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Trailblazer of institutional and normative pathways on the African human rights landscape

*Frans Viljoen**

Introduction

While the most prominent part of Christof Heyns' career has been devoted to working within the United Nations (UN) human rights system, he also professionally and academically engaged with regional human rights systems and mechanisms. To him, regional systems localised and rooted global human rights, and brought it closer to and made it more accessible to people as they experienced life.[1] Although he had some exposure to the European and Inter-American human rights systems, as a South African, his deepest interest and commitment was to the African regional system. It was important to him to bridge the international (of which the regional is a notable part) and the national. During the process of the drafting of the Constitution of the Republic of South Africa, 1996, Christof introduced this question: 'Where is the voice of Africa in our Constitution?'.[2] He argued that, to be 'truly legitimate', to 'reflect the soul of our nation', the Constitution must 'be rooted in African soil'. This 'Africanness' could be achieved, he contended, by using the language of 'individual duties', one of the distinguishing features of the African Charter on Human and Peoples' Rights (African Charter), to frame the constitutional limitation clause.[3]

This chapter takes stock of Christof's role in forging institutional and normative aspects of the African regional system. Departing from a 2001 academic contribution he made to the debate on the derogation of Charter rights during states of emergency, different readings of the legal position related to this issue are undertaken. After a quick turn to

* Director and Professor of International Human Rights Law, Centre for Human Rights, University of Pretoria.

1 See eg C Heyns & M Killander 'Universality and the growth of regional systems' in D Shelton (ed) *The Oxford handbook of international human rights law* (OUP 2013).

2 C Heyns 'Where is the voice of Africa in our Constitution?' Occasional Paper 8, Centre for Human Rights, February 1996 ('Voice of Africa), https://www.chr.up.ac.za/images/publications/centrepublications/occasional_papers/occasional_paper_8.pdf (accessed 31 December 2021).

3 Heyns (n 2): 'by acknowledging the existence of duties, society at large will be given a more balanced view of what citizenship entails'.

a wider perspective on the issue, some suggestions are made for more normative clarity.

Trailblazer

Christof was pivotal in establishing the African human rights system as a serious field of study and academic reflection. In retrospect, he may be called the 'father' of the 'Centre for Human Rights School of African Human Rights Law'. His trailblazing journey took five pathways.

First, Christof was pivotal in establishing the Master's degree programme in Human Rights and Democratisation in Africa (HRDA) at the Centre for Human Rights in the Faculty of Law at the University of Pretoria (UP). This programme, which has since 2000 been supported by the European Union, has grown into a flagship academic programme with continental reach, and established itself as a prized part of the seven programmess worldwide comprising the Global Campus of Human Rights. Boldly, the African regional human rights system lies at the academic heart of this programme. With around 30 students from across the continent graduating every year, this programme has contributed in no small measure to the pool of leading human rights professionals on the continent and beyond.[4] It is no wonder that HRDA alumni have held the positions of Chairperson of the African Commission on Human and Peoples' Rights (African Commission) and of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee), and in 2021, three of the four most senior legal officers at the African Court on Human and Peoples' Rights (African Court) were alumni of this programme. Not only was he a teacher to the HRDA students, but he also taught the African regional human rights system at the Summer School of the Washington College of Law, American University, Washington DC, and the International human rights law Master's programme at the University of Oxford, among many other programmes and universities.

Second, beyond formal legal education, Christof contributed to human rights education through his relentless advocacy of moot court competitions as experiential learning. His initiative to set up the African Human Rights Moot Court Competition was aimed at giving exposure to the African Charter and the jurisprudence of the African Commission, at influencing legal education at African law schools, and at stimulating reflection and discussion on the establishment of an *actual* African Court.[5] When the Moot Court Competition started in 1992 (at the

4 See *Alumni Diaries, 2000-2019*, https://www.chr.up.ac.za/images/publications/Alumni_Diaries/Alumni Diaries 2019 - web.pdf (accessed 31 December 2021).

5 See C Heyns, N Taku & F Viljoen 'Revolutionising human rights education in African universities: the African Human Rights Moot Court Competition' in *Advocating for*

Southern African level), the African Court did not exist. In fact, the legal instrument establishing the African Court was adopted only in 1998, and the Court started sitting only in 2005. His foundational and inspirational role in the Moot has been suitably captured in its renaming in September 2021 as the 'Christof Heyns African Human Rights Moot Court Competition'.

Third, Christof contributed as a scholar of 'African human rights law'.[6] While he was its Director, the Centre for Human Rights in March 2001 organised a conference not only to celebrate 20 years since the adoption of the African Charter in 1981, but also to consider the need and feasibility of treaty reform. On that occasion, Christof delivered a seminal paper setting the tone of the discussion.[7] In its 'Statement on the passing of Prof Christof Heyns', the African Commission acknowledged the 'large number of publications in leading academic journals on the work of the African Commission' from his pen, and its impact in 'making the African human rights system known to the world'.[8] His research and writing on the impact of human rights treaties also has relevance for Africa.[9]

Fourth, Christof cultivated scholarship on the African regional system. He did so as co-founding editor of the *African Human Rights Journal*, which has been published since 2001. The *Journal* is the first and still the only journal devoted to human rights in an African setting, with a pride of place given to the African regional system. He also made sources available and drew attention to the outputs and accomplishments of the African regional system at a time when scholarly pessimism towards the system largely prevailed.[10] Departing from the premise that the dim view of many scholars (particularly those not based in Africa) was rooted in their ignorance, reinforced by a lack of information about and access to relevant information, Christof

Human Rights (Brill Nijhoff 2008) 17-39.

6 See eg C Heyns 'African human rights law and the European Convention' (1995) 11(2) *South African Journal on Human Rights* 252-263; C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and People's Rights – the system in practice 1986-2000* (CUP 2002) 137-177; C Heyns 'The African regional human rights system: the African Charter' (2004) 108(3) *Penn State Law Review* 679-702; and C Heyns & M Killander 'Africa' in D Moeckli and others (eds) *International human rights law* (OUP 2017) 465-481.

7 C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-174. This article is one of Christof's most cited articles on the African regional system. (Google Scholar indicates 65 citations as at 9 January 2022.)

8 'Statement on the passing of Prof Christof Heyns', Commissioner Solomon Ayele Dersso, Chairperson of the African Commission on Human and Peoples' Rights, 29 March 2021.

9 See eg C Heyns & F Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (Brill 2021) (covering Egypt, Senegal, South Africa and Zambia).

10 See C Heyns & M Killander 'Africa in international human rights textbooks' (2007) 15(1) *African Journal of International and Comparative Law* 130-137.

embarked on one of his grandest and most influential projects – the compilation, publication and dissemination of documents relevant to the African regional human rights system.[11] It was a matter of serious concern to Christof that the African regional human rights system was not only neglected but often misrepresented in global human rights scholarship. This concern inspired him to introduce more readers and scholars to the African system. At a time when the internet was not yet widely accessible, when the African regional human rights system was largely unknown, and when the Commission's work remained hidden and did not travel well beyond its Secretariat in Banjul, The Gambia, he collected and published a number of volumes of texts and commentaries. In this way, he breathed life into an almost non-existent field of academic study. The collection *Compendium of key human rights documents of the African Union*, edited by Heyns and Killander (Pretoria University Law Press; various editions), has served – and still serves – as a source of reference to generations of students of African human rights law. It was also his passion to see others publish, and he was involved in the founding of the Pretoria University Law Press (PULP), which became an outlet for publications on 'African human rights', in particular.

Fifth, as human rights professional and expert, Christof was not a distant armchair critic, but a close, hands-on partner. He has served on several occasions as technical adviser on human rights to the African Union (AU) and the African Commission. In particular, Christof served as adviser to the African Commission in developing its influential General Comment 3 on the Right to Life, adopted by the Commission in 2015.[12] He also was a member of the Commission's Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa. Christof also took the initiative to establish and maintain close working relationships between the African Commission and the UN human rights system.

11 See C Heyns (ed) *Human rights law in Africa 1996 (vol 1)* (Kluwer Law 1996); C Heyns (ed) *Human rights law in Africa 1997 (vol 2)* (Kluwer Law 1999); C Heyns (ed) *Human rights law in Africa 1998 (vol 3)* (Kluwer Law 2001); C Heyns (ed) *Human rights law in Africa 1999 (vol 4)* (Kluwer Law 2002); C Heyns with M van der Linde (ed) *Human rights law in Africa vol 1* (Martinus Nijhoff 2004); and C Heyns with M van der Linde (ed) *Human rights law in Africa vol 2* (Martinus Nijhoff 2004). See also, for a French version of these, edited with P Tavernier: C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 1996-2000* (Bruylant 2002); C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 2000-2004 (Tome I)* (Bruylant 2005); and C Heyns & P Tavernier (eds) *Receuil juridique des droits de l'Homme en Afrique 2000-2004 (Tome II)* (Bruylant 2005). See also C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: a reader* (PULP 2006).

12 See the 'Preface' to the African Commission's General Comment 3: 'The African Commission is very grateful for the valuable contributions from members of the Working Group and experts to the text, in particular from Professor Christof Heyns'.

Derogations and states of emergency

Christof's interests in advancing the regional human rights system, on the one hand, and his passionate concern for the right to life and 'freedom from violence',[13] on the other, converge in a topic that has received attention since the adoption of the African Charter, namely, the possibility of derogating from human rights during periods of war, public emergency, other forms of turmoil, and political instability. Under circumstances of struggle for the very 'life' of the nation,[14] the lives of people ('civilians', in situations of armed conflict) within the national polity are at elevated risk. With national institutions under physical and psychological threat, the role of international (including regional) scrutiny or supervision becomes more pronounced. However, the assumption that the 'detached international judge' would necessarily be better suited to provide a robust but fair assessment is to some extent refuted by past practice.[15]

The position of the African regional human rights system on this issue has been a subject of considerable debate and discussion, mainly because the African Charter contains no derogation clause. The drafting process does not shed much light on the reasons for this 'omission'. An elaborate suspension clause, almost a word-for-word copy of the corresponding provision in the American Convention,[16] was included in the initial (Mbaye) draft.[17] However, this was not taken up in any further drafts – and the final version – of the African Charter. The lack of an extensive recorded drafting history makes it difficult to get into the minds of the drafters, but the sketchy details indicate that the drafters were not oblivious to contemporaneous comparative models.

In the 2001 conference organised by the Centre for Human Rights, Christof identified this omission as one of the problematic aspects of the African Charter.[18] Thus, he entered a deliberative space that has seen the emergence of four broad approaches to the implications of this omission. The first three approaches depend on and derive from the Commission's interpretation of the Charter. In the first, no derogation or suspension of rights is allowed. In the second approach, derogation is allowed as a *species* of limitation, and its validity is assessed against the same yardstick as 'ordinary limitations'. In the third, derogation

13 See various chapters in this volume.
14 Art 15(1) European Convention.
15 See, for example, F Ní Aoláin 'The emergence of diversity: differences in human rights jurisprudence' (1995) 19 *Fordham International Law Journal* 101.
16 Art 27 American Convention on Human Rights.
17 One of the sources through which this draft was given much exposure is *Human rights law in Africa* 1999 (n 11) 65-77.
18 Heyns (n 7).

is allowed, not based on the Charter but on general principles of international law (as mandated by the Charter).[19] The fourth approach takes the solution out of the Commission's hands, by trusting state parties to amend the Charter, so as to provide an unequivocal textual basis for derogation.

No derogation, ever

In terms of the first approach, the absence of a derogation clause is interpreted to mean that derogation is not allowed under any circumstances whatsoever, even during publicly declared or 'genuine' states of emergency. To Christof, such a wholesale impossibility of derogation would be 'unfortunate', since such a stance would mean that, in real emergencies, 'the Charter will be ignored and will not exercise a restraining influence'.[20] Ever the realist, he saw the following dilemma arising for states: 'States facing real emergencies could in practice be expected to ignore the Charter rather than succumb to the emergency, if those are the only two options available.'[21] Ouguergouz also finds this an 'extreme interpretation' that would be 'hard to defend'.[22]

Obviously, an omission or silence in any legal document can be interpreted with one of two legal maxims in mind: 'everything which is not (explicitly) prohibited is (by implication) allowed', or 'everything which is not (explicitly) allowed is (by implication) prohibited'. What would be the best approach to take in this particular instance? From the state party's point of view, it should be allowed to act within the scope of its sovereignty (that is, retain the discretionary competence to derogate when required) unless doing so would breach a contradictory obligation. From the rights-holder's perspective, what weighs heaviest is to have in place the most extensive level of rights protection. From the Commission's vantage point, the interpretation should ideally be guided by what fits best into the exercise of its general powers. Understood in this way, all three perspectives call for the application of the maxim 'everything which is not prohibited is allowed', since reading into the Charter a derogation clause would be compatible with maximising state sovereignty; it would enlarge the Charter's protective scope to the benefit of victims; and it would be in line with the Commission's general protective mandate.

19 Art 61 African Charter (The Commission 'shall … take into consideration, as subsidiary measures to determine the principles of law' … 'general principles of law recognised by African states').

20 Heyns (n 7) 162.

21 As above.

22 F Ouguergouz *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable development in Africa* (Martinus Nijhoff 2003) 425.

These viewpoints notwithstanding, the Commission adopted the position that no derogations are allowed. Full-stop. Commentators point to *Commission Nationale des Droits de l'Homme et des Libertés v Chad* as the clearest expression of the Commission's position on this matter.[23] It is undeniable that the Commission concluded that 'even a civil war cannot be used as an excuse' for violating Charter rights *because* the Charter 'does not allow for state parties to derogate from their treaty obligations during emergency situations'.[24] However, the precedent-setting nature of this decision for the question under consideration may be questioned. In this particular case, the government provided no 'substantive response' other than a 'banket denial of responsibility'.[25] The matter was therefore not fully ventilated before the Commission either as far as the law or the facts are concerned. The 'emergency situation' to which the Commission refers was not a formally-declared state of emergency, and the state made no attempt to argue that some basis for the derogation of rights existed. It should also be taken into account that this was one of the Commission's earliest decisions,[26] coming at a time when its style of reasoning was decidedly terse and not fully substantiated. Also, the Commission's actual finding on the merits is a violation of 'serious and massive violations of human rights', which under article 58 of the Charter requires referral to the Assembly of Heads of State and Government, the supreme political body within the Organisation of African Unity (OAU, now the AU). This element reinforces the impression that the decision does not contemplate answering a vexing legal question, but should rather be understood as an appeal to the political forum of African states, of which Chad forms a part, in response to a deeply troubling and unacceptable political situation.

The next Commission decision usually referred to is *Media Rights Agenda v Nigeria*.[27] In this finding, the Commission again notes that the Charter 'does not contain a derogation clause', and then concludes that 'limitations' on Charter rights 'cannot be justified by emergencies or special circumstances'.[28] As in the first case, the government in this instance did not make representations, although a visit by the Commission was allowed to be undertaken to Nigeria. The violations

23 (2000) AHRLR 66 (ACHPR 1995) (*Chad Massive Violations* case). See eg Heyns (n 1) 161; Ouguergouz (n 21) 425-426; and F Viljoen *International human rights law in Africa* (OUP 2012) 333.

24 *Chad Massive Violations* case (n 23) para 21.

25 *Chad Mass Violations* case (n 23) para 24.

26 It was contained in the Commission's 9th Annual Activity Report, and was taken in October 1995.

27 (2000) AHRLR 200 (ACHPR 1998) (*Media Rights Agenda* case). See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

28 *Media Rights Agenda* case (n 27) para 67.

occurred during the military government of Sani Abacha, following a military take-over. The Abacha government issued a series of decrees, including one suspending the Constitution,[29] and one dissolving political parties.[30] As in the earlier *Chad Massive Violations* case, the circumstances are so dire and the violations so flagrant that any argument by the newly established government justifying its actions as 'preserving the life of the nation' would have been entirely preposterous.

It is against this background that the Commission's approach starts to make more sense. To some extent, the Commission's lack of nuance and occasional over-stating legal requirements,[31] reflects a 'jurisprudence of exasperation', rather than careful analysis with a view to setting legal precedents.[32] In the forefront of its mind was the need to signal to African states, at a political level, that they cannot trample Charter rights by justifying their actions with reference to civil war, insecurity or popular dissent. It should be taken into account that the Commission does not only adjudicate 'communications', but also plays an important role to guide states in the performing their obligations under the Charter. In 2007, responding to the killing of at least 129 Guineans by government security forces cracking down on a nationwide strike protesting corruption and 'bad governance' in Guinea,[33] the Commission, in the name of its Chairperson, issued an 'appeal' in which it recalled that 'unlike other international human rights treaties, the African Charter does not allow for states to derogate' from Charter rights, and reiterated that the Charter provisions must be 'observed even during emergency situations'.[34]

The strongest argument for retaining the status quo as set out by the Commission (not allowing for derogation under any circumstances), is probably based on political expediency. In a context of grave political instability, which characterises many Africa countries, the risk of baseless reliance on derogation leading to abuse looms large. This

29 Constitution(Suspension and Modification) Decree 107 of 1993.

30 Political Parties (Dissolution) Decree 114 of 1993.

31 See eg *Media Rights Agenda* case (n 27) para 69, where the Commission states that limitations have to be 'strictly proportionate with and *absolutely* necessary for the advantages to be obtained' (emphasis added).

32 See K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39 (explaining that a jurisprudence of exasperation is the 'tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country, rather than on the basis of 'carefully thought out arguments based on the law's possibilities and limits).

33 Human Rights Watch, 'Dying for change: brutality and repression by Guinean security forces in response to a nationwide strike', 24 April 2007, https://www.hrw.org/report/2007/04/24/dying-change/brutality-and-repression-guinean-security-forces-response-nationwide (accessed 9 January 2022).

34 Appeal: The African Commission on Human and Peoples' Rights Concerned about the Situation in the Republic of Guinea, Salamata Sawadogo, Chairperson, ACHPR, Banjul, 16 February 2007.

absolute choice may however have the effect of encouraging these important issues to be dealt with 'extra-legally', thereby removing these questions from independent supervision. This 'all-or-nothing' approach may be presented as 'evidence of the steely resolve of the Commission not to allow deviations from human rights standards under any circumstances', Christof warned, but in truth it debases human rights by removing an important layer of scrutiny.[35] Another argument in support of this approach is that it is consistent with and gives impetus to an 'international trend of expanding non-derogable rights'.[36] However, this is a very optimistic view of the expanding floor of what constitutes non-derogable rights, for which there is inadequate support in state practice.

Derogation as limitation

A second approach is that, although it is not explicitly provided for, 'derogation' is possible as part of the 'limitation' of rights under the Charter. This approach is based on the underlying understanding that limitation and derogation both are forms of 'restriction' of rights, in the broadest sense. In this context, 'limitation' and 'derogation' have legally defined meanings, but the word 'restriction' is used in its ordinary language sense, that of: setting an 'official limit', or controlling something so that it does not exceed a particular level or that it is kept within specified bounds.[37]

From this point of view, 'derogation' and 'limitation' are located on a continuum according to the degree and modality of 'restriction'. The Human Rights Committee, in its 2020 Statement in the context of the COVID-19 pandemic, implicitly supports the view of the overlapping nature of 'derogation' and 'limitation' when it advises state parties not to *derogate* from ICCPR rights 'when they are able to attain their public health or other public policy objectives' by '*restricting*' rights by introducing 'reasonable *limitations*' on certain rights.[38]

In *Media Rights Agenda*, the Commission seems to adopt this approach, although it does not do so very deliberately and with accompanying substantiation or explanation. In its decision, the Commission immediately moves from stating that the Charter does not contain a 'derogation clause' to the following: 'Therefore *limitations* on the rights and freedoms enshrined in the Charter cannot be justified

35 Heyns (n 7) 161-162.

36 AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17(1) *Law, Democracy & Development* 78-110.

37 See definition of 'restriction' in the Cambridge and Collins English Dictionaries.

38 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2, 30 April 2020, para 2(c) (emphasis added).

by *emergencies* or special circumstances.'[39] Probably, the Commission would have been clearer if it stated that 'restrictions' (understood as covering both 'derogations' and 'limitations') cannot be justified by emergencies. Be that as it may, what is clear is that the Commission devises a single test to assess the justification of both limitations and derogations of rights. According to this test, which is based on article 27(2) of the Charter, to pass Charter muster the measures taken must be 'strictly proportionate with an absolutely necessary for the advantaged for which are to be obtained'.[40]

To Sermet, the Commission hereby introduced derogation as 'a sub-clause implied by the general clause on the restriction of human rights',[41] which can only be justified if it conforms with the principles of necessity and proportionality. To him, this approach is 'logical and legally sound'.[42]

Not all commentators agree. The argument against this approach is that the conflation of 'derogation' and 'limitation' fails to take account of the distinct differences between them.

In Ouguergouz's view, the Commission is wrong for trying to make the limitation clause play the role of a derogation clause.[43] For him, the differences between limitation and derogation are too fundamental, with each of these clauses playing a 'highly specific role':[44] 'imposing the role of a derogation clause' on limitation clauses 'in certain circumstances is to misunderstand their purpose'.[45]

It is undeniable that derogation and limitation were devised for different circumstances. Derogation releases the state from the obligation to observe a particular right, for a particular period, thus 'placing the right in abeyance'.[46] Limitation entails justifiably encroaching on individual rights in the normal application of the law, based on the principles of necessity and proportionality. The major differences lie in the elements of inviolability and temporality.[47] While limitations are applicable equally to all rights, derogations are not allowed in respect of certain categories of 'non-derogable' rights. While limitations are routinised, derogations have a particular temporal validity.

39 *Media Rights Agenda* case (n 27) para 67 (emphasis added).
40 *Media Rights Agenda* case (n 27) para 69.
41 L Sermet 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: a critical discussion' (2007) 7 *African Human Rights Law Journal* 142 at 152.
42 As above.
43 Ouguergouz (n 22) 434 (n 1529).
44 Ouguergouz (n 22) 437.
45 Ouguergouz (n 22) 434.
46 TR Hickman 'Between human rights and the rule of law: indefinite detention and the derogation model of constitutionalism' (2005) 68 *Modern Law Review* 655 at 658.
47 Sermet (n 41) 153.

The drafting history of the 1950 European Convention is of interest here. Up to a late stage of the deliberations, only 'limitations' were provided for. Having accepted that rights may be limited with reference to specific grounds (including public order), the inclusion of derogation clause seemed superfluous. However, it appears that delegates were swayed by the argument that extraordinary cases may arise that would not fall within the scope of the grounds justifying limitation. It would appear that the derogation saw the light of day not as an additional layer of protection of the individual, but as a way of appeasing states, in fact, to leave them more elbowroom.[48]

Derogation based on general principles of international law

A third approach is that the treaty-silence implies that derogation may be allowed – not based on the Charter but on general principles of international law. Here, the premise is that derogation should be permitted, but only if an applicable principle of international law allows it. One such possibility is the principle that no one could be required to perform a duty when it is impossible to do so ('impossibility of performance'). Article 61(1) of the Vienna Convention on the Law of Treaties (VCLT) allows for impossibility as a result of the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'. Ouguergouz shows convincingly that the 'object' here refers to a 'physical object', such as the drying up of a river,[49] and not, for example, to fluctuating political turmoil. Kombo asks whether the related theory of 'force majeur' could justify derogation. Analysing one of the African Court's judgments (*APDF and IHRDA v Mali*), she criticises the Court's superficial engagement with the vexing issue of the derogation from rights.[50] She concludes that the *force majeur* justification can only succeed if the limitation clauses in the Charter could be used to assess such situations. If the no-derogation position holds sway in the Commission's practice, *force majeur* would not be able to justify derogation.[51]

Another possibility basis under international law is a 'fundamental change of circumstances'.[52] Different to the 'impossibility of performance', no material impossibility is required. However, even if this avenue may look more promising as a basis to justify derogation,

48 See Ouguergouz (n 22) 435-436.

49 Ouguerzouz (n 22) 445.

50 BK Kombo 'Silence that speaks volumes: the significance of the African Court's decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389.

51 Kombo (n 50) 401.

52 See Ouguergouz (n 22) 447-468. See also art 62 VCLT.

the criteria are numerous and onerous, and largely correspond with the requirements for derogation under other treaties.[53]

Amending the Charter by adding a derogation clause

A final approach is the introduction into the Charter of a derogation clause through a formal process of legal reform (rather than 'quasi-judicial law-making'). The main problem with this proposal lies in the realm of strategy and tactics. Revision of the Charter requires a simple majority of state parties for the approval of amendments, and subsequently approval of the amendments by each state through its own domestic constitutional procedure.[54] This inevitably opens a door to political deliberations, which may have unpredictable consequences potentially detrimental to the African human rights project.

Twenty years ago, Christof sketched two opposing views on Charter reform. The one is that it should be avoided, because of the dangers it holds;[55] because the Commission's creative and progressive interpretation of the Charter shows that the defects can be remedied through interpretation; and because the 'overwhelming' support that the Charter enjoys may be whittled down.[56] The other view is that reform should be undertaken, so as to improve the 'impact and effectiveness of the system'.[57] To ensure predictability and certainty, the Commission's interpretive gains should ideally be formalised and anchored into treaty provisions. To 'retain its integrity', the Charter should 'say what it means';[58] this form of clarity would then make it easier to popularise the Charter.

When Christof wrote, he emphasised that wide acceptance of 'the idea of human rights' meant that 'more substantial support for significant reforms' could be counted on 'than is traditionally expected'.[59] Regrettably, 20 years later, it is difficult to argue that we live in an 'age of rights' or that human rights still is the 'idea of our time'. Domestic politics are seeped in populist demagoguery, and multilateralism is under constant threat of being eroded. Within Africa,

53 The coexistent obligations of states that are party to both the ICCPR and the African Charter is obviously a topic that needs to be explored in greater depth that can be done in this contribution.

54 Art 68 African Charter.

55 Heyns (n 7) 157: 'To now tamper with the system may create confusion, and provide an opportunity for some of the 'fish' that have already been caught to escape'.

56 At the time, the Charter had been ratified by all AU member states; in 2022, only Morocco is outside the fray.

57 Heyns (n 7) 157.

58 Heyns (n 7) 158.

59 Heyns (n 7) 173-174.

we have witnessed a slide back to illiberal democracies,[60] and recurrent unconstitutional changes of government.[61]

As in 2001, this is a time of AU reform. Institutional reform has been a dominant feature of AU debates and discussions for the last few years. Systemic AU reform received an impetus when the AU Assembly of Heads of States discussed the 'Kagame report' at a retreat and subsequently in 2017 adopted Decision 635,[62] which launched a comprehensive process of far-reaching institutional reform of AU organs and institutions. This reform is aimed at improving the ability of AU organs and institutions to deliver efficiently on their mandates. The aim is to leave no AU organs or institution untouched. The organs and institutions to be reviewed as part of these institutional reforms therefore include judicial and quasi-judicial organs bodies, of which the African Commission is part. In February 2021, the Assembly requested the AU Commission to finalise the remaining reform priorities for consideration by policy organs in early 2022.[63] To this end, the Institutional Reforms Unit, which is tasked with implementing the day-to-day activities to be delivered as part of the ongoing reform process of institutional reform within the AU, has been undertaking study visits to the various AU organs and institutions. Five key transformation challenges to be addressed as part of the review process are identified.[64]

This may not be an optimal time for reforming the African Charter. We are still living in the aftermath of the AU Executive Council's directive to the African Commission to rescind its decision to grant observer status to an African non-governmental organisation, and the Commission's eventual acquiescing to this demand.

60 By one measure (Freedom House annual reports), the number of African countries rated as 'not free' increased from 14 in 2006 and 2008 to 20 in 2021 (J Campbell & N Quinn "What's happening to democracy in Africa' https://www.cfr.org/article/whats-happening-democracy-africa (accessed 7 January 2022)).

61 *Coups d'etat* took place in Sudan (2019), Mali (August 2020 and May 2021), Chad (2021), and Guinea (2021); see P Fabricius 'African coups are making a comeback', 15 October 2021 https://issafrica.org/iss-today/african-coups-are-making-a-comeback (accessed 8 January 2021).

62 Assembly/AU/Dec.635(XXVIII) 28th Ordinary Session of the Assembly of the Union, 30 and 31 January 2017, Addis Ababa.

63 Assembly/AU/Dec.798(XXXIV) 34th Ordinary Session of the Assembly of the Union, 6 and 7 February 2021, Addis Ababa, Ethiopia.

64 'The Imperative to Strengthen our Union: Proposed Recommendations for the Institutional Reform of the African Union' (Annex to Assembly Decision on the Outcome of the Retreat of the Assembly of the African Union on Institutional Reform of the AU). The five areas are: the need for the AU to focus on key priority areas that by nature are continental in scope; operational efficiently and effectively; sustainable financing; institutional realignment for better service delivery; and the need to connect the AU with the African citizenry.

A comparative view

One of Christof's many talents was his ability to lift his gaze. Not allowing himself to get tied down by the weight of the immediate, Christof would try to adopt a contextual and holistic view. Even in his study of the 'African regional system', he soon branched out to place it in a comparative regional perspective.[65]

Of the three well-established regional human rights systems, the African is the only without a derogation clause.[66] Adopting a narrow gaze, one may be convinced that this in itself is a problem. However, if one extends the inquiry to the global level, one observes that only one of the UN human rights treaties, the ICCPR, contains a derogation clause. Two of the core UN human rights treaties mention the issue of 'derogation'. The Convention against Torture (CAT) is explicit that no 'exceptional circumstances whatsoever', including 'a state of war or a threat of war', may ever be 'invoked as a justification of torture'.[67] In other words, CAT identifies a particular right – the right not to be tortured – as not allowing for derogation, in line with the ICCPR, which has already identified that right as non-derogable.[68] The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) clarifies that treaty rights cannot be derogated from by way of private contractual agreements.[69] The remaining human rights treaties, including ILO Conventions, are silent on derogation. This is equally true for treaties predating the European Convention (such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) as for those adopted thereafter (such as the 1953 Convention on the Political Rights of Women and the 1990 Convention on the Rights of the Child).

What explains the discontinuity between the ICCPR and other core UN human rights treaties? Part of the explanation can lie in the extensive scope of the rights in the ICCPR (covering an extensive array of 'civil and political' rights of 'everyone' or 'all persons'), and its wide coverage (as one of the most ratified treaties).[70] In broad terms, the two

65 See C Heyns, D Padilla & L Zwaak 'A schematic comparison of regional human rights systems: an update' (2005) 5 *African Human Rights Law Journal* 308-320; C Heyns, D Padilla & L Zwaak 'A schematic comparison of regional human rights systems: an update' (2006) 3 *Sur-International Journal of Human Rights* 160-169; and Heyns & Killander (n 1).

66 1951 European Convention on Human Rights, art 15 1969 American Convention, art 27; see also the 2004 Arab Charter on Human Rights, art 4 (mirroring the ICCPR).

67 Art 2(2) CAT.

68 Art 4(2) read with art 7 ICCPR.

69 Arts 25(2) & 82 CMW.

70 By 31 December 2021, a total of 173 states have become party to the ICCPR

regional treaties share these features. In other words, the rights enjoyed by specific categories of persons ('women' (under CEDAW), 'children' (under CRC), 'persons with disabilities' (under CRPD) etc) need not be derogated from in relations to the specific category at stake, because they will all already be covered or 'subsumed' under any general (population-wide) derogation. Given its adoption contemporaneous with the ICCPR, the omission of a similar provision from International Covenant on Economic, Social and Cultural Rights (ICESCR) calls for an explanation. It has been suggested that the very nature of socio-economic rights, in so far as they relate to the minimum core content of health, nutrition, housing, and food,[71] makes the notion of derogation unsuited to this Covenant. It has also been suggested that the notion of derogation does not sit well with 'programmatic' rights, as the ICESCR was, initially at least, conceived.

The notion that derogation under a more expansive treaty makes derogation under a more specific treaties unnecessary or redundant is dispelled by the Council of Europe treaties. The European Social Charter, for example, both in its original (1961),[72] and revised (1996) iterations, allows for derogation during 'war' or 'public emergency',[73] alongside general limitations 'prescribed by law' that are 'necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'.[74] The 1977 European Convention on the Legal Status of Migrant Workers allows a state party to 'temporarily derogate' from its obligation to allow family reunification, based on 'receiving

(https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 31 December 2021).

71 See A Müller 'Limitations to and derogations from economic, social and cultural rights' (2009) 9 *Human Rights Law Review* 557 at 598-599.

72 Part V Article 30 – Derogations in time of war or public emergency 1 In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

73 Part V, Article F – Derogations in time of war or public emergency 1 In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

74 1961 Social Charter, art 31; 1996 Revised Social Charter, Part V, art G.

capacity'.[75] Although the 1977 Convention does not explicitly mention the European Convention, it stipulates safeguards quite similar to those in article 15 of the European Convention.

This analysis does not support the often-repeated charge of African exceptionalism, and inference that the African Charter somehow falls short because it has no derogation clause. In any event, all but two African UN member states are party to the ICCPR.[76] According to the UN Treaty Body Collection database, only four African states (Ethiopia, Namibia, Senegal and Togo) have since the outbreak of COVID-19 registered notifications of states of emergency, all of them invoking derogation from articles 12 (freedom of movement) and 21 (peaceful assembly) of the ICCPR, and two of them some other rights.[77] The Human Rights Committee observed that states generally have not complied with their duty of notification.[78] According to the same database, only seven African state parties – less than ten per cent of their total number – have ever made a notification under art 4(3) of the ICCPR. In addition to the four states mentioned earlier, Algeria, Burkina Faso and Sudan have also on at least one occasion done so.[79] The formal requirements under article 4 of the ICCPR are evidently no magic bullet.

75 Art 12(3) European Convention on the Legal Status of Migrant Workers.

76 Thye are: Comoros (which signed ICCPR in 2008) and South Sudan (which, arguably, is bound by Sudan's ratification) (UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 8 January 2022).

77 Ethiopia, notification of 9 June 2020, effective from 8 April 2020 for a duration of five months; additional derogation from art 18 (freedom of religion) and 'visitation rights of accused and convicted persons' (not specifically provided for under the ICCPR); Namibia, notification received 6 July 2020; Senegal, notification received 6 July 2020, state of emergency lifted 30 June 2020; Togo, notification received 17 May 2021, additional derogation from arts 9 (liberty of person) and 18 (freedom of religion).

78 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, UN Doc CCPR/C/128/2, 30 April 2020 (para 1: 'It has been brought to the attention of the Committee, however, that several other States parties have resorted to emergency measures in response to the COVID-19 pandemic in a manner seriously affecting the implementation of their obligations under the Covenant, without formally submitting any notification of derogation from the Covenant.')

79 Algeria (1991 (in response to 'disturbances' that had been 'fomented with a view of preventing the general elections to be held on 27 June 1991 and to challenge the ongoing democratic process'), 1992, 1993, and on 25 February 2011, informed the Secretary-General that the state has lifted the 1993 state of emergency); Burkina Faso (2019, state of emergency in 14 provinces in the country, in response to 'terrorist attacks' that have 'caused an enormous loss of human life, severe injuries to many people, and significant material damage'); and Sudan (state of emergency declared on 30 June 1989, notification received; notifications if renewals, 2001 and 2002; further state of emergency declared 22 February 2019, notification received 8 March 2019). Namibia has once before, in 1999, made a notification: (a 30-days state of emergency in response to 'public emergency threatening the life of the nation and the constitutional order' in the Caprivi region of the country; notification received 14 September 1999 of revocation of the declaration of state of emergency and emergency regulations in the Caprivi region), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 8 January 2022). See also Viljoen (n 23) 334.

Conclusion

Christof had great faith in the regional dimension of international human rights law, generally, and in the African regional system, specifically. He devoted a large part of his academic and professional life to raise awareness, contribute his expertise and explore ways in which people may benefit from being rights holders under the African regional human rights system. The vexing issue of the best legal approach to optimally protecting human rights during situations of conflict, public emergency, disaster and calamity has preoccupied Christof in various professional contexts. His voice is also indelibly part of the African discourse on this issue.

As far as the derogation of rights during periods of instability and threat is concerned, there is a need for the position under the African Charter to be clarified. The Commission has taken a positions on this matter that may appear contradictory and unclear. There is a distinct need for greater normative clarity, preferably not through an incremental process involving the occasional consideration of communications or the unpredictable examination of state reports, but through a normative instrument resulting from an informed, participatory and analytical drafting process. Issues to be considered include: under what circumstances may derogation be acceptable; what are the conditions for legitimate derogation; which Charter rights are non-derogable, with specific reference to social, economic and cultural rights, and peoples' rights; how do assessments of derogation and limitation differ if at all; how do the obligations of state parties to the Charter relate to their (apparently contradictory) obligations under the ICCPR and national law;[80] and how can better compliance with reporting requirements be assured?

In my view, the Commission should build on the second approach discussed above, 'derogation as limitation'. State measures to *restrict* rights, whatever the circumstances, should be assessed for their compatibility with reference to the principle of proportionality: In this balancing exercise, the nature of the right and the extent of its restriction, the purpose of the restriction, the rational link between the restriction of the right and its purpose, and the availability of less restrictive means, should all be accorded their appropriate weigh in the peculiar circumstances.[81] Under circumstances amounting to

80 The domestic law of many African states provide for the formal declaration of states of emergency, and some of them for derogation of rights and for enumerated non-derogable rights, see eg Ali (n 36) 94-97.

81 See also Müller (n 71): 'the principle of proportionality applicable to limitations and derogations alike ensures that, in practice, neither limitations nor derogations permit states to disregard their human rights obligations altogether'.

public emergency, the fact that a right is considered non-derogable in other treaty regimes will be an important factor to consider. So will the purpose of the limitation, which may be to 'preserve the life of the nation'. Adopting an adjusted proportionality test, wrought out of the Charter, and legitimated by both the Commission and the Court, may just be what makes best sense for the African regional human rights system. This suggestion is made, mindful that proportionality analyses have their detractors,[82] and that this approach may not be most suitable for all human rights systems or in all contexts. Dealing with states of emergency though a proportionality lense, in the same way that limitations are considered, would free the African system of the historical baggage that the derogation discourse brings.[83]

Fortunately, the Commission has already set in motion a process to develop this normative clarity. Within the African human rights system, the issue of derogation and states of emergency has largely been viewed through the prism of ongoing and widespread conflict, insecurity and terrorism. Responding to the criticism that it has not paid enough attention to such issues, including the intersection between the Charter and international humanitarian law, the Commission in 2016 resolved that a study on human rights in conflict situations in Africa be conducted, on which to base its strategy intervention.[84] The African Commission also appointed a Focal Point on Human Rights in Conflict Situations in Africa (Focal Point), a position that Commissioner Dersso has been holding since its inception. Like a chameleon, the issue of suspension of rights under dire societal pressures reappears in different guises over time, even if the core considerations remain constant. Over the last two years, the COVID-19 pandemic propelled the suspension of rights during a 'state of emergency' into renewed focus. In August 2020, the African Commission gave two tasks to its Focal Point.[85] On the short-term, it was to report and provide an assessment of emerging practice among African states on the matter. On the slightly longer term, the Focal Pont was asked to 'develop a normative framework in the form of Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring states of emergency or disaster'. In this process, the almost complete overlap between ICCPR and African Charter state parties has to be taken into consideration, to ensure a system of duality that is congruent and consistent.

82 See eg K Möller 'Proportionality: challenging the critics' (2012) 10 *International Journal of Constitutional Law* 709-731.

83 In the sense of 'derogation' being understood as 'the complete elimination of an international obligation' (Müller (n 71) 651).

84 Res 332 on Human Rights in Conflict Situations, ACHPR/Res.332(EXT.OS/XIX)2016, 25 February 2016.

85 Res 447 on upholding human rights during situations of emergency and in other exceptional circumstances, ACHPR/Res. 447 (LXVI) 2020, 7 August 2020.

Drawing on Christof's writing in 2001, the temptation to embark on far-reaching Charter-amending reform should be resisted. These are not the times for reopening the debates of 1981, but rather for consolidating and clarifying the scope of gains already achieved.