DE JURE LAW JOURNAL

VOLUME 54 2021

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Articles

On "Dumping" and the Competition Act of South Africa: No "double remedy"

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SUMMARY

In "'Dumping' and the Competition Act of South Africa", Vinti espouses that the Competition Commission has jurisdiction over the actions of extra-territorial parties insofar as such actions involve "prohibited price discrimination" or "price dumping". He finds that the Competition Act and the International Trade Administration Act both bestow jurisdiction over the matter and hence argues that this would constitute an unfair double remedy if both authorities were to take action. He therefore proposes, on the basis of a Memorandum of Agreement that has been concluded between the Competition Commission and the International Trade Administration Commission, that either of the Acts should be amended to ensure that no such double remedies are imposed. Although it is agreed that such "double remedy", if applied, would indeed be unfair for several reasons, this article argues that no such double remedy exists and that, despite the provisions of the Competition Act, the Competition Commission has no jurisdiction in matters related to dumping.

1 Introduction

Vinti argues that there is dual jurisdiction in cases where dumping causes injury to a domestic industry, as the Competition Commission and the International Trade Administration Commission (ITAC) could have concurrent jurisdiction and that this could result in "double remedies" being imposed against dumped imports.[1] While it is recognised that such double remedies would be unfair to the affected parties, it is submitted that, regardless the wording of the Competition Act, as a result of South Africa's international obligations, the Competition Commission does not have any jurisdiction in these matters and that no double remedies exist. It is further argued that there are significant differences between the like provisions in the competition and anti-dumping legislation, respectively, so that even if the Competition Commission did have jurisdiction, it could never apply the relevant provisions to exporters.

To illustrate this, this paper is divided into four parts: the first part of the paper provides a brief overview of the issues at stake and defines the relevant terms. Part two considers the relevant anti-dumping and

1 Vinti "'Dumping' and the Competition Act of South Africa" (2019) *De Rebus* 207.

How to cite: Brink 'On "Dumping" and the Competition Act of South Africa: No "double remedy"' 2021 *De Jure Law Journal* 1-15
http://dx.doi.org/10.17159/2225-7160/2021/v54a1

competition legislation, and evaluates whether the corresponding legal provisions, specifically those relating to price discrimination and sales below cost, have the same meaning; part three considers South Africa's international obligations and international jurisprudence in this regard; and the final part of the paper offers a conclusion.

As Vinti has correctly indicated,[2] South Africa is a founding Member of the World Trade Organization (WTO). Therefore it is bound, at least at international level, by the WTO Agreement and all its covered agreements, including Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement).[3] With the exception of GATT,[4] these agreements have not been promulgated as part of South Africa's municipal law and therefore only finds external application.[5] However, South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITA Act) and its accompanying Anti-Dumping Regulations (ADR),[6] as well as chapter VI of the Customs and Excise Act 91 of 1964, to give domestic effect to its international obligations in this regard.[7]

Conceptually, there is only one form of dumping.[8] Dumping takes place when the export price from a country[9] is less than the normal value of that product.[10] The normal value is usually determined with reference to the domestic selling price of the product in the exporting country.[11]

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2 Vinti (2019) 208-209.

3 See *Chairman Board on Tariffs and Trade v Brenco* 2001 (4) SA 511 (SCA) 28-29; *Progress Office Machines v SARS* [2007] SCA 118 (RSA), para 6; *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* (Case 98/6589 T) 29; Eisenberg 'The GATT and the WTO Agreements: Comments on their legal applicability to the Republic of South Africa' (1993) 19 *South African Yearbook of International Law* 127.

4 See Geneva General Agreement on Tariffs and Trade Act, 29 of 1948. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) note 1.

5 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

6 Anti-Dumping Regulations, GN3197 in GG25684 of 14 November 2003.

7 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

8 Note that Vinti argues that "[t]here are two forms of 'dumping': the first is 'international price discrimination', which occurs through 'price discrimination by the investigated producer between the domestic and export markets'. The second form is 'cost dumping', which occurs when an exporter sells products in an importing country at below the cost of production." (footnotes omitted) Vinti (2019) 207.

9 For purposes of this article, "country" includes customs territories and customs unions.

10 Art VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994); Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

11 Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

This is why dumping is also referred to as international price discrimination.[12] However, when this price cannot be used,[13] the normal value may be determined, in any order,[14] either on the basis of the comparable export price of the product to an appropriate third country or on the basis of a constructed value.[15] It is this final methodology, the constructed normal value, that Vinti refers to as "cost dumping"[16] and that he equates to certain prohibited practices under the Competition Act.[17]

2 Legislative provisions and jurisdiction

2 1 Anti-dumping legislation

The ITA Act defines dumping as "the introduction of goods into the commerce of the Republic or the Common Customs Area [of the Southern African Customs Union] at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2), of those goods". Section 32(2)(b) then defines normal value as

> i the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
> ii in the absence of information on a price contemplated in subparagraph (i), either-
>
> (aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
> (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.

It must be noted that dumping is neither illegal, nor prohibited.[18] However, if dumping causes injury, as defined in the Anti-Dumping Agreement and the ADR, to a domestic industry producing the like

12 See e.g. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513 (Appellate Body Report, *US – Stainless Steel (Mexico)*), paras. 87, 88, 90, 91, 94, 95, and n 208; Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R, adopted 27 January 2020 (*Australia – A4 Copy Paper)*, para 7.64.

13 See Art 2.2 of the ADA and its sub-paragraphs, and Anti-Dumping Regulations (ADR) 8.2 and 8.3 for reasons not to rely on the domestic selling price. See also Brink *Anti-dumping and countervailing investigations in South Africa* (2002) 43-45; Brink *A theoretical framework for South African anti-dumping law* (LLD thesis 2004 UP) 773-774.

14 GATT *Report of the Group of Experts on Anti-Dumping and Countervailing*, para. 148; GATT Panel *US – Atlantic Salmon AD*, paras. 392-393; GATT Panel, *EC – Cotton Yarn*, para. 482; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95; Panel Report, *US – OCTG (Korea)*, para 7.15-7.16.

15 Art VI:1(b) of GATT 1994; Art 2.2 of the Anti-Dumping Agreement, s 32(2)(b)(ii) of the ITA Act.

16 Vinti (2019) 210.

17 S 8(d)(iv) of the Competition Act 89 of 1998

product, then an anti-dumping duty equivalent to, or lower than, the margin of dumping, that is, the difference between the normal value and the export price, may be imposed to level the playing fields and protect the domestic industry from the unfair trade.[19]

South Africa is also a signatory to both the GATT 1994, which has been incorporated into South Africa's domestic legislation,[20] and to the Anti-Dumping Agreement, which has not been incorporated into its domestic legislation.[21]

2 2 Competition legislation

In contrast, the Competition Act 89 of 1998 provides that a dominant firm may not sell goods or services "at predatory prices".[22] The Competition Act regards predatory prices as prices below a company's "average avoidable cost" or "average variable cost".[23] Effectively, this means that a company may not sell a product below its marginal or average variable cost. In addition, the Competition Act provides that prohibited price discrimination exists where a dominant firm "involves in discrimination between … purchasers in terms of the price charged for the goods".[24] However, the latter is not regarded as prohibited price discrimination if it relates to an act "in good faith to meet a price or benefit offered by a competitor",[25] "is in response to changing conditions affecting the market for the goods… concerned",[26] including

18 Art VI:1 of GATT 1994 provides that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party…" (own underlining). Art VI of GATT 1994 and the Anti-Dumping Agreement do not contain any provisions on limiting dumping, but contain provisions on how to apply anti-dumping measures. Thus, it prescribes how investigations against dumping should be conducted, rather than to address dumping as such. See also Hailsham, Lord *Halsbury's Laws of England* 4th ed. (Volume 51) (1986) 489; Hudec 'United States Compliance with the 1967 GATT Antidumping Code' in Michigan Yearbook of International Legal Studies (1979) *Volume 1: Antidumping Law: Policy and Implementation* 205.

19 Art VI:1 of GATT 1994; Art 9.1 of the Anti-Dumping Agreement; ADR 1, 12 and 65.

20 Geneva General Agreement on Tariffs and Trade Act 29 of 1948. Technically, this incorporated GATT 1947 into South African legislation, but as regards anti-dumping, there have been no changes between Art VI of GATT 1947 and GATT 1994.

21 See the references in n 4.

22 S 8(d)(iv) of the Competition Act 89 of 1998.

23 S 1 of the Competition Act 89 of 1998. "Average avoidable cost", in turn, is defined as "the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output", while "average variable cost" is defined as "the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product". *Idem*.

24 S 9(1)(c)(i) of the Competition Act 89 of 1998.

25 S 9(2)(b) of the Competition Act 89 of 1998.

26 S 9(2)(c) of the Competition Act 89 of 1998.

because of "any action in response to the actual or imminent deterioration of perishable goods"[27] and "any action in response to the obsolescence of goods".[28]

Vinti argues that:

> "a foreign 'dominant firm', which has engaged in prohibited price discrimination or cost dumping, will have simultaneously violated the [Competition] Act and the anti-dumping law of South Africa. This may mean that a foreign producer may face the unpalatable prospect of both an administrative penalty imposed by the Competition Tribunal and an anti-dumping duty from the International Trade Administration Commission (ITAC). This would constitute a 'double remedy'. The government of South Africa would in essence, be penalizing the same injury twice. This means that there is an overlap between the jurisdictions of ITAC and the Competition Commission."

2 3 Prohibited price discrimination

Under the ADA and the ITA Act, any exporter can dump, that is, engage in price discrimination, and an anti-dumping duty may be imposed, provided the margin of dumping exceeds two per cent.[29] Furthermore, the dumped imports must have caused injury.[30] Under the Competition Act, only a "dominant" supplier can engage in the prohibited activity of price discrimination. While there are virtually no provisions in anti-dumping law regarding the size of the company practicing dumping, that is, price discrimination,[31] under the Competition Act a firm is only dominant if it has acquired at least 35 per cent market share.[32]

More often than not, in anti-dumping investigations the exporter is not a dominant supplier. For instance, an analysis of the five most recently completed original[33] anti-dumping investigations shows the following:

In the *Frozen Bone-in Portions* investigation, anti-dumping duties were separately imposed on ten exporters, while a further three exporters were found not to be dumping, and a residual anti-dumping duty was also imposed against non-cooperating exporters in each of the three

27 S 9(2)(c)(i) of the Competition Act 89 of 1998.
28 S 9(2)(c)(ii) of the Competition Act 89 of 1998.
29 Art 5.8 of the Anti-Dumping Agreement; ADR 12.3
30 Art 3 of the Anti-Dumping Agreement; ADR 13 and 16.
31 Art 5.8 of the Anti-Dumping Agreement provides that dumped imports would be negligible, and that an investigation would have to be terminated immediately without any anti-dumping measures imposed, where dumped imports from the *country* represent less than three per cent of the total volume of imports of that product in the importing country. Thus, negligibility applies on a country-wide basis, rather than on a company-basis. The same provision has been incorporated into South African municipal law through ADR 16.2.
32 S 7 of the Competition Act. Note that above 45%, this is irrefutable, while it is refutable between 35% and 45%. See e.g. Vinti 211.
33 This relates to the original investigations, that led to the imposition of anti-dumping measures, as opposed to any later reviews of such measures.

countries subject to investigation.[34] Bearing in mind that, worst case scenario, all the exporters combined represented less than twenty per cent of the total SACU market for bone-in chicken,[35] it is clear that none of the exporters could be regarded as a "dominant supplier". Accordingly, the Competition Act would not have found application in this investigation.

In *Wheelbarrows*, the report identifies two exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.[36] However, imports increased from 165,410 units in the first year under review to 540,710 units in the final year under review,[37] and although the domestic industry's market share decreased as a result,[38] the domestic industry's actual sales volume increased by between seven per cent[39] and 31 per cent[40] over the same period, again confirming that none of the exporters was a "dominant supplier".

In *Cement*, the report identifies four exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.[41] Imports had increased from 142,806 kg in the first year under review to 1,091,235 kg in the final year under review,[42] but this led to a decrease of only nine per cent in the domestic industry's market share[43] as the industry increased its sales over the investigation period.[44] This confirmed that none of the exporters was a "dominant supplier".

In *Float glass*, the report identified four exporters, although only three of them submitted proper responses that were taken into consideration.[45] The report separately provides import data for the four products that form the product under investigation, but failed to provide a consolidated set of data. Although this does not provide an accurate analysis, the author has simply added the volume of imports for each of

34 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK*), 85, Table 8.3.

35 This is based on allegations by the South African Poultry Association, the applicant in the investigation, as is evident from the public file in the investigation. Note that ITAC Report 502 Table 5.5.4 indicates that the applicant's market share *increased* by 5% over the investigation period, despite dumped imports growing 38-fold and its market share growing 33-fold (whereas other imports had decreased by 63%).

36 ITAC Report 502 – *Wheelbarrows (China*), para 1.7.2. The fact that a residual anti-dumping duty was imposed on other exporters from China indicates that there were other exporters from that country.

37 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.1.

38 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.4.

39 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.1, Table 5.2.3.1(a).

40 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.1, Table 5.2.3.1(b).

41 ITAC Report 512 – *Cement (Pakistan*), para 1.8.2. The fact that a residual anti-dumping duty was imposed on other exporters from Pakistan indicates that there were other exporters from that country.

42 ITAC Report 512 – *Cement (Pakistan*), para 5.3.1.

43 ITAC Report 512 – *Cement (Pakistan*), para 5.3.3.4, Table 5.3.3.4(c).

44 ITAC Report 512 – *Cement (Pakistan*), para 5.3.3.2, Table 5.3.3.2(c).

45 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 1.8.2.

the four products to determine the total volume of float glass imports in square metres.[46] On this basis, the alleged dumped imports increased from 3,022,146 m^2 in 2016 to 3,630,256 m^2 in 2018. In 2018, there a total of 475,874 m^2 were also imported from other sources.[47] The domestic industry consisted of a single producer, and its indexed sales for three of the four products decreased by nine, thirteen and four per cent, respectively, while sales increased by eighteen per cent for the fourth product.[48] For the first product, which accounted for 62 per cent of all dumped imports by surface area, the alleged dumped imports had increased by 28 per cent, yet the decrease in the industry's market share was only nine per cent, indicating that the single domestic producer was still at least three times as big as all the exporters combined. This again shows that there was no "dominant supplier".

In *PET*, the report identifies six exporters from China,[49] while there were also imports from other countries.[50] On the one hand the report indicates only a single domestic producer,[51] but on the other it indicates that the rest of the industry's market share increased.[52] There is no indication of the relative size of the applicant and other producers. While the applicant's market share decreased by nearly 50 per cent over the period,[53] the market share of the dumped imports increased by 33 per cent. However, the market share of non-dumped imports increased by more than 200 per cent, and non-dumped imports amounted to 88 per cent of the volume of dumped imports, thus indicating that dumped imports only constituted only 53.3 per cent of total imports.[54] Accordingly, with several producers from several countries combined gaining less than 50 per cent of the applicant's market share (and bearing in mind that there were other producers in South Africa as well), and that nearly half of the exporters were either not accused of dumping or found not to be dumping,[55] it is clear that there were also no dominant exporters in this investigation and that the Competition Act would not find application.

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46 This is not an accurate way to determine the volume of imports, as the industry's capacity is measured by weight, rather than surface area. The report does not indicate the conversion rates for the different products, which are differentiated by thickness, from surface area to weight.

47 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 5.3.1. Bearing in mind that "other imports had decreased from 782,134 m^2 in 2016 to 475,874 m^2 in 2018, a decrease of 306,620 m^2, while the dumped imports increased by 608,110 m^2, it follows that the dumped imports to a large extent replaced other imports rather than take market share away from the domestic industry.

48 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 5.4.1.

49 ITAC Report 621 – *PET (China)*, para 1.7.2.

50 ITAC Report 621 – *PET (China)*, paras 5.3.1 and 5.4.3.

51 ITAC Report 621 – *PET (China)*, para 1.7.1.

52 ITAC Report 621 – *PET (China)*, para 5.4.4.

53 ITAC Report 621 – *PET (China)*, para 5.4.4.

54 ITAC Report 621 – *PET (China)*, para 5.3.1.

55 ITAC Report 621 – *PET (China)*, para 4.3.4.

In view of the above, it is submitted that there would be very few, if any, instances where an exporter that dumps could be regarded as a "dominant supplier" as defined by the Competition Act. Accordingly, even if an exporter's actions fell foul of what would constitute prohibited actions if it were a dominant supplier, its actions would not fall within the ambit of the Competition Commission.

In addition, the Competition Act provides that price discrimination is not regarded as prohibited price discrimination if it relates to an act "in good faith to meet a price or benefit offered by a competitor".[56] Although no tangible proof exists, anecdotal evidence suggests that in many instances, dumping to South Africa takes place where an importer approaches an exporter with a purchase order at a price that would meet the price of either the domestic producer(s) or other importers.[57]

2 4 Sales below cost

In terms of the Competition Act, a dominant firm may not sell goods at predatory prices,[58] that is, below their "average avoidable cost" or "average variable cost".[59] Under anti-dumping legislation,

> "Domestic sales or export sales to a third country may be considered to be not in the ordinary course of trade if the Commission determines that such sales–
>
> a took place at prices below total costs, including cost of production and administrative, selling, general and packaging costs, provided such sales took place –
> i in substantial quantities equalling at least 20 per cent by volume of total domestic sales during the investigation period; and
> ii over an extended period of time, which period shall normally be a year, but in no case less than 6 months."[60]

There is a clear distinction between these provisions. The average avoidable or variable cost in the Competition Act refers to the additional cost incurred to produce one more unit.[61] This includes the bill of materials, that is, the volume and price of the different raw materials, as well as any additional direct (variable) costs, such as additional consumables, labour, energy and packaging material. However, this does not extend to indirect or fixed costs, such as fixed labour costs, depreciation, maintenance, rent and insurance, administration costs or any costs related to the sales of the product. Under anti-dumping law, however, the costs refer to the total costs to produce and sell a product. This means that it not only includes the variable cost of production, but

56 S 9(2)(b) of the Competition Act 89 of 1998.
57 This is evident from the comments of various importers in anti-dumping investigations.
58 S 8(d)(iv) of the Competition Act 89 of 1998.
59 S 1 of the Competition Act 89 of 1998.
60 ADR 8.2. See also Art 2.2 of the Anti-Dumping Agreement, where the provisions are slightly different.
61 Vinti (2019) 213.

also the fixed costs, the general office overheads and all costs incurred in selling the product. Therefore, there is a very significant difference in when a product will be regarded as being sold below cost under competition law and under anti-dumping law.

In addition, under anti-dumping law, where an exporter sells products on its domestic market at below the total cost thereof, it has to be determined whether such sales took place in significant quantities, such quantities being at least 20 per cent of the total sales on a product-by-product basis.[62] If fewer than 20 per cent of sales, on a product-by-product basis, were sold below cost, those sales must, by law, still be included in the determination of the normal value that is used to determine whether dumping is taking place. Thus, not all sales at a loss are deemed to be unfair or "prohibited".[63] Furthermore, such sales at a loss must also be made over an extended period of time, normally a year, but not less than six months, and must not provide for the recovery of all costs within a reasonable period of time before they may be rejected.[64] On the other hand, where there are targeted sales to South Africa below the price at which the same product is exported to other importers in South Africa, the ITAC may use a different methodology to determine the margin of dumping.[65] Therefore, rather than using the usual weighted average normal value-to-weighted average export price to determine the margin of dumping,[66] or even the alternative transaction-to-transaction methodology,[67] it may compare a "normal value established on a weighted average basis … to prices of individual export transactions if [ITAC] finds a pattern of export prices which differ significantly among different purchasers".[68]

In the *Frozen Bone-in Portions* investigation,[69] the ITAC found that one of the German producers sold some products on its domestic market at less than the full cost of that product. However, it found that such "sales were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model … were used for normal value determination."[70] As regards one of the Dutch exporters in the same investigation, it "made a final determination to disregard sales at a loss, by volume exceeding 20 percent of total domestic sales during the period

62 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.
63 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.
64 ADR 8.2. See also, Art 2.2 of the Anti-Dumping Agreement.
65 Art 2.4, last sentence, of the Anti-Dumping Agreement; ADR 11.6; Board Report 4054 – *Sutures (Germany)*; Brink (2004) 832-833.
66 ADR 11.5, first part of the sentence.
67 ADR 11.5, second part of the sentence.
68 ADR 11.6, read with ADR 11.7.
69 Note that there is no reference to below cost sales in ITAC Reports 502 – *Wheelbarrows (China*), 512 – *Cement (Pakistan*), or 615 – *Float glass (Saudi Arabia, United Arab Emirates*).
70 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK*), 31, para 4.1.4(a).

of investigation for dumping in accordance with ADR 8.2."[71] For yet another producer, the ITAC found that

> "Some of the sales of the two comparable models sold in the Netherlands were sold below cost. For model legs, [sic] sales made at a loss were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model were used for normal value determination. For wings A-grade, sales made at a loss were found to be more than 20 percent by volume of domestic sales. [ITAC] made a final determination to disregard the sales made at a loss, by volume exceeding 20 percent of total domestic sales during the period of investigation for dumping…"[72]

Of significance from these findings is the different treatment accorded by the Competition Commission and the ITAC to sales below cost. For the Competition Commission, the relevance of sales below cost are those sales that were made below cost on the South African market. These sales are deemed to be prohibited, if made by a dominant supplier. For the ITAC, the question is whether the exporter makes sales at prices below cost *on its own domestic market*, that is, not in South Africa. If the volume of those below-cost sales are below the 20 per cent threshold, even these below-cost sales are included in the determination of the normal value. However, where below-cost sales reach the threshold, the ITAC will exclude these sales from the normal value determination. This has the effect of excluding low-priced sales from the calculation, thereby increasing the average normal value. Since the export price to SACU is compared to this weighted average normal value,[73] this has the effect of increasing the margin of dumping and, consequently, the anti-dumping duty that ITAC may recommend. Accordingly, ITAC may indirectly penalise an exporter, whether dominant or not, for selling products below costs on its own market, rather than on the SACU market, even where such sales were not made at prices below average avoidable or average variable cost.

3 International law and South Africa's international obligations regarding protective measures against dumping

3 1 Restriction on remedies that may be used against dumping

In view of the above analyses, it is already clear that notwithstanding the provisions of the Competition Act and the ITA Act, there is little, if any, practical overlap between the jurisdiction exercised by the Competition

71 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 35, para 4.3(a).
72 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 38, para 4.4.1(a).
73 ADR 11.5.

Commission and that exercised by the ITAC. However, it is also necessary to consider South Africa's international obligations in this regard, which completely remove any possible jurisdiction the Competition Commission might have wanted to exercise in respect of international trade.

Article VI of GATT 1994 and the Anti-Dumping Agreement only provide for provisional anti-dumping duties,[74] definitive anti-dumping duties[75] and price undertakings[76] as measures against the unfair trade. This limitation is further expressly limited by Article 18 of the Anti-Dumping Agreement, which provides that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[77] A panel has interpreted this to mean that "a measure will only constitute 'specific action against dumping' if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping, and (2) it acts 'against' dumping, in the sense that it has an adverse bearing on dumping."[78]

This has been confirmed by the Appellate Body, which indicated that there are only three "permissible responses to dumping" available to WTO Members, being definitive anti-dumping duties, provisional duties, and price undertakings.[79]

74 Add Note 1 to Art VI:2 of GATT 1994; Art 7 of the Anti-Dumping Agreement.
75 Art VI:2 of GATT 1994; Art 9 of the Anti-Dumping Agreement.
76 Art 8 of the Anti-Dumping Agreement.
77 Art 18.1 of the Anti-Dumping Agreement; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767 (Appellate Body Report, *Guatemala – Cement I*), paras 79-80.
78 Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US – Continued Offset (Byrd Amendment)*), para 7.18.
79 Appellate Body Report, United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793 (Appellate Body Report, *US – 1916 Act*), para. 137. See also Panel Report, *US – Continued Offset (Byrd Amendment)*, para 7.8. The panel in *US – 1916 Act (Japan)* also remarked that "[e]xcept for provisional measures and price undertakings, the only type of remedies foreseen by the AntiDumping Agreement is the imposition of duties. Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831 (Panel Report, *US – 1916 Act (Japan)*), para 6.216.

The WTO's Dispute Settlement Body has interpreted the possible actions that may be taken against dumping in two separate disputes. The first related the United States of America's pre-existing legislation, dating back to 1916,[80] which criminalised dumping and made provision for punitive damages to be awarded to an affected domestic industry under certain conditions.[81] After a long analysis, the panel found that

> "Article VI:2 of the GATT 1994 provides that only measures in the form of antidumping duties may be applied to counteract dumping as such and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994"[82] and "conclude[d] that the 1916 Act, because it violates Article VI:2 of the GATT 1994 by providing for other remedies than antidumping duties, is not 'in accordance with the provisions of GATT 1994 as interpreted by [the AntiDumping Agreement]', within the meaning of Article 18.1. As a result, the 1916 Act also violates Article 18.1 of the AntiDumping Agreement."[83]

This was confirmed on appeal,[84] with the result that the United States of America was required to bring its Act into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.[85] It follows, therefore, that no criminal action can be brought against dumping and that damages may not be awarded to a domestic industry injured by dumping.

The second dispute in which the WTO's Dispute Settlement Body considered "other" actions against dumping, was *US – Offset Act (Byrd Amendment)*.[86] In this Act, the US adopted legislation in terms of which "offset" payments were (a) "made only and exclusively to US producers that supported an application for an anti-dumping investigation"; (b) "made only and exclusively to US producers 'affected' by an instance of dumping which is the subject of an anti-dumping order"; (c) "paid for 'qualifying expenses' incurred by the affected domestic producers 'after' the issuance of anti-dumping order"; and (d) the 'qualifying expenses'

80 See Title VIII of the United States Revenue Act of 1916, Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72, with the relevant portions also quoted in Appellate Body Report, *US – 1916 Act*, para 129.

81 See Panel Reports, *US – 1916 Act (Japan)*; *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593 (*US – 1916 Act (EC)*); Appellate Body Report, *US – 1916 Act*.

82 Panel Report, *US – 1916 Act (Japan)*, para 6.230 (footnote omitted).

83 Panel Report, *US – 1916 Act (Japan)*, para 6.231.

84 Appellate Body Report, *US – 1916 Act*, para 138.

85 Appellate Body Report, *US – 1916 Act*, para 156.

86 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375 (Appellate Body Report, *US – Offset Act (Byrd Amendment)*; Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US – Offset Act (Byrd Amendment)*.

must be related to the production of a product that is the subject of an anti-dumping order."[87] In this regard, the panel noted that:

> "… at first sight, the [Continued Dumping and Subsidies Offset Act] CDSOA contains no reference to the constituent elements of dumping. Nor are the constituent elements of dumping explicitly built into the essential elements of eligibility for offset payment subsidies. Nevertheless it is clear that CDSOA payments may only be made in situations where the constituent elements of dumping are present. Specifically, CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments. For domestic producers who have qualified for CDSOA payments by having supported the petition for an anti-dumping investigation, and having incurred qualifying expenses in the production of like products, the CDSOA offset payments flow as automatically from the presence of the constituent elements of dumping as do the anti-dumping duties themselves. For this reason, we find that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping. Indeed, this conclusion is even suggested by the reference to 'dumping' in the title of the CDSOA.
>
> In order to avoid any misunderstanding, we wish to emphasise that our finding that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping is in no way based on the fact that offset payments are funded from collected anti-dumping duties. Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph – that offset payments may be made only in situations presenting the constituent elements of dumping."[88]

The panel then evaluated whether the payments to domestic companies that supported action against dumping qualified as action taken "against" dumping, and found that there was "no express requirement that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good such as the importer, exporter, or foreign producer". The panel also noted that there was also no requirement that the action must act "directly" against dumping, but that any indirect action would be included within the scope of Article 18.1 of the Anti-Dumping Agreement.[89] Therefore, the panel concluded that the CDSOA had "an adverse bearing on dumping"[90] as it distorted competition between dumped and domestic products,[91] and as it provided domestic producers with an incentive to lodge or support anti-dumping applications.[92] Accordingly, the US government could not

87 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.19.
88 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.21-7.22.
89 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.33.
90 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.34.
91 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.35-7.41.
92 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.42-746.

"reward" US producers that had been affected by dumping, as this was a violation of the only permissible remedies against injurious dumping.

In view of the above, it is submitted that the remedies available under the Competition Act, in response to prohibited price discrimination by dominant suppliers and sales below costs by a dominant supplier, would violate South Africa's obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement if they were used in response to dumping. As a result, they cannot be applied in this way and, consequently, there cannot be any double remedies against dumping.

3 2 Requirement to treat imported and domestic products the same

Article III of the GATT 1994 provides for national treatment. In essence, this means that an imported and domestic like product must be treated equally and be subject to the same taxes and regulations. No measures may be introduced, other than normal customs duties, to "afford protection to domestic production".[93]

Although there are several paragraphs to Article III of the GATT 1994, two paragraphs are of particular importance: (a) paragraph 2, which provides that the imported product "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products"; and (b) paragraph 4, which provides that the imported product "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Vinti argues that as the anti-dumping law does not apply to domestic firms in the sense that a domestic firm would only be subject to the Competition Act, as opposed to an exporter that would be subject to both the Competition Act and the anti-dumping provisions of the ITA Act and the Anti-Dumping Regulations, this would violate Article III:2 of the GATT 1994.[94] I concur. The same would apply as regards the imposition of measures by the Competition Commission, as these would violate Article III:4 of the GATT 1994.

4 Conclusion

Should a situation arise in which the provisions of the Competition Act on price discrimination or sales below cost are applied against an exporter that is dumping, this would result in a double remedy, which

93 Art III.1 of the GATT 1994.
94 Vinti (2019) 208.

would be unfair.[95] However, there are a number of reasons why it is not foreseen that such a double remedy would ever be applied.

Firstly, the Competition Act refers to price discrimination by a dominant firm, that is, a firm with at least 35 per cent market share. It has been shown that in South Africa's five most recently completed anti-dumping investigations, imports in total seldom met that threshold and that such imports were shared between several exporters. Therefore, there are seldom, if ever, a dominant foreign supplier, with the result that this provision in the Competition Act would not find application.

Secondly, there is a distinct difference in the meaning of "sales below cost" in the Competition Act and in the ITA Act. In the Competition Act, this is restricted to sales below average avoidable or average variable (marginal) costs, whereas under the ITA Act it relates to sales below total cost of production and sale. However, sales at a loss under the ITA Act and the Anti-Dumping Agreement must meet several tests before they may be excluded from the margin of dumping determination. Additionally, as with the price discrimination test, under the Competition Act, this provision only finds application if such sales are made by a dominant firm.

Thirdly, South Africa has incurred international and domestic obligations under Article VI of GATT 1994, and international obligations under the Anti-Dumping Agreement. These obligations include that no remedy other than a provisional duty, a definitive duty and a price undertaking may be imposed "against" dumping. Accordingly, even if a dominant foreign supplier were to practice price discrimination (dumping) in respect of sales to South Africa, the Competition Act would still not find application. Alternatively, if a double remedy were applied, South Africa's trading partners would have recourse to dispute settlement and arbitration under the WTO. Finally, the application of both the Competition Act and anti-dumping legislation to an exporter, but not to a domestic producer, would also be a violation of South Africa's obligations under Article III of GATT 1994, which is part of our domestic legislation.

95 Vinti (2019) 208.

Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe

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SUMMARY

This contribution provides an overview of children's rights adjudication in Zimbabwe with a specific focus on emerging jurisprudence under the 2013 Constitution. After a summary of Zimbabwe's performance in implementing children's rights under both international and African regional law, the authors examine how Zimbabwean superior courts have dealt with the protection of children's rights. In order to give a fair assessment, we begin by reflecting on the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence thus shedding light on how courts conceptualised children's rights in the absence of a specific child rights provision in the Constitution. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution which specifically entrenches children's rights. We focus specifically on cases decided between 2013-2019. A focus on seminal court judgements and how courts adjudicated children's rights will guide the authors in ultimately deciding whether or not Zimbabwean courts have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

1 Introduction

In 2013, Zimbabwe adopted a new Constitution and one of the distinctive features of the Declaration of Rights (DoR) is the unique protection awarded to children.[1] The aim of this contribution is to review and demonstrate the implications of constitutionalising children's rights in Zimbabwe and assess progress made by the courts in the first five

1 S 81 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution) is the children's rights clause, and it does not preclude children from claiming all the other rights in the DoR.

How to cite: Magaya & Fambasayi 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' 2021 *De Jure Law Journal* 16-34
http://dx.doi.org/10.17159/2225-7160/2021/v54a2

years of the Constitution (2013-2019). Given children's particular vulnerabilities and welfarism which dominates children's rights in general, the constitutional protection of children's rights in Zimbabwe cannot be gainsaid. The inclusion of a children's rights clause in the 2013 Constitution is revolutionary for a number of reasons. Firstly, it underscores the status of Zimbabwean children as individual rights holders signalling "a commitment to the recognition of children's rights at the highest level".[2] Secondly, it is opens the door to "an undeniable claim of access to justice for children"[3] and more importantly constitutionalisation sets up children's interests to take centre stage in litigation. In cases of rights violations, constitutionally entrenched children's rights are difficult to ignore and in cases where these rights are in conflict with national laws, entrenched rights enjoy a special status over the other laws.[4] Thus section 81 stands as a powerful legal tool for vindicating children's rights in domestic courts.

The year 2019 marked a five-year milestone after the adoption of the 2013 Constitution, thereby presenting an opportunity to critically reflect on the extent to which the children's rights clause has impacted on the adjudication of children's rights by Zimbabwean courts. This five-year milestone provides an opportunity to advance our understanding of how the courts are engaging with children's constitutional rights. For the child rights movement in Zimbabwe, reviewing the court's performance in the first five years of the 2013 Constitution provides a benchmark from which to measure the court's and the country's progress in advancing children's rights going forward. This milestone is an opportune time to reflect on achievements and address any identified challenges. However, this review is by no means an exhaustive account of the children's rights jurisprudence in Zimbabwe but rather seeks to give a bird's eye view of the development of children's rights through courts with a specific focus on the 2013 Constitution.

This article is organised as follows: in order to paint a holistic picture, the first part begins by looking at Zimbabwe's performance in implementing children's rights under both international and regional law.[5] The objective is to shed light on key child rights issues that Zimbabwe is grappling with. The second part reflects on the old constitutional order – the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence, thus revealing how superior courts conceptualised children's rights in the absence of a constitutional

2 Kilkelly "The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation"2019 *International Journal of Human Rights* 5.

3 Fambasayi "The constitutional protection of child witnesses in Zimbabwe's criminal justice system" 2019 *South African Journal of Criminal Justice* 58.

4 Sloth-Nielsen & Oliel Constitutionalising "Children's Rights and Domestic Courts of Member States of the Council of Europe" (2019) 6.

5 Zimbabwe ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1990 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1995.

children's rights clause. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Lastly, in order to ascertain progress in advancing children's rights, a comparison of case law under the two Constitutions is made and the authors will determine whether Zimbabwean courts, in the period under review, have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

2 International law and children's rights in Zimbabwe

2 1 The place of international human rights in domestic spheres

The domestic application of international law in Zimbabwe is guided by two principles: the monist approach which allows automatic application of international law into municipal law and the dualist approach which provides that international law requires national legislation to be applicable domestically. Zimbabwe follows both a monist and a dualist approach to international law which means customary international law is part of domestic law unless it is inconsistent with the Constitution.[6] However, international conventions, treaties and agreements only have domestic application once transformed into municipal law, approved and incorporated into law by Parliament.[7]

When interpreting the DoR, courts are constitutionally mandated to take into account international law to which Zimbabwe is a party to.[8] Of relevance to this contribution, Zimbabwe is party to the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), as well as other international legal instruments which have a bearing on children rights.[9] Although the UNCRC and the ACRWC have not been domesticated at national level, principles of children's rights laid down in both instruments have found constitutional expression in section 81 of the

6 S 326(1) of the Constitution.

7 S 327(2) of the Constitution. For a general discussion also see Feldman "Monism, dualism and constitutional legitimacy" 1999 *Australian Year Book of International Law* 105.

8 S 46 of the Constitution.

9 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 2013); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (February 2012); the Convention on the Rights of Persons with Disabilities and its Optional Protocol (September 2013); the ILO Convention No. 182 on the Worst Forms of Child Labour (1999); the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (October 2009); the SADC Protocol on Gender and Development (August 2008); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (November 2003).

2013 Constitution. It is therefore encouraging to learn that internationally recognised children's rights commitments are to some extent reflected in the 2013 Constitution thereby providing fertile ground for the emergence of a progressive children's rights jurisprudence.

2 2 Treaty monitoring bodies and Zimbabwe's children's rights scorecards

Ratification of international treaties means that Zimbabwe has to periodically report to experts from relevant treaty bodies. Reporting is often followed by the issuing of recommendations on necessary steps that the State party needs to take in order to meet its international and regional obligations laid out in the treaties.

It is estimated that children constitute 48% of the 13 million people in Zimbabwe.[10] More than half of these children live in rural areas and lack access to adequate socio-economic rights such as health, education, nutrition, water and sanitation.[11] Therefore, the need for consistent review of Zimbabwe's performance in implementing children's rights, through submitting country reports to the UN Committee on the Rights of the Child (CRC Committee) and African Committee of Experts on the Rights and Welfare of the Child (African Committee) cannot be gainsaid.

2 2 1 The UN Committee on the Rights of the Child

Zimbabwe submitted its initial country report to the CRC Committee, which was due in 1992, sometime in 1995.[12] The second report was submitted 19 years later in 2015. From a procedural perspective on reporting under the UNCRC, Zimbabwe has not been doing as well as it should. This inconsistency in reporting prevents effective monitoring of the implementation of the UNCRC.

In its first Concluding Observations to Zimbabwe, the CRC Committee commended the government on a number of issues, including, the prohibition of gender discrimination; raising awareness of children's rights as well as encouraging child participation by organising a children's parliament and promoting youth councils and child mayors.[13] Furthermore, the CRC Committee welcomed government's commitment

10 UNICEF "Situation of children in Zimbabwe" https://www.unicef.org/ (last accessed 2020-08-18).

11 UNICEF "Situation of children" https://www.unicef.org/zimbabwe/situation-children (last accessed 2020-07-21).

12 See Zimbabwe's initial report to the CRC Committee CRC/C/3/Add.35 12 September 1995 https://tbinternet.ohchr.org/ (last accessed 2020-07-10).

13 CRC Committee "Concluding Observations: Zimbabwe" CRC/C/15/Add.55 7 June 1996 https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZWE/CRC_C_ZWE_CO_2_22991_E.doc (last accessed 2020-07-10) para 3.

to submit annual reports to Cabinet and Parliament on measures taken to implement rights in the UNCRC.[14]

However, the CRC Committee expressed concern over a number of issues, key among them being government's failure to carry out comprehensive legal reforms to align national legislation with the UNCRC; the existence of a dual system of common law and customary law which raised difficulties in implementing the UNCRC;[15] insufficient attention being paid to the best interests of the child in legislation and practice; the exercise of children's rights subject to parental consent; the use of corporal punishment;[16] issues on *juvenile*[17] justice, particularly the lack of a clear legal prohibition of capital punishment, life imprisonment without the possibility of parole and indeterminate sentencing. The CRC Committee recommended, among other things, that Zimbabwe address all the issues mentioned above.

Zimbabwe submitted its second country report to the CRC Committee in 2015 and the Committee issued Concluding Observations and recommendations in 2016.[18] The CRC Committee applauded Zimbabwe's progress in ratifying a significant number of international legal instruments pertaining to children.[19] It welcomed various national plans, policies and strategies adopted by Zimbabwe on thematic areas of children's rights. However, it was concerned that the draft *Child Rights Policy* took too long to finalise.[20] The CRC Committee applauded the constitutionalisation of the best interests of the child and expressed concern that the best interests principle is not reflected in all relevant legislation nor applied in all areas and that its content is not well defined.[21] The Committee then referred to its previous recommendations which, it said, were not sufficiently implemented, especially issues pertaining to law reform,[22] prohibition of the use of corporal punishment,[23] and raising the minimum age of criminal responsibility.[24]

14 CRC Committee *supra* para 4.
15 CRC Committee *supra* para 11.
16 CRC Committee *supra* para 42.
17 The authors use the term 'juvenile' as referred to in court rulings and legal documents in Zimbabwe. However, we are aware of the move away from using such terminology as it paints a negative picture of child offenders, that is why juveniles is in italics.
18 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" CRC/C/ZWE/CO/2 (7 March 2016) https://www.icj.org/wp-content/uploads/2016/01/Concluding-Observations-CRC-Zimbabwe-2016-eng.pdf (last accessed 2020-07-01).
19 See the list in footnote 9 *supra*.
20 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" (29 January 2016) para 10. At the time of writing this article no progress had been made in terms of finalising the draft policy.
21 CRC Committee *supra* para 28.
22 CRC Committee *supra* para 22.
23 CRC Committee *supra* para 31.
24 CRC Committee *supra* para 33.

Arguably, the Concluding Observations do not tell the best of stories. Although Zimbabwe has progressed, to some extent, from 1995 when the first report was submitted to the Committee, a lot of what was recommended by the Committee was also highlighted in the 2016 Concluding Observations as still requiring more action in order to give full effect to children's rights.

2 2 2 The African Committee of Experts on the Rights and Welfare of the Child

Zimbabwe submitted its initial country report to the African Committee in 2014, instead of 2003 and the periodic report was due in 2006. This is very discouraging as the failure to comply with its reporting obligations means that Zimbabwe is depriving the African Committee, ample opportunity to review its implementation of the ACRWC.

In its Concluding Observations, the African Committee, commended Zimbabwe for defining a child as a person below the age of 18 years under the 2013 Constitution. However, the Committee expressed concern with contradictions of the definition of a child in various pieces of legislation[25] and subsequently encouraged the government to ensure harmonisation in all corresponding domestic laws. Furthermore, the African Committee was concerned with the anomaly on the minimum age of marriage. The Marriage Act (Chapter 5:11), for example, sets the minimum age of marriage for girls at 16 while the Customary Marriage Act (Chapter 5:07) does not provide for the minimum age of marriage. The government was strongly urged to set the minimum age of marriage to 18 in all circumstances. Furthermore, the African Committee was concerned that the minimum age of criminal responsibility was set at 7 years and it was recommended that it be raised to at least 12 years of age in line with international standards.[26]

Child participation was another subject of concern for the African Committee. It recommended the government to establish and strengthen child friendly courts as well as procedures for child victims and witnesses.[27] This would allow for children to be heard in judicial proceedings affecting them. Zimbabwe was scheduled to submit its combined fourth and fifth periodic reports, which the Committee considers as the first Periodic Report in December 2018. At the time of writing this contribution, no submission had been made.

In conclusion, Zimbabwe's commitment to children's rights at both international and regional level is laudable. However, the failure to report promptly and regularly to treaty monitoring bodies is a cause of concern.

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25 Public Health Act (Chapter 15:17), and the Marriage Act (Chapter 5:11).

26 Concluding observations and recommendations by the African Committee of Experts on the Rights and Welfare of the child (ACERWC) on the Republic of Zimbabwe on the status of Implementation of the African Charter on the Rights and Welfare of the Child (2016) para 12.

27 African Committee *supra* para 20.

The jurisprudence of the treaty monitoring bodies are a valuable tool which may guide Zimbabwean courts in the interpretation of children's rights. Judicial officers and lawyers often rely on the recommendations and Concluding Observations from the treaty bodies to promote and protect children's rights. In addition, the jurisprudence of the treaty monitoring bodies is useful in putting pressure on the government to comply with its international and regional obligations.

3 Children's rights under the Lancaster House Constitution, 1980

The LH Constitution was a transitional document adopted in 1980 to address the injustices of Zimbabwe's colonial past. The LH Constitution had no express provision dedicated to children's rights, and it can be described as an "invisible child [C]onstitution"[28] where children were neither seen nor heard, and consequently not accorded any special recognition.[29] The DoR entrenched basic and justiciable fundamental human rights and freedoms for everyone, including children. Thus, the protection of children was premised on the understanding that the interpretation of constitutional provisions would ensure that fundamental rights are construed to fully apply to, and also protect, children.[30]

While the LH Constitution protected everyone, there was bias towards the protection of first-generation rights at the expense of second-generation rights.[31] Socio-economic rights were not justiciable, which may be ascribed to the fact that at the time of the enactment of the LH Constitution, globally, the constitutional protection of socio-economic rights was rare.[32] This explains why the majority of notable court cases concerning children's rights dealt with civil and political rights while marginalising socio-economic rights,[33] as evidenced by the jurisprudence discussed below.

28 Tobin "Increasingly seen and heard: the constitutional recognition of children's rights" 2005 *SAJHR* 100.

29 See Alston and Tobin *Laying the foundation of children's rights* (UNICEF Italy 2005) 21-23.

30 Tobin 2005 *SAJHR* 102-103.

31 Ndulo "Zimbabwe's unfulfilled struggle for a legitimate Constitutional Order" in Miller (Ed) Framing the court in times of transition: Case studies in Constitution making (2010) 184.

32 Ndlovu "*Protection of socio-economic rights in Zimbabwe. A Critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe*" (2016) 2.

33 In *Batsirai Children's Care v The Minister of Local Government, Public Works and Urban Development and others* (unreported case number HC 2566/05) an orphanage was affected by the *Murambatsvina* (Clean-Up Campaign) resulting in the unlawful demolition and eviction of children from the children's home, violating children's rights to dignity, housing, education amongst other socio-economic rights. Legal remedies, by way of spoliation, failed leaving the children homeless and in limbo.

However, courts were alive to the duty to protect the rights and interests of children within the broader context of human rights. Constitutional litigation on children's rights, dealt with matters relating to the use of judicial corporal punishment against *juvenile* (child) offenders, the sentencing of *juvenile* offenders to imprisonment, the right of children to freedom of conscience and religion, amongst others.

The commitment towards children's rights was visible even before Zimbabwe ratified the UNCRC and the ACRWC. In *S v A Juvenile*,[34] the Supreme Court declared that judicial corporal punishment against *juvenile* offenders violated the constitutionally entrenched right not to be subjected to torture or inhuman or degrading punishment.[35] In this matter, an 18-year-old male offender was convicted of assault with the intent to do grievous bodily harm[36] and sentenced to receive four cuts. The Supreme Court declared that the use of "a moderate correction of whipping" in terms of the Criminal Procedure and Evidence Act against male *juvenile* offenders was unconstitutional because it was inhuman and degrading punishment.

Dumbutshena CJ declared judicial corporal punishment to be inherently brutal and cruel, invading the inherent humanity, integrity and dignity of the child offender, equating it to an inhuman and degrading form of punishment - thereby unconstitutional. The same opinion was expressed in relation to corporal punishment meted in schools and homes, as a violation of section 51(1) of the LH Constitution. The Supreme Court described judicial corporal punishment as "institutionalised violence" against children sanctioned under the protection of the law.[37] Gubbay JA, in a separate opinion, noted that the prohibition against inhuman or degrading punishment was couched in absolute and non-derogable terms.[38] Influenced by (the then) contemporary international best practice and standards, the court relied upon international law[39] and persuasive decisions from foreign jurisdictions to reach a well-reasoned conclusion.

In a dissenting judgement, McNally JA disagreed with the conclusion that there is an inevitable brutality and cruelty in the use of corporal punishment. The reasoning behind the dissenting judgement validates a traditional latent welfarist protectionism philosophy which viewed children as mere objects, rather than subjects, of human rights. The judge

34 *S v A Juvenile* 1989 2 ZLR 61 (SC). The Supreme Court decision was delivered on 29 June 1989, whereas the CRC was ratified on 11 September 1990.

35 S 15(1) of the LH Constitution provided that "No person shall be subject to torture or to inhuman or degrading punishment or other such treatment".

36 The conviction for assault with intent to do grievous bodily harm was later set aside on appeal to be substituted by one of common assault. See *S v Harry & A Juvenile* S-146-88 (unreported).

37 *S v A Juvenile supra* 73F-H.

38 *S v A Juvenile supra* 91G-H.

39 For instance, Rule 17(3) of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules).

pointed out that whipping of children was constructive, correctional and reformatory.[40] Reliance was placed on the lack of alternative sentencing options befitting *juvenile* offenders, thus, corporal punishment saved *juvenile* offenders from imprisonment.[41] Regrettably, the dissenting judgement upheld the constitutionality of corporal punishment because it formed the basis for parliament to amend the Constitution, thereby allowing corporal punishment against children.[42] The reasoning for the minority decision was not supported by empirical research[43] or international human rights law and accordingly was 'out of touch with contemporary thinking' at the time.[44]

On the strength of international law, superior courts were slowly moving away from the incarceration of *juvenile* (child) offenders, save in exceptionally serious offences. In *S v Zaranyika*[45] the High Court declared that 'normally a *juvenile* should never be sent to prison unless the offense is so serious that only a prison sentence can be justified'. The court noted that in determining the appropriate sentence for a *juvenile* offender, 'it is the duty of the court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender, as well as the (best) interests of the juvenile'.[46] Cognisant of the youthfulness and immaturity of *juvenile* offenders, courts placed emphasis on treating *juveniles* in a manner different from adult offenders.[47] Even without any constitutional protection of the right of *juveniles* not to be detained except as a last resort, courts were applying the rights under international law to protect and promote children's rights.

In addition, in *Dzvova v Minister of Education Sports and Culture*[48] the Supreme Court dealt with children's right to freedom of conscience and religion. The applicant, the father of a six-year-old boy, filed a constitutional application in terms of section 24(2) of the LH Constitution on the basis that the actions of the respondents infringed section 19(1)

40 *S v A Juvenile supra* 93G-H.
41 *S v A Juvenile supra* 97F-H.
42 Constitution of Zimbabwe Amendment (No 11) 1990. See Naldi "Constitutional developments in Zimbabwe and their compatibility with international human rights" 1991 *African Journal International & Comparative Law* 376 arguing that "… the revision to S 15(3)(b) of the Zimbabwean Constitution reflects this minority opinion".
43 *S v A Juvenile supra* 94B-C.
44 Hatchard "The fall and rise of the cane in Zimbabwe" 1991 *Journal of African Law* 200.
45 *S v Zaranyika* 1995 (1) ZLR 270H-271A.
46 *S v Zaranyika supra* 271D-E.
47 *S v Mavasa* HH 13-10. See also *S v Hunda* HH 124-10 where the Court held that the sentences on their own were not appropriate for young offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration and the rigours of punishment on young offenders should have had the effect of reducing the sentence and the total effective sentence.
48 *Dzvova v Minister of Education Sports and Culture* SC 26-07.

of the LH Constitution which protected the right to freedom of conscience and religion.

The child was enrolled at a Government Primary School, after attending pre-school at the same school. Whilst in pre-school the child's hair was never cut until the child graduated from pre-school and the hair had developed into dread locks. School authorities summoned the father to the school to advise him of the regulation that every child's hair had to be kept short. Pending the resolution of the matter between the school and the parent, the child was denied access to education. The father contended that his child was Rastafarian and cutting his hair was an infringement of his religious rights. Unsettled by that contention, the school issued a letter demanding that should the parent fail to comply, the child would be withdrawn from the school.

Aggrieved by the school's decision, the applicant challenged the regulations as *ultra-vires* section 19(1) of the LH Constitution. The court ruled that every child has a constitutional right to freedom of conscience and religion. Furthermore, the school regulations having been enacted without the authority of any law, infringed the child's enjoyment of his religion or belief through practice and observance. The court stated that attempts by the school to exclude the child was discriminatory and contravened constitutional provisions, as well as the Education Act (Chapter 25:04).[49] This ruling by the Supreme Court affirmed that in the absence of a specific children's rights provision, general constitutional rights could be interpreted to protect and promote children's rights.

It is commendable to note that, under the LH Constitution, judges were proactive to extend the protection of children's rights using general human rights provisions in the LH Constitution, although it was a slow process. Without legal instruments protecting the rights of children, Couzens argues that courts determine children's rights on a discretionary basis, dependent on the personal openness of individual judges towards the rights of children.[50] It is commendable that when matters were brought to courts, judges utilised the constitutional provisions to promote and protect children's rights.

4 Children's rights under the 2013 Constitution and emerging jurisprudence

4 1 The Constitution of Zimbabwe, 2013

The constitutionalisation of children's rights was a watershed moment in the history of human rights in Zimbabwe. The Constitution contains progressive provisions which protect and promote children's rights in

49 Section 4 of the Education Act.
50 Couzens "*Le Roux v Dey* and children's rights approaches to judging" 2018 *Potchefstroom Electronic Law Journal* 3.

line with the UNCRC and the ACRWC. Firstly, we see children's rights enumerated in section 19 under the heading 'national objectives' which details constitutional obligations of the State *vis-à-vis* the adoption of laws and policies ensuring that the best interests of the child are of paramount importance in all matters concerning children. The national objectives are not justiciable and enforceable in courts, however, their importance lies in the guidance they offer to the when developing laws and policies.

Notably, children's rights are also contained in section 81 in the Declaration of Rights. The inclusion of section 81 signals the primacy of children's rights because rights in the DoR are justiciable and enjoy horizontal and vertical application.[51] Unlike section 19, children's rights in section 81, like all other rights in the DoR, have a built in enforcement mechanism found in section 85 of the Constitution.[52] The insertion of children's rights in the DoR is a significant shift from the position of children's rights under the LH constitutional order which was regulated by a limited DoR.[53] The 2013 Constitution therefore lays fertile ground for litigation and judicial elaboration of children's rights.

The new constitutional era is not only characterised by an expanded DoR but a constitutional dispensation founded on the rule of law, separation of powers, government accountability, good governance and respect for fundamental rights.[54] Section 81 guarantees every child the right to, equality before the law; be heard; protected from economic and sexual exploitation; not to be detained except as a measure of last resort and the paramountcy of a child's best interests in every matter concerning the child amongst others. Furthermore, children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.[55] The 2013 Constitution presents Zimbabwe with an opportunity to change the trajectory of children's rights.

4 2 Emerging children's rights jurisprudence under the 2013 Constitution (2013-2019)

The discussion that follows explores how courts have utilised the children's rights clause found in section 81 to advance the respect, protection and promotion of children's rights.

51 In terms of sections 44 and 45 of the Constitution, rights in the DoR bind all organs of State as well as natural and justic persons.
52 Section 85 provides for the enforcement of fundamental human rights and freedoms.
53 Mavedzenge and Coltart *"A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights"* 2014 1.
54 Mavedzenge and Coltart *supra* 1.
55 S 81(3) of the Constitution.

4 2 1 Equality and non-discrimination: Intestate succession and children born out of wedlock

In *Bhila v Master of the High Court*[56] the High Court held that the common law position excluding children born out of wedlock from inheriting intestate from their father's estate violated children's rights to equality,[57] and non-discrimination.[58] The applicant, a surviving spouse, challenged the Master of the High Court's decision to allow three children born out of wedlock to inherit from her husband and their father's estate. The applicant and the deceased were married in a civil union. Upon the death of her husband, the applicant was appointed executrix of the estate, and whilst processing the estate the applicant realised that her late husband had three children born out of wedlock. The three children sought to inherit from their late father and the Master of the High Court appointed a natural executor, the second respondent who prepared a distribution plan. The issue before the Court, was whether children born out of wedlock can inherit intestate. The High Court ruled that excluding children born out of wedlock from inheriting intestate from their father was discriminatory and could not pass constitutional muster. Acting in terms of section 176 of the Constitution, which empowers the High Court to develop the common law and ensure that it aligns with the Constitution, the Court developed the common law on intestate succession *vis-à-vis* the rights of children born out of wedlock to inherit from their parent.

4 2 2 Detention of child offenders as a measure of last resort

In *S v FM (A Juvenile)*[59] a 17-year-old offender was convicted of eight counts of theft and eight counts of unlawful entry.[60] The accused was labelled as an unrelenting offender and as such the trial court sentenced him to nine years imprisonment. The case was sent on criminal review to the High Court and the judge was taken aback by the lengthy sentence against the young offender. Tsanga J held that, although,

> "the sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency".[61]

56 *Bhila v Master of the High Court* (HC 4396/13) [2015] ZWHHC 549 (27 May 2015).
57 S 81(1)(a) of the Constitution provides for the right to equal treatment before the law.
58 S 56(1) of the Constitution provides that everyone is equal before the law and have the right to equal protection and benefit of the law; S 56(3) lists marital status as one of the prohibited grounds of discrimination.
59 *S v FM (A Juvenile)* 2015 (1) ZLR 56 (H).
60 S 131(1) and 131(1) (a) of the Criminal law (Codification and Reform) Act [Chapter 9:23].
61 *S v FM (A Juvenile) supra* 2.

The Court's approach, based on the Constitution[62] and the UNCRC,[63] was aimed at ensuring that child justice matters are managed in a rights-based manner. The judge defended the proposition that child justice aims to assist children in conflict with the law to turn their lives around and become productive members of society.

Tsanga J was of the view that the sentence by the trial court ran contrary to the letter and spirit of the Constitution, especially given the fact that the offender did not commit a violent crime. Sentencing the child offender for such a lengthy time was described as "removing the child offender from the society by locking him up and throwing away the keys".[64] The judge challenges entrenched sentencing practices in Zimbabwe by holding the view that "[f]rom the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences in prison".[65] Tsanga J's adoption of a children's rights perspective in sentencing must be celebrated. Anchored by the best interests of the child principle, the judge underscored the need to look at a much broader perspective when dealing with child offenders, emphasising the need to look at all the circumstances of the young offender's life and ensure that a child is detained only as a measure of last resort[66].

What is exceptional about this judgement is the judge's emphasis on proportionality of the sentence as guided by the circumstances that fuelled the delinquent behaviour in the young offender. From the facts of the case, the accused grew up in a child-headed household without much adult supervision. Without exonerating the accused, Tsanga J called for a balanced approach by emphasising the role of the State in such cases, opining that;

> "It is the responsibility of the state and its officials who come into contact with cases of need to reduce chances of recidivism by thoroughly examining the range of possible interventions. It is also the responsibility of all officials involved, both judicial and non-judicial, to be thorough in their assessments so as to give each accused child a real chance at being justly treated".[67]

After considering the circumstances of the case and the 16 counts involved, the Court altered the sentence from nine years to the shortest appropriate of three years imprisonment for all counts, of which one year was suspended for five years on condition of good behaviour.[68] Two important rights were upheld in the matter, namely, the best interests of the child and the right not to be detained except as a measure of last

62 S81(h)(i) of the Constitution.
63 Article 37(1)(b) and art 40(1).
64 *S v FM (A Juvenile) supra* 2.
65 *S v FM (A Juvenile) supra* 3.
66 For a detailed discussion, see Fambasayi and Moyo "The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe" 2020 *South African Journal on Human Rights* 44-45.
67 *S v FM (A Juvenile) supra* 4.
68 *S v FM (A Juvenile) supra* 5.

resort for the shortest appropriate period. In reaching its decision, the Court emphasised the State's responsibility towards children in conflict with the law, highlighting the need to ensure the child's rehabilitation instead of a narrow focus on punishment.

4 2 3 Sexual exploitation of children

In *S v Banda; S v Chakamoga,*[69] the High Court invoked section 81(3) of the Constitution, in a matter involving two adult men convicted of having presumably consensual sexual relations and impregnating two girls aged 15 years of age. The first accused subsequently took the young girl as his wife while the other gave the young girl two small sums of money after he had sexually exploited her. In each case, the accused was sentenced to 24 months imprisonment, half of which was suspended. On review, the High Court noted with concern that the sentences handed down by the trial court trivialised the constitutional protection of children's rights.[70]

The review judge underscored that courts were constitutionally mandated to adopt a reasonable interpretation consistent with international law, [71]

> "Gone are the days when it was enough for a judicial officer to be insular in his jurisprudence: attention must be paid to international best practices, particularly on matters that impinge on the rights of vulnerable groups, such as children. The current position that Zimbabwe holds on the African continent requires judicial officers to rise to the responsibility that go with it and help, if not lead, in setting judicial standards and benchmarks for the protection of children".

Charewa J underscored the importance of the constitutional protection of children in Zimbabwe, and cautioned judicial officers against paying mere lip service to these rights.[72] The significance of the paramountcy of the best interests of the child in all court proceedings was emphasised, including handing down appropriate sentences that serve as a deterrent for those preying on children.[73] The constitutional obligation placed on the courts, and the High Court in particular, by section 81(3), makes it imperative to reconsider the sentencing regime for sexual offences. In the judge's view, "the courts must be seen to apply the law in a manner that achieves the intended aim of the legislature which is to effectively protect children from predatory older persons". In reaching his judgement Charewa J relied heavily on international and regional law and opined that, under the circumstances, an effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims' ages, are married with

69 *S v Banda; S v Chakamoga* (CRB GVE 644/15, CRB Mhw 450/15, HH 47-16) [2016] ZWHHC 47 (20 January 2016).
70 *S v Banda; S v Chakamoga supra* 1.
71 S 327(6) of the Constitution.
72 *S v Banda; S v Chakamoga supra* 2.
73 *S v Banda; S v Chakamoga supra* 3.

children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV.[74]

4 2 4 Child marriages

The approach that courts are obliged to offer adequate protection to children is also evident in the widely celebrated Constitutional Court judgement against child marriages in *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs*.[75] Two young women, acting in the public interest, applied for a declaratory order to the Constitutional Court asking that the minimum age of marriage be set to 18 and that no person under this age should be allowed to enter a marriage. The application was based on section 78(1) of the Constitution, which provides that every person who has attained the age of 18 years has the right to found a family; read together with section 81(1) of the Constitution, which accords special protection to children. In terms of the then applicable law, the Marriage Act[76] and the Customary Marriage Act, a girl above the age of 16 years was allowed to marry.

There were four issues before the Court:[77] (a) *locus standi* of the applicants since they were no longer children; (b) whether section 78(1) sets 18 as the minimum age of marriage; (c) if so, did the coming into force of the Constitution render invalid section 22(1) of the Marriage Act or any other law authorising a girl under 16 to marry; and (d) if it did, what relief should be granted.

On the first issue, the Court found that the applicants had the *locus standi* to bring the matter in the public interest because children are a vulnerable group in society whose interests constitute a category of public importance.[78] The Court was satisfied that the applicants were acting in the public interest specially to protect girls' rights. Malaba DCJ (as he then was) writing for a unanimous court held that,

> "Children fall into the category of weak and vulnerable persons in society. They … have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest".[79]

74 *S v Banda; S v Chakamoga supra* 7.
75 *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* CC 12-15. See Sloth-Nielsen and Hove "Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review" 2016 *African Human Rights Law Journal* for an in-depth discussion of the case.
76 In particular, S 22 provided for the marriage of the girls under the age of 16 years or boys under 18 years with the written consent of the Minister of Justice and Parliamentary Affairs.
77 *Mudzuru supra* 7.
78 *Mudzuru supra* 12.
79 *Mudzuru supra* 24.

On the second issue, the Court pronounced that section 78 of the Constitution, as read with section 81(1), makes it clear that any person below the age of 18 years is a child and cannot start a family.[80] The Court noted that the enactment of sections 78(1) and 81(1) of the Constitution was born out of Zimbabwe's commitment to provide greater protection for the fundamental rights of the child as provided for in international and regional law. According to the Court, the obligation imposed by article 21 of the ACRWC to observe 18 as the minimum age to marry was clear and Zimbabwe was duly bound to comply with it and abolish child marriages.[81]

Thirdly, the Court declared provisions in the Marriages Act and the Customary Marriages Act unconstitutional, from the date of the judgement in 2016. The applicants argued that, because

> "the … government failed to take legislative measures to repeal s 22(1) of the Marriage Act, it has continued to provide…legitimacy to child marriages entered into after 22 May 2013".

The Court opined that "invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court".[82] Lastly, the Constitutional Court declared, as its first children's rights judgement since its creation, that child marriages are unconstitutional.

Sloth-Nielsen and Hove lists three ways in which the Mudzuru judgment made significant jurisprudential contribution: "first, with respect to legal standing to bring a constitutional challenge under the Zimbabwean Constitution; second, with respect to the use of international treaty law and foreign case law; and third, in its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriages".[83] We agree with this view and note that the Mudzuru judgement is undoubtedly one of the Zimbabwean judiciary's trailblazing rulings.

4 2 5 Judicial corporal punishment

In *S v Chokuramba*[84] the Constitutional Court was tasked to confirm the declaration of unconstitutionality of judicial corporal punishment from the High Court.[85] The High Court had declared section 353 of the Criminal Procedure and Evidence Act, which permitted the sentence of whipping of *juvenile* male offenders, unconstitutional. In terms of section

80 *Mudzuru supra* 45.
81 *Mudzuru supra* 43.
82 *Mudzuru supra* 47.
83 Sloth-Nielsen and Hove 2016 *AHRLJ* 555
84 *S v Chokuramba* (CCZ 10/19 Constitutional Application No. CCZ 29/15) [2019] ZWCC 10 (03 April 2019).
85 *S v C (A Juvenile)* (CRB R 87/14) [2015] ZWHHC 718 (30 December 2014).

175(4) of the Constitution, the High Court referred the matter to the Constitutional Court for confirmation of the order of invalidity.

In Court, three key issues were up for determination: the constitutionality of section 353 of the Criminal Procedure and Evidence Act which allowed the use of corporal punishment as a sentence against male *juvenile* offenders; the meaning of the phrases "inhumane punishment" and "degrading punishment" and whether judicial corporal punishment amounts to 'inhuman' or "degrading punishment". The Constitutional Court confirmed the order of invalidity and ruled that judicial corporal punishment was by nature, intent and effect an inhuman and degrading punishment within the meaning of section 53 of the Constitution.[86] The Court emphasised the centrality of section 53 in the constitutional protection of human rights in Zimbabwe. Malaba DCJ (as he then was) opined that the value system underpinning the Constitution was instructive,[87] the Court held that the object and purpose of section 53 is to afford protection to human dignity as well as physical and mental integrity.[88] Human dignity is a foundational value which consequentially gives rise to all fundamental rights, and the Court made reference to inherent human dignity as a guiding provision.[89] The Court underscored the fact that:

> "Human dignity is a special status which attaches to a person because he or she is a human being … Human dignity is inherent in every person all the time regardless of circumstances or status of the person. Human dignity is not a creature of State law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it".[90]

In terms of section 86(3) of the Constitution, the limitations clause, the right to dignity and right not to be subjected to inhuman and degrading punishment are non-derogable rights. Therefore, no law may limit these rights and no person may violate them.

In determining what constitutes inhuman or degrading treatment, the Court was guided by the right to human dignity. Malaba DCJ noted that the appropriate approach when interpreting a provision guaranteeing a fundamental right must be purposive, broad, progressive and a value-based approach.[91] Following a purposive approach towards section 53, the Court opined that if punishment invades a person's human dignity then it is inherently inhuman.[92] Judicial corporal punishment, in the Court's view, brutalises the recipient as it violates their physical and mental integrity. Furthermore, punishment is degrading if the recipient

86 The section guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment.
87 S 3 of the Constitution.
88 *Chokuramba supra* 13.
89 S 51 of the Constitution.
90 *Chokuramba supra* 19.
91 *Chokuramba supra* 17.
92 *Chokuramba supra* 22.

is, according to the Court, exposed to disrespect and contempt from fellow human beings. Lastly, the fact that punishment arouses fear, anguish or inferiority in the person being punished means that it can be considered degrading.

Addressing alternative sentencing options and dismissing that corporal punishment can serve the interests of keeping children in conflict with the law out of prison, the Court stated that: [93]

> "Keeping male … offenders out of jail cannot justify the imposition of inhuman or degrading punishment … as the means of securing the legitimate objectives of punishment … Human dignity may not be infringed upon for any reason. No interest, such as saving the … offender from imprisonment, can justify infringement of human dignity. Interpretation of what constitutes the best interests of the … offender cannot be used to justify practices which conflict with … human dignity and right to physical integrity … Judicial corporal punishment is not in the best interest of the male juvenile".

Apart from relying on international law, in particular the UNCRC, ACRWC and the Beijing Rules, the Court utilised the best interests principle emphasising its centrality in determining appropriate sentences for child offenders.[94] The Court was wary of competing interests and pointed out that, in as much as the best interests should be a primary consideration in every decision affecting the child, this principle will not always be the single overriding factor to be considered. Rightfully, the Court declared that in those exceptional circumstances, a child's best interests must be the subject of active consideration. Active consideration, in this case refers to a demonstrated fact that the child offenders' interests have been explored and taken into account as a primary consideration in the choice of appropriate sentences for juvenile offenders.[95]

The Court noted that, the abolition of judicial corporal punishment should give new impetus to the establishment of a well-equipped juvenile justice system that is specifically responsive to the needs of juvenile offenders and which will also contribute to their reintegration into society.

This judgment is important for several reasons: firstly, it underscores the fact that child offenders are individual rights holders whose right to human dignity is not created or awarded by the State but rather requires legal protection at all times. Secondly, it emphasises that sentencing child offenders should be a less formal and more inquisitorial process that is able to provide sentences which are geared towards rehabilitation of children in line with principles of restorative justice. Although the *Chokuramba* judgement was a big win for children's rights, the delay by the Constitutional Court in handing down judgement is a grave concern.

93 *Chokuramba supra* 40.
94 *Chokuramba supra* 51.
95 *Chokuramba supra* 52.

5 Conclusion: Giant leaps or baby steps?

This article has done three things. Firstly, it looked at Zimbabwe's performance in implementing children rights under the UNCRC and the ACRWC and found that Zimbabwe is still grappling with a significant number of children's rights issues. Secondly, the article reflected on how Zimbabwean courts, under the LH Constitution, conceptualised children's rights in the absence of a children's rights clause. The lack of a children's rights clause in the LH Constitution resulted in slow progress, referred hereto as "baby steps", in the development of children's rights via courts. However, we acknowledge that lawyers and judges did the best they could in the context of broad human rights provisions and applied them to protect children's rights as seen in the judicial corporal punishment and freedom of religion judgements. Thirdly, we analysed the emerging children's rights jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Under this period, we demonstrated how Zimbabwean courts have engaged with children's constitutionally protected rights resulting in a progressive and promising jurisprudence. This is evident in how the High Court has been a front-runner in shaping the contours of children's constitutional rights resulting in the development of a fledgling children's rights jurisprudence in the areas of child justice – limiting the detention of child offenders to the shortest period of time; underscoring the role of courts in protecting children from sexual exploitation and developing the common law in as far as it denied children born out of wedlock from inheriting because of their "illegitimacy" status.

Section 81 of the Constitution is a powerful tool for the Constitutional Court, together with other superior courts, to set promising and transformative child rights jurisprudence, such as the ones we have seen on child marriages and judicial corporal punishment. Section 81 has also been used in conjunction with other rights, such as the use of human dignity as a core value in the *Chokuramba* case dealing with judicial corporal punishment. Unlike under the LH Constitution in which rights were construed in general, we see the children's rights provision taking centre stage and operating as the fulcrum in the interpretation of children's rights.

The constitutionalisation of children's rights in the 2013 Constitution is a watershed moment in how courts interpret children's rights in Zimbabwe. The courts' treatment of children's rights has been far more engaging. The emerging jurisprudence demonstrates how children's rights and child law in Zimbabwe is replete with potential for further developments. From the discussion above, we submit that Zimbabwe is making decent and promising progress, not quite giant leaps yet, in the development of children's rights via courts. Progress is owed, in no small part, to a progressive Constitution which has entrenched children's rights as opposed to the LH Constitution.

Lessons from history predicting a possible tax revolt in South Africa

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SUMMARY

South Africa is experiencing harsh economic circumstances, which negatively affects the economic environment of its citizens. Literature shows that historical tax resistance or tax revolts were mostly sparked by citizens burdened by their economic living conditions. South Africans' disgruntlement has been voiced in many ways, from resistance to E-tolls to increasing numbers of violent service protests. This article explores the economic factors present in three historical tax revolts to assess the possibility of tax resistance and/or a tax revolt in South Africa. The three historical tax revolts were identified through a purposive selection process. A systematic review was then followed to identify the economic factors present in each historical tax revolt. Finally, the economic factors deduced from the historical tax revolts were applied to the current economic situation in South Africa. The findings are that all the economic factors identified from history are currently present in South Africa, indicating the imminent possibility of a tax revolt. Whilst previous research has focused mainly on explaining past events, this article attempts to anticipate and prevent a future event. The contribution of this article is thus to underline possible economic factors that may lead to tax resistance and/or a tax revolt in South Africa. The aftermath of COVID-19 may further worsen the current economic situation, especially with the exacerbation of the already high unemployment rate that may just be a tipping point for a possible tax revolt.

1 Introduction

Can South Africa learn from the wisdom of George Santayana (1863-1952), who said: "Those who cannot learn from history are doomed to repeat it"?

Resistance to and revolt against the imposition of taxes by governments are as old as taxation itself. History is scattered with examples of both tax resistance and tax revolts,[1] which date back as far as the Hammurabi era in Babylon (BC 1792–BC 1750), the Late Han

1 The terms "tax resistance" and "tax revolt" have a specific meaning in the context of this article and are defined in Section 2.

How to cite: du Preez & Molebalwa 'Lessons from history predicting a possible tax revolt in South Africa' 2021 *De Jure Law Journal* 35-53
http://dx.doi.org/10.17159/2225-7160/2021/v54a3

Dynasty in Asia (25 AD–220 AD) and the Roman Empire in Europe (BC 27–337 AD).[2]

Since 2013, some evidence and many current debates about whether South Africa is encountering unusual tax resistance or is even heading for a tax revolt have been observed. Tax resistance is evident, for example, in the attitudes and behaviour of citizens towards electronic tolling (E-toll) in Gauteng.[3] South Africa has seen increasing numbers of social protests such as the resistance of vehicle owners to pay their E-toll accounts.[4] The media has recently speculated on the possibility of a tax revolt and has identified factors that can be classified as political (such as perceived corruption), social (such as service delivery protests) and economic (such as high unemployment).[5] Understanding the prospects or likelihood of tax resistance and/or of a tax revolt is of critical importance, because such a resistance or revolt may lead to a decline in income for the fiscus, which may have a negative effect on the provision of public goods and services.[6]

Non-compliance is a form of tax resistance and leads to a disintegration of trust in government and to the possibility of a breakdown in the rule of law. The maintenance of democratic institutions and the building of state capacity are thus critical for the continuing development of South Africa in the twenty-first century.[7]

2 Burg *A World History of Tax Rebellions* (2004) vi.

3 Gauteng Provincial Government, "The socio-economic impact of the Gauteng Freeway Improvement Project and E-tolls report" Report of the Advisory Panel appointed by Gauteng Premier, Mr David Makhura 2014 http://www.gautengonline.gov.za/Campaign%20Documents/E-%20Toll%20Report.pdf (last accessed: 2017-06-06) 41.

4 Nkrumah "We'll fight this little struggle' alleviating hunger in South Africa" 2020 *De Jure* 194-211.

5 Online newspaper articles have discussed the probability of a tax revolt in South Africa: *Moneyweb* "Is SA heading for a tax revolt?" 2015 https://www.moneyweb.co.za/mymoney/moneyweb-tax/is-sa-heading-for-a-tax-revolt/ (last accessed: 2017-03-13); *Fin24* "Tax revolt threat heed the signs" 2016 http://www.fin24.com/Opinion/tax-revolt-threat-heed-the-signs-20160106 (last accessed: 2017-03-13); *Biznews* "Gordhan's killer blow to SA? expect higher debt, tax revolt as tax hikes take effect – Legwaila" 2017 http://www.biznews.com/budget/budget-2017/2017/02/28/gordhan-higher-debt-tax-legwaila/ (last accessed: 2017-03-13); *BusinessTech* "The real state of South Africa's economy and why a tax revolt is coming" 2017 https://businesstech.co.za/news/government/163011/the-real-state-of-south-africas-economy-and-why-a-tax-revolt-is-coming/ (last accessed: 2017-03-13).

6 Lowery & Sigelman "Understanding the tax revolt: eight explanations" 1981 *Am. Political Sci. Rev.* 963.

7 McKerchar & Evans "Sustaining growth in developing economies through improved taxpayer compliance: challenges for policy makers and revenue authorities" 2009 *eJTR* 170.

Research has been conducted to understand historical tax resistance and tax revolts.[8] Burg[9] studied historical tax rebellions[10] from Antiquity until the twenty-first century.

Lowery and Sigelman[11] focus on the period from 1978 to 1980, attempting to explain the Proposition 13 Californian Revolt. Findings emerging from these studies suggest that tax resistance and tax revolts share many characteristics and causal factors.

The causes of tax resistance and tax revolts are usually found in a combination of political, social, economic and even religious factors.[12] Although the influence of political, social and religious factors cannot be ignored, this article only focuses on the economic factors influencing tax resistance and tax revolts. However, the article acknowledges that political, social and religious factors are fundamentally interlinked with economic factors.

The research question is: Can historical events provide evidence of a possible tax revolt in South Africa?

The purpose of this article is to use history as a determinant of possible tax resistance and/or of a tax revolt in South Africa. More particularly, this article explores the underlying economic factors present in the identified historical tax revolts that may serve as factors influencing the potential for tax resistance and/or a tax revolt in modern-day South Africa.

The value of this contribution can be found in the fact that previous research has focused mainly on explaining past events, whilst this article attempts to anticipate and prevent a future event. The intended contribution is to highlight possible economic factors that may lead to tax resistance and/or a tax revolt in South Africa. These economic factors can also enlighten and caution the government against possible tax resistance and/or a tax revolt.

This article is a systematic literature review, which involves a detailed and systematic analysis of the content of the historical material in order to identify significant economic factors.[13] A systematic review integrates or compares qualitative studies with an aim to identify themes or constructs found in the studies.[14] Through the systematic review of the historical material, history was divided into three eras, namely:

8 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Burg 6.
9 Burg 6.
10 Tax rebellions include tax resistance and tax revolts.
11 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963.
12 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Listhaug & Miller "Public support for tax evasion: self-interest or symbolic politics?" 1985 *Eur. J. Political Res.* 265; Burg.
13 Leedy & Ormrod *Practical Research Planning and Design* (2014) 341.
14 Grant & Booth "A typology of reviews: an analysis of 14 review types and associated methodologies" 2009 *HILJ* 91-108.

Antiquity, the Dark and Middle Ages, and the Modern times. Due to the large number of tax resistance or tax revolt events that occurred in these eras,[15] a purposive approach was followed in this study to identify one of the most prominent instances of tax resistance or of a tax revolt from each of the three eras. The selected event was then analysed to deduce the economic factors present during that period.

The selected historical events are the Jewish Revolt of 66 AD–70 AD against the Roman Empire, the Great Spanish Revolt of 1520–1521 against the rule of King Charles IV and the Proposition 13 Californian Revolt against the United States of America's government in 1978. These events offer insight into the economic factors that were present historically in instigating tax resistance or tax revolts.

This article commences by defining the concepts of "tax resistance" and "tax revolt". Thereafter, the three historical events are discussed according to the economic factors identified through the systematic literature review. The identified economic factors are then evaluated against the current economic environment in South Africa. Finally, the article concludes by highlighting the possibility of tax resistance and/or a tax revolt in modern-day South Africa.

2 Tax resistance and tax revolts

"Tax resistance" and "tax revolt" are terms which are often used interchangeably, although they refer to different concepts. Tax resistance can be achieved through passive non-compliance and typically takes effect as tax avoidance or tax evasion. Tax avoidance involves using legal methods to reduce one's tax liability: Taxpayers reduce the payment of tax by identifying loopholes in the tax legislation. Meanwhile, tax evasion involves the illegal structuring of one's tax affairs to reduce the payment of taxes. An example of tax resistance is driving through an E-toll gantry without paying the toll.

History[16] reflects an overarching theme that when tax resistance does not yield the anticipated results, citizens may resort to a tax revolt. A tax revolt would thus involve action (and sometimes violence) against a tax or tax system. An example of a tax revolt would be the burning down of the gantry upon which the E-toll charging mechanism is located.

In the South African tax system, all salaried taxpayers have their taxes deducted as a form of withholding tax (PAYE). A tax revolt would thus not be the non-payment of taxes, but rather the non-submission of tax returns or non-payment of additional taxes (for example: taxes on interest, etcetera).

15 Burg 6.
16 Burg 6.

For this article, "tax resistance" is defined as an objective achieved through passive noncompliance in the form of tax avoidance or tax evasion,[17] whilst "tax revolt" is defined as an objective achieved through active opposition. Tax resistance transitions into tax revolt in progressive stages on a continuum that ranges from general, passive non-compliance on one end (tax resistance) to active opposition on the other end (tax revolt).[18] Three historical tax revolts are now analysed in light of the definition of "tax resistance" and "tax revolt". The focus of these analyses is the identification of economic factors that may in turn assist in the identification of possible tax resistance and/or a tax revolt in South Africa in the present day.

3 Three historical tax revolts

Tax revolts have a long history and were seen for the first-time during Antiquity. Accordingly, this article focuses on three periods in history and on a corresponding tax revolt during each of the three periods. The discussion commences with the Jewish Revolt of 66 AD–70 AD (during Antiquity), then looks at the Great Spanish Revolt (during the Middle Ages) and finally at the Proposition 13 Californian Revolt (during post-modern times). These three historical incidents, all of which had moved beyond tax resistance and culminated in tax revolts, are considered here in order to identify the economic factors that led to the spark of the tax revolts: The historical background for each revolt is discussed; the economic factors are analysed; and the root causes underpinning the reasons for the tax resistance/revolts are examined with their resulting effects. The main purposes of the tax revolts were to change the tax system, to demand accountability from rulers and to change the economic situation of citizens to a more favourable one.[19]

3 1 The Jewish Revolt of 66 AD–70 AD

3 1 1 Historical background

Josephus was a first century historian who fought alongside the Jews during the revolt and provided first-hand evidence of the circumstances and events. Extensive research and analyses have been done of this incident based on the work of Josephus.[20] Scepticism exists around the objectivity of this source and the events leading up to the revolt instigated by the Jewish people against the Roman Empire.[21] Josephus states that

17 Oberholzer & Stack "Possible reasons for tax resistance in South Africa: a customised scale to measure and compare perceptions with previous research" 2014 *Public Relations Review* 251.
18 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963.
19 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Beard *The Administration of Spain Under Charles V. Spain's New Charlemagne* (MA thesis 2005 UNT) 165.
20 Lopez *Jewish War and the Causes of the Jewish Revolt: Re-examining Inevitability* (Masters dissertation 2013 UNT) 47.
21 Lopez 47.

the incompetence and corruption of the Roman governors, the oppressiveness of the Roman rule, the impoverishment and indebtedness of the Jewish peasantry, Jewish religious susceptibilities and quarrels with local gentiles were some of the main reasons for the revolt.[22] In contrast with the ideas of Josephus, however, Goodman[23] argues that the Jewish revolt was caused mainly by class tensions between the elite and the poor in Judea: The Jewish elite supported the Romans and thus gained access to privileges offered by the Romans.[24] Lopez[25] argues that Josephus tried to conceal the distinction between the poor and the elite in Judea. According to Lincoln,[26] the "Jewish peasantry was largely illiterate, desperately poor, increasingly landless and burdened by taxes that were mainly spent on supporting the lifestyle of the priestly elites and other aristocratic groupings".

Josephus' account also has a religious perspective, when he states that God was also punishing the Jewish people for their sins. Scholars[27] indicate that the aforementioned religious tensions were both external (between Romans and the Jewish people) and internal (between the Jewish poor and their priests). Furthermore, temple priests ceased to bring sacrifices for the emperor, indicating the Romans' loss of control over the temple.[28]

> The factors discussed above had negative consequences for the Jewish people. The Jewish people, especially the peasants, were forced into poverty because of their excessive debt. In order to pay their debt, they gave up their land as security. These debts were caused by the punitive taxes imposed on them by the Romans, the temple and by other religious taxes they had to pay. Therefore, these factors resulted in socioeconomic challenges for the Jewish people, namely, high unemployment, high indebtedness, inequality, and an excessive tax burden.

3 1 2 Economic factors

3 1 2 1 High unemployment

The employment of Jewish peasants flourished through Herod's great building projects, inter alia, the building of several temples, including the Jerusalem temple and royal palaces at the peak of Jerusalem's economic growth.[29] Nevertheless, this stimulus for employment through the growth of the economic infrastructure was not sustainable. Crisis ensued

22 Horsley in Berlin & Overman *The First Jewish Revolt: Archaeology, History and Ideology* (2002) 87; Silberman in Berlin & Overman *The First Jewish Revolt: Archaeology, History and Ideology* (2002) 237.
23 Goodman *The Ruling Class of Judaea* (1987) 3.
24 Oates "The Great Jewish Revolt of 66 CE" 2015 https://www.ancient.eu/article/823/ accessed (last accessed: 2020-04-10).
25 Lopez 50
26 Lincoln *A Socio-Historical Analysis of Jewish Banditry in First Century Palestine 6 to 70 CE* (MPhil dissertation 2005 US) 14.
27 Goodman 237; Lopez 37.
28 Burg 7; Lopez 3.
29 Goodman 64; Lincoln 102.

upon the completion of the temple in 64 AD, when 18 000 workers were left unemployed.[30] According to Lincoln,[31] the masses of Jewish peasants left unemployed created fears within the Roman government of civil disorder.

3 1 2 2 High indebtedness

There is a possible correlation between the high unemployment and the high indebtedness of the Jewish people. Rich Jewish people and landowners took advantage of the deteriorating conditions of the Jewish peasants and farmers.[32] The Jewish peasants and farmers were still required to pay their religious taxes and tithes.[33] The Jewish farmers borrowed from the rich and used their own land as security. Farmers then forfeited their land to their creditors,[34] resulting in the farmers' becoming outlaws.[35] The rich became richer and the poor became poorer.

3 1 2 3 Inequality

The Jewish people suffered unfairness at the hands of the Romans and the imperial Jewish family. Romans regarded the Jewish people as peculiar and handled them differently because of their religious customs. Inequality came through double taxation, including both Roman tributes and Jewish taxes in support of the temple and priests. The famine during 48 AD resulted in a decline in the economic status of the Jewish people: The land owned by the Jewish peasants and farmers was taken over by the wealthy gentry and the imperial family. The Jewish farmers and peasants became labourers on their own farms when they forfeited their lands due to debt payments.[36] Due to the decline in the economic situation of the peasants and farmers, they became hostile towards the rich, who only became richer. This inequality in their economic situations led to class tensions.[37]

3 1 2 4 Excessive tax burden

Herod's building projects birthed a new burden of more taxes for the Jewish people, especially for the farmers and peasants.[38] Romans imposed poll tax, land tax and a range of indirect taxes on the Jewish people, and Jewish religious tax and tithes still had to be paid.[39] The

30 Goodman 64; *The Testimony* (2005-01-01) 23.
31 Lincoln 102.
32 Lincoln 102.
33 Tithe means "one-tenth". Tithing was introduced as a law in the book of Leviticus in *The Bible* (NIV 2011).
34 Horsley "The zealots: their origin, relationships and importance in the Jewish Revolt" 1986 *Novum Testamentum* 176.
35 The Testimony (2005-01-01) 23.
36 Lincoln 106.
37 Horsley "Ancient Jewish banditry and the Revolt against Rome, AD 66–70" 1981 *CBQ* 413; Goodman 13; The Testimony (2005-01-01) 26.
38 Horsley "The Sicarii: ancient Jewish 'terrorists'" 1979 *Journal of Religion* 446; The Testimony (2005-01-01) 26.
39 Horsley 1979 *Journal of Religion* 447; *The Testimony* (2005-01-01) 26.

peasants and farmers were taxed up to 40 percent of their income,[40] which contributed significantly to their excessive tax burden.

3 1 3 Summary

When a man cannot work, is indebted, treated unequally when compared with others and burdened by taxes, he is bound to act.[41] Jewish people had a history of resistance against the Roman Empire. Before the Jewish Revolt of 66 AD–70 AD, the Jewish people revolted in the Maccabee Tax Revolt in BC 160–BC 167 and in the Hyrcanus Opposition in BC 67.[42] The economic conditions and status of the Jewish people may have been a motivation for them to revolt.

The Jewish Revolt of 66 AD–70 AD did not yield the anticipated result for the Jewish people. Instead, they were more oppressed by the Roman Empire and more burdened with taxes. Although the revolt was deemed unsuccessful, the violent actions of the Jewish people were a "voice" loudly heard by the Roman Empire.[43]

3 2 The Great Spanish Revolt of 1520–1521

3 2 1 Historical background

The Revolt of the *Comuneros* against King Charles V between 1520 and 1521 is hailed as one of the most dangerous and history-making rebellions.[44] To the discontent of the Spanish population, Charles V was appointed the sole ruler of the Spanish Kingdom in 1516. Having been born and educated in Ghent, Belgium, he was regarded as a foreigner.[45] King Charles V arrived in Spain in 1517. In 1520, the public was further outraged by the announcement that King Charles V would be absent from Spain for a long period whilst visiting Germany. The public viewed the absence of the King as abandonment. In addition to his absence, taxes were increased to fund the state visit to Germany. The increase of taxes resulted in a greater burden for the citizens who were already heavily burdened by the existing taxes (thus culminating in an excessive tax burden).[46] The rebel movement, *Comuneros*, instigated the Great Spanish Revolt in the Castilian cities – the core of the Spanish

40 *The Testimony* (2005-01-01) 26.
41 Lincoln 9; *The Testimony* (2005-01-01) 26.
42 Horsley 1979 *Journal of Religion* 448; Burg 18.
43 Goodman 3.
44 Szaszdi "The Castilian resistance to the imperial ideal (1520–1522)" 2014 *JEHL* 57.
45 Espinosa "The grand strategy of Charles V (1500–1558): Castile, war, and dynastic priority in the Mediterranean" 2005 *Journal of Early Modern History* 254.
46 Beard 183.

Kingdom.[47] The *Comuneros* consisted mainly of the low and middle classes of the Castile.[48]

The *Comuneros* openly rebelled against the monarchical authority.[49] They aimed to make Constitutional changes, which would result in King Charles V's being dethroned.[50] A petition sent to the King by the rebels cited the following grievances: Taxes should not be increased; money should not be taken out of Spain to foreign countries; the King's absence from Spain was objectionable to the citizens; and offices in government should not be given to foreigners. The King ignored the petition, and riots and violence erupted.[51]

The purpose of the Great Spanish Revolt was to demonstrate the Spanish people's discontent by listing their grievances and petitioning the King. The main economic factors present in the Great Spanish Revolt were an excessive burden of taxes and inequality.

3 2 2 Economic factors

3 2 2 1 Excessive tax burden

According to Beard,[52] King Charles crippled Spain's economy through an excessive tax burden exacted in order to fund wars in other parts of his Empire. King Charles inherited an existing problematic tax system from the Catholic Monarchs, but his imposition of excessive taxes crippled the economy of the Castile and, ultimately, of Spain.[53]

In Spain, new taxes had to be approved by the *Cortes,* a body of taxpayer representatives. King Charles exercised substantial influence over the *Cortes* and they subsequently approved his demands for revenue. King Charles kept them under his influence by giving them lucrative pensions, offices and "benefits". The revolt was sparked when King Charles persuaded the *Cortes* to approve the introduction of a new tax called *servicio* (a direct tax on farmers). The *Comuneros* rebel movement protested against *servicio*. *Servicio* replaced the traditional *encabezamiento* (a fixed tax levied on each city according to the proportion of households). Queen Isabella (1451–1504) had instituted *encabezamiento*, and King Charles committed himself to continue with this. The public perceived this tax as fair; however, King Charles changed his mind because he needed to increase his income, and he therefore instituted *servicio*. The *Comuneros* called for the abolishment of *servicio* and the reinstatement of the traditional *encabezamiento*.[54]

47 Burg 146; Beard 80.
48 Crews "Juan de Valdes and the Comunero Revolt: an Essay on Spanish Civic Humanism" 1991 *SCJ* 238; Beard 170.
49 Burg 149; Beard 170.
50 Burg 149.
51 Burg 149.
52 Beard 162, 187.
53 Beard 183.
54 Burg 148; Beard 183.

The tax system of the Castile[55] also included *alcabala* tax (a 10 percent excise tax on the transfer of all real and personal property). *Alcabala* contributed a large portion of revenue to the state coffers and could therefore not be abolished. It was even expanded to include food, resulting in increased local food prices that made food prices too expensive in comparison with those of imported foods which were often smuggled in and excluded *alcabala*.[56]

Since the clergy and nobility were exempt from *servicio*, it was a tax that proved more burdensome than *alcabala*, specifically for the common people.[57] Another reason for the Castilians' disgruntlement was the fact that these burdensome taxes were used to support foreign wars.[58]

3 2 2 2 Inequality

According to Beard,[59] the Great Spanish Revolt was initially across all classes, but later, the noble and wealthy stepped back. Therefore, the Great Spanish Revolt became a class action with the lower and middle classes at the forefront. The intention of the lower and middle classes was to re-establish their political, social and economic status. King Charles was perceived as pursuing political power at the expense of the lower and middle classes. The middle class in Castile was quite small before King Charles took office, but it increased due to the heavy burden of taxes.[60] The burdensome taxes led to the decline of the economic status of the Castilians, increasing the levels of inequality.

3 2 3 Summary

The success of a revolt depends on the government's response. The Great Spanish Revolt had a bittersweet ending.[61] Many of the leaders of the *Comuneros* were executed, and others were silenced when King Charles returned to Spain[62] and declared war on the *Comuneros*. The violent suppression of the revolt by King Charles led to greater stability in his authority, and he obtained greater political power. According to Adams,[63] the revolt appeared to have failed when King Charles crushed the rebels. However, Adams[64] also states that the "revolt taught the monarchy a lesson – taxes still had to be tolerable for the taxpayer, regardless of what their corrupt representative might do". After the

55 Kingdom of Castile. King Charles V assumed the crown of Aragon and Castile of Spain.
56 Adams *For Good and Evil: The Impact of Taxes on the Course of Civilization* (2001) 192.
57 Ames & Rapp "The birth and death of taxes: a hypothesis" 1977 *J. Econ. Hist*. 165.
58 Beard 162.
59 Beard 170.
60 Beard 179.
61 Beard 174.
62 Burg 150.
63 Adams 193.
64 Adams 193.

revolt, King Charles established a "no new taxes" policy. Therefore, although the *Comuneros* rebel movement was crushed, their voices were heard.[65]

3 3 The Proposition 13 Californian Revolt of 1978

3 3 1 Historical background

The Proposition 13 Californian Revolt was the result of an anti-tax campaign by a grassroots movement called the United Organization of Taxpayers, chaired by Howard Jarvis. Although Jarvis spearheaded the campaign, the tax revolt had been looming since the 1960s due to seemingly unfair political practices and shifts in taxation levels. The purpose of the Proposition 13 Californian Revolt was to reduce property taxes by curbing increases in tax rates and government spending. Californians were heavily burdened by taxes, and 60 percent of property owners viewed the property taxes as inequitable.[66] Proposition 13 stated that new tax legislation must be approved by a two-thirds majority vote of the state legislature before being introduced. Proposition 13 set a 1 percent maximum limit on property taxes.[67] The economic factors of the Proposition 13 Californian Revolt were high inflation and an excessive tax burden.

3 3 2 Economic factors

3 3 2 1 High inflation

Lowery and Sigelman[68] found that one of the possible explanations for tax revolts relates to the anxiety people experience over the economy in general and in their personal finances. An increase in the inflation rate decreases household disposable income. This may in turn serve as a motivation over the long term for a tax revolt due to the lack of economic progress. Inflation and recession play vital roles in the instigation of tax revolts. California experienced high inflation in the 1970s. In 1974, consumer prices increased by 10.3 percent. The inflation rate also increased by an average of 6 percent annually from 1975 to 1978.

3 3 2 2 Excessive tax burden

Californians experienced an increasing tax burden[69] because of the high inflation rate and personal income taxes that increased to 48 percent between 1975 and 1978. Californian homeowners, most of whom were middle-class citizens, faced high property taxes and a 6 percent sales tax. California used a progressive income tax system, resulting in the

65 Adams 193.
66 Ladd, Potter, Basilick, Daniels & Suszkiw "The polls: taxing and spending" 1979 *Public Opin. Q.* 127; Burg 410.
67 Baratz & Moskowitz "Proposition 13: how and why it happened" 1978 *Phi Delta Kappan* 11; Burg 410.
68 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 965.
69 Burg 410.

overburdening of the highest tax bracket earners. State revenue from all taxes rose by 40 percent between 1975 and 1978.[70] According to Baratz and Moskowitz,[71] perceptions at the time "among middle-class voters [were] that taxes [were] too high and government [was] both uncontrollable and unaccountable". The government was unresponsive to the cries of the citizens regarding the citizens' tax burden.

3.3.3 Summary

The outcome of the Proposition 13 Californian Revolt was experienced immediately. State revenue decreased by 57 percent in 1978.[72] Government spending was modestly reduced and continued to decrease until the 1990s. The success of the Proposition 13 Californian Revolt against excessive tax burden due to property taxes and high inflation indicates that when citizens voice their grievances, government can be forced to listen.

4 Economic factors present in South Africa

In South Africa, the first known tax revolt was the 1906 Bambatha Rebellion.[73] The Bambatha rebellion was against a poll tax imposed by the British colony of Natal, and the rebellion ultimately opposed the colonial rule.[74] Ndlovu[75] focuses on the history of taxation in South Africa and the imposition of excessive taxes on South Africans. Violent protests against regressive apartheid government policies and excessive tax burden on Africans were experienced between 1960 and 1990.[76] A continuation of such protests can be found in 1991 when the Congress of South African Unions (Cosatu) protested against the enactment of Value-Added Tax (VAT).[77]

Protests, especially of a violent nature, are common in South Africa, spurning from the unequitable policies of the British since the nineteenth century. More recently, South Africa experienced a number of service delivery protests. Rough[78] analysed these events in order to conclude on whether these protests had a revolutionary potential. He found that some of the factors instigating the service delivery protests are cultural cleavage, land tenure and economic development. Economic development is hindered by poor service delivery. Service delivery protests often occur in poor communities (grassroots protests) and

70 Baratz & Moskowitz 1978 *Phi Delta Kappan* 10.
71 Baratz & Moskowitz 1978 *Phi Delta Kappan* 12.
72 Baratz & Moskowitz 1978 *Phi Delta Kappan* 11; Burg 411.
73 Burg 375.
74 Burg 375.
75 Ndlovu "Fiscal histories of Sub-Saharan Africa: the case of Botswana" 2016 *WITS Working Paper Series* 13.
76 Ndlovu 24.
77 Ndlovu 26.
78 Hough "Violent protest at local government level in South Africa: revolutionary potential?" 2008 *South African Journal of Military Studies* 1.

provide a voice for the frustrations of the poor.[79] Manyaka[80] argues that the primary cause of service delivery protests is rooted in frustration with socioeconomic conditions in South Africa. He further states that a lack of basic service delivery is a symptom and is not the root cause of protests. The root cause can be attributed to high levels of unemployment, poverty and inequality. The National Development Plan of 2030[81] states that the eradication of poverty and inequality are the plan's desired outcomes. South Africa is facing a poverty crisis, as more than 49.2 percent of the population live below the upper-bound poverty line[82].

When comparing the root causes of protests in South Africa with the economic factors of the historical revolts identified, it seems as if there are similarities. This article assumes that a comparison between historical economic tax revolt factors (together with the root causes of service delivery protests) and the current economic environment in South Africa may provide an indication and even a prediction of the possibility of a tax revolt. The following economic factors were found to be present in all or some of the three historical revolts and/or the service delivery protests in South Africa: high unemployment, high indebtedness (together with an increase in poverty), inequality, high inflation and an excessive tax burden.

4 1 High unemployment

South Africa's unemployment rate at the end of 2019 was 29 percent. This figure is expected to rise to 50 percent after the COVID-19 pandemic.[83] The unemployment rate amongst graduates between the ages of 15 and 24 was 55.2 percent in 2019. The youth unemployment rate (15–34 years) accounts for more than 63.4 percent of the unemployed people in South Africa. The high unemployment rate amongst the youth stifles the economy, as it means that a large share of the potentially active population is inactive.[84] The National Development Plan of 2030 lists unemployment as a critical challenge for South Africa and aims to reduce the overall unemployment rate to 19 percent by 2030.

79 Mkhize "Is South Africa's 20 years of democracy in crisis? examining the impact of unrest incidents in local protests in the post-apartheid South Africa" 2015 *ASR* 192.

80 Manyaka "Making sense of community protests in South Africa: issues for consideration" 2018 *Journal of Public Administration* 57.

81 South African Government "National Development Plan 2030 'Our Future–Make it work'" 2012 https://www.gov.za/issues/national-development-plan-2030 (last accessed: 2020-04-10).

82 StatsSA "Five facts about poverty in South Africa" 2019 http://www.statssa.gov.za/?p=12075 (last accessed: 2020-05-03).

83 *IOL* "Covid-19: South Africa's unemployment rate expected to reach 50 as economy keeps plummeting" 2020 https://www.iol.co.za/news/south-africa/covid-19-south-africas-unemployment-rate-expected-to-reach-50%-as-economy-keeps-plummeting-48457893 (last accessed: 2020-07-02).

84 Aflagah "Failed promises of a wage subsidy: youth and South Africa's employment tax incentive" 2020.

McClelland and MacDonald[85] highlight that unemployment causes poverty, debt, housing stress and crime. Unemployment negatively affects living conditions and contributes to the high poverty rate in South Africa. A further result of unemployment is an increase in indebtedness to cover day-to-day living expenses.

4 2 High indebtedness

High unemployment has a negative impact on household disposable income, and people often turn to debt to cover their daily expenses, which contributes to a rise in the indebtedness of South Africans.[86] According to Dimant,[87] South Africa's household-debt-to-disposable-income-of-households ratio increased from 54.8 percent in 1994 to 74.3 percent in 2016. The debttodisposableincome-of-households ratio was 72.5 percent in the 2019 fourth quarter.[88] During the COVID-19 pandemic, many people have not received employment income. Although the government has provided a solution to some extent, the household debt is predicted to increase substantially due to a need for daily necessities. Individuals with a low disposable income are encouraged to use credit in order to cover their living expenses.[89] A study by the National Planning Commission in collaboration with World Bank in 2018 highlighted that individuals who can be described as lower income earners in the young to middle age groups have high rates of indebtedness.[90] Household debt in South Africa was 72.8 percent of gross income in 2019.[91] The National Credit Act[92] was introduced in 2005 to assist over-indebted consumers through debt relief measures such as debt counselling.[93] An increasing number of consumers applying for debt counselling is a witness to the high indebtedness of South

85 McClelland & Macdonald "The social consequences of unemployment" Report for the Business Council of Australia 1998 http://library.bsl.org.au/jspui/bitstream/1/266/1/social_consequences_of_unemployment_AMcClelland.pdf (last accessed: 2020-04-14).

86 Bond "Debt, uneven development and capitalist crisis in South Africa: from Moody's macroeconomic monitoring to Marikana microfinance mashonisas" 2013 *TWQ* 585.

87 Dimant "The economy" 2018 South African Survey: South African IRR 140.

88 South African Reserve Bank "Quarterly bulletin" 2019 https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/9328/01Full%20Quarterly%20Bulletin%20%E2%80%93%20June%202019.pdf (last accessed: 2020-04-19) 25.

89 Fanta, Mutsonziwa, Goosen, Emanuel & Kettles "The role of mobile money in financial inclusion in the SADC region" 2016 FinMark Trust Policy Research Paper No 03/2016 5.

90 Hurlbut "Overcoming poverty and inequality in South Africa: an assessment of drivers, constraints and opportunities" 2018 World Bank xvi.

91 Trading Economics "South African household debt" https://tradingeconomics.com/south-africa/households-debt-to-income (last accessed: 2020-04-17).

92 National Credit Act 34 of 2005.

93 Boraine, Van Heerden & Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)" 2012 *De Jure* 82.

Africans.[94] The level of indebtedness is on the rise, and high unemployment is a contributing factor to this challenge.

4 3 Inequality

"Inequality is [South Africa's] defining feature" is an opinion expressed recently about the gap between the rich and the poor in South Africa.[95] The Gini coefficient[96] of 0.65 calculated in 2014[97] (the most recent figure) supports this opinion, showing that South Africa is one of the most unequal countries in the world.

The two most prominent factors affecting inequality in South Africa are education and the labour market. Employment income is by far the biggest contributor to income inequality.[98] To illustrate the extent of inequality in South Africa, The World Bank states the following: "The bottom 50 percent of households account for only 8 percent of incomes, 5 percent of asset values, and 4 percent of net wealth. Conversely, the top 10 percent of households account for 55 percent of household incomes, about 69 percent of total household asset values, and 71 percent of household net wealth."[99] Therefore, wealth inequality is greater than income inequality.

Income inequality declined during the period between 2006 and 2015 due to the social welfare system. There are currently seven types of social grant, and these are used to substitute employment income. Although the current welfare system has little effect on the wealth inequality level, social grants aim to reduce the levels of income inequality.[100] Inequality is a challenge that frustrates society, as it impacts the very livelihood of its people.

4 4 High inflation

Inflation is a well-known phenomenon in the world of economics – it is a measure of the overall increase in prices or of the increase in the cost

94 Masilo & Marx "Assessment of debt counselling services: a case of Gauteng, South Africa" 2015 *JEF* 194.

95 *News24* "SA is a country of two nations – and evictions lay bare its injustice" 2020 https://www.news24.com/news24/Columnists/GuestColumn/opinion-sa-is-a-country-of-two-nations-and-evictions-lay-bare-its-injustices-20200702?isapp=true (last accessed: 2020-07-02).

96 The Gini coefficient is a measure used to calculate income inequality over time with a distribution between 0 and 1, where 0 means total equality and 1 means total inequality.

97 World Bank "The World Bank in South Africa: Overview" 2019 http://www.worldbank.org/en/country/southafrica/overview (last accessed: 2020-08-17).

98 World Bank "Overcoming poverty and inequality in South Africa" 2018 https://openknowledge.worldbank.org/handle/10986/29614 (last accessed: 2020-07-13).

99 World Bank "The World Bank" 2019 https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA (last accessed: 2020-08-08) 52.

100 Lehohla & Shabalala "Inequality in South Africa" 2014 *Development* 501.

of living in a country. The inflation rate target for South Africa is set by the South African Reserve Bank and has been set between 3 percent and 6 percent, based on the Consumer Price Index.[101] In 1994, the inflation rate was 9 percent, and it had risen to 11.5 percent in 2008 after the financial crisis. Since 2010, inflation has remained within the set target range of between 3 percent and 6 percent. In March 2020, the inflation rate was 4.1 percent, representing a decrease from 4.6 percent in February 2020.[102]

An increase in the cost of goods has a negative impact on the disposable income of citizens. South Africa has a high number of poor households living below the poverty line. National poverty lines are used as statistical monetary measures of poverty and are calculated approximately every five years.[103] Important factors in determining poverty lines are changes in the cost of goods and household consumption expenditure. There are three poverty lines in South Africa that were established using April 2019 prices. These poverty lines are the food poverty line (FPL), the lower-bound poverty line (LPL) and the upper-bound poverty line (UPL). FPL, also known as the extreme poverty line, represents the minimum amount an individual needs for required daily energy intake and amounts to R561 per month. LPL represents FPL plus an average amount for non-food items whose **total** expenditure is equal to the FPL and amounts to R810 per month. UPL represents FPL plus an average amount for non-food items, where **food** expenditure is equal to the FPL and **total** expenditure amounts to R1 227.[104] The South African government aims to eradicate poverty by 2030,[105] whilst the welfare system assists poor households in living above the poverty line. Between 2006 and 2015, the standard of living of 2.3 million South Africans improved to above the LPL, and 1.2 million improved to above the UPL. There was also an increase of 343 000 in South Africans that lived on the FPL.[106] Furthermore, the social wage provided access to the social grant system to 17 million low-income earners in 2015.[107]

The living conditions of South Africans may worsen after the COVID-19 pandemic. Prices may rise due to suppliers' and retailers' desperately trying to make ends meet. The inflation target of 4.1 percent excludes the effects of COVID-19, as it was calculated using the February 2020 figures in South Africa. Countries are implementing measures to neutralise the impact of COVID-19 on the economy and its citizens. Will the worsening

101 South African Reserve Bank "Inflation target" 2017 https://www.resbank.co.za/monetarypolicy/decisionmaking/Pages/InflationMeasures.aspx (last accessed: 2017-08-17).
102 StatsSA "Consumer Price Index report" 2020 http://www.statssa.gov.za/?page_id=1854&PPN=P0141&SCH=7922 (last accessed: 2020-05-01).
103 StatsSA "National poverty lines 2018" 2018 http://www.statssa.gov.za/publications/P03101/P031012018.pdf (last accessed: 2020-05-01).
104 StatsSA "National poverty lines 2019" 2019 http://www.statssa.gov.za/publications/P03101/P031012019.pdf (last accessed: 2020-05-05).
105 World Bank 2018.
106 Hurlbut xix
107 Hurlbut xxv

living conditions, poverty and income inequality create a surge in service delivery protests?

4 5 Excessive tax burden

The South African population currently consists of approximately 59.4 million people.[108] The number of individual taxpayers registered increased to 22.2 million in 2019 from 21.1 million in the 2018 tax year. There are 4.9 million active personal income taxpayers in South Africa.[109] VAT and personal income tax (PIT) are the largest sources of tax revenue for SARS, with a combined contribution of 64.6 percent of the total revenue. PIT contributes 39 percent of the total tax revenue.[110]

An indication of the tax burden in South Africa can be found in the analysis of the tax-to-GDP ratio. When the percentage of this ratio is high, it is an indication that the tax collected is higher relative to the size of the economy. Thus, the higher the percentage, the greater the tax burden.[111] For the 2017/2018 tax year, the tax-to-GDP ratio for South Africa was 25.9 percent. According to the IMF, this percentage places South Africa on the list of top 10 countries with the highest tax-to-GDP ratios.[112] This percentage is troubling considering the persistent high inequality and poverty in South Africa.

A number of civil movements have risen in South Africa in an attempt to voice the dissatisfaction of citizens with the current tax burden. Examples of such movements are the Organisation Undoing Tax Abuse (OUTA) and service delivery protests.[113] The small proportion of the population contributing towards the tax revenue is a result of the high level of income inequality.[114] Ndlovu[115] indicates that South Africans have always experienced excessive tax burden. Her study shows that the oppressed taxpayers instigated resistance, even in the form of protests, against the tax burden and other policies implemented by the government. This behaviour is evident in historical tax revolts in South Africa. A study conducted by Statistics SA[116] on the perceived impact of COVID-19 indicated that 93.2 percent of respondents were very or

108 Worldometer "World population prospects" 2020 https://www.worldometers.info/world-population/south-africa-population (last accessed: 2020-07-06).
109 *BusinessTech* "This is who is paying South Africa's taxes" 2020 https://businesstech.co.za/news/finance/386931/this-is-who-is-paying-south-africas-taxes/ (last accessed: 2020-07-06).
110 *BusinessTech* 2020.
111 StatsSA "A breakdown of the tax pie" 2019 http://www.statssa.gov.za/?p = 12238 (last accessed: 2020-07-06).
112 StatsSA "A breakdown of the tax pie" 2019 http://www.statssa.gov.za/?p = 12238 (last accessed: 2020-07-06).
113 Manyaka 2018 *Journal of Public Administration* 57.
114 World Bank Group 2019.
115 Ndlovu 3.
116 StatsSA "Behavioural and health impacts of the COVID-19 pandemic in South Africa" 2020 http://www.statssa.gov.za/?page_id = 1854&PPN = Report-00-80-02&SCH = 72636 (last accessed: 2020-05-03).

extremely concerned about an economic collapse as a result of the COVID-19 pandemic, and 79.7 percent were concerned about possible civil disorder.

6 Concluding remarks

The aim of this article was to use history as a determinant of possible tax resistance and/or of a tax revolt in South Africa. The five economic factors identified in the historical revolts studied (the Jewish Revolt of 66 AD–70 AD, the Great Spanish Revolt of 1520–1521 and the Proposition 13 Californian Revolt of 1978) were systematically identified as high unemployment, high indebtedness, inequality, high inflation and an excessive tax burden. The analyses of the five economic factors assisted in answering the research question: Can historical events provide evidence of a possible tax revolt in South Africa?

In South Africa, the five economic factors were found to be present and integrated within one another. High unemployment is evident in the 29 percent unemployment rate calculated in 2019. This figure is expected to rise to 50 percent after the COVID-19 pandemic.[117] Ministers of Finance have acknowledged that unemployment, inequality and poverty due to slow economic growth are concerns. High unemployment negatively affects the living conditions of South Africans; therefore, households need to borrow money for their day-to-day expenses, plunging citizens into high levels of indebtedness. Household debt in South Africa was 72.8 percent of gross income in 2019. Such high indebtedness leads in turn to high levels of income inequality within a society. This is evident from the Gini coefficient of 0.65 for South Africa in 2014. High inflation rates further decrease disposable income and economic growth.[118] Additionally, the living conditions of South Africans may worsen after the COVID-19 pandemic. Prices may rise, and the inflation rate of 4.1 percent may be distorted, as it excludes the effects of the COVID-19 pandemic. Finally, the tax-to-GDP ratio indicates a high tax burden. With less disposable income and with the simultaneous increases in taxes, citizens are prone to be more disgruntled. This can already be seen in the fact that 79.7 percent of respondents on a Statistics SA survey on the perceived impact of COVID-19 indicated that they are concerned about civil disorder.

Citizens use different methods to voice their displeasure. Tax can be one of the tools used by citizens to show their dissatisfaction when their government is perceived as failing in the improvement of the economic environment of the average citizen. The economic factors deduced from the historical events can thus be seen as lessons from history.

117 *IOL* 2020.
118 Vermeulen "Inflation and unemployment in South Africa: is the Phillips curve still dead?" 2017 *SABR* 5.

The economic factors identified through history also confirm that South Africa is currently experiencing a harsh economic environment. Fiscal policy in South Africa should thus earn credibility by prioritising growth-enhancing spending. The government should improve the cost of spending to assist in curbing the ever increasing public debt. Additionally, South Africa needs structural reforms in order to boost productivity for employment to raise the income and living standards of South Africans: A sustained job creation programme should be able to increase household disposable income and therefore improve the living standards of citizens. According to the Organisation of Economic Co-operation and Development, South Africa is facing a tough monetary policy change.[119]

The contribution of this research can be found in its attempt to anticipate and prevent a future event that may delay the tough monetary policy changes needed in South Africa, whereas previous research has focused mainly on explaining past events. However, as evident from the recent outbreak of the COVID-19 pandemic and its extraordinary impact on the international community, one can merely attempt to pose suggestions for possible future events.

Anticipating and preventing a possible future tax revolt may be possible, but one should never predict more than what is deduced from the research. The COVID-19 pandemic has changed the world's view of what the future may hold. Thus, whilst the five economic factors may be an indication of a future tax revolt, the COVID-19 pandemic may just be the tipping point of the scale.

119 OECD "Developments in individual OECD and selected non-member economies" 2017 http://www.oecd-ilibrary.org/docserver/download/1216021ec042.pdf?expires = 1477311052&id = id&accname = oid011488&checksum = E9FDC2779EB08937DD537467880EAFAB (last accessed: 2016-10-24).

The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?

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SUMMARY

The article examines the possibility of creating an indigenous legal pluralism within the South African context. Due to the historical and current marginalisation of customary law, can customary law be developed, reformed and codified? Furthermore, can the legal regimes and human rights of indigenous people of South Africa be ascertained? The article renegades the historical marginalisation of customary law due to colonialism and apartheid; where indigenous people's legal regimes were placed subordinate to common law. The article further implores the current status of indigenous law nationally and internationally. The article seeks to advance the argument based on legislative and judicial analysis, that customary law is still marginalised under the current constitutional dispensation. The international call and new recognition of customary law are commendable; the article seeks to review whether South Africa is keeping up or not to the international directives embedded within declarations and conventions they are a signatory to. The article will further comparatively analyse foreign countries that have managed to do what South Africa is struggling to achieve with regard to the recognition, development, application, and reform of customary law.

1 Introduction

South Africa prides itself on its post-1994 Constitution.[1] Embedded within it is the Bill of Rights to protect every person in South Africa,[2] and also giving recognition to the indigenous people of South Africa. South Africa's Constitution elucidates that customary law is in parallel with common law under section 39 of the Constitution,[3] in light to the above

1 Constitution of Republic of South Africa, 1996 (hereafter the Constitution).
2 S 7(1) of the Constitution.
3 S 39 of the Constitution.

How to cite: Morudu & Maimela 'The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?' 2021 *De Jure Law Journal* 54-69
http://dx.doi.org/10.17159/2225-7160/2021/v54a4

contention, the article begs to claim that this is only superficial.[4] The constitutional advancement of customary law has been delayed in terms of legislative and judicial reform and development, and the legislature is inattentive with respect to remedying the inadequate position customary law is placed in. Instead, the legislature has been replacing customary law considered "non-transformative and undeveloped", with common law to promptly deal with customary disputes.[5] The insufficiency of the development and reform of customary law allows the judiciary and the legislature to limit the development of customary law as a whole in terms of its application and interpretation. It is highly significant to engage with the need to ascertain indigenous people's human rights in South Africa, by paving the way and ensuring due regard to their legal regimes and human rights.[6] Indigenous peoples' human rights which Tobin list them as; self-determination; autonomy; land; territory; resource rights; rights to culture and cultural heritage; access to generic resources and protection of traditional knowledge; and the recognition of the issues on the conflict between human rights and customary law, and the future of customary law within the national and the international legal pluralism.[7]

Even at the advent of the codified version of customary law; there are still ambiguities and misunderstandings that exist within the official customary law.[8] Engaging in the creation of indigenous legal pluralism in questioning whether customary law can exist as a separate pluralism within the South African state law pluralism, it is both bold and daunting. If an argument cannot be successfully made, the question left to ask by the article is: Can customary law exists successfully, undistorted and purposefully within the current dispensation? Can the courts and the legislature ensure its constant development and codification, especially giving due regard to living customary law and the customs that exist concurrently?

2 Historical marginalisation of South African customary law

2 1 Concept of customary law

Before the article can engage in the historical analysis of the marginalisation of customary law, it is beneficial to the reader to understand the concept of customary law. Customary law is the concept of law which attaches to a person or a group of people as a form of identity, it serves as both personal and communal law for indigenous

4 G Van Niekerk "The endurance of the Roman law tradition" http://studia.law.ubbcluj.ro/articol.php?articolId = 474 (accessed 2015-07-16).
5 As witnessed in *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 (CC).
6 Tobin *Indigenous people, customary law and human rights – why living law maters* 2.
7 Tobin 3.
8 SALRC *Project 144 Single Marriage Statute 35* (2018) 6.

people.[9] It is imperative to draw a distinction between living customary law and official customary law for the purpose of this article. Living customary law consists of unwritten customary practices that regulate the day-today lives of indigenous people.[10] Living customary law consists of actual practices or customs of the indigenous people whose customary law is under consideration.[11] Furthermore, derived from the initial practices of customary law, custom practices that are long-established, reasonable and uniformly observed by the indigenous people,[12] custom can be ascertained under living customary law; it is an original source of living law.[13]While, official customary law is the opposite of living customary law and is written down.

2 1 1 Pre-colonial, colonial, and apartheid marginalisation of customary law

Before the colonial era, customary law was practiced and applied unrestrictedly;[14] customary law was generally unwritten and thus passed orally from one generation to another.[15] The most prominent customary law was made by the ruling monarch, in which their orders and judgment made current law and amendments to existing living customary law.[16] Ndulo correctly states the nature of customary law as:[17]

> "The law before colonialization in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject to customary law. 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country."

During this time, harmony to law and custom was brought about within the indigenous communities.[18] Thereafter, a distinctive policy towards customary law in Southern Africa began with the British occupation of the Cape in 1806.[19]

9 Woodman 35.
10 Himonga & Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* 27.
11 Himonga & Nhlapo 27.
12 *Van Breda v Jacobs* 1921 AD 330.
13 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).
14 Ndulo "African Customary Law, Customs, and Women's Rights" (2011) *Cornell Law Faculty Publications.* 187.
15 Ndulo 187.
16 Ndulo 188.
17 Ndulo 189.
18 Seroto "An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks" (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169.
19 Seroto 170.

The current colonial power confirmed the Roman-Dutch law already operating in the Cape from 1600s, as the general law of the land, for that system was deemed to be suitably "civilized", unlike customary law.[20] Roman-Dutch law as influenced by English law is what makes up common law, as currently observed in South Africa.[21] Van Niekerk strictly defines Roman-Dutch law as, "…[as] the primary or dominant component of South African state law and in the courts and in academic writing the term 'common law is used.'"[22] No account was taken of the indigenous Khoi and San laws,[23] and based on the history of South Africa, preceding to the arrival of the European settlers in South Africa, indigenous peoples the Khoi, San and the Bantu-speaking people occupied the vast areas of South Africa.[24] In 1828 Ordinance 50 was passed to free people of colour from slavery. This is where the colonial rule was prominent. Consequently, declaring Roman-Dutch law as the law of the Cape.[25] When Britain annexed the Cape territory in 1843, Roman-Dutch law was again declared the general law of the current colony, but shortly afterward courts were also allowed to apply customary law in disputes between Africans.[26] Recognition of customary law was subject to the repugnant formula that was later to be adopted throughout the colony making customary law subject to common law.[27] The government attempted to codify some parts of customary law under the Code of Zulu law, which came in effect in 1869;[28] to regulate customary marriages and divorces for the Zulu nation.[29]

In the Unionisation of the Republic in 1910, the position of customary law differed drastically from one part of the country to the other. In the Cape and Transvaal, customary law had no official recognition.[30] In British held territories and to a lesser extent in Natal and the Transkei territories, customary law was regularly applied subject to the supervision of higher courts.[31] This created a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of customary law. The Native Administration Act 38 of 1927 was passed.[32] Although the government's ostensible purpose was to revive African tradition, its actual intention was to establish a separate system of justice to match segregation in land and society.

20 *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur 72 para 78.
21 Van Niekerk 18.
22 Van Niekerk 19.
23 Elphick *Kraal and Castle: Khoikhoi and the Founding of White South Africa* 7.
24 Seroto 170.
25 Burman 12.
26 Himonga & Nhlapo 5.
27 Ordinance 3 of 1849.
28 Code of Zulu Law 19 of 1891.
29 Code of Zulu Law 19 of 1891.
30 Mahomed & Nhlapo Project 90: The harmonization of the common law and the Indigenous law: Customary marriages Discussion article (1998) 74 *Pretoria: South African Law Commission* 9.
31 Mahomed & Nhlapo Project 90:10
32 Native Administration Act 38 of 1927.

During the advent of apartheid, the systematic oppression of Black indigenous people of South Africa augmented and it also extended to their legal regimes. Customary law was only recognised under a legal exception.[33] This was the apartheid government form of cultural segregation, through enacting of the Bantu Authorities Act 68 of 1951, power was centralised under the tribal rulers, who controlled land and indigenous people, where the tribal ruler was subject to state control and authority.[34] Section 4(1)(d) of the Bantu Authorities Act stated that.[35]

> "A tribal authority shall, subject to the provisions of this Act – generally, exercise such powers, and perform such functions and duties, as in the opinion of the Governor-General fall within the sphere of tribal administration as he may assign to that tribal authority."

These tribal authorities paved ways for indigenous people to be subjected to further segregation, limited access to their land and freedom of movement.[36] Due to the uprising by indigenous communities against imposed and authoritarian traditional authorities in the established homelands (Transkei, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa).[37] The then government decided to establish the Law of Evidence Amendment Act 45 of 1988. The Act took judicial notice of customary law principles that could be readily ascertainable and apply them where applicable in customary disputes.[38] Even so, the Act placed a repugnancy clause, which gave the presiding officer the legal discretion to either apply customary law or to not, and when both parties to the litigation were African.[39]

3 Constitutional marginalisation of South African customary law

Under the current dispensation, the Constitution recognises the application of customary law by the courts in order to promote the spirit, purpose, and object of the Bill of Rights.[40] Customary law must be applied when applicable, subject to the Constitution, public policy, rules of natural justice and legislation.[41] Therefore customary law can only apply if applicable and parties seeking to apply customary law in court should prove that: there is a tribal connection between the litigants; that

33 Himonga & Nhlapo 14.
34 Himonga & Nhlapo 15.
35 Bantu Authorities Act 68 of 1951.
36 Himonga & Nhlapo 15.
37 South African History Online "The Homelands" 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 2019-09-10).
38 S 1(1) of Law of Evidence Amendment Act 45 of 1988.
39 Mahomed & Nhlapo 33.
40 S 39(2) the Constitution. Furthermore, please refer to Traditional Leadership and Governance Framework Act 41 of 2003.
41 S 211(3) of the Constitution. See also *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) 150 153; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Metis v Padongelukfonds* [2002] 1 All SA 291 (T).

a particular system of indigenous law applies; and applicable principles.[42] It is judicious that the courts must satisfy themselves with the contents of customary law and evaluate local customs in order to ascertain the contents of legal rules, bearing in mind that customary law is not uniform.[43] This ascertainment was done through the use of communal leaders and leaders within the royal clan or group, this will apply when the court is ascertaining living customary law.[44] Currently, the major constitutional recognition for the application and practice of customary rules, laws, and principles is contained under sections 39(2),[45] 30,[46] and 31[47] of the Constitution, which affords indigenous people the right to cultural self-determination. Sections 30 and 31 of the Constitution provides for the recognition and "assumed" protection of customary law.[48] These entrenched rights are to an extent a way to ascertain the indigenous people's rights to self-determination.[49] The right to self-determination centres on the need to allow indigenous people to exclusively enjoy their own culture, to profess and practice

42 *Maisela v Kgolane* NO [2000] 1 All SA 658 (T). The case concerned application by the appellant for a rescission of default judgment ordered against him for the return sale of a tractor which was sold and delivered to the appellant the respondent. The Magistrate issued a rule *nisi* to hear reasons of the appellant on reasons they did not make it to court for the initial hearing on the matter. After the discharged of rule *nisi* the Magistrate refused to grant the rescission of default judgment after application motion; even with good reasons given by the appellant and furthermore the Magistrate proceeded to refuse a special plea made by the applicant based on the reason that indigenous law applied to the case because the litigants were black thus extinctive prescription did not apply. The appellant applied to court for the decision on three issues: (1) whether the magistrate had been wrong to discharge the rule in terms of which the attachment was suspended pending the outcome of the application for rescission of the judgment and to award costs against the appellant; (2) whether the magistrate had been wrong not to set aside the judgment of 3 September 1996 as the appellant had shown good cause and had not been in wilful default; and (3) whether the magistrate had been wrong to dismiss the special plea of prescription, in particular in his finding that indigenous law applied without any mention of it on the papers. In an appeal to a Provincial Division. The court held that the Magistrate was wrong in refusing to grant the rescission of the default judgment; the court further held that the magistrate's application of indigenous law and his consequent dismissal of the appellant's special plea, that it was wrong to adjudicate on a sale that was not governed by indigenous law according to the principles of indigenous law merely because the parties were both black. It was clear that indigenous law could apply in cases of sale only where the principles of indigenous law provided for the sale of the thing sold. It would also be wrong to regard such an agreement as regulated by indigenous law if common law principles not known to indigenous law had been agreed upon by the parties.

43 *MM v MN* 2013 (4) SA 415 (CC) para 48-51.

44 Himonga & Nhlapo 25-27.

45 S 39(2) of the Constitution.

46 S 30 of the Constitution.

47 S 31 of the Constitution.

48 Ss 30 & 31 of the Constitution.

49 Tobin 3.

their own religion, or to use their own language.[50] Whilst, section 39(1)(b) of the Constitution, which states that, "when interpreting the Bill of Rights, a court, tribunal or forum; must consider international law."[51]

Realising the importance of the Bill of Rights in ensuring the values of equality, freedom, and dignity especially for the marginalised women and children; which customary law may seek to exclude in terms of succession/ownership of land and property.[52] This questions the real legitimacy of customary law and the indigenous community right to self-determination for the law to apply according to their beliefs and custom. The evidence in *Bhe v Magistrate, Khayelitsha,*[53] and *Mthembu v Letsela,*[54] both these cases indicate the current position of customary law in the constitutional dispensation, both these cases are similar in terms of customary rule and principle challenged.[55] Both cases are to be discussed below they deal with the rules of intestate succession in terms of Black indigenous people of South Africa.

4 Judicial marginalisation of customary law: Case law precedents

4 1 *Mthembu v Letsela* 2000 (3) SA 867 (SCA)

In the Supreme Court of Appeal case, in *Mthembu v Letsela*,[56] the court also came to refrain to interfere with how Black indigenous people dealt with their succession, and the court refused to make any decision about the constitutionality of the rule of male primogeniture regulated under section 4(1) of the Black Administration Act 38 of 1927 and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.[57] Simons explicitly explains the male primogeniture rule and he states that:[58]

> "The rule of male primogeniture is consistent with the structure and functions of the communal family for indigenous people. The general successor, who succeeds in the office as well as to an estate, must be a male because only a man can be head of the household in the traditional society. Intestate succession through the male line forestalls the partitioning of an estate and

50 Ermacora "The Protection of Minorities Before the United Nations" (1983) 1 *Recueil des Course* 246. See also International Covenant on Civil and Political Rights of 1966.
51 S 39(1)(b) of the Constitution.
52 As illustrated in *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) & *Maisela v Kgolane* NO [2000] 1 All SA 658(T).
53 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).
54 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
55 See *Bhe v Khayelitsha Magistrate* para 3 and *Mthembu v Letsela* 867.
56 *Mthembu v Letsela* 868.
57 Regulations for the Administration and Distribution of the Estates of Deceased Blacks of the Act 23 (10) and promulgated under Government Notice R200 of 6 February 1987.
58 Simons *African Women: their legal status in South Africa* (1968) 239.

keeps it intact for the support of the widow, unmarried daughters, and younger sons."

In the *Mthembu* case, the court was faced with the question whether to recognise Ms. Mthembu and Mr. Letsela, the deceased, as married couple; and whether to grant Ms. Mthembu and her daughter the right to claim succession intestate on the property acquired between her and the deceased, during the subsistence of their relationship/partnership.[59] The respondent, the deceased father, claimed that Ms. Mthembu and the deceased where not married in terms of customary law and that the estate of the deceased should devolve to him by the rule of male primogeniture as regulated by statutes.[60] The court refused to grant respondent's claim, and the court reasoned that "it does not believe that the rule of male primogeniture is inconsistent and infringes on the rights entrenched in the Constitution."[61] Also, the court further substantiated that, "the gender discrimination contented by the appellant was not for the court to answer based on the hiatus of its constitutionality."[62] The court further refused to scrap section 23(4) of the Black Administrative Act which dealt with Black indigenous people succession, the court emphasised that, "the provision of succession under the Act is a legislative recognition of 'Black' laws and custom,[63] allowing Black people the opportunity to choose how they wish their estates to be devolved upon their death, either by means of customary rules or by means of a Will, it would be imposing for the court to declare a provision unconstitutional based on it being *contra bona mores,* which allowed an individual to choose how to devolve or what to do with their estate after their death."[64] The court followed a more indigenous legal pluralism in terms of the interpretation of customary law and maintained the rigidity of the indigenous people's legal regimes.

4 2 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC)

In the constitutional court case of *Bhe v Khayelitsha Magistrate*, the case is based on the rule of male primogeniture,[65] it is a custom rule where line of succession or inheritance follows the eldest males in the family. In the *Bhe v Magistrate, Khayelitsha* the applicant acting on behalf of her two daughters brought an application to challenge the customary law rule of male primogeniture as well as section 23 of the Black Administration Act.[66] As the applicant wanted to secure the deceased's property for her daughters.[67] Under the customary law rule of male primogeniture as well as section 23 of the Black Administration Act, the house became the

59 *Mthembu v Letsela* para 2.
60 *Supra*.
61 *Mthembu v Letsela* para 3.
62 *Mthembu v Letsela* para 33.
63 S 23(4) Black Administration Act 38 of 1927.
64 *Mthembu v Letsela* para 45.
65 Black Administration Act 38 of 1927.
66 *Bhe v Khayelitsha Magistrate* paras 9-20.
67 *Supra*.

property of the eldest male relative of the deceased, in this case, the father of the deceased.[68] The Constitutional Court declared the customary law rule of male primogeniture unconstitutional and struck down the entire legislative framework regulating intestate succession of deceased Black South Africans.[69] According to the court, section 23 of the Act was archaic since it solidified official customary law and grossly violated the rights of Black South Africans.[70] With regard to the customary law rule of male primogeniture, the court held that it discriminates unfairly against women and illegitimate children on the grounds of race, gender, and birth.[71] The result of the order was that all deceased estates are to be governed, until further legislation is enacted or developed by the legislature, by the Intestate Succession Act 81 of 1987, whereby widows and children can benefit regardless of their gender or legitimacy.[72]

By scrapping out the entire rule/law, the court overlooked the indigenous communities who still practiced this custom and have embedded it as their custom.[73] In both cases, no other rules of interpretation were followed, unlike how it is done with common law, where rules of interpretation are followed. The purposive rule of interpretation could have been used and applied flexibly to allow consideration of the rule of male primogeniture,[74] Ngcobo J makes that suggestion in his minority judgment in *Bhe v Magistrate, Khayelitsha*, and he states that, "the courts have an obligation under the Constitution to develop indigenous law to bring it in line with the rights in the Bill of Rights in order to promote equality."[75] The rigid application and interpretation of customary law is still marginalising, and the courts should be aware of these realities when dealing with disputes that are customary in nature.

5 Legislative marginalisation of customary law: Legislative disparity

5 1 Regulation of indigenous people marriages

Since the enactment of the Recognition of Customary Marriages Act 120 OF 1998 (herewith referred to as RCMA),[76] which came into force on 15 November 2000, there have been quite a few cases that challenged the provisions within the Act. The RCMA was the attempt by the legislature to regulate customary marriage especially with regard to polygynous

68 *Supra*.
69 *Bhe v Khayelitsha Magistrate* paras 107-108.
70 *Supra*.
71 *Supra*.
72 *Supra*.
73 *Bhe v Khayelitsha Magistrate* paras 137-146.
74 *Notham v London Borough of Barnet* [1978] 1 WLR 220.
75 *Bhe v Khayelitsha Magistrate* para 147.
76 Recognition of Customary Marriages Act 120 of 1998.

marriages.[77] The Act came under fire for some of its discriminatory or exclusionary provisions against women to claim their proprietary rights under customary marriages. Specifically, section 7(1) and (2) of RCMA,[78] the court had to consider section 7 constitutional validity in terms of its exclusion for women who were married before the Act's enforcement.[79] Women in monogamous customary marriages who got married before the RCMA's enforcement, could not claim their proprietary rights because of the matrimonial property system of such marriages were out of community of property.[80] Whilst marriages concluded after the enforcement of the RCMA wherein community of property.[81] This question why did the Act not apply retrospectively to protect such women? These provisions were challenged in the case of *Gumede v The President of the Republic of South Africa,*[82] where the applicant concluded a customary marriage with her husband in 1968. The husband instituted divorce proceedings, due to the nature of the customary marriage as classified as out of community of property and challenged the provisions under the RCMA. The applicant claimed that the provisions sought to discriminate wives who concluded their marriages before the enforcement of the RCMA. Section 7(1) of the RCMA stated that, "the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law."[83] Whilst, section 7(2) stated that, "marriage entered into after the commencement of the Act is marriage in community of property."[84] The court concluded that the provisions were indeed discriminatory and declared them unconstitutional.[85] The issue lies with the legislative oversight of the development and the protection of indigenous people with regard to customary law. This is not the only issue with regard to the RCMA, the Act refers to the Matrimonial Property Act 88 of 1984, for customary marriages concluded in community of property according to the default system in South Africa.[86] This means that if married in community of property, you are bound by Matrimonial Property Act, this questions the relevance of the RCMA, because the Act does not establish its own identity in terms of the regulation of Black people customary marriages. This leads back to the semiotic interpretation and view of customary law. This is the blind spot that customary law finds itself under the current dispensation and section 7 of the RCMA was referred to the legislature for amendment.

77 Recognition of Customary Marriages Act 120 of 1998.
78 S 7(1)-(2) Recognition of Customary Marriages Act 120 of 1998.
79 Louw, & Van Schalkwyk *Introduction to Family Law: Student Textbook* (2019) 83.
80 Louw, & Van Schalkwyk 83.
81 Louw, & Van Schalkwyk 83.
82 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152.
83 S 7(1) Recognition of Customary Marriages Act 120 of 1998.
84 S 7(2) Recognition of Customary Marriages Act 120 of 1998.
85 *Gumede v The President of the Republic of South Africa* 152.
86 Recognition of Customary Marriages Act 120 of 1998.

5 2 Regulation of indigenous people law of succession

Due to indigenous people's unfamiliarity with drafting Wills to regulate their estate, this status *quo* has raised a lot of disputes regarding the rights of wives married under customary rites to inherit intestate without an express contract akin to that. One must remember that the aspect of Wills and the devolvement of the estate of indigenous people is a foreign concept and arises from common law.[87] Only indigenous people who have money, resources, and knowledge about the devolvement of one's estate are able to make an informed choice.[88] Succession under customary law rest on the principle of the acquisition of status and family property of the deceased over their lifetime as the head of the household.[89] The successor will acquire the rights, duties and position of the person he succeeded.[90] The judge in *Mthembu v Letsela* erred in assuming that indigenous people do not understand the concept of succession. Where most indigenous communities devolve their estate intestate and also based on the rule of male primogeniture.[91]

Whilst, in the case of *Bhe v Magistrate Khayelitsha,*[92] the court observed whether extra-marital children and domestic partner of the deceased could inherit intestate. The court declared the provision unconstitutional, which discriminated against gender and children with regard to succession and remedied the unconstitutionality by making the Intestate Succession Act,[93] applicable to indigenous people.[94] Balancing the rights of children under section 28(2) of the Constitution, where the best interest of the child is of paramount importance and ensuring the protection of women against gender discrimination.[95] The flexible and practical means sought by the court are commendable, but the judgment further marginalised and subordinated customary law to common law. The court's negation to reform and develop customary law roved the existential crisis that customary law finds itself under the constitutional guise. This declaration of unconstitutionality with regard to the provisions under Black Administration Act,[96] and the rule of male primogeniture came under heavy criticism in the minority judgment of Ngcobo J. The Judge reiterate that, "it is first important to understand the nature and scope of application of the rules established under customary law."[97] Courts should not deviate from the importance and existence of indigenous people's legal regimes.

87 Ndulo 70.
88 *Bhe v Khayelitsha Magistrate* para 66.
89 Himonga & Nhlapo 162.
90 Himonga & Nhlapo 163.
91 *Mthembu v Letsela* 867.
92 *Bhe v Magistrate Khayelitsha* paras 9-20.
93 Intestate Succession Act 81 of 1987.
94 *Bhe v Khayelitsha Magistrate* para 66.
95 S 28(2) of the Constitution.
96 Black Administration Act 38 of 1927.
97 *Bhe v Khayelitsha Magistrate* para 147.

6 International directives for the protection and advancement of indigenous people legal regimes

Article 27(1) of the Universal Declaration of Human Rights (herewith referred to as UDHR) state that: "everyone has the right freely to participate in the cultural life of their community, to enjoy the arts and to share in scientific advancement and its benefits."[98] The right given in the UDHR is not limited by any right, the only infringement which is not allowed is when such enjoyment and practice seek to infringe on another's rights, freedom, and security.[99] Since the prevalence of indigenous law-related cases, the Commission Drafting Group of United Nations proposed for the passing of the Declaration on the Rights of Indigenous Peoples.[100] During its ratification 144 states voted for its passing (this includes South Africa), and only 4 countries voted against it (Australia, Canada, New Zealand, and the United States), with only 11 countries abstaining from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).[101] This was due to the persistence and call by the indigenous communities for the recognition of their legal regimes and independence by seeking autonomy from colonial laws and decolonisation from the colonial influence.[102] Due to international calls by indigenous communities and bodies representing indigenous people, United Nations saw it fit to enact the United Nations Declaration on the Rights of Indigenous Peoples,[103] which South Africa is a signatory, to address the issues of indigenous people's right to self-determination and autonomy from colonial laws that sought to eradicate their legal regimes.[104] Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples states that:[105]

> "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

98 Universal Declaration of Human Rights 1948.
99 Universal Declaration of Human Rights 1948.
100 Establishing a Working Group to Elaborate a Draft United Nations on the Rights of Indigenous Peoples (March 1995), Commission on Human Rights, Report on the 51st Session, UN Doc. E/1995/23 and also UN Doc. E/CN.4/1995/L.11/Add.22.
101 United Nations: Department of Economic and Social Affairs "United Nation Declaration on the Rights of Indigenous Peoples" (2007) http://www.un.org/development/desa/indgenouspeople/declaration-on-therights-of-indigenous-peoples.html (accessed 2019-09-20).
102 Dugard *International Law: A South African Perspective* (2016) 100.
103 United Nation Declaration on the Rights of Indigenous Peoples, 2007.
104 Dugard 102.
105 United Nation Declaration on the Rights of Indigenous Peoples, 2007.

Tobin states that, "these are the instruments that affirm the status of customary law as a source of law that must be taken into consideration by states in the development of any law and policy affecting the rights and wellbeing of indigenous people."[106] Customary law is important in recognising indigenous people's rights to land; resources; guiding with the decision on the exploitation of their customs and resources or on their land; re-defining the relationship between the state and third parties.[107] These can also assist in international peace missions, adopting some of customary norms assist in better ways to solve disputes instead of the western way (i.e. restorative justice, social justice that is community-based and human-centred; transformative justice based on involving all parties and families and community in dispute resolution; the need to create a system of rehabilitation through dialogue and community service and not incarceration of perpetrators, etc.)[108]

7 Foreign comparative law: Learning from Papua New Guinea

Papua New Guinea (hereafter, New Guinea) serves an acclaimed comparative analysis in terms of the reception and legal recognition of customary law. New Guinea was no exception to colonialism.[109] After their colonial independence and placed under the Australian territorial administration, the need to recognise and protect the indigenous people regimes, two legislation, was enacted for this purpose, Laws Repeal and Adopting Ordinance 1921 and Native Administration Regulation 1924, this was the foundation of when the status of custom gradually began to be recognised as a source of law post-colonialism, and over time through further legal developments, it made way into being part of the legal system of New Guineas.[110] New Guinea has adopted a dual legal system where two court systems exist, the customary court systems and the formal court system. This is due to the fact that more indigenous people rely on customary law dispute agencies.[111] To respond as well as ascertain and maintain indigenous people legal regimes, there is a pipeline legal philosophy that needs to be developed into legal statutes, namely, Indigenous Melanesian Jurisprudence where it is based on the diverse custom, culture, and traditions of the people of New Guinea, where, customary law is to be the object of law reform, and as a basis of a legal system in New Guinea.[112] This is a legal stance that South Africa can adopt as part of the customary law reform and development.

106 Tobin 1-2.
107 Tobin 4.
108 Nhlapo 2.
109 Kamongmenan "Status of Customary Law Within Papua New Guinea's Legal System" (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (accessed 2019-07-12).
110 *Supra*.
111 *Supra*.
112 *Supra*.

8 The idea of underlying law and the hierarchy of laws

To place importance in the status and recognition of customary law in New Guinea enacted the Underlying Law Act 2000 under the constitutional directive,[113] which places and recognises that custom is a source of law and also, how it is given preference over common law in terms of the order of application, interpretation in courts and development of the underlying law (common law).[114] Section 6 of the Constitution further orders that:[115]

> "Subject to this Act, in dealing with the subject matter of a proceeding, the court shall apply the laws in the following order: a) Written law; b) The underlying law; and c) The customary law; d) Common law."

This indicates the preference and sequence of the importance of the application of customary law. The provision elucidates that common law has to be consistent with customary law of Papua New Guinea before it can be applied as part of the underlying law, and if a court applies common law instead of customary law, it has to supply reasonable and sufficient reasons for refusing to apply customary law.[116]

Sufficient and reasonable ascertainment of related custom is important. This stride is made by the judicial and legislative system of New Guinea is commendable and inspirational. The stance taken by Papua New Guinea in ascertaining the legal regimes of their indigenous people indicates the importance and respect awarded to the indigenous people residing there. This can also be said about the Constitution of South Africa due to its restorative approach and recognition of customary law but more work still needs to be done to develop customary law in South Africa.

9 Conclusion

Given the historical marginalisation of customary law and its constant battle to remain relevant and applicable to the indigenous communities, it has come to the need to ascertain indigenous people of South Africa are afforded their human rights through the development, reform, and codification of their legal regimes. This contention is based on living customary law, special legal reform is imperative in this regard. The article introspectively looked at the status of customary law in South Africa, and how it is handled, interpreted and understood by the legal fraternity, specifically the judiciary and the legislature.

113 S 20(1) of the Constitution of the Independent State of Papua New Guinea
114 Refer to the Underlying Law Act 2000.
115 S 6 of the Constitution of the Independent State of Papua New Guinea.
116 *Supra*.

The *legislative* approach should be based on understanding and the imposed intention of customary law. Further understanding of what customary law seeks to achieve and the values and norms it held dear by the indigenous people of South Africa, should be interpreted in a socio-traditional manner and a flexible approach must be employed to ascertain customary law in its true light, nature, and scope. Reform and codification of customary law must be understood to the cultural tenets and customs of indigenous people. A single statute that holistically regulates all aspects of customary law (i.e. marriage, land rights/ ownership, succession, customary legal procedure, remedies, legal recourse, etc.), despite of diversity in customs because this will ensure that no doubt is left when customary disputes are in court. Furthermore, the legislative approach should be flexible and non-discriminatory to the legal regimes of the indigenous people of South Africa. The first point of departure is to remove all laws that seek to discriminate and still segregate indigenous people. It is true that customary law must be viewed as a separate legal system and not as stoic law that needs to be reformed according to the tenets imposed under western/common law, such foreign-imposed ideologies are what dismantles the legality of customary law and further distort its intention.

The indigenous people's *legal regimes* need to be maintained for the purpose of identity, cultural development, and reform. Not viewing customary law with a constrict attitude, but then holistically analyse the current status of customary law to the benefit of the current society and communities and also the future generation. Not only questioning its status and its constant marginalisation, but also seeking its preservation, protection, reform, and development. In the aspect of the focus of this article, reform is based on the idea of reforming customary law in correlations to modern society's moral aspects. Where it is found that customary law is contrary to basic human rights,[117] it shall be reformed in a manner that does not eliminate the rule without proper legal interpretation and only eliminating aspects that are contrary to basic human rights and morality aspect.[118] The reform also seeks to ensure the continuous codification and amendment of customary law which truly reflects indigenous people's legal regimes; the aspect of reform also seeks to look at the preservation and creation of indigenous pluralism also synonymously coined term “indigenisation” of customary law. Therefore, legal development in relation to customary law and the focus of this article means, the judicial and legislative development of customary law. This aspect means that the judiciary and the legislature are tasked to ensure that customary law is preserved and developed to fit and suit the modern social aspects of the indigenous people, whether urbanised or in a rural setting. The world, social anthropologists and the legal academic fields should accept and acknowledge the contribution of traditional-scientific research and knowledge in medicine that traditional healers and leaders possess.

117 Chapter 2 Bill of Right of the Constitution.
118 As argued by Ngcobo J in *Bhe v Khayelitsha Magistrate* case.

An international legal discourse based on the status and reform of customary law is indicated in the UNDRIP, this international declaration should be used to appreciate and ensure that the legal regimes of indigenous people are elevated and are acclaimed in a non-discriminatory fashion. The incorrectly unfounded criticism of customary law and indigenous people is the reason why it is difficult to attain indigenous pluralism to successfully exists in the current dispensation. The importance of customary law lays in the indigenous communities who still want to conform and be bound by customary law to the exclusion of positive/common law. Current mutual respect of the indigenous ideas, knowledge, and resource should be the State's approach to better understand indigenous people and their traditional regimes.

The strides in South Africa are commendable and this should be expanded to indigenous people's legal regimes and not only their traditional regimes. As it was said by Van De Westhuizen J, that, "Legislation has to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm-structure its rightful place in jurisprudence,"[119] no better than the article could say.

119 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 44.

Investigating the extraterritorial application of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights

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SUMMARY

The territorial scope of the application of human rights treaties has been a core discussion when dealing with the enforcement of human rights obligations imposed by human rights treaties on State Parties. In particular, this is because the conduct of a State may affect the human rights of people situated outside the State's territorial borders. Accordingly, to afford protection to the affected States, most international human rights instruments contain the so-called jurisdictional clause which aims to identify the range of people to whom States owe their human rights obligations under a treaty. However, the term "jurisdiction" has not achieved an undoubted definition as yet and remains a continued area of contention. The subject matter of this article is the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It concerns therefore, the applicability of these human rights treaties to the conduct of a State which affects the rights of people outside its territorial borders and results in the lack of the full enjoyment of the human rights recognised in the Covenants, and which would be qualified as a violation of human rights treaty had it been undertaken on the State Party's own territory. Although most of the literature on this topic relates specifically to armed conflict and military occupation, the author applies the tests established for the determination of the exterritoriality of the treaties in circumstances inclusive of and beyond armed conflict and military occupation.

1 Introduction

The second half of the twentieth century has given birth to the adoption of significant multilateral international human rights law instruments.[1] These new instruments were different from the treaties that had come before them as they specifically regulated the legal relationship that

1 Hathaway "Human rights Abroad: When do Human Rights Treaty Obligations apply extraterritorially" 2011 *Yale Law Faculty Scholarship Series* 1.

How to cite: Mateus 'Investigating the extraterritorial application of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights' 2021 *De Jure Law Journal* 70-90 http://dx.doi.org/10.17159/2225-7160/2021/v54a5

existed between a sovereign State and its human rights guarantees to its own citizens, in its own territorial frontiers. From this point, States could no longer act in their own national territory with complete impunity.[2] A question that rises from these circumstances is whether there are any limits placed by human rights treaties on States in respect of the States' conduct outside of their own territorial frontiers. Over the years, scholars and courts have expressed their views on the position regarding the applicability of human rights obligations abroad,[3] focusing on aspects that address the framework of extraterritoriality. Nonetheless, the author concludes that this issue remains unsettled, giving rise to great controversies in current international human rights law. In confronting these controversies, this article explores the extraterritorial applicability of the ICCPR and the ICESCR.

2 Interpretation: A point of departure

There is a general presumption under international law reflected in Article 29 of the Vienna Convention on the Law of Treaties (VCLT) that a treaty binds a State within its territory in whole, unless a different interpretation appears from the text of the treaty or it is otherwise established.[4] However, this Article concerns merely the possibility of restricting the application of a treaty to parts of a State territory and does not address the issue regarding the application of the treaty outside of a State's territory.[5] It is the submission of the author that this treaty provision specifically intends to prevent States from claiming that a treaty does not bind certain parts of its territory, it does not establish that a treaty - for example the ICESCR, which does not restrict its binding character only within a territory of a State Party - would not have extraterritorial application.[6]

It follows, then, that the scope of the extraterritorial application of these human rights treaties must be determined by reference to their own provisions and the general presumption can be rebutted through the application of the rules of interpretation contained in Articles 31 to 33 of the VCLT, *inter-alia*, by considering the relevant subsequent State practice, context, purpose and the *travaux preparatoires* in respect of each treaty.[7]

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2 Hathaway 2011 *Law Faculty Scholarship Series* 1.
3 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* (2013) 1.
4 Art 29 of the Vienna Convention of the Law of Treaties 1969 (hereinafter, VCLT).
5 Gondek *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) 11.
6 Kunnemann "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans and Kamminga) (2004) 201.
7 Sinchak "The Extra-territorial Application of Human Rights Treaties: Al-Skeini et al. v United Kingdom" 2011 *Pace Int. Law Rev. Online Companion* 416.

For most human rights treaties under international law, the central requirement which allows for the extraterritorial applicability of these treaties is the exercise of "jurisdiction".[8] These treaties use variable terms such as "subject to" or "within" a State's jurisdiction. The author accepts and argues that the restriction of the extraterritorial applicability of human rights treaties is aimed at introducing a reasonable limit to a State's responsibility under the treaties as it is impractical that States should be expected to protect the human rights of all persons all over the world.

The International Court of Justice (ICJ) in its *1986 Nicaragua* judgment espouses what the term jurisdiction could be. This paper argues that although the judgment itself does not concern jurisdiction *per* se, but the exercise of effective control, the Court seems to suggest that "the exercise of effective control" either on persons or territory equals jurisdiction.[9] The factual determination of whether a State exercises jurisdiction in the territory of another State is usually clear-cut when dealing with cases involving the military occupation of a foreign territory by another State's military base.[10]

The Human Rights Committee (HRC) in its Concluding Observations on Croatia,[11] its Concluding Observations on Israel,[12] as well as the European Court of Human Rights (ECtHR) in *Cyprus v Turkey*,[13] came to the conclusion that if a State has effective control in a foreign territory as a result of its military action, that State exercises jurisdiction and will be responsible under the international human rights treaties framework for any violations or damages which result from such exercise of jurisdiction.[14] On this note, it is significant to consider what "extraterritorial application" of the ICCPR and the ICESCR means in order to determine whether the threshold for their extraterritorial applicability fits the "jurisdiction test" set in the preceding paragraph. To appropriately understand and follow the debates and discussions

8 See the International Covenant on Civil and Political Rights 1966 (hereinafter, ICCPR).

9 *Nicaragua v United States of America* 1986 ICJ Rep 14 para 115 (hereinafter, 1986 Nicaragua).

10 Benvenisti "Occupation, Belligerent" 2009 *MPEPIL* 1-3.

11 See Human Rights Committee "Concluding Observations of the Human Rights Committee on Croatia" (2009) *Refworld* 7 and 10.

12 See Human Rights Committee "Concluding Observations on the fourth periodic report of Israel" (2014) *Refworld* 10.

13 *Cyprus v Turkey* 1978 (13) DR 85.

14 See *Loizidou and Cyprus (intervening) v Turkey* 1996 ECHR 64. Subsequently, the Court clarified in its *2001 Bankovic and Others v Belgium and Others Appl No* 52207/99 case that the European Convention on Human Rights (ECHR) would apply extraterritorially only in the situation of inhabitants of a territory being under the effective territorial control of an ECHR Contracting State. It is notable that the Court in that case went on to hold that the North Atlantic Treaty Organization (NATO) member States did not exercise effective control over the territory of the Federal Republic of Yugoslavia, and that the extraterritorial application of the Covenant was therefore inadmissible.

surrounding the text of Article 2(1) of the ICCPR, it is important to quote the relevant provision, which reads:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[15] (own emphasis).

The text of this provision suggests that the ICCPR's extraterritorial application is subject to the jurisdictional clause. On further investigation, the same cannot undoubtedly be said about the ICESCR, which does not contain a jurisdictional clause which delimits a State's fundamental obligations to its own territory or subject to its jurisdiction.[16] Instead, the ICESCR refers to the undertakings by which States are to take steps "through international assistance and co-operation".[17] These two treaties were drafted concurrently, therefore, the differences in the language used would ordinarily be considered to be substantially significant as the territorial applicability of the treaties might be intended to be different in scope.[18] Therefore, this article will particularly consider the circumstances under which the treaties have extraterritorial application.[19]

It is the submission of the author that the texts of the two treaties seem to suggest that the standard used to determine the extraterritorial applicability of each treaty may be different. The ICCPR has an explicit jurisdictional clause, providing protection for individuals within its territory and subject to its jurisdiction. Because of the explicit circumscription of jurisdiction, extraterritorial jurisdiction may be more difficult to substantiate in comparison to the ICESCR which does not contain a similar jurisdictional clause circumscribing its application.[20] However, as to whether this is the case, remains unclear and international law does not seem to resolve this issue, as it provides no

15 Art 2(1) of the ICCPR.

16 Askin "Economic and Social Rights: Extraterritorial Application" 2019 *MPIL* 3; Coomans and Kamminga *Extra-territorial Application of Human Rights Treaties* (2004) 1-29; Skogly *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006) 1-34.

17 International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter, ICESCR).

18 McGoldrick "Extra-territorial application of the ICCPR" in *Extra-territorial Application of Human Rights Treaties* (Coomans and Kamminga) (2004) 47.

19 *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 2004 ICJ Reports 163 para 111 (hereinafter, Wall Advisory Opinion).

20 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 1-34.

legal certainty in respect of standards that trigger the extraterritorial applicability of human rights treaties in general.[21]

3 The international law framework regarding the application of human rights law treaties

3 1 Interpreting the scope of the ICCPR's application

When considering the territorial scope of the ICCPR, regard must be had to the basic rules of treaty interpretation as contained in the VCLT. It is worth noting that the ICJ stated in its *1989 Arbitral Award* judgment that "Article 31 of the [VCLT] … may in many respects be considered as a codification of existing customary international law …"[22] and therefore, is applicable to all treaties, even when the States concerned are not parties to the VCLT.[23] In particular, Article 31(1) of the VCLT provides that a treaty shall be interpreted in *good faith* and in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its *object* and *purpose*.[24]

This paper argues that on a *prima facie* basis, when following this fundamental rule of treaty interpretation, the conclusion that follows is that the ICCPR does not provide for human rights obligations on State Parties to people who are not within the territory of that State. This suggests that the ICCPR does not apply to a State Party in respect of areas beyond its territorial frontiers.[25] In support of this *prima facie* case, Conrad Harper, the then legal advisor of the United States Department of State, submits that the Covenant is not regarded as having extraterritorial application because the dual requirement restricts the scope of the Covenant to individuals who are within the territory of a State and under the jurisdiction of such State. In support of this argument, Harper submits that the *travaux preparatoires* underscore a clear understanding between

21 CESCR "General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" (2017) para 10; see also International Commission of Jurists Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997.

22 *Guinea-Bissau v Senegal* ICJ Reports 1991 para 53.

23 Mbengue "Rules of interpretation (Article 32 of the VCLT)" 2016 *FILJ* 388-412.

24 Article 31(1) of the VCLT; see also *Australia v France* 1974 ICJ Rep 253, 268.

25 Human Rights Committee "Consideration of reports submitted by States Parties under article 40 of the Covenant" (2008) *Refworld* 109; see Dennis & Surena "Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice" 2008 *Eur. Hum. Rights Law Rev.* 714; see also McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 45-50.

the drafters of the Covenant to limit the territorial reach of the obligations recognised in the Covenant.[26]

This means that the interpretation of the word "and" in Article 2(1) of the ICCPR would naturally be seen to suggest a cumulative test that the individuals must be (i) within the State's territory and (ii) subject to the State's jurisdiction.[27] However, this paper argues that this would be inconsistent with the object and purpose of the ICCPR and therefore manifestly absurd. Article 12(4) of the ICCPR supports this opposing view as it contemplates that in order for an individual to invoke the provisions of Article 12(4), that individual must be outside of the State's territory. Therefore, it is the submission of the author that following a restricted interpretation of the provision would devoid Article 12(4) of its substance if it can only be invoked if the individual is already within the territory of the State.[28]

Such a restrictive interpretation as proposed by Harper also differs from that which follows when we employ the consideration of subsequent practice in terms of Article 31(3)(b) of the VCLT, which supports the extraterritorial scope of the ICCPR.[29] The ICJ has relied on the concept of subsequent practice in its *Wall Advisory Opinion*;[30] in *Certain Expenses*,[31] and in the *Namibia Advisory Opinion*.[32] In these three cases, the ICJ considered the practice of the "relevant organs" such as the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC), to determine the meaning of provisions in the United Nations Charter.[33]

Accordingly, the author disagrees with Harper that the *travaux preparatoires* underscore a clear understanding between the drafters of the Covenant to restrict the territorial reach of the Covenant. It is notable that during the drafting phase of the negotiations over the ICCPR, the United States (US) had proposed an amendment to Article 2(1) of the

26 See Human Rights Committee "Statement of State Department Legal Adviser, Conrad Harper" 53rd Session.
27 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 47.
28 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 48.
29 *Wall Advisory Opinion supra,* para 109.
30 *Wall Advisory Opinion supra,* paras 94-96.
31 See discussion of *Certain Expenses of the United Nations (Article 17 paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962 on Lauterpacht "The Development of the Law of International Organizations by the Decisions of International Tribunals" 1976 *Rec. Cours* 460; Blokker "Beyond 'Dili': On the Powers and Practice of International Organizations" in *State, Sovereignty, and International Governance* (ed Kreijen) (2002) 312-318.
32 *Legal consequences for States of the continued presence of SA in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,* Advisory Opinion 1971 ICJ Rep. (hereinafter, Namibia Advisory Opinion).
33 Arato "Treaty interpretation and Constitutional Transformation: Informal change in International Organisations" (2013) 38 *Yale J. Int'l L.* 289-326.

Covenant. The proposed amendment read "each State Party hereto undertakes to ensure to all individuals *within its territory* the rights set forth in this Covenant …"[34] and was discussed at the fifth and sixth sessions of the Human Rights Commission, where it was ultimately rejected.[35] The British delegate, Ms Bowie, challenged the wording of the proposed amendment. She argued that such an amendment would unreasonably restrict "the guarantees of those rights to individuals *actually* on the territory of a State, while the original text extended it to all individuals within its jurisdiction".[36] Following which the US opted to propose that the phrase "within its territory *and* subject to its" be added immediately before the word "jurisdiction", so that the provision would read "each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and *subject to its jurisdiction* the rights recognized in the present Covenant …".[37]

As a result thereof, the Lebanese delegate, Mr Azkoul, requested clarifications regarding the implications of the proposed wording put forth by the US. He specifically expressed that if the implication was the restrictive interpretation that both territory and jurisdictional control must be present for a State to bear obligations in terms of the treaty, then he would object to such amendment and/or interpretation.[38]

This remark allowed the US representative, Mrs Roosevelt, the opportunity to explain the purpose and implications of the amendment. Her explanation was that the amendment would indeed restrict the application of the treaty to a dual threshold of: (i) territory and (ii) jurisdiction.[39] This interpretation did not find much favour. The Yugoslav representative expressed that there was a difference between those individuals who are within the territory of a State, and those subject to the jurisdiction of the State. The Greece representative proceeded to suggest that Article 2(1) must be read with the effect that the words "within its territory" and "subject to its jurisdiction" are distinct and disjunctive tests that give rise to the same obligations. The Chilean

34 For a detailed discussion see the United Nations Document E/CN.4/224.

35 United Nations "Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)" 1949; see also United Nations "Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session" 1950.

36 United Nations "Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)" 1949 *supra*; see also United Nations "Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session" 1950 *supra*.

37 This which became the final wording of the Covenant. See United Nations "Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the proposed additional Articles: Memorandum by the Secretary-General" 1950 para 15 (hereainfter, Compilation of Comments).

38 Compilation of Comments *supra*, para 24.

39 Follow this discussion from United Nations "Summary record of the 193rd meeting of the Commission on Human Rights: Sixth Session" 1949 paras 17-87.

representative agreed with this, indicating that the concept of national territory and that of national jurisdiction were distinct matters.

This paper argues that the discussion surrounding the amendment indicates that no such clear understanding was underscored by the drafters as proposed by Harper. Amongst other representatives, those of Lebanon, Belgium, and Yugoslavia, indicated their dissent to the implied interpretation of the amendment as proposed by the US. Subsequently, in response to the US's claim that the ICCPR has no extraterritorial effect, the HRC Stated in its Concluding observations on the fourth periodic report of the US that:

> "[It] regrets that the State Party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State Party has only limited avenues to ensure that State and local governments respect and implement the Covenant, and that its provisions have been declared to be nonself-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2). The State Party should: (a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extra-territorial application of the Covenant under certain circumstances …"[40]

Moreover, long before HRC's Concluding observation, the ICJ in its *2004 Wall Advisory Opinion*, opined that the ICCPR is applicable to the conduct of a State outside of its own territory, in the exercise of its jurisdiction.[41] Furthermore, the HRC had acknowledged in its General Comment No. 31 that a State Party has obligations to respect and ensure the protection of the rights recognised in the Covenant to any person who is within the effective control of that State, even if not situated in the territory of the State Party.[42] This was already long indicated by the HRC in its 1986 General Comment No. 15, where the Committee had indicated that the enjoyment of the rights recognised in the Covenant is not limited to citizens of State Parties but must also be extended to every individual,

40 Human Rights Committee "Concluding observations on the fourth periodic report of the United States of America" 2014 para 14.

41 *Wall Advisory Opinion supra,* para 111.

42 Human Rights Committee "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 2004 OXIO 10. The Human Rights Committee is the supervisory body of the ICCPR constituted by independent experts that monitor the implementation of the treaty. The Committee also publishes its interpretation of the content of human rights provisions in general comments and these general comments are important when dealing with treaty interpretation as they provide guidance as subsidiary means of treaty interpretation pursuant to Article 38(1)(d) of the Statute of the ICJ.

(irrespective of their nationality or statelessness) who find themselves in the territory *or* subject to the jurisdiction of the State Party.[43]

As early as in 1977, the Committee had already expressed that the Covenant had extraterritorial application, which stems from the fulfilment of either one of the requirements Stated in Article 2(1), arguing that the literal interpretation of Article 2(1) would lead to the absurd conclusion that State Parties could perpetrate with impunity abroad human rights violations that were prohibited within their own territory.[44] It is the submission of the author that notwithstanding the Committee's consistent practice, the debate surrounding the extraterritorial applicability of the treaty has not escaped the hands of international law in recent times. In 2004 the government of Sweden raised an objection to Turkey's declaration that its ratification of the Covenant extends obligations arising from the Covenant only in respect of its national territory. Sweden opined that the duty to respect and ensure the protection and fulfilment of all rights in the Covenant is an obligation upon all State Parties to all persons under the States' jurisdiction and a limitation on the basis of the principle of national territory is inconsistent with the obligations imposed by the Covenant on all State Parties and therefore, incompatible with the object and purpose of the Covenant.[45]

3 2 Illustration: Controversy regarding Article 2(1) of the ICCPR's scope of application

For purposes of this illustration it must be borne in mind that jurisdiction is subject to "effective control".[46] The ICJ in *Nicaragua* had to consider whether some actions by the *contras* in violation of international humanitarian law (such as the killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping)[47] could be attributed to the US.

The Court held that this could not be the case because effective control by the US over the *contras'* individual acts in violation of international humanitarian law was not established. This paper argues that from the reading of the Court's judgment, effective control would be equal to the issuance of directions to the *contras* by the US concerning specific operations (such as the indiscriminate killing of civilians, etc.), that is to say, an exercise of authority over the *contras'* individual acts.[48]

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43 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 35-56.

44 Kalin and Kunzli 2009 *The law of International Human Rights Protection* (2009) 132-133.

45 Sweden "Objection to the declarations and reservation made by Turkey upon ratification" 2004 *United Nations Treaty Series* 222.

46 *1986 Nicaragua supra*. See also *Bankovic v Belgium supra* where the Court establishes a territorial or spatial model of jurisdiction. Although the Court never bluntly deserted the spatial model, the Court has, before and after *Bankovic*, developed case law that appears to depart from the strict territorial/spatial model of jurisdiction.

47 *1986 Nicaragua supra*, paras 20, 113.

48 *1986 Nicaragua supra,* para 115.

Subsequently, the author posits that since a receiving State does not exercise such authority over a sending State's diplomats or members of its armed forces, if Article 2(1) of the ICCPR is to be interpreted as constituting a cumulative test, this would mean foreign diplomats or members of foreign armed forces stationed on the territory of another State pursuant to international agreements between the two States, would not benefit from human rights recognised in the treaty, as they would not be considered beneficiaries of human rights per that restrictive interpretation.

The author argues that this is because the receiving State has no general power to exercise authority (adjudicative or enforcement jurisdiction) over said diplomats within its territory.[49] Subsequently, if the State has no effective control over a foreign diplomat, it translates that it has no jurisdiction over said diplomat and that means the receiving State would have no human rights obligations in respect of the diplomat because the diplomat is not subject to its jurisdiction. Similarly, the sending State would also have no human rights obligations in respect of the diplomat because the diplomat is not within its national territory. Therefore, this paper concludes that a restrictive interpretation of Article 2(1) of the ICCPR would devoid the treaty of its purpose as it excludes certain categories of persons/situations from protections afforded by international human rights.

3 2 1 The possible interpretation that favours the extraterritorial application of the ICCPR

This paper argues that on a deeper level of inquiry, Article 2(1) of the ICCPR acknowledges that it is *de facto* capable of extraterritorial application. However, this is only possible if the requirement "within a State's territory and subject to the jurisdiction of the State" has been established.[50] It is the submission of the author that the context of the word "and" operates as a disjunctive word that is used to create clear, distinct and independent requirements that are not cumulative to establish the extraterritorial applicability of the Covenant.[51] In fact, the HRC unequivocally interprets the requirements found in Article 2(1) disjunctively and rejects the interpretation that the requirements are cumulative.[52] In addition, the ICJ in its *Wall Advisory Opinion* addressing the question of the applicability of the ICCPR, left no doubt that it does not subscribe to the strictly literal "conjunctive" interpretation of the Covenant, but rather favours that which offers a disjunctive approach.[53] The Court considered the object and purpose of the ICCPR and concluded

49 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 44.
50 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 43.
51 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 55; see also Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132.
52 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 55 and 56.

that even in situations where jurisdiction is exercised beyond national territory, a State should be bound to comply with the treaty provisions.[54]

Accordingly, the effect of the term "and" in Article 2(1) of the treaty is the same as that of the word "or".[55] As such, this paper argues that only in circumstances where the State has established that its peoples are within the territory of another State, *or* are subject to the jurisdiction of another State, will the latter State also incur obligations to respect, protect and fulfil the rights recognised in the Covenant in respect of those individuals.[56] In effect, it is sufficient to accept either one of the requirements in Article 2(1) to establish the extraterritorial applicability of the Covenant.

In this section, the study particularly focuses on the second part of Article 2(1) of the ICCPR: "subject to its jurisdiction", as it primarily concerns itself with issues potentially occurring outside the territorial borders of the State and thus directly relates to the question of extraterritoriality. In this respect, the primary question should not be whether the treaty imposes obligations which find extraterritorial application, but rather, in what circumstances the treaty will find extraterritorial application.

The consistent jurisprudence and authoritative statements of the relevant international human rights law bodies such as the HRC, as well as the ICJ, in respect of the American and European Conventions on Human Rights and the Convention Against Torture (CAT), have been to interpret the term "jurisdiction" in these treaties as operating extraterritorially in certain circumstances.[57] The author argues that although there is not much commentary in support of the extraterritorial effect of the term "jurisdiction" in the ICCPR, the meaning of the term in the Covenant is arguably of an extraterritorial effect.

In the *Namibia Advisory Opinion*, the ICJ opined that South Africa was responsible for the violations of the rights of the people of Namibia because physical control of a territory and not sovereignty or legitimacy

53 Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205.

54 *Wall Advisory Opinion supra,* paras 109-111; Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 206; *Wall Advisory Opinion supra: Declaration of Judge Buergenthal* 240 para 2.

55 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

56 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

57 United Nations "Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America" (2006) 15; see United Nations "General Comment No. 2: Implementation of Article 2 by States Parties" 2007; see also Wilde "The extraterritorial application of international human rights law on civil and political rights" in *Routledge Handbook of International Human Rights Law* (eds Sheeran and Roodley) (2013) 635-661.

of title, is the basis upon which State responsibility for acts affecting other States must be decided.[58] Wilde suggests that as a general proposition, the echo of the Court's Statement can be traced through later decisions on the spatial applicability of human rights treaty law in two related but distinct ways:

> "In the first place, the fundamental point that State responsibility should not be limited to situations where a State enjoys title is the basic underpinning of extraterritorial applicability. In the second place, the particular concept of 'physical control over territory' as a basis for determining where the obligations should subsist."[59]

This opinion paved the Court's pronouncements on issues regarding the extraterritorial application of human rights treaties in subsequent matters.[60] Evidently, the ICJ, in its *Wall Advisory Opinion*, as well as the *DRC v Uganda* judgment, appeared to espouse and assume that even though there is less authoritative commentary on the extraterritorial applicability and meaning of the term "jurisdiction" in the ICCPR, the treaty reflected an extraterritorial application.[61] The Court acknowledged that this interpretation was consistent with the drafting history of the Covenant as the drafters of the Covenant had not intended the wording of Article 2(1) to allow a State to evade its obligations when it exercised jurisdiction abroad.[62] The Court considered the ICCPR's *travaux preparatoires* and observed that they did not exclude the extraterritorial applicability of the Covenant.[63] Instead, the Court decided that the *trevaux preparatoires* of the Covenant reinforce the disjunctive reading of the phrase "within its territory and subject to its jurisdiction".[64]

This interpretation is also assumed to have been favoured by most States during the drafting of the Covenant as pointed out in the preceding paragraphs.[65] Moreover, the author acknowledges that although there is room to argue against the extraterritorial applicability of the Covenant from the preparatory works, it must be considered that the applicability of the Covenant to States operating abroad was not considered, except in cases of military occupation.[66] Thus, it cannot be said that the

58 Namibia Advisory Opinion 54 par 118.
59 Wilde 2013 *Routledge Handbook of International Human Rights Law* 663.
60 Wilde 2013 *Routledge Handbook of International Human Rights Law* 650-663.
61 *Wall Advisory Opinion supra,* paras 109-112; *Democratic Republic of the Congo v Uganda* 2005 ICJ Reports 168 paras 216, 217 (hereinafter, Armed Activities).
62 Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132-133.
63 *Wall Advisory Opinion supra,* para 109.
64 *Wall Advisory Opinion supra*.
65 See United Nations Documents "E/CN.4/224" 1949; see also United Nations Documents "E/CN.4/SR125" 1949.
66 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 37-40.

Covenant is by all means not capable of finding an interpretation that favours extraterritorial application.[67]

During the 6th Session of the HRC in its 194th meeting, several issues were raised regarding Article 2(1), however, most of them were merely "flagged up but not necessarily agreed upon and thus there was no clear and decisive answer" regarding various issues for the current study.[68] It is on this basis that it is reasonably fair to conclude that much room was left for subsequent interpretation of the Covenant.[69] This paper argues that such subsequent interpretation of the Covenant as indicated in the preceding paragraphs favours the extraterritorial application of the Covenant. Even the report of the then Special Rapporteur of the Commission on Human Rights on the situation of human rights in Kuwait under Iraqi Occupation, Mr Walter Kälin, infers that although the occupation of Kuwait by Iraqi troops was not "within the territory" of Iraq, the application of the obligations envisaged in the Covenant were not precluded by the stipulation of the requirement of territoriality in Article 2(1).[70] The same report was referred to in the UNGA Resolution 46/135 of 17 December 1991 which was adopted with 155 votes to 1, with 10 abstentions.[71] It is the submission of the author that the favour received by this report and its inclusion in the adopted resolution is important as it is indicative of the *opinio juris* shared by the global community of States regarding the issue of extraterritoriality.

3 2 2 Interpreting the scope of the ICESCR's application

Noticeably, Article 2(1) of the ICESCR does not contain a jurisdictional clause.[72] The Covenant makes no reference to the qualification of jurisdiction or the territory of a State.[73] Rather, the Covenant includes an express reference to the concept of international cooperation and assistance in order to achieve its objects and purpose.[74]

The debates surrounding the ICESCR are therefore not concerned with the meaning of jurisdiction, but on whether the lack of an express

67 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 40.
68 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.
69 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.
70 See Kälin "Special Rapporteur of the Commission on Human Rights: Report on the Situation of Human Rights in Kuwait under Iraqi Occupation" 1992.
71 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 85.
72 Coomans "The extraterritorial scope of the ICESCR in the work of the United Nations Committee on Economic, Social and Cultural Rights" 2011 *Hum. Rights Law Rev.* 1 – 35.
73 Ramazanova "Extraterritorial application of Human Rights Obligations in the context of Climate Change Impacts on Small Island States" 2015 *University of Oslo* 35.
74 Article 2(1) of the ICESCR; see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 295.

provision delimiting the States obligations to its territory or jurisdiction, renders the Covenant always applicable in an extraterritorial context, or whether a spatial test is applied to delimit the obligations of States.[75]

Article 2(1) of the Covenant provides that each State Party to the Covenant shall undertake steps, independently and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the Covenant by all appropriate means as may be necessary.[76] It is the submission of the author that this provision evidences a stronger basis for the Covenant's extraterritorial application of human rights than its sister provision in the ICCPR.[77] Any restrictive approach to the interpretation of Article 2(1) of the ICESCR would render the obligation of international cooperation and assistance meaningless, especially in light of today's globalisation processes.[78]

It is the submission of the author that the extraterritorial applicability of the Covenant is also alluded to in the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.[79] Principle 28 provides that all States are under an obligation independently and jointly, through international cooperation to fulfil economic, social and cultural rights of people within their territory, as well as extraterritorially.[80] This interpretation has also been endorsed by the ICJ in its *Wall Advisory Opinion* where the Court underscored that the ICESCR finds extraterritorial application.[81] Nevertheless, the Court further emphasised that the extraterritorial applicability of the ICESCR cannot be unrestricted so as to obligate State Parties to protect the human rights of all persons all over the world. The Court held that the rights recognised in the Covenant are by nature territorial and thus a State is bound by the obligations in the Covenant outside of its territory only if it exercises effective jurisdiction in another State, thus qualifying the scope for the Covenant's extraterritorial space.[82] The author concludes that although the Court espouses the jurisdictional test for the extraterritorial application of the ICESCR, it would seem that a test based on the effects doctrine is also plausible, especially when dealing with cases of shared resources between two or more States. This test will be discussed below. It must also be noted, that although the Court itself has not made an express decision as to the application of this test specifically in respect of the ICESCR, the Court has

75 See Wilde 2013 *Routledge Handbook of International Human Rights Law* 666.
76 Article 2(1) of the ICESCR.
77 Ramazanova 2015 *University of Oslo* 39.
78 Askin 2019 *MPIL* 2 and 3.
79 Preamble, Principle 9 and 29 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013; De Schutter *International Human Rights Law* (2014) 204.
80 Principle 28 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013 *supra*.
81 *Wall Advisory Opinion supra*, paras 109-113.
82 *Wall Advisory Opinion supra*, para 112.

in fact espoused the effects doctrine in its *1927 Lotus* case to the Convention of Lausanne and principles of international law.[83]

3 2 3 Other considerations as regards the ICESCR's extraterritorial application

Reference can be made to the UN Charter as mentioned in the Preamble of the ICESCR.[84] Article 1(3) of the UN Charter provides that the purpose of the UN is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[85]

The principle of international assistance is also emphasised in Articles 55 and 56 of the Charter, setting out that the UN shall promote the universal respect for and observance of human rights and fundamental freedoms for all and all member States shall take measures to ensure the achievement of the rights recognised in the Covenant. Accordingly, the author argues that this implies that the principle of international cooperation and assistance means that human rights obligations cannot be limited to territory as that interpretation would run against such principle. The use of the word "universal" instead of "domestic" in Article 55 of the UN Charter supports the extraterritorial application of human rights treaties. This interpretation is consistent with the practice of the ICJ which highlights that should a State Party's conduct violate rights in the Covenant beyond its own territory, then such State Party is in breach of the UN Charter.[86] Similarly, the author argues that the use of "international" in Article 2(1) of the ICESCR to foster for assistance and cooperation, supports the extraterritorial applicability of the Covenant.[87]

83 *France v Turkey 1927* PCIJ 10; see Born & Rutledge *International Civil Litigation in United States Courts* (2007) 567-568; Gerber "Beyond Balancing: International Law Restraints on the Reach of National Laws" 1984 *Yale J. Int'l L.* 196-197, 293-294; see also Parrish "The Effects Test: Extraterritoriality's Fifth Business" 2008 *Articles by Maurer Faculty* 1470-1478.

84 See preamble of the ICESCR; see also Kunnemann 2004 *Extraterritorial Application of Human Rights Treaties* 202.

85 Article 1(3) of the Charter of the United Nations 1945.

86 *Namibia Advisory Opinion supra*; also see Chenwi and Bulto *Extraterritorial Human Rights Obligations from an African Perspective* (2018) 44.

87 Skogly 'Extraterritoriality: Universal Human Rights without Universal Obligations' in *Research Handbook on International Human Rights Law* (eds Joseph & McBeth) (2010) 75.

4 The jurisprudence of the International Court of Justice and the Supervisory Bodies of the Covenants in their determinations on the question of extraterritorial application of the Covenants

The study below will show that there is evidence to support that the world court, and relevant supervisory bodies, consider the ICCPR and the ICESCR applicable on an extraterritorial basis, especially in situations where a State exercises control over the territory of another State and/or over persons who may be situated outside of that States territory.[88]

This paper argues that based on the jurisprudence of the ICJ, it is clear that if violations of treaty based human rights arise from the conduct of a State in a foreign territory, such State would have been in violation of its obligations in respect of said treaty. An example of such jurisprudence is the *Namibia Advisory Opinion* where the Court advised that South Africa was in breach of its obligations under the United Nations Charter for establishing Apartheid in Namibia.[89] It is the submission of the author that although this does not specifically relate to the ICCPR nor the ICESCR, it reflects the attitude of the Court as regards the issues surrounding the territorial reach of human rights treaties. This is an issue that is core to the investigation of the ICCPR and the ICESCR's extraterritorial applicability. Therefore, the author argues that the Court's decision on the matter may be used to anticipate the attitude of the Court when approached with the question of the extraterritoriality of the ICCPR and the ICESCR. This extrapolation will be substantiated below.

The ICJ in its *1996 Bosnia Genocide* case decided that given the *erga omnes* character of rights and obligations under the Genocide Convention, as well as the fact that the treaty contains no clause limiting the treaty's application to a State Party's jurisdictional control, the obligation placed on States to prevent and punish crimes of genocide is not territorially limited.[90] As a result, the Federal Republic of Yugoslavia could be held responsible for acts of genocide perpetrated by Serb forces in Bosnia-Herzegovina.[91] Although the precise basis by which the Court makes this decision in support of extraterritoriality is not immediately apparent, it can be extracted from the decision that the absence of a jurisdictional clause in a human rights law treaty, may extend a State Party's obligations even to those acts performed by the State outside of

88 For a detailed discussion see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 121-228.
89 *Namibia Advisory Opinion supra*, paras 131 and 133.
90 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports 31-33.
91 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports *supra*.

its territorial or jurisdictional control.[92] This paper suggests that the Court seems to draw this conclusion on the basis of the functional approach test.[93] This test bases its foundations on the effect's doctrine. It traces a State's extraterritorial conduct and establishes extraterritorial obligations on the State if the conduct in question has effects beyond the territory of the State.[94]

The Genocide Convention is not the only human rights treaty that lacks a jurisdictional clause. Similarly, the ICESCR which is particularly important for this discussion, does not contain a jurisdictional clause delimiting State obligations to territory or jurisdiction.[95] Moreover, considering the context of the wording of the ICESCR obligations that State Parties shall recognise the right of "everyone" together with the obligation to take steps through "international assistance and co-operation" to fully recognise the rights in the Covenant, it may naturally be construed that the obligations imposed by the Covenant extend beyond the territorial jurisdiction of a State Party.[96] Such a conclusion is also supported by the Committee on Economic, Social and Cultural Rights (CESCR) which has outlined in its General Comment No. 24 that the obligations of State Parties under the ICESCR do not simply stop at their territorial borders.[97] The Committee expresses that obligations of State Parties to the ICESCR have an extraterritorial reach, which is generally confined to the jurisdictional test.[98]

Conversely, Article 2(1) of the ICCPR *prima facie* limits a State's obligations to territory and jurisdiction. However, the HRC has interpreted the provision to mean that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if situated outside the territory of the State Party".[99] The Committee seems to suggest that although the treaty subscribes its obligations to territory and jurisdiction, an extraterritorial application of the treaty is possible in situations where a State Party exercises effective control over another State's territory. The

92 Craven "Human Rights in the realm of order: Sactions and Extraterritoriality" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans & Kamminga) (2004) 251.
93 See Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251.
94 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251; *IACtHR Advisory Opinion OC-23/17 Requested by the Republic of Colombia* 2017 para 81.
95 See Article 2(1) of the ICESCR; see also Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.
96 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.
97 CESCR "General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" 2017 para 26.
98 CESCR "General Comment No. 19: The Right to Social Security - Art. 9 of the Covenant" par 54; see also "General Comment No. 24" *supra* 2017 paras 24-37.
99 Human Rights Committee "General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 2004 para 10.

Committee has expressed this view in *Lopez v Uruguay*, where it held that the delimitation in Article 2(1) of the ICCPR is not to be read as permitting a State to commit violations of civil and political rights in the territory of a foreign State.[100] Similarly, the HRC also expressed great concern over an interpretation of Article 2(1) that suggests the exclusion of the application of the treaty with respect to individuals under the jurisdiction of a State Party who find themselves within the territory of a foreign State Party.[101]

Noteworthy, the ICJ has also confirmed the extraterritorial applicability of the ICCPR in its *2004 Wall Advisory Opinion* stating that "the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside of its own territory".[102] This principle was subsequently confirmed by the Court in its decision in *DRC v Congo,*[103] Below, these judgments are discussed to briefly highlight the position espoused by the ICJ to the issue of the extraterritorial applicability of the ICCPR and the ICESCR.

4 1 The Wall Advisory Opinion

In July 2004, the ICJ delivered an Advisory Opinion in response to the request by the UNGA on the legality of the situation surrounding the "wall" by Israel in the Occupied Palestinian Territories.[104] The "wall" boasts a breadth between 50-100 metres, circling some areas in Palestine without adhering to the demarcation line between Israel and the Palestinian territories. The construction of the wall "seriously affected the lives of the Palestinians living in the occupied territories, impeding the exercise of a number of their fundamental rights".[105] While assessing the legality of the construction the wall, the ICJ had to determine whether the ICCPR and the ICESCR are applicable outside the territory of a State Party, and if so, in which circumstances would such application follow.[106] Although the ICJ's analysis of the question of the extraterritorial applicability of these treaties is rather brief, the Court left no doubt that it considers the treaties to have an extraterritorial reach. In fact, as regards Article 2(1) of the ICCPR, the Court expressed that it does not subscribe to the strict literal conjunctive interpretation of the Covenant but rather espouses a more "disjunctive" approach.[107] The

100 *López Burgos v Uruguay supra*, para 12.3.
101 See Human Rights Committee "Concluding Observations on the Sixth Periodic Report of Germany" 2012 para 16. The Human Rights Commission has been consistent with its position that the ICCPR is applicable and triggers obligations beyond State territory, an early pronouncement on this can be seen in *López Burgos v Uruguay supra*.
102 *Wall Advisory Opinion supra*, para 111.
103 See *Armed Activities supra*.
104 See General Assembly "10th Emergency Special Session: Resolution ES-10/14" 2003.
105 See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205; see also *Wall Advisory Opinion supra*, para 134.
106 *Wall Advisory Opinion supra*, para 107-113.

Court held that the ICCPR enjoys an extraterritorial application as it is applicable in respect of acts done by a State Party in the exercise of its jurisdiction outside of its own territory. In its own words, the Court said:

> "While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[108]

The ICJ also considered the ICESCR's applicability to the conduct of Israel in the Occupied Palestinian Territories. This was the first time that the ICJ acknowledged the extraterritorial applicability of the ICESCR. Although the Courts' analysis of the issue is very succinct, it is quite remarkable as there is still very little judicial authority from the Court on the matter to date. In its opinion the Court reinforces the position taken by the CESCR in its Concluding Observations on Israel's periodic reports by endorsing the extraterritorial applicability of the treaty.[109] In particular, the Court commented on the territorial reach of the ICESCR, stating that the extraterritorial applicability of the treaty should not be excluded, as the treaty's extraterritorial effect will be triggered in a situation where a State Party exercises control (territorial jurisdiction) over the territory of another State.[110] It is the submission of the author that the Court espouses the effective control test, instead of the functional approach test here.[111]

4 2 *DRC v Uganda*

In *DRC v Uganda* the Court had to consider the extraterritorial applicability of the ICCPR in respect of Uganda's armed activities in the territory of the DRC.[112] The Court gave regard that there were two situations of extraterritorial applicability that had to be considered separately. First, the occupation of the Congolese region (Ituri) by the armed forces of Uganda and second, the armed activities in other areas. The Court held that both the occupation of the Ugandan forces in the Ituri region as well as its military activities, signified the exercise of jurisdiction as per Article 2(1) of the ICCPR and thus triggered extraterritorial consequences and/or obligations.[113]

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107 See eg. Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 185.

108 *Wall Advisory Opinion supra,* paras 109-110.

109 CESCR "Concluding Observations on the initial report of Israel" 1998 para 8.

110 *Wall Advisory Opinion supra*, para 112. Note that the CESCR refers to such territorial jurisdiction as 'effective control', see CESCR "Concluding observations on the initial report of Israel" 1998 *supra*, paras 15 and 31.

111 Nonetheless, it ought to be recalled that the Court has not expressly opposed the application of the functional approach test to the ICESCR, conversely the Court has espoused such an approach to the extraterritorial application of human rights in its *1927 Lotus* case.

112 *Armed Activities supra*; see Okowa "Case concerning armed activities on the territory of the Congo (DRC v Uganda)" 2006 *Int Comp Law Q* 742-753.

4 3 A brief analysis as to whether ICJ pronouncements on the extraterritorial applicability of the ICCPR and/or the ICESCR are reflective of CIL

Although the ICJ has not had many opportunities to decide on the extraterritorial application of the ICCPR or the ICESCR, it has set some standard as regards the manner it interprets the territorial scope of the Covenants. Even more significant is the fact that the ICJ has followed the jurisprudence of the supervisory bodies of the treaties when determining the territorial reach of each Covenant. Consequently, this strengthens the argument that the Covenants find extraterritorial application, even though ICJ decisions do not necessarily have the binding value of precedents as they merely constitute subsidiary means for the determination of the rules of law under the international law regime.[114] Therefore, as regards the question whether the relevant position of the ICJ is a reflection of customary international law, one would have to assess State practice and *opinio juris* to determine the status of the position maintained by the ICJ. On that assessment, one can note that State practice on the subject of the extraterritorial applicability of the ICCPR and the ICESCR is equivocal and largely incomplete, and thus cannot decisively meet the requirement of a wide, sufficiently representative, virtually uniform and "settled State practice" as necessary to establish a rule of customary international law.[115] Since there is no State practice in support of such position as maintained by the ICJ, no rule of custom arises.

5 Conclusion

From this article, it is clear that every human rights institution that has had to address the question of the extraterritorial applicability of the ICCPR or the ICESCR, has concluded that the Covenants embrace an extraterritorial application, at least in some situations.

As a result thereof, it is plausible to accept that the treaties are applicable to persons outside of the territory of each State Party. Moreover, the author argues that although international jurisprudence does not regard that there are different standards triggering the extraterritorial application of the Covenants, this paper suggests that a much flexible approach be adopted for matters relating to the ICESCR as its wording is much more flexible in that it has no territorial circumscription. It is the submission of the author that this approach will curb the difficulties present in the attempt of applying human rights

113 *Armed Activities supra,* para 216.
114 Article 59(d) of the Statute of the International Court of Justice 1946.
115 *Federal Republic of Germany v Netherlands* 1969 ICJ Reports paras 74-77.

treaties extraterritorially to situations that do not "wield enough control to guarantee human rights standards",[116] or to guarantee State responsibility for an internationally wrongful act, such as in cases of the misuse of shared resources by one State to the exclusion of a range State. While this article does not exhaust the topic on the extraterritorial applicability of the selected human rights treaties, it must be noted that it suggests that in a globalised world – where activities of one State within its territory may affect the rights of a foreign State – placing greater restrictions to the extraterritorial applicability of the treaties risks the protection of human rights.

116 See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 368.

Makeshift 1190 (Pty) Ltd v Cilliers 2020 5 SA 538 (WCC)

The increasing difficulty of protecting quasi-possession of incorporeals with the *mandament van spolie*

1 Introduction

The *mandament van spolie* (*mandament*; spoliation remedy) protects peaceful and undisturbed possession against unlawful spoliation (Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 326-327; Boggenpoel *Property Remedies* (2017) 96-101; Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD thesis 1986 UP) 297-307). It also protects *quasi*-possession of certain incorporeals or rights (Muller *et al* 337-346; Boggenpoel 105-121). In *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA) (*Masinda*), the Supreme Court of Appeal held that the *quasi*-possession of a right, specifically electricity supply, does not enjoy protection under the *mandament* if the right is sourced in contract (par 22). The *quasi*-possession of a right only enjoys possessory protection if the right is in the nature of a servitude, is registered or flows from statute (par 22).

In *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) (*Makeshift*), the Western Cape Division of the High Court, Cape Town (the court; Cape High Court), recently had to decide whether the *mandament* is available for restoring the *quasi*-possession of electricity supply that derives from contract. The appellant severed the electricity supply to the respondent's home without her permission, upon which she instituted the *mandament* to have her *quasi*-possession of the supply restored. Rogers J, with Cloete J concurring, held that the *quasi*-possession of such supply, despite being contractual in nature, enjoys possessory protection. He distinguished the case from *Masinda* by reinterpreting the "incident of possession" notion, which is a key requirement for the *quasi*-possession of a right to enjoy possessory protection. He ruled that electricity supply used on land is an incident of possession of the land – and therefore enjoys possessory protection – if such supply is additional to, or part of, a professed right, the *spoliatus* has against the spoliator to occupy the premises where the right used. Furthermore, the spoliator must have an interest in the possession of the land. By severing the electricity supply, the appellant attempted to evict the respondent without following due process. He therefore granted the *mandament* to protect her *quasi*-possession of the electricity supply.

The Cape High Court's approach towards *quasi*-possession, particularly the "incident of possession" requirement, is novel and deserves attention, particularly due to the precedent in *Masinda*. This is because Rogers J identified a category of rights the *quasi*-possession of

How to cite: Marais '*Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) The increasing difficulty of protecting quasi-possession of incorporeals with the mandament van spolie' 2021 *De Jure Law Journal* 91-104
http://dx.doi.org/10.17159/2225-7160/2021/v54a6

which enjoys possessory protection regardless of their personal nature. His attempt to distinguish the case from *Masinda* is admirable, as his judgement arguably upheld the respondent's right to have access to adequate housing and her right against arbitrary eviction from her home. Unfortunately, the decision's potential drawbacks seem to outweigh these positive features.

Rogers J's interpretation of the "incident of possession" requirement does not find authority in either case law or academic scholarship. His understanding of this requirement, though appearing to vindicate the respondent's constitutional rights, has the potential to subvert these same rights in other contexts. This is because without the *spoliatus* having an alleged occupation right against the spoliator (or when someone other than the spoliator cuts off the electricity supply), the *quasi*-possession of such *spoliatus* will not enjoy possessory protection. Furthermore, the court's construal of the "incident of possession" notion delves into the merits of the dispute, which are irrelevant in spoliation proceedings. Scrutinising the merits may subvert the speedy and robust nature of the spoliation remedy, which could undermine its purpose and, hence, the rule of law. For these reasons, the judgment is unappealing.

The case note is structured as follows: section 2 sets out the facts of the case and the court's decision. Section 3, in turn, evaluates the decision in view of the two points raised in the previous paragraph. The final part, namely section 4, sets out the conclusion.

2 The *Makeshift* case

2 1 Facts

Makeshift is an appeal to the Cape High Court from the Riversdale Magistrate's Court (court *a quo*). The appellant, namely Makeshift 1190 (Pty) Ltd (the appellant), owned a farm in the Riversdale area, on which the respondent and her family occupied a building (referred to as "the store"). It was common cause that the store was their home.

Eskom served the store with electricity. The respondent's husband paid the electricity bills, though it was the appellant who had the contract with Eskom for the provision of electricity. During December 2017, Eskom disconnected the electricity on the farm after the appellant cancelled its contract with Eskom. The only part of the farm that still used Eskom electricity at that point was the store and its related facilities. There was a strained relationship between the appellant and the respondent, and it appeared that the appellant terminated the electricity supply to force the respondent and her family off the land.

Immediately after the disconnection, the respondent launched an urgent spoliation application in the court *a quo* against the appellant to have the electricity supply restored. Following several developments which are irrelevant for present purposes, the court *a quo* finally granted the spoliation remedy in favour of the respondent on 6 December 2019.

The appellant subsequently appealed this decision to the Cape High Court.

2 2 The judgment

The legal question that confronted the court, according to Rogers J, was whether the respondent had *quasi*-possession of the electricity supply, as meant in *Masinda*, and whether she may use the *mandament* to have such *quasi*-possession restored (par 20). The spoliation remedy only protects the *quasi*-possession of certain rights and it is unnecessary to prove that the alleged right exists to reclaim *quasi*-possession with the *mandament* (par 21). To have *quasi*-possession of an alleged right, the *spoliatus* must have performed acts demonstrating the exercise of the right (par 21). Rights the *quasi*-possession of which enjoy protection under the spoliation remedy are *gebruiksregte* (use rights) or rights which are incidental to the possession or control of the property where the professed right is exercised (pars 22 and 24, with reference to *Firstrand Ltd v Scholtz* 2008 2 SA 503 (SCA) (*Firstrand*) and *Masinda*). However, the mere fact that such supply is used at residential premises does not automatically mean it is incidental to the possession of property (par 25). As held in *Masinda*, the *quasi*-possession of electricity and water supply does not enjoy possessory protection if such supply is personal in nature (par 23).

Rogers J held that *Masinda* does not confine the rights the *quasi*-possession of which enjoys possessory protection only to those right which are "bestowed by servitude, registration or statute" (pars 29-30). In his view, there are rights the *quasi*-possession of which enjoys such protection despite them being "purely personal in nature" (par 30, citing *Firstrand* par 13). He divided *quasi*-possession cases into three categories to provide clarity in this regard:

a) cases where the professed right is an alleged servitude or alleged registered statutory right; here the *quasi*-possession of the professed right enjoys possessory protection (such as in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) (*Bon Quelle*) and *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) (*Impala*));
b) cases where the alleged right is contractual in nature and where no servitude or similar right is alleged; here the *quasi*-possession of the right does not enjoy possessory protection (such as in *Masinda* and *Firstrand*); and
c) cases where the alleged right is personal in nature but where its *quasi*-possession still enjoys possessory protection (as happened in *Naidoo v Moodley* 1982 4 SA 82 (T) (*Naidoo*) and *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W) (*Froman*) (par 32).

In *Naidoo* and *Froman*, which were not rejected in *Masinda*, the courts awarded the spoliation remedy to protect the possession of the premises and not the *quasi*-possession of the alleged right to electricity and water supply (pars 31 and 36, referring to *Masinda*). The defining feature of these cases, and, hence, category (c), is that the claimant is not complaining about the severing of the electricity or water supply in itself

but rather about the "adverse impact" such severing has on her possession of the premises (par 37). Rogers J ruled that the same might also be said of cases in category (b), like *Masinda* (par 37). However, as *Masinda* did not share this view, there must be another consideration which distinguishes category (c) from (b).

In category (b), the supplier of the service has no interest in the possession of the land, while in category (c) the supplier has a direct interest in such possession (pars 33-34). Consequently, in category (c) cases the service provider severs the service to evict the claimant without following due process, while in category (b) there is no such attempt on the supplier's side (par 34). The distinguishing feature of category (c) is therefore that the "alleged right to electricity is an incident of, or an adjunct to, the alleged right which the [*spoliatus*] has against the spoliator to be in occupation of the premises" (par 38). If electricity supply is an incident of the claimant's possession in this manner, the *quasi*-possession of such supply enjoys protection under the *mandament* and terminating such supply amounts to spoliation of the premises where the supply is used (par 38). This is because severing electricity supply used at residential premises amounts to a substantial disturbance with the possession of the premises itself (par 39). As the spoliation remedy guards against interferences of this nature and not only against complete deprivation of possession, it may be awarded (par 39).

The court found that respondent's possession of the premises (and that of her family) was permitted in terms of a *precarium* (revocable consent) from the appellant, which *precarium* extended beyond permission to occupy the premises by including the use of Eskom electricity at the store (pars 43-44, 48). The electricity supply was thus an adjunct to the respondent's permission to occupy the store and, hence, an incident of her possession of the land (pars 44, 48). The respondent's occupation of the premises, and her use of its electrical appurtenances, therefore amounted to possession of the premises while, simultaneously, amounting to *quasi*-possession of the alleged right to electricity (par 41). Therefore, the respondent's case fell into category (c), as the appellant's severing of the electricity supply was intended – like in *Naidoo* and *Froman* – to be a constructive eviction (par 49). Consequently, Rogers J agreed with the court *a quo*'s order and dismissed the appeal.

3 Evaluation

3 1 Introduction

It seems that the source of an alleged right which is being *quasi*-possessed was initially irrelevant in spoliation proceedings, as rights the *quasi*-possession of which enjoys possessory protection could derive from either real or personal rights (Kleyn *Mandament* 394; Kleyn "The protection of *quasi*-possession in South African law" in Descheemaeker (ed) *The consequences of possession* (2014) 187, citing *Firstrand* par 12). However, since *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA)

(*Telkom*) the courts have placed more emphasis on the source of a professed right to determine whether its *quasi*-possession enjoys possessory protection (see, for instance, *Impala*; *Firstrand*; *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA); *Masinda*). This investigation is said to prevent the spoliation remedy from replacing a claim for specific performance, which would collapse the distinction between property law and contract law (*Telkom* par 14). Therefore, if the right is sourced in contract, its *quasi*-possession does not enjoy possessory protection (*Telkom*; *Firstrand*; *Impala*). This trend was recently confirmed in *Masinda* regarding *quasi*-possession of electricity supply.

Given the precedent in *Masinda*, one might have expected *Makeshift* to have gone the other way, as the alleged electricity supply in this case (as in *Masinda*) was sourced in contract. Still, Rogers J awarded the spoliation remedy by finding that the respondent's *quasi*-possession of the electricity supply was an incident of the possession of the land. As mentioned in the introduction, this finding is problematic in view of (i) the way courts and scholars have previously construed the "incident of possession" requirement, and (ii) the purpose of the spoliation remedy. I address these two matters under the next two headings below.

3 2 The "incident of possession" requirement

Rogers J relied on two considerations to award the spoliation remedy in the case before him. The first entails that the courts in *Naidoo* and *Froman* granted the *mandament* to protect the claimant's possession of the premises where the electricity supply was used and not the *quasi*-possession of the supply itself (pars 36-38, with reference to *Masinda* par 16). The second factor, which is related to the first, is the "incident of possession" requirement.

The first factor touches on how the *mandament* protects *quasi*-possession of incorporeals. There are two schools of thought in this context. Both acknowledge that *quasi*-possession plays a role when dealing with the control of rights, as rights – being incorporeals – are not susceptible to possession in the same way as tangible things (*Telkom* par 9; Boggenpoel 105-106). However, they differ as to the relative importance of *quasi*-possession in cases which concern severance of electricity (and water) supply.

For the first school of thought, which consists of Sonnekus, Van der Walt, and De Waal, the point of departure is the *possession of the premises* where the electricity supply is used (Sonnekus "Besit van serwituutbevoegdhede, *mandament van spolie* en logika" 1989 *TSAR* 430; Van der Walt "*Mandament van spolie*" 1983 *THRHR* 237-238; De Waal "*Mandament van spolie*" 1984 *THRHR* 115). By using the mentioned services through the appurtenances on land, such use is incidental to (or is a component of) the possession of the land (Sonnekus 1989 *TSAR* 430; Van der Walt "Die *mandament van spolie* en *quasi*-besit" 1989 *THRHR* 451-452; De Waal 1984 *THRHR* 115). Hence, cutting off the service

amounts to a substantial interference with the possession of the premises, which disturbance may be addressed with the spoliation remedy (Sonnekus 1989 *TSAR* 430; Van der Walt 1989 *THRHR* 452). It is unnecessary to prove the existence of the right to use the spoliation remedy here (Van der Walt 1989 *THRHR* 448, 451; but see *contra* Sonnekus 1989 *TSAR* 432-434). Sonnekus and Van der Walt argue that *quasi*-possession merely shows that the possession at hand is exceptional (Sonnekus 1989 *TSAR* 432-434; Van der Walt 1989 *THRHR* 451-452). Hence, it is unnecessary to work with this notion when dealing with electricity and water supply cases, as it does not add anything to the existing principles on possession (Van der Walt 1989 *THRHR* 451-452).

Kleyn, who represents the other school of thought, focuses on the *quasi*-possession *of the right* instead of the possession of land (Kleyn *Mandament* 391-392; Kleyn "Protection of *quasi*-possession" 200). He argues that by exercising physical acts normally associated with an alleged right on land, such exerciser acquires *quasi*-possession over the right (Kleyn *Mandament* 392-393; Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). It is unnecessary to prove the existence of the right to have *quasi*-possession over it (Kleyn *Mandament* 395). A right must be a *gebruiksreg* (use right) for its *quasi*-possession to enjoy possessory protection, as the *mandament* does not protect the *quasi*-possession of all kinds of rights (Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 13). There are two kinds of *gebruiksregte*, namely servitutal rights and rights which are incidental to the possession of land (which he also describes as "incidents of possession") (Kleyn "Protection of *quasi*-possession" 195). Examples of rights which are incidents of possession include electricity and water supply used on premises (Kleyn *Mandament* 393-394; Kleyn "Protection of *quasi*-possession" 204-205).

There must be a link between the exercise of an alleged *gebruiksreg* and corporeal property, like land, for such right to be an incident of possession (Kleyn *Mandament* 392-393; "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). If this link is present, the spoliation remedy may be used to restore the *quasi*-possession of the alleged right, as preventing the *spoliatus* from exercising the right amounts to spoliation of the *quasi*-possession of the right. The link ensures that the spoliation remedy is not abused to compel specific performance, thereby upholding the division between contract law and property law (Kleyn "Protection of *quasi*-possession" 195). Although Kleyn acknowledges that electricity (and water) supply could also be regarded as a component of the possession of land, he prefers working with the notion of *quasi*-possession when dealing with possessory protection of incorporeals (Kleyn *Mandament* 393-394).

These approaches are two sides of the same coin – both reveal that the *mandament* may be used to restore electricity (and water) supply used on land, even though the *spoliatus* may not be entitled to the right. The

incident of possession aspect is an essential requirement for obtaining spoliatory relief under both schools of thought.

Rogers J should be applauded for referring to, and quoting from, many of the sources cited in the previous paragraphs. In terms of the outcome in *quasi*-possession cases, nothing hinges on which school of thought one favours. This is because the correct application of the principles under either one leads to the same result. This view finds support in the *Naidoo* and *Froman* cases, given that the former is characteristic of the first school of thought, while the latter is reminiscent of the second one. The fact that Rogers J preferred the first school of thought is therefore unproblematic for purposes of the outcome in *quasi*-possession cases. Though there may be doctrinal implications for favouring one school of thought over the other, such an investigation is beyond the scope of this case note.

However, Rogers J's construal of the "incident of possession" requirement is problematic. As mentioned above, this requirement highlights the link between the exercise of a professed right and the land where it is exercised under both schools of thought. Rogers J's interpretation of the requirement differs from the views of the two schools of thought and the position in case law (*Firstrand* par 12; *Zulu v Minister of Works, KwaZulu* 1992 1 SA 181 (D) 188C). At best, *Naidoo* and *Froman* only provide indirect authority for his interpretation, as both cases were decided on the basis that the services were used on the land which the *spoliatii* occupied without explicit reference to an alleged occupation right they had against the spoliators. Rogers J's approach supplements the existing considerations under this requirement, as the investigation no longer pivots on whether the *spoliatus* performed acts normally associated with a professed right on land. If the right is sourced in contract, the *spoliatus* must also have an alleged agreement against the spoliator to occupy the premises. Furthermore, it must be the landlord who severs the supply. Absent this alleged occupation right and severance by the landlord, the electricity supply is not incidental to the possession of the premises and cannot, thus, be restored with the spoliation remedy. As will be seen below, these added considerations may undermine the constitutional rights of a *spoliatus* in certain instances.

It must be emphasised that the *ratio decidendi* in *Masinda* precluded Rogers J from only focusing on the link between the exercise of the right and the land where it is used, as per the two schools of thought. Due to the personal nature of the right in *Makeshift*, strict adherence to *Masinda* would have meant that the judge had to reject the respondent's reliance on the spoliation remedy. Instead, Rogers J voiced his disagreement with *Masinda* by holding that severing electricity supply in category (b) cases entails an adverse impact of one's possession of premises in the same way as in category (c) cases, which means there is no difference between these two categories (par 37). Nonetheless, he was bound by *Masinda* due to the doctrine of *stare decisis*. It is for this reason that he attempted

to distinguish *Makeshift* from *Masinda* on another basis, which he did by reinterpreting the "incident of possession" requirement.

Distinguishing *Makeshift* from *Masinda* (as well as disagreeing with the latter decision) is commendable, given the *Masinda* court's (over)emphasis of the source of the right (Kleyn "Protection of *quasi*-possession" 206-208). Furthermore, Rogers J's decision appears to vindicate the constitutional rights of the respondent, namely her right to have access to adequate housing and her right against arbitrary eviction from her home (section 26(1) and 26(3) in the Constitution of the Republic of South Africa, 1996 (Constitution)).

Electricity is necessary for the "dignified and humane occupation of residential premises" (Freedman "The application of the *mandament van spolie* to constitutional and statutory rights" 2015 *TSAR* 200). It is "one of the most common and important basic municipal services and has become virtually indispensable" in modern society (*Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (*Joseph*) par 34). It therefore comes as no surprise that electricity supply is a constitutive element of "adequate" housing, as meant in section 26(1) of the Constitution (G Muller "Restoring electricity use with the spoliation remedy" 2019 *Pretoria Student Law Review* 3-4). Where adequate housing exists, it should not "be removed unless it can be justified" (*Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) par 29). The spoliation remedy protects this right against limitation by forcing those who sever electricity supply through unlawful self-help to restore the supply forthwith. This is so that the dispute may be adjudicated on the merits in subsequent legal proceedings based on the merits (see the discussion in section 3 3 below and the sources referred to there). Although there might be other remedies available to protect an electricity user's electricity supply (and, hence, the right to have access to adequate housing), such as the interdict and perhaps even remedies in electricity legislation, these remedies are arguably not as effective as the *mandament*. This is because they – unlike the *mandament* – require proof of a right (see section 3 3 below and the sources referred to there). Furthermore, where existing legislation does not provide remedies which offer the same type of protection as the spoliation remedy (which seems to be the case in the electricity setting), it might be preferable to use the *mandament* until existing legislation is amended (or new legislation is enacted) to provide similar protection to those whose electricity supply is severed without following due process (Boggenpoel 154-155).

Rogers J's approach also seems to uphold the right against arbitrary eviction from one's home (section 26(3) of the Constitution). In *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC), it was held that any attenuation or obliteration of the incidents of peaceful and undisturbed occupation of one's home, without a court order, amounts to an eviction contrary to section 26(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) (par 12). Given this *ratio* and the indispensable nature of electricity in society, as mentioned in the

previous paragraph, it follows that severing electricity used at residential premises without the occupier's permission amounts to a constructive eviction without a court order and is therefore contrary to section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (see similarly Muller 2019 *PSLR* 8). Forcing the *spoliatus* to restore the electricity supply forthwith discourages the spoliator from engaging in unlawful self-help and forces him to follow due process when evicting the *spoliatus*.

The fact that *Makeshift* seems to vindicate the mentioned constitutional rights is admirable. Yet, the judgment unfortunately only achieves this goal in a narrow setting. For example, it does not cover cases where someone severs electricity supply (which is sourced in contract) to a premises when there is no alleged occupation right between such person and the one using the supply to the land. It also does not extend to instances where someone other than the landlord cuts off such supply (compare *Joseph*, where the electricity supply was severed by the relevant power utility and not the landlord). Although *Masinda*, and not *Makeshift*, bears responsibility for this shortcoming, the problem remains: absent an alleged occupation right and severance by the landlord, the *quasi*-possession of the electricity supply does not enjoy possessory protection. Excluding the *mandament* from cases which fall outside the narrow exception Rogers J created will probably frustrate the two fundamental rights discussed above, as persons using electricity supply at their homes will arguably not be able to protect their section 26(1) and 26(3) rights as effectively as would be the case if they had access to this remedy.

The single-system-of-law principle, which the Constitutional Court laid down in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA674 (CC) (*Pharmaceutical Manufacturers*), entails that all sources of law, including the common law, flow from the Constitution and is subject to constitutional control (par 44; AJ van der Walt *Property and constitution* (2012) 20ff). All legal sources must thus promote the spirit, purport and objects of the Bill of Rights, as per section 39(2) of the Constitution (Van der Walt *Property and constitution* 20). The proviso to the second subsidiarity principle, which the Constitutional Court developed in light of the single-system-of-law principle, states that litigants may only invoke the common law to protect their rights if the common law does not conflict with a constitutional right or, should such a conflict exist, it can be developed to accord with the Constitution (Van der Walt *Property and constitution* 36ff, 115-116). Given the potential of Rogers J's understanding of the "incident of possession" requirement to undermine section 26(1) and 26(3) of the Constitution outside the narrow confines of his approach, this proviso requires that courts should adopt an interpretation of the common-law sources (or develop the common law, if necessary) which does not frustrate these fundamental rights (Van der Walt *The law of servitudes* (2016) 43-44; Van der Walt *Property and constitution* 36ff, 115-116). The construal of the "incident of possession"

requirement in terms of the two schools of thought, and as applied in *Naidoo* and *Froman*, seem to provide a constitutionally-compliant interpretation, as it does not require proof of an alleged occupation right or that the spoliator must have an alleged interest in the possession of the land. It would be better to afford possessory protection to all persons who use electricity at their homes irrespective of there being an alleged occupation right or whether the spoliator has an interest in possession of the premises. That said, this avenue was unfortunately closed to Rogers J due to the precedent in *Masinda*.

3 3 The purpose of the *mandament van spolie*

The second problem with Rogers J's interpretation of the "incident of possession" notion is that it frustrates the purpose of the *mandament* by complicating the investigation under this requirement. The spoliation remedy is usually described as being speedy and robust in nature (Kleyn "Die *mandament van spolie* as besitsremedie" 1986 *De Jure* 1; Muller *et al* 328; Boggenpoel 98-100). It can be obtained on an urgent basis and restores the *status quo ante* forthwith, as per its maxim *spoliatus ante omnia restituendus est* (the *spoliatus* must be restored to her prior position before all else) (Muller *et al* 326; Boggenpoel 96). Merits are irrelevant and may not be raised during spoliation proceedings at all; parties may only litigate on the merits in subsequent legal proceedings (*Nienaber v Stuckey* 1946 AD 1049 1053; Muller *et al* 349; Kleyn 1986 *De Jure* 6-7). The irrelevancy of merits flows from (i) the distinction between the possessory suit (where merits play no role) and the petitory suit (where rights must be proved) in South African law (Kleyn 1986 *De Jure* 3-5), and (ii) the rationale of the remedy.

The spoliation remedy protects bare possession, which is possession without reference to rights, and is therefore available to all types of possessors, namely both possessors and holders (Kleyn 1986 *De Jure* 8-9; Boggenpoel 96). Even a thief may institute the *mandament* against anyone who committed unlawful spoliation, including the owner of property (*Yeko v Qana* 1973 4 SA 735 (A) 739G). The fact that the remedy does not protect rights, but rather possession as a mere factual relationship, makes it unique (Kleyn 1986 *De Jure* 1; Boggenpoel 96-97). The purpose of the *mandament* is to uphold law and order by protecting stable possessory relations against unlawful dispossession (Van der Walt "Squatting, spoliation orders and the new constitutional order" 1997 *THRHR* 525-526). Therefore, it prevents unlawful self-help in the possessory context by discouraging people from taking the law into their own hands (*Nino Bonino v De Lange* 1906 TS 120 156; Kleyn 1986 *De Jure* 11). In *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) (*Ngqukumba*), the Constitutional Court held that "[s]elf-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled" (par 21). The remedy gives effect to the rule of law by requiring spoliators to immediately undo the consequences of their unlawful acts, thereby

encouraging parties to submit their dispute to a court of law instead of resorting to self-help (section 1(c) of the Constitution; *Ngqukumba* par 12).

The following considerations touch on the merits of a dispute and may therefore not feature in spoliation proceedings: the spoliator has a stronger right (like ownership) in the property, the *spoliatus*' possession is unlawful or illegal, the spoliator has a right to terminate the *spoliatus*' possession, and whether restoring possession to the *spoliatus* would inconvenience the spoliator (Muller *et al* 349; Boggenpoel 96-99, 129). Rogers J's construal of the "incident of possession" requirement contains elements of several of these considerations.

According to the judge, electricity supply used at a residential premises is only an incident of the possession of such premises if the supply is additional to an alleged occupation right the *spoliatus* has against the spoliator. The spoliator must therefore have a professed interest (like ownership) in possession of the premises. Stated differently, the spoliator must have a right to terminate the *spoliatus*' possession. On the flipside, the *spoliatus* must have an alleged right against the spoliator (like a lease) to occupy the premises. These aspects, notwithstanding their alleged or professed nature, all touch on the merits and should play no role in spoliation cases.

The spoliation remedy realises its purpose by providing immediate and effective relief. Such relief is only possible if merits are disregarded (Muller *et al* 331-332; Taitz "Spoliation proceedings and the 'grubby-handed' possessor" 1981 *SALJ* 40-41). Investigating the merits undermines the efficacy of the remedy, as it will delay the court in delivering judgment, thereby postponing the restoration of the *status quo ante*. This is because parties will have to lead evidence in addition to the two requirements of the *mandament van spolie*, namely peaceful and undisturbed (*quasi-*)possession and unlawful spoliation (Kleyn 1986 *De Jure* 6). Such an investigation, which involves a factual dispute, is more at home at a trail procedure and not the more expedient motion procedure in terms of which spoliation cases are normally decided (Muller *et al* 331-332). Indeed, one merely has to look at what length Rogers J went to examine the merits of the dispute before him to find that the *spoliatus*' use of the electricity supply was indeed additional to her alleged occupation right and that the severing of the electricity supply was intended to be a constructive eviction (pars 48-49).

Though the merits are examined in spoliation proceedings to some extent, namely, to determine whether an alleged right is an incident of possession to ascertain whether its *quasi*-possession enjoys possessory protection, such investigation is limited and does not dominate the proceedings (Boggenpoel 120). This restricted examination does not extend to the actual rights (namely the merits) the parties to the dispute have in the property (Boggenpoel 120-121). Though Sonnekus argues that the *spoliatus* must prove that he is entitled to the right for its *quasi*-possession to enjoy possessory protection (Sonnekus "Watervoorsiening

en die *mandament van spolie* – die Hoogste Hof verstel die wissels" 2007 *TSAR* 148-149), it is trite law that rights need not be proved in *quasi*-possession cases (*Bon Quelle* 516E-H; *Masinda* par 14; Van der Walt 1989 *THRHR* 448, 451; Kleyn *Mandament* 395). Requiring proof of an *alleged* occupation right, which is nearer Sonnekus' view, seems to conflict with the legal position that rights need not to be proved for their *quasi*-possession to enjoy protection under the spoliation remedy.

Moreover, Rogers J's approach has elements of the notion of the "grubby handed" possessor (Taitz 1981 *SALJ* 36), which entails that a court may refuse to grant the spoliation remedy to a *spoliatus* who has no right in the property (Taitz 1981 *SALJ* 40). This concept, of which scholars are critical (Taitz 1981 *SALJ* 40-41; Van der Merwe *LAWSA* (ed Joubert & Faris) 27 (2014) par 111), has been rejected by the Supreme Court of Appeal (*Yeko v Qana* 1973 4 SA 735 (A) 739G-H; *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA) par 32). Rogers J's seems to apply this notion in a unique manner, namely where the focus falls on the reprehensible conduct of the spoliator (and not that of the *spoliatus*). In his view, *quasi*-possession of electricity supply only enjoys protection if the spoliator has an (alleged) interest (or right) in possession of the premises. Here the spoliator's hands are "grubby" due to him seeking to evict the *spoliatus* without following due process (in terms of section 26(3) of the Constitution and PIE), which means the court may award the spoliation remedy. The same objection to the grubby-handed possessor defence applies to this approach, namely that it touches on the merits and would defeat the purpose of the spoliation remedy (Taitz 1981 *SALJ* 40-41).

The emphasis on the source of the right, which involves the merits, first started to feature in *quasi*-possession disputes with *Telkom*, where it was held that the *quasi*-possession of a right does not enjoy possessory protection if it is sourced in contract. This approach was carried through to the electricity supply context in *Masinda*. In light of *Makeshift*, even further scrutiny of the merits is now necessary to ascertain whether the electricity supply is incidental to the *spoliatus*' possession of the premises. The *quasi*-possession investigation is therefore characterised by increasing difficulty, one where the merits play a bigger and bigger role. The *Makeshift* decision is unattractive because of its potential to undermine the rationale of the spoliation remedy and, hence, the rule of law.

4 Conclusion

In *Makeshift*, the Cape High Court held that the *quasi*-possession of electricity supply enjoys possessory protection despite such supply being sourced in contract. According to Rogers J, exercising a professed right on land is an "incident of possession" – which means the right's *quasi*-possession enjoys protection under the *mandament* – only if the right is additional to an alleged right the *spoliatus* has against the spoliator to occupy the premises where the electricity is used and if the spoliator has

an interest in the possession of the land. The judge deserves praise for his attempt to distinguish the case before him from *Masinda*, where it was held that the *mandament* does not protect the *quasi*-possession of contractual rights at all.

Makeshift is preferable to *Masinda*, as it vindicates *spoliatus*' right to have access to adequate housing and her right against arbitrary eviction from her home (though only in a narrow setting). Nevertheless, Rogers J's decision is problematic for two reasons. Firstly, it misconstrues the "incident of possession" requirement. According to case law and academic scholarship on this notion, exercising an alleged right is incidental to the possession of premises if one performs acts usually associated with such right on land. Severing the right is then tantamount to interference with the possession of the premises, which may be addressed with the spoliation remedy. This is so irrespective of whether the right is additional to an alleged occupation right the *spoliatus* has against the spoliator. More significantly, Rogers J's interpretation of this notion has the potential to undermine the mentioned constitutional rights in cases where his restricted requirements are not met, such as when there is no such alleged right or where someone other than the landlord severs the supply.

Secondly, requiring proof of an alleged occupation right complicates the investigation under this requirement by touching on the merits of the dispute, which are irrelevant in spoliation proceedings. The *mandament*, which restores possession forthwith without considering the merits, upholds the rule of law in the possessory context by restoring the *status quo ante* immediately. Such restoration discourages unlawful self-help and forces litigants to submit their dispute to a court of law. It realises this goal by providing speedy and robust relief, which is only possible if courts disregard the merits. Rogers J's investigation of the merits has the danger of undermining the efficacy of the remedy by requiring courts to consider factors other than the two requirements of the spoliation remedy. Such added investigation has the potential to undermine the speedy and robust nature of the remedy and, hence, the rule of law.

The sourced-based investigation in *quasi*-possession cases, which began in *Telkom* and was confirmed in *Masinda*, has led Rogers J to identify a limited category of personal rights the *quasi*-possession of which enjoys possessory protection. Though preferable to *Masinda* for its potential to uphold the mentioned constitutional rights, the decision is unappealing for the reasons discussed in this case note. The decision needlessly complicates how the *mandament* protects the *quasi*-possession of incorporeals by adding to the array of considerations courts must consider when deciding spoliation cases. It would be preferable if the courts extended possessory protection to all persons who use electricity supply at their homes and not to limit it to the narrow exception Rogers J created, which can be done by returning to the legal position as per *Naidoo* and *Froman*. Given the precedent in *Masinda* and

Telkom, however, this change will have to be brought about by either the Supreme Court of Appeal or the Constitutional Court.

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