

## Editorial

### Special focus

This edition of the *African Human Rights Law Journal* starts with a 'Special focus' on the 'Forty years of the African Charter on Human and Peoples' Rights: Honouring the memory of Christof Heyns'. The African Charter on Human and Peoples' Rights (African Charter) was adopted by the OAU Assembly of Heads of State and Government in Nairobi, Kenya, on 27 June 1981 – forty years ago in 2021. The 'special focus' marks this milestone. It also pays tribute to a baobab on the landscape of international human rights law, Professor Christof Heyns.

The special focus brings together eight papers delivered at a conference organised by the Centre for Human Rights (Centre), Faculty of Law, University of Pretoria (UP), in collaboration with the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). These papers were later converted into articles, peer-reviewed and are published here. The Conference, with the theme '40 years of the African Charter: Honouring the memory of Christof Heyns', took place virtually on 2 July 2021. Professor Christof Heyns, a previous Director of the Centre and Dean of the Faculty of Law, University of Pretoria (UP), was recognised internationally for his influential role as Special Rapporteur on extrajudicial, summary or arbitrary executions, and member of the UN Human Rights Committee. He passed away unexpectedly on 28 March 2021, aged 62. At the time of his passing, he was the Director of the Institute for International and Comparative Law in Africa (ICLA), at UP. His death was a great loss to international human rights law and the associated community of scholars and practitioners. Christof was a beloved friend and an inspirational colleague to many. Although he is sorely missed, his legacy lives on – also in this issue of the *African Human Rights Law Journal*.

Christof left a lasting footprint on the African regional human rights landscape. His legacy encompasses multiple elements. He was pivotal in establishing the Master's degree programme in Human Rights and Democratisation in Africa (HRDA) at the Centre. This programme has since 2000 grown into a flagship academic programme with continental reach, shaping African human rights professionals to be agents for social change. Christof contributed to human rights education through his unyielding advocacy of moot court competitions, including the African Human Rights Moot Court Competition. The African Moot is aimed at giving exposure to the African Charter and the jurisprudence of the African Commission and the African Court. Christof cultivated scholarship on the African regional system. He did so as co-founding editor of the *African Human Rights Journal*, 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. His research and writing on the impact of human rights treaties also has relevance for Africa. Christof has on several occasions served as technical adviser on human rights to the African Commission, in particular, in developing its influential General Comment 3 on the Right to Life. 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'.

Twenty years ago, in March 2001, the Centre for Human Rights organised a conference with the title 'The future of the African regional human rights system' to reflect on the achievements of the system and the need for reform to further human rights on the African continent. This conference took place at the 20-year mark since the adoption of the African Charter. At the time, Christof was the director of the Centre. Papers from the conference were published in the second issue of the then newly launched *African Human Rights Law Journal*. Christof was also the author of a seminal paper, 'The African regional human rights system: In need of reform?', delivered at the conference and published in that issue. In the article, Christof noted that engaging in debates about reform of the African regional human rights system 'is to exercise a form of ownership, and to say that since the Charter belongs to all of us, it is up to us to continuously ensure its improvement.' In the 20 years thereafter, the Centre, Christof, and the *Journal* continued their various levels of 'engagement' with the Charter, specifically, and the African regional human rights system, more broadly.

The first of the eight articles in the Special Focus is penned by Solomon Dersso, who at the time the conference took place was the Chairperson of the African Commission. Solomon Dersso is also a 2003 graduate of the HRDA programme that Christof initiated. His contribution 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights', sets the tone for the discussions in the 'special focus', and contextualises the need for ongoing reform against the background of the COVID-19 pandemic. Okafor and Dzah add their voices to the growing scholarly literature to draw attention – and critically examine – the innovative normative inflections that the Charter brought ('The African human rights system as "norm leader": Three case studies'). They discuss three innovative features of the Charter: the right to remedial secession (on the basis of self-determination); development as a right; and the inclusion of a justiciable right to development.

Rudman shifts the focus to the African Court, which was added to the African human rights system to complement the work of the Commission in 2006. The year 2021 therefore also represented 15 years since the first 11 Judges were elected to this Court, in 2006. One of the major innovations in the Protocol to the African Charter on the Establishment of an African Court (Court Protocol) is the extensive material jurisdiction of the Court, which under article 3(1) of the Protocol includes non-AU treaties ratified by states before the Court. In her contribution ('The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights'), Rudman shows that the fear of the Charter being relegated to 'just one treaty among many' – an apprehension shared by Christof in his 2001 article – was misplaced.

Orao and Durojaye review thematic issues that are at the heart of the Charter in their articles. Orao links the right to life and freedom of assembly ('Protecting the right to life during assemblies: Legal and jurisprudential developments in the African human rights system'), in the process drawing attention to two of the themes defining of Christof's work within the UN. Durojaye elaborates on the role of the African Commission in providing an autochthonous interpretation of one of the socio-economic rights in the Charter, the right to health ('An analysis of the contribution of the African human rights system to the understanding of the right to health'). He also underlines the importance of prioritising the social determinants of health in the ongoing interpretation of this right.

Since the adoption of the Charter in 1981, significant normative expansion has taken place, taking the form of three Protocols to the African Charter. One of these is the 2016 Protocol on the Rights of Older Persons in Africa. Although requiring only 15 ratifications for its entry into force, this Protocol is still far from becoming operational. With reference to the COVID-19 pandemic, Oamen and Ekhaton show the disproportionate impact of COVID-19 on the lives of older person, affecting for example their rights to social security, health and equality. On this basis, they call for the increased acceptance of this Protocol by state parties to the Charter ('The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons').

The two final contributions in the 'special focus' part of this edition deal with the reparations and post-reparations phases, respectively. Sánchez interrogates the 'right to reparations' in the jurisprudence of the African Court ('The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court'), while Murray and Long investigate the African Commission's actual and potential role in the implementation of its decisions ('Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?'). While the Commission has over the last decade or so taken a variety of measures to monitor the implementation of its own decisions, Murray and Long argue that these actions are disparate and lack strategic direction and being institutionally embedded.

## Articles

The second part of this issue of the *Journal* consists of 15 articles and a discussion of recent developments pertaining to human rights in Africa.

The first two articles are devoted to issues of general and continent-wide relevance. Analysing the 'business and human rights' and 'corporate social responsibility' approaches against the background of the UN Guiding Principles of Business and Human Rights, Amodu highlights the shared objectives of these two approaches, and calls for the development of an integrated victim-centred accountability remedial framework.

Although the impact on Africa of the COVID-19 pandemic has been relatively contained, as in other parts of the world it did highlight inequality, and placed in stark relief pre-existing governance

challenges. Taking a continental view, Agaba shows how COVID-19 was being exploited to clamp down on opposition politics, and charts the economic implication of the misuse of funds dedicated to curb the effect of COVID-19.

Two contributions are comparative in nature, both involving South Africa and another African country.

Jordaan compares the performance of Rwanda, an 'authoritarian state', and South Africa, a 'liberal democracy', during their tenure as members of the United Nations Human Rights Council. He shows that between 2017 and 2019 Rwanda took positions more supportive of human rights than South Africa did and concludes that this finding contradicts the expected correlation between human rights adherence at the domestic and international levels. Rosenberg draws insights about the best approach to curbing unsafe infant abandonment from a comparison of the mechanism in place in Namibia and South Africa, and concludes that South Africa should urgently introduce 'baby savers' and 'baby safe havens' to prevent the death of abandoned infants. This comparison is particularly apt, since Namibia initially (as South West Africa) adopted the laws of its colonial neighbour, from which it has since departed.

The remaining articles all consider particular aspects of human rights in so far as they relate to specific African countries. Following the Khartoum Agreement between the government and armed groups in 2019, the issue of transitional justice in Central African Republic (CAR) is being debated. Sadiki considers various alternatives to transitional justice in the CAR and concludes that, wherever a combination of options is adopted, the overall capacity of the state has to be significantly buttressed. Buzard analyses ethnocentric nationality in the Democratic Republic of the Congo by assessing the tie between birth-right citizenship and ethnicity to three international human rights treaties to which the state has committed itself. He argues that this apparent violation is actionable under the DRC Constitution, which accords to international treaties a status superior to that of domestic law.

The Constitution of Ethiopia (in article 43(3)) contains a right to sustainable development. Acknowledging that the provision is unclear, Mekonnen expands on his understanding of the right holders and duty bearers, as well as the justiciability and binding nature of the right. The author concludes that the government has a 'soft constitutional obligation' to protect national development-related interests, starting with adopting policy and legislative measures that protect 'development-related national interests'.

As is often the case in this *Journal*, a number of contributions deal with human rights in Nigeria. Adegbite argues that Nigerian abortion laws should be rethought to account for the prevalence of sexual violence, an issue that has been foregrounded by the heightened prevalence of rape by Boko Haram insurgents. She argues that an expansive approach of the phrase 'preservation of the mother's life' be adopted to also take into account the psychological and social well-being of pregnant women. Adeyemo considers the right of victims of core international crimes in Nigeria to reparation. The author critically examines the latest legislative attempt to domesticate the Rome Statute, and recommends that the Bill be reviewed to provide more comprehensive reparation to potential victims of international crimes. In their contribution, Oamen and Erhagbe argue that international cooperation and assistance can and should complement (and not substitute) the Nigerian government's efforts to ameliorate the impact of climate change on economic and social rights realisation in Nigeria. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Olumese interrogates the impact of this provision on health care in Nigeria, and calls for judicial interpretations foregrounding the connection between the right to health and the right to life.

Two contributions concern South Africa. The first concerns a decision by the Gauteng Division of the South African High Court in a case concerning Grace Mugabe. The Court decided that Grace Mugabe was not entitled to derivative immunity, on the basis that her husband (President Robert Mugabe) would not have enjoyed personal immunity under the same circumstances. Disagreeing with the Court's finding, Dyani-Mhango contends that South African law recognises absolute personal immunity for incumbent foreign heads of state in respect of all crimes committed in South Africa, except international crimes. In another article and against the backdrop of the lockdown due to the COVID-19 pandemic, Eloff analyses the rationality test in South African constitutional litigation with reference to three decided cases (one by the Supreme Court of Appeal and two by the Gauteng Division of the High Court).

Uganda is the area of focus of the last two authors. Deriving from the Ugandan Constitution what he coins the right to 'unlove', Kabumba makes the case that no-fault divorce is in line with the Ugandan Constitution. He argues that fault-based divorce violates constitutional rights, such as the right to privacy and the rights of women and children, and that it is not justifiable under article 43 of the Constitution. He recommends that 'the law should let human being be human'. Namwase examines the role of public interest litigation and structural interdicts to secure law reforms related to the use of force in the context of police militarisation in Uganda. This article focuses on the right to life, which has been one of Christof Heyns' abiding professional and scholarly concerns.

In the section on 'recent developments', Makunya provides an overview, identifies trends and draws lessons from of the 55 decisions delivered by the African Court in 2002. In particular he notes the Court's position, manifest in its multiple findings on election-related human rights violations, against 'manipulations of electoral and constitutional norms to consolidate personal rule'.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001, especially as anonymous reviewers. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Ernest Yaw Ako; Jean Allain; Evelyne Asaala; Zemelak Ayele; Victor Ayeni; Seun Bakare; Gina Bekker; David Bilchitz; Yonas Birmeta; Amanda Boniface; Martha Bradley; Lydia Chibwe; Danwood Chirwa; Kobina Daniel; Ebenezzer Durojaye; Eghosa Ekhator; Omotunde Enigbokan; Oludayo Fagbemi; Charles Fombad; James Fowkes; Charlemaine Hüsselmann; John-Mark Iyi; Ademola Jegede; Matilda Lasseko-Phooko; Sandra Liebenberg; Roopanand Mahadew; Trésor Makunya; Stuart Maslen; Nelson Mbu; Gladys Mirugi-Mukundi; Tom Mulisa; Jan Mutton; Robert Nanima; Maria Nassali; Carol Ngang; Mwiza Nkatha; James Nkuubi; Godwin Odo; Godfrey Odongo; Chairman Okoloise; Benson Olugbuo; Ohio Omiunu; Thomas Probert; Adamantia Rachovitsa; Ben Twinomugisha; Martin van Staden; Jane Wathuta; Cori Wielenga; and Amy Wilson.