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Foreword: *Kabarak Law Review* as a vanguard of radical legal scholarship

James Thuo Gathii*

I am honoured to have been invited by the *Kabarak Law Review* Volume 2 (2023) student editors to write this foreword. *Kabarak Law Review* has emerged as an important scholarly journal publishing cutting edge scholarship from its students, faculty and leading scholars. In this issue for example, Professor Issa Shivji, one of Africa's foremost scholars, has an article in response to an inaugural lecture by Professor Justice Willy Mutunga, Chief Justice Emeritus and Professor of Public Law, Kabarak University.

That article together with Marion Joy Onchangwa's exchange with Professor Willy Mutunga, and Nadya Rashid's article reflecting on radical legal education in Kenya further demonstrates *Kabarak Law Review's* pre-eminence as the scholarly home of radical legal education in Kenya. As a law student at the University of Nairobi in the very turbulent late 1980s and early 1990s, with many of my peers, I thirsted for a radical legal education. For example, then conservative law professors like Jackton Boma Ojwang would intimidate students who confronted his defense of one-party rule by asking them to stand-up in class when they asked him probing questions. Professor Jackton Boma Ojwang defended one-party rule, in part arguing that whether

* Wing-Tat Lee Chair of International Law and Professor of Law, Loyola University Chicago School of Law and Founding Editor, Afronomicslaw.

or not Kenya should be a one-party state was a political and not a legal question. That question he argued, could not be discussed in his class on constitutional law.

The Faculty of Law at the University of Nairobi was so divided on this question of whether the then Section 2A of the 1969 Constitution of Kenya should be repealed that the teaching of constitutional law course was divided between Professor Jackton Boma Ojwang who defended one-party rule, on the one hand, and Professor Kivutha Kibwana who argued that Section 2A should long have been repealed to usher in multi-party democracy, on the other.[1] Professor Kivutha Kibwana invited Professor Githu Muigai to give a lecture or two in the class the year I took constitutional law. Professor Muigai taught us about the Constitution as a social contract. Both Professors Kibwana and Muigai gave us rather different views of the 1969 Constitution of Kenya than those of Professor Ojwang. I ended up being a research assistant for both Professors Kibwana and Muigai. This is another way of saying how influential our teachers are to our legal education and our career choices. Like Professor Kibwana and Muigai, I ended up studying in the United States for my graduate education, unlike Professor Ojwang who went to one of the bastions of conservative legal education, Cambridge University in the United Kingdom.

As a student, I wished to have had a journal like the *Kabarak Law Review* and to have intellectual leaders of radical legal education like Professor John Osogo Ambani and Humphrey Sipalla. It is a tribute to

[1] See for example, Kivutha Kibwana's critique of Jackton Boma Ojwang's argument in favour of extra-juridical executive power in a one party state to get a sense of the constitutional debates of the late 1980s early 1990s, Kivutha Kibwana, 'Legal limits of executive power in a one-party state,' *Nairobi Law Monthly*, available here: https://nairobilawmonthly.com/legal-limits-of-executive-power-in-the-african-one-party-state/ (concluding that '*if we defer to Ojwang's formulation of legitimate exercise of executive extra-juridical power, his concept could be used as a reliable ally to bolster dictatorship,' id.)* For an extended analysis, see James Thuo Gathii, 'The contested empowerment of Kenya's Judiciary, 2010-2015: A historical institutional analysis, Sheria Publishing House, 2016, especially chapter 5 tracing how activist lawyers litigated in a repressive one-party state-controlled judiciary in the 1980s and 1990s thereby creating the foundations for the 2010 Constitution of Kenya.

Kabarak University School of Law to have on its faculty such scholars, not to mention Professor Willy Mutunga, Professor Sylvia Kangara and other icons of radical legal education. The time is gone when law teachers who are challenged by students who hold more radical views than them proceed to intimidate, embarrass or to retaliate by giving them low grades. Without many generations of radical law teachers from the late Professor Shadrack Gutto, to Willy Mutunga, to Kivutha Kibwana and Kathurima Inoti who suffered detention without trial or who had to flee the country, the 2010 Constitution may not have been possible. Indeed, without radical legal publications like Gitobu Imanyara's *Nairobi Law Monthly*, the seeds of radical legal thought during the dark days of one-party rule may have been stamped out forever. Even more, without radical legal practitioners like Martha Karua, Martha Koome, James Orengo, John Khaminwa Khaminwa, Kamau Kuria, Pheroze Nowrjee, and others like them, radical legal thought would have long been buried under the weight of the repressive forces of the Moi dictatorship and succeeding governments.

Further, there are many unsung heroines and heroes of Kenya's, and indeed of the broader African legal academy whose vast and important contributions remain unknown and uncelebrated. In the 'Honour Your Elders' Section that has become a regular feature of the *Kabarak Law Review*, Elvis Mogesa Ongiri revisits the distinguished career of Taslim Elias Olawale who rose through the ranks of the Nigerian legal establishment to become the President of the International Court of Justice. Ongiri's article continues the radical legal education thread that runs through this issue of the *Kabarak Law Review* because of the critical lens through which he uses to analyse Olawale's contributions to international law.

When I studied international law at the University of Nairobi, the course was a dry doctrinal course and when I tried to ask why rules were skewed in a particular way in class, I was shut down. Hence, articles like Ongiri's are important. As a related point, as an international lawyer, I was pleased to see the articles on jurisdiction conflicts between the World Trade Organisation and other international trade dispute

settlement bodies (by Samson Muchiri) and civilian protection under Common Article 3 of the Geneva Conventions (by Kevin Kipchirchir). As a student at the University of Nairobi in the late 1980s and early 1990s, I did not have the exposure or guidance to have been able to write articles in these two areas.

The foregoing observations in my view go to show why journals like the *Kabarak Law Review* are important for providing students the opportunity not to be solely dependent on the information that comes from law teachers especially where that information is dated or merely doctrinal. Unlike in the early 1990s when I graduated from the University of Nairobi, students are no longer dependent on a few printed copies of primary texts (often held by teachers or in reserve in the library or their illegal copies!) or for that matter the information provided to them in class. The internet and online access – including on Afronomicslaw.org for international law – [2] have changed the landscape, opening up previously unavailable sources and perspectives to students.

Further, *Kabarak Law Review* is freely available online further enhancing its utility in producing locally relevant knowledge that is not parochial or removed from the global production of knowledge. All the articles published in this Issue engage with some of the latest thinking in their respective subfields. I raise this point to emphasise why journals like these are needed. African universities have been too dependent on books and materials produced in Europe and the United Kingdom in particular. This is not because the United Kingdom, Europe – or North America for that matter – have the monopoly in producing legal knowledge. It is simply a colonial legacy that has to be sharply rejected.

We do not need Europe and Europeans, or for North Americans or non-Kenyans to continue to dominate the shelves of Kenyan law libraries and the pages of the journals and materials that they use to teach their students. After 60 years of independence from colonial rule, there is a tonne of scholarship and materials produced by Kenyans,

[2] See https://www.afronomicslaw.org/ (is to amplify the voices and issues that are not often part of the conversation in international economic law relating to Africa and the Global South)

Africans or scholars from the Global South that are more relevant to our context and circumstances. Where there are gaps, it is upon us as scholars to identify them and produce the materials to fill those gaps in all subjects of law. African universities must not simply be conduits for the reproduction of knowledge products of the United Kingdom or other external sources.

The recent flourishing of law schools in Kenya sits in a major tension with the paucity of locally relevant publications. Every time I speak to a founding Law Dean of one of these schools, they emphasise how much money they had to spend to buy volumes upon volumes of English books to be in compliance with the Council of Legal Education's accreditation standards. There is no emphasis on stocking locally relevant legal knowledge. The standards merely provide that the libraries have stocked five legal titles per unit and the universities must spend at least 5% of their recurrent budget on libraries. These standards need to be changed to emphasise the production of locally relevant legal materials.

However, they can best be changed when there is a credible and significant amount of scholarly productivity that reflects our local circumstances. This is not an easy task when government support of higher legal education has continued to dwindle and the privatisation of education – making it a profit-making venture – has taken hold. It is this huge reduction in public spending and the privatisation of legal education that is undermining and undercutting the growth of domestic content in legal education. *Kabarak Law Review* is an example of rejecting legal education that is not relevant to our circumstances and instead embracing local legal content in a radical legal tradition. I hope Kabarak University continues to embrace and build on this trajectory so that it can become its exemplar for other universities in Kenya and indeed in Africa and the Global South.

Beyond international law, there is also a focus of domestic law in this issue. For example, Christine Wanjiku's essay examines the effectiveness of the investigative powers of the Independent Policing and Oversight Authority, (IPOA), in light of the fallen Kianjokoma Brothers, one of whom was a student at Kabarak University School of

Law. Wanjiku argues that given its institutional design, IPOA was set up for failure in exercising its mandate of promoting police accountability. This article is yet another tribute to radical legal education that has a very personal connection to Kabarak University, again illustrating the simple truism that merely teaching and writing about law in its abstract black letter approach is a profoundly alienating and decontextualised exercise removed from our lived realities.

The final section of the journal features a case commentary of the Supreme Court of Kenya's decision in *JOO V MBO* by Marvis Ndubi. The commentary analyses the dilemma in the division of matrimonial property in divorce. It argues that the dilemma arises because there is no predictable formula for sharing matrimonial property as well as due to the vagueness in of Article 45 (3) of the 2010 Constitution of Kenya. To resolve this dilemma, Ndubi proposes merging the 50:50 distribution formulae and the division based on contribution approach.

All the articles in this Issue continue to illustrate the *Kabarak Law Review*'s commitment to fostering academic rigour, and advancing Afrocentric legal scholarship following a radical trajectory. I warmly welcome this issue of the *Kabarak Law Review*.

James Thuo Gathii
December 2023

Foreword by the Dean

Religion tells us that words hold untold power. That the simple words 'let there be …' brought the entire universe into existence, that mere words rendered the sun motionless, and that words themselves became flesh, and once transmuted, gave hope to the poor, healed the sick, and resurrected the dead, among other miracles.

Our own African history is replete with stories of prophets who foretold imperialism, elders who administered oral oaths to inspire liberators, and luminaries who declared Africa's independence.

The world is about words. Clearly. Therefore, who speaks is important, what they say, and from which vantage point. In academic circles where written words are the currency, we lost nearly all battles before we were invited to join the war. The northerners dominate critical academic institutions and the entire knowledge industry. They are the authors of knowledge, including knowledge about us. It is the northerners who narrated our history, defined our present, and are now busy shaping our future. They write and say their words for African intellectuals to repeat after them like the late Prof Micere Mugo's *kasuku*. It is worse for the female youth of Africa as the knowledge industry continues to be the domain of a few male northerners.

In one fell swoop, *Kabarak Law Review* (KLR) dethrones nearly all these hegemonies. Just two issues down the line, KLR has proven to be the forum for youthful African scholars, both male and female. And they are seizing the platform to ventilate matters close to their hearts. In this issue, two youthful Africans write memorable odes to two pioneer African scholars of international law, Taslim Olawale Elias and Bonaya Adhi Godana, who northern scholarship would rather ignore. Our

youthful scholars also give an African touch to international trade law, international humanitarian law, and matrimonial property law, which continues to suffocate under the challenge of the duality of laws caused by colonialism. This issue carries a rare gem – our student's experience of reverse learning under our most eminent member of faculty, Prof Willy Mutunga, Chief Justice Emeritus of the Republic of Kenya.

May KLR continue to be a 'liberated zone'. May it amplify the voices of African youth. Male, female and others. May it say our stories. And may it say them from our standpoints. KLR will speak words that strengthen our systems of law; words that build. As long as I am Dean of Kabarak Law School, where KLR is hosted, I shall guard this revolutionary platform. Jealously.

Prof J Osogo Ambani, LLD
Dean, Kabarak University School of Law
Kabarak, December 2023

Editorial

To speak means to be in a position to use a certain syntax,
to grasp the morphology of this or that language…
but it means above all to assume a culture,
to support the weight of a civilisation
– Frantz Fanon[1]

In the profound wisdom of Frantz Fanon's words, we are reminded that language is a tapestry woven beyond the confines of grammar and basic communication. Fanon urges us to understand that language is the assumption of a culture and a pillar of civilisation. For *Kabarak Law Review*, language is a culture of diligence, excellence, academic rigour, cooperation and service. Language for us means breaking down frontiers and hegemonic structures thereby producing cutting edge Afrocentric legal research to support the weight of our African civilisation. To this end, *Kabarak Law Review* 2022-2023 Editorial Board is pleased to present the first double-blind peer reviewed issue of our journal, *Kabarak Law Review* Volume 2(2023). Within its pages, we invite you to reflect on the transformative power of language and immerse yourselves in the cadence of words, ideas and intellectualism that define our commitment to legal scholarship.

For sixteen months, we embarked on an odyssey to not only institutionalise, produce and disseminate quality legal scholarship but to also demystify and entrench a culture of legal research and writing at

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1 Frantz Fanon, *Black skins white masks,* Editions de Seuil, 1952, trans. Grove Press, 1967.

Kabarak Law School. Our journey began in June 2022 when our board was constituted under the guidance of Sharon Moraa Amwama, *Kabarak Law Review's* first Editor-in-Chief, and Arnold Nciko, our mentor and trainer. Over the following three months, from June 2022 to August 2022, we received legal research and writing training from Arnold Nciko and concurrently formulated our policy documents including our constitution and editorial procedure. We also conceptualised the *Kabarak Law Review Blog* (*KLR Blog*).

True to our culture and language of service, in September 2022, we actualised our commitment to demystifying and promoting a culture of legal research and writing in Kabarak Law School by holding weekly legal research and writing training sessions. This decision was motivated by the need to share the nuggets we had learnt during our training with Arnold Nciko. Since then, we have consistently conducted thirty-one (31) training sessions every Friday from 4 pm to 7 pm. These training sessions not only allowed us the opportunity to train our fellow students on the intricacies of legal research and writing, but also provided us with an opportunity to select committed students as editorial trainees.

I am extremely proud of our editorial trainees: Elvis Mogesa, George Murimi, Mercy Jebaibai, Jabez Oyaro, Victoria Okeke, Blessing Nasimiyu, Nasra Ali, Sylvian Pawi, James Ndung'u, Uday Keya, Wa Nciko Laetitia, Sandra Barendo, Kenaya Komba and Christian Nciko for their commitment and hard work. From among these, the 2024 Editorial Board has been selected and installed. As they take over the reins of *Kabarak Law Review* for 2024, under the guidance of Nadya Rashid, I could not be more confident that they will scale the *Kabarak Law Review* to greater heights.

On 30 January 2023, we set up the *KLR Blog*. Since that pivotal moment, we have edited, and published insightful blog pieces contributed by both faculty and students. As of now, the *KLR Blog* proudly boasts a collection of thirty-four (34) thought provoking articles. We are grateful to Professor Willy Mutunga, Chief Justice Emeritus and Professor of Public Law at Kabarak University, for gracing our blog

with his thoughts, as well as Florence Shako, Senior Partner at Mitullah Shako and Associates.

This year, we also embarked on the commitment set forth by the *Kabarak Law Review* 2021-2022 Editorial Board – bringing to fruition a double-blind peer-reviewed journal. This meticulous process has not only tested our mettle but has instilled in us a profound appreciation for the conscientious effort required to produce scholarly work of the highest calibre.

We extend our heartfelt gratitude to our expert reviewers whose insights were critical in shaping this publication. We express sincere thanks to: Julie Lugulu, Cheptum Toroitich, Joseph Agutu Omolo, Melissa Mungai, Johannes Buabeng-Baidoo, Humphrey Sipalla, Delbert Ochola, Kiai Gachanja, Sidney Tambasi, Dr Rosemary Mwanza, Cedric Kadima, Dr Evelyn Asaala, Sandra Bucha, Sana Hussein, Dr Victor Chimbwanda and Edmond Shikoli.

Cooperation stands as an integral pillar within the foundation of the *Kabarak Law Review* (KLR). Student run law reviews play a pivotal role in advancing legal scholarship, underscoring the necessity for functional and well run law reviews in Kenyan law schools. This year, our vision extended to uniting all existing law reviews in Kenya to foster the exchange of best practices and mutual guidance for running effective publications. We extend our heartfelt gratitude to the *Strathmore Law Review, Moi University Law Journal,* and the Kenyatta University *Journal of the All-Kenya Moot Court Competition* for their collaboration. Their support and shared insights have undoubtedly enriched our journey. I look forward to 2024, hoping to witness more collaborative efforts among law reviews in Kenya.

This year we also commemorated the annual Kiswahili Day on 7 July 2023 through a webinar moderated by Nadya Rashid titled: *Matumizi ya Kiswahili katika sheria nchini Kenya*. This commemoration went beyond the mere acknowledgment of linguistic diversity, it was a testament to our commitment towards dismantling hegemony within the legal landscape and a reflection of our belief in the transformative

power of language to foster inclusivity. We are thankful for the participation of the eminent panellists: Harrison Kinyanjui, Dr Owiso Owiso, John Nyanje, and Honourable Yusuf Shikanda, who later joined our Advisory Board.

Another milestone for us this year was constituting our Advisory Board, whose advice has been instrumental in shaping our conviction and maintaining our focus. I am grateful to our Advisory Board for this support, and the convening leadership of our chair, Mr Delbert Ochola.

Kabarak Law Review Volume 2 (2023) features nine articles from a diverse array of legal topics, divided into five sections. In the full length articles section, Samson Muchiri opens our volume with a reflection of the use of *res judicata* to resolve jurisdictional overlaps that arise in dispute settlement systems in international trade law. He concentrates his case study on the WTO DSB and the MECOSUR DSB. Kevin Kipchirchir revisits the problems of civilian protection in the changing nature of conflicts to an increase in non-international armed conflicts that are seemingly not covered by existing trite law. He reflects on how, given its drafting history and application, Common Article 3 can be used to fill this increasingly critical protection gap.

The second section covers a review of Professor Justice Willy Mutunga's thought on transformative constitutionalism. Flowing from disparate actions in response to Professor Mutunga's inaugural lecture at Kabarak University titled, *In search and defence of radical legal education: A personal footnote*,[2] this section features three reflections. Professor Issa Shivji, having responded to the inaugural lecture on the material day on 28 January 2022, has reduced his thoughts into a reflection piece where he primarily challenges Professor Mutunga to consider transformative constitutions as key players in advancing counter-hegemonic consciousness, over and above their use as legal instruments. Two Kabarak law students also issue their reflections on the inaugural lecture: Marion Joy Onchangwa engaged Professor Mutunga on a vibrant email exchange as she pushed him to clarify some of his

[2] This was issued by Kabarak University Press, 2022.

thoughts. Nadya Rashid critiques contemporary university education that promotes rote learning and, inspired by the model of the University Students African Revolutionary Front (USARF) at the University of Dar es Salaam in the 1960s and 1970s, calls for more critical legal education.

As is now the established custom at *Kabarak Law Review,* the last three sections feature short commentary pieces that do not undergo double-blind peer review but rather rigorous single-blind review: Honour Your Elders; the Kianjokoma Tribute, a section where students discuss police accountability law, in honour of our fallen classmate Emmanuel Mutura Ndwiga and his brother Benson Ndwiga Njiru who were victims of police extrajudicial killing on 2 August 2021; and the case review section.

Honour Your Elders in this volume covers contributions on the life and works of two African scholars of international law: Taslim Olawale Elias and Bonaya Godana. This year, we commemorated the second anniversary of the deaths of the Kianjokoma brothers. To honour them, *Kabarak Law Review Blog* published two blog articles calling for reform and police accountability. In continuation of this tribute, Christine Wanjiku's article examines the investigative powers of the Independent Policing Oversight Authority (IPOA).

Marvis Ndubi's striking critique of the Supreme Court of Kenya's lacklustre determination of the vexing question of computation of contribution in matrimonial property division disputes in *JOO v MBO*, closes our Volume 2.

As we conclude this 2023 journey, I am grateful to the Almighty God for his grace and providence throughout this endeavour. I also like to extend my sincerest gratitude to my team members; David Arita, Alex Tamei, Patricia Cheruiyot, Caleb Sadala and Nadya Rashid for their commitment and dedication to this endeavour. I also extend my gratitude to Carson Kiburo, Hilda Chebet and Lorraine Koskei for their support in promoting the outreach and visibility of *Kabarak Law Review*. Finally, I wish to appreciate Professor J Osogo Ambani, (Dean, Kabarak Law School), Mr Humphrey Sipalla, (Editor-in-Chief, Kabarak

University Press), Mr Sam Ngure, (Editor-in-Chief *Kabarak Journal of Law and Ethics*), Mr Joseph Agutu Omolo and Ms Melissa Mungai for their support in making this publication a success.

To the 2024 Editorial Board, I invite you to reflect on the profound wisdom in Habakkuk 2:2-3. This scripture encourages us to write our vision and carve out our aspirations. As custodians of the legacy of *Kabarak Law Review*, may the words of the Lord to Habakkuk resonate within your collective consciousness that you may set down your aspirations and dreams with clarity and conviction. Your collective vision, like an enduring beacon, will guide the *Kabarak Law Review* to a future marked by innovation, impact and scholarly distinction.

Laureen Mukami Nyamu
2022-2023 Editor-in-Chief, *Kabarak Law Review*
December 2023, Kabarak

Using *res judicata* to resolve jurisdictional conflicts between WTO and regional trade agreements' dispute settlement mechanisms

Samson Muchiri*

Abstract

The WTO has a renowned dispute settlement body, distinguished from other dispute settlement bodies by its compulsory and exclusive jurisdiction. However, regional trade agreements provide for rights and obligations similar to those guaranteed by the WTO thus, causing material jurisdictional overlaps between the WTO institutions and regional dispute resolution institutions. Potentially, a State aggrieved by measures that contravene rights or obligations within such overlaps has two alternative fora for dispute resolution. Where the regional trade agreement dispute resolution mechanism resolves the dispute first, the compulsory and exclusive nature of the WTO jurisdiction allows the matter to be re-determined at the WTO level, causing jurisdictional conflicts and duplicative proceedings.

Although it is an established principle in customary international law, res judicata is not provided in any of the instruments guiding the jurisdiction of the WTO dispute settlement system. The jurisprudence of WTO Panels and the Appellate Body are also thin on this matter. Seemingly, the inclination has

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been to exercise the compulsory and exclusive jurisdiction, without regard to other existing fora. This paper therefore suggests clear recommendations to be employed in widening the existing WTO jurisprudence on res judicata as a solution to jurisdictional conflicts. In doing so, this paper further acknowledges the possible criticisms against res judicata in WTO dispute settlement and provides possible solutions to these challenges to ensure the peaceful and harmonious coexistence of the WTO dispute settlement mechanisms vis-à-vis those of regional trade agreements. Using the South American region as an example, this paper enunciates the jurisdictional overlaps and proposes the application of res judicata by the WTO dispute settlement mechanisms in judicial restraint.

Keywords: dispute resolution, *res judicata,* WTO, jurisdictional overlaps, regional trade agreements

Introduction

International trade in particular continually presents a means of reducing poverty worldwide and prospering economies.[1] The World Trade Organisation (WTO provides a platform for the economic engagement of states and the solution of trade challenges. Additionally, the WTO normatively strives for a greater measure of equity by integrating emerging powers and assisting marginalised countries in their efforts to participate in worldwide economic expansion.[2] The WTO has among its core functions, the settlement of disputes between Member States,[3] with a strong and binding dispute settlement system for the enforcement of negotiated international trade rules.[4] Since its formation in January 1995, over 300 disputes have been brought to the system.[5] The dispute settlement system comprises the Dispute Settlement Body (DSB),[6] with exclusive[7] and compulsory jurisdiction over WTO law disputes,[8] exercised through panels and the standing

1 Peter Van den Bossche and Werner Zdouc, *The law and policy of the World Trade Organization: Text, cases and materials*, Cambridge University Press, 2017, 2; M Bacchetta and M Jansen, 'Adjusting to trade liberalisation: The role of policy, institutions and WTO disciplines', *Special Studies Series*, WTO, 2003, 6.

2 Bossche and others, *The law and policy of the World Trade Organization*, 32; R Coase, *The firm, the market and the law*, University of Chicago Press, 1988, Chapter 5, 4; P Sutherland, 'Beyond the market, a different kind of equity' *International Herald Tribune*, 20 February 1997.

3 WTO, 'World Trade Organisation' (n.d.); Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994), Article III.

4 Bruce Wilson, 'WTO dispute settlement system training module, preface', *World Trade Organisation*, 21 April 2021.

5 Bruce Wilson, 'WTO dispute settlement system training module, preface' *World Trade Organisation*, 21 April 2021.

6 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 UNTS 401, Article 2.

7 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.1, United States – *Section 301 Trade Act*, WT/DS152, Panel Report (22 December 1999), WT/DS152, para 7.43; European Communities — *Measures affecting trade in commercial vessels*, WT/DS301, Panel Report (22 April 2005), para 7.193.

8 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 6.1 and 23.1; Bossche and others, *The law and policy of the World Trade Organ-*

Appellate Body established under the Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (DSU).[9] The panels are composed of at least three persons selected by the DSB at the request of the disputing parties.[10] The Appellate Body consists of a standing committee of seven persons appointed by the DSB for a four-year term that may be renewed once.[11]

In addition to hearing and giving recommendations on trade disputes, the panels and the Appellate Body have inherent adjudicative powers to determine whether they have jurisdiction in a given case and the scope and limits of that jurisdiction.[12] In this very context, the WTO also provides a platform for the formation of regional trade agreements.[13] The General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) provide for the formation of regional trade agreements, customs areas, and free trade areas.[14] The WTO has further established a Committee on RTAs (CRTA) that examines and approves regional trade agreements that have been notified to the WTO and their systemic implications to the multilateral trading system.[15]

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ization, 180; Prabhash Ranjan, 'Applicable law in the Dispute Settlement Body of the WTO' 44 (15) *Economic and Political Weekly* (2009) 23.

9 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 2 and Article 17.

10 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 8.

11 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 17.

12 European Union – *Countervailing measures on certain polyethylene terephthalate from Pakistan*, WT/DS486/AB/R/Add.1, Appellate Body Report (28 May 2018), para 5.16.

13 Gabrielle Marceau, *News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus*, Proceedings of the 116 AFSIL Annual Meeting, American Society of International Law, 2009, 124.

14 General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 UNTS 190, Article XXIV; General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994).

15 World Trade Organisation General Council, 'Committee on Regional Trade Agreements', WT/L/127, Decision of 6 February 1996; Marceau, 'News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus', 125.

These agreements are encouraged since they benefit the multilateral process by facilitating openness and competitive liberalisation in international trade relations.[16] Consequently, many WTO members continue to engage in multiple bilateral and plurilateral agreements that give rise to hundreds of regional trade agreements (RTAs).[17] As of 15 June 2021, over 350 RTAs were in force.[18] In the South American Region alone, seventy (70) regional trade agreements were notified to the WTO and, were in force as reported on 30 June 2021.[19] These regional mechanisms have been lauded for increasing transparency, information exchange, and predictability in international trade law, among other reasons.[20]

However, most of these RTAs provide for their dispute settlement procedures.[21] The existence of these dispute settlement fora often creates jurisdictional overlaps against the established WTO dispute settlement mechanisms.[22] These overlaps occur where the regional trade agreements and the WTO provide similar obligations, which can be enforced under the RTA mechanism and the WTO dispute settlement mechanisms as well.[23]

Against this background of multiple and alternative dispute resolution fora, criticism has been lodged with respect to the holding of

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16 Marceau, 'News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus', 124.

17 WTO, 'Regional Trade Agreement', *World Trade Organisation*, 2 September 2021.

18 WTO, 'Regional Trade Agreement', *World Trade Organisation*, 2 September 2021.

19 WTO, 'Facts and figures - Regional trade agreements 1 January-30 June 2021' 1 January 2021, *World Trade Organisation*, on 28 October 2023.

20 Laura Gomez-Mera and Andrea Molinari, 'Overlapping institutions, learning and dispute initiation in regional trade agreements: Evidence from South America' 58(2) *International Studies Quarterly*, 2014, 270.

21 Ana Cristina Molina and Vira Khoroshavina, 'How regional trade agreements deal with disputes concerning their TBT provisions?' Staff Working Paper ERSD-2018-09, World Trade Organisation Economic Research and Statistics Division, 14 September 2018, 3.

22 Molina and another, 'How regional trade agreements deal with disputes concerning their TBT provisions?', 3.

23 Molina and another, 'How regional trade agreements deal with disputes concerning their TBT provisions?', 3.

disharmonious duplicative proceedings,[24] whose final determinations threaten the doctrine of *res judicata*.[25] Such was the case identified by the Panel in the *Mexico – Taxes on soft drinks* case, where both the North American Free Trade Agreement (NAFTA) and the WTO provided recourse to the Applicant;[26] and, in *Argentina – Poultry,* where the Applicant, Brazil, had similar recourse before both the Southern Common Market (MERCOSUR) ad hoc Tribunal and the WTO Dispute Settlement Body against the same anti-dumping measures.[27]

In the first case, both the North American Free Trade Agreement (NAFTA) and the WTO were available as means of recourse to the United States against Mexico's tax measures. The two fora shared jurisdiction over the subject matter.[28] Although only the WTO system was approached, the Appellate Body approved of the Panel's finding that under the Dispute Settlement Understanding, a panel did not have the discretion to decline to exercise its validly established jurisdiction.[29]

In the *Argentina – Poultry* case, the Applicant, Brazil, challenged Argentina's anti-dumping measures before the WTO after the Southern Common Market (MERCOSUR) Tribunal had already decided on the same measures.[30] Although the Respondent did not argue primarily for the application of *res judicata* directly, it sought to rely on the fact that

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24 Jagdish Bhagwati, *Free trade today*, Princeton University Press, 2002, 112-13; Jagdish Bhagwati and Anne O Krueger, *The dangerous drift to preferential trade agreements*, AEI Press, 1995, 2-3.

25 J Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO-What should WTO do?' 42 *Cornell International Law Journal* (2009) 193.; Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions the relationship between the WTO Agreement and MEAs and other treaties' 35(6) *Journal of World Trade* (2001) 1081-1131.

26 Mexico - *Tax measures on soft drinks and other beverages*, WT/DS308, AB-2005-10, Appellate Body Report, 6 March 2006.

27 Argentina - *Definitive anti-dumping duties on poultry from Brazil*, WT/DS241, Panel Report, 22 April 2003.

28 Mexico - *Soft drinks and other beverages,* Appellate Body Report, para 47.

29 Mexico - *Soft drinks and other beverages,* Appellate Body Report, para 53.

30 Argentina - *Definitive anti-dumping duties,* Panel Report, para 7.17.

the matter had already been determined by an international tribunal, and the doctrine's applicability was raised by third parties.[31]

The Applicant, Brazil, challenged the applicability of the doctrine based on: the lack of basis for the doctrine in the DSU; the authority of the *India – Autos*[32] case to distinguish between the dispute before the regional mechanism and the dispute before the WTO; and the exclusive nature of the jurisdiction of the WTO.[33] The Respondent contested the applicability of the *India – Autos* jurisprudence since the case differed materially in that while it concerned the approaching of multiple WTO panels on the same subject matter, the instant dispute concerned the Applicant approaching a regional tribunal and the WTO.[34]

The Panel in the instant dispute restrained itself from addressing the main arguments made by the Respondent and did not make a determination on the question of *res judicata.* As elaborated below, the doctrine of *res judicata* would be of great systematic importance in remedying the arising jurisdictional conflicts.[35] However, the DSU does not provide for the application of this internationally recognised principle.[36] Although one may seek to rely on WTO jurisprudence in applying the doctrine, the Panel in *Argentina – Poultry* was categorical that panels are not bound to follow rulings contained in adopted WTO panel reports.[37] In any case, present WTO jurisprudence on *res judicata* fails to establish the applicability of the doctrine in the WTO and does not address the jurisdictional overlap between the WTO and regional trade agreement mechanisms.

This paper focuses on the existence of both the WTO Dispute Settlement Body and South American RTA mechanisms, which gives rise

31 Argentina – *Definitive anti-dumping duties,* Panel Report, para 7.17, 7.18 and 7.28.

32 India – *Measures affecting the automotive sector*, WT/DS146/R WT/DS175/R, Panel Report (21 December 2001).

33 Argentina – *Definitive anti-dumping duties,* Panel Report, para 7.38.

34 Argentina – *Definitive anti-dumping duties,* Panel Report, para 7.38.

35 India – *Automotive sector,* Panel Report, para 7.57.

36 India – *Automotive sector,* Panel Report, para 7.58.

37 Argentina – *Definitive anti-dumping duties,* Panel Report, para 7.41.

to jurisdictional overlaps and conflicts between the two fora. The paper also acknowledges the present legal framework of the WTO Dispute Settlement Body under the Dispute Settlement Understanding, which does not provide for the application of the *res judicata* principle in the WTO. The paper further notes that the jurisprudence of panels and the Appellate Body in the WTO has not settled the question of jurisdictional overlaps between the WTO and regional trade agreements. To this end, the paper suggests durable solutions to incorporate *res judicata* in solving and avoiding jurisdictional conflicts.

The need to address jurisdictional overlaps between the WTO and regional trade agreement mechanisms

The WTO dispute system has significantly contributed to the growth of international trade and the development of international trade law.[38] Concerning adjudicative powers, the Appellate Body has asserted that the jurisdiction of a panel and the scope of such jurisdiction lies squarely within the adjudicative powers and discretion of the panel.[39] This discretion is governed by the DSU, based on consideration of conditions such as whether the Understanding covers the dispute between the members and, whether such a dispute has been fully resolved or still requires to be examined.[40]

This reasoning is defended by Marceau and Trachtman who posit that adjudicative powers are delineated by WTO law and Panels and the Appellate Body may only apply rules as set out in the relevant WTO agreements; as interpreted according to the rules of customary international law on the interpretation of treaties.[41] Despite the clear

[38] Jeffrey M Lang and John H Jackson, 'The WTO: Is it working?' *90 Proceedings of the Annual Meeting (American Society of International Law) Are international institutions doing their job?* (1996) 423; Lockhart and another, 'Reviewing appellate review in the WTO dispute settlement system', 14.

[39] Mexico –*Soft drinks and other beverages,* Appellate Body Report, para 45.

[40] European Union – *Countervailing measures,* Appellate Body Report, para 5.59.

[41] G Marceau, 'A call for coherence in international law: Praises for the prohibition against 'clinical isolation' in WTO dispute settlement' 33(5) *Journal of World Trade* (1999)

position on the laws on jurisdiction, Davey notes that the exercise of the WTO adjudicative powers has not been without setbacks.[42] J Hillman also identifies conflicts between dispute settlement mechanisms in the regional trade agreements and those under the WTO in terms of duplicative proceedings, *res judicata,* forum choices, and other occurrences of overlap.[43]

As of 1 August 2023, the WTO received 593 notifications of RTAs, with 360 of these being in force.[44] According to Songling, these jurisdictional conflicts are attributable to the continuing membership of states in the WTO and RTAs, which often share international obligations that states undertake.[45] The DSB under the WTO and the DSMs (Dispute Settlement Mechanisms) under the RTAs both have jurisdiction over disputes arising from such obligations.[46]

As a result, Yuval identifies that more similar and even identical factual and legal claims are submitted before various dispute settlement fora,[47] causing confusion and chaos in the WTO system as noted by

87, para 109-115; Trachtman, 'The domain of WTO dispute resolution' 40(2) *Harvard International Law Journal* (1999) 342, n 41. For case law, see United States – *Standards for reformulated and conventional gasoline*, WT/DS2, AB-1996-1, Appellate Body Report (29 April 1996), 23; Japan – *Alcoholic beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996, Appellate Body Report (1 November 1996), 104;

42 William J Davey, 'Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques' 4(1) *Journal of International Economic Law* (2001) 79-110.

43 Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO-What should WTO do?', 193; Marceau, 'Conflicts of norms and conflicts of jurisdictions the relationship between the WTO Agreement and MEAs and other treaties' pp. 1081-1131; Pauwelyn, 'Conflict of norms in public international law: How WTO law relates to other rules of international law'.

44 WTO, 'Regional trade agreements: Facts and figures', *World Trade Organisation*, 4 October 2023.

45 Songling Yang, 'The settlement of jurisdictional conflicts between the WTO and RTAs: The *forum non conveniens* principle' 23(1) *Willamette Journal of International Law and Dispute Resolution* (2015) 234.

46 Yang, 'The settlement of jurisdictional conflicts between the WTO and RTAs: The *forum non conveniens* principle', 23.

47 Yuval Shany, *The competing jurisdictions of international courts and tribunals*, Oxford University Press, 2003.

Jagdish Bhagwati.[48] The latter describes the disharmony as a 'spaghetti bowl' consisting of a maze of bilateral treaties and regional agreements in addition to WTO law that overlap in jurisdiction.[49] This lack of harmony has manifested in various WTO cases including the *Mexico - Soft drinks* case and the *Argentina - Poultry* case as noted above.[50]

There is a need to assess the jurisdictional overlaps between the WTO and RTA mechanisms to find a solution to prevent duplicative proceedings and conflicting rulings between the two types of fora. This paper seeks to highlight the jurisdictional overlaps between the WTO and RTA mechanisms in South America whilst elaborating on the necessity and applicability of *res judicata* as a solution to the jurisdictional conflicts.

Dispute settlement jurisdiction of the WTO and of RTAs: The nature and scope of overlaps

The previous section has enunciated the jurisdictional overlaps, and conflicts, that arise from the existence of dispute settlement fora under the WTO and RTAs. This section seeks to paint a clearer picture of the contentious jurisdiction of the WTO mechanisms, with a focus on the obligations of states under WTO agreements that fall within RTA mechanisms in the South American region as well. The approach taken will first highlight the objective of the WTO dispute settlement jurisdiction before limiting the discussion to the jurisdiction likely to overlap with RTAs.

This section will give particular regard to the mandatory and exclusive nature of WTO jurisdiction and its implications on the presence of RTAs mechanisms. This section will also give regard to the objectives of South American RTAs and their dispute settlement mechanisms.

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48 Bhagwati, *Free trade today*, 112-13; Bhagwati and another, *The dangerous drift to preferential trade agreements*, 2-3.

49 Bhagwati, *Free trade today*, 112-13; Bhagwati and another, *The dangerous drift to preferential trade agreements* 2-3.

50 Mexico – *Soft drinks and other beverages*, Appellate Body Report, para 47; Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.38.

The section will finally conclude with an elaboration of the potential and actual jurisdictional overlaps between the WTO and the RTAs in dispute settlement.

Dispute settlement jurisdiction under the WTO

The DSU lays the basis for dispute settlement in the WTO.[51] The system is aimed at the prompt settlement of disputes between WTO Member States regarding their rights and obligations under WTO law.[52] According to the DSU, the purpose of the dispute settlement system is to provide security and predictability to the multilateral trading system preserving the rights and obligations of Member States.[53] The system is also expected to clarify the provisions of WTO Agreements under customary rules of public international law.[54] However, such clarification of WTO can only be called upon in the context of an actual dispute.[55]

As highlighted in *Guatemala – Cement I,* the Understanding establishes a single, coherent, and integrated system of rules and procedures for the settlement of disputes arising under any of the covered agreements.[56] One of the fundamental pillars of this system is the rationale that Members ought to settle disputes through a multilateral system rather than through unilateral action.[57] The Appellate Body emphasised this obligation in the *US – Certain EC products* with reference to Article 23 of the Understanding. In the first instance, the Panel in this case interpreted the provision of the Understanding to be prohibiting any form

51 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 12.

52 Bossche and others, *The law and policy of the World Trade Organization*, 171.

53 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2; Panel Report, US – Section 301 Trade Act, para 7.75; Bossche and others, *The law and policy of the World Trade Organization,* 171.

54 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2; Bossche and others, *The law and policy of the World Trade Organization*, 171.

55 US – *Wool shirts and blouses*, Appellate Body Report, 340.

56 Guatemala – *Cement I,* Appellate Body Report, para 64.

57 US – *Certain EC products,* Appellate Body Report, para 111.

of unilateral action 'because such unilateral actions threaten the stability and predictability of the multilateral trade system' necessary for 'market conditions conducive to individual economic activity in national and global markets' which consist a fundamental goal of the WTO.[58]

It is therefore not surprising that the DSU primarily prefers the settlement of disputes through consultations,[59] a negotiation mechanism under which conflicting parties consult each other in good faith within a determined period to achieve a mutually amicable solution.[60] Additionally, Article 3.7 enunciated the aim of the dispute settlement to be the securing of a positive solution to a dispute, with a preference for a mutually acceptable solution.[61]

Where consultations and negotiations fail, parties are then allowed to seek alternative resolution mechanisms under the Understanding. These include arbitration;[62] good offices, conciliation, and mediation;[63] and adjudication by panels and the Appellate Body.[64] The Dispute Settlement Body, established by the Understanding, forms the panels and the Appellate Body to hear and give recommendations on trade disputes to meet the objectives of the dispute settlement system.[65] This paper shall focus on the jurisdiction of the WTO to 'preserve the rights

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58 US – *Certain EC products,* Appellate Body Report, para 6.14; US – *Section 301 Trade Act*, Panel Report, para 7.71.

59 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 22.6 and 23.2(c).

60 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 4.3.

61 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

62 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 25.

63 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 5.

64 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 6-20.

65 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1 and 6; Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The extensive (but fragile) authority of the WTO Appellate Body' 79(1) *Law and Contemporary Problems* (2016) 237.

and obligations of Members under the covered agreement'. To this end, this section will evaluate the nature and scope of the adjudicative powers of the WTO dispute settlement system.

Nature of WTO adjudicative jurisdiction

The jurisdiction of WTO dispute settlement is peculiar in that it is not only contentious but also compulsory and exclusive.[66]

Contentious jurisdiction

As highlighted above, the jurisdiction of the WTO is contentious and not advisory. The adjudicative powers of the WTO under Article 3 of the DSU can only be invoked in the context of a dispute between parties. The Appellate Body in *US – Wool shirts and blouses* was clear that Article 3.2 is not meant to 'encourage either the panels or the Appellate Body to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute'.[67] Similarly, the Panel in *EC – Commercial vessels* declined to make a finding on an issue that it considered 'an abstract ruling on hypothetical measures' that was neither necessary nor helpful for the resolution of the dispute at hand.[68]

Compulsory jurisdiction

According to Article 23.2 of the Understanding, Members seeking redress for the 'violation of obligations of other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements' shall have recourse to and abide by the WTO system and its procedures.[69]

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66 Bossche and others, *The law and policy of the World Trade Organization*, 178.

67 US – *Wool shirts and blouses*, Appellate Body Report, 340.

68 EC – *Commercial vessels,* Panel Report, para 7.30.

69 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.2.

The enabling provisions of the Understanding are phrased in mandatory terms. The effect is that, where a dispute arises under the covered agreements, a Member is obligated to bring it before the WTO dispute settlement system.[70] Similarly, once a dispute has been submitted before the system, the responding Member has no option but to accept the jurisdiction of the adjudicative system.[71]

The Members, therefore, need not sign an additional agreement to indicate their consent to the jurisdiction of the WTO, nor can they decline such jurisdiction.[72]

Exclusive jurisdiction

In addition to being compulsory, the jurisdiction of the WTO adjudicative mechanisms is exclusive against other international fora.[73] As noted before, Article 23.1 of the Understanding prohibits unilateral conduct, in that Members are not allowed, by themselves, to make a declaration or a determination that a violation has occurred or that benefits have been nullified or impaired.[74]

More importantly, as highlighted by the Panel in *EC – Commercial vessels,* apart from protecting the multilateral system from unilateral conduct, the Understanding excludes determinations by any other fora regarding the rights and obligations of Members in the covered agreements.[75] In the *US – Section 301 Trade Act* the Panel referred to Article 23.1 as the 'exclusive dispute resolution clause' that requires Members not to approach any other system when enforcing their rights and obligations under the WTO.[76]

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70 Bossche and others, *The law and policy of the World Trade Organization,* 178.

71 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 6; Bossche and others, *The law and policy of the World Trade Organization,* 178.

72 Bossche and others, *The law and policy of the World Trade Organization,* 179.

73 Bossche and others, *The law and policy of the World Trade Organization,* 179.

74 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.1.

75 EC – *Commercial vessels*, Panel Report, para 7.193.

76 US – *Section 301 Trade Act*, Panel Report, para 7.43.

Scope of WTO adjudicative jurisdiction

To begin with, access to the adjudicative mechanisms in the WTO is limited to Member States – government-to-government – and not to individuals, international organisations, non-governmental organisations, or industry associations.[77] Even then, only Members party to a dispute or with a substantial interest in a dispute have recourse before the system.[78]

In terms of cause of action, Article 3.3 of the Understanding offers guidance in terms of the general provisions that Members may submit situations where any benefits accruing to them directly or indirectly under the covered agreements are being impaired by measures taken by another Member.[79] This provision is mirrored in other covered agreements such as Articles XXII and XXIII of the GATT, which provides for the scope of the material jurisdiction of the WTO.[80] Article XXIII: 1 of the GATT 1994 gives examples of circumstances that may result in benefits accruing to a Member directly or indirectly under an agreement being impaired.[81] These include where a Member fails to carry out its obligations under a covered agreement, where a Member applies a measure (whether or not it conflicts with the provisions of a covered agreement), or in any other situation. In *India – Quantitative restrictions,* the Appellate Body considered all of these circumstances and noted, particularly, that the United States considered that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under XVIII: B of the GATT, and, therefore, the US was entitled to access redress before the WTO.[82]

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77 US – *Shrimp,* Appellate Body Report, para 101; Bossche and others, *The law and policy of the World Trade Organisation,* 182.

78 US – *Shrimp,* Appellate Body Report, para 101.

79 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, Article 3.3.

80 General Agreement on Tariffs and Trade 1994, Articles XXII and XXIII.

81 General Agreement on Tariffs and Trade 1994, Article XXIII:1.

82 India – *Quantitative restrictions,* Appellate Body Report, para 84.

Such covered agreements are listed in Appendix 1 of the Understanding and include the following agreements:[83] Agreement Establishing the World Trade Organisation; Multilateral Agreement on Trade in Goods; General Agreement on Trade in Services; Agreement on Trade-Related Aspects of Intellectual Property Rights; Understanding on Rules and Procedures Governing the Settlement of Disputes; Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and the International Bovine Meat Agreement.[84]

The above-covered agreements further contained special and additional rules for the application of the WTO adjudicative powers.[85] This essentially includes agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade; the Agreement on Subsidies and Countervailing Measures; the General Agreement on Trade in Services among others, under the Understanding and the WTO dispute settlement procedures.[86]

From the above, it is clear that the contentious, exclusive, and compulsory dispute settlement jurisdiction of the WTO spans a wide scope in terms of subject matter. The covered agreements comprehensively govern the interaction of states in goods and services in most forms.

Dispute settlement jurisdiction under South American RTAs

Regional trade agreements (RTAs) are described as engines for trade liberalisation and the promotion of economic growth.[87] Consequently,

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83 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.1.

84 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Appendix 1.

85 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.2.

86 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.2, Appendix 2.

87 Yenkong Ngangjoh-Hodu, 'Regional trade courts' in the shadow of the WTO dispute settlement system: The paradox of two courts' 28 *African Journal of International and Comparative Law* (2020) 45.

Article XXIV of the General Agreement on Trade and Tariff and Article V of the General Agreement on Trade in Services allow Member States of the WTO to form RTAs.[88] The Appellate Body has also noted that Member States have the right to form RTAs.[89]

In recent decades, these RTAs have increased not only in number but also in complexity: most of the RTAs in recent years have sophisticated enforcement regimes with dispute settlement mechanisms.[90] South American countries particularly stand out in establishing and signing preferential trade agreements of varying scope and institutional density.[91] Empirical evidence from the WTO and the ECLAC Integrated Database of Trade Disputes indicates that South American countries have been more active in regional dispute settlement fora rather than multilateral fora such as the WTO.[92]

Examples of RTAs in South America include the Latin American Integration Association (ALADI); the Southern Common Market (MERCOSUR); and the Andean Community (ANCOM) among other intercountry economic complementation agreements.

The next section will focus on elaborating the nature and scope of the jurisdiction of dispute resolution measures within the Andean Community of 1969. This is because the MERCOSUR has since 2001 adopted the Protocol of Olivos, which, in entering into force in January 2004, remedied the threat of jurisdictional conflict by providing a forum

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88 General Agreement on Tariffs and Trade 1994, Article XXIV and General Agreement on Trade in Services 1994, Article V.

89 Peru – *Additional duty on imports of certain agricultural products*, WT/DS/457/AB/R, Appellate Body Report (31 August 2015), 276; Turkey – *Restrictions on imports of textile and clothing products,* WT/DS34/AB/R, Appellate Body Report (19 November 1999), para 58.

90 Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 269.

91 Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 269.

92 Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 272.

choice clause to prevent Member States from approaching both the WTO and the MERCOSUR dispute settlement mechanisms. [93]

Jurisdiction of the Andean Community

The Andean Subregional Integration Agreement of 1969, signed by Bolivia, Colombia, Chile, Ecuador, and Peru, establishes the Agreement on Andean Subregional Integration ('Cartagena Agreement').[94] This regional agreement was formed to create a customs union to:[95] eliminate all tariff barriers and quantitative restrictions on goods within the Community and promote sectoral industrial development programmes to achieve a higher level of economic development.[96]

In 1979, the Community adopted the Treaty Creating the Court of Justice of the Cartagena Agreement, establishing the Community's dispute settlement mechanism.[97] The dispute settlement procedure under the Andean Community has the reputation of being quite open to litigation.[98] This is inferred from the fact that the system grants both treaty parties and private actors the right to initiate dispute settlement proceedings.[99]

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93 Protocol of Olivos, 18 February 2002, 42 ILM 2, Article 1; Ljiljana Biukovic, 'Dispute resolution mechanisms and regional trade agreements: South American and Caribbean modalities' *UC Davis Journal of International Law and Policy* (2008) 289.

94 Andean Sub-Regional Integration Agreement, 26 May1969, 8 ILM, 910.

95 Biukovic, 'Dispute resolution mechanisms and regional trade agreements', 266; Maria Alejandra Rodriguez Lemmo, 'Study of selected international dispute resolution regimes, with an analysis of the decisions of the Court of Justice of the Andean Community' 19 *Arizona Journal of International and Comparative Law* (2002) 863, 902.

96 Andean Sub-Regional Integration Agreement, Article 72.

97 Treaty Creating the Court of Justice of the Cartagena Agreement, 10 March 1996, Articles 19-33.

98 Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 271.

99 Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 271.

Nature and scope of the Andean Community dispute resolution jurisdiction

The Court has compulsory jurisdiction to render prejudgement or preliminary interpretations on the provision of the Andean legal system; to decide on the validity of decisions of the Council of Foreign Ministers and the Commission; and on the validity of resolutions of the Secretarial. Disputes before the Court may be brought by Member States, the institutions of the Community, and by private parties in certain situations.[100] The jurisdiction of the Court of Justice is wide in that it has the mandate to decide all disputes concerning the interpretation of all Andean Treaty norms.[101]

The Andean Community treaties that fall within the jurisdiction of the Court of Justice are the Andean Subregional Integration Agreement, its protocols, and additional instruments.[102] The additional instruments include the Modifying Protocol of the Andean Subregional Integration Agreement, the Quito Protocol, the Trujillo Protocol, and the Sucre Protocol. These instruments regulate trade in goods and services within the Community, giving the Court jurisdiction over subject matter that is similarly within the jurisdiction of WTO covered agreements.

Jurisdictional overlaps and conflicts

Overlaps of jurisdictions are situations where aspects of the same disputes can be brought before two distinct dispute settlement systems.[103]

In line with the Member States' right to form RTAs under WTO law, a State would be justified in invoking the dispute settlement mechanisms in an RTA to enforce obligations under the RTA even if

100 Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 19-33.

101 Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 19-33.

102 Treaty Creating the Court of Justice of the Cartagena Agreement, Article 1.

103 Kyung Kwak and Gabrielle Marceau, 'Overlaps and conflicts of jurisdiction between the WTO and RTAs' 41 *Canadian Yearbook of International Law* (2004) 83, 86.

the subject matter could also consist of a WTO violation.[104] Similarly, the Dispute Settlement Understanding of the WTO grants States wide discretion in deciding whether to bring a case against another Member:[105] WTO panels are not authorised to question or review a Member's decision to bring a matter.[106]

From the above analysis of jurisdictions, it is clear that the contentious, exclusive, and compulsory dispute settlement jurisdiction of the WTO spans a wide scope in terms of subject matter. The covered agreements in the WTO govern the interaction of States in good faith and services in most forms comprehensively. Similarly, the Andean Community treaties and protocols regulate trade in goods and services within the South American region extensively. Both levels of agreement therefore provide South American States with rights and obligations in international trade. Where a South American State party to both fora adopts a measure or acts in an arbitrary manner likely to infringe both the Andean Community and the WTO, a jurisdictional overlap will occur.

This was the case in *Argentina – Poultry* where the Applicant, Brazil, had similar recourse to and approached both the Southern Common Market ad hoc Tribunal and the WTO Dispute Settlement Body against the same anti-dumping measures.[107] This resulted in conflicting decisions between the RTA mechanisms and the WTO. It is important to note, however, that the Protocol of Olivos, which provides for a forum-choice clause, was not in force at the time the Panel was ruling in the case of *Argentina – Poultry,* on 22 April 2003, therefore, nothing would

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[104] Gabrielle Marceau, 'The primacy of the WTO dispute settlement system, is the settlement of trade disputes under regional trade agreements undermining the WTO dispute settlement mechanism and the integrity of the world trading system?' 1 *Questions of International Law* (2014) 5.

[105] European Communities — *Regime for the importation, sale and distribution of bananas*, DSR 1997: II, 591, Appellate Body Report (25 September 1997), para 135; Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

[106] Mexico – *Corn syrup (Article 21.5 – US),* Appellate Body Report, para 74; Bossche and others, *The law and policy of the World Trade Organization,* 183.

[107] Argentina – *Definitive anti-dumping duties*, Panel Report.

stop Brazil from approaching both fora with the same matter.[108] With the Protocol in force presently, Members of the Southern Common Market and the WTO are not allowed to approach multiple fora.

This is, however, not the case in the Andean Community. The Court of Justice of the Andean Community has compulsory jurisdiction vis-à-vis the compulsory jurisdiction of the WTO and does not have any clause limiting States from approaching multiple fora. Therefore, where the action of a Member State such as Peru contravenes the national treatment obligation under Article 8 of Decision 439 of the Andean Community Commission and, simultaneously, contravenes the national treatment obligation under Article III of the GATT both regimes would provide recourse. Nothing in the provisions of the Andean Community or the WTO precludes the affected Member States such as Ecuador and Colombia from approaching both the Court of Justice of the Andean Community and the Dispute Settlement Body under the WTO.

This Section set out to elaborate on the nature and scope of dispute settlement jurisdiction within the WTO and within South American RTAs. Accordingly, it has established that the WTO has wide compulsory jurisdiction over matters of international trade law. This is similarly the case with the Court of Justice of the Andean Community. A Member State in the WTO would be entitled to a hearing before the WTO by simply alleging that a measure affects or impairs its trade benefits, hence excluding the jurisdiction of any other mechanism over the same subject matter.[109] Since the jurisdictions of these two fora overlap, and States are not precluded from approaching both fora in case of a dispute, there is the risk of jurisdictional overlaps and conflicts between the two forms of dispute settlement mechanisms.

Although one may argue for the adoption of a forum-choice clause as the solution to these potential conflicts, this paper proposes *res judicata* as a more appropriate solution as demonstrated below.

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108 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

109 Kwak and another, 'Overlaps and conflicts of jurisdiction between the WTO and RTAs', 85.

Res judicata as an applicable solution for jurisdictional conflicts

The previous section elaborated on the actual and potential jurisdictional overlaps between the WTO dispute settlement mechanisms and the dispute settlement mechanisms under South American RTAs, particularly the Andean Community. This analysis demonstrates the need for a solution to the jurisdictional overlaps and conflicts. Various scholars have provided propositions such as 'choice of forum' clauses in the RTAs,[110] and the *forum non conveniens* principle to be exercised by the WTO panels.[111]

The proposition on 'choice of forum' that would require States party to both the WTO and RTAs to choose only one forum has been criticised based on the compulsory and exclusive nature of the WTO jurisdiction against all other bodies.[112] Essentially, therefore, the WTO's jurisdiction of a matter cannot be limited by the provisions of a regional trade agreement.

The *forum non conveniens* principle, on the other hand, would require WTO panels to refrain from ruling on matters that they consider would be better handled before RTA dispute settlement mechanisms.[113] This principle can be challenged based on the jurisprudence of the Appellate Body, which provides that, where a panel declines to exercise validly established jurisdiction, then it diminishes the right of the complaining Member to seek redress.[114]

The WTO's Dispute Settlement Understanding, under Article 3.2, prohibits the Dispute Settlement Body, and the panels in extension,

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110 C Chase, A Yanovich, JA Crawford and P Ugaz, 'Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?', WTO Staff Working Paper ERSD-2013-07, 2013.

111 Yang, 'The settlement of jurisdictional conflicts between the WTO and RTAs', 234.

112 Marceau, 'The primacy of the WTO dispute settlement system',6; EC – *Commercial vessels*, Panel Report, para 7.193; US – *Section 301 Trade Act,* Panel Report, para 7.43; Bossche and others, *The law and policy of the World Trade Organization*, 179.

113 Yang, The settlement of jurisdictional conflicts between the WTO and RTAs', 240.

114 Mexico – *Soft drinks and other beverages,* Appellate Body Report, para 53 and 41.0

from making recommendations and rulings that diminish the rights of Members under the covered agreements, including the right to access redress.[115] Panels are therefore, cautioned from 'judicial activism'[116] and the relinquishment of rights granted by the Understanding is only acceptable when made clear.[117] In addition, Article 23 of the Dispute Settlement Understanding provides that the WTO's mechanism shall be the most appropriate forum for matters concerning the violation of WTO obligations, to the exclusion of other fora.[118]

Considering the above, this section proposes the *res judicata* principle as a solution to the jurisdictional conflicts eminent from the present jurisdictional overlaps. This is because, from a third-world-centred approach, the RTAs offer more accessible and more contextual dispute settlement mechanisms that should thus be prioritised over the global WTO DSB. Particularly, this section shall assess the nature of the principle; and, how it has featured in jurisdictional conflicts. This assessment shall take the form of an evaluation of WTO jurisprudence, in two main cases, on *res judicata*, its scope, and elements, which shall cumulate into the conclusion that this principle is applicable as a solution in addressing jurisdictional conflicts and preventing duplicative judgements.

The principle of *res judicata* in the WTO

> *Res judicata*: A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. (…) In addition, to be applicable requires identity in the thing sued for as well as identity of cause of action, of persons and parties to the action, and of quality in persons for or

[115] Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2.

[116] Bossche and others, *The law and policy of the World Trade Organization*, 179.

[117] Peru – *Agricultural products*, Appellate Body Report.

[118] Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.

> against whom the claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided (…).[119]

The principle of *res judicata* is the doctrine providing that the final judgement by a court of competent jurisdiction, conclusively adjudging the rights or obligations of disputing parties, shall constitute an absolute bar to a subsequent action involving the same parties, the same claim, or the same cause of action. The recommendations of WTO panels and the Appellate Body as discussed below re-emphasise the need for *res judicata* as discussed throughout this paper. More importantly, the cases highlight the statutory and jurisprudential gap with regard to the applicability of the principle and, eventually, guide the applicability of the principle in the WTO dispute settlement system.

India – Measures affecting the automotive sector

In this matter, a panel was established to look into complaints raised by the European Communities and the United States against India's licensing regime and measures affecting the automotive sector. The case did not address the issue of jurisdictional overlaps between the WTO dispute settlement system and similar systems under RTAs since it concerned the handling of similar matters by two WTO panels. However, the Panel discussed the question of *res judicata* in the WTO system as pleaded by the parties and contributed significantly to the jurisprudence on the matter.

The principle of *res judicata* was pleaded by India in *India – Measures affecting the automotive sector,* where India, as the Respondent, asked the Panel to apply the principle and decline to exercise its jurisdiction since the matter raised by the United States had already been adjudicated upon by another panel in *India - Quantitative restrictions on imports of agricultural, textile and industrial products* (WT/DS90).[120] India traced the basis of this principle in the old maxim, *interest republicae ut sit finis*

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[119] *Black's Law Dictionary,* West Publishing Company, 1990, 1305.

[120] India – *Automotive sector,* Panel Report, para 3.7 and 4.55.

litigium, which essentially means that there must be an end to litigation.[121] The rationale being that 'if matters which have been solemnly decided are drawn again to controversy; if facts, once solemnly affirmed, are to again be denied whenever the affirmant sees his opportunity, there can never be an end to litigation and confusion.'[122]

The Panel noted that *res judicata* has not been explicitly provided for in any guiding instrument, nor has it been referred to or endorsed by any panel or by the Appellate Body.[123] It however took note of two cases where panels were formed successively over the same or similar subject matter but noted that *res judicata* was not applicable in either of the cases.[124] The European Communities, as a Respondent in this case, whilst urging the Panel, if at all, to apply the principle with much circumspection elaborated on the elements of *res judicata*.[125] These are that there must be complete identity between the parties and between the 'matters' at issue.[126]

In this case, 'matters' includes both the impugned measure or conduct, and the claim against such a measure.[127] The Panel sided with this elaboration of the scope of *res judicata*,[128] stating that the principle, if applicable, would presumably relate to the effect of a previously adopted panel report on a subsequent dispute involving the same matter between the same parties.[129]

Essentially, the Panel established a two-tier test to be applied where a party seeks to rely on *res judicata*, namely: an investigation of the applicability of the principle to WTO dispute settlement, and whether

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121 India – *Automotive sector*, Panel Report, para 4.55.

122 India – *Automotive sector*, Panel Report, para 4.55; Herman, *Commentaries on the law of estoppel and res judicata*, 8.

123 India – *Automotive sector*, Panel Report, para 7.57.

124 India – *Automotive sector*, Panel Report, para 7.58.

125 India – *Automotive sector*, Panel Report, para 4.67.

126 India – *Automotive sector*, Panel Report, para 4.67.

127 India – *Automotive sector*, Panel Report, para 4.67.

128 India – *Automotive sector*, Panel Report, para 7.65 and 7.66.

129 India – *Automotive sector*, Panel Report, para 4.68.

the conditions of the principle had been met in the facts.[130] Noting that the Dispute Settlement Understanding did not make any provisions with regard to the application of the principle, the Panel stated that the principle could only be 'potentially' invoked where 'its commonly understood conditions of application' were met in the facts.[131]

Thus, referring back to the elements of *res judicata*, the Panel noted that the question of applicability of the principle would only be pertinent where it was clear that the matter ruled on by the *India – Quantitative restrictions* Panel is identical to the matter before it.[132] It conducted this evaluation based on the specific measures at issue and the claims – the legal basis of the complaints.[133]

Consequently, the Panel adopted a strict approach in examining the terms of reference of the *India – Quantitative restrictions* Panel vis-à-vis those of itself and found that while the former ruled on the EXIM licensing policy by India, the latter was required to rule on Public Notice No. 6 and therefore the measures at issue were not identical.[134] Similarly, the Panel opted to investigate the specific legal basis of the claims before each panel and found that the *India – Quantitative restrictions* Panel did not rule on Article XI as the instant Panel was tasked to and therefore the claims were not identical.[135] This echoes the criticism lodged against *res judicata* as a solution for jurisdictional conflicts, that though the parties may be the same and the subject matter similar, formally the rights of the parties and the applicable law between RTAs and the WTO are different, and would preclude the application of *res judicata*.[136]

Accordingly, the Panel found that the doctrine of *res judicata* could not apply to that dispute and declined to rule on whether the

130 India – *Automotive sector*, Panel Report, para 7.57.
131 India – *Automotive sector*, Panel Report, para 7.59.
132 India – *Automotive sector*, Panel Report, para 7.60.
133 India – *Automotive sector*, Panel Report, para 7.80.
134 India – *Automotive sector*, Panel Report, para 7.83 and 7.86.
135 India – *Automotive sector*, Panel Report, para 7.87 and 7.90.
136 Marceau, 'The primacy of the WTO dispute settlement system', 10, 11.

principle could potentially apply to WTO dispute settlement.[137] The significance of this case is that though the Panel did not express itself on the applicability of the principle in the WTO, it proceeded to evaluate the principle's elements of identity of parties and identity of issues to refute such applicability. This recommendation thus implies that one, *res judicata* is not prohibited in the WTO and that second, where the conditions in the fact justify, potentially, *res judicata* 'would' be applicable to bar the jurisdiction of a WTO panel over a matter.

Argentina — Definitive anti-dumping duties on poultry from Brazil[138]

This matter concerned Brazil's challenge against Argentina's anti-dumping measures. Argentina submitted a preliminary request to the effect that the Panel refrains from ruling on the matter based on grounds including that a Southern Common Market (MERCOSUR) ad hoc tribunal had already decided on the anti-dumping measures. Argentina's main argument was that Brazil's conduct in bringing the matter first to the regional dispute settlement ad hoc Tribunal and then to the WTO was contrary to the principle of good faith, warranting an invocation of estoppel, and alternatively, that the Panel ought to be bound by the decision of the regional ad hoc tribunal.[139]

The Panel rejected Argentina's request on the reasoning that the conditions for estoppel had not been established,[140] and that the Panel was not bound by non-WTO dispute settlement bodies.[141] Though the Panel did not address *res judicata*, and despite Argentina's unwillingness to invoke *res judicata*,[142] other parties to the dispute proceeded to submit on the principle. It is these submissions that are instrumental in exploring the applicability of *res judicata.* Paraguay, as a third party, submitted preliminarily that the matter was *res judicata* as it had already

137 India – *Automotive sector*, Panel Report, para 7.103.

138 Argentina – *Definitive anti-dumping duties*, Panel Report.

139 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18.

140 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.39.

141 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.41.

142 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18 and para 13.

been brought before a RTA dispute settlement procedure, particularly the Brasilia Protocol of the Southern Common Market.[143] Its argument was based on Article 21 of the Brasilia Protocol, which rendered the decision of the ad hoc Tribunal binding and excluded from appeal.[144] Additionally, Paraguay argued that the Southern Common Market's Protocol of Olivos, albeit not in force then, excluded members from initiating a dispute in multiple fora.[145]

Though not with regards to *res judicata*, the Panel stated that the adoption of the Protocol of Olivos indicated that the parties recognised that before the Protocol, a Southern Common Market dispute could be followed by a WTO dispute settlement proceeding regarding the same subject matter.[146] Despite Argentina's unwillingness to invoke *res judicata*,[147] according to Brazil, its argument that the ad hoc Tribunal ruling is binding has the effect of *res judicata*.[148] To this, the Applicant referred to the definition of *res judicata* as the 'rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action'.[149]

The Applicant then relied on the two-part test set in *India – Measures affecting the automotive sector*[150] that the Panel ought to satisfy itself on the applicability of the principle to WTO dispute settlement, and on whether the conditions of the principle had been met in the facts.[151] On the first requirement, Brazil stated that Argentina did not cite any

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143 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

144 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

145 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.29.

146 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.38.

147 Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18.

148 Argentina – *Definitive anti-dumping duties*, Panel Report, para 4.

149 Argentina – *Definitive anti-dumping duties*, Panel Report, para 19; *Black's Law Dictionary*, 1305.

150 Argentina – *Definitive anti-dumping duties*, Panel Report, para 20; India – *Automotive sector,* Panel Report.

151 India – *Automotive sector,* Panel Report, para 7.57.

WTO legal texts to justify an invocation of *res judicata*.[152] On the second requirement, Brazil distinguished, factually, the claims raised before the regional ad hoc Tribunal from those raised before the WTO in that the former concerned the Southern Common Market's legal framework and the latter concerned WTO obligations.[153]

In response, Argentina first distinguished the instant dispute from that in *India – Measures affecting the automotive sector,*[154] in that while the latter involved the listening of successive complaints under the same forum, the instant dispute was first before a RTA forum and then the WTO.[155] The Respondent then highlighted more substantive distinctions from the cited jurisprudence that would justify an application of *res judicata*.[156] Particularly, sticking to the known elements, Argentina argued the requirement of identity of parties had been fulfilled as the parties in the regional proceedings were the same as these; that the identity of the issues was fulfilled as the measure being challenged before both proceedings was the same; and that the legal basis of the claims was also fulfilled due to the 'high degree of similarity between the arguments' made before both proceedings.

Thus, the Respondent in this matter, while using the same test as in *India – Measures affecting the automotive sector*, adopted a more liberal approach, particularly when looking into the identity of the legal basis of the claims at issue. Despite the Panel's decision not to address *res judicata,* this case is significant in indicating the position of present WTO jurisprudence on *res judicata* and what this means to Member States and their arguments.

From the cases above, it is clear that the principle of *res judicata* is not an alien concept in WTO dispute settlement. Additionally, though implicitly, panels have acknowledged the applicability of this principle,

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152 Argentina – *Definitive anti-dumping duties*, Panel Report, para 11.

153 Argentina – *Definitive anti-dumping duties*, Panel Report, para 24.

154 Argentina – *Definitive anti-dumping duties*, Panel Report, para 20; India – *Automotive sector,* Panel Report.

155 Argentina – *Definitive anti-dumping duties*, Panel Report, para 12.

156 Argentina – *Definitive anti-dumping duties*, Panel Report, para 12.

and its effect in precluding jurisdiction and, in certain cases, remedying the challenges caused by jurisdictional overlaps and duplicative proceedings. These cases confirm that *res judicata,* as established and defined in international law is compatible with the structure of WTO albeit with formalistic limitations, and, provided all its requirements are met. This section therefore concludes that the principle of *res judicata* would be applicable in the WTO dispute settlement system.

Res judicata as the key element in resolving jurisdictional conflicts

This section recommends the *res judicata* principle as a solution to the jurisdictional conflicts that occur where a Member seeks to institute a matter before the WTO dispute settlement system for resolution after it has been determined by a competent RTA dispute resolution mechanism. Having established the applicability of the principle in WTO dispute settlement, this section addresses the question of how this solution is to be applied. Particularly, this section will recommend the trite use of general principles of international law and the exercise of the inherent discretion of WTO panels as the fundamental basis for the application of this solution. It will recommend a subjective approach to the interpretation of the elements of *res judicata* to ensure the effective resolution of jurisdictional conflicts and the prevention of duplicative proceedings. In doing so, this section will also recommend ways to counter or mitigate against possible limitations and criticism against *res judicata*.

Application of res judicata as a solution

Application of *res judicata* by panels would essentially mean that panels be allowed under the dispute settlement to decline to exercise their jurisdiction, even where it is well established. For this to be justifiable, such conduct would need a basis in the Understanding. The following section proposes that the Understanding does grant panels the discretion to act in this manner.

Use of inherent discretion of panels as the basis for the principle

It has become accepted that panels have powers inherent to their adjudicative function to determine whether they have jurisdiction and to determine the scope of their discretion as well.[157] This discretion is guided by Article 3.7 of the DSU, which provides for the aim of dispute settlement under the WTO to be to 'secure a positive solution to a dispute'.[158]

The Appellate Body in *US – Wool shirts and blouses* thus ruled that the Understanding does not require panels to address all legal claims raised by a party.[159] The Appellate Body emphasised this position in *India – Patents (US)*, where it reiterated that a panel has the discretion to determine the claims it must address in order to resolve a dispute.[160] This exercise of judicial economy is permissible within the confines of transparency.[161]

Essentially, therefore, panels are empowered to rule on only what is necessary to ensure they find a 'positive solution to a dispute'. On this ground, panels may apply the principle of *res judicata* to guard their jurisdiction. This would entail panels evaluating, in substance, the extent to which a WTO dispute before them has already been resolved at an RTA level. Where the panel can conclude that the substance of a conflict, or part of it, has been determined by an RTA body it would no longer be necessary 'to secure a positive solution' under Article 3.7 of the DSU for the panel to proceed to re-evaluate the conflict. In such a case, the panel could exercise judicial economy by deeming that particular aspect of the conflict *res judicata*. This can only apply where the conflict before the RTA and the one before the panel are similar in substance, in that

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157 Mexico – *Soft drinks and other beverages*, Appellate Body Report, 45; US – *1916 Act*, Appellate Body Report, para 54; Mexico – *Corn syrup (Article 21.5 – US),* Appellate Body Report, para 53.

158 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

159 US – *Wool shirts and blouses*, Appellate Body Report, para 19 and 340.

160 India – *Patents (US),* Appellate Body Report, para 87.

161 Canada – *Autos,* Appellate Body Report, para 117.

they concern the same rights in substance and the RTA determination has granted a remedy to such a right already.

Permitted use of general principles of international law

The Panel in *India – Measures affecting the automotive sector* found that widely recognised principles are applicable in WTO Dispute Settlement with regard to fundamental procedural matters.[162] It cited the principle of good faith[163] and the presumption against conflict as examples of such principles.[164] This import of general principles of international law has a basis in Article 3.2 of the Understanding that provides for the use of such principles by WTO panels.[165] On the same note, the principle of *res judicata* would be justifiably applicable in the WTO dispute settlement system.

Criticisms against the principle of *res judicata*

Two main criticisms can be identified against *res judicata* as a solution to jurisdictional conflicts. One, the exercise of *res judicata* may diminish the rights of complaining parties to get redress through the WTO dispute settlement system; and, two, formally, the rights of the parties and, the applicable law between RTAs and the WTO are different and would preclude the application of *res judicata*.[166] This section gives recommendations on how each of these criticisms can be addressed or mitigated.

Rights of complaining Members

As highlighted by the European Communities in *India – Measures affecting the automotive sector,* there is a risk of denial of justice or denial

[162] India – *Automotive sector*, Panel Report, para 7.57.

[163] India –*Automotive sector*, para 7.57; US – *Shrimp*, Appellate Body Report, para 158.

[164] India – *Automotive sector*, para 7.57; Indonesia - *Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para 14.28.

[165] Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

[166] Marceau, 'The primacy of the WTO dispute settlement system', 10,11.

of the rights of a complaining member with the application of *res judicata*.[167] This issue is adequately addressed by the justification of the judicial economy. This is the allowance that panels have to rule only on what they consider necessary to resolve a dispute in accordance with Article 3.7 of the Dispute Settlement Understanding.[168] According to the Appellate Body, the exercise of judicial economy does not diminish the rights of Members but rather it is a fulfilment of a panel's obligations under the Understanding.[169] Accordingly, where a panel applies *res judicata* under the justification of judicial economy the rights of the complaining member cannot be said to be diminished.

Formal difference between applicable laws regionally and in the WTO

This is the fundamental challenge in the application of *res judicata*.[170] It particularly relates to the second condition of *res judicata;* that the matters decided upon should be identical to the matters already decided upon, not only in terms of the claim but also in terms of the legal basis.[171] Since the legal basis, in a strict sense, of regional trade agreements and that of the WTO are not the same, this formalistic view renders *res judicata* practically inapplicable. Thus, if a panel, as was the case in *India – Quantitative restrictions*,[172] adopts a strict approach to examining the legal basis in terms of the laws relating to the matter at issue, then the challenge of jurisdictional conflict will remain unsolved.

For this reason, this paper recommends a more subjective approach, pegged on Articles 3.4 and 3.7 of the Dispute Settlement Understanding

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167 India –*Automotive sector*, Panel Report, para 4.67; Mexico – *Soft drinks and other beverages*, Appellate Body Report, 53.

168 Australia – *Salmon*, Appellate Body Report, para 223; Japan – *Agricultural products II*, Appellate Body Report, para 111; US – *Wheat gluten*, Appellate Body Report, para 183; US – *Lamb*, Appellate Body Report, para 194; Brazil – *Retreated tyres*, Appellate Body Report, para 256.

169 India – *Patents (US)*, Appellate Body Reports, para 87; *Canada – Autos*, Appellate Body Report, para 117.

170 Marceau, 'The primacy of the WTO dispute settlement system', 10, 11.

171 India – *Automotive sector*, Panel Report, para 7.57.

172 India – *Automotive sector*, Panel Report, para 7.83-7.90.

that prioritises the positive resolution of a dispute as a function of panels.[173] This approach would require that panels interpret a 'matter' not based on the specific laws invoked by the parties but rather based on the rights and obligations invoked. That way, the settlement of a right or obligation at the RTA level will be duly considered in establishing the similarity of subject matter and applying *res judicata.*

Conclusion

This paper has coursed a journey through the comprehensive dispute resolution system that has been established by the WTO and its agreements. In doing so, it has highlighted the compulsory and exclusive nature of WTO dispute settlement jurisdiction and the practical challenges these features pose to the efficient implementation of the WTO provisions, which allow for the formation of RTAs. Particularly, though the WTO allows for the establishment and running of RTAs, the compulsory and exclusive nature of WTO dispute settlement jurisdiction causes jurisdictional conflicts with the RTAs' dispute settlement mechanisms where jurisdictional overlaps exist. With the example of the South American region and the Andean Community in particular, this paper has highlighted the jurisdictional overlaps and recommended the application of *res judicata* by WTO panels as the solution.

Through the analysis undertaken, it is clear that *res judicata* is applicable as a remedy where a Member seeks to institute a matter before the WTO dispute settlement system for resolution after it has been determined by a competent regional trade agreement dispute resolution mechanism, thus resulting in jurisdictional conflicts and duplicative proceedings. In terms of how this recommendation is to be applied, this paper has recommended two approaches: one, the trite use of general principles of international law; and two, the exercise of the inherent discretion of WTO panels as the fundamental basis for the application of

[173] Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 3.4 and 3.7.

this solution. This is not to mean that this application would be seamless. This paper has identified the major criticisms and hence challenges to the application of *res judicata*. To these, it recommends the justification of judicial economy by panels, and the employment of a subjective interpretation approach when considering the elements required to apply *res judicata.* With the implementation of these recommendations, the international trade challenges posed by jurisdictional overlaps and jurisdictional conflicts between regional trade agreements dispute settlement mechanisms and the WTO dispute settlement system would be well addressed.

Towards comprehensive civilian protection under Common Article 3 by addressing protection gaps in spill-over conflicts

Kevin Kipchirchir*

Abstract

There is a proliferation of non-international armed conflicts across the globe. Increasingly, these conflicts involve groups across two or more borders or that involve cross-border clashes. This is termed as spill-over conflict. The Middle East and Central Africa serve as salient examples to this effect. A literal reading of Common Article 3 locks out the victims of such conflicts from protected status. Common Article 3 restricts its application to non-international armed conflicts occurring in the territory of one high contracting party. The gap in protection occurs where the groups do not meet the organisational threshold in Additional Protocol II regarding the structure of the non-state actors' organisation but are engaged in conflicts spanning more than a single territory. This paper examines the history of Common Article 3 and finds that the parties had no intention of locking out the application of Common Article 3 based

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on territorial considerations. Secondly, this paper looks into customary international law through state practice and jurisprudence. It finds that state practice and emerging jurisprudence recognises the fundamental principles that underpin Common Article 3. To this end, even where treaty law is inapplicable, customary international humanitarian law shall apply to provide protection to victims of spill-over non-international armed conflict. It is against this backdrop that the paper proposes that the single territory provision in Common Article 3 be amended to accommodate a more inclusive cross border reading.

Keywords: civilian protection, Common Article 3, non-international armed conflicts, customary international humanitarian law

Introduction

Since the early 2000s, there has been a worldwide proliferation of non-international armed conflicts (NIACs).[1] From the conflicts in the Middle East[2] to the raging military engagements in the Sahel and Central Africa, and closer home, the war on Al Shabaab being waged by the Uganda-led African Union Mission in Somalia (AMISOM).[3] In 1949, the International Committee of the Red Cross (ICRC) spearheaded an effort that culminated in the Four Geneva Conventions of 1949.[4] On 8 June 1977, the state adopted two Protocols Additional to the 1949 Conventions.[5] Kenya has since ratified all these Geneva Conventions and the Protocols. Additional Protocol I covers international armed conflicts (IACs) while Additional Protocol II (APII) covers NIACs.[6] In 2005, states adopted the third Protocol Relative to the Adoption of an Additional Distinctive Emblem.[7]

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1 International humanitarian law and the challenges of contemporary armed conflicts, ICRC Report (22 November 2019) 50; International Committee of the Red Cross, 'ICRC engagement with non-state armed groups: Why, how, for what purpose, and other salient issues' ICRC Position Paper (March 2021) 3.

2 Marco Sassòli, 'Transnational armed groups and international humanitarian law' Harvard University Occasional Paper Series 6, 2006, 1.

3 David M Anderson and Jacob McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa,' 114(154) *The Royal African Society* (2015).

4 Geneva Convention for the Amelioration of the Condition of the Wounded in the Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

6 Additional Protocols I, II to the Geneva Conventions.

7 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

On one hand, IACs are conflicts in instances of declared war between states, or partial or total occupation by a state of another state's territory[8] or in cases of self-determination.[9] NIACs on the other hand, are conflicts occurring between states and dissident armed forces or between states and armed groups within its territory or between such groups.[10] The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Dusko Tadić* held that NIACs occur whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[11]

The framework governing NIACs is twofold: firstly, Common Article 3 (CA3) covers conflicts not of an international character occurring in the territory of one of the high contracting parties either between the state and armed groups or between two such groups.[12] The practice has shown that CA3 covers conflicts which have no state participants from either side.[13] The second framework is APII. Conflicts covered by APII occur in the territory of a high contracting party either between its armed forces and dissident armed forces or occur between states and other organised armed groups.[14] These armed groups must also exercise control over a part of the territory of the high contracting party under responsible command.[15]

Due to the proliferation of NIACs, seven subsets of NIACs have emerged. Jelena Pejic[16] indicates that the types are as follows: Firstly, the traditional or classical CA3 armed conflicts between government

8 Geneva Conventions of 12 August 1949, Common Article 2.

9 Additional Protocol I, Article 1(4).

10 Geneva Conventions of 12 August 1949, Article 3; Additional Protocol II, Article 1.

11 *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, ICTY (1995), para 70.

12 Geneva Conventions of 12 August 1949, Common Article 3.

13 International Committee of the Red Cross, *Commentary of 2016 Article 3: Conflicts not of an international character (ICRC Commentary 1987).*

14 Additional Protocol II, Article 1.

15 Additional Protocol II, Article 1.

16 Jelena Pejic, 'The protective scope of Common Article 3: More than meets the eye' 93(881) *International Review of the Red Cross* (2011).

armed forces and one or more organised armed forces within the territory of the state.[17] Secondly, an armed conflict where two or more armed groups are pitted against each other.[18] Thirdly, multinational NIACs may arise where other states join a state in fighting an organised armed group in the territory of that state.[19] Fourthly, NIACs may occur where armed forces acting under the authority of regional bodies or intergovernmental organisations are sent to aid a state in stabilising armed conflict in its territory.[20] The fifth type is cross-border NIACs where a state invades another state to fight organised armed groups in that territory without the permission of the host state.[21] The sixth subset is a transnational armed conflict whereby a state or group of states is fighting an organised armed group in various countries for example, the so-called global war on terror.[22] The seventh subset that Pejic identifies is a spill over armed conflict whereby a conflict between a government's forces and an organised armed group extends to the territory of a third state.[23]

This realisation presents a problem for the international humanitarian law project as we currently know it. At face value, it means that from Pejic's practical list, some types of NIACs will not be covered by the current regime. CA3 restricts conflict to the confines of a border[24] while APII restricts its application to a strict organisational and intensity threshold.[25] The gap then occurs as regards groups who do not meet the intensity and organisational threshold required by APII and are engaged in spill-over conflicts. One such example is the war against Al Shabaab in Somalia which has over the years spilled over into the Kenya's north eastern counties with occasional attacks in other parts

17 Pejic, 'The protective scope of Common Article 3: More than meets the eye'.
18 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 5.
19 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.
20 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.
21 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.
22 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 7.
23 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 7.
24 Geneva Conventions of 12 August 1949, Common Article 3.
25 Additional Protocol II, Article 1.

of the country. While the attacks in Kenya's north eastern counties are linked to the conflict in Somalia, they do not meet the intensity threshold in APII.[26] This gap is further confounded by the fact that the treaty regime governing NIACs is narrower than that governing IACs with only 29 provisions governing the former and 529 provisions governing the latter. This is to be considered against the ICRC's report that there are hundreds, if not thousands, of armed groups engaged in armed conflicts across the globe.

Notably, the rationale for IHL is to ensure the protection of all victims of armed conflict, regardless of their character, with a focus on civilians, civilian objects and soldiers who are unable to engage in combat, whether due to illness, injury, capture, or incapacitation.[27] Although the Appeals Chamber of the ICTY in *Prosecutor v Duško Tadić* posited that there is no need to prohibit an act in an IAC and not prohibit the same in a NIAC,[28] there still exists a significant gap in NIAC protection. The current dispensation automatically locks out NIACs involving groups that do not meet the APII threshold and who are involved in either a spill-over conflict or a transnational conflict. To further paint the grim picture of the evolving situation, we have cases where the conflict begins in the territory of a high contracting party and subsequently spills over to the territory of a third party or where hostilities are fought and retaliated in different parts of the belligerent states.[29] This immediately brings forth the reality of an unprotected NIAC since the organisational and intensity threshold might not be met in the face of such retaliatory attacks.

The main issue that then persists is which framework of IHL applies in the territory of the third state? Or, does IHL apply at all? This calls for an examination of whether there is a conflict, that is not provided for

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26 Anderson and McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 4.

27 Geneva Conventions, Common Article 3.

28 *Prosecutor v Tadić,* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY, para 140.

29 Anderson and McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 4.

in IHL. Secondly, if treaty law does not govern such conflicts, this calls for an analysis of whether customary international humanitarian law (CIHL) has made provisions to fill this gap. It is against this backdrop that this paper seeks to highlight these implications and whether IHL, CA3 especially, should now be modified to reflect such contemporary issues that arise in armed conflict. Furthermore, this paper will focus on the situations which involve armed groups that do not fit the APII requirements and which amount to spill-over conflicts. This paper will appraise the preparatory works of CA3 to propose recommendations that include removing the single territory requirement in CA3 which apply to a specific category of war. The paper will also highlight how CIHL can be used to cover such gaps. This aims at expanding the scope of CA3 and possibly providing exceptions to the general rule in APII.

In seeking these conclusions, this paper will address the following questions: What was the intention of state parties when coming up with the territorial clause in CA3? What is the position of CIHL as regard spill-over NIACs? What is the emerging jurisprudence and state practice as regarding the territorial requirement of CA3? And how can CA3 be amended to feature protection for NIACs not meeting the strict APII test and not confined to a single territory? The answers to these questions will inform the section breakdown of this paper.

On that note, the first bit of this paper is the introduction, the second segment shall discuss the theoretical framework revolving around NIACs and CA3. The third section shall grapple with the origin and objectives of CA3 and the effects of spill-over NAICs. The fourth bit of this paper shall endeavour to bridge the gap emerging in CA3 through analysing CIHL and state practice. The final part shall provide for the way forward through a comprehensive protection thereby concluding this paper.

An analysis on the concept of NIACs and the provisions of CA3

The regimes of rights in customary and treaty IHL rules apply in the Afghan conflict, which is characterised by non-state actors.[30] This conflict has moved through three phases i.e., the situation leading up to the 2001 US-led invasion that constituted a NIAC between the Taliban and the North Alliance Forces,[31] an IAC began with the US attacks against the Taliban,[32] and the commencement of Afghanistan's occupation which constituted an IAC as well.[33] In this analysis, for CA3 to apply, there must be an armed conflict not of an international character occurring in the territory of one of the high contracting parties.[34] This conclusion is based on the requirement made in the *Tadic Case* that armed groups meet the intensity and organisational threshold.[35] It is a widely settled position that CA3 applies to armed groups engaged in armed conflicts. However, the applicability of CA3 in light of spill over conflicts or light of the transnational fight against Al Shabaab remains in dispute among scholars.

Considering the aim and purpose of IHL, this must be understood as simply recalling that treaties apply to state parties.[36] To this end, the wording cannot have been taken to mean that conflicts spanning more than one country's territory are excluded from IHL's protection regime.[37] The concerns of state sovereignty do not justify providing less protection to victims of spill over conflicts as opposed those of conventional NIAC.[38] Notably, Articles 1 and 7 of the Statute for the International Criminal Tribunal for Rwanda (ICTR Statute) extended the jurisdiction of the Tribunal to NIACs occurring in neighbouring

30 Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan' 93(881) *International Review of the Red Cross* (2011), 51.

31 Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 51.

32 Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 51.

33 Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 52.

34 Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 54.

35 Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 54.

36 Sassòli, 'Transnational armed groups and international humanitarian law', 13.

37 Sassòli, 'Transnational armed groups and international humanitarian law', 13.

38 Sassòli, 'Transnational armed groups and international humanitarian law', 13.

countries.[39] This emphasises that NIACs are distinguished from IACs by the parties involved rather than by the territorial scope of the conflict.[40] War involving many states and a transnational terrorist group or armed group may fall under the NIAC classification,[41] however, this view depends on the facts.[42]

The 2004 and 2005 London and Madrid bombings where the British and Spanish governments did not consider themselves to be involved in an armed conflict by bombing the apartments the attackers were living in fits this criteria.[43] The article identifies the ideal classification of conflicts involving transnational armed groups to be that of a NIAC.[44] However, it does not address how best IHL can regulate situations of spill-over conflicts especially with regards to groups that do not fit the intensity and organisational requirements in APII.

The ICRC opinion paper of 2008 distinguishes NIACs falling within the ambit of CA3 from those described in Article 1 of APII.[45] APII is narrower in scope as it specifies the territorial control aspect and restricts the parties to such a conflict.[46] The paper quotes Sassòli who writes that CA3 and APII's definitions are narrower in scope, focusing on territorial control and specific parties to the conflict.[47] However, it would be counterproductive for IHL to exclude spill-over NIACs from the scope of either CA3 or APII, as it contradicts IHL's purpose.[48] The paper also makes reference to the ICTR Statute which applied to spill over conflicts implying that such conflicts are NIACs.[49] In summary, the

39 Sassòli, 'Transnational armed groups and international humanitarian law', 13.
40 Sassòli, 'Transnational armed groups and international humanitarian law', 13.
41 Sassòli, 'Transnational armed groups and international humanitarian law', 13.
42 Sassòli, 'Transnational armed groups and international humanitarian law', 13.
43 Sassòli, 'Transnational armed groups and international humanitarian law', 14.
44 Sassòli, 'Transnational armed groups and international humanitarian law', 14.
45 International Committee of the Red Cross, 'How is the term 'armed conflict' defined in international humanitarian law?' ICRC Opinion Paper, 17 March 2008, 1.
46 ICRC Opinion Paper, 4.
47 ICRC Opinion Paper, 5.
48 ICRC Opinion Paper, 5.
49 ICRC Opinion Paper, 6.

paper suggests that NIACs are distinguished from IACs by the parties and not by the territorial scope.[50] However, this paper does not highlight the extent to which IHL applies to spill over conflicts involving groups not fitting the APII requirements.

Jelena Pejic argues that CA3 is limited to the territory where the NIAC is taking place, emphasising the drafting history's focus on the refusal by states to elevate the status of insurgents for IHL protection.[51] Based on this assertion, the gap theory emerges which essentially focuses on the following subsets of theories: firstly, a conflict between a state and a non-state actor that transcended national boundaries, and secondly, extra-state hostilities that do not fit the bill of either IAC or NIAC.[52] Evidently the article establishes the various types of CA3 wars but fails to identify the proper legal regime that should govern the situations of spill-over conflict or transnational conflicts in light of the territorial limits of CA3, and situations where armed groups do not fall under the APII requirements.

While contributing to the Bruges Colloquium,[53] Tristian Ferraro[54] takes a traditional approach that features the classical application of IHL in the territory of belligerents.[55] Naturally in IACs, all territories of the belligerents are under the scope of IHL.[56] Further, IHL does not overstep its application into the territory of third states.[57] However, he notes that it would be an absurd interpretation of IHL if its protection was based on territorial considerations.[58] With regards to a NIACs, there is no geographical indication in the *travaux préparatoires* of the

50 ICRC Opinion Paper, 6.

51 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 11.

52 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 15.

53 Proceedings of the Bruges Colloquium, 'Scope of application of international humanitarian law' (2012) ICRC Doc No 43, Autumn/Automne 2013.

54 Tristan Ferraro, 'The geographic reach of IHL: The law and current challenges,' (2012) ICRC Doc No 43, Autumn/Automne 2013 105, 107.

55 Proceedings of the Bruges Colloquium, 'Scope of application of international humanitarian law'.

56 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 107.

57 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 108.

58 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 108.

CA3 nor in its drafting history.[59] The drafting of the IHL on NIACs was intending to apply IHL to the whole territory of the belligerents.[60] The distinction between IACs and NIACs is based on the parties and not on the territorial scope.[61] While all this is true, the author does not cover the applicability of IHL to spill over conflicts involving groups not meeting the APII requirements.

Further, Abdikadir Abdi writes about the impact of spill-over conflicts into Kenya from the conflict in the Horn of Africa.[62] The article highlights the instances of the spill-over conflict and their causes of which include failure of regional governments, porous borders, and proliferation of small arms and light weapons.[63] Nonetheless, the article does not address the effects of the spill-over on the classification of the conflict and the application of CA3 on this classification and IHL protection.

The war being waged by the Uganda-led African Union Mission in Somalia (AMISOM) alongside the Ethiopian, Kenyan and Somali forces against Al-Shabaab to the south of Somalia serves as another conflict which fits the description of spill-over conflicts.[64] Anderson and McKnight discuss the various stages of the operation which was primarily a retaliatory effort by the East African nations against the group's insurgence.[65] KDF's role was also to take control of the port city of Kismayo and the lucrative charcoal trade and port business.[66] The rationale for this approach was, according to Major General Karangi and other top establishment figures, to cut off Al-Shabaab from its source of income and eventually cut it to size in terms of territorial control

59 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

60 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

61 Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

62 Abdikadir Ahmed Abdi, 'The impact of conflicts in the Horn of Africa: A case study of Kenya' University of Nairobi Master of Arts Thesis, 2015, 12.

63 Abdi, 'The impact of conflicts in the Horn of Africa: A case study of Kenya', 2.

64 David Anderson & Jacob McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa' 114(454) *The Royal African Society* (2015) 2.

65 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 3.

66 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 8.

and influence.[67] What the forces did not anticipate were the retaliatory attacks that were to be waged by the group.[68]

Three major attacks that defined Al-Shabaab's retaliation are identified in the paper. The group first led the attack on the Westgate mall in the centre of Nairobi's affluent Westlands neighbourhood.[69] This was followed by *Gaidi Mtaani* which was a massive propaganda publication that capitalised on Kenya's response to these attacks in her capital that included ethnic segregation especially around Eastleigh and the coastal *madrassas*.[70] The next devastating attack was the Mpeketoni attack that left close to fifty villagers dead.[71] All these were accompanied by several attacks on police posts in Kenya's north-eastern counties with estimations that such attacks could have run into several tens.[72] Around the same time, Kenya was embroiled in a fight with a local Al-Shabaab affiliate, Al-Hijra which is the primary vehicle for the group's operations in-country.[73] The Anti-Terrorism Police Unit went on attacking its recruitment bases and suspected leaders.[74]

It should be noted that the group is no longer what it was in the 2007-2008 period and that it has morphed into a regional group spanning three countries.[75] With its reinvention, Kenya is no longer confronting an enemy that is confined to Somalia but a regional group.[76] The

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67 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 8.

68 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 3.

69 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 15.

70 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 20.

71 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 23.

72 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 15.

73 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 17.

74 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 17.

75 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 26.

76 Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 26.

shapeshifting tendency of the group since the invasion in 2014, with the retaliatory efforts being made by the group and its insurgence further into the Kenyan territory is outlined in the said paper. This shall serve the paper's objective of analysing CA3 and demonstrate how CIHL can mitigate the gap set forth by the said provision.

Bohumil Doboš reviews the territorial influence that the Al-Shabaab as an armed group wields in Somalia.[77] He outlines the history of Al-Shabaab from its formation in 2006 to its almost decimation in post-2011.[78] He further outlines the effect that this shapeshifting control of territory has had on the operations of the group and the operations of the troops fighting against it i.e. Kenya's *Linda Nchi* troops and the AMISOM forces fighting in Somalia. The shapeshifting tendency in the operations of Al-Shabaab is evident from a reading of the article. Since their ouster from the control of the Port of Kismayo, they have retreated to the mountainous regions of Somalia.[79]

It is from these ragged terrains that they have launched operations which are anything but consistent. Arguably, they equate to a hit-and-run operation by the once-powerful group.[80] Additionally, due to the group's recession from the port city, they have adopted an offensive strategy i.e., attacks in the Kenya's northeastern counties, the Garissa University attack, and the Westgate attack.[81] The article has effectively showcased the effect that shifting spheres of influence has had on the war against the Al-Shabaab armed group. However, it has not noted the implications on the applicability of IHL that these shape-shifting tendencies of armed groups have.

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77 Bohumil Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab' 27(5) *Small Wars and Insurgencies* (2016).

78 Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 11.

79 Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

80 Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

81 Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

Again, it is noteworthy to restate the increasing occurrence of extraterritorial NIACs which can be characterised as either cross-border conflicts, spill-over conflicts or transnational armed conflicts.[82] Among all these, the one that appears to have been accepted as a NIAC is one where a state fighting an armed group is joined by another state.[83] Subject to the foregoing, there are existing questions as to how far IHL applies in case of spill-over conflicts.[84] The main question being whether one-off attacks or engagements in a territory of a third state amount to armed conflict or does it fall under sporadic cases of violence.[85] Other questions linger as to whether hostilities occurring in geographically disparate locations should be considered as a whole for IHL.[86]

Therefore, it is clear that there have been no attempts to address the identified deficiency in CA3. An examination of the recognised sources makes apparent that transboundary NIACs are not adequately protected. Consequently, a strong argument for amending CA3 to provide protection for NIACs that do not meet the criteria outlined in APII is called upon in the paper. This necessitates an examination of the basis of this provision and an exploration of its implications for conflicts that spill-over into neighbouring territories.

Tracing the origin and object of CA3 to the Geneva Conventions: Effect on spill-over NIACs

The previous section has highlighted the regulatory gap that exists in contemporary armed conflict. This gap is especially apparent in NIACs involving armed groups not meeting the organisational threshold in APII or between two or more armed groups but spanning one territory. Effectively, a strict reading of both CA3 and APII ousts

82 International Committee of the Red Cross, *Commentary of 2016 Article 3: Conflicts not of an international character (ICRC Commentary 1987)*, 4.

83 ICRC Commentary 1987, 4.

84 ICRC Commentary 1987, 4.

85 ICRC Commentary 1987, 4.

86 ICRC Commentary 1987, 5.

the application of IHL in such a scenario.[87] However much as this supposition has been described to be legal, such a supposition cannot be explained by concerns of state sovereignty as it exposes civilians to an unprotected status during armed conflict.[88] The situation is grim. The ICRC has reported that there are hundreds of such armed groups engaged in spill-over NIACs.[89] Indeed, while in 1949 the major concern of states was state-to-state armed conflicts, the reality today is that NIACs are becoming more and more common.[90]

CA3 has been defined as a 'convention in miniature' and as the most important article in the Geneva Conventions of 1949.[91] This segment will be dedicated to tracing the historical antecedents of CA3. It will highlight the reasons why the state parties sought to adopt this 'convention in miniature' and the contextual basis on which it was framed thereby indicating how territorial consideration were not taken into consideration. It will then proceed to analyse the *travaux préparatoires* of the article and to determine the plausible intention of state parties in adopting the article. Special focus will be given to highlight if the state parties had any special intentions in coming up with the single territory provision. This will then be cross-checked against the backdrop of spill-over NIACs.

Historical background of CA3

This section is dedicated to analysing the historical underpinnings of CA3. Before such a journey down history is taken, it is important to

87 Geneva Conventions, Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), Article 1.

88 Sassòli, 'Transnational armed groups and international humanitarian law', 1.

89 ICRC, International humanitarian law and the challenges of contemporary armed conflicts, 49.

90 Roy S Schondorf, 'Extra-state armed conflicts: Is there a need for a new legal regime?' 37(1) *New York University Journal of International Law and Politics* (2005) 3.

91 David A Elder, 'The historical background of Common Article 3 of the Geneva Convention of 1949' 11(1) *Case Western Reserve Journal of International Law* (1979) 37, 41.

highlight the importance of CA3 to better understand its drafting history. Just as today, there was at the time a need to extend humanitarian protection to a wider net of victims. As noted by Michael Newton, the mandate for humane treatment existed way before the adoption of the Common Articles.[92] This obligation involves the extension of this treatment to all individuals who are not participating in the conflict. While the obligations of humane treatment are an essential interpretative tool to CA3, it is not the object of this section. This section attempts to look into the history and map out whether there was any territorial concern that states had.

The ICRC notes that CA3 was a breakthrough as it covered NIACs for the first time.[93] In as much as this position is partially true, other laws covered brigandage and civil wars. Indeed, Kathryn Greenman notes that the doctrine of belligerency applied the laws of war to revolution and civil war.[94] What became evident is that it imposed an obligation on rebels to respect international obligations.[95] This became problematic to state parties since at the heart of international law is statehood and recognition. In any case, a treaty can only be concluded between states in written form and governed by international law.[96] Delegates became wary thus of what the extension of treaty obligations to non-state actors meant for state sovereignty.

As noted by Greenman, CA3 established humanitarian principles and sought to bind non-state entities to them.[97] It establishes fundamental rules from which no derogation is permitted, contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to NIACs.[98] It is for this reason that it has been called a

92 Michael Newton, 'Contorting Common Article 3: Reflections on the revised ICRC commentary' 45(3) *Georgia Journal of International and Comparative Law* (2017) 513, 514.

93 Geneva Conventions I, II, III, IV; Additional Protocols I, II, III.

94 Kathryn Greenman, 'Common Article 3 at 70: Reappraising revolution and civil war in international law' 21 *Melbourne Journal of International Law* (2020) 1, 4.

95 Greenman, 'Common Article 3 at 70', 4.

96 Vienna Convention on the Law of Treaties, 23 May 1969, A/CONF.39/11/Add.2, Article 2.

97 Greenman, 'Common Article 3 at 70', 4.

98 Greenman, 'Common Article 3 at 70', 4.

'convention in miniature'. The general trend had started with the protection of military personnel who were wounded or became sick in the field.[99] It was then extended to other categories of war victims i.e., the shipwrecked and the prisoners of war.[100]

Notably, even before these nuanced aspects of humanitarian protection, there was an aspect of it in terms of rebels being afforded belligerent rights and thus entitlement to prisoner of war status.[101] As William Edward Hall puts it in his influential 1895 treatise, 'it would be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to capture and hang the crews of warships as pirates.'[102] Following the same trend, Sassòli opines that it would be unreasonable to prohibit one act in IACs and not prohibit in NIACs.[103] Similarly, the Appeals Chamber of the ICTY in the *Celebici judgement* determined that nothing that is prohibited in NIACs is allowed in IACs where the scope is broader.[104] Effectively, the Appeals Chamber determined that there is no reasonable distinction between the crimes prohibited in NIACs from those prohibited in IACs.

It was then a logical application of principle that the process of protection would lead to applying the laws to all cases of armed conflicts, including those of a non-international character.[105] Over 25 meetings were devoted to its drafting and final tabling before the 1949 Diplomatic Conference. It would appear that the motivation for the adoption of the Article was the humanitarian protection gap that existed. The ICRC was aware that Conventions were primarily the affairs of state parties. However, it became near impossible to speak of the object of the Geneva Conventions in sovereign terms without considering the humanitarian

99 Pictet and others, Commentary on the First Geneva Convention, para 38.

100 Pictet and others, Commentary on the First Geneva Convention, para 38.

101 Greenman, 'Common Article 3 at 70', 4.

102 Greenman, 'Common Article 3 at 70', 9; citing William Edward Hall, *A treatise on international law*, Clarendon Press & Oxford University Press, (1895) 33-4.

103 Sassòli, 'Transnational armed groups and international humanitarian law', 9.

104 *Prosecutor v Zdravko Mucic* aka *'Pavo', Hazim Delic, Esad Landzo* aka *'Zenga', Zejnil Delalic* (Appeal Judgement), IT-96-21-A, ICTY (20 February 2001) para 150.

105 Pictet and others, Commentary on the First Geneva Convention, para 38.

role played by the ICRC.[106] On the contrary, it became a momentous point in the deliberations when it was noted that non-state entities were willing to adopt the humanitarian principles in their quest for recognition.[107]

It is against this backdrop that the ICRC had long sought to extend the humanitarian substratum of the Conventions to cover victims of NIACs. Notably, it was highlighted that the humanitarian concerns that underlined CA3 predated both the Conventions and the states and were neither a product of them nor dependent on them.[108] Before the conception of CA3, the humanitarian concern was evident in, *inter alia,* the provisions relating to military personnel.[109] However, the ICRC has noted that this application was not because of their combatant status but rather due to their status as human beings.[110] The horrors of NIACs often surpassed those of IACs due to the contexts in which they were fought.[111]

From the outset of the 1949 Conference, differences became apparent as delegates were opposed to any recognition of insurgents in binding conventions.[112] Notably, it is plainly stated that CA3 prohibits acts 'committed against persons taking no active part in the hostilities.'[113] While this is the postulation of CA3, the opposition was directed at not only the provisions relating to civil wars but also the application of the Geneva Conventions in such contexts.[114] The antagonists believed that the Convention would give insurance to all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage.[115]

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106 Pictet and others, Commentary on the First Geneva Convention, para 39.

107 Newton, 'Contorting Common Article 3', 517.

108 Pictet and others, Commentary on the First Geneva Convention, para 39.

109 Pictet and others, Commentary on the First Geneva Convention, para 39.

110 Pictet and others, Commentary on the First Geneva Convention, para 39.

111 Pictet and others, Commentary on the First Geneva Convention, para 39.

112 Pictet and others, Commentary on the First Geneva Convention, para 43.

113 Geneva Conventions, Common Article 3.

114 Commentary of 2020, ICRC, para 43.

115 Commentary of 2020, ICRC, para 43; citing 'Final Record of the Diplomatic Conference of Geneva,' 1949, Vol. 11-B, on Article 2, 9, 15.

The advocates of the Stockholm draft that had been presented at the ICRC conference in 1946 on the other hand were optimistic that not all 'insurgents are brigands' and that some were patriots fighting for the independence or dignity of their country.[116] The rationale was that some insurgents observed humanitarian principles in the field and it would have been improper to speak of them in terms of 'terrorism', 'anarchy' or 'brigands.'[117] The Chinese, the French and the Greek delegations were opposed to this sweeping provision and preferred the provisions based on humanitarian considerations.[118] A compromise provision was eventually reached, specifying that CA3 applied when the de jure government recognised the status of belligerency of the adverse party or when the adverse party possessed an organised civil authority exercising de facto governmental functions over a portion of the national territory.[119]

However, opposition to this draft persisted, and the French among other delegates proposed an alternative that sought to establish a minimum set of provisions for application. The debate revolved around who would be entitled to protection under CA3.[120] Concerns arose about whether civilians on the opposing side in a civil war would receive overly generous protection, potentially undermining state sovereignty. Some feared the draft's reference to unnamed humanitarian law principles would lead to ambiguity.[121]

Opposition to this draft was not unexpected as it placed reference on unnamed principles of humanitarian law. Neither did it define any of those principles.[122] To address these concerns, a second Working Group was formed to define and guide the principles of IHL.[123] The Working

116 Commentary of 2020, ICRC, para 44.

117 Commentary of 2020, ICRC, para 44.

118 Commentary of 2020, ICRC, para 44.

119 Final Record of the Diplomatic Conference of Geneva of 1949, 6 June 1950, Volume 2A, para 85.

120 Newton, 'Contorting Common Article 3', 514.

121 Newton, 'Contorting Common Article 3', 514.

122 Commentary of 2020, ICRC, para 47.

123 Commentary of 2020, ICRC, para 47

Group drew from the Preamble to the four Geneva Conventions proposed by the ICRC, and its text was eventually adopted, despite objections from the USSR.[124] The second text is as featured in CA3 in the four Geneva Conventions.

This context highlights the consensus among delegates that any aid provided by the ICRC to opposition forces in NIACs amounted to interference in a state's domestic affairs and was seen as aiding and abetting common criminals and traitors under domestic law.[125] The efforts of the ICRC to assist victims of NIACs were always frayed by the internal politics of the state.[126] Despite strong opposition, the ICRC persisted in its efforts, eventually securing a 1921 resolution affirming the right to relief for all victims of civil wars, social disturbances, and revolutionary movements.[127]

Drawing from the successes of the 1921 resolution in the civil wars in the plebiscite area of Upper Silesia and Spain, the conference in its sixteenth assembly passed the 1938 Resolution which significantly supplemented the 1921 Resolution.[128] It addressed *inter alia,* the application of humanitarian principles formulated in the Geneva Convention of 1929 and the Tenth Hague Convention of 1907, humane treatment of political prisoners, respect of the life of non-combatants and effective child protection measures.[129] During its preliminary conference of Red Cross societies in 1946, the ICRC proposed a modest approach; that in the case of civil wars, the parties to the conflict should be invited to state that they will apply the provisions of the Convention on a basis of reciprocity.[130] The rationale was that it would be difficult to refuse such an invitation, reducing suffering in civil wars.[131]

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124 Commentary of 2020, ICRC, para 47.

125 Elder, 'The historical background of Common Article 3 of the Geneva Conventions of 1949', 41; Commentary of 2020, ICRC, para 39.

126 Pictet and others, *Commentary on the First Geneva Convention,* para 39.

127 Pictet and others, *Commentary on the First Geneva Convention,* para 40.

128 Pictet and others, *Commentary on the First Geneva Convention,* para 40.

129 Pictet and others, *Commentary on the First Geneva Convention,* para 41.

130 Pictet and others, *Commentary on the First Geneva Convention,* para 41.

131 Pictet and others, *Commentary on the First Geneva Convention,* para 41.

The Conference of Government Experts in 1947 recognised the need for extending partial protection to civil wars, thus moved forward to draft an article that recognised the application of principle of recognition on a reciprocal basis.[132] Though this fell short of what the ICRC had proposed, it was a step forward. Emboldened by these developments, the ICRC completed the draft by adding the last paragraph which highlighted that in all cases of NIACs, the principles of the Convention would be an obligation of each adversary.[133] This draft also included the non-recognition of the legal status of parties.[134]

This amendment was important to the protection of the interests of the most vulnerable in armed conflict. The ICTY in the *Celebici Case* noted that CA3 contains minimum mandatory rules for the regulation of internal conflicts.[135] This approach is supported by proponents of the 'gap theory' who encourage a wider interpretation of CA3 to overcome a lacuna in the law of NIACs including extra-territorial NIACs and that the creation of new international humanitarian law is not necessary.[136]

Building on the history analysed above, it is clear that territorial considerations were not a point of contention in the drafting process of CA3. Instead, the focus was on ensuring the application of humanitarian principles in civil wars and NIACs.[137] This makes the case for the conclusion that there was no consideration for the inclusion of a rigid territorial consideration in the drafting process. The next section will build on this finding and attempt to draw the same conclusion as Nils Melzer's contention that while territorial restrictions remained uncontroversial during the negotiations, they have been outlived by contemporary legal opinion and state practice.[138]

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132 Pictet and others, *Commentary on the First Geneva Convention,* ICRC, para 42.

133 Pictet and others, *Commentary on the First Geneva Convention,* para 42.

134 Pictet and others, *Commentary on the First Geneva Convention,* para 42.

135 *Prosecutor v Zdravko Mucic* aka '*Pavo*', *Hazim Delic, Esad Landzo* aka '*Zenga*', *Zejnil Delalic* (Appeal Judgement), ICTY, para 150.

136 Pejic, 'The protective scope of Common Article 3: More than meets the eye', 15.

137 Elder, 'The historical background of Common Article 3 of the Geneva Conventions of 1949', 49.

138 Nils Melzer, *International humanitarian law; A comprehensive introduction*, ICRC, 2016, 72.

Bridging the gap in CA3: The place of CIHL, emerging jurisprudence and state practice

This part builds on the findings of the previous two sections and attempts to draw the same conclusion as Nils Melzer; that while territorial restrictions remained unspoken, they have been outlived by contemporary legal opinion and state practice.[139] This section will investigate whether CIHL has been developed to bridge the gaps that are created from an otherwise plain reading of CA3. It will also include an appraisal of emerging jurisprudence and state practice regarding spill-over NIACs.

This part draws heavily from the definition of custom in the Statute of the International Court of Justice to be general practice accepted as law[140] and the *North Sea Continental Shelf Case* two-tier postulation of custom.[141] However, as correctly pointed out by Roy Schondorf, reliance on custom can be a little bit tricky for two reasons: firstly, extra-state armed conflicts are a relatively new phenomenon and are not particularly common to enable practitioners to draw practice from historical examples.[142] Secondly, states take different positions as to the legal regime that governs extra-state armed conflicts.[143] Notably, Schondorf points out that some countries engaged in extra-state armed conflict allow greater latitude in the actions that they can carry out while human rights organisations and some countries condemn such kind of freedom.[144] He then poses the question of whether in light of this reality, state practice is ineffective in covering the protection of victims of extra-state armed conflicts. He proceeds to provide a methodology to solve this, which I agree with.

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139 Melzer, *International humanitarian law*, 72.

140 Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993, Article 38(1)(b).

141 *North Sea Continental Shelf Cases* (*Federal Republic of Germany & Denmark v Federal Republic of Germany & The Netherlands*), International Court of Justice (Judgment), 1969, para 77.

142 Schondorf, 'Extra-state armed conflicts,' 52.

143 Schondorf, 'Extra-state armed conflicts,' 53.

144 Schondorf, 'Extra-state armed conflicts,' 53.

This part of the paper shall be divided into three bits, that is an examination of the European and the second bit shall grapple the African lens on CIHL and how it can bridge the gap made evident in CA3. The third sub-segment shall discuss the emerging jurisprudence and state practice of said continents in complement of CIHL as an antidote to the problem illustrated from CA3.

The European supposition

Schondorf notes that the creation of cohesive state practice is underway and which may ripen into CIHL.[145] Indeed, just a year after the publication of Schondorf's article, Jean-Marie Henckaerts and Louise Doswald-Beck of the ICRC published the first volume on CIHL.[146] Secondly, he notes that although there is a dearth in state practice, there are some basic customary norms that are applicable in all armed conflicts.[147]

Some principles which are fundamental and so intricate to the Article have risen to the level of custom as evidenced by state practice and buttressed by emerging jurisprudence from the International Criminal Court (ICC),[148] the International Criminal Tribunal for the Former Yugoslavia (ICTY)[149] and the International Criminal Tribunal for Rwanda (ICTR).[150] The two principles underlying CA3 are distinction and humanity. Both were significant points of discussion during the drafting process and feature across CIHL, state practice and emerging jurisprudence.

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145 Schondorf, 'Extra-state armed conflicts,' 53.

146 Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary international humanitarian law*, Cambridge University Press, 2005, 1.

147 Schondorf, 'Extra-state armed conflicts', 54.

148 Rome Statute of the International Criminal Court, 10 November 1998, A/CONF.183/9, Article 8(2)(e)(i).

149 *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement), IT-96-21-A (2001), para 150.

150 *Prosecutor v Alfred Musema*, (Judgment and Sentence) ICTR-96-13-A (2000), para 248; *Prosecutor v Jean Paul Akayesu,* (Trial Chamber), ICTR, para 444.

There was consensus among the state delegations present at the 1947 Stockholm conference that produced the Stockholm draft and at the 1949 Conference that adopted the Article as we currently know it, that there was a need to extend the protection to all persons affected by a NIAC.[151] This is in tandem with the IHL principle of distinction that has crystallised into CIHL.[152] The principle of distinction places an obligation on the parties to an armed conflict to distinguish between civilians and combatants and between civilian objects and military objectives and to only direct attacks against military objectives.[153] This obligation stems from the position that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.[154] Effectively, the civilian population and individual civilians are to enjoy general protection against dangers arising out of military operations.[155]

The principle of distinction is correlated to the principle of precaution.[156] The principle of precaution entails a duty to avoid or to minimise the infliction of incidental death, injury and destruction on persons and objects protected against direct attack.[157] The parties to a conflict are required to exercise constant care to spare the civilian population and civilian objects.[158] This principle provides for a double obligation on both the attacking party and the party being attacked. The attacking party must do everything feasible to avoid inflicting incidental harm and the party being attacked must take all measures to ensure the civilian population is under protection from the effects of the attacks.[159]

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151 Commentary of 2020, ICRC, 40.

152 Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 1.

153 Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rules 1 & 7.

154 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, Saint Petersburg, 11 December 1868, 138 CTS 297, Preamble.

155 Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 1.

156 Melzer, *International humanitarian law*, 18.

157 Melzer, *International humanitarian law*, 18.

158 Melzer, *International humanitarian law*, 18; Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 15.

159 Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rules 15 & 22.

As noted earlier, Rule 1 of CIHL provides that parties to a conflict must distinguish civilians from combatants and that attacks shall only be directed against combatants.[160] This rule is further embedded in Article 8(2)(e)(i) of the Rome Statute which classifies that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in NIACs.[161] Moreover, this rule is included in that it regulates NIACs e.g., the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY;[162] the 1994 San Remo Manual;[163] and the Agreement on the Application of IHL between the parties to the conflict in Bosnia and Herzegovina.[164] This can be said to lay the position of states as regards the custom status of the principle of distinction.

Military manuals which guide the conduct of states in armed conflict are instructive of this principle, which is the cornerstone of CA3, crystallising into custom. As early as the 19th century, the 1863 Lieber Code provided that the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms is paramount.[165] Similarly, the Oxford Manual provides that the state of war does not admit acts of violence, save between the armed forces of belligerent States.[166] This has been interpreted to imply a distinction between the individuals who compose the armed forces and other civilians.[167]

Argentina's military manual provides that the parties to the conflict must distinguish at all times between the civilian population and

160 Henckaerts & Doswald-Beck, *Customary international humanitarian law,* Rule 1.

161 Rome Statute of the International Criminal Court, Article 8(2)(e)(i).

162 Socialist Federal Republic of Yugoslavia and Croatia, Memorandum of Understanding on the Application of International Humanitarian Law, 27 November 1991, para 6.

163 *San Remo manual on international law applicable to armed conflicts at sea*, 12 June 1994, para 39.

164 Bosnia and Herzegovina, Agreement on the Application of International Humanitarian Law between the Parties to the Conflict, 22 May 1992, para 2.5

165 Instructions for the Government of Armies of the United States in the Field, Lieber Code, 24 April 1863, Article 23.

166 The Laws of the War on Land, Oxford Manual, 9 September 1880, IIL, Article 1.

167 Oxford Manual, Article 1.

combatants.[168] Australia's Law of Armed Conflict (LOAC) which replaces the Defence Force Manual of 1994 contains the same provisions as the Argentine manual. Just like the Defence Force Manual, it establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects; and places an obligation on both parties to the conflict.[169]

Switzerland's Penal Code of 1937 as amended in 2011 criminalises attacks against the civilian population in both IAC[170] and any other armed conflict.[171] Tajikistan's Criminal Code punishes the act of making civilians or the civilian population the object of attacks in both IACs and NIACs.[172] The United States of America defines a protected person to be any person entitled to protection under any of the Geneva Conventions including civilians not taking part in the conflict.[173] The US Military Commissions Act, which was enacted following the US Supreme Court decision in *Hamdan v Rumsfeld* which determined that the Guantanamo detention facility was against some of the basic guarantees provided in CA3,[174] prohibits attacks against civilians.[175]

Belgium's Law of War Manual refers to CA3 and provides that in NIACs, persons not taking a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed hors de combat, must be treated humanely.[176] This is similar, albeit with

168 Argentina Law of War Manual 1989, PE/AR/MM 0001.

169 The Manual of the Law of Armed Conflict, Australia, 2006, Section 5.40; Defence Force Manual, 1994, Section 504.

170 *Pénal Suisse* (1937), Article 264b.

171 *Pénal Suisse* (1937), Article 264d.

172 Criminal Code of the Republic of Tajikistan, 1998, Article 403(1).

173 United States Military Commissions Act, 2006, Section 948a.

174 Sassòli, *Transnational armed groups and international humanitarian law*, 20; International Commission of the Red Cross, 'Practice relating to Rule 1; The principle of distinction between civilians and combatants' ICRC. <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule1> accessed on 20 January 2023.

175 United States Military Commissions Act, 2009, Section 950(t).

176 Law of War Manual, Section 2.

slightly varying vocabularies, with the LOAC of Australia,[177] Canada,[178] Kenya,[179] New Zealand[180] and Pakistan.[181] Once again placing reliance on Sassòli's comments[182] and the *North Sea Continental Shelf Case* jurisprudence, this being state practice is an indicator of CIHL.[183]

African jurisprudence and state practice

Two fundamental issues in the Statute of the ICTR emerge. Firstly, it was enacted following a Security Council Resolution and secondly, Article 7 is material as it provides for the extraterritorial application of the Statute.[184] Given that this was a Statute passed by the UN Security Council, it is safe to note that it expresses the intention of state parties to extend the application of NIACs beyond the borders of a single state. The ICRC interprets this expansive jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States.'[185] The Trial Chamber in *Prosecutor v Alfred Musema* affirmed this extraterritorial application.[186] Furthermore, the Trial Chamber in *Prosecutor v Akayesu* determined that CA3 was adopted to protect the victims as well as potential victims of armed conflicts.[187]

177 Law of Armed Conflicts Manual of 2006, Section 9.45.

178 Law of Armed Conflicts Manual of 2001, Section 203.9.

179 Law of Armed Conflicts Manual of 1997, 14.

180 Military Manual of 1992, Section 1807(1).

181 Military Law of 1987, 396.

182 Sassòli, *Transnational armed groups and international humanitarian law*, 41.

183 Sassòli, *Transnational armed groups and international humanitarian law*, 41.

184 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, 8 November 1994, S/RES/955, Article 7.

185 Commentary of 2016, ICRC, para 475.

186 *Prosecutor v Alfred Musema* (Judgment and Sentence), ICTR, para 248.

187 *Prosecutor v Jean Paul Akayesu* (Trial Chamber), ICTR, para 444.

Kenya's LOAC Manual states that fighting shall only be directed at enemy combatants and forbids attacks against the civilian population, individual civilians or civilian objects as a deliberate method of warfare.[188] Somalia's Military Code and Act of Military Discipline criminalises the violation of 'persons not bearing arms' and recognises the principle of distinction.[189] This has been interpreted to lay the foundation of states as regards the principle of distinction. While noting that custom has something to do with practice, (and I concur as this aligns with the material element laid down in the *North Sea Continental Shelf Case*), practice consists not only of more or less humanitarian statements of belligerents and third states but also of what belligerents do in armed conflicts.[190]

Judicial bodies ranging from the International Court of Justice (ICJ), the ICTR, the ICTY, various special courts and national courts have pronounced themselves on this customary principle of distinction. The ICJ in its judgment in the *Armed Activities on the Territory of the Congo* found that there was sufficient evidence to support the Democratic Republic of the Congo's (DRC) allegation that the Uganda People's Defence Force (UPDF) failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against the *Forces Armées Rwandaises* (FAR).[191] The ICJ relied on the report of the inter-agency assessment mission to Kisangani which reported that the armed conflict between Ugandan and Rwandan forces in Kisangani involved fighting in residential areas and indiscriminate shelling for six days.[192] During this period, 760 civilians and another 1700 were killed and wounded respectively. This is not to mention the destruction of civilian infrastructure in the Kisangani area.

Furthermore, the ICJ relied on a special report of the United Nations

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188 Law of Armed Conflict, Military Basic Course, Kenya, 1997, paras 2-5.

189 Military Criminal Code, Somalia, 1963; Act of Military Discipline, 1975, Section 35 & 36.

190 Sassòli, *Transnational armed groups and international humanitarian law*, 41.

191 *Armed Activities on the Territory of the Congo case (Democratic Republic of the Congo v Uganda)* (Judgement) ICJ, 92-1-071016-9, para 208.

192 *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 208.

Mission in the Democratic Republic of the Congo (MONUC) on the events in Ituri which noted the death of civilians and looting of houses of shops and houses on 6 and 7 March 2003 during and after fighting between Union of Congolese Patriots (UPC) and the UPDF.[193] In sum, the ICJ found that the UPDF forces had committed crimes of failing to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants.[194] Similarly, the Appeals Chamber of the ICTR in *Jean Paul Akayesu v Prosecutor* while interpreting the Statute of the ICTR as against CA3, determined that the minimum protection provided for victims under CA3 implied effective punishment on persons who violate it.[195] It further held that CA3 was passed to protect victims and potential victims of armed conflict.[196] This is closely related to the determination of the Appeal Chamber in *Prosecutor v Delalić et al* which determined that the rules under CA3 form the minimum standards which apply to all armed conflicts.[197]

The relevance of these cases is that they not only cement the position of the principle of distinction in custom but are also relevant to the issue of the expanded reading of CA3 and the matter of spill-over armed conflicts. The ICJ in *Armed Activities on the Territory of the Congo* dealt with the issue of spill-over armed conflicts involving armed groups i.e., the *Union des Patriotes Congolais* (UPC) and the *Forces Armées Rwandaises* (FAR) and a few state owned entities i.e., the Uganda People's Defence Forces (UPDF).[198] The *Akayesu case* dealt with an interpretation of the ICTR Statute which provides in Article 7 for the expanded reading of NIACs.[199]

Having therefore examined the principle of distinction and establishing its notoriety status in international law as custom, this paper

193 *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 211.

194 *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 211.

195 *Jean Paul Akayesu v Prosecutor* (Appeal Judgement) ICTR, para 443.

196 *Jean Paul Akayesu v Prosecutor* (Appeal Judgement), ICTR, para 444.

197 *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement), ICTY, para 150.

198 *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 208.

199 *Jean Paul Akayesu v Prosecutor* (Appeal Judgement), ICTR, para 444.

would seek to examine the principle of humane treatment which, though in a different vocabulary, featured significantly in the deliberations of CA3. It provides that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. They shall also be treated without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[200]

This is the basis for the principle of humane treatment and has been described as the cornerstone of IHL governing NIACs.[201] The ICJ has succinctly referred to it as the minimum yardstick of the elementary considerations of humanity in armed conflicts of whatever nature.[202] CA3 further provides for fundamental guarantees i.e., prohibition of violence to life and person e.g., murder, hostage-taking, outrages upon personal dignity and the passing of sentences and the carrying out of executions.[203] These fundamental guarantees of humane treatment are part of CIHL applicable in all conflicts.[204]

This lays a good foundation to consider state practice and any other emerging jurisprudence on the principle of distinction. By dint of the foregoing, the following sub-section shall examine state practices and emergent jurisprudence and seek to establish whether there is a cast in stone exclusion of CA3 application in spill-over NIACs.

Emerging jurisprudence and state practice

Emerging jurisprudence on the matter is authoritative that the guarantees under CA3 are minimum standards that must be accorded to all civilians and non-combatants. The ICTY Appeals Chamber

200 Geneva Conventions, Common Article 3(1).

201 Melzer, *International humanitarian law,* 256.

202 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* (Judgement Merits), ICJ, (1986), para 218.

203 Geneva Conventions, Common Article 3(1)

204 Henckaerts & Doswald-Beck, *Customary international humanitarian law,* Rules 87-105.

in *Karadžić Radovan case* while interpreting Geneva Convention III against CA3 in light of the *lex specialis* principle reiterated that the CA3 applies under CIHL to both NIACs and IACs, without any exceptions or limitations.[205] The Appeals Chamber equated CA3 to a minimum yardstick of protection regardless of the nature of the conflict.[206] The minimum yardstick label has been reiterated in *Jean Paul Akayesu*[207] and *Čelebići*.[208]

As noted by Sassòli,[209] and Michael Schmitt,[210] these developments have attained the level of CIHL and are guiding all states and all parties to armed conflicts. From the findings of this paper, it is worth summarising that the proponents of the gap theory[211] need not worry as a constructive use of CIHL is an adequate solution. Building on the fundamentals of CA3 that influenced its drafting, the findings of this paper have proven that CIHL has been used and can be used to influence the protection regime in armed conflicts where there would otherwise be a gap in protection.

In my assessment, CIHL bridges this gap effectively in two ways: firstly, it has a universal application and needs no ratification and secondly, it does not give rise to the issue of legal recognition of belligerents as would treaty application due to ratification which can only be done by states. In light of the above, this paper proposes that in cases where the purposeful reading of CA3 is falling short of full protection, the customary IHL principles of distinction and humane treatment can be used to bridge that gap.

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205 *Karadžić (Prosecutor v Karadžić Radovan,*) (Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment), IT-95-5/18-AR72.5, ICTY, 2009, para 26.

206 Henckaerts & Doswald-Beck, *Customary international humanitarian law,* 334.

207 *Prosecutor v Jean Paul Akayesu*, (Trial Chamber), ICTR, para 443.

208 *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement) ICTY, para 150.

209 Sassòli, *Transnational armed groups and international humanitarian law*, 41.

210 Michael N Schmitt, 'Charting the legal geography of non-international armed conflict,' 90 *International Law Studies* (2014) 8.

211 Pejic, 'The protective scope of Common Article 3'.

The way forward: Suggestions for comprehensive protection

This segment shall endeavour to provide recommendations as to how CA3 can be amended to cover spill over NIACs. This shall be subject to the discussions made in the previous sections with regards to bridging the gap through CIHL.

It is plausible from the research in the preceding sections that the humanitarian principles of humane treatment and distinction are inseparable from the application of CA3. These concerns were so material to the drafting of the Article that they reflected in the final draft of CA3. As noted by the ICRC, the impetus for championing the adoption of the Article was the need for protection of all victims of armed conflict.[212] Notably, the Geneva Conventions of 1949 portray a golden thread of protection that cuts across the history of IHL. Protection was first extended to combatants and civilians in the field.[213] It was then followed by the protection of armed forces at sea and the protection of detainees and prisoners of war.[214] There was an urge to also extend the protection to victims and parties engaged in a NIAC.[215] This became fruitful with the consideration and adoption of CA3 and the subsequent APII. This is perhaps why Sassòli notes that to limit the protection offered by CA3 to one territory cannot be explained by considerations of state sovereignty.[216] Furthermore, it would go against the principles that the parties acted on to pass CA3.

In any case, state practice has moved to recognise the cross-border application of the principles of IHL. These are the principles that led to the adoption of CA3. For instance, the ICTR Statute recognised that it extended its application to crimes committed by the belligerents across the border. Given that this was a Statute passed by the UN Security Council, it is safe to assume that it expresses the intention of state parties

212 Commentary of 2016, ICRC, 46.

213 Commentary of 2020, ICRC, para 38.

214 Commentary of 2020, ICRC, para 38.

215 Commentary of 2020, ICRC, para 38.

216 Sassòli, *Transnational armed groups and international humanitarian law*, 9.

to extend the application of NIACs beyond the borders of a single state. Indeed, Sassòli notes that this is a confirmation that a conflict spreading across borders remains a NIAC.[217] This is just one portrayal of the emerging state practice. Moreover, the principle of distinction is embedded in Article 8(2)(e)(i) of the Rome Statute which classifies that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in NIACs.[218]

Judicial bodies have not been left behind. While considering the applicability of the principles of IHL, tribunals and the ICC recognise that these principles as CIHL. The Appeals Chamber of the ICTR in *Jean Paul Akayesu v Prosecutor* while interpreting the ICTR Statute as against CA3 determined that the minimum protection provided for victims under CA3 implied effective punishment on persons who violate it.[219] The ICRC interprets this expansive jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of IHL Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States.'[220]

The Trial Chamber in *Prosecutor v Alfred Musema* affirmed this extraterritorial application.[221] Furthermore, the Trial Chamber in *Prosecutor v Akayesu* determined that CA3 was adopted to protect the victims as well as potential victims of armed conflicts.[222] The ICJ in its judgment in the *Armed Activities on the Territory of the Congo* found that there was sufficient evidence to support the DRC allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against the FAR.[223]

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217 Sassòli, *Transnational armed groups and international humanitarian law*, 9.

218 Rome Statute of the International Criminal Court, Article 8(2)(e)(i).

219 *Jean Paul Akayesu v Prosecutor*, (Appeal Judgement) (2001), ICTR, para 443.

220 Commentary of 2016, ICRC, para 475.

221 *Prosecutor v Alfred Musema*, (Judgment and sentence) ICTR, para 248.

222 *Prosecutor v Jean Paul Akayesu*, (Trial Chamber) ICTR, para 444.

223 *Democratic Republic of the Congo v. Uganda* (Judgement), ICJ, para 208.

Taken together, the principles, emerging jurisprudence and established state practice point to the direction that protection in armed conflict of whatever nature must be extended to all victims and even to potential victims. Importantly, any limitation based on territorial considerations even if legal will not pass the muster of the foundational principles. Moreover, state practice, judicial decisions and customary law have evolved to lock out the territorial limitations on civilian protection. at this juncture, the paper shall examine the questions it had formulated at the beginning and see if the research has met the hypotheses that had been noted.

The paper's objective was firstly to examine the intention of state parties when coming up with the territorial clause in CA3. The second question sought to define the position of CIHL as regard spill over NIACs and the third question sought to find out the emerging jurisprudence and state practice as regarding the territorial requirement of CA3.

Lastly the paper sought to examine how CA3 ought to be amended to feature protection for NIACs not meeting the strict APII test and not confined to a single territory. The hypotheses drawn then were among others, that it was not the intention of state parties to exclude victims of spill over NIACs from the protective scope of IHL. Further, the paper hypothesised that CIHL can be used to protect the victims of spill over NIACs and that jurisprudence is indicative of including victims of spill over NIACs from the protective scope of IHL. From the preceding units, it is true that the parties did not intend to exclude victims of spill over NIACs from the protective scope of IHL. In any case and to even buttress the position, judicial bodies have pronounced that CIHL extends to protect the victims of spill over NIAC.

It is against this backdrop that this paper proposes that the singularity provision in CA3 be amended to reflect a broader interpretation, not that there lacks a broader interpretation but to ensure that all victims of armed conflict are protected. As it stands, CA3 reads in part as, 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following

provisions...'.[224] As a conclusion, this paper proposes that the singularity provision be dropped. Thus, a proposed CA3 should read, 'In the case of armed conflict not of an international character occurring in the territory of a High Contracting Party, each Party to the conflict shall be bound to apply, as a minimum, the following provisions…'. With such an amendment, the parties will have achieved the proverbial killing two birds with one stone. On the one hand, the state concerns of sovereignty will be retained and on the other hand, victims of spill-over NIACs shall be protected.

Conclusion

In conclusion, this paper has found that it is possible to address the protection gap occasioned by the singularity provision in CA3. The concern of state sovereignty that state parties invoked during the drafting process of the Article is adequately addressed by the retention of the requirement of 'high contracting party.' The protection gap that formed the gist of this research is addressed by the removal of the singularity provision. Restricting the application of CA3 to high contracting parties may undoubtedly be seen by some as another protection gap. However, the finding of this paper that CIHL is applicable to spill over NIAC would cushion this concern.

[224] Geneva Conventions, Common Article 3.

Using transformative constitutions to build counter-hegemonic consciousness in society: Response to Professor Justice Willy Mutunga's inaugural lecture at Kabarak School of Law, *In search and defence of radical legal education: A personal footnote* on 28 January 2022

Issa Shivji*

Keywords: transformative constitutionalism, legal radicalism, hegemony, social reform

To start with, Vice Chancellor, Professor Justice *ndugu* comrade Willy Mutunga, eminent academic community, distinguished guests and participants, and friends and comrades. I'd like to start off by congratulating the Vice Chancellor for 'capturing a person of Professor Mutunga's calibre'. As it has been said, Professor Mutunga comes with a lot of experience at the bar, at the bench, in academia, and in civil society. And I am sure any university in the world would be proud to be able to get a person like Professor Mutunga on its faculty and staff.

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Professor Mutunga has all the usual qualifications in terms of a string of degrees and publications that we demand of our professors. But Professor Mutunga has an additional degree which not many professors have, and many of us do not have. And the degree that Professor Mutunga has is called 'PG' – prison graduate. So, he comes with additional experience of a detainee of the Nyayo State, which was as you know, one of the most oppressive states in the history of Kenya.

I do not want to spend a lot of time, because mine is not a rebuttal – mine is much more a confirmation. I really agree with many things that Willy Mutunga has said. However, I would like to underscore two take aways, and make another request for greater reflection on one issue.

First, is on the limits of legal radicalism, whether that legal radicalism is in terms of teaching, the bar or the bench. There are limits to this which Prof Mutunga recognises and which he has mentioned in his lecture. But one thing he urges us to do is to stretch these limits to the extreme. In other words, not to give up. And I think that is a very important emphasis: that those of us who are trained in this field, and who are involved in this field, while recognising the limits, must stretch them to extremes. Stretching limits to their extremes means struggle. But it also serves a very important pedagogical function for the society as a whole, to bring out in the open what law actually is, and what the legal struggles are actually about; and how do these legal struggles directly or indirectly, ultimately or immediately, reflect real life social struggles in our society. In other words, these struggles are not abstract. What goes on in court is not abstract. It relates directly or indirectly as I said, to the social struggles which go on in our society. That is the first point I would like to underscore and that I would like particularly the academic community to reflect on.

The second point that Willy has made again and again is that law is a terrain of struggle. Law is not simply some kind of neutral instrument which can be used by anyone who likes to use it. It is actually an arena of struggle. Law embeds in itself an ideology, a world outlook. But unlike other ideologies, like for example religion, the ideology of law cannot be too abstract, because it also regulates relations on earth not in heaven.

And to that extent its level of abstraction, ideological abstraction, is at a lower level.

I have always said that law is one of the majestic inventions of the bourgeoisie. It both legitimises and hegemonises, while serving the status quo in the interest of dominant interests. Its ideology is not always apparent, it is subtle. In fact, law is used to legitimise a class society, and in doing so, of course law is political. So, we must recognise from the outset that law is political. That does not mean that judges consciously recognise law as such or go out of their way to make political decisions. Of course, they will make decisions, and arrive at those decisions using all the techniques of law, but while perhaps unaware that it is a political decision. And as we all know, in practice, the decisions are not made simply by legal reasoning. Decisions are contextualised and situated and localised in a particular society and particular struggles which are ongoing at the time. I would therefore want to summarise by saying that law is a concentrated form of politics.

Finally, and this is where I would like to make a few more remarks, specifically on the last 15 or 20 pages of Professor Mutunga's lecture, which I had the privilege of reading beforehand, and I enjoyed a lot. It is really a magisterial lecture covering a lot of ground and raising lots of issues which demand our reflection – and very thoughtful reflection at that – and continued debate.

My remark is on what is called the transformative constitution. I asked myself, and Willy Mutunga has done his best to answer the question, what exactly is a transformative constitution? Is it that the constitution can bring about social transformation? And by social transformation here I am talking about fundamental transformation. Can constitutions bring about fundamental social transformations in society, because they are transformative constitutions? Can they for example, transform the existing social order to a new social order? Or they are transformative only to the extent that they facilitate some social change, some transformation, or provide the ground for what Professor Mutunga calls small revolutions or ordinary revolutions towards a grand revolution.

And if so, how do we characterise this in terms of social theory? How do we theorise this particular role of constitutions, of what we call transformative constitutions? Let me say the obvious. If you are talking about a fundamental social transformation, or revolution, then obviously law or the constitution does not do that or cannot do it by itself, because that means taking on the state, politically. And the state is the real defender, the real organ of class rule – an organ which legitimises the existing social order. The state is the one which defends and protects the existing social order and, law and courts are part of the state. So, unless we are developing a theory, which is not logically impossible, that one part of the state overthrows another part of the state, then we have to think of those transformative constitutions within the existing social order and within the existing state.

Now if we agree on that, how do we characterise the role of the constitution and law? Because constitutions are a terrain of struggle. There's no doubt about that. And, undoubtedly, constitutions and law are a site of social struggles. My question though is: can constitutions or law by themselves bring about a fundamental change? My answer is no. Nevertheless, they do work, hand in glove, towards a transformation accompanied by, and in the context of other social struggles. If we accept that, then how do we theorise that. Here is what I would like to suggest for all of us to reflect on, and hopefully for Mutunga to elaborate on. I find that the two theorists he refers to and whom he obviously admires and accepts, are Rosa Luxemburg and Antonio Gramsci. In combination, they provide us probably some pointers towards helping us to characterise, theoretically characterise, what we call transformative constitutions or the social role of transformative constitutions.

Rosa Luxemburg, to summarise her article or reform and revolution, in my reading, is that she distinguishes between two types of reforms: reformist reform and revolutionary reform. And this distinction is already in Marx's writings. What is a reformist reform? A reformist reform essentially reinforces the status quo, while revolutionary reform works towards a larger revolution of the society. So, combining that with Gramsci's theory of hegemony and counter-hegemony, I would

like to suggest that transformative constitutions and the struggle at the level of the terrain of constitutions and law help us towards building a counter hegemony. That is an important point. In other words, they help us towards a pedagogy of developing the consciousness of civil society to understand that only revolutionary reformism helps us to build the elements of counter hegemony against the hegemony of the existing social order.

It is a very important insight of Gramsci that a state or ruling class in a capitalist world or in a capitalist social order does not simply rule by coercion. Hegemony and instruments and apparatus of hegemony like education, law, and various elements of ideology play a very important role. In other words, bourgeois hegemony is exercised not only at the level of the state but also at the level of civil society. The rule of the oppressive class is accepted and internalised by the oppressed. Revolutionary situation occurs only when the oppressed refuse to be ruled. And that happens only when there is a whole period of insurrection of counter-hegemonic ideas. As someone said, 'insurrection of arms is preceded by insurrection of ideas, insurrection of thought'. It is here, I suggest, that we should locate the role of transformative constitutions. In other words, in building counter hegemony. Gramsci said that you have to win the battle of hegemony at the level of civil society before you can take it to the level of the state. And this is the insight which many of us, including revolutionaries and Marxists, miss out resulting in adventurism, insurrection and putchism.

In short I am arguing that one should locate the place of legal radicalism and legal struggles at the level of building elements of a counter-hegemonic consciousness and ideology. We should push for understanding of law and the constitution on the agenda of a kind of revolutionary reform, number one, and number two, towards building a counter hegemony. To raise the consciousness of the society in terms of counter hegemony and for the society to accept that the hegemonic ideas they have internalised are not common sense. This indeed is the important role of bourgeoise hegemony, that bourgeoise ideas are made common sense. They are taken for granted. You don't challenge them.

They are obvious. And we know through analysis that what is obvious is not really obvious. It is the outlook of a particular class or social order. And that is where we should be pushing society towards, towards an acceptance that what is obvious is not really obvious, there is a different view, and there is a different outlook. In other words, for society to help move away from what they consider to be common sense.

I would like to leave you with this thought: whether Gramsci's and Rosa Luxemburg's ideas can be woven together to help us to theorise what we have been calling transformative constitutions, in analytical terms. I think it is high time we moved from description to theory, to analyse – how do we theoretically characterise the role of transformative constitutions.

With those few remarks, let me thank you all for giving me this opportunity, and let me thank profusely and sincerely my friend Willy Mutunga, first for going back to the academy from the bench, which is not easy for many of us. And secondly, for delivering a magisterial lecture covering so much ground, including his own personal intellectual journey which was really fascinating.

Again, *asanteni sana, nawashukuru sana*. Thank you!

In search of answers: My reverse education with Prof Chief Justice Willy Mutunga

Marion Joy Onchangwa*

Abstract

After listening to Professor Chief Justice (CJ) Willy Mutunga deliver his lectures, I had questions about some of the things he was saying. I later joined a class he was teaching at Kabarak Law School, reached out, and began to ask some of the questions that I had. The question-and-answer sessions resulted in lengthy and substantive intellectual exchanges on various legal subjects. Prof CJ Mutunga suggested that I publish the exchanges. This piece presents the first part of the exchanges. A second part was published by The Platform, November 2023 Issue as 'A conversation on The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions by Prof Chief Justice Willy M Mutunga', 20-30.

Keywords: feminism, judicial activism, philosophy, Marxism.

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Introduction

When I reached out to Professor Willy Mutunga, Chief Justice Emeritus of the Republic of Kenya, I set out to engage him on one issue. His responses led me to ask more questions, which led to this intellectual piece borne of our conversations. This piece is in two parts. The first part is about judicial activism and the second part is about feminism, great thinkers, and philosophy.

In the first part, I interrogate Prof CJ (as we affectionately call him) on why he uses the term 'judicial activism' to describe judges who, in my opinion, are simply guarding the Constitution. The answers given by Prof CJ lead to the second part. In the second part, I make a follow-up on the great feminists and great thinkers that CJ Mutunga mentions in the first part. While at it, I present my thoughts on the problem of who qualifies to be a great thinker, and who does not.

I argue that great thoughts and great thinkers did not exist only in the 'good old days', in fact, they exist even in the present day. Further, I seek to explore what should happen when celebrated 'great thinkers' are discovered to have been preaching water and drinking wine. I also try to pick Prof CJ's brain on why there are little to no women in the thinkers 'Hall of Fame'. Is it possible that women just never used to think? Or were they ignored? Is there an explanation? The second part also interrogates feminism and religion.

Part 1. Why 'judicial activism'?

My question

I noted that you use the term 'judicial activism' quite often, even in your writings, to refer to when judges make 'bold', 'transformative', and often 'innovative' decisions.[1] For instance, in *Moses Kasaine Lenolkulal*

[1] Willy Mutunga, In *search and defence of radical legal education: A personal footnote*, Kabarak University Press, 2022, 44- 47.

v DPP (Lenolkulal decision)[2] High Court decision, Justice Mumbi Ngugi ruled to deny a governor –accused of graft – access to his office. The *David Ndii & others v Attorney General & others* (Building Bridges Initiative {BBI} decision)[3] was met with praise and criticisms for being a show of 'judicial activism'.[4] However, it can be argued that it is simply the judiciary guarding the Constitution, not the judiciary being 'an activist'.

The *Kabarak Journal of Law and Ethics* published a debate between Ken Ogutu and Duncan O'Kubasu, on whether decisions such as the *Lenolkulal decision* were 'activism' or a defence of the Constitution.[5] Duncan O'Kubasu took issue with Justice Mumbi Ngugi's decision, which he found to be activist and against the rule of law.[6] JV Owiti responded by defending Justice Mumbi Ngugi and described him as brave and upholding the rule of law [7] Ken Ogutu joined JV Owiti in defending Justice Ngugi.[8] So, I would like to hear your opinion, is it really 'judicial activism'? And why so?

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2 *Moses Kasaine Lenolkulal v DPP*, Criminal Revision 25 of 2019, Ruling on Revision of 24 July 2019, eKLR. In the case, Moses Kasaine Lenolkulal, who was the Governor of Samburu County, was accused of four counts under the Anti-Corruption and Economic Crimes Act. The Court reaffirmed the decision of the trial court that since the Samburu County Government Office was a scene of the crime, the governor was barred from accessing the offices without the prior written authorisation of the Chief Executive Officer of the investigative agency, the EACC.

3 *David Ndii & others v Attorney General & others, Petition number E282 of 2020 and Petition numbers 397, E400, E401, E402, E416, 426 of 2020, 2 of 2021(Consolidated), Judgement of the High Court of Kenya at Nairobi,* 13 May 2021 [eKLR]; the decision declared an attempted constitutional amendment, popularised by the political elite, unconstitutional.

4 Walter Menya, 'Kenya: BBI High Court ruling rekindles judicial activism debate' *AllAfrica*, 23 May 2021.

5 Duncan O'Kubasu, 'Ruinous judicial activism: What a solemn scrutiny of the ruling of Justice Mumbi Ngugi in the Moses Kasaine Lenolkulal case reveals' 4 *Kabarak Journal of Law and Ethics* (2019) 1-16.

6 O'Kubasu, 'Ruinous judicial activism', 1-16.

7 JV Owiti, 'A tale of judicial courage: Lady Justice Mumbi Ngugi's bravery that gave back some life to the dying edicts of Chapter Six of the Constitution' 4 *Kabarak Journal of Law and Ethics* (2019) 17-30.

8 Ken Ogutu, 'Defending guardians of the Constitution against ruinous criticism: A reply to Duncan O'Kubasu' 4 *Kabarak Journal of Law and Ethics* (2019) 31-46.

Professor Mutunga's response

Thank you, Marion.

Please read my Inaugural Lecture[9] yet again on this issue so that you are clear about my stand. It supports what Professor Gathii writes.

I interrogate Professors Joe Oloka-Onyango and Upendra Baxi. I also make it clear that the Constitution of Kenya (2010) is activist, and judges have to be activists. I state clearly that judges have different intellectual, ideological and political positions that can be conservative, liberal, radical, and even revolutionary. However, the Constitution has its ideology, and politics spelt out in its transformative vision. Therefore, struggles will continue within and outside the judiciary and in society at large. I also dwell on what I call transformative judicial politics in the quest to make our jurisprudence what it should be, and I give various categorisations that you will find in the article and in the Inaugural Lecture.

Thank you, Marion, for referring me to the debate between Ogutu and Duncan Okubasu. I believe it follows hot on the heels of mine with Githu Muigai, which is on YouTube.[10] Once you re-read my article and the debate let me know what your position is and why. Read my analysis of judicial activism in response to Professor Upendra Baxi in the Inaugural Lecture and the article published by Osgoode Law School.[11]

My response

Greetings CJ!

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9 Willy Mutunga, In *search and defence of radical legal education: A personal footnote*, Kabarak University Press, 2022, 44-47.

10 The great debate: Prof. Githu Muigai vs Dr Willy Mutunga at UoN School of Law, Vice- Chancellor University of Nairobi, 5 July 2019 <https://www.youtube.com/watch?v=6Pxbvmr2IA4> on 30 November 2023.

11 Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' 8 *Transnational Human Rights Review* (2021) 10.

I have re-read your writings on judicial activism. If my question was 'Why judicial activism', it has been answered. I understand you to explain your use of the terms from a historical and contextual perspective. It makes sense that in your opinion, the Constitution itself is activist, and therefore guarding it requires activism. Before I go on; correct me if I am wrong. I do not wish to make a strawman's argument.

Having understood your very sensible reasoning, I think that if indeed the Constitution is activist, then anyone who stands by the spirit of the Constitution is only a guardian of the Constitution, not an activist. Let me highlight that I substantively agree with your reasoning and justification. I only disagree to the extent that sometimes a big spoon is a big spoon, not a spade. I believe that there is nothing extraordinary in bold decisions, they should be viewed as they are; 'the right thing to do' and, not a radical thing to do. So much so that the only extraordinary decisions are those that fail to uphold the spirit of the Constitution, because how dare they depart from what ought to be done as a norm? In my view, upholding the spirit of the Constitution is an activist affair only when compared to the pre-constitutional judicial order. It indeed takes extraordinary courage to pronounce judgements such as the *Lenolkulal* decision, or the BBI High Court and Court of Appeal decisions, because of the nature of the persons on the receiving end, but that should be the norm rather than the landmark.

Professor Mutunga's Response

I see you have an issue with the word 'activism'. Have you understood the origin of the word as discussed by Upendra Baxi? Why would a guardian of the Constitution not be an activist given Baxi's analysis? I salute the notion of the guardian of the Constitution, but it cannot ban activism from the historical contexts it has been used. Activism, transformation, and revolution are words that should be understood in their historical, economic, social, cultural, and spiritual contexts. They are not 'dirty' words as some people, particularly those in opposition to their use, are wont to do. Some politicians called me an activist CJ. I told them that they were activists also, for the status quo and the

dismembering of the Constitution. They were not guardians of the Constitution. As I have written, we are all activists depending on our causes. It is the extraordinary courage of judges, not political and activist given the status quo, that I have given an example of. The extraordinary decisions that fail to uphold the spirit are also activist as I argue.

The debate continues. Let me know why the word activism should be banned from our struggles.

My response

CJ, I am not saying the word should be banned. I think it makes sense once understood in its context. I have listened to what you have said before, and read what you wrote; it makes total sense. Indeed, at the onset of the post-2010 order, it only made sense to label the task ahead 'judicial activism'. However, having substantively changed the reputation and order of the judiciary (in my analysis as Wanjiku, the pre-2010 judiciary is not the post-2010 judiciary, though some judges disappoint, and those judges are the exception to the settled 'general rule'). The task has therefore moved past activism; we are at the 'keep the momentum' stage.

Why do I find the word 'activist' problematic? Activists, as I understand them, are those who question what is and seek to do something about it (for example the 2010 Constitution). Any judge who was an 'activist' in the pre-constitutional order must have been the cure Kenyans were longing for.

Surely, the pre-2010 Constitution judicial order did not make sense (the then judiciary has been described as '…an institution so frail in its structures…so deficient in integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.'),[12] and those who sought to transform that, were truly activists.

[12] Willy Mutunga 'We found an institution so frail…' in Sylvia Kang'ara, Duncan Okello and Kwamchetsi Makokha (eds) *Beacons of judiciary transformation*, Sheria Publishing House, 2022, 14. Prof CJ Mutunga details a brief history of the judiciary in Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (1) *Speculum Juris*, 2015, 6.

If I were to describe activists, I would borrow (activist) Jerotich Seii's words; that they are those who are 'more than a little bit fed up and doing something about it'.[13] They seek to transform the status quo. Thus, it is only factual when you term the Constitution 'activist'. It is truly activist. So why then would anyone want to 'do something about that'?

However, I think that the 'judicial activist' mindset is a good one, and those who are against 'judicial activism' are the same ones that make judgements that are not progressive. For instance, before the BBI decision,[14] the Court of Appeal was termed 'the graveyard of progressive jurisprudence'.[15]

Walter Khobe wrote that '…if there is a group of people whose ideology is contrary to the spirit, values, and principles of the 2010 Constitution, it is the judges of the Court of Appeal. In fact, if there is a group of people who are irredeemably mired in a legal culture of liberal legalism (formalism, positivism, and rule-bound technical approach to adjudication) associated with the pre-2010 dispensation and are oblivious to the demands of change in legal culture demanded by the 2010 Constitution, it is the judges of the Court of Appeal.'[16]

These are connotations I agreed with, for the 'unprogressiveness' witnessed in decisions such as the *Kenya Airports Authority v Mitu-Bell Welfare Society and 2 Others*[17] where the Court of Appeal ruled *inter alia*,

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13 @JerotichSeii Twitter account bio, accessed via Twitter on 7 February 2023.

14 *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (amicus curiae)*, Petition E291 of 2021 and Civil Appeals E292, E293 and E294 of 2021 (Consolidated), Judgment of the Court of Appeal at Nairobi, Tuiyott dissenting opinion, 20 August 2021, [eKLR], where the Court of Appeal substantively upheld the judgement of the High Court that declared the controversial constitutional amendment attempt dubbed the Building Bridges Initiative (BBI) unconstitutional.

15 Mark Mwendwa also terms it a 'human rights graveyard' in Mark Mwendwa, in the 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' SSRN, 29 April 2019.

16 Walter Khobe's remarks cited in Mwendwa, 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' 29 April 2019.

17 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others,* Civil Appeal 218 of 2014,

in favour of the Government's right to property and that international law (in the case, the United Nations Guidelines on Evictions and General Comment No.7) is not directly applicable in Kenya despite Article 2 (5) and (6), and, that persons could be forcefully evicted from public land. This decision overturned Justice Mumbi Ngugi's decision on the case at the High Court.

The jurisprudence of the matter of the two-thirds gender rule in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* was, in my opinion, painfully ridiculous.[18] The High Court judges stated that the implementation of the two-thirds gender rule had to wait for Parliament to make legislation and that the two-

Judgement of the Court of Appeal, 1 July 2016 [eKLR]. The facts of the case were that, residents of Mitumba village in Nairobi were ordered to vacate the premises, via a notice by the Kenya Airports Authority, in local dailies on 15 September 2011. The village sat on public land and housed the Mitumba Village Primary School. The residents obtained conservatory orders from the High Court to restrain the demolition of their village, but the village was demolished anyway. The High Court decided that the demolitions were unreasonable, unconscionable, unconstitutional and were in violation of the right to housing. The Court further ordered the respondents (the Attorney General, the Kenya Airports Authority and the Commissioner of Lands) to resettle the petitioners and to provide, within 60 days of the judgement, state policies and programmes on provision of shelter and access to housing for marginalised groups such as residents of informal and slum settlements. The latter order amounted to a structural interdict. This decision was appealed to the Court of Appeal. The latter overturned the decision of the High Court, citing *inter alia*, that there was no legislation in Kenya regulating forcible eviction and resettlement of persons occupying public land and UN Guidelines were not directly applicable in Kenya. Thus, there was no framework within which to judge the evictions as unlawful. Further, the Court of Appeal insisted that structural interdicts were unknown to Kenyan law. The case was further appealed to the Supreme Court. The Supreme Court reversed the decision of the Court of Appeal, thereby enforcing the applicability of structural interdicts in Kenya, the applicability of UN Guidelines in Kenya, and deciding that a long occupation on public land crystallised the occupants' right to housing over the property, even though the occupation was a wrongful one.

[18] The facts of the case were that on 15 June 2011, about a year after the promulgation of the Constitution of Kenya 2010, the Judicial Service Commission (JSC) recommended the appointment of five persons as judges of the Supreme Court. Of the five only one was a woman. The petitioners contended that this was short of the two-thirds gender rule and was thus in contravention of Article 27 of the Constitution of Kenya. The Court dismissed the petition on grounds that Parliament was yet to enact legislation to give effect to the two-thirds gender rule and that the realisation of the two-thirds gender rule was to be progressive not immediate.

thirds gender rule was to be achieved progressively. The Court said, '… feminists hold your missiles to your launch pads until the state acts…'.[19] The Court also countered the 'feminist' argument by bringing up the issue of other groups disadvantaged by their economic, social, political, and environmental struggle, adding that being female is not grounds enough to require affirmative action. These arguments buttressed oppression olympics (a term used to describe the competition between groups wanting recognition as the most oppressed).[20] In concluding the case, the Court stated that '…if we were to decide this case on moral grounds or if we were conducting a lottery or giving honorary degrees, we would have granted your prayers.'[21]

This, in my opinion, was wrong, because there is a history of gender discrimination in Kenya, which is why gender equality is entrenched in the Constitution.[22] Further, the needs of minorities and marginalised groups can all be addressed without requiring the subjugation of one for the other groups.[23] The Constitution of Kenya in Article 100 recognises five marginalised groups i.e. women, persons with disabilities, youth, ethnic and other minorities, and marginalised communities, and mandates legislative action for all of them.

At this point allow me to laud your dissenting opinion *In the Matter of the Principle of Gender Representation*.[24] It gives me relief, as Wanjiku, to

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19 *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another,* Petition no 102 of 2011, Judgement of the High Court of Kenya at Nairobi, 25 August 2011, [eKLR].

20 Ange-Marie Hancock, *Solidarity politics for millennials: A guide to ending the oppression olympics*, Palgrave Macmillan, 2014, 4; For an in-depth analysis of oppression olympics in Kenya, see, Lucianna Thuo, 'Ending the oppression olympics: Promoting the concomitant political participation of marginalised groups in Kenya' 5 *Strathmore Law Journal* (2021).

21 *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another.*

22 See for instance the deliberations in 'The Final Report of the Constitution of Kenya Review Commission approved for issue at the 95-plenary meeting of the Constitution of Kenya Review Commission held on 10 February 2005' (Constitution of Kenya Review Commission (CKRC), 2005, 47, 61-64.

23 Lucianna Thuo notes that oppression olympics derail the inclusivity of the marginalised in the country's public life and in politics, see, Thuo, 'Ending the oppression olympics', 66.

24 *In the Matter of the Principle of Gender Representation in the National Assembly and the*

know that some powerful men support the equality cause. You say you felt the discrimination and did not see how the two-thirds gender rule was a 'progressive' provision; but rather an 'immediate' one.

On the upshot, I argue that if Justice Mumbi Ngugi was an activist in blocking suspect governors from accessing office, then so be it! Until when will the judiciary sit back, fold its arms, and stare at corruption as though the judiciary is a powerless cartoon?

So, do I wish to ban the term 'judicial activism'? This could be a tussle, but 'the end justifies the terms.'[25]

CJ Mutunga's Response

You write well. You argue well. You read and critique stuff. I adore critics of my work. I love to debate. I like being convinced so that I can change my views. I believe I always tell people that I have a reflective, creative, and undogmatic brain. I want to clarify two points:

1. I do not agree we are past activism. The momentum you talk about is the struggle to implement the Constitution, fundamentally change the status quo, and think of revolution and socialism. My writings make that clear. Both tasks are fundamentally political and that is why I talked at length about alternative and authentic political, social, cultural, and economic leaderships that are anti-imperialist and against the stealing and thieving comprador classes.

Senate, Advisory Opinion number 2 of 2012, Advisory Opinion of the Supreme Court of Kenya at Nairobi, [2012] eKLR, Chief Justice Willy Mutunga dissenting opinion at para 11.5-11.7. In this 2012 matter, the majority opinion of the Supreme Court was that the implementation of the two-thirds gender rule was to be realised progressively and that by 27 August 2015, there should have been passed legislation to realise the rule. CJ Mutunga dissented by advising that the two-thirds gender rule was to be realised immediately, not progressively. To quote CJ Mutunga 'Arguing that the two-thirds gender rule requires progressive realisation flies into the face of this history of struggle by Kenyan women.' Further, CJ Mutunga recognised that the two-thirds rule was only a minimum, progressive realisation was to be aimed at a 50/50 parity (at para 11.4.).

[25] Inspired by the phrase, 'the end justifies the means.'

2. The theory I am talking about which has become clear to me since the Inaugural Lecture and Issa Shivji's comments is the merger of theories by Marx, Engels, Lenin, Mao Zedong, Rosa, Gramsci, Che, and my African creative Marxists in the name of Samir Amin, Rodney, Issa Shivji, Karim Hirji, Dani Nabudere, and Yash Tandon. All have written on theories that can be anchored to transformative constitutions as small revolutions, revolutions, continuities, and links of past struggles towards liberating our societies. Therefore, a theory can be a merger or creative development of theories by others in different contexts and changing circumstances. I have a roll call of women Marxists and feminists that I can quote besides Rosa. It is just that I confine myself to those who have addressed the issue of the Constitution.
3. The third point is just an observation. As you debate and critique, be persuasive and less dismissive. The latter strategy belongs to those who are full of intellectual arrogance.

Part 2: On feminism, great thinkers and philosophy

My question

Thank you for your substantive engagements. Thank you for your observation, I welcome your critique/advice. I will endeavour to be more persuasive and less dismissive; I think it is a brilliant strategy.

You mention women Marxists and feminists. I have a request in my capacity as an ignorant student, could you please refer me to more women philosophers, Marxists or not, who have made substantive contributions in the field of philosophy and feminism? If you have their works, you can also share them. I am interested in interacting with their works.

Additionally, from a reading of your chapter in Yash Pal Ghai's *Liber amicorum*, and some of your judgments, one can conclude that you

are a person who believes in the substantive equality of men and women. Do you identify as a feminist? What are your views on 'feminism'?

CJ Mutunga's response

You can start with Micere Mugo, Angela Davis, Sylvia Tamale, Nawal El Sadawi, and Bell Hooks... I published a paper, 'Feminist masculinity' that, perhaps, qualifies me as a feminist masculine... a continuous and consistent struggle because we also carry the viruses of patriarchy, misogyny, and male chauvinism.[26]

My memoir, *Studded justice*[27] has a chapter on women that traces my struggles in this subject.

My response

Thank you for your recommendations, you have recommended erudite women! I will definitely check them out!

I have a curious question; why do you think there are little to no female voices being preached as compared to male voices when it comes to theories of law? By that, I mean the levels and the likes of John Austin, John Locke, Karl Marx, Aristotle, Emmanuel Kant, and Hugo Grotius... Is it that there were genuinely no female thinkers at the time? Could there be other reasons?

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I am officially looking forward to your memoir! I have not found your paper, yet, but I have come across an interview where you spoke about your type of feminism (feminist masculinity).[28] I would quickly

[26] Willy Mutunga, 'Feminist masculinity: Advocacy for gender equality and equity' in Makau Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions*, University of Pennsylvania Press, 2009.

[27] *Studded Justice* is forthcoming from Mkuki na Nyota, Dar es Salaam.

[28] Damaris Agweyu, *'Dr Willy Mutunga on walking in your truth', Kenya Buzz*, on 15 February 2023.

agree that selfishness is part of the reason why patriarchy still prevails. I mean, who would want to agree to something that takes away some of their privileges? In my little yet large experience, the mere belief in the equality of men and women is in itself very controversial.

It is almost always worse when anyone claims equality in the home setting, which I understand the law may have no business regulating. I am always delighted to interact with male feminists because it then means that someone recognised some of their alleged privileges. Additionally, it is more convincing when a man speaks about equality to their fellow men because it extinguishes the 'them v. us' debate that tends to ensue when a woman is speaking about the same thing. I am not saying women should not speak, I am saying there are inherent or otherwise built-up attitudes that get in the way.

CJ Mutunga's response

I believe there have been women thinkers all the time. I have this conspiracy theory that their works were published by their men. I have no evidence, although I always wonder why brilliant women novelists use pen names, invariably male names so that they can get published. Patriarchy of course.

Feminist masculinity is attacked by women and men. It is seen as hypocritical. I believe it only when it is shared with women who have the same ideological, intellectual, and political positions is it possible to be believed. I have found, in practice, men are 'feminist masculines' when it comes to their mothers, sisters, daughters, granddaughters and aunts, but not to their girlfriends, wives, and other women.

My response

I am happy to interact with someone who believes there have been women thinkers since time immemorial! It always struck me oddly that all mainstream ideologists were male, and if I may add, dead. Well, it is true that old is gold, but a new broom sweeps better. I tend to think

there was a danger in presenting only the golden ideas of the ancient men as applicable today. I think it would create a perception, and I think it successfully has, that today's thinkers are not that great, at least not as great as the ones who lived in the golden days. So much so that, the present potential thinkers could judge themselves so harshly, even when they have great ideas, just because they are not in the Plato era.

I never understood what it takes to be a thinker at the level of Socrates. For instance, I think our dean, Prof Ambani, is an exceptional thinker. Our other lecturer Mr Omolo, in my opinion, has simple yet perplexing life philosophies that are evergreen. Our other teacher, Mr Ongoya often has his speeches etched in our minds because the sentiments are well thought out and concisely stated...

John Stuart Mill spoke of the harm principle. He said 'Whatever you do is your business unless you're harming someone else.' In all honesty, I do not believe that Mill came up with an idea that a reasonable person would not have thought about. Anyone today, who has never heard about the harm principle, can speak of its ideas. I suspect a field survey on random people could back me up. Yet, will all those with the same opinion be classified as 'great thinkers?

Eric Gitari for instance, was another great thinker, as far as his lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ) cause in *Eric Gitari v NGO Co-ordination Board*.[29] In my opinion, a departure from the normal question of the morality of the LGBTIQ to a question of who 'every person' is was genius.[30] His argument leads a reasonable bystander, his opinion on LGBTIQ matters notwithstanding, to acknowledge first, that they are persons. What comes after this acknowledgement is left to debate, but Eric scores by simply stating that they are human first before

[29] *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 other,* Petition number 440 of 2013, Judgement of the High Court of Kenya at Nairobi, 30 April 2015, [eKLR]: the case argued that in refusing to register an NGO that would champion the interests of sexual minorities, the NGO Coordination Board contravened the right to freedom of association granted to 'every person' in Article 36 of the Constitution. The Court agreed with this argument. This decision was unsuccessfully appealed to the Court of Appeal and Supreme Court.

[30] I have since learnt that this qualifies to be called 'strategic litigation'.

they are classified in any other category, and by that, they are entitled to any minimums granted to any other human. However, this is not exactly considered 'genius'.

Law schools authoritatively teach about the morality doctrines of Lord Devlin, even though his immoral conduct hovers around after his death. Lord Devlin was under investigation for sexual molestation meted upon his daughter. The details of his life reveal a man who was drunk in the constructs of perceived classism.[31] It is often highlighted with caution that HLA Hart was a suppressed homosexual and thus his ideas should be understood in that context.[32] Should Lord Delvin too be contextualised so that the entire debate on morality is lost for hypocrisy?

Back to feminism, I want to agree with you, entirely. A story is told of James Barry, who was the first British person to perform a caesarean section that saved both mother and child.[33] It was later discovered that he was a woman, who carried herself as a man, just to beat the gender barriers present at the time in the medical field.[34] So, perhaps there is a disguise in philosophical writings? Highly likely. I am happy to hear your thoughts! I want to support your theory. I want to have faith that evidence can be found. If evidence of 'Australopithecus' was found, why not this?

I also believe in feminist masculinity. Which makes me conclude that it is a problem of selfishness. If I may pursue the theory a little further, it is said that a man who greatly loves a woman will do anything for her on and beyond this planet. In light of this, do you then think that the question of 'feminist masculinity' would end at the door of genuine love? And that those who want to oppress their wives don't love them as such? Could it be?

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31 Beatrix Campbell, 'Our silence permits perpetrators to continue: One woman's fight to expose a father's abuse' *The Guardian*, 25 July 2021.

32 G Edward White 'Getting close to HLA Hart' 29(1) *Melbourne University Law Review* (2005).

33 Pieter WJ van Dongen, 'Caesarean section – etymology and early history' 15(2) *South African Journal of Obstetrics and Gynaecology African Journals Online*, 2009, 64-65.

34 Wendy Moore, 'Dr James Barry: A woman ahead of her time review – an exquisite story of scandalous subterfuge' *The Guardian*, 15 February 2023.

On a related note, CJ, I worry about the efficacy of laws in bringing societal change. For instance, historical land injustices, how many legal reforms has the country witnessed? As Prof Manji notes, Kenya hosts land legal provisions' reforms but no land reforms.[35] I want to believe you have lived through legal regimes that I and most of my peers can only read about, therefore, you would know something I/we don't (I always prefer learning from relatable lived experiences). In light of the above, do you think the two-thirds gender rule would end up being just another reform? Would it really bring about substantive equality?

CJ Mutunga's response

There are women thinkers; and there will always be. Systems do not glorify them, except for some, for various reasons. You know the historical reason for this, the entrenched patriarchy in all systems we have known to date. In addition, the systems cause cracks in solidarity among women as well.

Thinkers are born every day. Intrigued, you mention three men at Kabarak and not a single woman! Thinkers create ideas but they become obsolete if others do not develop them given the changing contexts and environments. Marxism would not be celebrated if Lenin, Engels, Mao Zedong, Rosa, and the African Marxists (women and men) I keep writing about who have also made the Marxist paradigm creative, innovative, and inventive. So, thinking and thinkers are never frozen in time.

You have the right to worry about 'great' thinkers. Who made them great thinkers and why?

You have your list of great thinkers and your reasons for it. I believe that systems glorify the ideas of public intellectuals/thinkers who reinforce their interests while vilifying those thinkers who do not. History has such records. I believe it is Marx who wrote that the ruling ideas of any epoch are the ideas of the ruling classes. I have already responded that the birthing of thinkers does not stop and those who stick to some have both ideological and political reasons for doing so.

[35] Ambreena Manji, 'The struggle for land and justice in Kenya', James Currey, 2020, 53.

I believe, in Devlin and Hart, you are bordering on homophobia! Why would their ideas be discarded simply because of who they were? And you think the basis of their sexuality was the basis of their thought? Their ideas have been critiqued by various scholars in various schools of jurisprudence because they are important and help us understand the role of law in society. Even the insane have sane moments if only we listen!

Feminist masculinity and selfishness: it could also be opportunism or hypocrisy. Like everything else commitment is required so that the struggle continues. In my case, I have never claimed success in feminist masculinity. I always see progression and regression because I am a man who does not live in a vacuum of patriarchy. To argue the idea of feminist masculinity is selfishness is to argue that good ideas cease to be good because of their practice. Bell Hooks has shown the falsity of that position. It reflects intellectual laziness and pessimism. Therefore, we glorify the idea and urge its implementation.

Feminist masculinity is ever present in love affairs. A feminist masculine, who is conscious, will consider the feelings and desires of his partner because he knows that mouthing that he is one counts for nothing if the practice counts for nothing. Oppressors do not have a heart to love in my books. They lack humanity. In any case, if we see love outside ideology and politics, we would not have the truth that is the whole truth. Have you heard of Alexandra Kollontai? Google her.

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History records that law brings social change. The question that engages my mind always is in whose interests is this social change? History has the answer because the law does not exist in a vacuum. Look at welfare capitalism and social democracy that brought social reforms as concessions extracted from the ruling systems when people rose in struggle. Besides, your position has not been investigated. It sounds like a feeling. Be a critical thinker, always!

My response

Thank you for your illuminating responses! I appreciate your engagement.

CJ, I am not homophobic. I am what the LGBTIQ community would call an 'ally'; I however doubt it is an academic or even indigenous term.[36] My mention of HLA Hart and his sexuality was merely a descriptive report. I mentioned Hart just to show the justifiable narrative of 'contextualising the author' in philosophy, and, in comparison I wondered if we should contextualise Lord Delvin, an immoral person by his standards, who preached morality. HLA Hart's alleged homosexuality is used to critique and sometimes dismiss his scholarship as a personal defence. How did that end up being interpreted to mean I am borderline homophobic? I probably need to sharpen my reporting skills.

However, you have said it; 'even the insane have sane moments if only we listen'. I would then ask; can we consume from preachers who do not partake in the gospel they preach? If they do not believe in what they are saying, why should we believe what they are saying? And in so asking, I'm thinking about Lord Delvin. Lord Delvin de-preached same-sex unions by day and sexually abused his daughter by night.[37]

When Lord Delvin was done writing about morality and the rights society had over two consenting adults of the same sex who want to 'pollute' society with their sexual conduct, he would go home to daunt his little daughter with another immoral act. I may sound like I am perpetuating what has, in modern-day been termed as 'cancel culture'.[38] I may even sound like I am blameless but Jesus can attest that I am one among the sinners He died on the cross for. Coincidentally, I write this

[36] 'Ally', *Gender & Sexuality Dictionary, Dictionary.com*, 15 February 2023.

[37] Beatrix Campbell, 'Our silence permits perpetrators to continue": One woman's fight to expose a father's abuse' *The Guardian*, 15 February 2023.

[38] Cancel culture is a 'controversial' trend where public figures get stripped of their public honour and/or support if it is discovered or suspected that they did something that is not generally acceptable, see Merriam Webster dictionary on cancel culture. This is the author's note.

during Easter! Yet I only wonder; should Lord Delvin be one among the people we authoritatively listen to as a legal fraternity, when talking about law and morality? Should we separate the preacher from the preaching? Should the blameless be the first to throw stones at the prostitute? What is your take?

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I am guilty of not mentioning great women thinkers in my recent discussion. Yet I have mentioned Chimamanda for a start! Way before I knew of Aristotle and his fellow wise men, Prof Ambani, and colleagues, I knew of Chimamanda. I was taking notes from the Michelle Obama school of thought. I intended to limit my earlier mentions to people I have frequently interacted with in the corridors of Kabarak. Eric Gitari stood out because ever since I read his case, I was mind blown, yet he is barely thought of as a thinker, just an activist. I thought of mentioning Dr Jay[39] of the University of Nairobi, she was the first person on this planet to give me the most simplistic answer to a question that had been bothering me all my life. My interactions with her changed some of my perspectives in life. I met a humane genius by the name of Lizzy Muthoni.[40] I can mention other women who I believe are great thinkers...

CJ Mutunga's response

I apologise if you thought I suggested you are homophobic!

Lord Devlin worries you. Let me agree with you on what you say about him. He was despicable, hypocritical, and an abuser. I ask if his ideas as a thinker should be banned on that basis? If you asked my favourite theologians and philosophers, Mbiti and Tutu, both will tell you not to play God, to let God deal with it. I am assuming here you are a Christian and that you have read Tutu's *God is not a Christian: And other provocations*. Ngugi wa Thiong'o gave us a great idea of how to judge

[39] The name has been changed.

[40] Lizzy was an intern at Kabarak Law School, where I ended up interacting with her.

people: Put them in their lives' trajectory where you can separate the wheat from the chaff. As humans, we are not perfect. In that trajectory which people invariably call legacy, politics, ideology, revolution, radicalism, history, calling, etc., you will find great attributes and great sins, failings, and inhumanities. Such an analysis gives an objective person a great opportunity to judge the person. And a debate about the person continues that is an aspect of their greatness.

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What answer did Dr Jay give you? I am curious. It is great you think Gitari is both a thinker and an activist. And in Kenya you know there are narrow-minded people who have given that word an abusive and unthinking definition. It reminds me of public intellectuals who doubt that self-educated individuals, for example Boniface Mwangi, cannot be intellectuals and thinkers!

You have given me a list of women who are great thinkers. I am grateful. I need to engage Muthoni in a debate. I agree with what you say about her. She is also a happy heart. Who are the others? I am very keen on the ones of your generation. For the avoidance of doubt, I am convinced you are in that list.

My response

There is no need to apologise. At least we agree we are not homophobic! I saw an interview where you said you were CJ for all Kenyans, straight or not.[41] God is a God for all. Which reminds me of the greatest commandment, without which, anyone claiming to do right by God is doing absolutely nothing: LOVE.[42] The discovery of the weight of that commandment blew my mind away. I could compare it to the supremacy of the Constitution: that any law that contravenes the Constitution is invalid. Whether the law was always in place

41 Damaris Agweyu, 'Dr Willy Mutunga on walking in your truth', *Kenya Buzz*, 15 February 2023.

42 Holy Bible, Matthew 22:34-40, 1 Corinthians 13, *New International Version*.

historically, whether it was enacted in good faith, whether it followed the procedures required to be enacted, such a law amounts to nothing if it contravenes the Constitution.

I find the greatest commandment to have similar weight. Assuming being LGBTIQ is immoral – I do not think it is; but for argument's sake, we assume it is – I often wonder, would Jesus condemn LGBTIQ persons? The same Jesus who prevented a prostitute from being stoned?[43] Come to think of it, the prostitute was breaking religious norms. Pharisees were all about following these norms at whatever cost, yet Jesus condemned Pharisees every chance he got and acted lawyer for persons like the prostitute.[44] Did the lovers of God forget about His greatest commandment? Have we forgotten that all we do, on behalf of God is nothing if it is not founded on love? It is at this point that I confess that I have not read Tutu's *God is not a Christian and other provocations*, but I will make sure to read it. It would be terrible if I played God on Delvin's case, so I will not. I find truth in what you have said about Ngugi's analysis.

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I asked Dr Jay about her understanding of the verse that says, 'Men love your wives... and women submit to your husbands.' That would be Colossians 3:18-19; Ephesians 5:22-29. These verses are particularly interesting because they are often invoked as proof of male superiority and in worse instances, proof of women being inherently assigned the insubordinate position by God Himself. The latter has in my observation, given both women and men license to treat women as lesser beings, rather than teammates, in a marriage. It is the verse women will invoke to justify why they would be okay with living at the mercy of their husbands, who on the other hand use the verse to veto decisions and actions in the home setting.

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43 Holy Bible, John 8:1-11, *New International Version*.

44 For example, in Matthew 23:1-12; Mark 12:38-40; Luke 11:37-52; 20:45-47.

Plainly understood (from the dictionaries), the term 'submit' means to 'accept or yield to a superior force or the authority or will of another person'.[45] I often wondered why Paul settled on that word about a marriage. Did the word have a different meaning then? Did the authors of dictionaries wrongly define that word? Does the Bible need to be historicised and contextualised? I have often asked for an interpretation of the verse and nobody has ever given me sensible feedback. According to Dr Jay, or rather, as I understood her answer, the verse simply tells wives to give in to/accept to be loved by their husbands. Sounds like a fair deal.

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Boniface Mwangi is a thinker in his own right. You could tell me more about him since you interact with him more than I do. I share your concerns about activists and thinkers. Conservative minds worry me. They tend to think in one predetermined way. I find danger in that because then they will fail to see new possibilities based on the thinking that they have never seen that before. It is easy to kill creativity and innovation with that mind set. Eliud Kipchoge said before, 'No human is limited', if you ask me, no human is limited, even in thinking!

Muthoni is one who always challenges me, to go ahead and have that debate! Muthoni has a smart colleague named Christine Juma,[46] I am constantly running to her for advice. I have a friend called Grace Jelimo,[47] whose life and works keep me inspired. I am not sure you know any of these people. I must mention Ms. Julie Ingrid Lugulu, who has always encouraged us to believe in our abilities and dreams in a warm rather than intimidating way. Her diligence, humility, kindness, and humanity are something that moves me to believe that good people still exist. When I was a student in her class, Ms Lucianna Thuo had us see for ourselves how women shy from acknowledging our achievements

45 Definitions from Oxford Languages, 'Submit', *Oxford*, 15 February 2023.

46 Christine is a Kabarak Law School alumna.

47 Grace is a Kabarak Law School alumna.

often to our detriment, as compared to men, who quickly do.[48] This highlight made me realise we (women) have a habit we did not even know we had, and needless to say, that was mind-transforming.

CJ Mutunga's response

Brilliant. What a sermon. I will borrow some of the preaching here for some chapter I am writing and acknowledge you. It is called 'The God of the Constitution'.[49] You have made my day.

Yes, the Bible has to be contextualised, historicised, and problematised. And like our Constitution it has to be interpreted holistically with no verse subverting another. I have always thought seriously about starting a multi-denominational SHRINE in this country.

My response

You truly are open-minded; questions such as mine are not always welcome or at least tolerable. Thou I must say I did not set out to 'preach', the questions and sentiments I put out are merely my thoughts. I look forward to the book! And the SHRINE.

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[48] In one class, Ms Thuo asked group leaders about who was very active in some group assignments she had given. The ladies, including myself, were hesitant to say we were active. We were quick to recognise others, and we mentioned ourselves last, while the lads would quickly mention themselves. For various reasons, this tendency to downplay one's own competencies is common among women; See, Pauline Rose Clance and Suzanne Imes, 'The imposter phenomenon in high achieving women: Dynamics and therapeutic intervention' 15(3) *Psychotherapy Theory, Research and Practice*, 1978, where the authors explain how imposter syndrome is higher among women than it tends to be among men. Women are very likely to attribute their success to external factors such as luck, oversight by selection committees, and everything but their own skills and intelligence. This contributes to slowing the progress of women in various aspects of their lives.

[49] The "God of the Constitution" is a chapter in the manuscript CJ Mutunga is working on and its tentative title is: *Transformative constitutions and constitutionalism: Another school of jurisprudence from the Global South?*

In lieu of a conclusion

This piece has presented part of a conversation between a teacher and a student. The conversation begun with questions about why Prof CJ Mutunga uses the term 'judicial activism' to describe judges who I thought were only guarding the Constitution. As the engagements progressed, I sought to pick Prof CJ Mutunga's brain on some of the issues that have always bothered my mind. Issues such as judicial activism, feminism; who a 'great thinker' is; philosophy and philosophers. As expected, CJ Mutunga gave responses that are nothing short of brilliant, and which deserve to be read by the world.

On judicial activism, I wondered why CJ Mutunga would often use the term 'judicial activism' to describe judges that were in my opinion, only guarding the Constitution. In defense of the use of the term, CJ Mutunga pointed me to the origins of the term as discussed by Uprenda Baxi and in Prof CJ's own writings. Prof CJ explained that the Constitution itself is activist and thus the guardians of the constitution are activist. While I understood the context of the term, I maintained that in light of the post-2010 Constitution order it was no longer necessary to refer to judges who make bold decisions as 'activists.' As is common in academic discourses, we did not come to an agreement on the use of the term.

While engaging in the discussion on judicial activism, issues of 'feminism', cropped up. I engaged CJ Mutunga on why there were little to no female thinkers in mainstream philosophy. CJ Mutunga stated that he believed women were just not glorified, their works were published by their men, or they got their works published under male pen names so they could beat the patriarchal barriers present during their times. CJ Mutunga also brought to light the idea of feminist masculinity, which I was happy to learn about. That part also discussed great female thinkers within us and some of the religious texts that have been abused to further the suppression of women. Needless to say, there was little to disagree on and a lot to learn regarding the issue of feminism.

On the tracks of discussing feminism, the subject of philosophy and great thinkers came up. I presented my worry on how mainstream philosophy predominantly fronts the ideas of ancient European men, as though they are the only golden ideas that have ever been thought about. I argued that this creates a perception, that today's thinkers are not that great, and eventually the present potential thinkers judge themselves so harshly even when they have great thoughts, just because they are not in the 'Plato' era. I also argued that it was wrong for mainstream philosophy to insist on giving credit to few people for ideas that in my opinion, could have been thought of by any other ordinary person without the influence of the 'fathers' of those respective ideas.

Additionally, I suggested that the conduct of mainstream philosophers like, Lord Delvin, needed to be challenged against the ideas they preached. CJ Mutunga cautioned that this would be playing God, and that, even the insane have sane moments if only we listen.

Last but not least, it is worth restating that this piece was inspired by CJ Mutunga's inaugural lecture. In concluding his inaugural lecture, CJ Mutunga encourages the battle of ideas and intellectual debates to continue. Exchanges, such as the ones presented here, are far from over. Thus, this conversation is yet to be concluded. The search for answers continues.

Law students' role in radical legal education: Lessons from the University Students African Revolutionary Front

Nadya Rashid*

Keywords: radical legal education, social reform, social development, critical legal analysis.

Introduction

Law, as a course taught at universities, needs to not only involve the teaching of the mastery and understanding of the laws of a particular nation but should also involve the teaching of how to analyse and criticise these laws.[1] Legal education should equip students with the relevant skills to internalise, analyse and criticise the laws of their country and international laws.[2] Law students should also be able to analyse and critique the actions of the government, uphold rights and stand up for

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1 Willy Mutunga, *In search and defence of radical legal education: A personal footnote*, Kabarak Law School, Occasional Paper Series 1(1), 2022, 20.

2 Willy Mutunga, 'My memories of Hastings Wilfred Opinya Okoth Ogendo from 1968-1982,' in Patricia Kameri-Mbote, Collins Odote (eds) *The gallant academic: Essays in honour of HWO Okoth Ogendo*, Nairobi, University of Nairobi, 2017, 26.

the citizens.[3] To do this, legal studies as well as law students need to be radicalised and revolutionised so that they can interpret laws, legal phenomena and the conduct of the leaders for their benefit and that of the people. Doing so will enable students be more equipped to advocate reform should they feel that the government's policies are at odds with their beliefs or are likely to hurt others, or even exploit them.[4]

Radical legal education in this essay refers to a system that empowers law students by giving them the authority and ability to determine what they learn and how they are taught in law school. It promotes a liberal approach to learning where the voices of students are considered just as important as those of their instructors.[5] Essentially, it creates an educational environment where students can freely express their opinions without fear. This approach aims to educate and train lawyers who are actively engaged in various aspects of society.[6]

This paper teases out valuable lessons from the University Students African Revolutionary Front's (USARF) experience in shaping radical and critical law students in East Africa.[7] These lessons encourage active learning by law students rather than being passive conveyors of established norms without questioning or advocating the advancement of better policies. This essay ultimately posits that it is time for critical analysis of the law by law students, so as to foster their intellectual development. But first, let us establish how universities (law schools) create an enabling environment for these values.

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3 J Osogo Ambani, 'Money has killed our universities' *Katiba Corner, The Star,* 24 October 2020 --<https://www.the-star.co.ke/siasa/2020-10-24-money-has-killed-our-universities/> on 24 October 2022.

4 Ambani,' Money has killed our universities', *Katiba Corner,* 24 October 2020.

5 Mutunga, 'In search and defence of radical legal education: A personal footnote.' 1(1) Kabarak Law School, Occasional Paper Series, 2022, 19.

6 Ambani, 'Money has killed our Universities,' *Katiba Corner*, 24 October 2020.

7 Mutunga, 'In search and defence of radical legal education', 15.

The role of universities in entrenching radical pedagogy

Renowned intellectual and the former Kenyan Chief Justice, Professor Willy Mutunga credits the University of Dar es Salaam for his intellectual, ideological and even political development. It was during his time at the University of Dar es Salaam that he engaged in extensive reading, which has continued to shape his intellectual and political journey to date.[8] The impact of the University of Dar es Salaam on Professor Mutunga underscores the critical role that universities play in shaping the lives and futures of students. This is the focal point of this section.

Ella Patenall outlines five essential soft skills that students are expected to develop during their university education. In her work, Patenall contends that universities are not just about improving a student's writing skills but also enhancing their ability to engage effectively in face-to-face interactions, through which students acquire critical thinking and problem solving skills.[9] In essence, universities should be structured in a way that integrates the social, economic, historical and political facets of a student's life. This will enable students to not only pursue and connect with academic knowledge but to also effectively understand its correlation with their daily affairs.

Professor Mutunga provides a more detailed explanation of the university's role, drawing on Professor Mahmood Mamdani's insights.[10] According to Professor Mamdani, universities tend to acknowledge, honour and promote expertise primarily because they are driven by the pursuit of excellence.[11] This pursuit of excellence blends democracy into an intellectual environment. In this context, democracy entails recognising expertise while also remaining open to

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8 Mutunga, 'My memories of Hastings Wilfred Opinya Okoth Ogendo from 1968-1982', 26.

9 Ella Patenall, 'Five soft skills you develop at university', March 2018, last updated Dec (2021)-< https://www.topuniversities.com/student-info/careers-advice/five-soft-skills-you-develop-university > on 28 March 2022

10 Mutunga, 'In search and defence of radical legal education', 25.

11 Mutunga, 'In search and defence of radical legal education', 25.

questioning and scrutiny, which is akin to the peer review.[12] Professor Mamdani emphasises that universities should ensure that scholarly work is accompanied by humility, and the expertise fostered within universities should be subjected to rigorous debate and discussion.[13] Further, universities should resist the temptation to stifle debate through administrative means as true intellectual leadership should not be confused by intellectual dominance or hegemony.[14]

Role of law students in radical legal pedagogy through the USARF experience

Other than being a political students' movement, USARF provided a forum that students could use to produce scholarly articles, which developed into seminal works in later years. For example, Professor Issa Shivji, a member of USARF, published some of his student essays in his books *Class struggles in Tanzania* (1976) and *Intellectuals at the Hill: Essays and talks* 1960-1993.[15]

USARF together with TANU Youth League organised ideological classes on Sundays at the University of Dar es Salaam. These ideological sessions helped students to collectively engage with class reading materials outside the set lecture times. These classes yielded students who could analyse government affairs, relate law with historical approaches and develop the radical thinking in a multidisciplinary way. Radicalism of students from other departments like literature, political science, sociology, history and even engineering was reflected in the radicalism of law students, by virtue of the USARF classes.

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12 Mahmood Mamdani, 'Is African studies to be turned into a new home for Bantu educational at UCT?' 242, Social Dynamics, 1998, 73.

13 Mutunga, 'In search and defence of radical legal education', 25, citing Mamdani, 'Is African studies to be turned into a new home for Bantu education at UCT?', 73.

14 Mutunga, 'In search and defence of radical legal education', 25, citing Mamdani, 'Is African studies to be turned into a new home for Bantu education at UCT?' 1998, 73.

15 Mutunga, 'My memories of Hastings Wilfred Opinya Okoth-Ogendo from 1968-1982', 26.

USARF played an important role in developing a culture of intellectual discourse between lecturers and students, including critique. Through essays, Professor Shivji would pen down his opposing views against some of his lecturers. In fact, his book *Class struggle in Tanzania* contains some of his positions as a student.[16] One of the debates he scrutinised involved the neutrality of law espoused by his lecturer, Robert Siedmann, who taught Law and Development. [17] Some students including Shivji disagreed with Siedmann on the fact that the state could direct some transformative social development. The USARF students viewed the state as exploitative. These sentiments were vocalised through classroom debates or through writing.

Conclusion

Radical legal education helps law students grow intellectually by making decisions that add value to themselves and their society. Decision-making is a great thing, as it encourages students to air their views and learn from other intellectuals among the student body, administration and lecturers. When law students are subjected to radical learning, they will see clearly the shortcomings of law, how and where the government exploits its citizens. Law students will be able to relate law with the social, historical, cultural, political and economic phenomena. They will gladly defend what is right and oppose what is wrong audaciously. Should law students today yearn for radical legal education or should we keep on acquiring law degrees when we cannot stand up for ourselves or others?

[16] Issa Heinemann Shivji, *Class struggle in Tanzania,* Hienemann, London, 1976.

[17] Shivji, *An intellectual journey with my teachers,* 31-33.

Africa and international law: An ode to Taslim Olawale Elias

Elvis Mogesa Ongiri*

Abstract

The study of great personalities is an important venture as it retains the relevant cultural traditions and values and depicts the evolution of legal thought and practice. This is a study of the Nigerian jurist, Taslim Olawale Elias, in the form of a biographic. This paper aims to continue research, exploring the legacies of past greats African thinkers and their contributions to the present state of affairs. It focuses on Elias' contribution to the understanding of the involvement of Africa in the development of international law, the workings of the International Court of Justice, and finally, the emergent trends of public international law.

Keywords: afrocentricity, TWAIL, international law, Exclusive Economic Zone (EEZ), history of international law

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Introduction

Taslim Olawale Elias (1914-1991)[1] was a teacher, scholar, politician, diplomat, and judge. With immense intellectual and juristic prowess, he leaves behind a legacy that sets him apart in several dimensions. He is widely acclaimed as one of the leading African exponents of international law.[2] Contributing to various fields of law, he left behind a great wealth of knowledge that serves as the setting stone to the current discourse of Africa's involvement in international law.

Born on 11 November 1914 to a Muslim family, Elias undertook his elementary and high school education in Nigeria.[3] He went on to do his further studies at London University and at the Institute of Advanced Legal Studies (LLB, 1946; LLM, 1947; Ph.D., 1949; BA, 1954; and LLD, 1962).[4] Elias was also a Yarborough Andersen Scholar of the Inner Temple from 1946 to 1949. Amidst a prodigious academic performance and a multitude of distinctions and accolades, often overshadowed is the impressive count of sixteen honorary degrees received from universities across four continents, and the award of the title of Queen's Counsel in 1961.[5]

Aside from his educational pursuits, Elias was actively involved in Nigeria's pursuit of independence. This led to his appointment as the country's first Attorney General (1960-1972),[6] Minister for Justice

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1 International Court of Justice, 'Death of former President Taslim Olawale Elias', Press Release 91/26, 15 August 1991.

2 Emmanuel Bello and Prince Bola Ajibola (eds), *Essays in honour of Judge Taslim Olawale Elias,* (1992) as cited in James Thuo Gathii, 'A critical appraisal of the international legal tradition of Taslim Olawale Elias,' 21 *Leiden Journal of International Law*¸ 330 ,2008, n 64.

3 Siyan Oyeweso, 'Taslim Elias - The life of a phenomenal scholar and jurist,' in Siyan Oyeweso (ed), *Torch bearers of Islam in Lagos State,* Matrixcy Books, 2013, 3-4. This article can be found in (3) (PDF) Taslim Elias - The life of a phenomenal scholar and jurist (Researchgate.net).

4 Olufolake Elias Adebowale and Olusoji Elias, 'Taslim Olawale Elias (1914-1991): A biographical note,' 21 *Leiden Journal of International Law*, 2008, 291.

5 Olufolake Elias Adebowale and Olusoji Elias, 'Taslim Olawale Elias (1914-1991): A biographical note,' 291.

6 Chinua Achebe, *There was once a country: A personal history of Biafra*, Penguin Press, New York, 2012, 228. Where Achebe classes him in Gowon's camp during the negotiations that preceded the end of the Biafran War.

(1960-1966) and Commissioner for Justice (1967-1972). Later, he was appointed as the Chief Justice (1972-1975) having never occupied any position as a judge in the lower courts.[7] He also was a reputable litigator representing the Organisation of African Unity (OAU) as lead counsel in the acclaimed *Namibia* case (1962).[8] He was elected to the International Court of Justice (1976-1991), where he served as the Vice President (1982-1985) and then proceeded to make history as the first African jurist to serve as the President of the World Court (1985-1991). Unfortunately, his demise preceded the end of his tenure at the Court.[9] He was also appointed to the Permanent Court of Arbitration (1987).

Elias' intellectual portrait, which is the main focus of this research, has pervaded both national law (Nigerian) and international law. A festschrift written after his death has critically examined his contribution to these particular areas of law.[10] Additionally, a section of the twenty-first volume of the *Leiden Journal of International Law* is dedicated to Elias.[11] All these are examples of research exploring the past legacies of prominent figures in an attempt to establish the approaches to international law in Africa.[12] These publications highlight Elias' contribution to Nigerian law, Africa's involvement in international law, African customary law, the workings of the International Court of Justice (ICJ), and emerging trends in public international law during his tenure in the ICJ. This

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7 Siyan Oyeweso, *Taslim Elias - The life of a phenomenal scholar and jurist*, 1992, 4. Some would argue that this appointment was because he was an ally to the Gowon government, but Oyeweso asserts that this appointment was due to his intellectual fortitude, reputable integrity and international reputation.

8 Olufolake Elias-Adebowale and Olusoji Elias, 'Taslim Olawale Elias (1914-1991): A biographical note,' 292.

9 ICJ, 'Death of former President Taslim Olawale Elias', Press Release 91/26, 15 August 1991.

10 Bello and Ajibola (eds), *Essays in honour of Judge Taslim Olawale Elias*, Martinus Nijhoff Publishers, Dordrecht, 1992.

11 Fleur Johns, Thomas Skouteris and Wouter Werner, 'Editors' Introduction: Taslim Olawale Elias in the Periphery Series,' 21 *Leiden Journal of International Law*, 2008, 289-290.

12 Frans Viljoen, Humphrey Sipalla and Foluso Adegalu, 'Introduction: Exploring African approaches to international law,' in Frans Viljoen, Humphrey Sipalla and Foluso Adegalu (eds) *Exploring African approaches to international law: Essays in honour of Kéba Mbaye*, Pretoria University Law Press, Pretoria, 2022, 1.

article takes the approach of studying this great personality through the length and breadth of his works.[13]

The paper is divided into four parts. The present part serves well to introduce this discussion. Part two analyses Elias' works on Africa's involvement in the development of international law. The third part dwells on his views on the working of the ICJ and the last part highlights the emerging trends of public international law that came about due to Africa's involvement in international law.

Afrocentricity of international law

Elias has become acclaimed for his contribution to the legal discourse regarding international law, particularly Africa's involvement in its development. He claims that Africa was indeed involved in the formation of international law from what he terms medieval international law to modern international law. He argues that medieval international law dates from the period preceding Hugo Grotius and the signing of the Treaty of Westphalia to the collapse of the League of Nations; while modern international law the period dating after the end of the Second World War.[14] Elias posits that through this entire period, Africa has been actively involved in the formation and development of international law.[15]

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13 Humphrey Sipalla, 'Towards an African professional history of international law: The life and work of Kéba Mbaye', in Frans Viljoen, Humphrey Sipalla and Foluso Adegalu (eds) *Exploring African approaches to international law: Essays in honour of Kéba Mbaye*, Pretoria University Law Press, Pretoria, 2022, 37 where he proposes this as an approach of studying such exceptional personalities.

14 Taslim Olawale Elias, *Africa and the development of international law,* AW Sijthoff and Oceana Publications, Sijthoff, 1972, 63.

15 This school of thought posited by Elias is to counter arguments that international law was majorly developed by Christians from Europe or persons of European decent. See, Henry Wheaton, *Histoire de progrès du droit des gens*, Brockhaus, Leipzig, 1865; James Lorimer, *The institutes of the law of nations: A treatise of the jural relations of separate political communities*, William Blackwood and Sons, Edinburgh and London, 1894 for a further discussion on this as cited by Gathii, 'A critical appraisal,' 325.

He starts off his seminal book *Africa and the development of international law* with a discussion of how pre-colonial Africa was involved in the formation of international law.[16] In his view, '*it is only through this background that Africa's place in international law and relations can be understood*'.[17] He claims that 'the so-called Dark Continent' was actively taking part in internal and external relations that can be attributed to the formation of international law.[18] In support of this argument, he gives the example of the Carthaginian Kingdom, (which is present-day Tunisia) referring to its conquests both in Africa and other continents. He accounts for how there was trade between Carthage and its satellite colonies, which would explain its vast wealth in gold.[19] He also shows that the empire excluded Sicily, Sardinia, and southern Spain by treaty. This claim implies that Carthage had an international convention in the form of a treaty with the mentioned States.[20]

Further, Elias portrays a commercial and diplomatic history that strengthens this argument. He describes the 'silent trade' that occurs between Carthage and West Africans. The latter would exchange gold with the goods from Carthage. They would leave the gold on the beach and Carthaginians would equally leave the goods there, and each party would add their respective trading goods until they both deemed it was a fair bargain, then they would take their parts and depart.[21] The language barrier was not a problem and they would effectively trade with each other. This assertion adds on to the argument that pre-colonial Africa was indeed involved in shaping international law.

It is worth noting that Elias fails to engage in the discussion of how slavery in the eighteenth and nineteenth centuries shaped international law. He also does not attempt to counter the claims by colonisers that due to the barbaric and backward nature of the African kingdoms, they

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16 This is evident in chapter one, Elias, *Africa and the development of international law*, 3-15.

17 Elias, *Africa and the development of international law,* 6.

18 Elias, *Africa and the development of international law*, 3.

19 Elias, *Africa and the development of international law*, 4.

20 Gathii, 'A critical appraisal', 322.

21 Elias, *Africa and the development of international law,* 4, where he quotes Edward William Bovill, *The golden trade of the Moors,* Oxford University Press, London, 1958.

were merited to intervene and colonise them.[22] Equally, the same chapter of *Africa and the development of international law* proceeds to assert that the treaties formed by African chiefs and their colonisers are also a part of the development of international law.[23] This argument assumes that these African chiefs had absolute autonomy over the land and fails to critically analyse the contents of the treaties and see how unfairly they were drafted. It would seem that Elias' primary objective was to highlight and commend Africa's participation in the development of international law, thereby, refraining from investigating how international law played a role in establishing an institutional foundation for European dominance over Africa in the international political economy.[24]

Equally, Christopher Gevers questions Elias' interests in international law juxtaposed with the challenges facing post-colonial African countries. Granted, Elias had dedicated a chapter to address this situation.[25] Gevers points out that the Biafran War and its grave human rights implications did not affect Elias' scholarship.[26] Gevers points out how Elias, in a speech given to the Nigerian Society of International Law, absolves Nigeria from any allegations of violating international law during the war.[27] This criticism adds to the others that have termed the discussions by African international law lawyers such as Elias being *weak* and falling into the *contributionist* level of Gathii's taxonomy.[28]

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22 Gathii, 'A critical appraisal', 322. Gathii goes on to challenge Elias' apparent silence regarding the role of international law during the colonial encounter with a lens of political and economic oppression and further, appositely provides an alternative approach to Elias' legal tradition relying on scholars during the same epoch as Elias, see Gathii, 'A critical appraisal, 338-347.

23 Elias, *Africa and the development of international law*, 21.

24 Gathii, 'A critical appraisal', 324.

25 Elias, *Africa and the development of international law*, 107-120.

26 Christopher Gevers, 'South Africa, international law and 'decolonisation', 33 *Alternation Special Edition,* DOI https://doi.org/10.29086/2519-5476/2020/sp33a13, 352.

27 Gevers, 'South Africa, international law and 'decolonisation', 352.

28 James Thuo Gathii, 'International law and eurocentricity,' 9 *European Journal of International* Law (1998), 189. Gathii has since suggested his recognition of 'a third way, one that shares aspects of both approaches but has distinct characteristics of its own',

Despite these critiques, Elias stands among the front-runners in calling out the eurocentricity of international law or (European) international law.[29] He is at the forefront of challenging the *universality* of this (European) international law.[30] Gathii has termed his scholarly contributions, as an assault on (European) international law's universality claim.[31] His efforts countered the erroneous claims of Africans' inferiority, savagery, and backwardness.[32] Therefore, he is to be remembered as an African scholar who championed the inclusion of Africa in the development of international law.

Elias' reflections on the workings of the ICJ

This section highlights Elias' contribution to the ICJ. Having served for fifteen years in the ICJ from 1976 to 1991, his literary work serves as a first-hand representation of the functioning of the world court. At the ICJ, he had served as a member of the Court, then rose on to become the Vice President from 1972-1982 and then the President from 1982-1985.[33] In this timeline, he was able to author various publications that address various issues that came up then and are still relevant about adjudication at the ICJ.

In his position as judge of the world court, Elias encountered a couple of methodological problems which he has well documented in

in James Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28-50.

29 This phrase is coined from, Andreas Buser, 'Colonial injustices and the law of state responsibility: The CARICOM claim to compensate slavery and (native) genocide,' KFG Working Paper Series No 4, Berlin Potsdam Research Group, The international rule of law - Rise or decline? Berlin, 2016, 417, n 31, in his claim of the eurocentric nature of international law.

30 Chin Leng Lim, 'Neither sheep nor peacocks: TO Elias and post-colonial international law,' 21 *Leiden Journal of International Law*, 2008, 297.

31 Gathii, 'A critical appraisal', 320.

32 Gathii, 'A critical appraisal', 320.

33 International Court of Justice, Judge Taslim Olawale, <Judge Taslim Olawale Elias | INTERNATIONAL COURT OF JUSTICE (icj-cij.org)> on 27 July 2023.

the first chapter of his collection of essays on the ICJ.[34] He describes a problem pertaining admissibility of applications in situations where the parties have instituted concurrent proceedings such as negotiation, inquiry, mediation, conciliation, arbitration, or judicial settlement, which are indeed provided for by the United Nations Charter.[35] A case-in-point is the *Aegean Sea Continental Shelf* case[36] between Turkey and Greece where, before the institution of the application by Greece, Greece had already instituted negotiations to define their respective jurisdictions in the islands in the Aegean Sea.[37] The decision of the Court in this case, in which Elias presided over and formed part of the majority's opinion, settled the problem by holding that the two processes can continue *pari passu*,[38] without interfering with each other.[39]

Elias also had some thoughts regarding the dilemma of the non-appearing respondent. He begins the chapter dedicated to this phenomenon by acknowledging that many states especially the newly-independent states were reluctant to come before the world court.[40] The major reason of this non-appearance being the ICJ's decisions in the *South West Africa cases* (1962, 1966).[41] He then analyses the objective nature of the threshold placed in the ICJ Statute on this subject.[42] Article 53 observes that when a party to a claim fails to appear to defend

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34 Taslim Olawale Elias, *The International Court of Justice and some contemporary problems: Essays on international law,* Springer Science Business Media, Dordrecht, 1983, 13-26.

35 United Nations Charter, 24 October 1945, 1 UNTS XVI, Article 33.

36 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgement on merits) ICJ Reports (1978).

37 Elias, *The International Court of Justice and some contemporary problems*, 18.

38 Latin term meaning 'at an equal pace'.

39 *Greece v Turkey* (judgement on merits) ICJ, 29.

40 Elias, *The International Court of Justice and some contemporary problems*, 33.

41 Elias, *The International Court of Justice and some contemporary problems*, 33. Elsewhere, Elias has discussed these cases deeply showing how the 1962 decision *South West Africa (Liberia v South Africa)* (Preliminary objections) ICJ Reports (1962)) where the Court had asserted that both Liberia and Ethiopia had standing before the Court differed with the 1966 decision *South West Africa (Liberia v South Africa)* (Second Phase) (1966) where the majority decision held that these two countries did not have any legal interests in the claim. See, Elias, *Africa and the development of international law*, 88-106.

42 Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993, Article 53.

themselves then the other party can invite the court to adjudicate the claim in their favour.[43] However, this is only after the court satisfies itself that one, it has the requisite jurisdiction, and second that the claim is founded in fact and law.[44] He explains how this is peculiar to the ICJ since most municipal laws (that were operative then) would allow the present party to have the judgement in their favour without regarding the mentioned requirements.[45] This principle applies whether the non-appearance is partial or total.[46]

An example is the *Case Concerning the United States Diplomatic and Consular Staff*, whereby the Respondent (Iran) failed to make any written or oral pleadings, its only intervention being a letter from the Minister of Foreign Affairs.[47] The World Court, with Elias as Vice President, having satisfied themselves that they had the jurisdiction to adjudicate the claim,[48] went on to rule in favour of the applicant. This case shows how, although a state might fail to appear wholly before the Court, the ICJ should still handle its authority with care by ensuring it has jurisdiction and the claim is merited.

Elias, while President of the ICJ was interviewed on the relevance of the adjudication of the ICJ if state parties do not adhere to either the provisional measures of the Court or the final judgement of the Court.[49] A case pointed out by the interviewer, Sunhee Juhon, was the

43 ICJ Statute, Article 53(1).

44 ICJ Statute, Article 53(2).

45 Elias, *The International Court of Justice and some contemporary problems*, 37.

46 Elias, *The International Court of Justice and some contemporary problems*, 38.

47 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgement on merits) ICJ reports (1980), 10.

48 It is worth noting that Iran had not accepted the compulsory jurisdiction of the Court under Article 36 of the ICJ Statute, but the Court found that it had jurisdiction on the basis of interpretation of the Vienna Conventions of 1961-1963 that both were party to. See, *United States of America v Iran* (Judgement on merits) ICJ, 54. Iran has since accepted the compulsory jurisdiction of the ICJ specifically on 29 June 2023 making it the seventy fourth state. See, ICJ Press Release, 'The Islamic Republic of Iran files a declaration recognizing the compulsory jurisdiction of the Court', 29 June 2023.

49 Taslim Olawale Elias and Sunhee Juhon, 'Prospects for the ICJ: An interview with Taslim Elias', 7(2) *Harvard International Review*, 1984, 4.

Case Concerning the United States Diplomatic and Consular Staff earlier mentioned, that apart from giving the judgement, the ICJ had minimal effect in ameliorating the situation.[50] In response to this question, Elias mentioned how after the judgement, not only were the hostages released but, the ICJ set up an Iran-United States Claims Tribunal, which facilitated the settling of the claims and Iran fully complied. He finished answering the question by stating, 'those states that try to disregard us or feel that they can behave as they like, often have a way of settling these matters, following the judgment, without accepting it publicly, in their subsequent behaviour'.[51] This statement and the preceding paragraphs depict Elias' literary contribution and active involvement as a judge in the ICJ.

Emergent trends in international law

This section seeks to shed light on Elias' contribution to the discussion of the furtherance of public international law between 1959 and 1979. This discourse is majorly highlighted in his book *New horizons of international law,*[52] which was dedicated to students, lawyers, and scholars of public international law to highlight the emerging trends of the subject they are most fond of.[53]

In the first chapter of the book, he describes the United Nations Charter as an avenue of opening 'fresh vistas' paving the ground for the new 'modern international law'.[54] He equally lauds the Universal Declaration of Human Rights (UDHR) for its influence in the municipal laws of not just the newly independent states such as Nigeria but also the more advanced states such as Canada. These principles which were derived from President Roosevelt's famous declaration of 'the four

50 Elias and Juhon, 'An interview with Taslim Elias', 4.

51 Elias and Juhon, 'An interview with Taslim Elias', 4.

52 Taslim Olawale Elias, *New horizons in international law,* Martinus Nijihoff , Leiden, 1979.

53 Elias, *New horizons in international law,* xvii.

54 Elias, *New horizons in international law,* 3.

freedoms',[55] have pervaded the constitutions of the new states from the Third World and the earlier established states.[56]

Another improvement in international law recorded by Elias is the inclusion of the newly- independent states in its (re)formation. The newly independent states had previously suffered from insufficient manpower to represent them in the forums (these include the United Nations and its sub-divisions) in the development of this emerging trend of international law.[57] This inadequacy of personnel, necessitated a 'concerted action' by the Afro-Asian countries to remedy this situation. An example in which Elias himself was actively involved in is the Asian-African Legal Consultative Committee.

This Committee was created mainly to first, identify and make recommendations to legal problems facing the Afro-Asian bloc and second, to examine the laws made by the International Law Commission and the other UN agencies and whether they have positive and negative implications for the Afro-Asian bloc.[58] Elias explains how in just eighteen years of existence the Committee was actively involved in forums of discussion on international law where they tabled their recommendations. An example is the Conference on the Plenipotentiaries on the Law of Treaties in Vienna where Elias was elected as chair the Committee of the Whole and his recommendations as chair managed to save the formation of the Vienna Convention on

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55 These four freedoms had been earlier adumbrated by Thomas Paine and had been provided by the proponents of the 1789 French Revolution, see Elias, *New horizons in international law,* 6, where he relies on writings of Jean Jacques Rousseau and his followers.

56 Elias, *New horizons in international law,* 7. See also, Emmanuel Bello, 'Human rights: The rule of law in Africa,' 30(3) *International and Comparative Law Quarterly,* 1981, 633, n 33.

57 Elias, *New horizons in international law,* 21; A good example is the state in Kenya whereby the native Africans and Arabs in the country were prohibited from undertaking the law degree as a course in university until 1961 as recorded by Rhoda Howard, 'Legitimacy and class rule in Commonwealth Africa: Constitutionalism and the rule of law', 7(2) *Third World Quarterly*, 1985, 330, where she cites Amos Odenyo, 'Professionalisation amidst change: The case of the emerging legal profession in Kenya', 22(3) *African Studies Review*, (published online on 23 May 2014) 1979, 34-35.

58 Elias, *New horizons in international law,* 22.

the Law of Treaties (VCLT) amidst a seemingly unpromising outlook of success in the conference.[59]

Stemming from the previous point, a new form of law of treaties was adopted by the codification of the VCLT. In this Convention, the Conference on the Plenipotentiaries codified important principles such as *pacta sunt servanda,*[60] which is positioned right after the preliminary provisions emphasising its importance in treaty law. Equally, the principle of *jus cogens* (which was a matter of contention on invalidity as explained before) was codified into the VCLT.[61] The VCLT stands as the 'most comprehensive' authority on the law of treaties and is a 'progressive development' on the universality of international law.[62]

In Chapter 4, Elias highlights the 'progressive development' regarding the law of the sea. He mentions the introduction of the Exclusive Economic Zone (EEZ) by the First Negotiating Group.[63] This concept emphasises what this zone is, and the rights and duties of states regarding this zone. He earlier had shown how this concept was of Kenyan origin further contributing to the assertion that indeed Afro-Asian countries have been involved in the development of these emerging trends in international law.[64] The EEZ has been the object of discussion on a paper in the previous volume of this journal which sheds light on Prof FX Njenga and his contributions to the law of the sea.[65]

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59 Elias, *New horizons in international law,* 24. The problem that they faced concerned Part V regarding invalidity of treaties or grounds of mistake, fraud, coercion and *jus cogens*, whereby the Western bloc was against it questioning the practicability of enforcing claims of invalidity and further, there being a lack of machinery settling disputes regrading this invalidity. Elias presented a package deal of one, giving jurisdiction to the ICJ to adjudicate over the matter and two, a robust machinery of procedural regulations on the same which was wholly adopted by all the parties.

60 The meaning of this as posited by Elias being every treaty in force is binding to the parties and they are expected to perform their obligations in good faith, Elias, *New horizons in international law,* 43.

61 Vienna Convention on the Law of Treaties, 23 May 1969, 1115 UNTS 331, Articles 54 and 63.

62 Elias, *New horizons in international law,* 52.

63 Elias, *New horizons in international law,* 56.

64 Elias, *New horizons in international law,* 25.

65 Patricia Cheruiyot, 'The Exclusive Economic Zone and the legacy of FX Njenga', 1 *Kabarak Law Review*, 2022, 165-178.

This section has shown Elias' contributions to the discussion of emergent tendencies in contemporary international law. These thoughts have stemmed from his consistent claim of universal inclusion in the (re)formation of international law that has been portrayed earlier in this paper. Elias indeed stands as a pillar of greatness in the discussion of the emerging trends in international law.

Conclusion

The enduring intellectual and juristic impact of Elias remains remarkable on various fronts, establishing a legacy that stands alone. He has indeed been at the forefront in propagating the involvement of everyone(not just Africa)[66] in the (re)formation of international law. His works best describe the dilemma in which Africa was in, as shown by Gathii. This dilemma involved either Africa accepting international law as it was with an aim of changing it, or rejecting it completely which would have proved incautious.[67] Elias and his contemporaries chose to embrace it, and herald its change in time.

Currently, present scholars in third-world countries continue to propagate this discourse in the form of Third World Approaches to International Law (TWAIL).[68] Elias seemed to have had a hope of a better future of international law, one that encompasses universality.

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66 This is evident in his time at the Asian-African Legal Consultative Committee.

67 Gathii, 'A critical appraisal', 318, where he says; 'After all, international law was undoubtedly and unmistakably Eurocentric in its imprints. These scholars could either reject it entirely or accept only those parts of it that were not inimical to the interests of the newly independent African countries… Rejecting it entirely without an ability to change it even in the United Nations, where developing countries had majorities, seemed foolhardy. Yet accepting it without challenging its participation in the colonization of their countries seemed unacceptable.' This can be equated to the pragmatic approach posited by Chinua Achebe on the use of the English language in writing African literature arguing that although the language was forced upon Anglophone Africa, it is prudent to use it in literary works for a wider audience. See, Chinua Achebe, 'The African writer and the English language', reprinted in Achebe *Morning Yet on Creation Day* (1975), 58.

68 Gathii, 'A critical appraisal', 347.

Although some have argued that this goal is far from being attained, they share in this hope that international law can lead to a better future.[69] Concluding with Elias' words: 'Never before in the history of international relations have so many people from different climes and races joined together to make and to administer such a plethora of laws for their common welfare'.[70]

[69] Antony Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge University Press, Cambridge, 2005, as cited in Gathii, 'A critical appraisal', 347-348, where he shows Anghie's dual approach, of how current international law emasculates the Third World countries but there is still hope for an alternative future.

[70] Elias, *New horizons of international law,* 18.

Bonaya Adhi Godana: A legacy of leadership, scholarship and diplomacy

Jabez Oyaro*

Abstract

This article delves into the life, career, and enduring impact of Bonaya Adhi Godana, a prominent Kenyan legal luminary, scholar, politician and diplomat. This article chronicles Dr Godana's contributions to scholarship, leadership and diplomacy together with his rise from humble beginnings to becoming a key figure in Kenya's political landscape and Africa's international law. As a critical thinker and insightful policymaker, Dr Godana's ideas and perspectives shaped discussions on foreign policy, constitutional matters, and the role of the executive. The article also examines the tragic circumstances of his untimely death in a plane crash, reflecting on the profound loss felt by the nation. Through his legacy of service, Dr Godana continues to inspire discussions on effective governance, citizen participation, and the complex interplay between leadership and foreign affairs.

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Introduction

In the history of African scholars of international law is an unsung figure whose life's work and profound contributions have unjustly remained in the shadows, obscured by the relentless passage of time. Bonaya Adhi Godana, a distinguished legal luminary, stands as a testament to the often-overlooked brilliance that lies within the annals of Kenyan history. His remarkable life, exceptional scholarship, and enduring legacy deserve to be brought to the forefront, for he is a man whose unwavering dedication to the rule of law, the pursuit of peace, and the advancement of international legal thought has left an indelible mark not only in Kenya and Africa but also the entire world.

Bonaya Adhi Godana is an understated icon of Kenyan excellence in international legal scholarship and practice. Among the first graduates from the then newly established Faculty of Law at the University of Nairobi, he earned his Bachelor of Laws in 1973, becoming the first to earn first class honours. He completed his Master of Laws in 1976, also from the University of Nairobi. In 1984, he graduated from the Graduate Institute of International Studies in Geneva with a PhD in law, having studied Africa's international river systems.

In 1985, he published *Africa's shared water resources: Legal and institutional aspects of the Nile, Niger and Senegal river systems*. An avid Africanist international law thinker, Dr Godana was one of the founding members of the African Association of International Law (AAIL), and its first Deputy-Secretary-General and Treasurer, in 1986. He taught international law at the University of Nairobi in the late 1970s and throughout the 1980s and served from 1986 to 1988 as the Chairman of the Public Law Department in the Faculty of Law. His PhD research in fresh water international law was not only ahead of his time, but is still so today.

Dr Godana was deeply committed to serving his country, having been an integral part of the momentous lawmaking events of the 1990s and 2000s that have shaped contemporary Kenya. He was as a member of the Parliamentary Select Committee on Constitutional Review. From

2002 to his death in 2006 he was the deputy leader of the opposition Kenya African National Union (KANU) party. He was the Member of Parliament for North Horr Constituency (1988-2006). He died on 10 April 2006 in a Kenya Air Force plane crash. 13 other people were also killed in the crash while three survived. He was Kenya's foreign minister January 1998 until 2001.

Undoubtedly, Dr Godana remains today a great symbol of cutting edge legal scholarship and commitment to civic duty.

Early life

Bonaya Godana was born into modest beginnings in the arid expanses of Dukana on 2 September 1952, in Marsabit District (now Marsabit County) along the Kenya-Ethiopia border. He grew up as an ordinary child of a nomadic family. Herding camels was the main occupation of the Gabra community in the environs of the Chalbi Desert. At the time, his Gabra community was barely known beyond the then Marsabit District. As a herdsboy, he experienced first-hand, the challenges faced by marginalised communities and the pressing need for social change.

Education

As part of what was referred to as the Northern Frontier District during the British colonial days and in the immediate post-independent Kenya, Marsabit – especially far-flung areas like Dukana – was so remote that inhabitants did not consider themselves Kenyans. Moreover, the area was afflicted by commonplace banditry and cattle rustling. In Dukana, which is more than 600 km away from Nairobi, there were no learning institutions in the 1960s when Dr Godana was starting school.[1]

[1] Kenya Yearbook Editorial Board 'Dr Bonaya Adhi Godana – A rare gem from Marsabit' Moi cabinets, *Kenya Yearbook*, 1 May 2022.

The nearest primary school was at the North Horr trading centre, a distance of about 70 km from his home. Catholic missionaries worked jointly with chiefs and community elders to help mobilise young children, mainly boys, to go to school. Gabra elders picked young Bonaya to join the school. His sterling academic achievement remains a model for students from the region. He placed Marsabit Boys High School on the national academic map after he scored a six-point distinction in his O' Levels. He proceeded to Meru School for his A' levels where he scored three straight As, qualifying for admission at the University of Nairobi Faculty of Law.

At the University of Nairobi, Godana's brilliance earned him a first-class honours degree in law in 1976. Godana worked briefly at the University of Nairobi as a tutorial fellow in the Faculty of Law. The university then sponsored him to do a master's degree in law at the University of London, after which he returned to the University of Nairobi to teach for a while, before pursuing postgraduate studies at the Graduate Institute of International Studies of the University of Geneva between 1980 and 1984.[2] There, he immersed himself in international law. Upon his return to Kenya, he served as the Chairman of the Public Law Department in the Faculty of Law.[3]

Scholarly work and international law: African international law built on positive cooperation rather than negative coexistence

Dr Godana was a highly respected scholar and researcher.[4] This is evident in his book, *Africa's shared water resources: Legal and institutional aspects of the Nile, Niger and Senegal river systems,* published in 1985. The

[2] Internet Archive Wayback Machine, 'Members of Parliament: Profile' 15 May 2006, *www. Parliament.go.ke,* 28 July 2023.

[3] Abdulqawi Yusuf, Zidane Meriboute and Mpanzi Sinjela, 'Tribute to the memory of Dr Bonaya Adhi Godana (1952-2006) & Dr Andronico Oduogo Adede (1936-2006)' 13(1) *African Yearbook of International Law Online / Annuaire Africain de droit international Online*, 2005, 1-7.

[4] Yusuf, Meriboute and Sinjela 'Tribute to the memory of Dr Bonaya Adhi Godana (1952-2006) & Dr Andronico Oduogo Adede (1936-2006)' 1-7.

book is a study of the legal and institutional management of Africa's fresh water sources with a focus on the three major rivers; the Nile, Niger and Senegal. These rivers have an advanced legal and institutional framework of cooperation, which outlines the major problems in the field of the legal and institutional water resources in Africa.[5]

Dr Godana's starting point was the affirmation that Africa's shared water resources are not static or stagnant bodies but dynamic ones. Tijan Salah noted that Dr Godana's view of this dynamism meant that these shared water resources create both positive and negative spill-over effects among states in the form of, for example, floods and pollution, especially pronounced in lower basin states.[6] Salah notes that such effects generate tensions and disputes, which can lead to conflict among states, thus, accentuating need for cooperation and conflict resolution effective mechanisms.[7]

Dr Godana believed deeply in harmonious international relations and worked as a scholar and practitioner to advance these ideas. In *Africa's shared water resources*, he argued for an 'appropriate kind of public international law [as] one of cooperation involving positive obligations, in place of the classical international law of coexistence which [rests] on a set of prohibitions. Cooperation … brings into operation the 'principle of equitable utilisation'.[8] Considering he expressed these views in 1985, and in light of contemporary challenges on sharing of resources among African states, his thought was clearly prescient.

In *Africa's shared water resources*, Dr Godana advocated an African approach to international water law. He highlighted that colonial rule imposed legal regimes without sensitivity to local African legal regimes and usages and the political susceptibilities of independent sovereign

5 Gamal Badir, '*Africa's shared water resources: Legal and institutional aspects of the Nile, Niger, and Senegal river systems* by Bonaya Godana', *American Journal of International Law*, 1986, 17.

6 Tijan Salah, '*Africa's shared water resources: Legal and institutional aspects of the Nile, Niger and Senegal river systems* by Bonaya Adhi Godana Review', 24(1) *Canadian Journal of African Studies*, 1990.

7 Salah, '*Africa's shared water resources* - Review'.

8 Badir, '*Africa's shared water resources - Review*', 17.

states. The resulting regimes were, therefore, largely, and in one case, that of the Senegal river system, entirely of an inter-territorial nature.[9] This book was a timely piece addressing the steadily growing pressure on existing water resources. This issue was so dire that the nomads of Sahel had to relocate continuously as the Sahara Desert was gradually eating away more and more pastures each year.[10]

Dr Godana highlights that Africa is running out of fresh water and that every effort must be made to not only conserve available supplies but to utilise them to the greatest advantage for their dependants.[11] However, the solution of sharing rather than competing has yet to be recognised by the competitive nature of self-serving nation states, and 'the legal principles and rules governing such cooperation and its institutional implementation have yet to be sufficiently developed and established in general international law'.[12]

In 1986, he participated in the Inaugural Conference of the African Association of International Law in Lusaka and was one of the founding members of the Association. He was then elected Deputy Secretary-General and Treasurer of the Association. In this capacity, he provided a lot of encouragement and support to the work on the *African Yearbook of International Law* and followed with great interest its continuous publication and development.

In 1999, Dr Godana also co-authored with Patrick W Wargute and Arid Lands and Resource Management Network in Eastern Africa, *The impact of insecurity on resource use and the environment in northern Kenya: A case of Marsabit District*.[13]

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9 Frederick Parkinson, *'Africa's shared water resources: Legal and institutional aspects of the Nile, Niger and Senegal river systems* by Bonaya Adhi Godana - Review', 59(3) *Africa: Journal of the International African Institute*, 1989.

10 Parkinson, *'Africa's shared water resources* - Review'.

11 Badir, *'Africa's shared water resources* - Review', 1986, 7.

12 Bonaya Godana, *Africa's shared water resources: Legal and institutional aspects of the Nile, Niger, and Senegal river systems*, Frances Pinter, 1985, 7.

13 Centre for Basic Research, Kampala, 1999.

Political journey and diplomacy

Bonaya Godana's political journey was one marked by distinction, dedication, and service. In 1988, Dr Godana was elected to Parliament to represent the newly-created North Horr Constituency, which was carved out of Marsabit North during a review of constituency boundaries in 1986.[14] During this time, Dr Godana showcased his brilliance and acumen. President Moi appointed him as an assistant minister in various ministries. He worked in health, the office of the president and later, foreign affairs.[15] His astute leadership qualities and commitment to public service quickly gained recognition, propelling him to the distinguished position of Deputy Speaker, a role he skilfully held until 1997.

Following his remarkable tenure as Deputy Speaker, Godana's acumen in diplomacy and international affairs caught the attention of the government, leading to his appointment as Assistant Minister of Foreign Affairs in 1997. In this role, he represented Kenya on the global stage, fostering diplomatic relations and contributing to regional and international cooperation.

In January 1998, Dr Godana was appointed as Kenya's Foreign Minister. Dr Godana was the first person from Marsabit since independence to be appointed a Cabinet Minister, and especially to the important role of Foreign Affairs Minister. His appointment coincided with a need for Kenya and Ethiopia to repair their deteriorating relations. The presence of members of the Oromo Liberation Front (OLF) in Kenyan territory was a point of particular concern for Ethiopia, but for Kenya, the transborder communities – both the Gabra and Borana communities who occupy Moyale and other parts of Marsabit are Oromo speakers. They share names and have even intermarried over the years. In some ways, the situation of transboundary communities and transboundary water resources were similar: neighbour states needed to adopt a position of cooperation rather than competition to maintain prosperous

[14] 'Moi cabinets: The Nyayo era' *Kenya Yearbook*, 2022, 90.

[15] 'Dr Bonaya Godana – A rare gem from Marsabit' *Kenya Yearbook*.

relations. And none was better placed to advance such foreign policy as Dr Godana.[16] Later, in 2001, Dr Godana assumed the crucial role of Minister for Agriculture, taking on the immense responsibility of overseeing a vital sector in Kenya's economy.

Throughout his political career, Dr Godana remained steadfast in his commitment to the Kenya African National Union (KANU) party. From 2002 until his untimely passing in April 2006, he held the significant position of Deputy Leader of the opposition KANU party. As Deputy Leader, he played a pivotal role in shaping the party's vision and strategies.

Dr Godana played a vital role in the activities of the Inter-Parliamentary Union, particularly with respect to the protection of human rights in Africa, and in the then Organisation of African Unity, whereas as Foreign Minister of Kenya, he actively campaigned for an active role of the organisation in the settlement of internal conflicts such as those in neighbouring Sudan and Somalia, and significantly contributed to the ongoing efforts to craft a new constitution for Kenya.

As a senior Marsabit politician, Dr Godana was revered by many, especially in North Horr Constituency. One of his notable achievements was the establishment of a local non-government organisation – Pastoralist Integrated Support Programme – which today is a lifeline to thousands of nomadic communities in Marsabit. This support programme remains functional and has transformed the livelihoods of people in the community through development projects like digging boreholes and building water reserves to curb the water scarcity situation. The programme also provides bursaries and scholarships to students pursuing secondary and tertiary education. This can be attributed to the hardship Dr Godana's faced as a regular herdsboy in a marginalised Gabra community.[17]

[16] 'Dr Bonaya – A rare gem from Marsabit' *Kenya Yearbook*.

[17] 'Moi cabinets: The Nyayo era,' *Kenya Yearbook* 92.

Constitution making and the democratisation of foreign policy

Dr Godana possessed an exceptional acumen for generating profound and innovative ideas that often shed new light on complex matters. This was depicted when Dr Godana chaired the plenary proceedings of the Bomas Constitution of Kenya draft. He engaged in a thoughtful exploration of the concept of the constitutionalisation of foreign policy and diplomacy in an address to the Constitution of Kenya Review Commission (CKRC) titled, 'Constitutionalisation of foreign policy and diplomatic relations'.[18]

Dr Godana laid out the current constitutional landscape in Kenya, asserting that foreign affairs are the prerogative of the president, who holds the power to negotiate treaties and other international relations. He emphasised that the role of the Minister for Foreign Affairs, while significant, is subservient to the President's authority in this sphere.

He explained his view thus:

> '… Government is free to negotiate treaty and other relations with foreign nations, subject only to the rule of incorporation into domestic law, where such incorporation is necessary. Save in such cases of incorporation into domestic law, there are wide and important areas in foreign affairs where the Government is free of legal, as opposed to political controls. These include the declaration of war, the dispatch of armed forces, the annexation of territory, the conclusion of treaties, the accrediting and reception of diplomats and the recognition of new states and revolutionary governments. All such acts sometimes called "acts of state" fall within the scope of the prerogative to conduct foreign affairs and are assertions of state sovereignty in international relations.'[19]

The crux of Godana's discourse centred on the crucial question of how foreign policy should be constitutionally regulated. He framed the discussion by acknowledging the extent to which the constitution should regulate the conduct of foreign affairs and diplomacy. Godana

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[18] Bonaya Adhi Godana 'Constitutionalisation of foreign policy and diplomatic relations' Address to the Constitution of Kenya Review Commission (CKRC) on 13 November 2001, Available on Commonwealth Legal Information, CommonLii, http://www.commonlii.org/ke/other/KECKRC/2001/11.html on 24 November 2023.

[19] Godana, 'Constitutionalisation of foreign policy and diplomatic relations'.

emphasised that in the context of the constitutional review, while foreign policy was traditionally the prerogative of the executive, and more so, the president, because foreign policy is public policy, he urged the CKRC to contemplate a role for parliament, and *the citizen*. He insisted that any democratisation of foreign policy would require an assessment of the competences of the various institutions. He offered the following questions to guide the assessment:

> The issue of the constitutionalisation of foreign policy and diplomacy, which I have interpreted to mean the need for or otherwise for express constitutional regulation of the field leads to the following questions.
>
> * What should be the role of the Executive over the conduct of foreign affairs? For example, should the executive have an exclusive authority over the conduct of foreign affairs or should it have some limited role? If so what should be the extent of such limitation?
>
> * What role should Parliament, however conceived, have in the formulation of foreign policy? Should for instance major decisions such as the declaration of war or conclusion of peace, the conclusion of treaties and appointment of ambassadors be subjected to Parliamentary ratification, vetting or some form of censor, as the case may be?
>
> * What role should the citizen be assigned to influence the conduct of foreign affairs?
>
> …
>
> What is needed is a constitutional structure where competence, confidence and power are properly assigned in the constitution to facilitate effective foreign policy.'[20]

Dr Godana admitted his conservative view on the constitutionalisation of foreign policy. Contending that the citizenry and Parliament are ill-equipped to navigate the complexities of foreign policy, he advocated a preeminent role of the executive in the formulation and execution of foreign policy decisions. He emphasised that the swift and flexible nature of international politics necessitates prompt and informed actions, qualities that are best realised through an empowered Executive.

[20] Godana, 'Constitutionalisation of foreign policy and diplomatic relations'.

Dr Godana eloquently reasoned that while democratic governance entails citizen participation, foreign affairs are often too intricate and remote for average citizens to make informed decisions. He argued that even Parliament, despite its importance, is beset by issues of time constraints, public display of disunity, and a lack of executive-oriented expertise. In advocating a strong executive role, Dr Godana highlighted that international politics operates differently from domestic affairs, and the executive's competence and confidentiality are crucial.[21]

Death

The sudden and tragic death of Bonaya Godana occurred in a plane crash on 27 April 2006 at Marsabit Airstrip where he was, along with other senior politicians, on their way to a peace making mission. Abdulqawi Yusuf, co-founding member of the AAIL, later to be President of the International Court of Justice eulogised Dr Godana thus:

> Dr Godana's death in the course of a peace mission symbolises his life which was devoted to peace and development in his native Kenya, to the betterment of the welfare of his people, to the advancement of the rule of law in Africa in general, and to the teaching and dissemination of international law.[22]

His death was a profound loss to Kenya and its political landscape. As a seasoned politician and diplomat, Dr Godana had been an influential figure, contributing his insights and expertise to the nation's affairs. His untimely passing, alongside other officials, cast a shadow of sorrow and disbelief across the country. Dr Godana's legacy of service and his contributions to the fields of politics and diplomacy continue to be remembered, reminding us of the fragility of life and the impact of dedicated individuals on the course of a nation's history.

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21 Godana, 'Constitutionalisation of foreign policy and diplomatic relations'.

22 Yusuf, Meriboute and Sinjela 'Tribute to the memory of Dr Bonaya Adhi Godana (1952-2006) & Dr Andronico Oduogo Adede (1936-2006)' 1-7.

Conclusion

Despite the untimely end to Bonaya Godana's life, his legacy lives on through his works, teachings, and the impact he had on countless lives. From academia to politics, he continuously championed human rights, promoted the rule of law, and advocated peace, leaving an enduring mark on Kenya, Africa, and the global legal community. His Pastoralist Integrated Support Programme and his writings are the few of his many achievements that live on.

The effectiveness of the investigative powers of the Independent Policing and Oversight Authority

Christine Wanjiku*

Abstract

Is the Independent Policing Oversight Authority (IPOA) a toothless dog or a lame duck? Some have put forward that IPOA was set up for failure since inception. This commentary critiques the reality of these sentiments from the perspective of IPOA's power to investigate complaints on Kenyan police use of excessive force. Investigations into the reported claims of police brutality is among IPOA's key accountability measures over police (mis) conduct. However, IPOA has encountered various challenges in executing its mandate, especially the 'blue conduct of silence'. This paper demonstrates that despite the challenges in executing investigations, IPOA has managed to complete some investigations and secure some convictions.

Keywords: reporting, investigation, conviction, police brutality, IPOA

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Introduction

Police brutality in Kenya has an aspect of perpetuity as it is heavily rooted in Kenya's history. During the British colonial era, being a police officer meant that service was owed to the polity and administration and not to the general public.[1] After Kenya gained Independence, successive Kenyan politicians used the police force to impose their ideologies, further their interests and maintain political regimes.[2] For example, Adar and Munyae note that police committed numerous human right abuses in the President Moi era, where policing was a tool for repression and torture of political opponents.[3]

Efforts to reform the police force started to take shape in 2002 albeit unsuccessfully. Soon after he seized office, President Kibaki established a police-led taskforce that sought to reform the police force.[4] Osse accuses this task force of skewing their agenda towards increasing salaries and allowances for police officers and enhancing budget allocations to improve police operations, rather than substantive changes to police accountability.[5]

The Post-Election Violence of 2007-2008 (PEV) heightened the necessity for sharper focus on accountability for police misconduct in the National Police Service (NPS).[6] In 2009, the Commission of Inquiry into Post Election Violence (CIPEV) reported on the failure by the police to conduct themselves professionally resulting in the violence and the

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1 Anokhee Shah, 'Reopening old wounds: The never-ending tale of police brutality in Kenya' *Lacuna Magazine*, 24 March 2021.

2 Douglas Lucas Kivoi, 'Why violence is a hallmark of Kenyan policing and what needs to change' *The Conversation*, 5 June 2020.

3 Korwa Adar and Isaac Munyae, 'Human rights abuse in Kenya under Daniel Arap Moi, 1978-2001' 5 *Africa Studies Quarterly* 1 (2001).

4 Thomas Probert, Brian Kimari, and Mutuma Ruteere, *Strengthening policing oversights and investigations in Kenya: Study of IPOA investigations into deaths resulting from police action*, Centre for Human Rights and Policy Studies, 2020, 6.

5 Anneke Osse, 'Set up to fail? Police reforms in Kenya' *The Elephant*, 1 June 2016.

6 Probert, Kimari, and Ruteere, *Strengthening policing oversights and investigations in Kenya*, 6.

massive killing of Kenyans after the general election.[7] Consequently, the National Task Force on Police Reforms was established to implement substantial reforms of the NPS. One of its key recommendations was the 'creation of an oversight body that will not only benefit the police themselves, but also give the public confidence that their complaints are dealt with and that justice and fairness will prevail.'[8]

The promulgation of the Constitution of Kenya, 2010 (2010 Constitution) contributed to the ongoing efforts of reforming the NPS. The Bill of Rights entrenched state obligations to respect, promote, protect and fulfil human rights.[9] Further, Article 10 enlists accountability of state agents as a national principle.[10] Furthermore, Article 244 stipulates that the NPS should strive for the highest standards of professionalism and discipline.[11]

The establishment and performance of IPOA, through the IPOA Act (2011), sought to realise the constitutional aspiration to reform the NPS. In entirety, the IPOA Act endows IPOA with both institutional and operational powers to carry out its mandates. This will be elaborated later in the next section. Pointedly, IPOA undertakes to investigate cases of police misconduct and extremities such as rape, instant deaths, severe injuries as well as deaths resulting from the injuries caused by police officers.

There have been varying sentiments on the effectiveness of IPOA.[12] Some have termed IPOA as a toothless bulldog and some have stated that IPOA was destined for failure.[13] However, IPOA has a track record of successes stemming from its institutional design and its ability to

7 Truth, Justice and Reconciliation Commission, *CIPEV report*, 16 October 2008, 396-398.

8 Report of the National Task Force on Police Reforms, Government Printer, Nairobi, 2009.

9 Constitution of Kenya (2010), Chapter 4.

10 Constitution of Kenya (2010), Article 10.

11 Constitution of Kenya (2010), Article 244.

12 Bryson Ometo, 'Improving police accountability in Kenya: Curing the shortcomings of the IPOA in bringing an end to police brutality in the country' *SSRN* (2020).

13 Joe Kiarie, 'Is the Independent Policing Oversight Authority (IPOA) the new toothless bulldog in town?' *The Standard*, 22 February 2014.

overcome some of the systemic challenges that hinder it from fulfilling its mandate of promoting police accountability. The most pertinent systemic challenge that this paper highlights is the 'blue code of silence', where police officers refuse to cooperate in investigations.[14]

The next section of this paper analyses the establishment of IPOA and its investigative power, under the IPOA Act, as a response to the long-lived police brutality. The performance of IPOA in investigating reported cases of police brutality reported especially through the tried cases is also analysed before the conclusion section.

Establishment of IPOA's investigative role

Following the history of flagrant human right abuses by police in the name of policing, IPOA was established in 2011 by the enactment of the IPOA Act.[15] The Act gives effect to Article 244 of the 2010 Constitution, which outlines the principles of the NPS, including training staff to the highest possible standards of competence, integrity and relationships with the broader society.[16]

Predominantly, IPOA holds the police accountable to the public through receiving and investigating complaints on the disciplinary and criminal offenses of police officers.[17] IPOA also monitors, reviews, audits and keeps a record of actions undertaken by the Internal Affairs Unit (IAU).[18] IAU, is a National Police Service unit that receives and investigates complaints lodged against the police.[19] In addition, IPOA recommends cases for prosecution to the Director of Public Prosecutions

14 Fred M, 'Blue code of silence: Big threat to professional policing' *IPOA News*, 17 March 2021.

15 Independent Policing Oversight Authority Act (No 35 of 2011), Section 3.

16 Independent Policing Oversight Authority Act (No 35 of 2011), Section 5b. Constitution of Kenya (2010), Article 244.

17 Independent Policing Oversight Authority Act (No 35 of 2011), Section 6 (a)(c).

18 Independent Policing Oversight Authority Act (No 35 of 2011), Section 6d.

19 National Police Service Act (No. 11A of 2011), Section 87(2).

(DPP), which includes the power to demand for follow-up on the DPP's decision to prosecute the recommended case.[20]

The composition of the IPOA Board ensures investigative efficacy of IPOA. For a start, the chairperson of the Board should be a qualified Judge of the High Court.[21] In addition, the remaining seven IPOA Board members should have at least ten years' experience in the fields of criminology, psychology, law, medicine, human rights and gender, alternative dispute resolution, security matters, or community policing.[22]

IPOA has a developed reporting system. First, any person can report on police misconduct to IPOA.[23] From a survey conducted in 2022, 32.4% of the respondents agreed that the IPOA is reachable and accessible at any time.[24] Complaints against the police are lodged with IPOA verbally, in writing or in any other format prescribed in the IPOA regulations.[25] Complaints made orally are reduced into writing by the IPOA secretariat, which not only receives the complaints but also helps with the ensuing investigations.[26] Between January and June 2021, IPOA received and processed 1,324 complaints ranging from death resulting from police action, enforced disappearances, sexual offenses, abuse of office, physical assault and arbitrary arrests.[27] The complaints were received through walk-ins, letters, telephone calls, social media, emails, IPOA's complaint form housed in its official website and outreach activities; 133 complaints were received through the IPOA Call Centre.[28] In 2022, IPOA received 3,302 complaints.[29]

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20 Independent Policing Oversight Authority Act (No 35 of 2011), Section 7d.

21 Independent Policing Oversight Authority Act (No 35 of 2011), Section 9(1)(a).

22 Independent Policing Oversight Authority Act (No 35 of 2011), Section 9(1)(b)

23 Independent Policing Oversight Authority Act (No 35 of 2011), Section 24.

24 IPOA, *Performance Report Jan-June 2022*, 23 March 2023.

25 Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(1).

26 Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(2).

27 IPOA, *Performance Report January - June 2021*, 9.

28 IPOA, *Performance Report January – June 2021*, 9.

29 IPOA, *Performance Report July – June 2022*, 23 March 2023.

Part of IPOA's reporting system involves collaboration with government agencies. Section 24 of the IPOA Act dictates that depending on the nature of the received complaint, IPOA may seek information or initiate an inquiry about the complaint from any appropriate government department or agency or any other body within a specified period.[30] As mentioned earlier in this paper, some of these government agencies are the NPS, IAU and the DPP. Notably, IPOA maintains the power to refuse to consider a complaint where it finds it vexatious or frivolous.[31]

The NPS is legally obligated to enhance IPOA's investigations on police brutality. As a condition to the use of force, police officers in charge or superiors are to report to IPOA any death, serious injury or grave consequences resulting from the use of force.[32] Thereafter, the police should secure the scene in the interest of investigations and report to the victim's kin.[33] Where the police officer fails to make such a report, they commit a disciplinary offense and should face disciplinary action.[34]

Finally, IPOA has investigators selected for their experience, expertise and integrity, who observe a set guiding principles in their work. These investigators have backgrounds in law, policing, investigating human-rights violations and other relevant investigative work.[35] A number of specialised units, including international experts from the United Nations and foreign governments, support the IPOA investigators. The Investigations Manager works closely with the IPOA Board to ensure that quality and integrity is maintained during the investigations.[36] Additionally, the IPOA investigators observe the following investigation principles:

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30 *Independent Policing Oversight Authority Act* (No. 35 of 2011), Section 24(4).

31 Independent Policing Oversight Authority Act (No. 35 of 2011), section 24(8).

32 *National Police Service Act* (No 11A of 2011), Sixth Schedule, para 5.

33 *National Police Service Ac*t (No 11A of 2011), Sixth Schedule, para 7.

34 *National Police Service Act* (No 11A of 2011), Sixth Schedule, para 8.

35 <https://www.ipoa.go.ke/investigations/> accessed on 29 November 2023.

36 <https://www.ipoa.go.ke/investigations/> accessed on 29 November 2023.

a. Ensuring that appropriate terms of reference are clearly defined and an investigation plan is established;
b. Conducting investigation in a professional and ethical manner;
c. Ensuring that risk management strategies are adopted;
d. Constantly reviewing investigations to ensure they remain focused;
e. Ensuring appropriate confidentiality and security is maintained with respect to the investigation and information;
f. Reaching evidence-based conclusions as soon as practicable;
g. Reporting on the investigation findings, conclusions and recommendations; and
h. Remaining independent and objective at all times throughout the investigative process.[37]

An appraisal of convictions resulting from IPOA's investigation

As at 30 June 2021, IPOA completed investigations for 397 cases.[38] 18 of these cases were recommended for closure after legal review.[39] 96 cases were forwarded to the ODPP for action and 5 convictions were made.[40] This section analyses the different cases that have been investigated by IPOA and forwarded to the DPP for prosecution. It seeks to show that the challenges and successes in these investigations are attributed to IPOA's institutional reporting and investigative design outlined in the previous section.

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37 <https://www.ipoa.go.ke/investigations/> accessed on 29 November 2023.

38 Report of Independent Policing Oversight Authority on Performance January – June 2021.

39 Report of Independent Policing Oversight Authority on Performance January – June 2021.

40 Report of Independent Policing Oversight Authority on Performance January – June 2021.

The case of *Titus Ngamau Musila Katitu v Republic (2020)*, centred on the 'blue code of silence,' a systemic hindrance in conducting IPOA investigations.[41] Titus Katitu, the Appellant and a police officer, was convicted of maliciously firing at the deceased at close range when attempting to recover a stolen phone and secure an arrest, and thereby sentenced to 15 years' imprisonment.[42] The Appellant unsuccessfully appealed as the Court of Appeal affirmed the trial court's finding that he had manipulated the firearms register to conceal evidence of the fatal shooting, thus, 'honouring' the blue code of silence. However, IPOA managed to executing its investigative mandate, which was lauded by the Court as follows:

> PW18, an officer from IPOA alluded to manipulation of the firearms movement register. Out of the 15 prosecution witnesses, 8 were police officers, who were determined to maintain the "blue code of silence" and ensure they saved one of their own. Indeed, it was only after the intervention by IPOA and other pressure groups that the Appellant was apprehended and convicted to 15 years imprisonment after nearly two years of freedom.[43]

The High Court of Garissa decision in *R v Dennis Langat & Kennedy Okuli (2021)* showcases IPOA's investigators in action.[44] Evans Okenyo, an IPOA investigator, testified as PW16 on the facts surrounding the police shooting of the unarmed deceased. He stated that all facts proved the negligent officers shot the accused at close range causing her death. From the culmination of the evidence, the accused was convicted of manslaughter.[45] In my opinion, this illustrates how zealous IPOA undertakes its mandates. Its investigative personnel are aware of the need to testify and give evidence in court regarding the investigations they do upon receipt of a complaint. This is important because it shows

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41 Court of Appeal at Nairobi (2020) eKLR.

42 *Titus Ngamau Musila Katitu v Republic*, Judgment of the Court of Appeal at Nairobi, 24 April 2020, eKLR.

43 *Titus Ngamau Musila Katitu v Republic*, Judgment of the Court of Appeal at Nairobi (2020) eKLR.

44 Criminal Case No. 23 of 2019, Judgment of the High Court at Garissa, 29 June 2021.

45 Criminal Case No. 23 of 2019, Judgment of the High Court at Garissa, 29 June 2021, para 21.

the willingness IPOA has towards righting the wrongs of police officers who act unprofessionally.

These convictions, being the final step in gauging the efficacy of IPOA investigations into police brutality, can only be attributed to IPOA's institutional design and how it has helped achieve effectiveness. Also, the interplay between IPOA and other institutions in policing the police can be drawn out clearly.

Conclusion

IPOA is not a toothless bulldog as it has been termed. This commentary has highlighted the 'blue code of silence' as among the main challenges that IPOA faces in trying to investigate its received complaints. In some instances, like the *Titus Katitu* case, IPOA's investigative efforts overcame this hindrance by securing a conviction, which was also upheld by an appellate court. Just like any organ, IPOA is likely to have operational challenges that obscure effective investigations. Therefore, IPOA is neither a lame duck as this paper has shown, the police are 'policed', hence, they are not above the law.

A commentary on the matrimonial property conundrum in Kenya in *JOO v MBO*

Marvis Ndubi*

Abstract

Since the promulgation of the Constitution of Kenya 2010, Kenyan jurisprudence has tussled with the question of division of matrimonial property in the instance of divorce. This is due to the conundrum posed by the meaning of Article 45(3) of the Constitution on equality of spouses in the realm of matrimonial property. Arguably, the courts, including the Supreme Court, have failed to put to resolve this conundrum. This is by dint of the inexistence of any strict formula for the sharing of matrimonial property during divorce despite the question finding its way to the Supreme Court of the Republic of Kenya (SCORK). As chance would have it, SCORK got another grand opportunity to put this question to rest in the JOO v MBO case. However, this commentary opines that history repeated itself and the jurisprudential ambiguity in the sharing of matrimonial property is still with us, alive and well. This paper evaluates the question of matrimonial property sharing in Kenya in the lens of the SCORK's JOO v MBO decision.

Keywords: matrimonial property, equality, equity, contribution to matrimonial property, Article 45(3)

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Introduction

The *JOO v MBO*[1] case invoked the its appellate jurisdiction of the Supreme Court of Kenya (SCORK), under Article 163(4)(b) of the Constitution.[2] JOO (appellant) and MBO (respondent) had contracted a marriage in 1990 where they then begun cohabiting as husband and wife and later formalised their union under the repealed legal regime governing marriage[3] in 1995. The duo then moved to their matrimonial home on a piece of land located within Tassia area in Embakasi, Nairobi. In 2008, their marriage broke down and the appellant successfully applied for its dissolution which culminated into the commencement of proceedings on the division of matrimonial property. The respondent claimed that while together, they constructed rental units on their Tassia land which, she successfully applied for a 200,000 shillings' loan in support of the project. This formed the basis for the petition which found its way to the highest court of the land.

At the High Court, it was held that the respondent failed to prove her direct contribution to the property registered under the appellant's name.[4] However, the Court was lenient to the fact that she had done some indirect non-monetary contribution towards the family's welfare. The Court hence awarded her 30% of the matrimonial property and a 20% share of the rental units.[5] Aggrieved by the decision, the respondent appealed alongside the appellant's cross appeal. The Court of Appeal found that, having been married for 18 years, 15 of which were spent in gainful employment by the respondent, she constantly took loans

1 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* Petition No 11 of 2020, Judgement of the Supreme Court, 27 January 2023, [eKLR].

2 Constitution of Kenya (2010), Article 163(4(b); J*OO v MBO Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 1.

3 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 3.

4 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* Petition No.11 of 2020, para 10.

5 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae),* para 10.

and helped acquire the matrimonial home jointly with the appellant.[6] This gave birth to an order overturning the High Court and directing the sharing of the rental units in a 50:50 ratio.[7] When brought before the SCORK, it dismissed the appeal on ground that the 50:50 ratio was reasonable in the specific circumstances of the case.

Being the highest court of the land, this paper posits that the SCORK failed to rest the question of division of matrimonial property in Kenya. Over and above settling the matter at hand, Section 3 of the Supreme Court Act[8] obligates the apex court to develop rich jurisprudence, which this paper is at pains to establish in the said judgement.

The dilemma of Article 45(3) in the matrimonial property question

Pursuant to Article 45(3) of the Constitution, parties to a marriage are entitled to equal rights at the time of the marriage, during the subsistence of the marriage and at the dissolution of the marriage.[9] Rightfully interpreting this provision, the constitutional wording envisions a 50:50 formula when sharing matrimonial property. The argument, which this paper is in congruence with, has been advanced by the Federation of Women Lawyers Kenya in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another.*[10] Notably, the importation of the said provision into the new constitution was to protect women from their historical injustice in matters matrimonial property and thus the quest for pragmatic equality.[11]

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6 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Law Society of Kenya (amicus curiae)*, para 15.

7 *JOO v MBO*, Civil Appeal No 81 of 2017, Judgement of the Court of Appeal, 23 February 2018, [eKLR].

8 Supreme Court Act (No 7 0f 2011), Section 3.

9 Constitution of Kenya (2010), Article 45(3).

10 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*, Petition No 164B of 2016, Judgment of the High Court, 14 May 2018, [eKLR].

11 Freyda Konno Owino, 'The division of matrimonial property in Kenya: A feminist approach', Unpublished LLB dissertation, Strathmore University, 2017, 25-26.

Purposively, a historical contextualisation of Article 45(3) dates back to the epoch of the coverture principle where married parties were regarded as one even though the husband was the custodian of matrimonial property.[12] As Lord Denning put it in the *William & Glyn's Bank Ltd v Boland case*,[13] the law regarded the husband and wife as one and the husband as that one. This is to say, in as much the husband and wife enjoyed equal rights in marriage, in the context of matrimonial property rights, the husband was the most powerful and the ultimate decision maker. Redressing the equality myth in the coverture principle, Article 45(3) envisions a situation where both parties are equal with equal rights both in theory and practice of law.

However, it is evident that both the Matrimonial Property Act[14] and the Kenyan courts have deliberately misconstrued the wording of Article 45(3). Section 7 of the Matrimonial Property Act provides that matrimonial property rights vest on the parties based on their individual contributions towards the acquisition of the property in question.[15] This has also been buttressed by the SCORK insisting that the implication of Article 45(3) is that at the point of dissolution of the marriage, each party should depart with what they brought on the table. This fuels a war between equity and equality in the interpretation of the article in question in the context of matrimonial property. It is noteworthy that as the ancient maxim 'equality is equity'[16] posits, equality may mean equity but equity does not necessarily mean equality.[17]

Equality speaks to the question of fact in distribution unlike equity which connotes ethical judgement and considerations during

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12 Rosemary Auchmuty, 'Book review - *Married women and the law: Coverture in England and the common law world*, Tim Stretton and Krista J Kesselring (eds),' 85(3) *University of Toronto Quarterly*, 2016, 328-329.

13 *William & Glyn's Bank Ltd v Boland,* AC 487 [1979], House of Lords (UK).

14 Matrimonial Property Act (No 49 of 2013), Section 7.

15 Matrimonial Property Act (No 49 of 2013), Section 7.

16 J McGhee, SB Elliott and M Conaglen*, Snell's equity: Third cumulative supplement to the thirty-fourth edition,* Sweet & Maxwell, 2023, 101-102.

17 McGhee, Elliott and Conaglen*, Snell's equity*, 101-102.

distribution.[18] As Minow puts it, equality is a question of sharing and/or considering each party as factually equal regardless of their needs, abilities and capabilities.[19] On the flipside, equity extends to the consideration that the parties in question have different abilities, capabilities, and needs which should be considered in the sharing and/or distribution of any resources.[20] Article 45(3) explicitly speaks to equality of the parties' rights and not equity. Thus if the said rights were to be construed in the lens of proprietary rights, then no interpretation can depart from the 50:50 formulae.

Evidently, SCORK has shied away from confronting the ambiguity and impracticability in Article 45(3). If rightfully construed, this constitutional provision lacks a pragmatic sense. In the constitutional wording, the married parties are unconditionally expected to give a 50:50 contribution towards matrimonial property at the formation and subsistence of the marriage.[21] Equally, at the dissolution of the marriage, the parties are expected to have equally shared the property in question. This equality is also statutorily echoed under Section 3(2) of the Marriage Act.[22]

It is noteworthy that a marriage is a voluntary union between parties[23] based on, *inter alia*, affection, love and trust between the contracting individuals; an enterprise which enjoys state recognition and protection.[24] The trust, affection and the hope for eternal togetherness practically disallows the parties to live anticipating a separation or divorce. This hence informs this paper's contention of how impracticable equality is, in the question of spousal contribution to matrimonial property, development and equal division of the same.

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18 Martin Bronfenbrenner, 'Equality and equity' 409(1) *The Annals of the American Academy of Political and Social Science'*, (1973), 9-23.

19 Martha Minow, 'Equality vs equity', 1 *American Journal of Law and Equality*, 2021, 167-193.

20 Minow, 'Equality vs equity', 167-193.

21 Constitution of Kenya (2010), Article 45(3).

22 Marriage Act (No 4 of 2014), Section 3(2).

23 Marriage Act (No 4 of 2014), Section 3(1).

24 Constitution of Kenya (2010), Article 45(1).

Spousal contribution to marriage versus spousal contribution to matrimonial property

Though *prima facie* simplistic, it is worthy establishing an explicit dichotomy between the parties' contributions to the wellness of a marriage and their contributions towards matrimonial property. This confusion has first been established by the Matrimonial Property Act in its interpretation of 'contribution' at Section 2.[25] The Act defines 'contribution' to mean monetary and non-monetary contribution which includes: domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.[26] However, the Act fails to appreciate the difference between a contribution to the wellbeing of a marriage and a contribution towards the acquisition and/or development of matrimonial property. Notably, the latter falls under the former but the vice versa is not feasible.

A family institution entails ten different aspects/thematic areas.[27] These include, marriage, religion, culture, family education, family health, economy, environment, vulnerability and social protection, media and technology as well as family safety and security.[28] This speaks to the broadness of a family set up contrary to the unfair narrow understanding of family in the context of matrimonial property.

This paper therefore bifurcates the concept of contribution to mean either a contribution towards the wellness of the marriage or a contribution towards the matrimonial property aspect of a marriage.

A party's contribution towards any of the ten aspects amounts to a contribution towards the wellness of the marriage and not necessarily towards matrimonial property. Interestingly, the question of matrimonial property may only find its way into one of the many aspects, the economic aspect of the family/marriage. It thus begs the

25 Matrimonial Property Act (No 4 of 2014), Section 2.
26 Matrimonial Property Act (No 4 of 2014), Section 2.
27 Draft Family Promotion and Protection Policy, 2019.
28 Draft Family Promotion and Protection Policy, 2019.

question whether a party's contribution towards the other nine or so aspects should be ignored during marriage dissolution at the expense of one aspect. To this end, there should be consideration of all sorts of spousal contribution at the point of dissolution of a marriage. Unfortunately, the only mode of considering spousal contributions to the other aspects of a marriage is by monetising the contributions and proprietarily quantifying them so that they can at least find a seat in the matrimonial property omnibus.

The proof of contribution question

Much might not be clear, but at least, the rule of evidence is; he who alleges must prove![29] The requirement of evidence of contribution found its way in the Kenyan written laws vide Section 17 of the then Married Women Property Act.[30] The instances of its practice have been more futile than successful. Attention is brought to the Matrimonial Property Bill of 2013[31] before its amendment. The bill stated that ownership of matrimonial property vested in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition.[32] I am made to believe that this was a blanket redress mechanism towards the 'evidence of contribution' problem before its amendment to demand proof of contribution from the parties.[33]

The requirement to proof contribution is impracticable more especially in marriages with no prenuptial agreement addressing the same. It is therefore too much to ask couples who hope for eternal togetherness to keep a record of every financial contribution that they make towards the acquisition of property.[34] Furthermore, there lacks a

29 Evidence Act (No 80 of 2014), Section 107.

30 Married Women Property Act, Section 17 [repealed].

31 Matrimonial Property Bill (No 49 2013).

32 Matrimonial Property Bill (No 49 2013), Section 7.

33 Matrimonial Property Act (No 49 2013), Section 7.

34 MO Odhiambo and RK Nyaigendia, 'End of an era or error? A contextualised analysis of the historical evolution of the law on the division of matrimonial property', March 2023, *The Platform for Law, Justice and Society* 90.

clear guideline on what amounts to indirect contribution to matrimonial property and the quantification of the same at the point of property division.[35]

Conclusion

The genesis of the matrimonial property division conundrum in Kenya is the forceful imposition of the equality principle under Article 45(3) in the realm of matrimonial property division. Kenyan scholarship must first make peace with the fact that the wording of Article 45(3) is ambiguous and impracticable in the ambit of matrimonial property acquisition, development and division if at all. In my view, the rightful doctrine under matrimonial property division would be equity and not equality. Secondly, as afore-opined, marriage is a trust, love and affection affair, an enterprise independent standby gathering of evidence in anticipation of break-ups. To this end, it averts logic to expect the parties to prove contribution more especially in instances of substantial though unascertainable spousal contributions. As Dr Carl Sagan puts it, the absence of evidence is not the evidence of absence.[36]

Conclusively, to remedy the matrimonial property jurisprudential kerfuffle, I propose that the Kenyan laws should merge the two conflicting schools of thought i.e. the 50:50 distribution formulae and the 'division based on contribution' approach. This can be effectuated by a legislative or judicial adoption of a 'matrimonial property presumption clause'. The clause should have the presumption that, both parties, whether directly or indirectly, contribute to the general wellbeing of the marriage and their contributions must be put to account during property division. This is whether each contribution was in the realm of matrimonial property or not. The clause should hence guarantee each party a specific constant percentage of the cumulative matrimonial

[35] Ojima Abalaka, 'Once you get out you lose everything: Women and matrimonial property rights in Kenya' *Human Rights Watch*, 16 May 2023.

[36] Magda Feres and Fernando Neuppmann, 'Absence of evidence is not evidence of absence', *National Library of Medicine (NLM)*, 3 November 2023.

property during division. Say for instance, each party should be guaranteed 15 percent of the matrimonial property which will cater for *inter alia*, the non-monetary, indirect and direct though unascertainable contributions. Notably this basically means a 50:50 sharing of 30 percent of the cumulative property. The remaining 70 percent can then take the 'division based on contribution' approach. This will then require the parties prove their contribution whose percentage equivalent they shall receive from the remainder.

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