcement situation creates particular risks of arbitrary deprivation of life, because of the difficulty that [AWS] are bound to have in meeting the stricter requirements posed by IHRL'.[67]

Thus, in cases where AWS are used in peace time, for example in law enforcement situations, there are risks that are posed to a number of human rights such as the right to life and the right to non-discrimination.[68] AWS do not have situational awareness and understanding of the nuances of human behaviour in order to comply with fundamental principles on the use of force such as the 'protect life principle'.[69] This principle demands that states agents must only use lethal force as a last resort to protect the life of another person that is in immediate danger.[70]

Regulation of use of AWS in law enforcement situations is particularly important to people of colour who are often disproportionately affected when force is used by state agents. In 2020, a UN report on the United States – one of the states that are currently developing AWS – noted various concerns regarding racial bias and the use of lethal force. It noted 'the continuing practice of racial profiling, the use of brutality and the excessive use of force by law enforcement officials against persons belonging to racial and ethnic minorities.'[71] Similar concerns have been noted regarding other countries such as the United Kingdom, France and Israel.[72] In cases where people of colour are involved, the UN Report noted the disproportionate use of lethal force regardless of whether or not the victim concerned is armed.[73] The Report further noted that racism associated with use of lethal force is a matter of 'systemic and structural discrimination [that] permeates state institutions and disproportionately promotes racial disparities against [people of colour and ethnic minorities].'[74] UN has also recommended that UN institutions

(2021) 40(2) *Criminal Justice Ethics* 124-144.

66 A/HRC/23/47 (n 1) para 84.

67 A/HRC/23/47 (n 1) 85.

68 A/HRC/23/47 (n 1) 30.

69 A/HRC/23/47 (n 1) para 85.

70 UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36, 2014 para 72.

71 See A/75/18, Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5-29 August 2019), 100th session, (25 November-13 December 2019), para 22.

72 As above.

73 As above.

74 As above.

should condemn 'modern day racial terror lynchings and [should call] for systematic reform and justice.'[75]

Now that AWS raise various complex issues in different contexts of application and use, some scholars have already recommended a comprehensive and coordinated response that not only covers one context, but all possible situations discussed above.[76] The enduring question in this paper is whether the CCW framework is capable of producing a new law on AWS whose scope of application covers all contexts and circumstances.

Scope of application of new law on AWS

Given that many stakeholders agree that existing law is inadequate to govern AWS uses in various contexts and that states need to adopt new rules, it is necessary to consider the forum in which the new rules might be developed. As already indicated, AWS are currently being discussed by the UNGGE in the CCW framework. Indeed, Principle (k), one of the eleven Guiding Principles of the UNGGE on AWS, provides as follows:[77]

> The CCW (Convention on Conventional Weapons) offers an appropriate framework for dealing with the issue of emerging technologies in the area of lethal autonomous weapons systems within the context of the objectives and purposes of the Convention, which seeks to strike a balance between military necessity and humanitarian considerations.

In its 2021 submission to the UNGGE, Australia noted that 'it is a strong supporter of the Convention on Certain Conventional Weapons (CCW)'[78] and that 'the CCW maintains broad global support and is the appropriate forum to discuss issues, regulations, frameworks and legal aspects related to lethal autonomous weapons systems.'[79] Likewise, Canada submitted that 'given the mixture of states party to the CCW and the fact that it includes major military powers, Canada views the CCW as the appropriate forum for international discussions on such weapons.'[80] In the same vein, in their 2021 submissions to the UNGGE, France and Germany noted that a normative framework on AWS 'could include a reaffirmation of the role and objectives of the CCW which remains the appropriate forum, notably because of its multilateral

75 See also General Recommendations 31 of 2005 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 34 (2011) on racial discrimination against people of African descent and 35 (2013).

76 Heyns & others (n 147) 153.

77 CCW/GGE.1/2019/CRP.1/Rev.2 (n 8) Annex IV, p.13.

78 See 'Convention on Certain Conventional Weapons Group of Governmental Experts on Lethal Autonomous Weapons Systems, Submission of Australia' (2021) 1.

79 As above.

80 See the 'Commentary by Canada on the operationalization of the Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' (2021) 4.

nature.'[81] The same sentiments were expressed by the United Kingdom that noted that 'the CCW remains the optimum forum to discuss and progress the issue of Lethal Autonomous Weapons Systems'.[82]

The above notwithstanding, the appropriateness of the CCW framework has been previously questioned on the grounds that the CCW is a consensus framework – a consensus that is unlikely to be achieved given the issues raised by AWS.[83] For a new rules to be adopted in the CCW framework, there has to be consensus among the High Contracting parties of the CCW. Given that some of the critical concerns on, and objections to the use of AWS are anchored on moral values – values that are arguably subjective – it has been argued that chances of new rules on AWS emerging from the CCW framework are very low.[84] Relevant values such as dignity, virtue, compassion, religion, peace, security etc. and points of divergence in perception, present challenges to achieve multi-lateral consensus on a value-based regulation on AWS.[85]

In considering the appropriateness of the CCW framework to produce new law on AWS, this section considers the question whether the CCW framework can produce new rules whose scope of application covers situations outside the contexts of armed conflict that have been discussed above.

CCW and protocols' scope of application

After noting that 'existing IHL rules do not hold all the answers to the humanitarian, legal and ethical questions raised by AWS'[86] the ICRC recommended states 'to establish internationally agreed limits on autonomous weapon systems to ensure civilian protection, compliance with international humanitarian law, and ethical acceptability'.[87] In relation to the forum where that new law may come from, the ICRC noted that it 'supports initiatives by states aimed at establishing international limits on autonomous weapon systems … such as efforts pursued in the Convention on Certain Conventional Weapons to agree on aspects of a normative and operational framework.'[88]

81 See 'Franco-German contribution: Outline for a normative and operational framework on emerging technologies in the area of LAWS' (2021) 1.

82 See United Kingdom, 'Written contributions on possible consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems' (2021) 1.

83 T Chengeta 'Autonomous armed drones and challenges to multilateral consensus on value-based regulation' in C Enemark (ed) *Ethics of drone ethics: restraining remote-control killing* (Edinburgh University Press 2021) 171-184.

84 As above.

85 As above.

86 ICRC position on AWS (n 6) 11.

87 ICRC position on AWS (n 6) 2.

88 As above.

Likewise, in its recent statement to the UNGGE, the International Committee for Robot for Robot Arms Control (ICRAC) also noted that 'existing international law is not sufficient'[89] and 'considers it vital that the CCW moves to the negotiation of an international legal instrument' on AWS.[90] Similarly, other stakeholders who are advocating for new law on AWS have indicated that such new law could take form of an additional Protocol to the CCW. For example, in its 2021 submission to the UNGGE, the Republic of the Philippines noted that 'a normative and operational framework [on AWS] should ultimately be institutionalized through a legally-binding Protocol of the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or To Have Indiscriminate Effects (CCW)'.[91] As indicated above, the fundamental question is whether the CCW framework is appropriate for the production of new rules on AWS whose scope of application covers all contexts within which AWS may be used. In other words, is the *purpose* of the CCW framework and scope of application wide enough to cover all the contexts within which AWS may be used?

Article 1 on the Scope of Application of the CCW provides that the CCW 'and its annexed Protocols *shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949* for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.'[92] The referred Article 2 Common to the Geneva Conventions of 12 August 1949 and paragraph 4 of Article 1 of Additional Protocol 1 to the Geneva Conventions refer to contexts of armed conflict. Indeed, it is indicated that the 'the purpose of the Convention (CCW) is to ban or restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately.'[93] Clearly, it is only in the context of armed conflict that the terms 'combatants' and 'civilians' are used, not in law enforcement or other violent situations during peace time. Thus, basically, the CCW framework focusses on armed conflict and IHL.

Furthermore, all the Protocols to the CCW, namely, Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, Protocol III on

89 See Written contribution from the International Committee for Robot Arms Control to the CCW GGE on LAW (2021) 1 (Written contribution).

90 Written contribution (n 89) 2.

91 See 'Commentary of the Republic of the Philippines on the Normative and Operational Framework in Emerging Technologies in the Area of Lethal Autonomous Weapon Systems' (2021) para 2.

92 Art 1 of the UN Convention on Conventional Weapons (emphasis added).

93 See the UN CCW and its Protocols, https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/ (accessed 7 December 2021).

Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices and Protocol V on Explosive Remnants of War are contemplated to apply in the context of armed conflict.[94] For example, the CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 provides that while the Protocol is applicable to both IAC and NIAC[95], the 'Protocol *shall not apply* to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.[96]

As is clear from the above, stakeholders in the current debate on AWS in the CCW need to contend with the fact that the CCW framework is limited to contexts of armed conflict and use of weapons during times of war. The CCW has not, in the past, produced a Protocol or rules that applies both in times of armed conflict and peace. It is also to no surprise why the UNGGE, in its Guiding Principles states that IHL, states that the law of armed conflict, 'should guide the continued work of the Group'.[97]

Already, in its 2021 contribution to the UNGGE, France emphasised that a normative framework on AWS should be 'in line with the objectives and purposes of the CCW'[98] and that it 'should primarily aim at ensuring that *International Humanitarian Law* (IHL) will continue to apply fully to all weapons systems.'[99] Indeed, IHL only applies to situations of armed conflict.

Likewise, in its 2021 submission, while noting that 'the CCW as an optimal forum to address the issue of LAWS',[100] Russia emphasised that 'discussions within the GGE on AWS should be structured fully in line with the objectives of the CCW and should not go beyond its scope'[101] and as such 'the subject of the discussion within the GGE on LAWS

94 See the UN CCW and its Protocols, https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/ (accessed 17 December 2021).

95 Art 2 and 3 of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

96 Art 2 of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (emphasis added).

97 CCW/GGE.1/2019/CRP.1/Rev.2 (n 8) 13.

98 See 'Possible consensus recommendations in relation to the clarification, consideration and development of aspects on the normative and operational framework on emerging technologies in the area of LAWS, Written contribution by France' (2021) 2.

99 As above.

100 See 'Russia's Considerations for the report of the Group of Governmental Experts of the High Contracting Parties to the Convention on Certain Conventional Weapons on emerging technologies in the area of Lethal Autonomous Weapons Systems on the outcomes of the work undertaken in 2017-2021' (2021) (Russia's Considerations) at 4.

101 As above.

should be limited to *fully autonomous military systems*.'[102] In the recently concluded UNGGE meeting on AWS (2-8 December 2021), while states like France, the UK, Switzerland, the US etc. reiterated their views that IHL is the applicable regime to AWS, some states went as far as insisting that references to IHRL in the UNGGE draft report should be deleted.[103] For example, during the GGE session on 3 December 2021, the Israel delegation noted as follows: 'the CCW is an IHL-focused framework, we think that other legal frameworks that are outside the CCW mandate and objectives should not be mentioned (in the CCW report on AWS). We therefore, support what several delegations have already suggested: to delete the words "international human rights law" (from the report)'.[104] The delegation from India also spoke strongly against the inclusion of IHRL in the report of the CCW report on AWS. It noted as follows: 'For my delegation, we cannot accept the inclusion of international human rights law … in this paragraph or elsewhere in the report … We can keep discussing these issues till the cows go home but we will not be able to agree to this'.[105] Given the legal limitations or parameters that exists on the scope of application of laws that are adopted in the CCW framework, states and other stakeholders should seriously consider if the CCW framework is the appropriate framework within which new law on AWS should be negotiated and adopted.

Of course, one of the questions that may arise is whether prohibitions that are imposed in the context of armed conflict are not automatically applicable to law enforcement or other situations where force is used outside war situations. Ordinarily, there is a strong reason to argue that surely, what is bad for the goose must also be bad for the gander. In other words, if new rules are adopted in the CCW framework and provides for certain prohibitions on AWS, such prohibitions should also apply to contexts of law enforcement and other situations where force is used in peace time. Yet, this is not always the case. An example is the Chemical Weapons Convention which provides that 'each State Party undertakes not to use riot control agents as a method of warfare',[106] but 'may be used for certain law enforcement purposes including riot control.'[107] Thus, while the use of tear gas is prohibited in the context of armed conflict, it can be lawfully used in the context of law enforcement. Thus, the CCW will have to expressly deal with potential uses of AWS outside the context of armed conflict and consider IHRL and other laws that

102 Russia's Considerations (n 100) at 3.
103 See the CCW UNGGE meetings on AWS (2-8 December 2021), recordings available at https://conf.unog.ch/digitalrecordings/ (accessed 21 December 2021).
104 As above.
105 As above.
106 Article 1(5) of the Chemical Weapons Convention.
107 Article II(9)(d) of the Chemical Weapons Convention.

more fully apply outside the context of armed conflict. The argument in this section is that in terms of the CCW mandate and framework, there is no legal room to do that unless the state parties to the CCW choose to change the CCW scope of application and purpose of the Convention and its framework.

Furthermore, some may argue that the adoption of new rules or a treaty on AWS in the CCW framework does not stop states from negotiating another law or treaty outside the CCW framework to cover situations outside armed conflict. While this may be true, it is not an ideal situation. The challenges and issues raised by AWS are interrelated and they should be dealt with in a single and comprehensive treaty on AWS. On account of the limitations on the CCW framework and its purpose, it is doubtful that the CCW framework can produce such a comprehensive treaty.

Scope of application suggested by civil society

In its proposal of elements of a new treaty on AWS, the Campaign to Stop Killer Robots suggested a broad scope of application that covers both war and peace time.[108] In support of that broad scope of application, the Campaign gave examples of treaties such as the Chemical Weapons Convention, the Mine Ban Treaty, the Convention on Cluster Munitions and the Treaty on the Prohibition of Nuclear Weapons.[109] The Campaign particularly noted as follows: [110]

> All four treaties prohibit these activities 'under any circumstances.' As a result, they apply in times of peace and war. This broad scope is important in the fully autonomous weapons context given that the systems could be used in law enforcement operations as well as in situations of armed conflict.

While the examples given by the Campaign are compelling, it is important to note that all the four treaties referred to were not adopted in the CCW framework – a framework that focusses on situations of armed conflict and the application of IHL or *jus in bello*. The Chemical Weapons Convention is administered by the Organisation for the Prohibition of Chemical Weapons (OPCW), not the CCW.[111] The Mine Ban Treaty was adopted through a UN General Assembly Resolution, not the CCW.[112] Likewise, the Treaty on the Prohibition of Nuclear

108 See Human Rights Watch, 'New weapons, proven precedent: Elements of and models for a treaty on killer robots' (2020) https://www.hrw.org/report/2020/10/20/new-weapons-proven-precedent/elements-and-models-treaty-killer-robots (accessed 10 December 2021).

109 As above.

110 As above.

111 See OPCW, available at https://www.opcw.org/about-us (accessed 10 December 2021).

112 See UN General Assembly Resolution 52/38.

Weapons was adopted through a UN General Assembly Resolution.[113] Finally, the Convention on Cluster Munitions was adopted outside the CCW framework.[114] Thus, while there are disarmament treaties whose scope of application covers situations outside armed conflict, such treaties are not products of the CCW framework.

Importance of a broad scope of application

As already noted above, it is fundamental that when a new treaty on AWS is adopted, its scope of application should be broad to cover situations outside armed conflict because there is a real potential that AWS may be used in the context of law enforcement and counterterrorism operations.[115] Such a broad scope of application is also critical for those approaching the challenges raised by AWS from a racial justice standpoint. All contexts within which AWS may be used absolutely matter and should be equally governed by the new law that may be adopted on AWS.

As indicated above, several UN reports indicate that when state agents use force in the context of law enforcement and counterterrorist operations, people of colour and civilians in the Muslim communities are disproportionately affected.[116] Therefore, If AWS are used in the context of law enforcement and counterterrorism operations, it is highly likely that people of colour and Muslim communities will be disproportionately affected. Already, there have been indications that use of AWS may exacerbate racial and gender discrimination.[117] If used in the context of law enforcement and counterterrorism, AWS are not a neutral technology, they are not just conventional weapons but have far-reaching discriminatory consequences for certain groups of peoples. Such discriminatory consequences cannot be fully addressed in the CCW framework whose focus is IHL and contexts of armed conflict.

The 2020 Report of the UN Special Rapporteur on contemporary forms of racism notes that '*states must reject a 'colour-blind' approach to governance and regulation of emerging technologies, one that ignores the specific marginalisation of racial and ethnic minorities and conceptualises problems and solutions relating to such technologies without accounting*

113 See UN General Assembly Resolution A/71/L.52.

114 See the Convention on Cluster Munitions, available at https://www.clusterconvention.org/ (accessed 10 December 2021).

115 A/HRC/23/47 (n 1); Human Rights Watch (n 45), ICRAC (n 89).

116 See the Committee on the Elimination of Racial Discrimination, https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx (accessed 16 December 2021); See A/75/18, Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5-29 August 2019), 100th session, (25 November-13 December 2019), para 22.

117 See UNGGE 2020 Report, https://documents.unoda.org/wp-content/uploads/2020/07/CCW_GGE1_2020_WP_7-ADVANCE.pdf (accessed 21 December 2021).

for their likely effects on these groups.'[118] If there is an agreement that AWS may be used in contexts outside armed conflict – contexts such law enforcement and counterterrorist operations where certain peoples are disproportionately affected by the use of force – insisting that a framework that does not fully address such contexts is the appropriate forum to produce new law on AWS is to unjustifiably adopt a colour-blind approach to governance of AWS. It is equally contrary to the recommendations of the UN Committee on Convention on the Elimination of Racial Discrimination that noted that on every issue – including emerging technologies – states must seek to eliminate any forms of 'modern day racial terror lynchings' and must call for systematic reform and justice.[119]

Conclusion

In the AWS discussions in the CCW, many states and organisations such as the ICRC have reached the conclusion that existing law is insufficient to deal with the challenges that are raised by AWS. They have recommended the negotiation of a new legally binding instrument or treaty on AWS. This essay considered the question whether the CCW framework is the appropriate framework to produce a new law on AWS given the limitations of the CCW framework as far as scope of application is concerned. The essay showed that while the CCW framework can only produce new rules whose scope of application is limited to situations of armed conflict, AWS may be used in law enforcement, counterterrorism and other situations outside armed conflict. As such, unless adjusted, the CCW framework cannot produce a comprehensive law that can adequately govern AWS in all circumstances. This conclusion is not to say that the CCW framework is without merit or advantages, rather, it is to point out that stakeholders should contend with the issue relating to limitation of scope of application of treaties or protocols that are adopted in the CCW framework.

118 UN Special Rapporteur on contemporary forms of racism, Report, A/HRC/44/57, (2020), para 48.

119 See also General Recommendations 31 (of 2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 34 (of 2011) on racial discrimination against people of African descent and 35 (of 2013).

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Christof as Pan-African humanitarian lawyer

*Sarah Mabeza**

Introduction

At his heart Professor Heyns was two things: a public international law giant, and a true pan-Africanist. He believed in the value of international law – especially international human rights law and international humanitarian law (IHL) – and in the potential that exists on the African continent. Given these two values, this essay endeavours to highlight some of the work that Professor Heyns did to develop and clarify IHL from an African perspective, and to pay tribute to this immense contribution.

This essay starts by affirming the relevance of IHL to Africa and then turns to highlight current efforts being undertaken to promote this body of law on the continent, notably those which Professor Heyns was actively involved in. In concluding the essay, I share some recommendations for the continuation of Professor Heyns' work in advancing IHL on the continent.

Relevance of international humanitarian law to Africa

As a legal advisor for an international humanitarian organisation, I have been privileged over the last 13 years to be responsible for engaging Southern African governments on the implementation of IHL. I have also had the opportunity to engage with governments in East Africa as well as the Indian Ocean Island states. Through this engagement, two main reflections have arisen: African states are largely convinced that IHL is important; but at the same time, not all African states are persuaded that IHL is 'African'.

* Regional Legal Advisor, International Committee of the Red Cross, Pretoria, South Africa. I have chosen to contribute this chapter as a way of thanking Professor Heyns for everything he taught me, including those lessons I learnt simply from interacting with him. The one characteristic that Professor Heyns never failed to demonstrate for me was humility. It has been a privilege to know him.

African states are largely convinced of the relevance of international humanitarian law

African states are largely convinced of the importance and relevance of IHL to the continent. There is much evidence to support this assertion. First, the level of African state support can be gauged from the rate of ratification by African states of instruments of IHL,[1] as well as the numerous decisions and Resolutions passed within the African Union (AU) system related to IHL.[2] Second, the 2009 AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa is the first binding regional instrument in the world to regulate the treatment of internally displaced persons, and is thus evidence of the continent's willingness to play a leading role in codifying and adhering to principles of IHL and international human rights law related to displacement.[3] Third, African states were instrumental in advancing the drafting and adoption of the Treaty on the Prohibition of Nuclear Weapons, as the first international instrument to ban nuclear weapons. South Africa and Nigeria, in particular, were influential during the negotiations. When it came to its adoption, in July 2017, 42 African states voted in favour.[4] According to Van Wyk, Africa's normative commitment to the Ban Treaty is strong. She notes that the 'Africa Group has been involved in the promotion of the Ban Treaty and its ratification ... It has also continued to reiterate the continent's commitment to complete nuclear disarmament'.[5]

Fourth, 31 of 54 African states have created national IHL committees to follow-up on promotion and implementation of IHL at the domestic level.[6] These inter-ministerial committees provide a platform for broad government engagement on a variety of issues related to the domestication of IHL. Fifth, a number of African governments meet regularly at regional IHL seminars across the continent, hosted by the ICRC together with partner governments and institutions, including the Department of International Relations and Cooperation of the government of South Africa, and the Economic Community of West

1 https://ihl-databases.icrc.org/ihl (accessed 28 October 2021).

2 See for example African Commission Resolution 467 on the need for Silencing the Guns in Africa based on human and peoples' rights; and its Resolution 7 on the Promotion and Respect of IHL and Human and Peoples' Rights - ACHPR/Res.7(XIV)93.

3 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, entered into force 6 December 2012.

4 2017 Treaty on the Prohibition of Nuclear Weapons, entered into force 22 January 2021. For more on the role of African states in adopting the Treaty, see African Support for the TPNW (icanw.org) (accessed 27 October 2021).

5 Policy-Insights-104-van-wyk-turianskyi.pdf (accessed 4 November 2021).

6 Table of National Committees and other national bodies on IHL/International Committee of the Red Cross (icrc.org) (accessed 28 October 2021).

African States. In these seminars, states have the opportunity to report on developments in the field of IHL at the national level. They also receive updates on the recent developments in IHL. The seminars also provide a platform for peer-to-peer exchanges between governments on the role that IHL plays in their region.[7] And finally, African voices and perspectives on various IHL themes are increasingly being promoted at the regional and global level, for example through publication of articles by African authors in the *International Review of the Red Cross*.[8] Inviting African speakers to participate in regional, continental and global events on IHL also serves to profile these perspectives. An example is the webinar, chaired by Professor Heyns in September 2020 and co-hosted by the International Committee of the Red Cross (ICRC) and Institute for Security Studies, on Africa's role in regulating autonomous weapons systems, which featured a South African researcher and a Nigerian Air Commodore (retired) as speakers on the panel.[9]

Not all African states are convinced of Africanness of international humanitarian law

While the recognition of the relevance of IHL to the continent is encouraging, the second observation is that despite accepting its relevance, not all African states are convinced of the 'Africanness' of IHL. Like much of international law, it is often referred to on the continent as a 'Western construct' – as 'Geneva law', or as a body of international law for which the expertise lies in First World states.[10] This is an idea that may have developed from the fact that IHL was largely codified in the West. However, as is more fully elaborated below, principles of IHL historically existed in many traditional groups and cultures across the world, including in Africa.

My experience of Professor Heyns is that he fought to correct the misconception that public international law belonged to the West. The ICRC joined Professor Heyns in this crusade. In 2021, it released the ICRC

7 As an example, the Regional IHL Seminar in Pretoria is an annual Seminar, co-hosted by the ICRC and the Department of International Relations and Cooperation of the Government of South Africa, which brings together representatives from up to 18 governments from Southern Africa and the Indian Ocean Island States.

8 See for example the following contributions by African authors: SJ Swart 'An African contribution to the nuclear weapons debate' (2015) 97(899) 753-773 https://international-review.icrc.org/articles/african-contribution-nuclear-weapons-debate (accessed 31 December 2021); G Waschefort 'Africa and international humanitarian law: the more things change, the more they stay the same' (2016) 98(2) 593-624, https://international-review.icrc.org/sites/default/files/irc98_11.pdf (accessed 31 December 2021).

9 Joint ICRC/ISS webinar on 'Africa's role in regulating autonomous weapons systems', 23 September 2020.

10 Under the protection of the palm: wars of dignity in the Pacific (icrc.org) (accessed 4 November 2021).

Tool on African Customary International Humanitarian Law.[11] The Tool highlights the link between African traditions and customs and modern-day IHL, and is 'the product of a number of years of research into the values underpinning African customs concerning warfare'.[12] According to one of the legal advisors who worked on the Tool, its purpose is 'firstly to contribute to current debates on relevance of IHL to Africa; and secondly to increase understanding and acceptance of IHL rules on the African continent'.[13] As a result of the research undertaken, the ICRC identified 11 African traditions that correlate with modern day IHL principles. These traditions are gathered from across the continent, encompassing the Sahel, Somalia and Kenya. They range from issues such as protection of women and children in times of armed conflict to measures for dealing with the bodies of dead soldiers. An example of such African-specific IHL is the tradition in Somalia that strictly forbids the desecration of the bodies of the enemy dead or taking of their possessions for personal gain. This tradition reflects the modern-day principles of IHL which state that each party to the armed conflict must take all possible measures to prevent the dead from being despoiled, and that mutilation of dead bodies is to be prohibited.[14] Essentially, the value of the Tool on African Customary International Humanitarian Law lies in encouraging African states to take ownership of this important body of law.

Professor Heyns was aware of the importance of promoting the relevance of IHL to Africa, but also of the value in promoting African ownership of IHL.[15] The next section addresses some of the efforts undertaken by Professor Heyns in this regard.

Promotion of IHL in Africa

One of the main strengths of Professor Heyns was his practical understanding of the law. As a true Pan-Africanist, he brought this strength to his work on IHL by focusing on practical ways in which to

11 ICRC 'African Values in War: A Tool on Traditional Customs and IHL https://www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl (accessed 27 October 2021)

12 Sarah Jean Mabeza, 'Does IHL reflect African customs and traditions? A spotlight on the ICRC's Tool on African values in war' https://aauihl-clinic.org/2021/09/06/does-international-humanitarian-law-reflect-african-customs-and-traditions-a-spotlight-on-the-icrcs-tool-on-african-values-in-war/ (accessed 15 October 2021).

13 Interview with Tamalin Bolus, Legal Advisor, Pretoria Delegation, International Committee of the Red Cross, 12 August 2021, Pretoria, South Africa.

14 See for example GC I Art. 15(1); GC II Art. 18(1); GC IV Art. 16(2); AP I Art. 34(1); AP II Art. 8 & CIHL Rule 113.

15 For example, Professor Heyns wrote on the impact of the African human rights system, which incorporates some aspects of IHL, and the value in reforming the system. See C Heyns 'The African regional human rights system: in need of reform?' (2001) 1 155-174.

achieve its promotion on the African continent. For example, Professor Heyns constantly pointed to the African perspective on issues that were not normally prioritised among African audiences, such as the issue of autonomous weapons systems (AWS).[16] While supporting dialogue on the issue of AWS at the global level, Professor Heyns also participated in a number of discussions at the continental level addressing the question of the relevance of AWS for Africa. Another practical example of how he promoted IHL on the continent was his encouragement of African students to pursue post-graduate studies in IHL and international human rights law, so that strong African voices could be added to discussions on development of these bodies of law. This was particularly evident in recent years through his work with the Institute for International and Comparative Law in Africa (ICLA), where he developed a doctoral programme under the theme 'Freedom from Violence' that was designed to multiply the number of doctorates in IHL from African students.

Perhaps most importantly, and most practically, Professor Heyns stayed in Africa. He often travelled for meetings and fellowships, including to Harvard University as a Visiting Fellow, Oxford University as a teacher and Geneva on many occasions especially in his role as UN Special Rapporteur on extrajudicial, summary or arbitrary executions. Yet he always returned to South Africa, and to many, his intentional presence on the continent spoke loudest of all.

As many of his contributions to the development and clarification of IHL on the continent are elaborated on in various contributions to this book, this section focuses on only two specific areas through which Professor Heyns' clear passion for promoting IHL on the continent are evident in the annual All Africa Course on IHL and IHL research at ICLA.

Partnering on the annual 'All Africa Course on IHL'

The 'All Africa Course on IHL' is hosted annually in South Africa by the Pretoria Delegation of the ICRC and a local academic partner. This two-week course is always well-attended and attracts English-speaking African lecturers and teachers of IHL and post-graduate IHL students, as well as a number of practitioners in the field. The aim of the course is to provide participants with a comprehensive overview of the fundamentals of IHL and its impact on other bodies of international law, from an African perspective. One of the main objectives of the course is thus to equip participants to return to their home countries with a strong awareness of the need for increased African contribution to the global promotion of IHL. It is clear that the continental diversity

16 C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33 46-71.

represented in the course – both participants as well as lecturers – is where the value of the course lies.

Since 2020 the course has been co-hosted with the Institute for International and Comparative Law and the Centre for Human Rights at the University of Pretoria – both institutions in which Prof Heyns played a central role in establishing. This partnership was enabled through Professor Heyns' strong relationship with the ICRC and his constant willingness to engage in activities that could further the advancement of IHL in Africa. Since partnering with ICLA and the Centre for Human Rights, the number of applications for the course has increased exponentially, evidence of the reach and credibility that these institutions have on the African continent.[17] In a demonstration of his support for the Course, Professor Heyns opened the 17th edition of the All Africa Course in January 2020. In his usual inspirational manner, he encouraged participants to take home what they learnt at the course. In the 2021 programme, Professor Heyns not only opened the 18th edition of the course, but also participated in a panel discussion on the topic of new technologies, which focused on AWS as well as cyber warfare. His support for the course was evident through his participation, as well as through his behind-the-scenes support.

It is hoped that the All Africa Course will continue to achieve its aim of advancing IHL on the continent, and that this will be supported through a continuing partnership between the ICRC, ICLA and Centre for Human Rights. In this way, the name of Professor Heyns will be associated with an excellent tool for promotion of IHL in Africa.

IHL research at the Institute for International and Comparative Law in Africa

During his tenure as Director of ICLA, Professor Heyns sought opportunities to engage with partners to advance the promotion of IHL in Africa, as well as to advance African voices on IHL. In that vein, he in 2018 agreed with the Pretoria Delegation of the ICRC to work towards broader academic engagement between ICLA and ICRC on relevant IHL issues. This engagement aimed to match the high research standards at the University of Pretoria with the ICRC's global research needs. As a result of this partnership, a research project on 'Counterterrorism, IHL, Disarmament, Demobilisation and Reintegration and Human Rights: A Classic Case of Fragmentation?' was undertaken in 2019. The research, facilitated by the ICLA, contributed to ongoing research by the ICRC Law and Policy Department into the impact that IHL has in the field. Under the auspices of this project, ICLA research contributed

17 In 2019 approximately 28 applications were received; in 2020 approximately 180 applications were received.

to showcasing the actual impact of IHL during armed conflict on various social, political and economic factors, such as human security, development and international relations.

Professor Heyns helped pave the way for a research partnership between the ICRC and University of Pretoria on issues related to IHL, and it is hoped that this engagement can continue in order to pay tribute to his efforts.

Summary and recommendations

Professor Heyns' passing has left a giant-sized hole on the continent. The work he did must be continued by like-minded IHL enthusiasts, although it will be a mammoth task for anyone to work with as much insight and impact as he was able to. Additionally, it is not only the substance of his work, but also the manner in which he undertook it, that must be mirrored. Professor Heyns advocated for principled law-making, encompassing moral perspectives during negotiations on development of the law. Despite the difficulty in living up to his name, Professor Heyns has paved the way and we must now walk in his footsteps. As a tribute to his work, we must continue to advocate for the advancement of IHL generally, and for African ownership and promotion of IHL specifically. The following recommendations can be made in this regard.

First, in the realm of academia. There are a number of African academics (some of whom are represented in this book as contributing authors) working in both African and international universities who are writing on IHL issues, providing an academic perspective. These voices need to be strengthened, multiplied and heard. This can be achieved through publications in academic journals and humanitarian blogs that typically host only European or American perspectives; through focusing on aspects of IHL that are a challenge specifically in the African context; and through encouraging and supporting post-graduate students to follow suit.

Second, at the level of regional and sub-regional African organisations. Professor Heyns worked closely with the African Commission on Human and Peoples' Rights (African Commission) on issues related to IHL, serving as an expert advisor to the Working Group on the Death Penalty, Extrajudicial, Summary and Arbitrary Killing and Enforced Disappearances in Africa. He also served as a resource person for the drafting of the African Commission's General Comment 3 on the African Charter on Human and Peoples' Rights on the right to life (article 4)[18] and, at the time of his passing, he was working on supporting the

18 He is specifically mentioned in the preface to the General Comment, noting his

African Commission on the development of a study on the use of force in Africa.[19] Institutions such as the African Commission need support from international law experts; support which Professor Heyns was always willing to give, and which will now need to be provided by new, trusted African voices.

Third, at the level of global organisations and institutions. Professor Heyns was a loud and prominent voice within the United Nations system, including on issues related to IHL. His was not a lone African voice at this level, as more and more Africans take leading roles in positions related to IHL.[20] This is commendable, and should continue.

Fourth, through engagement in existing platforms by African government representatives. Numerous avenues exist for African governments to participate in and advance IHL negotiations and discussions, and Professor Heyns was adept at facilitating such an African participation. He provided space for African governments to speak and, when necessary, was often a voice for these governments on more sensitive issues. The active participation of African governments on issues of IHL is crucial, and any role that can be played in supporting such participation should be welcomed.

And finally, by staying passionate about the continent. In a recent event hosted by the ICRC's Pretoria Delegation and the University of Pretoria's Future Africa Institute in honour of Professor Heyns, it was noted that he believed his margin of impact was more meaningful by his presence in Africa. Whether we find ourselves on the continent or elsewhere, we can follow his example by focusing on positive impact for the African continent.

particularly valuable contribution. See African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 2015.

19 African Commission on Human and Peoples Rights Statement on the Passing of Christof Heyns https://www.achpr.org/pressrelease/detail?id=574 (accessed 28 October 2021).

20 An example is Dumisani Dladla from South Africa, who is currently the Head of the Arms Trade Treaty Secretariat.

33

‘Digital shift’: what have the UN treaty bodies achieved, and what is still missing?

*Vincent Ploton**

Introduction

Considering the extent to which the effectiveness of UNTBs mattered to Christof Heyns, this essay looks into the extent to which the ten existing United Nations (UN) human rights treaty bodies (UNTBs) have digitalised their operations and more importantly, why further digitalisation is urgently required. The essay considers digitalisation exclusively from a procedural perspective, rather than from a substantive perspective. In other words, it does not consider the extent to which UNTBs are dealing with the human rights impact of digitalisation and new technologies. The essay explores what is missing, how to fill the gap, and some of the hindrances and challenges that need to be overcome. The essay refers to examples of how digitalisation has been implemented by relevant stakeholders such as states, civil society and national institutions in their interactions with UNTBs, and proposes areas of further research for improvements. Although I identify areas where digitalisation has had benefits beyond the UNTBs, and where digitalisation related to UNTBs could benefit other international human rights bodies, my main focus remains on the UNTBs

Looking back

A historical perspective: the predominance of paper

In 2016, a UN Assistant Secretary General described the UN as ‘a Remington typewriter in a smartphone world’.[1] His assertion could certainly apply to the working methods of the UNTBs, the vast bulk of which have evolved with a limited and slow pace since the first

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1 A Banbury ‘I love the UN, but it is failing’ 18 March 2016 https://www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html (accessed 20 December 2021).

Committee started operating over 50 years ago.[2] This is notably true of digitalisation in the work of UNTBs: It is only in the early 21st century, and more specifically in the late 2010s, that the UNTBs finally said farewell to paper. Throughout their initial 50 years, the Committees initially entirely, and later mostly, worked on paper. Civil society organisations were required to submit paper copies of their submissions to the Committees until the mid to late 2010s – more than 15 years after the internet started being democratised. As a young intern in the Secretariat of the UN Committee on the Rights of the Child (CRC Committee) back in 2003, I recall having to organise huge boxes of documents for each Committee member. For each state party under review, each of the 18 members would have paper copies of all documentation made available, including reports from the state party, reports from civil society and UN entities. For every single state party, and particularly those attracting more global attention, this was the equivalent of thousands of pages. One would want to be able to assess the amount of paper which had to be produced for each of the UNTB sessions over 50 years, and the environmental impact this contributed to, including the number of trees required to produce those tons of paper. Of course, the vast majority of that documentation was not read by most UNTB members as it was physically impossible. Members of the UNTBs have always relied on summaries of relevant documentation prepared by the Secretariat.

The website of the Secretariat of the UNTBs, the Office of the High Commissioner for Human Rights (OHCHR) was created in the late nineties,[3] and remarkably, its original versions already included a database of UNTB documents. The current OHCHR UNTB database was established in 2005.[4] It brought public and confidential documents together in a single place, and to this day it provides information on the status of ratification and states' reporting history.

A joint NGO submission to the annual meeting of UNTB chairs in 2015 noted: [5]

> The outdated practice of requiring NGOs to provide numerous hard copies of their reports comes at a major environmental cost and constitutes a hindrance for NGOs from the Global South with limited access to international

2 The Committee on the Elimination of Racial Discrimination, the first of the ten existing UNTBs, started to operate in 1970.

3 Internet archive wayback machine, 1,704 captures: 21 April 1997-10 December 2021: Office of the High Commissioner for Human Rights https://web.archive.org/web/20021124004514/http://www.unhchr.ch/ (accessed 20 December 2021).

4 United Nations Human Rights Treaty Bodies: UN Treaty Body Database https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx (accessed 20 December 2021).

5 Joint NGO Statement 2015 Annual Treaty Body Chairpersons Meeting 22-26 June 2015, San José at 5 https://tbinternet.ohchr.org/Treaties/CHAIRPERSONS/Shared%20Documents/1_Global/INT_CHAIRPERSONS_NGO_27_23555_E.pdf (accessed 20 December 2021).

mail. It is also less relevant at a time when the overwhelming majority of TB members have access to electronic devices during sessions.

It is only around 2016 that UNTBs finally all implemented a paperless policy, and stopped requiring stakeholders to submit paper copies of their submissions, with discrepancies between Committees in the timeline of implementation. One of the functions of the international NGOs supporting specific UNTBs in Geneva, who are now part of the TBnet network,[6] was to help national NGOs in the submission of paper copies of their reports, given that for many of them, making sure that paper copies would make it on time to *Palais Wilson* in Geneva was challenging, and it was a relief to be able to count on a Geneva based ally.

Paper copies of documents were gradually replaced by soft or digital copies of documents, which for UNTBs are available on an extranet accessible to UNTB members and Secretariat. The extranet was definitely a move in the right direction in terms of reducing the environmental impact related to paper use, as well as the inherent benefits of digitalisation (including search functions). Nevertheless, the extranet also has limitations. For instance, it is clustered according to Committee, meaning that members may not have access to documents submitted recently in relation to a country coming up under review if those documents were submitted to a different Committee. Not all Committee members seem to be aware of all sections of the extranet they have access to, and there is evidence that in some instances, Committee members do not have access to documents such as individual communications and annexes made available on the extranet, and they instead rely on summaries or draft decisions or Concluding Observations (COs) prepared by the Secretariat. Committee members also do not have access to the OHCHR internal database of individual communications (ICs). Unless their attention is specifically directed by the Secretariat, Committee members may not be aware of other pending communications under review in fellow Committees. Situations have been reported of Committee Rapporteurs on ICs not having access to all ICs submitted to their own Committees unless they specifically request access, resulting in potential significant losses of information, due to poorly managed access to digital documentation, and the predominance

6 Members of the network include the Centre on Civil and Political Rights, working with the Human Rights Committee, World Organisation against Torture, working with the Committee against Torture, Child Rights Connect, working with the Committee on the Rights of the Child, IMADR , working with the Committee on the Elimination of Racial Discrimination, IWRAW Asia-Pacific, working with the Committee on the Elimination of Discrimination against Women, International Disability Alliance, working with the Committee on the Rights of Persons with Disabilities, and the Global Initiative for Economic, Social and Cultural Rights, working with the eponymous Committee.

of an institutional and bureaucratic culture in which confidentiality has become synonymous with impenetrability.

A 1985 UN internal report mentioned that UN 'human rights' – referring to the then UN entity preceding the current Office of the High Commissioner for Human Rights (OHCHR) – 'deserve the best possible computerized management, substantive and administrative support systems and services'.[7] This is an affirmation that remains true over 35 years later. Despite significant progress made in the digitalisation of their work, the UNTBs have so far mostly failed to make the most of the digital shift to facilitate and improve their work. As we will further unpack in the next sections, that situation is due to an accumulation of factors, and responsibilities.

The benefits of digitalisation

The impact of international human rights treaties on the ground was a central concern throughout Christof Heyns' career.[8] The landmark initiative which he undertook with Frans Viljoen and many others over a timespan of 20 years, which was being completed at the time of his unexpected and tragic passing, constitutes one of the most comprehensive global initiative to document the difference that treaties make on the ground. International human rights treaties have made a huge difference, they contribute to changing peoples' lives on all world corners, including thanks to the efforts of their main custodians, the UNTBs, and a myriad of advocates who tirelessly work to make dry legal standards a reality for all individuals, especially those in situations of vulnerability. Christof was capable of thinking outside of the rigid UN box and he had come up with a range of suggestions and ideas to improve the impact of the UNTBs on the ground, including through more in-country and in-region presence.[9] Suggestions from Christof and others contributed to the very first ever in-region session of a UNTB, when the CRC Committee undertook a regional session in the Pacific in March 2020, a development hailed as historic.[10]

7 E D Sohm (Joint Inspection Unit) 'The changing use of computers in organizations of the United Nations system in Geneva: Management issues' (1985) Geneva. JIU/REP/85/2 https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_1985_2_English.pdf (accessed 20 December 2021).

8 CH Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 483-535.

9 CH Heyns & W Gravett 'Bringing the UN treaty body system closer to the people' 14 August 2017 https://www.icla.up.ac.za/news/archive/2017/202-bringing-the-un-treaty-body-system-closer-to-the-people (accessed 20 December 2021).

10 A Bowe & J Cooper 'Putting people at the heart of the human rights treaty body system' *Open Global Rights* 17 June 2020 https://www.openglobalrights.org/putting-people-at-the-heart-of-the-human-rights-treaty-body-system/ (accessed 20 December 2021).

As further expanded below, the COVID-19 crisis and the global lockdown it imposed highlighted the dire need to speed up and improve the digitalisation of UNTBs, including their sessions. Although the webcasting of all UNTB sessions is now well established, the impossibility for UNTB experts to travel to Geneva during the COVID pandemic to hold their sessions exposed a glaring gap in their working methods, and opened a huge accountability breach, as dozens of state parties were able to escape scrutiny.[11]

Despite the enormous challenges induced by the COVID pandemic, several actors pointed to the opportunities a global ban on travel represented for civil society participation from a distance. Ochoa and Reinsberg argued as follows: 'If advocates can regularly, reliably, and meaningfully participate in hearings and meetings remotely, participation would become much more feasible for smaller and farther-flung organizations.'[12] Speaking about the vast potential offered by the first ever online session of the African Commission on Human and Peoples' Rights, Biegon noted that 'the virtual ordinary session had a "democratising effect" on the surface. Anyone could join, as access to the virtual platform was contingent on a simple online registration'.[13]

The benefits of optional online participation in UNTB sessions for civil society could be massive, especially for those with limited financial resources, knowledge and connections to the Committees, those geographically more remote from Geneva and who may face considerable restrictions in obtaining visas to travel to Switzerland. It should not come at the expense of restrictions for in person access though. National NGOs have had to rely heavily on the support and facilitation provided by Geneva based NGOs to participate in sessions of the Committees in Geneva, despite the fact that in principle, anyone can participate in these sessions, notably given that UNTBs, unlike the UN Human Rights Council for instance, does not require NGOs to be ECOSOC-accredited to participate. This has led to some of these international NGOs being labelled as 'gatekeepers'.[14] For many groups,

11 International Service for Human Rights 'Treaty bodies/State scrutiny by UN human rights bodies must resume' 7 October 2020 https://ishr.ch/latest-updates/treaty-bodies-state-scrutiny-un-human-rights-bodies-must-resume/ (accessed 20 December 2021).

12 C Ochoa & L Reinsberg 'Cancelled, postponed, virtual: COVID-19's impact on human rights oversight' *Open Global Rights* 17 July 2020 https://www.openglobalrights.org/cancelled-postponed-virtual-covid-19-impact-on-human-rights-oversight/ (accessed 20 December 2021).

13 J Biegon 'Can the virtual sessions of the African Commission generate more civil society participation?' *Open Global Rights* 26 October 2020 https://www.openglobalrights.org/can-the-virtual-sessions-of-the-african-commission-generate-more-civil-society-participation/ (accessed 20 December 2021).

14 F McGaughey 'From gatekeepers to GONGOs: a taxonomy of non-governmental organisations engaging with United Nations human rights mechanisms' (2018) 36 111-132.

such as indigenous peoples for example, the ability to participate in sessions in Geneva has been limited, despite the fact that they may suffer some of the worst forms of discrimination. The limited ability of some civil society actors to participate in sessions in Geneva has a clear negative impact on the extent to which their issues of concern are reflected in the Concluding Observations (COs), and generally on the national domestication process of UNTB COs. Despite the progresses made through the move towards the full digitisation of documents, including civil society submissions to the UNTBs in recent years, more remains to be done to enable the full participation of civil society in relevant UNTB meetings, including private bilateral briefings between civil society and UNTB members, most of which were entirely held in person only behind closed doors in *Palais Wilson* or *Palais des Nations* prior to COVID-19.

The benefits of digitalisation are also obvious insofar as knowledge management is concerned, specifically for research purposes. The growing digitalisation, archiving and indexing of UNTB COs and views on individual communications in the last two decades has opened up huge opportunities to access information, and contribute to a better dissemination of UNTB outputs. Interestingly, the process was nearly systematically taken over by the UNTB Secretariat following initiatives from third parties. In other words, the processes were rarely initiated by the UNTBs themselves. The current OHCHR-hosted Universal Human Rights Index[15] was preceded by various online databases of UNTB documents and COs, including the University of Minnesota human rights library.[16] The current OHCHR-hosted jurisprudence database[17] was preceded by various online databases on individuals decisions of the Committees, such as the CCPR Centre database of Human Rights Committee decisions.[18] The online webcasting of UNTB sessions, now available on UNTV, was undertaken for years by NGOs. The same can be said of the online presence of UNTBs on social media, which has been chronically lagging behind.

The benefits of digitalisation can also be massive from a financial perspective. The costs of flying UNTB members, states delegates, NGO and NHRI representatives to Geneva are huge. As noted in an academic article about the 2020 review of UNTBs, 'having some online meetings would save huge amounts of resources, not least in terms of the costs

15 United Nations Human Rights, Office of the High Commissioner: Universal Human Rights Index https://uhri.ohchr.org/en/ (accessed 20 December 2021).

16 University of Minnesota: Human Rights Library http://hrlibrary.umn.edu/research/uncountryreports.html (accessed 20 December 2021).

17 United Nations Human Rights: Office of the High Commissioner 'Jurisprudence' https://juris.ohchr.org/ (accessed 20 December 2021).

18 Center for Civil and Political Rights 'Database and case law briefs' https://ccprcentre.org/database-decisions/ (accessed 20 December 2021).

associated with TB members' travel and per diems paid for living away from home. It would also save states having to send lots of people to Geneva.'[19] It was not uncommon, before COVID, for sessions normally held in *Palais Wilson*, to be relocated to *Palais des Nations* instead, in order to be able to fit all participants in the room. Some reviews of states parties drew over 50, sometimes over 100 participants, which notably contributed to some actors suggesting that reviews could benefit from having less people in one room at the same time.[20]

The inability of UNTBs to adapt to the impossibility to host in person reviews of states parties during the COVID-19 pandemic led a number of UNTB members and their allies to emphasise that such reviews ought to be in person. However, the argument was influenced by the fact that the UNTB members' presence in Geneva is compensated with highly generous UN-standard daily subsistence allowance (DSA), and many members were vocal about the fact that they could not work without compensation.[21] Given the environmental and financial costs of flying people to Geneva, the potential savings enabled by virtual sessions could be considerable. Quite clearly, much of the work of the UNTBs requires in person interaction. Yet hybrid meetings, combining in person and remote participation, or meetings from individuals based in the same world regions, as pioneered by the Subcommittee on Prevention of Torture (SPT),[22] could be considered.[23] Various precedents have demonstrated that the remote participation of state delegations can come with positive benefits, notably the possibility for more participants to join, and thus an ability for states to provide immediate responses to often highly technical questions, rather than having to reach out to capitals after an exhausting day of review, asking for responses to be provided on the following day. As mentioned above, the remote participation of NGOs in UNTB sessions can also bring far-reaching benefits.

Substantial inspiration may be sought from the formidable processes and mechanisms put in place in a number of countries and regions, to

19 J Sarkin 'The 2020 United Nations human rights treaty body review process: prioritising resources, independence and the domestic state reporting process over rationalising and streamlining treaty bodies' (2021) 25 (8) s 1301 at 1310.

20 J Krommendijk 'Less is more: proposals for how UN human rights treaty bodies can be more selective' (2020) 38 5-11.

21 See discussion below, under the heading 'The elephant in the room: compensation for online work and sessions'.

22 O D Frouville 'The United Nations treaty bodies in a transition period – Progress Review March-December 2020 Chronicle' (2021) https://www.geneva-academy.ch/joomlatools-files/docman-files/working-papers/The%20United%20Nations%20Treaty%20Bodies%20in%20a%20Transition%20Period.pdf (accessed 20 December 2021) at 8.

23 The current chair of UNTB chairpersons said the same in her address to the UNGA on 21 October 2021: 'full state-party reviews should always be held in person, but there are areas of TB work that could benefit from moving online.

facilitate reporting and following up to UNTB COs and views, through the use of suitable tech tools. Some of these mechanisms, including National Mechanisms on Reporting and Follow up,[24] and tools such as National Recommendations Tracking Databases[25] are supported by the OHCHR. Other good practices can be found in the establishment of online tools to report to UN bodies, and then track and facilitate follow up and implementation of UNTB COs and views;[26] or tech tools to gather human rights information for periodic reviews.[27] Such tools have been developed by both state and non-state actors and should ideally be accessible to both.[28]

These examples demonstrate that the potential impact of tech tools on the inputs to, and outputs from UNTBs can be massive. Perhaps more importantly, they can come at very minor costs, and thus enable significant financial savings which in turn could be reinvested in technological capacity building for UNTB members and users.

The challenges and limits of digitalisation

Although the benefits of digitalisation on UNTB working methods are clear, they also induce several challenges. A number of UNTB members have deplored the end of paper, citing a preference to work on paper copies, and some members still work with paper copies which they arrange to print, including for individual communications.[29] More broadly, the extent to which digitisation of working documents has been fully integrated by UNTB members varies across individuals. As mentioned above, fragmentation of information, limited access to documents across the intranet or share point, and the notoriously dysfunctional management of individual communications[30] are

24 See in this volume of essays, R Murray 'The 'implementation' in 'National Mechanisms for Implementation, Reporting and Follow-up': what about the victims?' xxx.

25 Presentation of the tool see United Nation Human Rights: Office of the High Commissioner 'National recommendations tracking database' available at https://nrtd.ohchr.org/about, see also, 'National Recommendations Tracking Database' available at https://www.youtube.com/watch?v=0likHkHUXuU see also, Online tool United Nations Human Rights: Office of the High Commissioner available at https://nrtd.ohchr.org/login (accessed 20 December 2021).

26 An international example is the Impact OSS database https://impactoss.org/impactoss/

27 See V Ploton & C M Sehat 'Adapting tech tools for human rights monitoring: lessons from Burundi' 20 July 2021 https://www.openglobalrights.org/adapting-tech-tools-for-human-rights-monitoring-lessons-from-burundi/ (accessed 20 December 2021).

28 See national tools developed in Samoa 'Samoa's implementation plan for human rights & development' available at https://sadata-production.firebaseapp.com/; or in Paraguay https://www.mre.gov.py/simoreplus/ (accessed 20 December 2021).

29 HR Ctte member, interview conducted in Geneva in September 2021.

30 See references to case management in C Callejon, K Kemileva & F Kirchmeier 'Treaty bodies individual communications procedures: providing redress and reparation to victims of human rights violations' (2019) The Geneva Academy of International Humanitarian Law and Human Rights https://www.geneva-academy.ch/joomlatools-files/docman-files/UN%20Treaty%20Bodies%20Individual%20

additional challenges. The digitisation processes for external users of UNTBs has also been mostly ad hoc and has resulted in a fragmentation of practices across the Committees, which can be very confusing for users engaging with multiple Committees. For instance, submissions to periodic reviews by the CRC Committee now have to be made through an online platform hosted by the independent NGO Child Rights Connect.[31] An online platform for the submission of NGO reports to CESCR was also recently established by the Secretariat,[32] drawing on the existing platform available for NGO submissions to the Universal Periodic Review, apparently without much if any prior consultations with civil society users. All other UNTBs do not have online platforms for the submission of civil society reports, which can be submitted through the more traditional or regular general email addresses.

An overview of how the UNTBs have gradually adopted new technologies for their work demonstrates a pattern of systemic delays and difficulties in the adoption of these tools, and during transitions. The pattern repeats itself over and over from the delays in establishing websites and databases two decades ago,[33] to the years it took for OHCHR to establish the webcasting of sessions,[34] and the adoption of online platforms for meetings more recently. At a time when the whole world shifted to online tools, notably Zoom, it took months for the UNTBs to be able to start using this platform and instead they had to use other platforms which were notoriously dysfunctional[35] This pattern of delays and systemic inability to take advantage of new technologies in working methods is due to a range of factors, including heavy UN bureaucracy,[36] institutional cultures of opacity and secrecy, undue interference of states in the work of the OHCHR Secretariats and in the UNTB membership, ageing and inadequate UNTB membership, and an institutionalised aversion to change.

Some of the inherent limits to digitalisation in the work of UNTBs relate to the extent to which new tools and technologies are actually used by UNTB members, and users of the system. For instance, it appears that not all UNTB members are using the intranet or sharepoint

Communications.pdf (accessed 20 December 2021).

31 Child Rights Connect 'Submitting reports and additional information' https://www.childrightsconnect.org/upload-session-reports/ (accessed 20 December 2021).

32 United Nations Human Rights: Office of the High Commissioner 'CESCR submissions system' https://cescrsubmissions.ohchr.org/Account/Login.aspx?ReturnUrl=%2f (accessed 20 December 2021).

33 See this essay, under the heading 'A historical perspective: the predominance of paper'.

34 Joint submission (n 5). A joint NGO submission to the UNTB chairs of 2015 mentioned that the process of OHCHR putting in place the webcasting of sessions was 'taking too long'.

35 Frouville (n 22) at 2.A.

36 See F Baumann 'United Nations management – an oxymoron?' (2016) 22 461-472.

made available to access relevant information about countries under review, or about procedural matters. In spite of the improvements made to the Universal Human Rights Index recently, and the myriad of information made available through the platform, its use could be better democratised amongst potential users, and it should also integrate relevant existing data on states compliance with UNTB COs and views.[37]

A key lesson learnt in relation to the adoption of new technologies by UNTBs in recent years is that ownership taking is crucial. Change in working methods of UNTBs have been more successful when they have been the result of bottom up processes, rather than top down, and when there has been a collective consultation process, with a clear and strong internal leadership. This has applied to the adoption of new technologies: change processes, such as the end of paper copies, which have been 'imposed' or piloted from outside the Committees themselves, often by the OHCHR, have often faced resistance or failed.[38] Although the UNTBs have a soft governing structure through the annual meetings of chairpersons, those have proved unable to bring about any meaningful change across the system, despite repeated attempts to do so.

An International Service for Human Rights (ISHR) submission to the preparations of the 2020 review of UNTBs[39] noted:

> Unless and until fundamental changes can be brought to the chairs meeting mandate, or a new architecture adopted, fragmentation of working methods among the treaty bodies will persist

This applies to changes related to the integration and use of new technologies which can only succeed insofar as most members of the UNTBs are convinced or at least see the benefits of such changes. Unfortunately, UNTB members have not always been suitably consulted in the choice of technological tools affecting their work. This was notably illustrated by the choice of online platforms for UNTB meetings during the pandemic. As Olivier de Frouville recalls:[40]

> The UN (imposed) Interprefy for meetings with simultaneous interpretation and Webex for meetings without interpretation. Treaty body members generally expressed their dissatisfaction with this choice owing to the fact

37 V Ploton 'The implementation of UN treaty body recommendations: an overview of latest developments and how to improve a key mechanism in human rights protection' (2017) 24 219 at 225.

38 This was notably the case of the notorious proposal by then High Commissioner Louise Arbour for a unified standing treaty body, which was rejected notably due to lack of ownership by a number of UNTB members

39 International Service for Human Rights 'ISHR submission to OHCHR Questionnaire in relation to General Assembly resolution 68/268' (2019) secs 2.5 at 8, https://www.ohchr.org/Documents/HRBodies/TB/HRTD/3rdBiennial/CSO/InternationalServiceHumanRights.docx (accessed 20 December 2021).

40 Frouville (n 22).

that these platforms were deemed too complicated and not very reliable.

Another digitalisation challenge is what information and data can and should be made public. This is particularly relevant for UNTBs, which have traditionally applied a culture of confidentiality,[41] which has been described as equivalent to opacity.[42] It is undeniable that much of the information handled by UNTBs is sensitive insofar as it relates to victims and their relatives who may be at risk of persecution, reprisal or other forms of serious harm. Digitalisation of information must preserve the confidentiality of sources and victims as relevant, including through the use of encryption and secure communication channels, which NGOs have asked the OHCHR to improve.[43] Nevertheless, a number of inputs and outputs of the UNTBs could be made public but are not. Those include all submissions by NGOs to countries under review where there is consent from authors. UNTB inquiries have also been described as opaque, notably because final reports may not be made public.[44] Other examples include responses from states parties to CERD early warning and urgent actions, which are not made publicly available on the CERD website, or correspondence between UNTBs and states parties on reprisals, which are confidential except for the Committee against Torture (CAT)[45] and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).[46] A comprehensive digital shift process for UNTBs and beyond within OHCHR should also consider what information is currently not public but should be, and the other way round.

41 For instance, in the early 2000s, the only office in Palais Wilson which had to be locked with a key was the CAT Secretariat.

42 For instance, in relation to the inquiry procedure. See 'Joint NGO Statement on the occasion of the Twenty-ninth meeting of UN treaty body chairs' 27-30 June 2017, New York at 5, https://www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/29Meeting/JoinNGOStatement.pdf (accessed 20 December 2021).

43 See International Service for Human Rights 'COVID-19 | Principles and recommendations on ensuring civil society inclusion in UN discussions' 24 April 2020 https://ishr.ch/latest-updates/covid-19-principles-and-recommendations-ensuring-civil-society-inclusion-un-discussions/ (accessed 20 December 2021).

44 In instances such as the four-year CAT inquiry on Egypt, only a summary was made public. See United Nations Report of the Committee against Torture, Sixtieth Session 18 April-12 May 2017: United Nations, New York (UN Doc A/72/44 secs 58-71).

45 United Nations Human Rights: Office of the High Commissioner 'Committee against torture: reprisals letter' https://www.ohchr.org/EN/HRBodies/CAT/Pages/ReprisalLetters.aspx (accessed 20 December 2021).

46 United Nations Human Rights Treaty Bodies: UN Treaty body Database' https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&CountryID=93&TreatyID=7&DocTypeID=130 (accessed 20 December 2021).

A gap between Geneva and the field: case study on webcasting of UNTB sessions

The live webcasting of public sessions of UNTBs, especially periodic reviews of states parties, constitutes one of the successes of digitalisation. For those who, like Christof Heyns, are concerned with the impact of UNTBs on the ground, the ability for all those who cannot be physically present in Geneva to follow and engage in country reviews made a major difference.

The webcasting of UNTB sessions began in early 2012, and was originally undertaken by a small group of NGOs dedicated to support NGO engagement with the UNTBs, most of which subsequently formed part of the TBnet coalition. These Geneva-based NGOs live webcasted public sessions of the Committee with their own very limited resources on the platform http://www.treatybodywebcast.org/. The quality of image and sound was often unstable, and because they could only use one camera, most of the speakers could not be filmed properly. Despite the difficulties and the 'makeshift' nature of the original practice, it quickly picked up across most public UNTB sessions, and the June 2012 report of then High Commissioner Pillay[47] on strengthening UNTBs, the most comprehensive ever UN report on the system, included a dedicated paragraph with suggestions to systematise the webcasting of sessions. The emerging practice clearly filled a glaring gap, and states subsequently acknowledged the need for the UN to take over the process, which the NGOs had been calling for from early on, in GA resolution 68/268 of April 2014, which instructed the UN to take over the webcasting 'as soon as feasible'.[48]

Following a lengthy and bureaucratic process, typical to the UN, including needs assessment, identification of providers and technical works, it was only in August 2016 that the webcasting effectively became functional and NGOs were finally able to stop filling the gap on their own. The webcasting of sessions has led to significant improvements in bringing the UNTBs closer to the ground, including a series of public events at the national level,[49] often organised with supports from UN

47 N Pillay 'Strengthening the United Nations human rights treaty body system: a report by the United Nations High Commissioner for Human Rights' June 2012 https://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf (accessed 20 December 2021).

48 United Nation General Assembly 'Strengthening and enhancing the effective functioning of the human rights treaty body system' Resolution adopted by the General Assembly on 9 April 2014, Sisty-eighth session, res 68/268; secs 22.

49 On the occasion of the 2014 review of Ireland by the HR Ctte, See Media Advisory-Rights Groups Gather in Dublin as Ireland Faces UN in Geneva available at https://www.iccl.ie/archive/media-advisory-rights-groups-gather-in-dublin-as-ireland-faces-un-in-geneva/ (accessed 20 December 2021).

country teams, to follow the reviews of states parties, and discuss amongst relevant stakeholders.

It is worthwhile noting that when she launched her report nearly ten years earlier, Navi Pillay already acknowledged that 'technology can and should serve human rights' and called for 'the utilization of new technologies, including webcasting and videoconferencing to increase visibility and accessibility to these treaty bodies'.[50] Although webcasting is now fully operational, the COVID crisis and the obligation to work remotely for all clearly demonstrated that the UNTBs are still not able to work online, and far from making the most of the potential opportunities of videoconferencing, and online work more broadly. Some of the reasons for this are analysed below.

The current situation

Digitalisation and the 2020 review of UNTBs

As mentioned above, the need for UNTBs to better and more fully embrace new technologies was identified much earlier, including as part of the comprehensive 2012 Pillay report. Yet, aside from some of the highlighted developments such as webcasting of sessions, much remains to be done.

The need was also clearly and widely repeated and articulated ahead of the 2020 review. For instance, a review of state responses to the third UN Secretary General biennial questionnaire on UNTBs[51] found that 21 states

> recommend improving the use of information technology throughout the treaty body system. Further facilitating the use of video-teleconferencing, improving the OHCHR website's navigation and search functions, as well as allowing for the broadest possible broadcasting of treaty body meetings (also through social media) are examples of cost-effective means of improving accessibility to the system.[52]

In preparation of the 2020 review, ISHR noted that 'limited transparency, visibility, and accessibility of the system … considerably limits engagement by national level civil society and national human

50 United Nations Human Rights: Office of the High Commissioner 'A call to save the human rights treaty body system', 22 June 2012 https://www.ohchr.org/en/NewsEvents/Pages/StrengtheningTreatyBodies.aspx (accessed 20 December 2021).

51 Geneva Academy "An overview of Positions Towards the 2020 Treaty Body Review by States, NGOs, Treaty Body Members, Academia, OHCHR" https://www.geneva-academy.ch/joomlatools-files/docman-files/Overview%20of%20positions.pdf (accessed 4 January 2022).

52 Australia, Bahamas, Barbados, Bolivia, Dominican Republic, Estonia, Fiji, Gambia, Haiti, Malawi, Maldives, Marshall Islands, Mauritius, Netherlands, Solomon Islands, Spain, Sweden, Switzerland, Thailand, Turkey, Vanuatu.

rights institutions'.[53] Although not solely due to limited digitalisation, those fundamental challenges could nonetheless be addressed through better use of tech tools, for instance, the issue of limited visibility which is notably due to the absence of a proper communication or media strategy across the UNTBs, and the very limited use of social media.

UNTB members ahead of the 2020 review themselves recognised the need to 'increase the visibility and accessibility of the treaty body system, including through a much-needed improvement of the OHCHR website' as well as the need 'to increase the capacity of treaty bodies to consider individual communications'[54] – two challenges that also could be partially addressed through the use of suitable tech tools.

In their final report on the 2020 review of GA Resolution 68/268, the co-facilitators Morocco and Switzerland acknowledged the 'considerable potential of digitalization towards an increased efficiency of the treaty bodies and the interaction with all relevant stakeholders'.[55] The co-facilitators called for a 'dedicated project' on digitalisation of the work of UNTBs,[56] which resulted in a proposal of the Chair of UNTB chairs[57] that focuses on three main topics: adoption of fixed and predictable cycles of reviews; harmonisation of working methods and digital shift.

The Chair's proposal constitutes one of the most elaborate and detailed vision by UNTB members about what a digital transformation should entail. The move is significant given that it is the first time that a Chair of UNTB chairpersons has been on the initiative to develop an ambitious vision, and such move should primarily come from the UNTBs themselves, given that they have the prerogative to define their own working methods.

The proposal acknowledges that 'there are areas of Treaty Body work that could benefit from moving on-line and be enhanced by advanced, integrated digital platforms'[58] and 'transferring current Treaty Body practice to online modes, such as holding regional online consultations'.[59] The proposal envisages the development of a 'digital toolkit' which

53 International Service for Human Rights (38 above) at 9.

54 International Service for Human Rights (38 above).

55 The President of the General Assembly 'Report on the process of the consideration of the state of the UN human rights treaty body system'; secs 13 https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/09/2HRTB-Summary-report.pdf (GA President report) (accessed 20 December 2021).

56 GA President report (n 55) 17.

57 'Proposal of the Committee on the Rights of Persons with Disabilities – 2020 Review for Treaty Body strengthening' 3 August 2021 https://www.ohchr.org/Documents/HRBodies/Annual-meeting/Proposal-CRPD-3August2021.docx (CRD 2020 review) (accessed 20 December 2021).

58 CRPD 2020 review (n 57) secs 3 at 5.

59 CRPD 2020 review (n 57) 6.

> should be able to operate as a 'communities of practice' platform to support stakeholder engagement, working groups of Treaty Bodies and joint work undertaken by the Treaty Bodies. It will require a video conferencing/web-casting platform that is accessible and sustainable across the digital divide.

The OHCHR hired an expert consultant to work on the development of a digital tool across the office and the mechanisms it hosts, including UNTBs, in 2021, an assignment which was ongoing at the time of writing. The development of the tool presents a significant opportunity, given the glaring gap, the scope of needs, and the potential to make a range of gains by adopting the most suitable tech tools. In her address to the UNGA in October 2021, the CRPD chair mentioned that she believed there was 'still an opportunity for consensus' and that her proposal 'acknowledges that remote or virtual work needs to be recognised as part of the core mandate of UNTBs. This requires recognition of the time and effort that this additional work represents, through the provision of an honorarium.'

Any new digital tool designed for members and users of the systems, such as States and civil society, will only be a success insofar as the needs, views and perspectives of users are integrated in the formulation process.

Despites the various missed opportunities in taking the perspectives of users in the designation of new UNTB tools for users, such as online submission platforms, or requirements for petitioners, it is hoped that the OHCHR will undertake a robust consultation process to guarantee maximum ownership of the future digital platform or toolkit.

A game changer: COVID-19

The global COVID-19 pandemic affected nearly each and every individual on the planet. In the human rights world, and despite the obvious challenges, some people saw the crisis as a provider of new opportunities,[60] including in relation to better use of technology.[61]

For UNTBs, the pandemic revealed the fundamental and deep vulnerabilities of the system, which have been exposed time and again across the five decades since the first treaty body was established. Many, arguably most, of the inherent challenges identified by Philip Alston in his 1989 report[62] on UNTBs have persisted, and sometimes

60 D Petrasek 'Imagining our post-pandemic futures: COVID-19 is challenging the human rights movement to adapt, transform, and look ahead-so as to meet urgent demands now while laying the groundwork for a better future' (2020) https://www.openglobalrights.org/up-close/pandemic-futures/#up-close (accessed 20 December 2021).

61 Biegon (n 13).

62 United Nations General Assembly 'Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights' forty-fourth session 8 November 1989. UN Doc A/44/ 668.

considerably worsened since then. Faced with a radical challenge such as a global pandemic, the system collapsed: UNTBs were not able to adapt to the new normal, and reviews of states parties were suspended for months, resulting in a backlog of hundreds of periodic reports awaiting review across the system.[63] For example, at an average rate of six reports reviewed per session, and three sessions per year, it will take over 11 years for the Committee on the Rights of Persons with Disabilities (CRPD Committee) to review all reports currently pending review, excluding new periodic reports submitted in the meantime. That situation, which following the emergence of COVID, has become a reality for all UNTBs, constitutes in and of itself an expression of deep failure of the system.

The inability of UNTBs to adapt to COVID-19 and undertake reviews of states parties online is an expression of the profound weakness of the system and the related absence of institutional resilience. In the words of a CAT member, the system simply proved itself incapable of adaptation.[64]

Unlike regional human rights mechanisms such as the Council of Europe or the African Commission on Human and Peoples' Rights,[65] the UNTBs were only able to undertake a few periodic reviews,[66] only starting in 2021. The Committee on Enforced Disappearances (CED) was celebrated[67] as the first UNTB to carry out an online review of a state party in October 2020,[68] which was the only online review carried out across all UNTBs in 2020.[69]

Many actors, including civil society[70] and states, expressed their frustration with the inability of UNTBs to adapt to the situation and

63 428 periodic reports of states parties were awaiting review as at 6 October 2021, including a record 71 reports to CRPD; 6 October 2021.

64 United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, committee against torture 'Summary record of the 1823rd meeting' 13 July 2020. UN Doc CAT/C/SR.1823 secs 17 (CAT Summary record).

65 Ochoa & Reinsberg (n 12).

66 List as at June 2021 available in 'Joint NGO submission to the ten UN human rights Treaty Bodies' chairpersons and their respective Secretariats' https://www.ohchr.org/Documents/HRBodies/Annual-meeting/Geneva_chair_meeting_ENG_ESP_FRE_final.docx (accessed 20 December 2021).

67 United Nations Human Rights, Office of the High Commissioner 'Enforced disappearances: UN Committee to hold special online dialogue with Iraq' 3 September 2020 https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26205&LangID=E (accessed 20 December 2021).

68 For a detailed account of the pioneering review of Iraq by CED, see Frouville (n 22).

69 United Nations General Assembly 'Audit of the activities, performance and results of staff support provided to the human rights treaty body system by the office of the United Nations High Commissioner for Human Rights' Seventy-sixth session 17 August 2021. UN Doc A/76/197 secs 33.

70 Joint NGO letter dated 2 October 2020 and endorsed by over 500 organisations from all world regions, available at https://imadr.org/wordpress/wp-content/uploads/2020/10/Joint-civil-society-letter_2021-UNTBs-reviews-in-the-COVID19-context_02.10.2020.pdf. Joint NGO letter dated 11 May 2020 and endorsed by over 40 organisations, https://www.ishr.ch/sites/default/files/documents/joint_

carry on with their work. A joint NGO submission ahead of the 2020 review noted the following:[71]

> We are aware that some treaty bodies have held civil society consultations through remote participation ... these practises are still ad hoc, and we consider that the treaty bodies could and should make more frequent use of technologies to ensure remote participation for civil society representatives who may not be able to travel.

A joint submission of 46 states emphasised the following: [72]

> We appreciate that seven treaty bodies have held -- or will hold -- State party dialogues during online sessions in 2021. In this new working environment in which we all find ourselves, we recognize that a discussion is required on how to appropriately support, including financially, the participation of experts in remote meetings for the good functioning of the treaty body system in the future and to continue to ensure highly qualified independent and impartial experts from diverse geographical backgrounds.

The scheduling of online reviews gave rise to additional challenges as some argued that reviews could only take place in person,[73] and UNTBs had to identify which countries to prioritise for review, and they adopted a problematic policy of asking permission from states parties to review them online.

NGOs raised concern about the lack of clarity in the identification of countries scheduled for online reviews and the predominance of Western countries.[74]

An in-depth legal advice commissioned by the ISHR to a leading international law firm[75] found that the core UN treaties empower UNTBs 'to undertake periodic reviews online, with or without the presence or consent of the state concerned' and to 'accord genuine, meaningful consideration' to all UNTB directives, 'including any requests or invitations to attend review meetings convened online'. However, just

ngo_letter_un_human_rights_treaty_bodies_during_the_covid-19_pandemic_11may2020.pdf (accessed 20 December 2021).

71 'Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system' 7 July 2020, https://www.ohchr.org/Documents/HRBodies/TB/HRTD/CoFacilitationProcess/OtherStakeholders/CSOSubmission.pdf (accessed 20 December 2021).

72 Letter from a group of 46 states to the 33rd meeting of UNTB Chairpersons (7-11 June 2021) available at https://www.ohchr.org/Documents/HRBodies/Annual-meeting/Letter-group-46-States-2June2021.pdf (accessed 20 December 2021).

73 See the arguments developed by CAT members, including the affirmation that the Committee is 'unable to carry out its core activities online' see CAT Summary record (n 64). CAT was the most reluctant Committee to embrace online reviews of states parties, which gave rise to tensions notably with civil society, including a private joint NGO letter to the Committee submitted in March 2021.

74 'Joint NGO submission coordinated by race & equality and ISHR to the 33rd meeting of UNTB chairpersons' June 2021 available at https://www.ohchr.org/Documents/HRBodies/Annual-meeting/Geneva_chair_meeting_ENG_ESP_FRE_final.docx (accessed 20 December 2021).

75 Legal advice dated July 2021 (ISHR Legal advice).

like the general obligation to attend and participate in the review of state report review process, this obligation is not 'absolute'.

It was not until September 2021, after an interruption of 18 months, that UNTBs were able to return to a regular schedule of reviews, thanks to the resumption of in person sessions in Geneva.

As rightly noted by the co-facilitators of the 2020 review of UNTBs, 'the COVID-19 pandemic has drawn everyone's attention to the need to strengthen the capacity of the treaty bodies to engage and interact online. It also constitutes a momentum to tackle longstanding issues regarding a digital shift in the work of the treaty body system'.[76]

At the time of writing, one could not help but see that many, but not all, of the opportunities provided by the pandemic to transform the UNTB system and move it into the 21st century were being lost, leaving a deep sense of frustration to those who thought that the crisis would contribute to speed up the long awaited reforms to the system. It is hoped that the ongoing process at OHCHR and in the UNTBs of digital shift will lead to the urgently needed improvements in the adoption of technological tools.

Focus on social media

The emergence and explosion of social media in the last two decades constitutes one of the most visible features of the digital revolution. The use of social media has played a critical role in major societal changes, as illustrated by the Arab Spring revolutions,[77] or the election of Donald Trump in the United States. Online surveillance, and freedom of association online have become topics of exacerbated scrutiny during the COVID pandemic.[78]

As mentioned above, UNTBs have struggled to establish a robust online presence. Complaints about 'the website' have been recurring from the UNTBs themselves, as well as state and non-state users. A review of joint NGO recommendations to the UNTB chairpersons in 2018 found that several recommendations had been suggested to the Chairs in previous years in relation to visibility and social media, all of which had been either partially implemented or not implemented.[79] None of the ten UNTBs at that time had a presence on Twitter, for

76 The President of the General Assembly (n 55) 13.

77 S Joseph 'Social media, political change and human rights' (2012) 35(3) 145.

78 Including from UNTBs, See statement of the Chairpersons 'UN human rights treaty bodies call for human rights approach in fighting COVID-19' 24 March 2020 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E (accessed 20 December 2021).

79 Assessment of NGO recommendations to the UNTB chairs 2015-2017 https://tbinternet.ohchr.org/Treaties/CHAIRPERSONS/Shared%20Documents/1_Global/INT_CHAIRPERSONS_NGO_30_27299_E.xlsx (accessed 20 December 2021).

instance, while the UN Human Rights Council had already been on Twitter since September 2009.[80]

For years, individual NGOs tweeted during public sessions of the UNTBs. The first Committee to establish a presence on Twitter was CMW in September 2018 (@UN_CMW), followed by CRC Committee in February 2021.[81] The UNTBs opened a dedicated collective twitter account[82] in November 2020, when the UN Special Procedures already had theirs[83] since July 2018. To date, the CMW and CRC Committees are the only two UNTBs with a dedicated presence on twitter, where most 56 UN Special Procedures have a dedicated presence on twitter. Although it has significantly progressed in recent years, the proportion of UNTB members with a presence on twitter is significantly lower than Special Procedures mandate holders: as at March 2020, 39 of the 173 UNTB members (or 23 per cent of them) were on twitter. Ironically, the CRC Committee is not present on Tik Tok, one of the social media most currently used by the youth.

Going forward: key priorities, needs and opportunities

Making the most of the digital shift

Overall, one can draw a thread of chronically dysfunctional digitalisation in the work of UNTBs over recent years and decades. Some of the most recurring impediments, as mentioned above, have come from resistance from the UNTB members themselves, either due to lack of understanding or lack of consideration for the need to function as a system rather than isolated bodies, or because of vested interests, such as with the issue of compensation for online work. Since the failure of the 2006 Arbour proposal for a unified UNTB,[84] which sent a lasting chilling effect across the board, High Commissioners and UN Secretary Generals have carefully avoided the 'hot potato' of UNTB reform, except for the 2012 Pillay proposal, which identified practical and welcome avenues for reform, and contributed to the enactment of some of them. Both the current and previous High Commissioners (Bachelet

80 UN Human Rights Council https://twitter.com/UN_HRC (accessed 20 December 2021).

81 UN Child Rights https://twitter.com/unchildrights1?lang=en (accessed 20 December 2021).

82 UN Treaty Bodies https://twitter.com/UNTreatyBodies (accessed 20 December 2021).

83 UN Special Procedures https://twitter.com/UN_SPExperts (accessed 20 December 2021).

84 United Nations International Human Rights Instruments 'Concept paper on the High Commissioner's proposal for a unified standing treaty body' 22 March 2006 UN Doc HRI/MC/2006/2.

and Al Hussein),[85] and current Secretary General Antonio Guterres[86] have avoided getting involved in the UNTB strengthening process. Yet, leadership at the highest UN level in any meaningful reform of the system is critical.[87] Unless and until a top leader within the UN machinery decides to deal with the issue, and decision makers stop hiding behind the window-dressing excuse of leaving the UNTBs to decide for themselves, meaningful reforms will continue to lag behind,[88] and the system will continue to fail the rights holders it is meant to serve. The status quo tends to benefit those with an interest in a weak and dysfunctional system.

In addition to the need for clear and courageous leadership, a related challenge that will have to be overcome is the need to meaningfully involve and consult with concerned actors, namely UNTB members, as well as state and non-state users. Failing to involve beneficiaries and users in any process of change can only contribute to stir resistance and opposition. It will be crucial for the ongoing process of 'digital shift' conducted by OHCHR to meaningfully engage with and broaden those constituencies.

Any digital shift reform must ensure security of communications, especially with victims and their representatives. OHCHR and the UNTBs are under the influence of powerful states, and it is imperative that steps and procedures be taken to ensure that the confidentiality of communications between victims, their representatives and the UNTBs and their Secretariat be guaranteed. This requires for instance using encrypted tools whenever necessary, which has not always been the case thus far, and more broadly applying the do no harm principle across the board. Other practical measures may include anonymising names of individuals when they are at risk. Accessibility for persons with disabilities must also be guaranteed. As suggested during an October 2021 panel on digitalisation, considerable inspiration could also be drawn from the private sector.[89]

85 See Frouville (n 22) 'throughout the four years of his mandate, Zeid not only completely disregarded these independent organs' potential, but actively participated in their weakening' 12 September 2018, https://www.universal-rights.org/blog/is-zeid-raad-al-hussein-really-the-prince-of-human-rights/ (accessed 20 December 2021).

86 V Ploton 'António Guterres, please reform the UN's human rights tools' 20 November 2017 https://www.passblue.com/2017/11/20/antonio-guterres-please-reform-the-uns-human-rights-tools/ (accessed20 December 2021).

87 International Service for Human Rights 'Treaty bodies – Leadership and innovation from chairs needed to strengthen the system' 5 July 2017 https://ishr.ch/latest-updates/treaty-bodies-leadership-and-innovation-chairs-needed-strengthen-system/ (accessed 20 December 2021).

88 V Ploton 'More ambition required to reform UN treaty bodies' 10 July 2014 https://www.opendemocracy.net/en/openglobalrights-openpage/more-ambition-required-to-reform-un-treaty-bodies/ (accessed 20 December 2021).

89 Verbal intervention of Ashley Bowe and other speakers during the panel entitled 'The digital shift and the role of new technologies towards comprehensive human

Applying the digital shift across the board will also mean ending the cycle of fragmented processes and piecemeal approaches which have tended to be applied across UN human rights mechanisms as illustrated by the adoption of tech tools by some UNTBs, and not others. The ongoing process at OHCHR in a very welcome move acknowledged the need to avoid looking at different parts of the system in isolation, and the imperative for a holistic approach.[90] Quite clearly, a number of digital shift measures could not only benefit the UNTBs, but also other mechanisms, especially the UPR and Special Procedures.

One practical example of how technology could help the work of UNTBs, as well as other mechanisms such as UPR and even Special Procedures, is the need for a good OHCHR database of civil society contacts per country. Although OHCHR receive thousands of email communications from national level NGOs every year, such contacts are not integrated into a centralised database. The absence of such a database means, for instance, that the OHCHR does not in advance inform national level NGOs of an upcoming review opportunity. Although major reviews such as a UPR review may receive considerable advance notice from the OHCHR, states, NGOs and others, many UNTB reviews do not receive comparable attention. This is particularly the case for follow up reviews, many of which do not receive sufficient if any inputs from civil society[91] due to lack of adequate prior notice.[92] It should be relatively easy for the OHCHR to have databases of NGO contacts per country and send them targeted information in advance of adoptions of lists of issues, periodic reviews and follow up assessments. Such databases could avoid situations where UNTBs may adopt grades reflecting states parties' compliance with their COs on the sole basis of information provided by the state, and no alternative sources. Under the current scenario, NGOs are in most instances not made aware of an upcoming follow up review, which has resulted for instance in CEDAW finding that China had complied with a recommendation to enhance the independence of the judiciary,[93] with no alternative source of information than China's self-assessment.

rights monitoring and implementation at the national level' – 2021 Annual Conference of the Geneva Human Rights Platform 12 October 2021 https://www.geneva-academy.ch/joomlatools-files/docman-files/Plenary%20Panel%202.pdf (accessed 20 December 2021).

90 P Hicks, speaking at (n 89).

91 On the importance of NGO contributions to UNTB follow up reviews, see Ploton (n 37) and MVJ Kran 'Comments on the follow-up procedure of the UN Human Rights Committee' 3 February 2021 https://ccprcentre.org/ccprpages/marcia-v-j-kran-answering-questions-about-the-follow-up-procedure-of-the-human-rights-committee (accessed 20 December 2021).

92 In Cambodia; C Rollet & V Sokheng 'Rights review process has little NGO input', 27 August 2015 https://www.phnompenhpost.com/national/rights-review-process-has-little-ngo-input (accessed 20 December 2021).

93 Committee on the Elimination of Discrimination against Women follow up letter to

The elephant in the room:[94] *compensation for online work and sessions*

Aside from technical glitches such as faulty online platform tools, issues with interpretation, difficulties for common hours for members based across different world regions or accessibility for persons with disabilities,[95] much of the fierce opposition to online work expressed by UNTB members during the COVID crisis related to the absence of compensation for online work. UNTB members are not remunerated but they are nevertheless generously compensated during their presence in Palais Wilson or Palais des Nations in Geneva. Their signing a paper registry of presence in Geneva is conditional on receiving generous UN rate per diems (called DSA). For reasons that can be easily understandable, the frustration of members being unable to travel to Geneva was expressed primarily in private[96] and publicly it was often euphemistically framed as concerns for lack of adequate funding[97] or the imperative necessity to ensure that sessions should be held in person, rather than remotely.[98]

UNTB members are not paid for their work. Yet, the amount of commitment required for members to carry out their functions, including both during sessions and outside sessions, is considerable. With at least three regular sessions of four weeks on average together with pre sessions and the work required to prepare for sessions or review individual communications, the requirements to UNTB members is estimated to the near equivalent of a full-time job. The brutal and

China, DB/follow-up/China/67 21 September 2017 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CHN/INT_CEDAW_FUL_CHN_28950_E.pdf (accessed 20 December 2021).

94 The expression 'elephant in the room' to illustrate the issue of compensation for UNTB members' online work was first publicly expressed by a Belgian diplomat on the occasion of an online informal consultation on UNTB strengthening hosted by the co-facilitators of the 2020 review on 28 August 2020.

95 'Discussion paper of the Informal working group on COVID-19' August 2020 secs 3 https://www.ohchr.org/Documents/HRBodies/TB/HRTD/CoFacilitationProcess/outcomes/Discussion-paper-informal-WG-COVID-19.docx (COVID discussion paper) (accessed 20 December 2021).

96 One exception is the COVID discussion paper (n 95) of the informal working group on COVID which addressed in detail the issue of compensation for members (secs 3.e at 4-5) and arguably contributed to the ad-hoc payment of a symbolic compensation to all UNTB members in December 2020.

97 See United Nations Human Rights, Office of the High Commissioner 'Work of human rights treaty bodies at risk, warn UN Committee chairs' 4 August 2020 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26147&LangID=E (accessed 20 December 2021).

98 'It is important to emphasize that work on line is a supplementary tool, it cannot replace in person meetings which is an essential requirement to implement the mandate of treaty bodies' 'Written contribution of the Chairs of human rights treaty bodies on the treaty body system review in 2020' 4 August 2020https://www.ohchr.org/Documents/HRBodies/TB/HRTD/CoFacilitationProcess/outcomes/Written-contribution-co-facilitators.docx (accessed 20 December 2021).

unexpected halt to in person sessions in Geneva brought a major challenge to a number of UNTB members who rely on the compensation received during sessions for a living. Members cannot reasonably be expected to fulfil their mandate without a due form of compensation. In addition to UNTB members and chairs,[99] several actors pointed to the problem of compensation, including NGOs[100] states,[101] and the High Commissioner herself.[102] A review of the OHCHR UNTB Secretariat undertaken by the UN Office of Internal Oversight Services (OIOS) in 2021 at the request of the General Assembly acknowledged that

> there were still some lingering challenges associated with online meetings such as ... concern regarding lack of compensation to help experts to offset the costs associated with online meetings.[103]

The COVID crisis should have provided an opportunity to envisage a new form of compensation for UNTB members for their online work. At a time when the planet is struggling to counter the looming climate catastrophe, continuing to fly in more than 170 UNTB experts from all corners of the world to Geneva several times per year is not only anachronistic, but also blatantly incompatible with any sensible objective of greenhouse gas reduction. The model needs to be revamped, and that does require a new method for the compensation of members. Some initial ideas were developed by the UNTB chairs[104] and the UNTB working group on COVID-19.[105] Suggestions to think outside of the box were also formulated, such as envisaging that the members would be remunerated. Whatever option will be considered going forward will need to consider the perspective of the obvious actors – UNTB members, states and civil society users. It should also be emphasised that the perspective and interests of victims and users should be the main compass for any reform that would deal with compensation of members. Although praised publicly by many, that perspective has been

99 In a letter to the UN General Assembly of 7 December 2020, the UNTB chairs mentioned that 'Another issue of concern is the issue of financial support for on-line work … we have been informed that compensation for the time and effort treaty bodies devote to on-line work cannot be addressed within the current United Nations rules, which envisage allowances only in case of travel. However, we take this opportunity to request that other possible approaches be considered'.

100 The undersigned raised it on a number of closed meetings with OHCHR and UNTB members throughout 2020-21, including an information meeting with OHCHR on 28 September 2020; https://indico.un.org/event/34992/overview (accessed 20 December 2021).

101 Belgium on 28 August 2020, Hicks (n 90); Japan on 28 September 2020 (n 96).

102 International Service for Human Rights 'UNGA75 Impact of pandemic on human rights and UN's budget crisis loom large in third committee discussion with UN human rights chief' High Commissioner's yearly dialogue with the General Assembly's Third Committee, October 2020 https://ishr.ch/latest-updates/unga75-impact-pandemic-human-rights-and-uns-budget-crisis-loom-large-third-committee-discussion/ (accessed 20 December 2021).

103 United Nation General Assembly (n 69) 34.

104 Discussion paper of the Informal working group on COVID-19 (n 95).

105 COVID discussion paper (n 95).

too often ignored in the past due to the prevailing vested interests of stakeholders. Of course, reflections and proposals about compensation for UNTB members should look beyond the UNTBs and encompass Special Procedures as well as other UN-mandated pro-bono actors.

Digitalisation left behind: case study on digital case management system for individual communications

The need for a modern, robust and user-friendly digital tool, database or portal for UNTB individual communications has been highlighted for years, including most recently in the OIOS review of the OHCHR unit hosting the Secretariat of UNTBs.[106] Complaints about the current platform or absence thereof are unanimous amongst OHCHR Secretariat, UNTB members,[107] states[108] and petitioners.[109] It has been reported that a number of communications are only available in paper format, which obviously became problematic during the COVID-19 pandemic when staff did not have access to OHCHR premises. The most recurring complaints relate to the obsolescence of the OHCHR case management tools, unnecessary compartmentalisation and fragmentation of data and information, and the absence of an online tool for submission and follow up to the communications. State and non-state users also complain about the absence of a clear timeline for the review process, which often takes years,[110] with no visibility as to where the process is at any given moment.

The report of the co-facilitators of the 2020 review articulated the need for change:[111]

> There should be investment to set up a digital case management system for individual communications and urgent actions for the parties to submit,

106 United Nation General Assembly (n 103).

107 United Nations General Assembly 'Implementation of human rights instruments' Seventy-fifth session 14 September 2020. UN Doc A/75/346 §25.

108 See joint submission endorsed by 43 states to the 2020 review 'Non-paper on the 2020 review of the UN human rights treaty body System' at 5 https://tbinternet.ohchr.org/Treaties/CHAIRPERSONS/Shared%20Documents/1_Global/INT_CHAIRPERSONS_CHR_31_28571_E.pdf (accessed 20 December 2021).

109 Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system 7 July 2020, (n 71) secs 16.

110 International Service for Human Rights 'Treaty bodies | backlog in individual complaints must be addressed now' 26 November 2018 https://ishr.ch/latest-updates/treaty-bodies-backlog-individual-complaints-must-be-addressed-now/ (accessed 20 December 2021).

111 'Report of the co-facilitators on the process of the consideration of the state of the UN human rights treaty body system' https://www.ohchr.org/Documents/HRBodies/TB/HRTD/HRTB_Summary_Report.pdf (accessed 20 December 2021).

access and track relevant information, including on the status of the case. An online platform, such as those available in other regional systems,[112] could enable users to see where the communication currently sits in the review process, through a secure individual access.

As for the rest of digitalisation effort for UNTBs, which should not be looked at in isolation, but should be considered holistically together with other UN human rights mechanisms, the digitalisation of individual communications should also be part of broader reform efforts to address the other well documented challenges in the processing of UNTB individual communications.[113]

Further research into the extent to which digitalisation has been applied by other bodies such as regional human rights institutions and fellow international human rights bodies and judicial organs could contribute to the identification of good practices and practical tips which could potentially be replicated by the UNTBs.

112 Such as the Inter American system, see Callejon, Kemileva & Kirchmeier (n 30) secs 3.A.1 at 23.

113 K Kemileva 'UN inefficiencies undermine effective handling of individual petitions' 29 October 2019 https://www.openglobalrights.org/UN-inefficiencies-undermine-effective-handling-of-individual-petitions/ see also, AS Galland 'Treaty bodies | human rights victims' complaints to UN not treated effectively' March 2020 https://ishr.ch/latest-updates/treaty-bodies-human-rights-victims-complaints-un-not-treated-effectively/ (accessed 20 December 2021).

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The 'implementation' in 'National Mechanisms for Implementation, Reporting and Follow-up': what about the victims?

*Rachel Murray**

Introduction

As Prof Christof Heyns, with Prof Frans Viljoen wrote in 2001, 'ratification in itself is largely a formal, and in some cases, an empty gesture' and 'the success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices at the domestic (country) level'.[1] In the intervening years increased attention has been paid to the translation of human rights treaty obligations into achieving what they coined as this 'enabling domestic environment'.[2] Decisions on communications which call on states to take measures to remedy violations have similarly received some consideration. How this is achieved in practice has led to recommendations not only on how the treaty bodies and supranational courts themselves can change their practices to facilitate implementation, but also what states can do in practical terms.

Heyns and Viljoen recommended in 2002 that an 'inter-ministerial or interdepartmental human rights forum with an "institutional memory" should be established to deal with reporting and implementation of concluding observations in each country. Such a forum should include the relevant organs of state and civil society. The forum should also receive and consider concluding observations and views on individual

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1 C Heyns & F Viljoen, 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23(3) *Human Rights Quarterly* 483.

2 Heyns & Viljoen (n 1) at 518. See S Jensen, S Lagoutte & S Lorion 'The domestic institutionalisation of human rights' (2019) 37(3) *Nordic Journal of Human Rights* 165. S Cardenas *Conflict and compliance: state responses to international human rights pressure* (University of Pennsylvania Press 2007); C Hillebrecht 'The power of human rights tribunals: compliance with the European Court of Human Rights and domestic policy change' (2014) 20(4) *European Journal of International Relations* 1100; C Hillebrecht 'The domestic mechanisms of compliance with international human rights law: case studies from the Inter-American human rights system' (2012) 34(4) *Human Rights Quarterly* 959. J Krommendijk 'The domestic effectiveness of international human rights monitoring in established democracies. The case of the UN human rights treaty bodies' (2015) 10 *International Organization* 489; J Krommendijk 'The (in)effectiveness of UN human rights treaty body recommendations' (2015) 33(2) *Netherlands Quarterly of Human Rights* 194.

complaints'.[3] The UN High Commissioner for Human Rights took this idea of states establishing a body or mechanism to coordinate activities at the national level in order to facilitate their engagement with supranational bodies in her report in 2012.[4] Since then, it is clear that there has been some, not insubstantial movement, encouraged by supranational bodies themselves, organisations such as Universal Rights Group and civil society, in the establishment or identification of such mechanisms. Yet, still, a decade on, many countries have yet to create a mechanism, and those that do exist are still in their infancy.[5] Furthermore, while the mandate of these 'national mechanisms for reporting and follow-up' (NMRF) has been extended to encompass implementation ('national mechanisms for *implementation*, reporting and follow-up, NMIRF), practice indicates that many are still getting to grips with the coordination of reporting and have yet to move fully to post-reporting or a post-decision phase of this work and there is confusion as to whether their mandate covers individual communications. This chapter explores the establishment of these mechanisms, and then, using some examples, argues that some confusion surrounds the 'follow-up' and 'implementation' aspects of their mandates. As Lorien and Lagoutte note, it was not expected that NMRF would be the 'direct implementer' of supranational bodies' findings, rather the 'facilitator of implementation'. While agreeing with this approach, this essay considers that victims are often unclear what happens to the case once a decision has been reached. Although not directly implementing the decision, these mechanisms are uniquely placed to provide somewhere for victims to obtain information and be kept informed on the progress of implementation of reparations awarded to them.

National Mechanisms for (Implementation) Reporting and Follow-Up

In 2012, the UN High Commissioner for Human Rights, Navanethem Pillay, wrote that each state 'will be encouraged to systematize its preparation of those reports through the establishment or the

3 C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (Kluwer Law 2002) at 40.

4 United Nations Human Rights, Office of the High Commissioner, Navanethem Pillay *Strengthening the United Nations human rights treaty body system* (2012) (Pillay report) https://www2.ohchr.org/English/bodies/HRTD/docs/HCreportTBStrengthening.pdf (accessed 26 October 2021).

5 M Limon 'The global human rights "implementation agenda" and the genesis of NMIRFs' in R Murray & D Long (eds) *Research handbook on the implementation of human rights law* (Edward Elgar forthcoming). Universal Rights Group 'Human Rights Implementation, Compliance and the Prevention of Violations: Turning International Norms into Local Reality (Glion III report), https://www.universal-rights.org/wp-content/uploads/2016/10/Glion_2016_page.pdf (accessed 26 October 2021).

reinforcement of a standing national reporting and coordination mechanism'.[6] Such mechanisms should 'facilitating both timely reporting and improved coordination in follow-up to treaty bodies' recommendations and decisions'.[7] A subsequent Study and Practical Guide provided further advice for states setting up or identifying such a body. They defined the renamed 'national mechanism for reporting and follow-up (NMRF)' as a government structure, which is

> mandated to coordinate and prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, the universal periodic review and special procedures), and to coordinate and track national follow-up and implementation of the treaty obligations and the recommendations emanating from these mechanisms. It may be ministerial, interministerial or institutionally separate.[8]

The NMRF should be 'comprehensive' in its approach, namely that it

> engages broadly on all human rights, with all international and regional human rights mechanisms, and in following up on recommendations and individual communications emanating from all such human rights mechanisms.[9]

It was not envisaged that it would 'directly implement human rights obligations', but rather that such a mechanism

> prepares State reports and responses to communications, visits of independent experts, follow-up to facilitate implementation by line ministries, and manages knowledge around the implementation of treaty provisions and related recommendations and decisions by other parts of the governmental structure.[10]

Subsequent resolutions by the UN General Assembly recommended that the OHCHR provide the necessary support to states to build their institutional capacity,[11] and for states to

6 Pillay report (n 4) at 12.

7 Pillay report (n 4) at 85.

8 OHCHR *National Mechanisms for Reporting and Follow-up: A practical guide to effective engagement with international human rights mechanisms* (2016) (OHCHR Practical Guide) UN Doc HR/PUB/16/1 at 2-3. OHCHR *National Mechanisms for Reporting and Follow-up: A study of State engagement with International Human Rights Mechanisms* (2016) (OHCHR Study) UN Doc HR/PUB/16/1/Add.1., https://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_Study.pdf (accessed 26 October 2021)

9 OHCHR Practical Guide (n 8) 2-3.

10 OHCHR Practical Guide (n 8) at 2-3. See also Glion III report (n 5); Open Society Justice Initiative *From rights to remedies: structures and strategies for implementing human rights decisions* (2013); Open Society Justice Initiative *From judgment to justice. Implementing international and regional human rights decisions* (2010); DC Baluarte 'Strategizing for compliance: the evolution of a compliance phase of Inter-American Court litigation and the strategic imperative for victims' representatives' (2012) 27(2) *American University International Law Review* 263.

11 Resolution 68/268 adopted by the General Assembly on 9 April 2014: 68/268 Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System', https://www.ohchr.org/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf (accessed 26 October 2021).

> establish or strengthen national mechanisms for implementation, reporting and follow-up for further compliance with human rights obligations or commitments, and to share good practices and experiences in their use.[12]

There have been some attempts, such as with the Pacific Principles,[13] to provide further clarity and guidance on how these mechanisms should function. Regional bodies have similarly recommended that states create these bodies[14] and organisations such as the Universal Rights Group (URG) and the state-led Group of Friends set up to facilitate links between states,[15] provide a continual focus.[16]

Yet, detailed information about these mechanisms is limited. Work conducted by the Human Rights Implementation Centre (HRIC) in collaboration with the URG and Bingham Centre for the Rule of Law has identified that around 40 to 50 such mechanisms exist.[17] Information about their composition and functioning is scattered, mentioned, for example, in passing in paragraphs in state reports, and in the few publications and studies on the issue.[18] Websites for these bodies often

12 Human Rights Council, *Promoting international cooperation to support national mechanisms for implementation, reporting and follow-up* (2019) UN Doc A/HRC/42/30.

13 *The Pacific Principles of Practice (of National Mechanisms for Implementation, Reporting and Follow-Up)*, adopted Fiji (2019), https://www.universal-rights.org/wp-content/uploads/2020/06/The-Pacific-Principles-of-Practice.pdf (accessed 26 October 2021).

14 See for example African Commission on Human and Peoples' Rights *Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights* (2018); African Commission on Human and Peoples' Rights *General Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights* (2017); Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, S Kovalov *Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties* Doc 13087 (2013), http://assembly.coe.int/Communication/pressajdoc29_2012rev.pdf (accessed 26 October 2021).

15 See https://www.universal-rights.org/blog/what-are-friends-for-groups-of-friends-and-the-un-system/ (accessed 26 October 2021).

16 URG *Norwegian Ministry of Foreign Affairs, Global Human Rights Implementation Agenda: The Role of International Development Partners. Report of the Informal Meeting of Development Partners on 'International Support for the National Implementation of Human Rights Obligations and Commitments* (2018); B Chamoor, S Tadjbakhsh & I Salama and URG team *NMRFs: A key state structure for effective reporting, coordination and implementation of human rights recommendations* (2016) https://www.universal-rights.org/blog/nmrfs-key-state-structure-effective-reporting-coordination-implementation-human-rights-recommendations/ (accessed 26 October 2021).

17 See also for example Commonwealth, URG *The Global Human Rights Implementation Agenda: The Role Of National Parliaments, Policy Brief* (2018) at 27. M Limon and M Montoya 'Clustering and the integrated implementation of recommendations: The key to unlocking the complementary power of the UN's compliance mechanisms. The Universal Periodic Review, Treaty Bodies and Special Procedures: A connectivity Project. Part of a series of reports on the 'Global human rights implementation agenda' (2019). The Universal Rights Group, Bingham Centre for the Rule of Law and Human Rights Implementation Centre are in the process of publishing a study on NMIRFs.

18 OHCHR, Practical Guide (n 8); Open Society Justice Initiative (n 10); D Anagnostou & A Mungiu-Pippidi 'Domestic implementation of human rights judgments in Europe: legal infrastructure and government effectiveness matter' (2014) 25(1)

do not exist and the extent to which their work is visible, even to stakeholders at the domestic level, can be variable.

Different acronyms have arisen, starting with 'standing national implementation, coordination and reporting structures' (SNICRS) coined by the UN High Commissioner for Human Rights in her 2012 report.[19] 'Governmental human rights focal points' (GHRFP), some with a thematic mandate and some more comprehensive,[20] to a greater or lesser extent attempt to achieve similar aims, coordinating the executive arm of the state with respect to its domestic and international human rights obligations.[21] Other 'systems' are organised around the development of national human rights action plans,[22] although these tend to be 'inward looking',[23] and do not necessarily address the engagement with the regional and international bodies.

'SNICRS' from the OHCHR 2012 report[24] evolved into 'national mechanisms for reporting and follow-up' (NMRF) in the 2016 Study and Practical Guide.[25] The inclusion of the 'I' and 'implementation', in National Mechanisms for *Implementation*, Reporting and Follow-Up arose, it would seem rather by chance during discussion at Glion III, a yearly meeting bringing together key stakeholders as a dialogue for debate.[26] According to Limon,

> the outcome report of Glion III recalled the 'growing interest, among States, NGOs, UN experts and OHCHR, about the evolution of so-called 'national mechanisms for reporting and follow-up' (NMRF) or 'standing national implementation, coordination and reporting structures' (SNICRS – pronounced like the chocolate bar). To avoid creating confusion, Norway, Switzerland and URG agreed to also use the name in the Glion III report, alongside a new label, included in the background papers for the retreat: SNICRS. The significance of this new name (which was debated during the Glion III retreat, without any agreement being reached) was the inclusion

European Journal of International Law 205; S Lorien *Defining governmental human rights focal points. Practice, guidance and conception* (Danish Institute for Human Rights 2021); S Lorien & S Lagoutte 'What are governmental human rights focal points?' (2021) 39(2) *Netherlands Quarterly of Human Rights* 80.

19 Pillay report (n 4) at 4.5.4. See also M Camilleri & V Krsticevic 'Making international law stick: reflections on compliance with judgments in the Inter-American human rights system' in *Proteccion Internacional de Derechos Humanos y Estado de Derecho* (2009).

20 Lorien (n 18); and Lorien & Lagoutte (n 18).

21 Lorien (n 18) at 35.

22 OHCHR, *Handbook on National Human Rights Plans of Action* (2002) UN Doc HR/P/PT/10; Lorien (n 18).

23 Lorien (n 18) at 38.

24 Pillay report (n 4).

25 OHCHR Practical Guide (n 8).

26 https://www.universal-rights.org/the-glion-human-rights-dialogue/ (accessed 26 October 2021).

of the word 'implementation.[27]

It has been subsequently used by the Human Rights Council.[28]
Despite this addition, and perhaps due to them being relatively young entities, their focus is still principally on developing coordination around the reporting and to a much lesser extent on follow-up.[29] Some have established databases, collating recommendations from the supranational bodies mapped against responsible ministries and with timelines.[30] As the focus is on reporting, individual communications may not be part of an NMRF's mandate or only to the extent to which they are included in the follow-up to the reporting process.

What about the victims?

The insertion of the term 'implementation' has caused some confusion as to exactly what these mechanisms are supposed to achieve and how this differs from the 'follow-up' already present: the 'thin line between direct and indirect implementation'.[31] It is apparent, even with the addition of the word 'implementation', that the OHCHR 'warn'[32] NMIRFs should 'not directly implement human rights obligations'.[33] Speaking of GHRFP, Lorien and Lagoutte argue further that 'they are created for implementation purposes, but their implementation role is not to be a direct implementer: it is about triggering other actors in action'.[34] Thus, as explained by the OHCHR:[35]

> A national mechanism for reporting and follow-up systematizes and rationalizes the preparation of reports to international and regional human rights mechanisms and coordinates national follow-up to recommendations. It facilitates all other forms of engagement with these mechanisms. It ensures coordination between different government entities, thereby building national ownership and coherence, empowering line ministries and developing sustainable expertise. It ensures consultation with the national human rights institution (NHRI) and civil society, which serves to

27 Limon (n 5); Glion III report (n 5).

28 UN Human Rights Council *Promoting international cooperation to support national human rights follow-up systems, processes and related mechanisms, and their contribution to the implementation of the 2030 Agenda for Sustainable Development* (2017) UN Doc A/HRC/RES/36/29.

29 Danish Institute for Human Rights *Report on Country Experiences With HR-SDG Integrated National Mechanisms for Implementation, Reporting and Follow-Up* 2021.

30 E.g. SADATA in Samoa, https://sadata-production.firebaseapp.com/overview see and also the database promoted by the OHCHR, the National Recommendations Tracking Database, https://www.ohchr.org/Documents/HRBodies/UPR/NRTD.pdf

31 S Lorien & S Lagoutte 'Implementers or facilitators of implementation? Governmental human rights focal points' complex role in enhancing human rights compliance at the national level' in Murray & Long (eds) (n 5).

32 As above.

33 OHCHR Practical Guide (n 8) at 3. Lorien & Lagoutte (n 31).

34 Lorien & Lagoutte (n 31).

35 OHCHR Practical Guide (n 8) at 6.

> strengthen participatory, inclusive and accountable human rights-based governance. A national mechanism for reporting and follow-up is also uniquely placed to take the lead in clustering and prioritizing recommendations, in the coordination and development of a specific implementation plan for the follow-up to recommendations from all international and regional human rights mechanisms, with specific timelines, indicators and benchmarks for success or a comprehensive national human rights action plan, including implementation of treaty provisions and recommendations from the United Nations and regional human rights mechanisms.

However, there is little mention of where victims fit and to what extent the NMRF should be engaging with them. We found in our research that victims may not be informed, in the wake of a decision from the supranational body, how the harm they have suffered will be repaired and what part they have to play in the process to ensure they receive the reparations due. In the words of Zeid Ra'ad Al Hussein, it was hoped that with the creation of NMRF, '[t]hrough such institutionalised contacts, the voices of victims and their representatives will also be increasingly heard'.[36]

As part of their information management role, the OHCHR recommends that the NMRF

> [i]dentify responsible government ministries and/or agencies for their implementation; Develop follow-up plans, including timelines, with relevant ministries to facilitate such implementation; and Manage information regarding the implementation of treaty provisions and recommendations'.[37]

In addition, it notes that a NMRF is

> centrally placed not only to coordinate reporting but also to coordinate and track the follow-up to recommendations or decisions of international and regional human rights mechanisms. An important means by which this can be done is a human rights recommendations implementation plan.[38]

The NMRF could hence play an important role in providing information to the victim on the progress of the implementation of their case at the national level.

Challenges with implementing the 'implementation' and follow-up aspect of their mandate

Implementation of decisions involves a range of ministries and state authorities and technical and administrative processes, which should

36 Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights, in OHCHR Practical Guide (n 8) at iv.
37 OHCHR, Practical Guide (n 8) at 22.
38 OHCHR, Practical Guide (n 8) at 25.

ideally be coordinated.[39] These processes are rarely automatic and often complicated and bureaucratic, and the relationship between them and the NMRF, if it exists, is not always clear.

Burkina Faso's Inter-ministerial Committee on Human Rights and International Humanitarian Law, the *Comité Interministériel des droits humains et du droit international humanitaire (CIMDH),*[40] within the Ministry of Justice, Human Rights and Civic Promotion, has a broad mandate, encompassing coordination and advice in drafting reports to supranational bodies. It is a technical consultative body, composed of the secretariats of ministries that have human rights competencies,[41] and supports and advises government on policies and strategies for the promotion, protection and respect of human rights and international humanitarian law. The CIMDH is tasked, among other things, to: (a) facilitate the coordination of human rights promotion and protection activities initiated by government ministries; (b) review and advise on government policies and strategies on human rights and; and (c) provide technical support in the drafting of Burkina Faso's state reports to supranational human rights bodies.[42] Yet, there was an apparent lack of clarity as to its role on follow-up and implementation. For example, there was a perception among some we spoke with outside government that in fact there was 'no formal mechanism in

39 K Fox Principi *Implementation of decisions under treaty body complaints procedures – Do states comply? How do they do it?* (2017) https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf (accessed 26 October 2021). K Fox Principi 'Implementation of decisions under UN treaty body complaints procedures: how do states comply?' (2017) 37 *Human Rights Law Journal* 1-30. R Murray 'The implementation of human rights decisions: commitment despite rhetoric but no room for complacency' (2020) 12(1) *Journal of Human Rights Practice*. See Human Rights Law Implementation Project, www.bristol.ac.uk/law/hrlip, funded by the Economic and Social Research Council.

40 The inter-ministerial committee on human rights and international humanitarian law (CIMDH) was established by the *décret n°2005-100/PRES/PM/MPDH du 23 février 2005 portant création, attributions, composition et fonctionnement du Comité interministériel des droits humains et du droit international humanitaire* and later on amended by the décret n°2008-740/PRES/PM/MPDH, of 17 November 2008.

41 R Murray & C de Vos 'Behind the state. Domestic mechanisms and procedures for the implementation of human rights treaty body decisions' (2020) 12(1) *Journal of Human Rights Practice*. S Lorion *The institutional turn of international human rights law and its reception by state administrations in developing countries* (PhD thesis) (2020).

42 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author. This project, funded by the Economic and Research Council, aimed to track the implementation of select cases from regional and UN treaty bodies. In addition to desk based research, interviews were undertaken with representatives of governments, parliamentarians, the judiciary, NHRIs, civil society, academics and representatives from UN and regional bodies. Ethical clearance was granted from the Universities of Bristol, which led the project, as well as the two other universities involved, the University of Pretoria, Essex and Middlesex. For information and outputs from the project see: www.bristol.ac.uk/law/hrlip.

place … receiving, processing and implementing decisions',[43] but others suggested that this Committee could be asked by the victims to give its views on their case.[44] As for implementation of specific decisions, other ad hoc processes were set up, including appointing lawyers to manage the cases. Specific ministries will be required for specific reparations, for example, payment of compensation in one case was implemented through the Judicial Agency at the Treasury, but with no overall coordination of all aspects of the decision. Representatives of government did not know if there was a system which brought together victims and government to discuss implementation.[45]

With respect to the victims, our research found consequently that it was not at all clear what they should do, if anything, after the adoption of the judgment or decision. As one victim stated: 'I was left alone fighting for the implementation of the decision'.[46] Another told us that they were not approached directly by the government after the decision was adopted. Consequently, the role of national lawyers was critical, initiating contact with the government to understand what process should be followed, and liaising with the victims concerning progress.[47]

Cameroon's *Inter-Ministerial Committee for monitoring the implementation of recommendations of the regional and international mechanisms* has a broad mandate, explicitly set out in its founding Order, which also includes coordinating the implementation of decisions of a range of supranational bodies and mechanisms, among them the UN Human Rights Committee, and African Commission on Human and Peoples' Rights, and Universal Periodic Review.[48] It reports to the President of Cameroon, and is composed of a number of ministries and other stakeholders.[49] There did appear to be a system whereby on receipt of a decision from a supranational body the Inter-Ministerial Committee will contact the relevant ministries and also the victim. Although there was a lack of transparency in how the Inter-Ministerial Committee operated and it displayed weaknesses in making its deliberations and findings visible, victims were not always aware of its existence and it was not clear the extent to which it actually engaged

43 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

44 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

45 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

46 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

47 Interviews, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

48 Order No.081/CAB/PM, 15 April 2011. See also FIDH and OMCT *Cameroon: Homophobia and Violence against Defenders of LGBTI Persons* (2015) 9; CNDHL *2014 Annual Report* (2014) at 113. UN Doc A/HRC/WG.6/16/CMR/1 para 2.

49 Murray & De Vos (n 41).

with them, with one receiving no response after it had approached the Committee.[50] As one litigant informed us, 'it shows [the] case is considered at some level sometimes by somebody. But it must be part of this interministerial thing. … I think there is some kind of mechanism but I don't really know how it works'.[51]

In Zambia, an Inter-Ministerial Committee on Human Rights has been set up by the Ministry of Justice, this Ministry being the focal point for implementation of human rights obligations in the country.[52] The Inter-Ministerial Committee is composed of ministries and departments as well as the NHRI, the Human Rights Commission, and the judiciary. It coordinates reports to supranational bodies, but not apparently specifically the follow-up or implementation of decisions, for which we were told while the government was creating a database of updates, there was 'no formal structure'.[53] Responsibility lay with the Office of the Attorney General to advise the government on implementation,[54] with the Ministry of Justice ultimately determining to whom to refer the decision.[55] There was a recognition that

> the follow ups are not as good as they probably should be. I guess with most of these cases, the ideal situation would be that we constantly check up with what is happening in this matter with the relevant institution, but structural issues make it very difficult.[56]

In addition, others stated that there was no 'defined process' for informing the complainant or making the decision widely known.[57]

The role of the NMRF/NMIRF with respect to the victims

For the cases we examined, several factors indicate the importance of there being a governmental body which can engage with the victim.

50 Murray & De Vos (n 41). Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

51 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

52 See Human Rights Council *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Resolution 5/1: Zambia* A/HRC/WG.6/2/ZMB/1 of 9 April 2008. See also Committee Against Torture *Consideration of reports submitted by States Parties under article 19 of the Convention: Zambia* UN Doc CAT/C/47/Add.2 (2001). Gazette Notice Number 6102 of 2012.

53 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

54 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

55 Interview, August 2017, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

56 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

57 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.

Governments acknowledged that in reality it may be left to the complainant to initiate action: [58]

> The burden is very highly on the complainant right now. If the complainant isn't pushing, it's most likely that the matter is quiet, which is not obviously the best of practices, but that's what happens right now, I guess because, like I said, the work is compounded with other portfolios that people have, so it tends to get very diluted in systems.

Victims and complainants may not know who to refer to at the national level or indeed what the process is, if it even exists: "we don't know who to liaise with'.[59] The importance of having someone in country who understands the process which has to be followed to implement the decision, who can 'act as a local agent'.[60] As one litigant told us: [61]

> [The victim] needed somebody on the ground because you have to have somebody there who understands what ministry is what and who's who and to follow up and okay close that one down, no it's not the minister of justice it's the minister of interior or defence or whoever it is but from a distance it's really hard to make sense of it.

A government body that has oversight of all aspects of the decision, including which ministry is responsible for implementing which aspect of the decision, is an obvious entity from whom the victims and litigants can obtain information. The 'information management capacity' of the NMRF can do this whereby it can 'systematically capture and thematically cluster recommendations and decisions in a user-friendly spreadsheet or database' which also identifies key ministries, plans and manages information to enable the preparation of the state report.[62] The NMRF/NMIRF should proactively be contacting the victims in the wake of a decision.

Conclusion

Research is clear that those NMRF that have been established are still very much tackling the task of coordinating and reporting, with follow-up still in its infancy in terms of structures and processes being developed. Implementation is complex and the inclusion of the word in 'NMIRF' has perhaps provided an unhelpful diversion from understanding the intricacy of the numerous processes, involving various state authorities

58 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.
59 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.
60 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.
61 Interview, undertaken in the context of the Human Rights Law Implementation Project, on file with author.
62 OHCHR, Practical Guide (n 8) at 2-3.

which are needed to implement all aspects of a decision.[63] An NMRF can provide clear direction, develop plans of action and coordinate activities among the state,[64] and as part of this role can also act as the first port of call for victims seeking information on how to obtain the remedies for the harms they have suffered.

63 Murray & De Vos (n 41).

64 International Service for Human Rights *Has the Declaration made a difference to the lives of defenders? an analysis of the implementation of the UN Declaration on Human Rights Defenders in Colombia and Tunisia* (2020) at 7.

35

UN treaty body views: a distinct pathway to UN human rights treaty impact?

*Başak Çalı**

Introduction

Professor Christoph Heyns was a prolific scholar of the domestic impact of United Nations human rights treaties.[1] He rightly underlined that as human rights scholars we should study how UN human rights treaties impact the real lives of individuals and communities.[2] Professor Heyns, in particular, placed a strong emphasis on studying pathways for impact, underlining the significant roles that domestic institutions and domestic civil society, as well as domestic human rights culture, play in driving impact. In his seminal article, published in the *Human Rights Quarterly* in 2001 together with Frans Viljoen, and based on the study of the impact of UN human rights treaties in twenty countries across the globe up until 1999, the authors underlined the negligible role of UN human rights enforcement mechanisms themselves in ensuring impact. They reported that 'international enforcement mechanisms used by the treaty bodies appear to have had a very limited demonstrable impact thus far.'[3] In their contribution, Heyns and Viljoen underlined that this lack of impact was partly attributable to the inefficiencies of international human rights enforcement mechanisms.[4] Moreover, they further cautioned that while improvements to international enforcement mechanisms may enable greater impact, what was needed was to find ways to 'harness the treaty system to domestic forces'.[5] For Professor Heyns, methods to ensure the harnessing of UN human rights domestically also defined the road map for human rights practice at the intersection of domestic and international advocacy contexts. Effective advocacy for human rights treaties is not only about improving the

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1 CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (Kluwer Law 2002).

2 CH Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (1998) 23 *Human Rights Quarterly* 483 at 484.

3 Heyns & Viljoen (n 2) 488.

4 As above.

5 As above.

efficiency and accessibility of UN human rights standards, but also on strengthening the domestic infrastructure for human rights, composed not only of state institutions, but also all the other organs of domestic society.

Departing from the central insights of Professor Heyns' work on the barriers and pathways to impact of enforcement mechanisms of UN human rights treaties, this chapter turns its attention to one specific aspect of the UN human rights enforcement architecture, the individual complaints mechanisms before the United Nations human rights treaties, as a distinct avenue for increasing the domestic impact of UN human rights treaties. The chapter acknowledges that the individual complaints mechanisms share the standard weaknesses of other international enforcement mechanisms of UN human rights treaties as identified by Heyns and Viljoen. It also, however, argues that individual petition mechanisms present distinct opportunities for impact.[6] The reasons for this are twofold. First, individual cases present a distinct opportunity for civil society, media and academia to engage with UN human rights treaties. To engage with an individual case is to engage with a relatable, specific human story. In turn, individual cases may be more capable of focusing the attention of domestic compliance constituents to questions concerning the effective implementation of UN human rights treaties than a more abstract engagement with them. In the words of Heyns and Viljoen, individual cases may, in particular, offer a new opportunity for state and non-state actors in 'disengaged countries'.[7] Second, the decisions of UN human rights treaties are uniquely positioned to offer a special opportunity for judicial impact. This is because individuals demand a certain set of specific individual remedies, which courts are best placed to provide. In such situations judicial impact can take place directly, through the domestic courts engaging with individual remedies required in a case. It can also take place indirectly, by considering the case law of the United Nations treaty bodies (UNTB) in other comparable cases. There is also a second opportunity for indirect impact. UNTB case law may also provide opportunities for impact on regional human rights courts and commissions or other international courts. The judicial dialogue between regional courts and commissions (or other international courts) through their use of UNTB case law in individual cases can therefore subsequently act as a conduit of domestic impact in domestic judicial settings, in countries where individuals

6 I employ the definition of specific opportunities in the social movement literature when discussing the UNTB petition system as offering distinct opportunities. See, J Berclaz & M Giugni 'Specifying the concept of political opportunity structures' in M Kousis & C Tilly (eds) *Economic and political contention in comparative perspective* (Routledge 2005) 15-32.

7 Heyns & Viljoen (n 2) 534.

have access to both UN human rights treaty bodies and regional human rights courts.

In what follows, the chapter first outlines the proliferation of the right to individual petition mechanisms before the UN human rights treaties. It shows that the generation of UN human rights case law through individual cases has become a central avenue for UN human rights treaty bodies to harness UN human rights treaties to domestic institutions across the globe. Second, the chapter turns to how the standard weaknesses of international human rights enforcement mechanisms are also reflected in the human rights decisions of UNTBs. As such, lack of dissemination, backlog, vague recommendations and overlaps, alongside the lack of legally binding status of individual decisions are common barriers to ensuring the impact of the case law of UN generated through individual decisions.[8] Third, the chapter turns to the unique opportunities created by UN human rights views, and their ability to empower civil society and the media alongside domestic and international judiciaries. The chapter concludes by calling for more comparative studies of the impact of UN views and the need for a more robust cataloguing of best practices for impact created by UN views.

The proliferation of the right to individual petition before UN human rights treaty bodies

The individual complaints mechanisms of the United Nations have over the last two decades come to the foreground of the academic scholarship on the impact of UN human rights treaties as well as international litigation practices, in particular.[9] This is because alongside the older individual complaints mechanisms of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention against Torture (CAT), which came into force in 1976, 1982 and 1987 respectively, the individual complaints mechanisms have significantly

8 Heyns & Viljoen (n 2) 488. Also see KF Principi 'Implementation of UN treaty body decisions: a brief insight for practitioners' (2020) 12 *Journal of Human Rights Practice* 185, on non-legally binding status of decisions as a 'common reason' for implementation failures.

9 See representatively, G Ulfstein 'Individual complaints' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (CUP 2012), SP Subedi *The effectiveness of the UN human rights system: reform and the judicialisation of human rights* (Routledge 2017); Principi (n 8), V Shikhelman 'Implementing decisions of international human rights institutions– evidence from the United Nations Human Rights Committee' (2019) 30 *European Journal of International Law* 753, AJ Ullmann and A Von Staden 'Challenges and pitfalls in research on compliance with the "views" of UN human rights treaty bodies: a reply to Vera Shikhelman' (2020) 31 *European Journal of International Law* 693, C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.

expanded, and are now available for all UN human rights treaties with the exception of the Convention on the Rights of Migrant Workers. In the case of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) state parties have drafted and ratified optional protocols on individual complaints mechanisms well after the initial adoption of these treaties, in 2000, 2013, and 2014 respectively. The two new generation UN human rights treaties, the Convention on the Rights of Persons with Disabilities (CRPD) also has an optional protocol for individual complaints and states can opt in to the individual complaints mechanism under the Convention on Enforced Disappearances (CED) by making a declaration under Article 31 of CED.

What is more, the expansion of the right to individual petition before these UNTBs has received a significant number of opt-ins by state parties, also in the last two decades. The ICCPR, CEDAW and CRPD, in particular, now have a global reach with access to individuals from both the global north and the global south and deliver decisions with respect to states which are also under the jurisdiction of regional human rights courts and commissions in Europe, the Americas and Africa. In addition, some of these mechanisms have become the only quasi-judicial avenue for victims of human rights violations to seek redress. This is, to name a few, the case for countries across the globe such as Belarus[10] in Europe, Tajikistan,[11] Kazakhstan[12] and Turkmenistan,[13] Nepal and Sri Lanka[14] in Asia, and Saudi Arabia[15] in the Middle East.

The increase in the availability of individual complaints mechanisms, alongside the rise in state opt ins to such mechanisms, has led in turn to a proliferation of UN treaty body case law across all UN human rights committees in recent decades,[16] and what I and my co-authors have called the rise of UN human rights treaty bodies as 'soft courts'[17] in a

10 Belarus accepted the right to individual petition before the ICCPR and CEDAW in 1992 and 2004 respectively.

11 Tajikistan acceded to ICCPR and CEDAW individual complaints mechanisms in 1999 and 2014 respectively.

12 Kazakhstan acceded to CERD, CAT, CEDAW and ICCPR individual complaints mechanisms in 2001, 2008, 2008 and 2009 respectively.

13 Turkmenistan acceded to ICCPR, CEDAW and CRPD individual complaints mechanisms in 1997, 2009 and 2010 respectively.

14 Nepal acceded to ICCPR, CEDAW and CRPD individual complaints mechanisms in 1991, 2007, and 2010 respectively.

15 Saudi Arabia acceded to the CRPD individual complaints mechanism in 2008.

16 B Çalı & AS Galand 'Towards a common institutional trajectory? individual complaints before UN treaty bodies during their booming years' (2020) 24 *International Journal of Human Rights* 1-24.

17 B Çalı, C Costello & S Cunningham 'Hard protection through soft courts? non-refoulement before the United Nations treaty bodies' (2020) 21 *German Law Journal* 355.

comparative study of non-refoulement decisions delivered by UNTBs. This is because the quasi-judicial assessment of compliance with UN treaties in individual cases is now a central part of the work of the UNTBs, alongside the more standard mandates they have of reviewing state reports and of issuing concluding observations and general comments.[18]

Parallel to the rise of individual petition before UNTBs, scholarship on the impact of these views has also proliferated, following the seminal cross-country study by Heyns and Viljoen.[19] There are now more and more studies on the level of compliance of states with the views. The broad findings of this literature on the level of compliance with treaty body UN views show that the initial findings of Heyns and Viljoen on the low levels of compliance with the views have not significantly changed. Principi's 2017 and 2020 research confirms this finding, reporting that a lack of implementation of decisions is more prevalent than their implementation.[20] Shikhelman's 2019 research further shows that a lack of action to implement the views of the UNTBs is the most prevalent outcome.[21] This finding underlines that states' initial support of UN human rights treaty mechanisms by opting in to them is not met by these states' subsequent compliance with such views.

Table 1: Proliferation of UNTB Individual Complaints Mechanisms

UNTB	Entry into force of individual complaints mechanisms	Yearly average no. of communications registered (2018-2019)*	Yearly average no. of final decisions (2018-2019)*	Number of States' acceptance (2021)
HRC	1976	329	131	116

18 The Second Biennial Report of the UN Secretary General on the Status of the Human Rights Treaty Body System of 6 August 2018, A/73/209, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/309 (accessed 28 October 2021).

19 Earlier studies focussing on the compliance with HRC decisions also found compliance with HRC's views by state parties 'disappointing'. See D McGoldrick *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Clarendon 1994) 202.

20 KF Principi 'Implementation of decisions under UN treaty body complaint procedures: how do states comply?: a categorized study based on 268 cases of "satisfactory" implementation under the follow-up procedure, mainly regarding the UN Human Rights Committee' (2017) 37 *Human Rights Law Journal*, Principii (n 9).

21 Shikhelman (n 9)

UNTB	Entry into force of individual complaints mechanisms	Yearly average no. of communications registered (2018-2019)*	Yearly average no. of final decisions (2018-2019)*	Number of States' acceptance (2021)
CERD	1982	5	3	59
CAT	1987	60	57	70
CEDAW	2000	15	20	113
CRPD	2008	16	8	95
CED	2010	1	1	21
CESCR	2013	80	15	24
CRC	2014	35	15	46

* Data extracted from Report of the Secretary General, Status of the human rights treaty body system, A/74/643 Annexes, 10 January 2020 (available at www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx) and organised by Dr Aristi Volou.

Standard weaknesses of UN human rights enforcement mechanisms

As originally developed by Heyns and Viljoen, the output of the UN human rights treaties face two types of weaknesses.

The first type of weakness stems from the inefficiencies of the UN human rights treaty bodies themselves. These inefficiencies concern the slow operation of UN human rights treaty bodies, the lack of resources and the backlog problems they face alongside the vagueness of the outputs they produce and the weaknesses in their follow up mechanisms.[22] The literature on the weaknesses of UN human rights views also confirm these findings.[23] UN human rights treaty bodies

22 Heyns & Viljoen (n 2) 488.

23 MC 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?* (Intersentia 2011) Sandoval, Leach & Murray (n 9).

face a significant backlog to process individual complaints. Individual complaints that are processed are subjected to delayed publication. Their translation into all UN official languages takes considerable time and they are not translated to local languages by the United Nations country offices. Their dissemination via the United Nations takes place through the cumbersome United Nations websites. The views have also been criticised for their lack of detailed legal reasoning and the vagueness of their recommendations as to the necessary individual measures that need to be taken,[24] even though there is also evidence that the clarity of UN human rights committee views on what types of remedies are required to address violations has increased over time across a number of treaty bodies.[25] In addition, the UN has follow-up mechanisms to monitor the implementation of the views,[26] but these mechanisms are not adequately resourced.[27] The follow-up procedures established by the Committees to monitor the implementation of views primarily rely on responses by state parties and authors as opposed to other more resource-intensive mechanisms such as those found at the Inter-American Court of Human Rights, where compliance hearings take place[28] or at the Council of Europe by way of regular monitoring of compliance with direct written input from civil society organisations.[29]

Alongside these inefficiencies, the UN views also share with all UN human rights treaty outputs, the lack of express binding recognition.[30] This means that when a state authority declines to implement a view, they often argue that they are not 'breaking international law' per se. [31] There are, of course, counter-views on this, holding that views are legally binding because the treaty obligations to provide remedies is legally

24 Similar problems are also noted with respect to concluding observations, M Kanetake 'UN human rights treaty monitoring bodies before domestic courts' (2018) 67 *International and Comparative Law Quarterly* 201.

25 Çalı & Galand (n 16).

26 A von Staden 'Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies' (2018) 9 *Czech Yearbook of International Law* 329.

27 A Donald, D Long & AK Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 125.

28 Sandoval, Leach & Murray (n 9).

29 B Çalı &A Koch 'Foxes guarding the foxes? peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14(2) *Human Rights Law Review* 301-325. Also see, European Implementation Network, Domestic Advocacy for the Implementation of Judgments of the European Court of Human Rights: An EIN Guide (2020) https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5ec397941541404e7e1900c1/1589876642856/EIN+Toolkit+on+Domestic+Advocacy_FINAL.pdf (accessed 4 October 2021).

30 R Van Alebeek and A Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (CUP 2012), also see M Nowak *UN Covenant on Civil and Political Rights, CCPR commentary* (2005) and E Rieter *Preventing irreparable harm, provisional measures in international human rights adjudication* (2010).

31 Principi (n 8).

binding and Committees are the authoritative interpreters of these obligations.[32] The international law discussion on whether and on what basis UN views generate qualities of bindingness has knock on effects with regard to states' handling of the views. These range from refusals to implement and even contest views due to their lack of binding qualities, to making UN views binding as a matter of domestic law. In a recent case study of compliance with the CAT Committee's views by Canada, for example, Limon shows how the refusal to implement based on the non-legally binding status of UN views takes centre stage.[33] In *Masih Shakeel*, Limon shows that the Canadian government had expressly disagreed with the Committee's decision in its submission to the Human Rights Committee.[34] Following *Michael Lockrey v Australia* decision of the CRPD, Australian authorities contested that CRPD's interpretation that duty of reasonable accommodation required providing real-time steno-captioning in the courtroom and jury room.[35] However, as the views have become more prominent as a form of output of UN treaty bodies, there are now also counter-examples that treat views with binding or weighty persuasive authority. I will return to these in the following section.

The second type of standard weakness focusses on the lack of domestic will or capacity to implement UN views. This is also a standard weakness that UN views not only share with other outputs of UN treaty bodies such as concluding observations,[36] but also with the implementation of binding human rights judgments, emanated by regional human rights courts.[37] This means that whether states effectively

32 See, for example, M Scheinin 'International mechanisms and procedures for omplementation' in R Hanski & S Markku (eds) *An introduction to the international protection of human rights: a textbook* (Abo Akademi 1999), Nowak (n 30), Rieter (n 30).

33 P Limon 'Taking rights seriously: Canada's disappointing human rights implementation record' in *Implementing Human Rights Decisions: Reflections, Successes, and New Directions* (2021), available at http://www.bristol.ac.uk/law/hrlip/outputs/implementing-human-rights-decisions/ (accessed on 28 October 2021).

34 As above. Also see VA Schorm 'It takes a village to implement a judgment: creating a forum for multi-stakeholder involvement in the Czech Republic' (2020) 12 *Journal of Human Rights Practice* 193.

35 Response of Australia to the Views of the Committee on the Rights of Persons with Disabilities in Communications 11/2013 (*GB v Australia*) and 13/2013 (*ML v Australia*) https://remedy.org.au/reports/Aust_response_to_Lockrey&Beasley_FinalViews.PDF (accessed 28 October 2021).

36 C Creamer & B Simmons 'The proof is in the process: self-reporting under international human rights treaties' (2020) 114 *American Journal of International Law* 1.

37 D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts for Human Rights' (2010) 6 *Journal of International Law and International Relations* 35, C Hillebrecht 'Implementing international human rights law at home: domestic politics and the European Court of Human Rights' (2012) 13 *Human Rights Review* 279; A Von Staden *Strategies of compliance with the European Court of Human Rights: rational choice within normative constraints* (University of Pennsylvania 2018); Ø Stiansen 'Delayed but not derailed: legislative compliance

comply or do not comply with UN treaty body views largely depends on variations in domestic factors.[38] These factors range from political and judicial capacity and will to implement the views, how 'costly' the views are perceived as being by domestic authorities to implement,[39] whether views concern politically sensitive issues, and whether there is a robust climate of domestic compliance, which includes domestic advocacy by civil society organisations, national human rights institutions, the media and other salient domestic constituents. Von Staden, for example, argues that the rule of law or democracy rate of a state effects the capacity of states to implement not only legally binding court judgments, but also decisions of UNTBs.[40] Previous research has shown that where there are limited political and legal opportunity structures to mobilise for human rights implementation, the implementation of human rights treaties, recommendations, views, and also human rights judgments generally face important uphill struggles domestically. [41] In addition, some human rights judgments and views are more costly than others: in particular, when what is necessary to implement human rights judgments and views requires major systemic changes – especially when there is little appetite to engage in such far-reaching domestic reforms or when it requires significant resources. Conversely, decisions that are less resource intensive attract higher compliance rates.[42]

UN human rights views: Capacity to harness new domestic legal opportunity structures

Despite the fact that UN decisions in individual cases suffer from the standard weaknesses of UN human rights treaty body outputs as well as human rights judgments more generally, there is also evidence indicating that UN human rights views may be in a position to offer special opportunities for domestic impact compared to other forms of output. This is due to two unique features of UN human rights views in particular when compared to other types of UN treaty body outputs: the individualised and quasi-judicial nature of UN views.

with European Court of Human Rights judgments' (2019) 23 *International Journal of Human Rights* 1221.

38 R Murray & C De Vos 'Behind the state: domestic mechanisms and procedures for the implementation of human rights judgments and decisions' (2020) 12 *Journal of Human Rights Practice* 22.

39 B Çalı & A Koch 'Lessons learnt from the implementation of civil and political rights judgments' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 43. (2017) 47.

40 A Von Staden 'Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies' (2018) 9 *Czech Yearbook of International Law* 329

41 BA Simmons *Mobilising for human rights* (CUP 2009).

42 Principi (n 8).

First, UN views concern real individuals and the specific harms they suffer due to violations of UN human rights treaties. This connection to human stories opens up concrete domestic advocacy avenues for the authors of the applications and their legal representatives as well as for civil society, the media and legal academia. As such, views on individual cases offer concrete demonstrations for why a state falls short of its commitments to UN human rights treaties. Individual cases offer better opportunities for the media to advocate for human rights implementation, as they offer a human face to what a remote Geneva institution is able to offer to domestic and international audiences. For example, the case brought by Greta Thunberg and fifteen children before the UN Committee on the Rights of the Child[43] arguing that states' failure to adequately mitigate the climate crisis amounts to multiple violations of the Convention on the Rights of the Child has made international headlines,[44] bringing an unprecedented attention to the work of the Committee of the Rights of the Child that perhaps no public communications campaign by the UN could have achieved. Even though this case was ultimately declared inadmissible on non-exhaustion of domestic remedies grounds, its positive recognition of the climate crisis as a children's rights issue is expected to have ripple effects on how domestic and regional human rights courts will address climate related harms to children's rights.[45]

Second, UN views are quasi-judicial pronouncements. They make assessments as to whether states have violated the UN human rights treaties with respect to specific individuals, and in turn, they require states to remedy these violations, both with respect to the victims of human rights violations and guarantees of non-repetition of similar violations in the future. This unique feature makes the views easier to engage with from the perspective of domestic judicial and executive authorities as individuals who receive violation judgments from the UNTBs create feedback loops. Following a view finding violations of the UN human rights treaties, individuals turn back to domestic courts, executives and parliaments to seek domestic remedies and guarantees of non-repetition. An individual case, therefore, may become the basis

43 *Saachi et al v Argentina* et al, Communication 104/2019 (Argentina), Communication 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey)(8 October 2021), UN Doc CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019,CRC/C/88/D/107/2019, CRC/C/88/D/108/2019.

44 'Greata Thunberg and children's group hit back at attempt to throw out climate case' *Guardian*, 5 May 2020, https://www.theguardian.com/environment/2020/may/05/greta-thunberg-and-childrens-group-hit-back-at-attempt-to-throw-out-climate-case (accessed 28 October 2021).

45 A O'Nolan 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Saachi v Argentina*' *EJIL Talk!* https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/

for much broader systemic or institutional reform. These two aspects of UN views taken together show that views may be capable of mobilising a broad range of domestic compliance constituents for concrete domestic impact, especially when compared to other outputs of UN human rights treaty bodies.

Views as pathways to mobilise domestic judges, parliaments and executive organs

One important mechanism in this regard is domestic legal frameworks enabling domestic authorities to give domestic legal effect to UN human rights views. The existence of a robust domestic legal framework bypasses the problem of the non-binding nature of the views under international law by legalising the status and consequences of UN views in a state's domestic legal order. This in turn allows for domestic courts to be responsive to the individual and general remedies that are called for in the individual views, overcoming judicial rejectionism, as was manifested in the case of Canadian judges discussed above. There are examples of legal frameworks, which treat UNTBs similar to regional human rights courts and commissions as a matter of domestic law. One example is Colombia, where domestic law clearly instructs the domestic courts to provide compensation to individuals receiving decisions from 'international human rights bodies'.[46] In Sweden, the Swedish Aliens Act requires that a residence permit is given to any individual if an international complaints mechanism find that the deportation of that individual would violate Sweden's obligations under international law.[47] These examples, however, are not necessarily complete legal frameworks to give full effect to views, as the focus of the domestic law is on offering individualised remedies.

A second type of domestic mechanism is the legalisation of the status of the UN views domestically by way of the recognition of their binding effects by domestic courts. This has come about through the engagement of domestic judiciaries with UN views as a matter of international law, or domestic law or both. In Spain, the recognition of the binding nature of CEDAW views came at the apex of the judicial system, by the Supreme Cout of Spain..[48] In Switzerland, the judiciaries response was different. CAT views that found violations of

46 Concluding Observations on the 7th period Report of Colombia (17 November 2016) UN Doc CCPR/C/Col/Co/7 para 6. The HRC, however, also criticises that this legal framework only allows to give effect to compensation for victims, and not a general framework to implement all remedies flowing from a decision.

47 Swedish Aliens Act Section 5 para 4 cited in SS Ford, 'Nordic Migration Cases before the UN Treaty Bodies: Pathways of International Accountability' (2021) I *Courts Working paper Series* 267.

48 Judgment No. 1263/2018 of July 17, 2018, ROJ: STS 2747/2018, ECLI: ES:TS:2018:2747 (Tribunal Supremo [Sup. Ct.], Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber]) (Spain)

the non-refoulement obligations under the CAT have been treated as 'new evidence' by Swiss Administrative Courts, allowing for a review of cases following decisions by the CAT Committee.[49] There are now also emerging examples as to how the domestic judicial recognition of UN views in one country may have comparative law value in other contexts. This seems to be the case in Kyrgyzstan.[50] Lawyers advocating for the implementation of specific UN views in Kyrgyzstan, for example, submitted an *amici curiae* brief to domestic courts, offering reasons underpinning the obligation to implement the decisions of the UN HRC citing, among others, the Supreme Court of Spain's case law on the binding nature of a decision issued by the CEDAW Committee.[51] In addition, human rights lawyers in Kyrgyzstan were able to secure an amendment in the Kyrgyz Criminal Procedure Code, allowing a sentence or a judicial decision to be revoked in the light of a Human Rights Committee view.[52]

These examples show that the standard weakness of the 'non-binding objection' to the implementation of UN views can be overcome by directing the focus of advocacy to the creation of domestic legal frameworks and enabling domestic judicial attitudes. In countries, where a legal framework to implement UNTB decisions are lacking, compliance and impact risk being erratic and subject to whether the domestic authorities agree with the substance of the views themselves. Indeed, creation of enabling legal frameworks has also been the pathway for effective domestic implementation and impact, also in the case of internationally legally binding judgments of regional human rights courts. There is significant evidence that the internationally legally binding status of human rights judgments (as opposed to UN human rights views) has not by itself led to smooth domestic implementation.[53] Regional human rights courts have been keen to increase the buy-in

49 KF Princip 'Implementation of decisions under treaty body complaints procedures – do states comply? how do they do it?' (2017) https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf (accessed 28 October 2021).

50 M Lisitsyna & A Miller 'Litigating Torture in Central Asia: Lessons Learned from Kyrgyzstan and Kazakhstan' (2021) in 'Implementing Human Rights Decisions: Reflections, Successes, and New Directions', available at http://www.bristol.ac.uk/law/hrlip/outputs/implementing-human-rights-decisions/ (accessed 28 October 2021).

51 As above.

52 Concluding Observations on the 7th period Report of Colombia (n 44) 442. Art 4(3) of Kyrgyz Criminal Procedure Code states: 'a sentence or a judicial decision may be revoked and the procedure may be resumed in cases ordered by a recognized international body based on the international treaties to which the Kyrgyz Republic is a party.' Reported in Lisitsyna & Miller (n 49).

53 B Çalı 'How loud do the alarm bells toll? execution of the 'article 18' judgments of the European Court of Human Rights' (2021) 2 *European Convention on Human Rights Law Review* 1-29.

of domestic courts, parliaments and executives to ensure compliance with human rights judgments, either by way of doctrinal innovations, such as the 'conventionality control doctrine' in the case of the Inter-American Court of Human Rights[54] and the pilot judgment procedure of the European Court of Human Rights[55] or by way of extra-legal initiatives, such as the Superior Courts Network of the European Court of Human Rights or the Judicial Dialogue between the African Court on Human and Peoples' Rights and national supreme or constitutional courts.[56]

The recent successes of ensuring impact of UN views through domestic legalisation and the similarities in compliance challenges shared by human rights judgments and human rights views, opens up rethinking how to best boost domestic legal opportunity structures to ensure more routine forms of compliance with UN views domestically. In this regard, the non-legally binding status of UN views under international law does not present a significant weakness, if this is compensated by ensuring the legal effects of views under domestic law through advocacy for legislative frameworks or domestic judicial precedents. The judgment-like nature of the views offers them a better chance to have impact through domestic courts. That said, one of the standard weaknesses of the views, their quality in reasoning, becomes all the more important to enhance their chances of buy-in via domestic courts, so that they can be taken into account in similar cases.

Harnessing regional human rights courts and commissions for impact

The reasons as to why UN views are more amenable to domestic judicial impact – due to their quasi-judicial form – further applies to their uptake by regional human rights courts and commissions when it comes to influencing outcomes both in individual cases and as a matter of *erga omnes* impact, understood as application of UN treaty body case law as part of the international human rights corpus juris.[57] UN views

54 AE Dulitzky 'An Inter-American Constitutional Court? the invention of conventionality control by the Inter-American Court of Human Rights' (2015) 50 *Texas International Law Journal* 45–93.

55 L Glas 'The functioning of the pilot judgment procedure of the European Court of Human Rights in practice' (2016) 34 *NQHR* 41.

56 See, the Superior Rights Network Superior Courts Network launched by the European Court of Human Rights in 2015 to enrich dialogue and implementation of the Convention. https://www.echr.coe.int/Pages/home.aspx?p=court/dialogue courts/network&c= (accessed 28 October 2021) or the 5th session of the Judicial Dialogue between the African Court of Human and Peoples Rights and national supreme or constitutional courts in 2021. https://www.african-court.org/wpafc/fifth-african-judicial-dialogue-building-trust-in-african-judiciaries/

57 The impact of UN views extends beyond regional human rights courts to international courts and tribunals more generally. See, for example, ICTY, *Prosecutor v Hartmann* (Judgment) Appeals Chamber (2011) IT-02-54-R77.5-A, ICC, *Prosecutor v Bemba* (Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber

having an impact on the case law of the regional human rights courts and commissions, therefore, can be understood to be uniquely situated to generate both a form of direct impact, and also indirect impact on the ground for the lived experiences of individuals and communities, a central theme in Professor Heyns' scholarship.

Of the three regional systems, the design features of the African Court on Human and Peoples' Rights stands out as the most likely context for such indirect impact, as the Statute of the Court explicitly allows for the African Court on Human and Peoples' Rights to adjudicate cases brought by individuals under AU human rights treaties as well as under those UN human rights treaties which a state is party to.[58] The presence of a well-developed body of case law by the UN human rights treaties, therefore, has real potential for the African Court of Human and Peoples' Rights to take into account UN views in applications brought before it with a similar scope. This allows for the African Court of Human and Peoples' Rights to legalise the interpretive principles developed through UN views beyond merely treating them as persuasive authority.[59]

In the case of the Inter-American Court of Human Rights, rules and limitations regarding the interpretation of its provisions in Article 29 (restrictions regarding interpretation),[60] alongside the general openness of the Inter-American Court of Human Rights to treat its own treaty as an indispensable part of the broad international human rights corpus juris[61] further opens up the possibility that the UN views can be treated as relevant sources regarding the treatment of similar cases in the case law of this Court. The European Court of Human Rights, too, through the doctrine of 'global consensus' takes into account developments in international human rights law more broadly,[62] including through the development of UN views, is capable of directly engaging with UN views. This, for example, has been the case in its ground-breaking judgment

Ill's Decision on Disclosure) Pre-Trial Chamber III (2008) ICC-01/05-01/08-75.

58 Art 3(1) of Protocol on the Establishment of the African Court on Human and Peoples' Rights states
'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'.

59 See, *Zongo and Others v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 48 citing *Shirin Aumeeruddy and 19 other Mauritian Women v Mauritius* Communication No 035/1978 (9 April 1981) UN Doc CCPR/C/12/D/35/1978.

60 American Convention on Human Rights art 29.

61 IACtHR (Advisory Opinion) OC-1/82, 24 September 1982, "Other treaties" subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights. Also see, IACtHR, taking into account the case law of the UN Human Rights Committee on enforced disappearances in 'Street Children' (*Villagran-Morales et al v Guatemala*) (Merits) (1999) Series C No 63.

62 *Demir and Baykara v Turkey* (2008) 48 EHRR 54.

on domestic violence in the case of *Opuz v Turkey*.[63] The Court, in this case, directly cited two CEDAW decisions on domestic violence.[64]

Even if it may be held that taking cases before regional human rights courts is likely to be more impactful than UN treaty body views, the UN treaty bodies have also turned this assumption around by focussing on the shortcomings of the practices of the regional human rights courts in their approach to admissibility of cases that have been already examined by human rights courts. Specifically, and perhaps in an unexpected way, this has been the case with the UN Human Rights Committee's approach to handling individual complaints that have received a decision of inadmissibility from the European Court of Human Rights.[65] The UN Human Rights Committee in the case of *Achabal Puertas v Spain* in 2010, for example, clearly held that the 'limited reasoning contained in the succinct terms of the Court's letter does not allow the Committee to assume that the examination included sufficient consideration of the merits', and declared the communication admissible.[66] This has allowed individuals whose cases were summarily dismissed by the European Court of Human Rights to have a second chance of international review at the UN Human Rights Committee.[67] This approach has also been followed by the Committee against Torture.[68] The handling of the summary reviews of human rights cases by the European Court of Human Rights by UN Human Rights Treaty bodies show that the pathways of impact of UN treaty body views can also come about by the UN treaty bodies acting as correctives to the practices of regional human rights courts and commissions as a matter of practice.

63 *Opuz v Turkey* (2010) 50 EHRR 28. Also see the engagement with the UN Human Rights Committee case law on conscientious objection in the case of *Bayatyan v Armenia* (2012) 54 EHRR 15.

64 (n 56) paras 76 and 77 citing *AT v Hungary* Communication 2/2003 (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 and *Fatma Yıldırım v Austria* Communication No 6. 2005 (1 October 2007) CEDAW/C/39/D/6/2005.

65 C Deprez 'The admissibility of multiple human rights complaints: Strasbourg and Geneva compared' (2019) 19 *Human Rights Law Review* 517.

66 *Achabal Puertas v Spain* Communication 1945/2010 (27 March 2013), UN Doc CCPR/C/107/D/1945/2010, para 7.2.

67 Also see *X v Norway* Communication 2474/2014 (5 November 2015) UN Doc CCPR/C/115/D/2474/2014, para 6.2; *AGS v Spain* Communication 2626/2015, (2 November 2015) UN Doc CCPR/C/115/D/2626/2015, para 4.2.

68 *JM v The Netherlands*, Communication 768/2016, UNCAT Committee (12 June 2019) UN Doc CAT/C/66/D/768/2016, *JI v The Netherlands*, Communication 771/2016 (11 June 2019) CAT/C/66/D/771/2016.

Conclusion

This chapter has showed that the domestic impact of UN views continues to suffer from the standard weaknesses seminally identified by Heyns and Viljoen. The judgment-like, or quasi-judicial nature of views, however, also offer distinct opportunities for impact, understood both as direct and indirect impact. Specifically, the views of UN treaty bodies are capable of generating distinct opportunities for impact. Views connect the remote structures of Geneva to the victims of human rights violations. They in turn are capable of receiving more attention in domestic contexts due to their ability to put a human face to UN human rights law and violations. In addition, UN views more easily garner the attention of domestic judiciaries, precisely because of the ways in which they are capable of creating specific feedback loops for impact. Individuals return to domestic courts to obtain remedies and require them to directly engage with such views and their consequences. While domestic courts in different countries continue to resist the implementation of UN views based on their non-binding legal status, there is now evidence showing that domestic courts around the world are also capable of clarifying the domestic legal status of UN views, drawing on resources from constitutional and public law interpretation. In this respect, the proliferation of UN views from nearly all of the UN human rights treaty bodies addressing a truly global audience is in the process of generating a new field of comparative constitutional and public law. The precedents created by the treatment of UN views by domestic courts across the world offers opportunities for comparative judicial dialogues amongst courts, making it more costly to ignore such views.

All of this is not to say that the original findings of Heyns and Viljoen in 2001, and subsequently others, that there is no significant and routine impact when seen from a global perspective, is fundamentally altered. However, it should be emphasised that the UN views and the specific interfaces they have created with domestic and international compliance audiences have become more dominant features of the UN human rights law architecture in particular in the last two decades. The significant trend of states opting into UN individual complaints mechanisms, and in turn the volume of UN views holding states accountable across the globe, both with respect to states that are parties to regional human rights courts and those that are not, have given a new impetus to the efforts towards the positive impact of UN human rights treaties on the lives of individuals.

What is clearly needed to further enhance the impact of UN views is creating more awareness and knowledge about them, not only

with respect to the procedural and substantive aspects of how these views contribute to the interpretation of UN human rights law, but also concerning the domestic pathways through which they become impactful. The latter, in turn, requires scholars of UN human rights law to focus further attention to the comparative reception of UN views in domestic legal contexts with a view to amplifying best practices and enhancing their ability to harness impact by way of comparative learning.

36

Socio-economic rights in South Africa: the 'Christof Heyns clause'

*Danie Brand**

Introduction

Christof Heyns was not a scholar of socio-economic rights. In the heady period before and directly after the drafting and adoption of South Africa's 1996 Constitution,[1] he authored and co-authored a number of exploratory articles and chapters on socio-economic rights;[2] and edited a book with me on the topic.[3] After that, as far as I can tell, he never wrote on socio-economic rights again. But it is testament to the depth and scope of Christof's influence – and typical of the man – that he nonetheless had an important and lasting impact on the law and life of socio-economic rights in South Africa in another way than through developing a body of scholarship on the topic.

During the process of drafting South Africa's 1996 Constitution, when the focus of everyone else was on the 'justiciability' of these rights, Christof conceived the idea that to ensure an adequate constitutional framework for the realisation of socio-economic rights it was, although desirable, insufficient to render these rights justiciable. Instead, so he argued, the Constitution should in addition to justiciability, mandate more programmatic means for the realisation of socio-economic rights; mechanisms through which the state could be held to account in a systemic and lasting, and less adversarial manner concerning socio-economic rights. He proposed that what he called a 'domestic reporting system', akin to the reporting systems of international treaty monitoring bodies, be included in the Constitution for socio-economic rights.

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1 Constitution of the Republic of South Africa, 1996 (Constitution).

2 See eg CH Heyns 'Extended medical training and the Constitution: balancing civil and political rights and socio-economic rights' (1997) *De Jure* 1; CH Heyns & D Brand 'Introduction to socio-economic rights in the South African constitution' (1998) 2 *Law, Democracy and Development* 153-165; CH Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' in G Bekker (ed) *A compilation of essential documents on economic, social and cultural rights* (PULP 1999) 1-12; CH Heyns & D Brand 'Socio-economic rights during the transition' in NC Manganyi (ed) *On becoming a democracy: transition and the transformation of South African society* (UNISA Press 2004) 25-39.

3 D Brand & CH Heyns (eds) *Socio-economic rights in South Africa* (PULP 2005).

Ever practical and strategic, he ensured that this idea was placed before the drafters in the form of a formal proposal, was presented during public hearings in the drafting process and so made its way into the Constitution. The end result was section 184(3) of the Constitution, which states the following:

> Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

In this chapter I focus on this section – let us call it the 'Christof Heyns clause'[4] - as an important aspect of Christof's professional and scholarly legacy. I describe Christof's idea and vision for 'his' 'domestic reporting system' and then trace what has happened to it since it started to operate. I close with something of a call to action to revive Christof's grand idea.

The idea: a 'domestic reporting system'

I could find nothing on paper on Christof's idea for a domestic socio-economic reporting system from before it was enacted into the Constitution. Fortunately, once section 184(3) was enacted, the Centre for Human Rights, through Christof, Frans Viljoen and I; and the Socio-Economic Rights Project at the Community Law Centre at the University of the Western Cape, through Sandra Liebenberg, started a project that ran for about five years to advise the Human Rights Commission on the implementation of section 184(3). In the course of this project Christof recorded his idea and vision for section 184(3) a number of times.[5]

The point of departure for Christof that emerges from this record of his ideas is that section 184(3) indeed creates a 'domestic reporting procedure' – that is, a domestic version of the reporting systems employed by a range of treaty monitoring bodies through which to monitor compliance with the treaties they are responsible for. This is important, because it means that for Christof, from the outset, the purpose of the section 184(3) procedure is to require the SAHRC to *monitor* the implementation of socio-economic rights. In other words,

4 It is not often that someone can be directly credited with scripting something into a constitution, but in this case we can. Although others were also closely involved (Frans Viljoen, Sandra Liebenberg, me) section 184(3) was Christof's idea and he was the driving force behind it being included in the Constitution.

5 CH Heyns 'Taking socio-economic rights seriously: the "domestic reporting procedure" and the role of the South African Human Rights Commission in terms of the new Constitution' (1999) *De Jure* 195; 'From the margins to the mainstream' (1998) 1(1) *ESR Review* 1 (Heyns 1998a); 'Update on the SA Human Rights Commission. Switching on the monitoring screens' (1998) 1(2) *ESR Review* 19 (Heyns 1998b).

rather than simply creating a system for the gathering and presentation of information about the state of implementation of socio-economic rights in South Africa, it requires 'a systematic gathering of information with the view to evaluating compliance with human rights commitments'.[6] In Christof's own words:

> At the heart of reporting as an enforcement mechanism lies the fact that it creates a duty of justification on the one side and a system of monitoring on the other; a system of introspection and inspection.[7]

Christof then proceeds to list a number of advantages that a domestic reporting procedures holds, as against reporting systems at international level and as against the courts.

Compared to international reporting systems, the domestic system holds the virtue, quite obviously, of being local: those who impart information to the system 'add the perspective of those who live with th[e] reality daily' and those who receive, process and evaluate that information bear 'intimate knowledge of the resources available to the state in question, and the challenges faced by the state'.[8] In addition, the domestic reporting system 'repatriates' monitoring. Instead of to some remote treaty monitoring body in far-away Geneva, domestic reporting is done to 'an institution which represents the interests of the people of the country itself, to whom the state owes its first duty'.[9] Finally, because it occurs more regularly and on a more ongoing basis than international reporting, the domestic reporting system better lends itself to the kind of 'constructive dialogue' between the monitoring institution (the SAHRC) and those that report to it, that the system is designed for.[10]

As against courts, the reporting system eschews the reactive, specific complaints based and problem solving nature of judicial work in favour of a more 'systematic and comprehensive approach', arguably better suited to socio-economic rights.[11]

In addition, the domestic reporting system potentially provides a contextualised and embedded accountability mechanism, enabling the people to hold the state to account for its socio-economic rights record on an ongoing, pro-active basis. In this way socio-economic rights are kept on the national agenda through a process that allows broad and

6 L Chenwi 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' Research paper, Studies in Poverty and Inequality Institute (2010) 38.

7 Heyns (1999) (n 5) 207. See also Heyns (1998a) (n 5) 2; Heyns (1998b) (n 5) 19-20.

8 Heyns (1999) (n 5) 208.

9 As above.

10 As above.

11 As above.

diverse participation in both the interpretation of the rights and the assessment of policies and programmes. This enhances democracy and a culture of justification instead of command.[12]

For the domestic reporting system to operate optimally and to achieve the intended aims, so Christof continues, the following practical 'points of departure' must be accepted:

- The process must be managed in such a way as to avoid an adversarial relationship between the Commission and organs of state. Instead, it should be focussed on 'constructive dialogue'. [13]
- Ways should be found in which to limit the burden that the reporting system places both on those who must report and the Commission that receives and must make sense of the reports.[14]
- Linked to the above, reporting should be approached 'holistically', situated within the context of broader international reporting obligations and systems – reporting between these different systems should be coordinated, avoid overlap and feed from one another.[15]
- The system should work in close cooperation with civil society and in particular NGO's, whether through a system of 'shadow reporting' or through NGO's working with or for the Commission or simply through the reports submitted by organs of state from the outset being made available to NGO's for them to consider and evaluate.[16]

As an aside, before I turn to a description of the manner in which the domestic reporting system was implemented by the Commission: against this background it should be clear that the domestic reporting system was a quintessentially 'Christof' idea. The insistence on a holistic approach, in which the domestic reporting system is firmly entrenched as a smaller part of a bigger scheme, reminds of his fondness for and lifelong fascination with ambiguous South African statesman Jan Smuts, and his philosophy of 'holism'.[17] The emphasis on civil society participation and broad, diverse participation in both the interpretative and policy/programme evaluation role of the Commission recalls his notion that human rights do not exist in the abstract, but are made and remade through human endeavour, through struggle.[18] The almost immediate turn from the conceptual to the practical, a to-do list, reflects Christof's penchant and talent for making ideas work and his distaste for abstract theorising absent concrete plans.

12 Heyns (1999) (n 5) 209.
13 Heyns (1999) (n 5) 210.
14 As above.
15 Heyns (1999) (n 5) 211.
16 Heyns (1999) (n 5) 222.
17 See eg CH Heyns & W Gravett '"To save succeeding generations from the scourge of war": Jan Smuts and the ideological foundations of the United Nations' (2017) 39 *Human Rights Quarterly* 574.
18 See eg CH Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (Kluver Academic 2001) 171.

The practice: the South African Human Rights Commission and what happened

As already noted above, once the section 184(3) process was included in the Constitution and the Commission turned to its implementation, the Centre for Human Rights at the University of Pretoria (primarily Christof and I) and the Socio-economic Rights Project at the Community Law Centre at UWC (Sandra Liebenberg) collaborated closely with the Commission in an advisory and assistive capacity to get the process up and running.

The collaboration lasted for more or less five years, but almost from the get-go the Commission was at odds with its NGO partners. This centred mostly around four related issues.

First, while the advice from the CHR and the CLC (echoing Christof's practical pointers related above) was that the reporting system at the very least should be implemented in a staged fashion and not all at once, but probably should always be dispersed in some way to lessen the burden on reporters and the Commission and make the process practically feasible, the Commission insisted on not only requesting reports from all relevant organs of state every year on all the listed socio-economic rights, but also preparing a report annually on everything that was reported to it. Its rationale was that section 184(3), in explicitly requiring it each year to request reports from relevant organs of state about the relevant rights, left it no space to decide, for example to focus on one or two rights only in a given year; or working only with a small group of 'relevant' organs of state from year to year.[19]

Second, from the outset the Commission never seemed sure whether it was indeed performing a monitoring function, as Christof envisioned (introspection combined with inspection), or simply gathering, collating and presenting information on the state of socio-economic rights implementation in South Africa. While at times the Commission was explicit that its role indeed was to monitor,[20] it also often declared itself opposed to monitoring in the evaluative sense that Christof had in mind.[21] Indeed, at the end of the five year period of collaboration with its two NGO partners, the Commission formally decided to move more toward the information gathering rather than monitoring role.[22]

19 See D Brand & S Liebenberg 'The South African Human Rights Commission. The second Economic and Social Rights Report' (2000) 2(3) *ESR Review* 21 24-25.

20 J Kollapen 'Monitoring socio-economic rights. What has the South African Human Rights Commission done?' (1999) 1(4) *ESR Review* 30 31.

21 See eg T Thipanyane 'The Human Rights Commission' (1998) 1(3) *ESR Review* 16 17; D Brand 'The South African Human Rights Commission. The first Economic and Social Rights Report' (1999) 2(1) *ESR Review* 34 35-36.

22 J Klaaren 'A second look at the South African Human Rights Commission, access to

Third, when almost from the outset the Commission experienced if not resistance then at least debilitating tardiness from organs of state in submitting their required reports, it elected to issue subpoenas to the relevant officials to appear before it to explain the failure to report. At an early stage already this raised the risk of the Commission jeopardising its relationship with relevant organs of state and putting at risk the constructive engagement with organs of state that the reporting process lends itself to.[23]

Fourth and finally, from the start the Commission adopted the position that, although it appreciates and encourages NGO and broader civil society participation in the section 184(3) reporting process, it would not make public and accessible the reports that organs of state provided to it in their 'raw' form. Instead, civil society would only be allowed entry into the process once the Commission had prepared its own report in draft form, to comment on the draft. The explanation for this position was throughout that the organs of state provided their reports to the Commission in good faith and to make that information public would breach that trust and bedevil the relationship.

In various forms and to various degrees, these four problems in the Commission's implementation of its section 184(3) mandate have persisted. It must be said that the process has progressively weakened, to the extent that it has now more or less ground to a halt.

The Commission produced reports in terms of section 184(3) from 1997/98 to 2012/13 – a total of nine Economic and Social Rights Reports. From 2013 onwards it has not produced another overarching report. Its approach since then has been to continue to request and receive from relevant organs of state reports on the steps they have taken to realise socio-economic rights, but to refrain from preparing its own report to Parliament or for the public. Instead, it has intermittently prepared focussed, much shorter 'policy briefs' on specific aspects of specific rights – such as on a Basic Income Grant as an aspect of the right to social assistance; or on the education of children with special needs. It does seem as though the core of Christof's idea – that the process would be one of real monitoring, involving the receipt, analysis and then critique of information, with conclusions about responsibility for failures or violations – has been jettisoned by the Commission. It seems that efforts are ongoing at least to make the received reports available to the public on an accessible platform, but so far this has come to naught.

From the outside, there appears to be a partial collapse of the Commission's execution of its section 184(3) mandate which was

information and the promotion of socio-economic rights' (2005) 27 *Human Rights Quarterly* 539.

23 Brand & Liebenberg (n 19) 23.

brought about by the problems related above. With the scope and depth at which it sought to report combined with its unwillingness to accept NGO assistance at an early stage of the process it seems that the Commission has increasingly lacked capacity to complete the reports at any level of usefulness and eventually simply could not continue to do so. In addition, the Commission experienced increasing and persistent inability or unwillingness on the side of organs of state to participate.

In short, Christof's idea has petered out, because Christof's initial advice was not followed.

What now?

It seems the height of (tragic) irony that the slow collapse of the Commission's section 184(3) socio-economic rights monitoring function occurred in particular over the last decade or so. During this time South Africa has experienced and is still experiencing a crisis of government. Due to a combination of incapacity, ineptitude and corruption, in particular local and to some extent provincial (and even in some instances – water comes to mind – national) government has failed and in many instances collapsed completely. The impact of this failure or collapse is most evident precisely concerning socio-economic rights. When a municipality disappears, the effect is that its residents do not have water or electricity or access to housing.[24]

Although the root causes of this collapse of what euphemistically is called 'service delivery' are the incapacity, ineptitude, lack of political will and corruption referred to above, the proximate cause is the lack of capacity of the citizenry to hold the government that touches their lives to account. In a province such as my own, the Free State, it is not so much that accountability has failed, as it is that the very notion of accountability – the idea that government can and should be held to account – has simply disappeared.[25]

How different might things have been had the Human Rights Commission from the outset approached the potentially powerful accountability mechanism with which it is mandated in terms of section 184(3) in an effective, collaborative, realistic manner? If it had, for example, for a given year focussed in its monitoring on one sphere of government only (let's say local government), in one province only,

24 See eg E Ellis 'Municipal government crisis: the solution lies far beyond November polls' *Daily Maverick*, 28 September 2021 https://www.dailymaverick.co.za/article/2021-09-28-municipal-government-crisis-the-solution-lies-far-beyond-november-polls/ (accessed 26 November 2021).

25 M Williams 'Accountability is a myth in South Africa. The system is not designed to be responsive to voters' *The Citizen*, 10 November 2021 https://www.citizen.co.za/news/opinion/opinion-columns/2906458/accountability-is-a-myth-in-sa/ (accessed 26 November 2021).

requesting information on one right only (water?). If it had built over time lasting and effective relationships with NGO's and broader civil society and been willing to harness the expertise and resources that are available from that sector to analyse and process the more manageable amounts of information it would then have received? If its focus had consistently been to monitor, to evaluate in a constructive and assistive manner?

Perhaps the time has come to take a look again at the section 184(3) reporting procedure that Christof conceived and created now more than 25 years ago. And this time, to try to do what Christof was so good at: to make things work.

37

The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin

*Trésor Muhindo Makunya**

Introduction

The central question addressed by this contribution is whether the manner in which the African Charter on Human and Peoples' Rights (African Charter) is invoked and applied by the Benin Constitutional Court provides good prospects for improving the quality of the judicial protection of human rights. Has the Benin Constitutional Court relied on the case-law and soft-law instruments developed by the African Commission on Human and Peoples' Rights (African Commission) and on the jurisprudence of the African Court on Human and Peoples' Rights (African Court)? If not, does this affect the ability of the African Charter to improve the lived realities of litigants who bring cases before the Benin Constitutional Court? These questions are central to the relationship and complementarity between the domestic and regional protection of human rights in Africa, a subject that was dear to the heart of the late Professor Christof Heyns to whom this contribution pays tribute. Christof Heyns believed that the 'ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people'.[1] For him, human rights research is a way of exposing the hypocrisy of rulers who undertake to protect human rights yet make little effort to 'translate these sentiments into practice'.[2]

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1 C Heyns 'African regional human rights system: in need of reform?' (2001) 1 *African Human Rights Law Journal* 155 at 156. See also C Heyns & F Viljoen *The impact of the United Nations human rights treaties at the domestic level* (Kluwer Law 2002) 1; C Heyns & others 'The right to political participation in sub-Saharan Africa' (2019) 8 *Global Journal of Comparative Law* 129-130.

2 C Heyns (ed) *Human rights law in Africa* (Kluwer Law 1996) viii; C Heyns (ed) *Human rights law in Africa* (Kluwer Law 1998) vii-viii. Other compilations of legal texts include C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (PULP 2016). This widely used compendium has been re-edited several times and translated into other African Union languages, see C Heyns & M Killander (eds) *Recueil des documents clés de l'Union africaine relatifs aux droits de l'homme* (PULP 2018); C Heyns & M Killander (eds) *Compêndio de documentos-chave dos direitos humanos da Uniâo Africana* (PULP 2008).

On a continent where pre-1990 authoritarian rule resulted in complete disregard of basic individual rights and freedoms, starting from Heyns' home-country, it is easy to understand why he laid so much emphasis on the impact of international and regional norms at the domestic level.[3]

This ambition was not wishful thinking on his part. In fact, the wave of post-1990 constitutional reforms in Africa provided drafters of African constitutions with an opportunity to prevent the resurgence of authoritarian practices by entrenching basic features of constitutionalism, among which the recognition and protection of human rights featured prominently.[4] Several constitutions granted special status to international human rights treaties ratified by the state, among which is the African Charter. Christof Heyns and Waruguru Kaguongo were emphatic that, 'by including certain norms in its constitution, a state notifies its population and the world at large that it is willing to be judged according to those norms'[5] and that this provides 'a useful starting point for them being held responsible to achieve these ideals, provided that the gap between promise and practice does not become too wide'.[6]

Benin provides a better example than most African countries to assess how one specific and African international human rights treaty – the African Charter – contributes to improving the lived realities of litigants owing to the special constitutional status conferred on the African Charter.[7] The drafters of the 1990 Benin Constitution (Constitution) incorporated a Bill of Rights and established a Constitutional Court as an attempt to prevent the resurgence of political and constitutional instability that was commonplace in the country for over 18 years.[8] Facilitated by liberal constitutional provisions on standing before the Constitutional Court and its broader jurisdiction,[9] individuals have approached the Constitutional Court invoking provisions in the Bills of Rights and articles in the African Charter to protect their rights and the constitutional order.

3 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23(3) *Human Rights Quarterly* 483-535; C Heyns & F Viljoen 'The impact of six major UN human rights treaties in South Africa' (2001) 16 *South African Public Law* 28-67.

4 CM Fombad 'Constitutional reforms and constitutionalism in Africa: reflections on some current challenges and future prospects' (2011) 59(4) *Buffalo Law Review* 1010; JM Mbaku 'Constitutionalism and Africa's Agenda 2063: how to build "The Africa We Want"' (2020) 45(2) *Brooklyn Journal of International Law* 581-582.

5 C Heyns & W Kaguongo 'Constitutional human rights law in Africa: current developments' (2006) 22 *South African Journal on Human Rights* 674.

6 Heyns & Kaguongo (n 5) 713.

7 Discussed further in section 2 below.

8 T Holo 'Préface' G Badet *Les attributions originales de la Cour constitutionnelle du Bénin* (2013) 9.

9 Arts 3, 117 and 122 of the Constitution.

The judicial application of any international human rights treaty, including the African Charter, is especially necessary when constitutionalism in a particular country is eroded, and the judiciary is called upon to arrest a 'descent towards symbolic constitutionalism'[10] such as that which has resurfaced in Benin over the past four years or so. The Freedom in the World indicator moved Benin from 'Free' in 2018 to 'Not Free' in 2020 as a result of several legal reforms that curtailed the ability of several political parties to participate in the 2019 legislative elections and stifled electoral competition.[11] The Benin Constitutional Court has been partly blamed for not preventing these regressive laws by using the Constitution and the African Charter to promote an inclusive electoral process.[12] Blaming the Court must be understood within the context of powers conferred on it. In fact, the possibility for the Court to review the constitutionality of legislation before its promulgation and to adjudicate any human rights-related petitions, irrespective of who the alleged perpetrators could be, implies that it must strictly scrutinise any legislation, behaviour and conduct that overtly and covertly undermine the fundamental ideals of the Constitution and the African Charter.[13] The existence of human rights unfriendly legislation in spite of the centrality of the African Charter within the Benin legal system prompts the question to what extent the Charter has been invoked in the Court's jurisprudence and whether stronger reliance on the Charter could have prevented the adoption of some of these laws. The next section reviews the legal status of the African Charter in the Benin legal system in order to highlight how it can be used to protect human rights more effectively.

10 CM Fombad 'Strengthening constitutional order and upholding the rule of law in Central Africa: reversing the descent towards symbolic constitutionalism' (2014) 14 *African Human Rights Law Journal* 412-448.

11 Freedom House 'Freedom in the world 2021: Benin' https://freedomhouse.org/country/benin/freedom-world/2021 (accessed 16 November 2021).

12 'Bénin: Indignation des requérants après la décision de la Cour constitutionnelle' 19 February 2021 in *RFI* https://www.rfi.fr/fr/afrique/20210219-bénin-indignation-des-requérants-après-la-décision-de-la-cour-constitutionnelle (accessed 16 November 2021). See generally, West Africa Early Warning and Early Response Network 'Le Bénin risque gros à perdre son juge constitutionnel' (September 2018) https://wanep.org/wanep/files/2018/Oct/BENIN_POLICY_BRIEF_2018.pdf (accessed 16 November 2021).

13 Art 117 of the 1990 Constitution of Benin.

The legal status of the African Charter under the Benin Constitution

Article 7 of the Benin Constitution bestows on the African Charter unparalleled constitutional status in the field of African constitutionalism.[14] It reads:[15]

> The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on 20 January 1986 *shall be an integral part of the present Constitution and of Beninese law*.

Something is said to be 'an integral part' of another when it is important or necessary and that the other part cannot function without it. In other words, the Benin Bill of Rights[16] and the Constitution cannot be separated from the African Charter. The Charter and other constitutional provisions form part of a system of equal constitutional norms that complement and strengthen one another and must be approached as a whole to provide solutions to constitutional and human rights petitions submitted to the Court.[17]

Given that the provisions of the African Charter are placed at the top of the hierarchy of norms in the Benin legal system, inferior legal norms – whether these are parliamentary acts, regulations and other administrative acts – must conform to the Constitution and the African Charter.[18] This requirement grants the Constitutional Court the competence of annulling inferior norms when they are inconsistent with the Constitution or the African Charter at the behest of any persons seeking to review their constitutional validity. The importance of the African Charter has been reiterated by the Constitutional Court, mainly

14 BG Gbago *Le Bénin et les droits de l'homme* (2001) 51. See also I Fall 'Témoignage d'un compagnon d'aventure' in FJ Aïvo (ed) *La Constitution béninoise du 11 décembre 1990: un modèle pour l'Afrique? Mélanges en l'honneur de Maurice Ahanhanzo-Glélé* (2014) 53.

15 Emphasis added. It is said that this provision is a mark of the faith of drafters of Benin Constitution in the African human rights system. See FJ Aïvo *Le juge constitutionnel et l'Etat de droit en Afrique: l'exemple du modèle béninois* (2006) 80. The President of the Constitutional Commission, Professor Maurice Ahanhanzo-Glélé indeed worked alongside Keba M'Baye during the drafting of the African Charter on Human and Peoples' Rights. Other scholars believe that article 7 is the logical consequence of article 1 of the African Charter. See H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011) 95.

16 From art 7 to art 40 of the 1990 Benin Constitution.

17 *Decision DCC 18-200* of 11 October 2018 at 4. See G Aïvo 'Les recours individuels devant le juge constitutionnel béninois' in FJ Aïvo (ed) *La Constitution béninoise du 11 décembre 1990: un modèle pour l'Afrique? Mélanges en l'honneur de Maurice Ahanhanzo-Glélé* (2014) 547.

18 OD Gnamou 'Juridictions constitutionnelles et norme de référence' (2019) 1 *Revue Constitution et Consolidation de l'Etat de Droit, de la Démocratie et des Libertés Fondamentales en Afrique* 87.

by reaffirming that the African Charter is part of the constitutional *corpus* (*bloc de constitutionnalité*).[19] The constitutional *corpus* is a set of rules, principles and values contained in legal instruments that are not formally constitutional. These instruments may include organic laws and international human rights treaties. They acquire constitutional status and become constitutionally binding on everyone. Constitutional jurisdictions can rely on them to assess the constitutional validity of inferior norms.[20] As an instrument of reference, the Constitutional Court relies on the African Charter directly or in conjunction with other constitutional provisions.[21] Similarly, litigants have the option to invoke the Charter alone or together with other constitutional provisions to achieve more effective protection for their rights.

Article 7 of the Benin Constitution must be read in conjunction with both the Preamble to the Constitution and article 147 to appreciate the significance of the African Charter in Benin positive law. Under the Preamble, 'the Beninese people'

> reaffirm attachment to the principles of democracy and human rights as they have been defined (…) by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on 20 January 1986 and whose provisions make up an integral part of this present Constitution and of Beninese law and *have a value superior to the internal law*.[22]

The Preamble reiterates the constitutional status of the rights guaranteed by the African Charter and their nature as rights provided under an international treaty ratified by Benin which, based on article 147 of the Constitution, take precedence over domestic legislation.

The African Charter is further 'annexed' to the Benin Constitution. This can readily be seen as a firm commitment of ensuring that the Charter is read alongside the Constitution and equally respected by everyone, including judges, state officials and ordinary citizens.[23]

19 See *Decision DCC 18-160* of 31 July 2018 at 3.

20 P Avril & J Gicquel *Lexique de droit constitutionnel* 16; D Baranger 'Comprendre le « bloc de constitutionnalité »'(2018) 20-21 *Jus Politicum – Revue de droit politique* 104-105. H Akerekoro 'La Cour constitutionnelle et le bloc de constitutionnalité au Bénin' (2016) *Revue d'étude et de recherche sur le droit et l'administration dans les pays d'Afrique* 5 http://afrilex.u-bordeaux.fr/wp-content/uploads/2021/03/Le_bloc_de_constitutionnalite.pdf (accessed 16 November 2021); D Rousseau *Droit du contentieux constitutionnel* (2016) 231.

21 A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International law and domestic human rights litigation in Africa* (PULP 2010) 118; EN Youmbi *La justice constitutionnelle au Bénin: logique politique et sociale* (2016) 414; A Essono-Ovono *'Decision DCC 98-043* du 14 mai 1998' (2013) 1 *Annuaire béninois de justice constitutionnelle* 568; H Akerekoro 'Le procès constitutionnel au Bénin' (2013) 1 *Annuaire béninois de justice constitutionnelle* 68.

22 Emphasis added.

23 OOM Laleye *La Cour constitutionnelle et le peuple au Bénin: d'un juge constitutionnel institué à un procureur suzerain* (2018) 262; Fondation Konrad Adenauer

Expressed differently, annexing the African Charter to the Constitution serves to raise awareness around the Charter, which, in turn, can increase the likelihood of its being relied upon by litigants. Related to this, article 40 enjoins the state to raise awareness and conduct teachings relative to the African Charter.[24] Although the Constitutional Court has repeatedly held this provision to be 'programmatic' in nature,[25] it can serve to highlight the intention of drafters of the Constitution to move from an abstract recognition of human rights norms to their concretisation, starting with the infusion of the Charter's ideals into the hearts and minds of citizens.[26]

Broadly speaking, the importance of the African Charter in Benin is enhanced in four ways. It is an instrument whose normative provisions are incorporated in the Constitution through article 7. The Preamble to the Constitution further clarifies its normative status. The African Charter is subsequently annexed to the Constitution, and the Constitution imposes an obligation to raise awareness about international human rights instruments including the African Charter.[27] Pursuant to article 1 of the African Charter, Benin courts and tribunals and the Constitutional Court,[28] as state organs, are integral parts of the enforcement mechanism of the Charter at the domestic level.[29] They must contribute to ensuring that ideals and values embodied in the Charter are utilised in the improvement of human rights protection in Benin so that the evils of authoritarianism and constitutional instability do not find their way into how parliament, the executive and the judiciary manage public affairs.

There are at least two implications of the legal status of the African Charter insofar as its application in constitutional rights litigation is concerned. First, since some rights in the Benin Constitution are formalistic in their formulation and their normative content is unclear[30] and certain aspects of other rights are not explicitly mentioned in the Constitution,[31] the application of the African Charter can assist in filling these gaps and clarifying the normative content of these rights. A more

Commentaire de la Constitution béninoise du 11 décembre 1990 (2009) 27.

24 It reads, 'The State has the duty to assure the diffusion and the teaching of the Constitution, of the Universal Declaration of Human Rights of 1948, of the African Charter on Human and Peoples' Rights of 1981 as well as all of the international instruments duly ratified and relative to human rights'.

25 See *Decision 19-322* of 5 September 2019 at 2; *Decision DCC 19-323* of 5 September 2019 at 2; *Decision DCC 19-324* of 5 September 2019 at 2; *Decision DCC 19-325* of 5 September 2019 at 2; *Decision DCC 19-329* of 5 September 2019 at 2.

26 See the claim in *Decision DCC Decision 19-322* of 5 September 2019 at 2.

27 Adjolohoun (n 15) 96-97.

28 The Constitutional Court does not form part of the judiciary.

29 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (OUP 2019) 17.

30 For example, arts 12, 15 and 21 of the 1990 Benin Constitution.

31 Compare art 17 of the Constitution and 7 of the African Charter.

significant example of such a role played by the African Charter is the active protection of the right to be tried within reasonable time, the right to be heard by a competent tribunal and the right to family, which are not mentioned in the Bill of Rights.[32] Second, it will probably not make much sense if the Benin Constitutional Court fails to draw inspiration, in constitutional adjudication, from 'international law on human and peoples' rights', particularly from provision of various African instruments on human and peoples' rights as stipulated under article 60 of the African Charter and the interpretation the African Commission and the African Court have developed. This practice is today accepted with approval by the International Court of Justice and several national judges who suggest that dealing with human rights related questions requires interpreters to look at how regional bodies established to interpret and oversee the implementation of human rights treaties have interpreted similar rights.[33] Drawing inspiration from regional human rights bodies thus enables the Benin Constitutional Court to protect and develop human rights properly. While the African Commission, the African Court and the Benin Constitutional Court are different in many respects, they all either quasi-judicial or judicial organs are established to protect human rights against arbitrary deprivation and, importantly, to apply and interpret the African Charter when dealing with human rights petitions. They do not operate in isolation.

It follows from the above discussion that the legal status accorded to the African Charter under the Benin Constitution paves the way for its direct or indirect application in human rights litigation and confers on the Court the ability to tether many legal norms to the African Charter. The constitutional text does not require judges to interpret constitutional rights in a manner consistent with the African Charter.[34]

32 See among other *Decision DCC 03-144* of 16 October 2003, *Decision DCC 05-125* of 25 October 2005; *Decision DCC 20-029* of 23 January 2020; *Decision DCC 19-493* of 31 October 2019; *Decision DCC 19-496* of 31 October 2019; *Decision DCC 19-496* of 31 October 2019; *Decision DCC 18-155* of 24 July 2018 at 3; *Decision DCC 01-082* of 17 August 2001

33 M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: an introduction' in M Killander (ed) *International law and domestic human rights litigation in* Africa (PULP 2010) 21; TM Daly 'Kindred strangers: why has the Constitutional Court of South Africa never cited the African Court on Human and Peoples' Rights?' (2019) 14(2) *Constitutional Court Review* 403; P Alston 'A framework for the comparative analysis of Bills of Rights' in P Alston (ed) *Promoting human rights through bills of rights: comparative perspectives* (Clarendon 2000) 12. In *Ahmadou Sadio Diallo v Democratic Republic of Congo*, the International Court of Justice pertinently recalled that 'when [it] is called upon, […], to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created […] to monitor the sound application of the treaty in question'; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo,* Merits, Judgment, ICJ Reports 2010, 639, para 67.

34 See for example sec 233 of the 1996 Constitution of South Africa & sec 326(2) of the 2013 Constitution of Zimbabwe. On consistent interpretation, see SB Traoré *L'interprétation des résolutions du Conseil de sécurité des Nations Unies: contribution*

This would have been legally redundant given that the constitutional status accorded to the African Charter implies an obligation to ensure that the outcome reached by the Court does not contradict democratic and human rights principles upheld by the African Charter.

The African Charter in constitutional adjudication in Benin

The African Charter can contribute to improving the quality of human rights protection by applying it directly in human rights litigation[35] or, indirectly, by ensuring that the interpretation provided by the Constitutional Court and the outcome reached in litigation are consistent with human rights and democratic ideals, values and principles propelled by the African Charter, its normative protocols and subsequent interpretations of the African Commission and the African Court.[36] These two aspects are discussed in the following sections using cases decided by the Benin Constitutional Court.

Direct application of the African Charter

The Court started by marking its protective territory since its formative stage in the mid 1990s by directly invoking the African Charter against executive orders that infringed the rights of individuals.[37] From the Court's early decisions, it delineated quite clearly how it would be relying on the African Charter to buttress the protection of rights already provided for in the Constitution or those that are indirectly constitutionalised by way of article 7 of the Constitution. In *Decision DCC 18-94* of 3 June 1994, it nullified an inter-ministerial decree that restricted the recruitment for Customs Services to civil servants employed by the Ministry of Finances, holding that it was discriminatory and inconsistent with the Constitution and article 13(2) of the African Charter on 'equal access to public service'.[38] In this case, the petitioner argued that the inter-ministerial decree did not conform to the logic of the Constitution and the African Charter, which is in favour of openness and inclusivity in the recruitment.[39] Relying on article 8(2) and 13(2) of the African Charter, the Court reasoned that one of the corollaries of

à la théorie de l'interprétation dans la société internationale (2021) 369.

35 F Viljoen *International human rights law in Africa* (OUP 2012) 527-528.

36 This flows from the Preamble to the Benin Constitution, article 7 and article 147. It is also the logical consequence of article 1 of the African Charter; see Viljoen (n 35) 528; S Szurek 'Article 1' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme et des peuples: commentaire article par article* (Bruylant 2011) 109.

37 *Decision DCC 16-94* of 27 May 1994 at 60.

38 *Decision DCC 18-94* of 3 June 1994 at 70.

39 As above.

the principle of equality provided under those provisions is 'equality in career development'.[40]

This decision undoubtedly sets the tone for the direct enforcement of the Charter by the Court and litigants. However, although the Charter was used to support the finding of the Court, in the end the Court simply finds a violation of the Constitution and not of the Charter.[41] This may be explained by the fact that, since the Charter is an integral part of the Constitution, there is no reason to separately assert the violation of the Charter. The African Charter is not relied upon as an international treaty but as a constitutional norm.[42] If it were relied upon as an international treaty in this instance, the Constitutional Court would have been exercising conventionality control – the review of the conformity or compatibility of legislation and other inferior norms including administrative acts to international treaties – for which it had no jurisdiction.[43] Conventionality control differs from constitutional review, which the Constitutional Court performs, in that the former reviews the conformity of legislation and other inferior norms to international treaties while the latter do so with respect of the Constitution. Using the African Charter as a constitutional norm is designed to ensure that the African Charter leads to greater transformation than when it is invoked as an international treaty, because, as a constitutional norm, the Charter can lead to the nullification of legislation and inferior norms through the authoritative interpretation and application by the Constitutional Court.

By directly invoking the African Charter, the Constitutional Court expunged from the Benin legal order retrogressive provisions of the Penal Code which entrenched double-standards in the criminalisation of adultery;[44] those of the Family Code which institutionalised polygamy;[45] and, very recently, article 6 of the Benin Family Code which empowered the husband to name the child.[46] All these cases are evidence of the combined use of the African Charter with the Constitution to reach conclusions that foster equality between men and women. In *Decision*

40 As above.

41 *Decision DCC 18-94* of 3 June 1994 at 71. See also Tanoh & Adjolohoun (n 21) 118.

42 On the constitutional and treaty nature of the African Charter in Benin legal system, see CK Tchapnga 'Le juge constitutionnel, juge administratif au Bénin et au Gabon' (2008) 75(3) *Revue française de droit constitutionnel* 571.

43 Article 117 of the Constitution. See for example *Decision DCC 18-202* of 11 October 2018 at 2-3.

44 *Decision DCC 09-081* of 30 July 2009 at 3.

45 *Decision DCC 02-144* of 23 December 2002 at 6. See the discussion in J-L Atangana-Amougou 'Du code des personnes et de la famille devant la Cour constitutionnelle du Bénin. *Decision DCC 02-144* du 23 décembre 2002: observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 433.

46 *Decision DCC 21-269* of 21 October 2021 at 6.

DCC 21-269 of 21 October 2021,[47] the complainant summarised the mischief of articles 6 and 12 of the Benin Family Code as follows:[48]

> to allow the father of a legitimate child to confer his name on the child, whereas this possibility is not given to the wife (who also contributed to the birth of the child); to allow that in case of simultaneous recognition of the child born out of wedlock by both parents, the name of the father is given to the said child to the detriment of that of their mother; worse, if the mother had previously recognised the child born out of wedlock and had given him her name and later the father comes to recognise them in the last position, the child will lose the name given to them by their mother and will take the name of the father.

The impugned provisions were said to be contrary to the Constitution and the African Charter by providing, without doing the same for the husband, that the female spouse would add the husband's name to her own and that a remarried widow or divorced woman would take the names of their spouses.[49] While invoking the Constitution, the Court invoked two relevant provisions of the African Charter that supported its conclusion in this case, article 3(1) and (2) and article 18(3). The Court held that the latter provision 'gives priority to the protection of women when several fundamental rights are involved'.[50] The Court concluded that there was a violation of the Constitution by utilising arguments based on the Charter, especially article 18(3), which has no equivalent in the Benin Constitution.[51] It is seen that the African Charter played several roles in this case: it complemented the protection offered by the Constitution; it served to emphasise the need for protecting women and children; and it iterated that only a constitutional principle may objectively justify the violation of equality between men and women.[52]

The above examples, although progressive in relation to how the African Charter has been applied, do not capture instances when both the Constitution and the African Charter fall short of providing strong protection to certain marginalised groups. A case in point pertains to the absence in the Constitution and the African Charter of measures of affirmative action to increase the participation of women in the decision-making process despite glaring sociological evidence that they have been side-lined in various social and political spheres.[53] In 2010,

47 I am indebted to Professor Sâ Benjamin Traoré who brought this case to my attention when preparing this contribution.

48 *Decision DCC 21-269* of 21 October 2021 at 2.

49 *Decision DCC 21-269* of 21 October 2021 at 2-3.

50 *Decision DCC 21-269* of 21 October 2021 at 5.

51 *Decision DCC 21-269* of 21 October 2021 at 5.

52 As above.

53 M-O Attanasso *Femmes et pouvoirs politiques au Bénin: des origines dahoméennes à nos jours* (Friedrich Ebert Stiftung 2012) 61; 69-70. An affirmative action provision has been incorporated in the Benin Constitution by way of constitutional amendment in 2019. New Article 26(2) reads: 'Men and women are equal in law. However, the

a Member of Parliament challenged the constitutional validity of an affirmative action law which enjoined political parties to reserve 20 per cent of seats in parliamentary elections for women.[54] He alleged that this would be a violation of men's right to equality based on article 26 of the Constitution and articles 2 and 3 of the African Charter.[55] The Court eventually annulled the impugned provision. It reasoned that such discrimination contravened the 'letter and the spirit' of the Constitution and the African Charter.[56] A more dynamic interpretation was required in this case. Regarding women's participation, the African Charter has been improved through subsequent interpretations and the adoption of normative protocols,[57] of which the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, binding on Benin,[58] requires parties to take 'positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action'.[59]

In another case, the Court was confronted with the hard and politically sensitive task of defining the notion of 'people'. A member of an ethnic group alleged before the Court that their collective rights under articles 19 and 22 of the Charter were violated by a decision of the National Institute of Statistics and Economic Analysis to include their ethnicity in an ethnic group to which they are not affiliated.[60] In defining 'people', the Court adopted a definition which eliminated differences among groups of ethnicities and fostered a common republican identity. It argued that, '…in spite of the cultural, ethnic, linguistic, religious and social diversity that enriches the Nation, the notion of people, within the meaning of the Constitution and the African Charter on Human and Peoples' Rights, which unequivocally designates all citizens, without any distinction, is not reducible to the different socio-cultural groups; that

law may lay down special provisions for the improvement of the representation of the people by women. The State protects the family, especially the mother and the child. It shall provide assistance to persons with disabilities and to the elderly' (emphasis added).

54 *Decision DCC 10-117* of 8 September 2010 at 7.

55 As above. See the discussion in J-L Atangana-Amougou 'L'élection des membres de l'Assemblée nationale. *Décision DCC 10-117* du 8 septembre 2010: observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 452-454.

56 *Decision DCC 10-117* of 8 September 2010 at 8.

57 R Ben Achour 'Les protocoles normatifs à la Charte africaine des droits de l'homme et des peuples' (2020) 4 *Annuaire africain des droits de l'homme* 83.

58 Benin ratified it on 30 September 2005 and deposited the instrument of ratification two weeks later. Ratification table https://au.int/sites/default/files/treaties/37077-s1-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 16 November 2021).

59 Article 9; 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(1) *Washington and Lee Journal of Civil Rights and Social Justice* 23.

60 *Decision DCC 18-200* of 11 October 2018 at 2.

the indivisibility of the Republic necessarily entails the unity of people, without this constituting a negation of the right of each socio-cultural group to flourish ...'.[61] Reducing the concept of 'people' to 'citizens' does not accord with the practice of the African Commission and the African Court which have recognised that sub-groups within each state may qualify as people.[62] These two regional human rights bodies are generally flexible when defining the concept of people because they do so on a case-by-case basis, based on the nature of the contested right,[63] guided by considerations such as 'common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, …'.[64] The invocation of the African Charter in this case establishes diverging standards for protection.

The Benin Constitutional Court has not developed a detailed and dynamic approach to the application of the African Charter. In the almost 25 years since the Court has been in existence, its approach with respect to the Charter has not evolved; the Court simply refers to the Charter provisions without further developments. The engagement with the African Charter has remained formalistic and similar in all the cases heard. Direct application of the African Charter has not resulted in serious engagement between the Court, litigants and state entities on the importance of the African Charter in Benin democracy in relation to what role it could play in preventing undemocratic practices of state services. A similar trend is observed in relation to the failure to give indirect effect to the African Charter as discussed in the next section.

Indirect application of the African Charter or lack thereof

If mere direct application of the African Charter by and before the Benin Constitutional Court could be regarded as being progressive in some cases, several other cases illustrate how the African Charter and the jurisprudence of the African Court and Commission could have been invoked to prevent some regressive constitutional and legislative changes from being allowed to take place. This section looks at a number of cases that came before the Court between June 2018 and June 2021, in relation to the 2019 and 2021 elections, where the Court passed by an opportunity to align its decisions with the Charter. These cases are also compared to and contrasted with similar pronouncements by the African Commission and the African Court, which would have aided the Benin Constitutional Court not to lower the standard of the protection of rights.

61 *Decision DCC 18-200* of 11 October 2018 at 5-6.
62 *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR) 2009, para 178.
63 Viljoen (n 35) 219.
64 *Gunme and Others v Cameroon*, para 170.

The first instance of the failure to align its decisions with the African Charter arose in a series of petitions challenging, on the one hand, the constitutional amendment which instituted the principle of sponsorship for presidential candidates,[65] and, on the other, the revision of the electoral law which clarified the modalities of application of the principle of sponsorship.[66] The context is relevant here. On 7 November 2019, 47 amendments[67] to the Constitution of Benin were adopted; one of which prohibited citizens from running for President unless they are sponsored by elected officials.[68] The new article 44 provides that '[n]o one may be a candidate for the office of President of the Republic or Vice-President of the Republic unless he or she […] is duly sponsored by elected officials in accordance with the conditions and procedures established by law'. Parliament subsequently passed Act 2019-43 of 15 November 2021, which required presidential candidates to be sponsored by a minimum of 10 per cent of members of the National Assembly and mayors.[69] Each presidential candidate is required to garner 16 sponsors from the 160 MPs that make up the National Assembly. In practice, this threshold is not easy to meet because the ruling coalition has 154 MPs, making it difficult for many presidential candidates, including independent candidates,[70] to be sponsored.[71]

Clearly, invoking article 10 of the African Charter on the right to free association of independent candidates and article 13 on political participation, as developed in the *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (*Mtikila* case)[72] would have pointed Benin Constitutional Court decisions in another direction.[73] The *Mtikila* case is the evidence of the Charter's commitment to preventing unjustifiable restrictions imposed on the right to political participation and the freedom of association but the Court turned a blind eye to it. The *Mtikila* case was relevant in this series of petitions by emphasising the duty of ensuring that limitations to

65 *Decision DCC 21-011* of 7 January 2021 at 3; *Decision DCC 21-073* of 4 March 2021 at 2-3.

66 *Decision EP 21-001* of 21 January 2021 at 2-7; *Decision EP 21-003* of 17 February 2021 at 1-2; *Decision EP 21-005* of 17 February 2021; *Decision EP 21-012* of 17 February 2021 at 2; *Decision EP 21-013* of 17 February 2021 at 2; *Decision EP 21-014* of 17 February 2021 at 2-3; *Decision DCC 21-067* of 4 March 2021 at 2-3; *Decision DCC 21-069* of 4 March 2021 at 2; *Decision DCC 21-070* of 4 March 2021 at 2.

67 *Decision 19-504* of 6 November 2019.

68 Art 44.

69 Art 132(8).

70 *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 at 2; *Decision DCC 21-011* of 7 January 2021 at 3.

71 *Decision EP 21-013* of 17 February 2021 at 2.

72 (merits) (2013) 1 AfCLR 34.

73 See *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), paras 38-40.

political participation are necessary and proportionate to the aim sought so that no amendment would be introduced to Benin legislation that would have the effect of reducing the participation of candidates.[74] This lack of interest in referring to African Court decisions cannot be blamed on the ignorance of their existence by the Benin Constitutional Court as some litigants brought them to the attention of the Constitutional Court.[75] Strikingly, the Court did not allude to these arguments when addressing the case. Furthermore, the claim that constitutional and legislative amendments discriminated against independent candidates was worth being investigated.[76] The enforcement of these amendments would most likely amount to what the African Court characterised as the negation to freedom of association because individuals would be forced 'to associate with others' or others are forced to associate with the individual[77] to expect elections. What the Benin Court missed was that article 10 of the African Charter could be construed to mean the 'freedom to associate and freedom not to associate'.[78]

The imposition of sponsorship within a parliament composed of supporters of the incumbent who was equally a candidate rendered the ability to obtain sponsorship perilous, difficult and beyond the reach of many candidates. As a consequence, running for president, a right recognised for all, would become impossible for many citizens.[79] The fact that candidates who did not obtain sponsorship turned to the Constitutional Court for it to enjoin parliamentarians to offer them sponsorship signalled total disarray, despair and loss of confidence in a parliamentary chamber led by a power-hungry majority.[80] The failure to give effect to the values of the African Charter by scrutinising limitations runs counter to the Benin Court's own decisions where it held that, for restrictions to be necessary, they should be proportionate and justifiable

74 Petitioners in similar political rights invoked *Mtikila* case. See *Decision DCC 19-266* of 25 July 2019 at 2 and *Decision 18-197* of 2 October 2018 at 2.

75 *XYZ v Benin* (merits and reparations), Application 10/2020 and *Houngoue Eric Noudehouenou v Benin* (merits and reparations), Application 3/2020 were referred to in *Decision EP 21-003* of 17 February 2021.

76 *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 at 2;

77 *Mtikila*, para 112.

78 *Mtikila*, para 113. For South Africa, see *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), para 60.

79 For analogical reasoning, see Khampepe J in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* (2017) 10 BCLR 1303 (CC), para 68: 'However, one may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited'.

80 *Decision EP 21-006* of 17 February 2021; *Decision EP 21-013* of 17 February 2021 at 3; *Decision EP 21-015* of 17 February 2021 at 2.

in a democratic society,[81] a stance similar to international human rights bodies.

There is an emerging consensus that the principle of sponsorship should either not be resorted to in elections or, if it is, its implementation must be well thought out to facilitate political participation and electoral competition.[82] In a recent decision, the the Economic Community of West African States Court of Justice ruled that a legislative amendment introducing the principle of sponsorship in Senegal ahead of the 2019 elections violated the secrecy of the vote and was an impediment to the right to participate in elections as a candidate.[83] The Court reached such a conclusion after a careful consideration of several international (human rights) instruments that Benin had also ratified, including the African Charter.[84] Besides this, General Comment 25 of the UN Human Rights Committee (participation in public affairs and the right to vote) developing article 25 of the International Covenant on Civil and Political Rights is pertinent to this question. It indicates that '[i]f a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy'.[85] These developments reaffirm the necessity not to make participation in elections the preserve of certain individuals, as candidates, as it was once the case in many African countries before the so-called third wave of democratisation.

From another perspective, it may be suggested that, since the principle of sponsorship was introduced through constitutional, and not legislative, amendments, both the ability of the African Charter to prevent constitutional amendments which violate human rights and that of the Court to annul them was limited by the lack of the Court's jurisdiction to review the constitutionality of amendments introduced by the primary (the people) or the derived (National Assembly) constituent powers.[86] Put differently, the Constitutional Court lacked the power to control constitutional amendments because its power was limited to reviewing compliance with procedural rules for constitutional amendment or whether or not certain non-amendable provisions[87] had

81 See for example *Decision DCC 20-536* of 16 July 2020 and *Decision DCC 20-497* of 4 June 2020 at 2.

82 D Zounmenou & N Adam 'Les « réformes électorales » étouffent la démocratie en Afrique de l'Ouest' 25 March 2021 in *ISS Today* https://issafrica.org/fr/iss-today/les-reformes-electorales-etouffent-la-democratie-en-afrique-de-louest (accessed 16 November 2021).

83 *L'Union sociale libérale (USL) c. L'Etat du Sénégal*, Application ECW/CCJ/APP/59/18, Judgment ECW/CCJ/JUD/10/21 (28 April 2021), para 104.

84 *L'Union sociale libérale (USL)*, paras 99-102.

85 para 17.

86 *Decision 21-073* of 4 March 2021.

87 Article 156 of the Constitution reads: 'No procedure for revision may be instituted or continued when it shall undermine the integrity of the territory. The republican form of government and the secularity of the State may not be made the object of a

been changed.[88] It is contended that a court willing to align its outcome with Charter rights had two workable alternatives. In the first place, the constitutional provision introducing the principle of sponsorship left to the National Assembly the power to determine conditions for sponsorship and how the principle could be implemented. This legal possibility suggests that the Court, although it did not have powers to review the constitutionality of the principle of sponsorship, could at least make sure the conditions and the modalities for sponsorship established through law are 'reasonable'.[89] In addition, the Court has generally nullified constitutional amendments not obtained through 'national consensus'.[90] On these grounds, there was a possibility of the conformity of constitutional amendments to this principle being reviewed.[91]

In another petition, the Constitutional Court did not consider progressive interpretations of the African Charter that prohibited unconditional amnesty legislation. In November 2019, the President of Benin approached the Benin Constitutional Court to review whether Act 2019-93 relating to amnesty for criminal acts, misdemeanours and contraventions committed during the legislative elections of April 2019 conformed to the Constitution, and, thus, indirectly to the African Charter.[92] The terse response of the Court was affirmative. Reaching such a conclusion was almost surprising owing to the unusual content of the amnesty legislation.[93] Most scholars and international tribunals tend to favour conditional amnesties because blanket amnesties exclude any form of accountability.[94] The African Commission[95] and the African Court[96] have taken similar positions. The pronouncements of

revision'.

88 *Decision DCC 21-011* of 7 January 2021 at 5-6; *Decision DCC 19-504* of 6 November 2019 at 2-4.

89 General Comment 25 of the UN Human Rights Committee (participation in public affairs and the right to vote), CCPR/C/21/Rev.1/Add.7, para 17.

90 *Decision DCC 06-074* of 8 July 2006. See SH Adjolohoun 'Centralised model of constitutional adjudication: the Constitutional Court of Benin' in CM Fombad (ed) *Constitutional adjudication in Africa* (OUP 2017) 72.

91 This was the basis of one of the claims in *Decision DCC 21-011* of 7 January 2021 at 3.

92 *Decision DCC 19-503* of 6 November 2019.

93 Art 2 of Act 2019-93 on amnesty for criminal acts, misdemeanours and felonies committed during the legislative elections of April 2019 provides that, 'in application of the provisions of article 1 of the present law, all proceedings initiated shall be devoid of purpose, the judgments or rulings pronounced shall be null and void and the persons detained provisionally or in execution of the judgments or rulings pronounced shall be released if they are not held for other legal reasons'.

94 SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 383.

95 *Thomas Kwoyelo v Uganda,* Communication 431/12, para 293.

96 *Sébastien Germain Marie Aïkoué Ajavon v Benin* (merits and reparation), Application 62/2019, para 239.

the latter two bodies based on the Charter have made it clear that the power of states to grant amnesty to perpetrators of various violations of international (human rights) law is constrained by states' obligations to investigate and prosecute human rights violations and ensure victims have their cases heard before competent tribunals. It is clear that the Constitutional Court's approach effectively endorses the violation of article 7 of the African Charter and fails to hold the executive and the legislature bound by the limitations imposed on their powers in an era of constitutionalism.

The strategic deference of the Court to the legislature and the executive may account for its unwillingness to choose alternative outcomes that could align decisions of the Court with the African Charter. In the last three years of operation (June 2018 - June 2021),[97] the Court has tended to declare any proposed laws presented to it by the President of the Republic constitutional even when some of them, such as the amnesty law, appear to be glaringly in violations of the African Charter.[98] The Court seems to align its policy preference with that of the executive and the legislature not only to gain support from it and shield itself from external attacks but also to prevent the type of tension which had emerged between the previous composition of the Court and the office of the President of the Republic and National Assembly. The previous composition of the Court was brave enough to nullify certain legislative amendments reviewed by it.[99] The current President of the Court initiated and defended some of the legislation nullified by the Constitutional Court in January 2018 before his appointment to the Court.[100] These laws were reinterpreted in favour of the government after he held the reins of the Court. His proximity with the Benin President has continued to raise suspicion about the Court's ability to

97 The period between June 2018 and June 2021 symbolises three years since new judges of the Constitutional Court were appointed. See 'La Cour Djogbénou trois ans après: Gilles Badet parle des innovations' 8 June 2021 https://ortb.bj/a-la-une/la-cour-djogbenou-trois-ans-apres-gilles-badet-parle-des-innovations/ (15 December 2021). This period symbolises a jurisprudential shift from what can be characterised as 'judicial activism' previous judges tended to adopt on public interest and democratic issues to 'judicial restraint'.

98 See also *Decision DCC 18-141* of 28 June 2018 which re-interprets in favour of the National Assembly and government policy preferences, three earlier rulings, *Decision DCC 18-001* of 18 January 2018; *Decision DCC 18-003* of 22 January 2018 and *Decision DCC 18-004* of 23 January 2018; and *Decision DCC 18-142* of 28 June 2018 reinterpreting *Decision DCC 18-005* of 23 January 2018.

99 See *Decision DCC 18-001* of 18 January 2018; *Decision DCC 18-003* of 22 January 2018 and *Decision DCC 18-005* of 23 January 2018. See generally, S Bolle 'La Cour Djogbénou, ou la Cour de rupture' 11 September 2018 in *La Constitution en Afrique* https://bollestephane.wordpress.com/la-cour-djogbenou-ou-la-cour-de-la-rupture-1/ (accessed 17 November 2019).

100 He was Minister of Justice at the time. See Bolle (n 99).

hold the current government and the National Assembly liable to the standards of constitutionalism.[101]

Whatever the reasons for the decisions of the Benin Constitutional Court to be regressive in terms of achieving the ideals of the African Charter, one serious implication has been the tension and backlash that has emerged between the Constitutional Court and the African Court, with the latter attempting to use the African Charter to 'fix' decisions that did not conform to it of the former, and the former denying that decisions of the latter had any superior authority. This is discussed in the next section.

Understanding and handling tension and backlash with the African Court

Adopting a friendly approach to the application of the African Charter and related normative standards can create a dialogue between national and regional organs protecting human rights. It can also prevent contradictions and differing standards of protection developed by the two levels. This is especially pertinent for the Benin Constitutional Court given the growing activism of the African Court and its expanded jurisdictions in matters that have direct links with domestic constitutional law.[102] Benin ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in June 2014. It has, thus, subjected itself to the jurisdiction of the Court. Besides, it has committed itself to '[complying] with the judgment of the Court in any case to which [it is party]'.[103] The signing of the declaration made pursuant to article 34(6) of the African Court Protocol by the departing government in February 2016, although withdrawn in 2020,[104] opened the jurisdiction of the Court to many Benin petitioners who have not hesitated to challenge, directly before the African Court, decisions of the Benin Constitutional Court which allegedly 'violated' the African Charter.[105]

In *Sébastien Germain Marie Aikoue Ajavon v Benin*, the African Court ruled that Benin had violated article 26 of the African Charter

101 Similar claims were made before the African Court in *Sébastien Germain Marie Aïkoué Ajavon v Benin* (merits and reparation), Application 62/2019 but were not sufficiently proven (para 300).

102 AK Abebe 'Taming regressive constitutional amendments: the African Court as a continental (super) constitutional court' (2019) 17 *International Journal of Constitutional Law* 113.

103 Art 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

104 OD Akinkugbe 'International decision commentary: *Houngue Eric Noudehouenou v Republic of Benin*' (2021) 115(2) *American Journal of International Law* 286.

105 *Sébastien Germain Marie Aïkoué Ajavon v Benin* (merits and reparation), Application 62/2019.

by failing to guarantee the independence of the Constitutional Court,[106] permitting interference of the executive in the appointment of judges and allowing members of the government to sit in the Supreme Council of the Judiciary.[107] This ruling is important because the Constitutional Court had declared the impugned law constitutional.[108] Clearly, when it reviewed this law, the Benin Constitutional Court turned a blind eye to the Charter ideals that 'neither the executive nor the legislature should interfere, directly or indirectly, in the making of decisions that fall within the competence of the judiciary, including those decisions concerning the management of the career of the members of the judiciary'.[109] In the same case, the African Court found the amnesty law to be inconsistent with the African Charter despite its having been found to be constitutional domestically.[110] The African Court did so after having reviewed provisions of the African Charter itself and also developments at the African Commission, the UN Human Rights Committee, the Inter-American Court of Human Rights (Inter-American Court) and the European Court of Human Rights (European Court), all of which suggested that 'an amnesty law is compatible with human rights only if it is accompanied by restorative measures for the benefit of the victims'.[111] Otherwise, it violates 'the right to have the case of each victim of the 28 April 2019 legislative elections violence heard'.[112] Owing to the abundant jurisprudence of the Benin Constitutional Court on the importance of article 7 of the African Charter in building accountable state organs, one wonders how it disregarded its own normative progress.

Furthermore, in *Houngue Eric Noudehouenou v Benin*,[113] the African Court held that the constitutional amendments of 7 November 2019 violated the principle of national consensus that has been anchored in the Benin Constitutional Court jurisprudence over the years and recognised under article 10(2) of the African Charter on Democracy, Elections and Governance. Most of these violations found by the African Court could have been identified by the Benin Constitutional Court before the matter escalated to the continental plane.

It is clear that the Benin Constitutional Court is institutionally complementary to and in competition with the African Court in the

106 *Ajavon*, para 290.
107 *Ajavon*, paras 320-324.
108 *Decision DCC 18-142* of 28 June 2018 reinterpreting *Decision DCC 18-005* of 23 January 2018. See also *Ajavon*, para 316.
109 *Ajavon*, para 312.
110 *Ajavon*, para 239.
111 *Ajavon,* para 238.
112 *Ajavon,* para 239.
113 *Houngue Eric Noudehouenou v Benin* (merits and reparations) – Appl 003/2020, paras 65-66.

quest for improving the quality of human rights protection in Benin.[114] This state of affairs owes to the fact that, as stated earlier, the two courts are empowered to apply and interpret norms of international origin, namely, the African Charter. This can weaken the legitimacy and respectability of the Constitutional Court when its decisions are deemed inconsistent with the African Charter. The Constitutional Court is a state organ which must contribute to the implementation of the international obligations the country had entered into, pursuant to article 1 of the African Charter, and cannot be seen, for whatever reason, to be an opponent to those very mechanisms established to ensure that these norms are clarified and not tempered with.[115] The tendency of the Benin Constitutional Court to overlook the interpretation provided by regional human rights organs may, therefore, not be warranted by the institutional position in which it finds itself.

An increasing culture of resorting to the African Court[116] also puts more pressure on the Benin Constitutional Court to have a frank and sincere jurisprudential dialogue with the African Court, and possibly the African Commission, so that the reliance on the African Charter serves the purpose for which the Charter was meant. It has been observed, regarding the Inter-American Court and the European Court, that domestic (constitutional/supreme) courts may disregard the interpretation preferred by regional bodies when their interpretation seems to conflict with the preferred outcome and policy orientation of domestic courts.[117] As discussed in the following lines, the Benin

114 Analogically for France, see EL Abdelgawad and A Weber 'The reception process in France and Germany' in H Keller & AS Sweet (eds) *A Europe of rights: the impact of the ECHR on national legal systems* (OUP 2008) 116.

115 On similar tendencies elsewhere, see R Kunz 'Judging international judgments anew? The human rights courts before domestic courts' (2020) 30(4) *European Journal of International Law* 1134-1135 (see 1140-1141 for positive collaboration); D Spielmann 'Jurisprudence of the European Court of Human Rights and the constitutional systems of Europe' in M Rosenfeld & A Sajo (eds) *The Oxford handbook on comparative constitutional law* (OUP 2012) 1232; but see positive acceptance by the Belgian Constitutional Court at 1249-1250. On other positive experience, see O Pollicino 'Toward a convergence between the EU and ECHR legal systems? A comparative perspective' in G Repetto (ed) *The constitutional relevance of the ECHR in domestic and European law: an Italian perspective* (2013) 112.

116 See the most recent rulings in cases involving Benin *Romaric Jesukpego Zinsou v Benin* (provisional measures) (10 September 2021), Application 6/2021; *Romaric Jesukpego Zinsou and 2 Others v Benin* (provisional measures) (2 September 2021), Application 7/2021; *Romaric Jesukpego Zinsou and Other v Benin* (provisional measures) (10 April 2021), Application 8/2021; *Landry Angelo Adelakoun and Others v Benin* (provisional measures) (25 June 2021), Application 9/2021. See also *Landry Angelo Adelakoun & Others v Benin*, Application 12/2021; *Lehady Vinagnon Soglo v Benin*, Application 11/2021 and *Houngoue Eric Noudehouenou v Benin*, Application 10/2021. It is doubtful, though, whether this trend will continue given that Benin withdrew in 2020 the Declaration made pursuant to art 34(6) of the African Court Protocol which mainly facilitated the submission of these cases.

117 A Chehtman 'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis' 8 June 2020 in *EJIL:Talk!* https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/ (accessed 17 November

Constitutional Court has followed this pattern and has not followed decisions of regional and sub-regional jurisdictions. Some encouraging attempts by litigants to invoke decisions of the African Court to sustain their claims in political rights litigation – which one may view as calls for the Benin Constitutional Court to look at how other courts construe the meaning of similar rights – have also been met with chauvinistic indifference.[118] This runs counter to the practice of some other African apex courts which have started to invoke decisions of the African Court when construing constitutional rights.[119]

Based on its jurisprudential practice, however, it is doubtful whether the Benin Constitutional Court will follow the trend of relying on the decisions of regional or subregional human rights bodies. The Constitutional Court has also shown that it cannot overturn its decisions simply because they were found to be inconsistent with Community law[120] or the African Charter.[121] This position is premised on the idea that decisions of the Constitutional Court are based on the Benin Constitution while those of community or human rights courts are based on international treaties and other norms which are hierarchically inferior to the Constitution. In *Decision EP 21-003* of 17 February 2021, it held that

> [w]hen a contradiction is found between a decision rendered by such a [Community or international] court and another rendered by the Constitutional Court, the decision rendered by the constitutional court takes precedence over that of the international or community court (...) and that [the Constitutional Court] decision which takes precedence over that of the African Court of Human and Peoples' Rights must be given effect.[122]

The Constitutional Court of Benin thus excludes any possible special status that could be conferred on decisions that interpret and apply the very same African Charter that is an integral part of its own Constitution. This creates space for standards of protection that may differ between it and the regional/international courts. In turn, the ability of the African Charter to improve the lived realities of people, at least through certain types of litigation, will be undermined. One reason is that there will, at the national level, be certain interpretations of Charter norms that

2021).

118 See *Decision DCC 19-266* of 25 July 2019 at 2 and *Decision 18-197* of 2 October 2018 at 2.

119 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), paras 38-40; *Peta v Minister of Law, Constitutional Affairs and Human Rights* (CC 11/2016) (2018) LSHC 3. See generally, Centre for Human Rights *Guide to the African Human Rights system: celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021) 14..

120 *Decision DCC 20-641* of 19 November 2020 at 5.

121 *Decision EP 21-003* of 17 February 2021 at 3.

122 As above.

do not increase the scope of protection afforded to individuals. At the same time, litigants will be aware of the existence of the African Court decisions which grant them more protection, but which they cannot enjoy because there are contradictory decisions of the Constitutional Court that take precedence over those of any other court, whatever its nature.

Conclusion

Looking at the practice of invoking and applying the African Charter in the jurisprudence of the Benin Constitutional Court, it is fair to posit that the Constitutional Court has not utilised the African Charter to its full extent so that the Charter could assist it in expunging critical human rights-unfriendly legislation, practices and behaviours. Drawing on the rich and outstanding experience of the late Professor Christof Heyns, whose main concern was to ensure the domestication and application of international human rights instruments, including the African Charter, at the domestic level, this contribution has attempted to examine whether the manner in which the African Charter is invoked in the Benin Constitutional Court jurisprudence provides good prospects for improving the quality of human rights protection in Benin. The Benin Constitution has constitutionalised rights guaranteed in the African Charter in a way that they could be a check against legislation and practices inimical to human rights and improve the protection of human rights. While the Court has relied on the African Charter from time to time, the invocation of the African Charter has remained formalistic and not been substantive in nature. The approach which it adopted in its formative stages – referring here and there to normative provisions of the African Charter without seriously engaging with their content and scope – has reduced the ability of the African Charter to transform human rights-unfriendly behaviours and legislation. This may seem surprising because, since the adoption of the Benin Constitution, many human rights developments have occurred at the regional level in terms of new human rights treaties and protocols which Benin has ratified and developments by African Union human rights bodies of standards and interpretations of rights which have advanced the content of the Charter and clarified its provisions in a manner consistent with human rights best practices in other regions.

The progressive failure to use the African Charter to reach outcome protective of human rights – excluding the instances when it protected rights related to the fair trial and equality – has emerged as the Court has not, over the past three years, attempted to ensure that legislation restricting fundamental political-related rights are construed in a way that fosters participation and checks parliamentary majoritarian abuses.

The Court has mainly been preoccupied with negotiating its legitimacy within the political sphere by deferring to the legislature and the executive to the detriment of advancing values and ideals of the African Charter. Such a quest for legitimacy by deference is also present in the hierarchical and chauvinistic interactions the Court has undergone with regional human rights bodies, the African Court in particular. This has led to serious jurisprudential setbacks and has undermined the quality of human rights protection at the domestic level. Christof Heyns did not want national and regional human rights systems to be pitted against each other. Rather, he held the view that they should complement one another and compete in a way that would promote and protect the fundamental rights for which many people shed their blood.

38

Struggle, refusal, narrative

*Karin van Marle**

Introduction

I had the privilege of hearing Christof present his 'A struggle approach to human rights' at the 2001 International Association for Philosophy of Law and Social Philosophy (IVR) World Congress in Amsterdam.[1] Over the years it was an approach that I often discussed with students in seminars and engaged with in my own research. In this reflection in honour of Christof I revisit his suggestion of a struggle approach to human rights as well as my earlier engagement with it against two theoretical frameworks. I draw on the latter to revisit and reconsider aspects of my earlier critical engagement that questioned if the notion of struggle, something that holds the possibility of a radical politics, could and should be coupled with an institution like human rights.

I engage with Bonnie Honig's take on the politics of refusal and her insistence on 'the return to the city',[2] and with Robert Cover's belief in the law's redemptive transformation.[3] I neither aim to throw (and to force) all three in the same basket nor to mix them all together to come up with some sort of hybrid end-product. Reading the 'struggle approach' alongside work on 'refusal' and 'nomos and narrative' helps me to understand better Christof's adherence to the institutional, to what is 'legitimate'.

South Africa, but also the world at large, finds itself in a very different place and time today than in 2001 when Christof delivered his paper on the struggle approach. The theme of the conference where he delivered his address, which is also the title of the book in which it was published, is *Pluralism and law*. Arendt Soeteman, at the time president

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1 CH Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (Kluwer Academic Publishers 2001) 171. 'IVR' refers to the German 'Internationale Vereinigung für Rechts- and Sozialphilosophie'.

2 B Honig *A feminist politics of refusal* (Harvard University Press 2021) 1; 72-100.

3 RM Cover 'The Supreme Court 1982 term. Foreword: nomos and narrative' (1982) 97 *Harvard Law Review* 34-40.

of the IVR and editor of the book, refers to the tension between on the one hand being part of 'one world', while at the same time coming from 'many different traditions.'[4] He asks: 'What can we say about justice in our pluralist world?'[5] Twenty years later the question of justice, or maybe better put, the question on the absence of justice remains. But the question of pluralism and the law / legal pluralism is also with us. All three authors - Christof, Honig and Cover – in their own way are dealing with these questions; not to provide answers but to open new angles from which to approach them.

I start with briefly describing the crux of the struggle approach as suggested by Christof, followed by my earlier reflection on it, after which I turn to Honig and Cover. As noted, I sense in the writings of Honig and Cover lines that can be connected to Christof's understanding of human rights. At the same time there are significant differences between them.

This is a tentative reflection done in honour of Christof's work, his contribution and his life.

'A struggle approach to human rights'

Christof described human rights as 'the flipside of the coin of legitimate resistance'.[6] For him the idea of human rights can be captured in the phrase 'human rights = legitimate resistance'. He explained the 'force' of human rights through the link between human rights and resistance. Christof believed that no matter how one explains human rights, in other words which political, philosophical or theoretical approach or perspective one follows, the 'concept of human rights' itself serves as a 'countervailing force' to the power of the state as well as society.[7] This belief in the force of human rights resulted in the statement that human rights are 'guides to action and triggers of resistance'.[8] For Christof human rights is a 'potentially revolutionary concept'. He relied on 'the clampdown worldwide by authoritarian regimes on human rights organisations' as evidence for this claim.[9] However, notably, Christof said that he did not view human rights as being part of 'the anarchist tradition' and explained that human rights draw on the sense 'that there is a general duty to political obedience, to which human rights norms constitute exceptions'.[10] I come back below to the idea of anarchy with reference to Cover, who boldly associates himself with the anarchist

4 A Soeteman 'Introduction' in A Soeteman (ed) (n 1) vii.
5 Soeteman (n 4) viii.
6 Heyns (n 1) 171.
7 Heyns (n 1) 171.
8 Heyns (n 1) 171.
9 Heyns (n 1) 171.
10 Heyns (n 1) 172.

tradition. Christof argued that human rights do not oppose or challenge the existence of the state as an institution, but in fact endorse it. As I show below this position is different from Honig and Cover, who stand critical towards the state. Important for my argument though is that neither of them believe that the state can be totally left behind. For Christof, disobedience can be allowed only in 'extreme cases' if it is 'justified', because of a general obligation to obedience.[11] Subscribing to the traditional view of constitutions as social contracts, Christof perceived human rights as the 'escape clause'. For him the concept of human rights is the 'ultimate guarantor of popular sovereignty' as well as the 'foundation for intervention by the international community' in the domestic affairs of states.[12] He applied the struggle theory to specific examples that I do not delve into in this chapter.[13]

I want to note his view on the notion of history and time, responsibility and passion. He tied history closely to the concept of legitimacy and explained this by saying that the normative aspect of the struggle approach can be captured in the word 'legitimate'. For him what is legitimate is to be found in history – 'history reflects beliefs that have stood the test of time'.[14] His understanding of responsibility is closely tied to the concept of human rights – the struggle approach to human rights is for him a call for responsibility to give direction to new struggles and also to protect existing norms. He described passion, the foundation of human rights, as 'passion tempered by history'.[15]

The limits of the law

I draw here on a previous engagement with the struggle theory which comes from a perspective that underscores the limits of the law and is in particular cautious of the way in which law reduces the political.[16] At the time, I highlighted that an obvious problem that one could have with the struggle theory is its 'grand narrative' style of argumentation. I read the struggle theory as an attempt to claim to provide the *ultimate foundation* and *explanation* for human rights; as a claim to solve all possible tensions, debates and struggles (!) on human rights. I highlighted the extent to which the theory relies on a modernist acceptance of rationality and human reason, follows an abstract form of agency and supports the notion of the all-and-ever-

11 Heyns (n 1) 172.
12 Heyns (n 1) 172.
13 Heyns (n 1) 178-187.
14 Heyns (n 1) 187.
15 Heyns (n 1) 188.
16 K van Marle 'Lives of action, thinking and revolt: a feminist call for politics and becoming in post-apartheid South Africa' (2004) 19 *South African Public Law* 608.

present subject. The theory, although it recognises with some reluctance the problematic consequences of asserting a single history, ultimately assumes the possibility and desirability of one universal truth. This is of course ironic given that the focus of the conference and the subsequent publication was on pluralism. Re-reading the piece, I was struck by the emphasis placed on actions and the 'empirical observation of historical processes.'[17] In this view, human rights should be seen as a form of action, not a set of moral truths. I invoked Hannah Arendt's fear that to concentrate on rights that are attached to politically passive and invisible legal subjects could lead to a misdirection in our resistance to totalitarianism.[18] Christof might have argued that this is what he envisioned in the formulation of the struggle approach to human rights. However, I was concerned about the strong requirement of legitimacy and the reliance on mostly Western history as yardstick, which is not true to the Arendtian tradition of active politics and the centrality of life and narrative.[19]

Another reason why in my view the struggle approach failed to address post-apartheid politics is because I was worried about its aim to provide a reason and justification for the existence of human rights, without showing concern for politics. Also, for the struggle approach, the eventual entrenchment of human rights in international treaties is the end of political struggle rather than its beginning. I came to the conclusion that the struggle theory is not only celebratory and monumental but is, in a sense, despite Christof's claim to the contrary, not all that different from natural law explanations of the origins of and justification for human rights. I read the meaning of struggle as reduced to the level of explanation and justification and not taken to be part of an active and continuous politics. Encompassed in this approach is the danger of institutional politics that functions only within the sphere of what is perceived as legitimate.

In my previous reflection I relied on Hannah Arendt and Julia Kristeva, to warn against the reductions that occur when coupling politics with law ('struggle' with 'rights') and humanity and human life with legitimacy ('human' with 'legitimate').[20] I was concerned also about the ethical notion of responsibility that is reduced to a mere instrumental responsibility that corresponds with rights. I lamented that passion and the passion of the moment is limited and reduced to a tempered passion. Just as Arendt's approach to human life and humanity

17 Heyns (n 1) 181.

18 H Arendt *The origins of totalitarianism* (Schocken Books 1951).

19 Van Marle (n 16). H Arendt *The human condition* (The University of Chicago Press 1958).

20 Van Marle (n 16), Arendt (n 19), J Kristeva & H Arendt *Life is a narrative* (University of Toronto Press 2001).

(her belief that political action and thought are what distinguish human life from other forms of being) is critical of the notion of a society, or life captured by 'human rights' and of the equalisation of 'human' with 'legitimate', Kristeva's call for eternal revolt disrupts the coupling of rights with struggle. Following Arendt and Kristeva, the dangers of a society overtaken by human rights discourse become clear – the result being a complacent society where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.

As indicated above my attempt in this chapter is tentatively to revisit and reread the struggle approach to human rights and reflect also on my earlier response in light of Honig's work on refusal and in particular her reworking of the way in which refusal has been invoked by other theorists to argue for a politics of refusal that does not retreat, does not reject, disavow or abolish but returns to the city, to politics and maybe even to law and rights, albeit with caution. I read Christof's approach also alongside the writing of Cover. I find moments of connection in a shared belief in law's jurisgenerative potential, albeit always already confronted by the violence of state law and courts.[21]

Refusal

Honig, in her latest work, *A feminist politics of refusal,* draws on the Greek tragedy by Euripides, the *Bacchae*, to develop her view.[22] Honig's theory of refusal is based on her feminist re-reading, re-interpretation and re-telling of the tragedy. If it is not obvious, I read Honig here alongside Christof, because of the possible connections between refusal and struggle. As indicated above, there are lines of connection but also of divergence. A divergence is that Honig's story is a tragedy that does not end well, where Christof's one is a story of optimism, one of success.[23]

The *Bacchae* tells the story of Dionysus coming to Thebes and the events that unfold when the women of Thebes join the festivities, reject work, leave the city to explore alternative lifestyles but later return to claim the city. According to Honig, refusal occurs in three moves in

21 R Cover 'Violence and the word' (1986) 95 *Yale Law Journal* 1601.

22 Honig (n 2).

23 The 'struggle approach' can be placed along the lines of a traditional coming of age story, usually a story of a male character leaving his rural place to come to the city whereby becoming a man he fulfill his destiny. I have compared the lives of Nelson Rohihlahla Mandela and Winnie Madikizela Mandela to the coming-of-age story and showed how if Nelson's life mirrors the coming-of-age story, Winnie's life does not. K van Marle 'Post-1994 jurisprudence and coming of age stories' (2015) No foundations. Christof notably associates the life of Nelson Mandela with the struggle approach.

the tragedy: firstly, women refuse to work in the city; they then move outside the city to live differently ; before they return to the city with certain demands. She reads these acts as 'a single arc of refusal', which conveys 'a normative, civic, and feminist obligation to risk the impurities of politics on behalf of transformation'.[24] For her the return to the city is central to a feminist politics -of refusal, even though the return may fail. The city for Honig symbolizes political community. I previously have raised the question whether the city can be imagined also as the constitution, prompted by the call for the constitution to be abolished in the South African context.[25] I asked whether the engagement with the constitution as return to the city could open space for critical constitutionalism and not its abolishment or abandonment.[26]

I should note that this is not the first time that refusal has been considered as a strategy for critical constitutional scholarship. Drawing on Cavarero's work on Penelope's weaving and unweaving as well as the laughter of the women of Thrace, I explored refusal as a critical response to a certain way of understanding and doing law.[27] Henk Botha, inspired by Njabulo Ndebele's *The cry of Winnie Mandela,* has also argued for refusal as a critical way to think about constitutionalism.[28]

Honig recalls three ways in which refusal has been invoked in critical theory, namely, Agamben's 'inoperativity'; Caverero's 'inclination'; and Hartman's 'fabulation'.[29] She re-reads each of these together with another theorist to substantiate her argument for a return to the city, for a politics of transformation. Agamben's inoperativity is read with Butler's idea of 'assembly'; Cavarero's inclination with Ahmed; and Hartman's fabulation with Arendt.[30] Honig reads the women's actions in the tragedy as being part of an 'arc of refusal' which forms the basis for a feminist politics of refusal. I find her version of refusal, that is prepared to take the risk of 'the impurities of politics

24 Honig (n 2) 1.

25 K van Marle 'Refusal and critical constitutional scholarship' *Critical Legal Conference* 2021 (unpublished paper, on file with author).

26 Honig concedes that her suggestion might not be useful to all with specific reference to some areas in Black studies who regards the city as 'unsalvageable'. However, she says that even those who regards the city as 'unsalvageable' may find something useful in the agonism that she finds in the Bacchae.

27 K van Marle 'Laughter, refusal, friendship: thoughts on a "jurisprudence of generosity"' (2007) 18 *Stellenbosch Law Review* 194; K van Marle (ed) *Refusal, transition and post-apartheid law* (ed) (Stellenbosch University Press 2009).

28 H Botha 'Refusal, post-apartheid constitutionalism and The cry of Winnie Mandela' in Van Marle, K (ed) *Refusal, transition and post-apartheid law* (Stellenbosch University Press 2009) 29.

29 G Agamben *Potentialities* (Stanford University Press 1999) 250; A Cavarero *Inclinations: a critique of rectitude* (Stanford University Press 2016); S Hartman *Wayward lives, beautiful experiments: intimate histories of social upheaval* (WW Norton & Company 2019).

30 J Butler *Notes toward a performative theory of assembly* (Harvard University Press 2015); S Ahmed *Queer phenomenology: orientations, objects, others* (Duke University Press 2006); Arendt (n 19).

on behalf of transformation', suggestive for critical legal scholarship. She identifies a feminist politics that shifts from the quest for power to collaborative experiments; from hubris to agency but notably also from heterotopia as fugitivity to heterotopia as a space/time of rehearsal and ultimately from heterotopia to a return to the city. Important features of the approach are its wordliness and the attention to the politics of storytelling. I turn briefly to inoperativity; inclination and fabulation and Honig's take on each of them.

Agemben situates his inoperativity, the suspension of use, in 'exceptional, liminal spaces', spaces associated with festival, exception and exhibition.[31] The *Bacchae*'s refusal of work can be read as inoperativity and suspension, but for Honig it is not only the suspension of use but its intensification.[32] Instead of Agamben's exhibition and spectacle associated with the male gaze we find in the *Bacchae*'s refusal a different inoperativity. The *Bacchae*'s refusal presents us with a new sociability; 'new use in common'; new ways of being.[33] Honig recalls an account of feminists who wanted to partake in a strike in support of Not One (Woman) less but who were involved in cooking food in a soup kitchen. Faced with the dilemma of 'We want to strike, but we can't strike' the women made the decision to provide raw food. What happened here is described as an evaluation of the 'sensible qualities of things', which recalls Ranciere's notion of redistribution of the sensible.[34] The *Bacchae*'s new ways of being also bring a new sense of time, a slow time, 'slow tempo of transcendence that refuse[s], by intensifying, everyday normativity and make[s] alternatives imaginable.'[35] Instead of an ethics or politics of pure means we find a 'more wordly and impure agonistic and politics of refusal.' The difference between the *Bacchae*'s refusal and inoperativity reminds us of Critical Race Scholar, Patricia Williams, who as alternative to the view of certain Critical Legal Studies theorists to reject rights (refuse and make them inoperative) called for rights to be unlocked.[36] Her notion of a jurisprudence of generosity is also an evaluation and ultimately redistribution of the sensible. Honig comments that Agamben's inoperativity ultimately leaves us with a notion of use that looks very much like the old – it is solitary, not common and exhibitive, not experimental; an untransformed use.[37]

31 Honig (n 2) 15-16.
32 Honig (n 2) 16.
33 Honig (n 2) 22.
34 Honig (n 2) 27. See J Rancierre *The politics of aesthetics. The distribution of the sensible* (2004) 12.
35 Honig (n 2) 43. K van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* 239. Christof showed specific interest in the idea of slowness and engaged with it in his time as Special Rapporteur.
36 P Williams *The alchemy of race and rights* (Harvard University Press 1991) 164-165; Van Marle (n 22).
37 Honig (n 2) 45.

Cavarero's inclination does not reject use but rather presents a way 'to rethink or recover use as care and mutuality'.[38] Normativity is not suspended but reoriented. Cavarero suggests inclination as alternative to rectitude associated with autonomy. She relies on maternalism's gesture of care to suggest 'a subversive ethics of altruism'.[39] Inclination of course recalls also feminist work on care and attunement.[40] I am interested also in linking inclination with horizontality, the horizontal working of constitutionalism. Honig recalls the riddle that the Sphinx gives to Oedipus, which although he manages to solve it still misses the lesson that she is trying to teach him, being the wisdom of inclination. ('What crawls on all fours in the morning, walks on two legs midday, and then the evening on three'.)[41] Another lesson coming from the riddle is pluralization, that human life is made of multiple gestures, none of them essential.[42] Pluralization, pluralism is another important feature of a critical constitutionalism. As noted above, Christof presented the 'struggle approach' at a conference on legal pluralism. He draws on the plurality of actions as grounding for the struggle approach.

Honig reads the main relation of kinship in the *Bacchae* as one of sorority rather than maternity and combines this with Ahmed's notion of disorientation to shift Cavarero's maternal care and pacifism to sororal love, care and violence.[43] The turn to sorority can be fruitfully compared to Jacques Derrida's lamentation of fraternity as the basis for democracy.[44] Honig identifies four moments of inclination in agonic contexts of care: Firstly, when the women of Thebes join the foreign women, they refuse not only domestication but also sovereignty's demarcation. Secondly, when leaving the city for the Cithaeron the women 'join together in dance, worship, and sleep and in caring for the animals in whose midst the women find themselves.' The third and fourth examples are when Agave, the King's mother leans over him first to kill and then to bury him.[45] For Honig, Ahmed's disorientation opens up the possibility of 'gathering' differently; of reaching the 'very limits of social gathering'.[46] In her words, 'to love out a politics of disorientation might be to sustain wonder about the very forms of social gathering.'[47] The possibility of 'new social relations' and not mere restoration to old ones, unfolds. The shift from maternal care and pacifism to sororal

38 Honig (n 2) 46.
39 Honig (n 2) 47.
40 Honig (n 2).
41 Honig (n 2) 52.
42 Honig (n 2) 52.
43 Honig (n 2) 58.
44 J Derrida *The politics of friendship* (Verso 1997) 236.
45 Honig (n 2) 54.
46 Honig (n 2) 55.
47 Honig (n 2) 55.

agonist politics urges another shift, namely after time spent at the Cithaeron as a heterotopian space to return to the city.

To expand on the return to the city, Honig relies on Hartman's fabulation in telling the stories of wayward women.[48] In addition to Arendt's view of the importance of the city and the archive to 'hold' stories of human action Hartman addresses how the archive 'hold[s] (back) the city'.[49] Hartman fabulates in order to bring the stories of women whose lives were deemed obscure to the archive. However, Honig notes that Hartman's counter-narratives are only 'momentary triumphs'. She is concerned with the question whether fabulation can also collectivize or politicize? She concedes to the slow time of transition. It is notable how Cadmus, Agave's father who took up the position of King after the death of Pentheus, tries to restore her to her role as wife and mother, to kinship back into the 'patriarchal fold'. Arendt's distinction between the who and the what comes to the fore in Cadmus' denial of who Agave is, a huntress, a revolutionary leader to a what, a daughter, a wife and mother. By doing this, he relocates her, dismembers and reassembles her, she is 'repatriated to patriarchy'. He restores her to his sensibility, kills the world that she created in order to make her legible to him.

Honig writes:

> … we know from Cadmus' example how the conventional center holds on to power in the face of such challenges when they come home: by turning such heterotopias into sites of madness of exception and reinserting wayward women into their proper locations in the structural map of patriarchal kinship.[50]

Ultimately Honig refabulates the story of the Theban bacchants: The women rejected confinement to work and labour; seeking more freedom-intimating moments; they flee the city; however, they wanted more than flight, something more lasting, an alternative, so they joined a chorus; and at the Cithaeron rehearsed new ways of being.[51] Honig suggests that the women wanted to establish equality in the city, not only outside the city in an exceptional moment. I sense a connection here with Christof's holding on to the institutional and to what is legitimate. For struggle to result in something that is accepted and that can make a difference it needs some kind of institutional legitimacy. Honig notes: 'Were the women successfully to claim the right to the city, the effect would be a repartitioning of the sensible.'[52] The women were not successful, the city was not ready for them, might not be ready

48 Honig (n 2) 73.
49 Honig (n 2) 75.
50 Honig (n 2) 96.
51 Honig (n 2) 92.
52 Honig (n 2) 93.

for the kind of democracies we seek, but that is not a reason not to try. Recalling Du Bois's notion of 'splendid failure', maybe the 'splendidness of the failure can itself have the power to generate new readings'.[53]

Redemptive transformation

Robert Cover famously asserted the extent to which we create law and live a life of law through our narratives.[54] He insisted that what law teachers mostly tell students about law – 'rules and principles of justice, the formal institutions of the law, and the conventions of a social order' - provides only a partial account of the 'normative universe that claims our attention.'[55] He underscored that no law or legal institution exists in isolation from the narratives within which it is situated and its meaning created. 'For every constitution there is an epic, for each decalogue a scripture.'[56] Law is not simply a system of rules that should be followed 'but a world in which we live.'[57] He notes the extent in which legal interpretation, legal hermeneutics, the question of 'meaning' in law' is often associated with a specific problem on which an official must decide. However, he urges us to see this also differently, and acknowledge that 'the normative universe is held together by the force of interpretive commitments' and that these commitments ultimately decide the meaning and existence of law.[58] Legal orders and principles are for him 'signs by which each of us communicates with others.'[59] Cover is a theorist of jurisdiction and thus refers to the role of jurisdiction to construct meaning in our normative world. With reference to *Marbury v Madison* he remarks that '[e]very denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm'.[60] He stresses the important role of legal tradition, which includes language and myth and is 'part and parcel of a complex normative world'.[61] The main difference between Cover and the struggle approach as supported by Christof, is Cover's scepticism about the state and his belief in the power of narratives to make law. At the same time the history of various struggles, resistances against power perform a law making, at least right making role in the struggle approach.

53 Honig (n 2) 96-97.
54 Cover (n 3) 4-68.
55 Cover (n 3) 4.
56 Cover (n 3) 4.
57 Cover (n 3) 5.
58 Cover (n 3) 7.
59 Cover (n 3) 8.
60 Cover (n 3) 8. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).
61 Cover (n 3) 9.

Cover described the law as a 'system of tension or a bridge' that has the task of connecting 'reality' with 'an imagined alternative'.[62] Often reality is perceived as unredeemed. Law, he believes, can bring about transformation. 'Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.'[63] Narratives assist by connecting different force fields, they connect 'the "is", the "ought" and the "what might be".'[64] Cover worked with a number of important and related distinctions: two versions of nomos, the insular and the redemptive; two ways of interpreting law, jurisgenerative and jurispathic; and two patterns/communities, paideic and imperial. Paideic/world creating patterns entail '(1) a common-body of precept and narrative, (2) a common and personal way of bringing education into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.'[65] An imperial/world-maintaining pattern relies on universal norms which are enforced by institutions. Where in paideic patterns law is seen as pedagogic and to understand it translates to obedience, law in the imperial pattern needs not be taught and must be effective. Cover explains that all normative worlds rely on both paideic and imperial patterns. The imperial mode of world maintenance is needed exactly because of the fertile forces of jurisgenesis, which causes 'the problem of the multiplicity of meaning'.[66]

I want to think about the struggle approach to human rights together with Cover's ideas on nomos and narrative. To what extent does the notion of struggle open possibilities for jurisgenesis, for the making of meaning in the interpretation of rights? Can the struggle theory be used to counter jurispathic decisions? De Sousa Santos describes modern law in terms of a tension between emancipation and regulation.[67] The failure of the nation-state caused the collapse of emancipatory ideals, resulting in over-regulation. I see an interesting resemblance between the idea of emancipation and jurisgenesis and regulation and jurispathia. De Sousa Santos strives to revive law's emancipatory ideal. Cover is known for his hope for redemptive transformation. He supports the idea of 'redemptive constitutionalism' to respond to contexts where a transformational politics is needed.[68] In this way there is a shared belief between Cover and Christof about law's potential. Cover, however, underscores the extent to which the jurisgenerative

62 In the South African contact Etienne Mureinik famously invoked the image of the constitution as a bridge, E Mureinik 'Bridge to where? Introducing the interim Bill if Rights' (1994) 10 *South African Journal on Human Rights* 31.

63 Cover (n 3) 10.

64 Cover (n 3)10.

65 Cover (n 3) 12-14.

66 Cover (n 3) 16.

67 De Sousa Santos *Toward a new legal common sense. Law, globalization and emancipation* (Routledge 2002) 2.

68 Cover (n 3) 34.

> process never takes place in isolation of violence. For him courts, 'at least the courts of the state are characteristically jurispathic':[69]
> It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.[70]

Cover responds critically to the sentiment that courts, and their jurispathic function, are needed because of the problem of 'unclear law'. He insists that the problem is rather one of 'too much law', which puts the problem in a totally different light. To acknowledge the problem of too much law is 'to acknowledge the nomic integrity of each of the communities that have generated principles and precepts'.[71] This acknowledgement recognises the role of narratives in the creation of law. To describe the problem as one of 'unclear' law assumes or maybe presumes that there is one correct interpretation, 'a hermeneutic that is methodologically superior to those employed by the communities that offer their own law'.[72] Cover in this time was concerned about what he recognised as 'the statist impasse', which he believed will come to an end. He believed that this will be disrupted by 'some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of indifference or opposition of the state'. Holding on to the belief in the possibility of transformation, he noted:

> Perhaps such a resistance … will reach not only those of us prepared to see law grow, but the courts as well. The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law.

Do we see similar redemptive strands in the struggle approach to human rights? The firm belief that experience can translate in a law, a right that can generate new meaning? We may recall here Christof's coupling of rights with legitimate struggle. Cover notes that 'it is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities.' He urges us to also recognise and distrust the reality of the power of social movements and to examine the worlds of law that they create.[73] He believed that the same way in which constitutionalism gives legitimation to the state, constitutionalism may give legitimation 'within a different framework' to communities and movements.

69 Cover (n 3) 40.
70 Cover (n 3) 40.
71 Cover (n 3) 42.
72 Cover (n 3) 42.
73 Cover (n 3) 68.

Conclusion

My aim in this chapter is to revisit the struggle approach as well as my initial response to it years ago by reading it alongside the work of Honig on refusal and Cover on the power of narratives.

The struggle approach, paideic patterns, jurisgenerative decisions, multiple gestures and fabulations affirm the importance of pluralism, plural accounts, plural histories, plural laws. At a time where the search for justice continues to be thwarted, the search for more than one, for alternatives, for alterity holds some hope. These reflections, although different from one another, share in varying degrees a commitment to the institutional, whether in the form of legitimate struggle, jurispathic courts or a return to the city. The importance of struggle, resistance, anarchy and refusal as sources of law comes to the fore even though our attempt to create law may fail splendidly, and the violence of the state lurks.

A difference between Cover, Honig and Christof is that where Christof relies on the history of world events and grand narratives, Cover recalls myth and Honig tragedy and rely on community and the everyday as source. Cover and Honig find themselves in the realm of narrative, stories and fabulation where Christof recalls evidence-based actions.

In the many tributes that followed after Christof's unexpected and untimely passing he was described as someone who had not only ideas but who made work to translate those ideas into material and practical plans. My sense is that the struggle approach is another example of Christof's method of making ideas real. For some there is a certain reduction, a violence in the translation of the conceptual to the real but that does not take away the respect for the brave ones like Christof who dare to be bold. As I was thinking, reading and writing I wished, like many others I am sure, for another opportunity to talk to Christof in the hall-ways of the law building, at a faculty festival with a beer in the hand or in Stilbaai.

> Up until now: up until now, in sum, and still just a second ago, we were speaking of life's brevity. How short life has been, too short in advance … Up until now we have been speaking of the infinite precipitation into which an eschatological sentiment of the future throws us. Imminence, a world is drawing to a close, fatally, at a moment when, as we were saying a moment ago, things have only just begun: only a few brief millennia, and it was only yesterday that 'we were friends' already.[74]

74 Derrida (n 44) 271.