

Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa

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Abstract: *This article reviews selected developments in human rights and democratisation in sub-Saharan Africa during 2017. It discusses the presidential elections held in Kenya, Liberia, Angola, Rwanda and Somalia/Somaliland, noting in particular democratic gains in Liberia, Angola and Somalia where elections resulted in changes of government, which brought in new leadership. It further notes the democratic crises in Zimbabwe, where President Mugabe was removed from power through military intervention, and in the Democratic Republic of the Congo, where instability continued due to efforts by incumbent President Kabila to prolong his term of office. It reports on incidents of protests, recurrent internet shutdowns and interference with the freedom of expression and right of access to information in various African countries. The authors identify the cause of the rift between the African Union and the International Criminal Court as the Al-Bashir warrant issued pursuant to a Security Council Resolution, and recommend that the AU should focus on petitioning the Security Council to withdraw its referral, rather than to persist with its current onslaught against the ICC. In this context, they discuss the decision of ICC Pre-Trial Chamber, which clarified that there is no conflict between article 27(2) and article 98 of the ICC Statute in relation to state parties to the Statute or states referred to the ICC by the Security Council. As far as women's rights are concerned, the article traces significant normative and jurisprudential gains, in particular the adoption of the Joint General Comment on ending child marriage, the Guidelines on combating gender-based violence and its consequences, and the decision of the ECOWAS Court of Justice against Nigeria denouncing gender-based discrimination as a violation of the right to dignity and non-discrimination.*

Key words: *human rights; democracy; sub-Saharan Africa; elections; mass atrocities; accountability; women's rights*

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1 Introduction

In this article we review selected developments in human rights and democratisation in sub-Saharan Africa during 2017. The issues discussed cover developments at the global level that are relevant to sub-Saharan Africa as well as developments at the regional, sub-regional and national levels. The themes covered in the article include democracy; protests and internet shutdowns; accountability for mass atrocities; and women's rights. The article provides an analytical commentary on some of the most important developments in human rights and democratisation across sub-Saharan Africa, mainly focusing on normative and jurisprudential developments, although relevant sections contain descriptive overviews of some issues that are worth noting.

2 Democracy

In 2017 elections were scheduled to take place in 23 African countries. These included presidential elections, national and provincial legislative elections as well as local elections. Presidential elections were expected to be organised in Kenya, Rwanda, Liberia, Somalia/Somaliland, the Democratic Republic of the Congo (DRC), Libya and Angola (Electoral Institute for Sustainable Democracy in Africa 2017). Only the DRC and Libya did not hold their presidential elections. National legislative elections were expected to be held in Algeria, Angola, Republic of Congo, the DRC, Equatorial Guinea, Gabon, The Gambia, Kenya, Lesotho, Liberia, Libya and Senegal. The DRC, Gabon and Libya did not organise these elections. Local and provincial elections were scheduled in Algeria, Chad, Equatorial Guinea, Kenya, Madagascar, Mali, Niger, Swaziland, Togo and Tunisia, but only Swaziland and Algeria held these elections. Constitutional referenda scheduled in Sierra Leone and Libya were postponed to 2018.

In the next section we briefly discuss the presidential elections held in Kenya, Liberia, Angola, Rwanda, and Somalia/Somaliland. Both positive and negative developments and democratic lessons are highlighted. This exposition is followed by a brief discussion on democratic crises in the DRC and Zimbabwe.

2.1 National elections

2.1.1 Kenya

Kenya organised its sixth presidential elections on 8 August 2017. Eight candidates, including the main contenders, Raila Odinga of the National Super Alliance (NASA) coalition, and the incumbent President, Uhuru Kenyatta of the Jubilee coalition, contested the elections. However, the elections were marred by a number of incidents of violence, sometimes resulting in ethnic and tribal clashes. According to Carter Centre observers, 'several politicians from both Jubilee and NASA were arrested on hate speech charges' (Carter Centre 2018: 29). The sudden murder of Chris Msando, the head of information, communication and technology at the Independent Electoral and Boundaries Commission (IEBC), nine days before the elections (Freytas-Tamura 2017), brought into question the

commitment of parties to free, fair and transparent elections. Such a commitment was needed to break away from a culture of electoral violence and deaths that have become characteristic of elections in Kenya. Msando played a key role in the establishment of the electoral voting management system in the country (Burke 2017). Other incidents were recorded subsequent to the annulment of the elections by the Supreme Court of Kenya. When the Supreme Court annulled the August 2017 presidential election results and ordered a rerun, verbal attacks by members of political parties toward the Court and the IEBC increased. Uhuru Kenyatta, whose declaration by IEBC as President-elect was annulled by the Court, labelled the majority judges as 'crooks' and threatened to reform the Court. Concerns about transparency during the rerun presidential elections became more apparent when Roselyn Akombe, a commissioner at the IEBC, unexpectedly resigned and fled to the United States of America, blaming her colleagues of partisanship in the decision-making process (Al Jazeera 2017). Supporters of both Odinga and Kenyatta resorted to protests in their strongholds. During some of these protests in Nyanza and Nairobi, for example, clashes between security forces and young protesters resulted in the death of six persons and many injuries (Carter Centre 2018: 30). The Inspector-General of Police acknowledged the death of 19 persons before and during the elections, even though the Independent Medico Legal Unit reported that 36 Kenyans had been killed by police (Cherono 2017).

Despite the violence and controversies that marred the elections, the 2017 Kenya elections will be remembered across the world largely because of the decision of the Supreme Court to annul the first round of elections. This decision marked the first time that a presidential election petition in Africa resulted in the annulment of the election in its entirety (Kaaba 2015). The Supreme Court ordered the rerun of the election within 60 days. In a majority judgment of four to two, the Supreme Court was convinced that the elections had not conformed to the Constitution and relevant electoral laws. It consequently declared the results 'invalid, null and void' (Supreme Court 2017). The Court annulled the elections on the basis that 'irregularities and illegalities ... were so substantial and significant that they affected the integrity of the election' (Supreme Court 2017). These irregularities and illegalities were reported to have occurred during the 'process of electronically transmitting polling station results and tabulation of results at county level tallying centres' (Carter Centre 2018). This process was found not to be 'simple, accurate, verifiable, secure, accountable and transparent', necessitating the annulment of the elections.

This decision marks a departure from the established pervasive culture of judges rubberstamping election results in Kenya, specifically, and Africa, more generally. African judges tend to hold the view that courts must uphold election results in order to ensure political stability (Kaaba 2015: 335). This may be one of the reasons why, until the September 2017 ruling by the Supreme Court of Kenya, no other court in Africa had ventured to annul presidential election results. The then President of the Supreme Court of Ghana made this clear when in 2013 he stated that the Ghanaian judiciary 'does not readily invalidate a public election but often strives in the public interest to sustain it' (Azu 2015: 165) – a 'public interest' that mostly benefits the incumbent or his political party to maintain its grip on power.

What prompted opposition leaders to lodge a petition with the Supreme Court was the fact that the election results sent to the National Tally Centre were not accompanied by the 'scanned copies of polling-station results forms' as required by the Electoral Act. The day after the elections, the Independent Electoral and Boundary Commission (IEBC) published online 30 000 out of 40 833 polling station result forms. When the election results were declared, the IEBC was yet to receive results from 11 883 polling stations and 17 constituency tallying-centres and polling station result forms of 5 015 polling stations (Supreme Court: para 39). Constituency result forms were posted online two days before the expiration of the deadline to challenge presidential results in court. The impatience on the part of the IEBC to obtain and post all the required forms prior to announcing the election results as well as the interruptions in the transmission of election results are said to have jeopardised the transparency of the tallying process and the ability of stakeholders to cross-check results (Carter Centre: 17-18).

The Court in fact did find that the IEBC had not properly conducted the elections and that the irregularities and illegalities were substantive so as to affect the integrity of the elections, and ordered the organisation of fresh elections. The rerun, held on 26 October 2017, was won with a landslide result of 98 per cent in favour of the incumbent Uhuru Kenyatta, due to the boycott by the main opposition leader, Raila Odinga, by alleging that the IEBC had not fully complied with the Court's orders.

The role played by the Kenyan Supreme Court to uphold democracy, the rule of law and constitutionalism reveals the courageous role apex court judges can play in presidential election petitions. While it may be too soon to assess the influence of the Kenyan 2017 Supreme Court ruling on other courts in Africa, one may submit that the fever of this ruling might have been instrumental in the Liberian Supreme Court decision to delay the organisation of the run-off, initially scheduled for 7 November, by a month and a half until it was satisfied that the 2017 presidential elections in Liberia contained no irregularities as contented by complainants (Toweh 2017).

While the decision provides an important precedent and a lesson for other African courts, it remains to be seen whether any African court will ever be bold enough to declare an election in favour of an opposition candidate. The ruling also provides a lesson to electoral observation missions. African Union (AU) and regional economic communities observation missions always applaud elections as having been free and fair and seldom engage in a critical assessment of the period before, during and after elections. The first round Kenyan elections were lauded by almost all electoral observation missions as having been fair (Obulutsa & Njuguna 2017), even though the Court found the irregularities to be so substantial that they affected the integrity of the results.

2.1.2 *Liberia*

The first peaceful alternation of power in Liberia since 1944 occurred in 2017 when President Ellen Sirleaf Johnson handed power over to Georges Weah, the confirmed winner of the 26 December 2017 presidential elections runoff. Sirleaf had served as the country's President for two consecutive constitutional terms of six years each. Liberia is comprised of former African and Caribbean American slaves and their descendants,

known as ‘American Liberians’ that settled in the country in the 1800s, and the indigenous inhabitants. Between 1980 and 2003, Liberia’s political history was marred by military rule, autocratic presidency and civil war. Eventually, in 2005, the country succeeded in holding general elections that marked the dawn of a new democratic dispensation in the country. Ellen Sirleaf Johnson’s two terms in office mainly focused on political stability, security and social cohesion at the expense of the social and economic needs of Liberians. The courage, enthusiasm and stamina of George Weah finally paid off with his victory (61,5 per cent) over the then sitting Vice-President (38,5 per cent). Before his 2017 victory, Weah had unsuccessfully competed in elections as presidential candidate and presidential running mate in 2005 and 2011.

President Sirleaf, the first African female President, will be remembered for her courage to step down as President after two consecutive terms in office on a continent where incumbents are all too often altering presidential term limits to maintain their grip on power (Makunya 2017). Setting this example was crucial in Liberia because of its past and was instrumental in the Mo Ibrahim Institute awarding president Sirleaf the Achievement in African Leadership prize worth US \$5 million.

In spite of these significant gains, it is essential to highlight that Liberia is yet to take meaningful steps to advance the participation of women, the youth and persons with disabilities. For instance, Liberia did not endeavour to ensure, through affirmative action, that 30 per cent of candidates nominated by political parties and coalitions are women as contemplated by sections 4(5)(1)(b) and (c) of the amended 1986 Elections Law. The lower representation of women is also evidenced by the fact that out of 20 presidential candidates, only one was female and six out of 20 running mates were female, while 16 per cent of candidates for legislative elections were female (EISA 2018). In the previous House of Representatives (2011-2017), only nine women were elected compared to 64 men. The paradox of the poor representation by women is remarkable in light of the fact that a female president ruled the country for 12 years.

2.1.3 *Angola*

Angola witnessed its first transfer of presidential power in 2017, when José Eduardo Dos Santos was replaced by Joao Lourenço. Dos Santos had for 38 years been President of Angola. However, the euphoria behind Dos Santos’s decision to stand down and the apparent dawn of a new democratic era in the former Portuguese colony were undermined by the decision of Dos Santos to handpick his successor and to remain president of the ruling dominant party, the People’s Movement for the Liberation of Angola (MPLA). It was easy for the outgoing President to handpick his successor as the MPLA enjoys an absolute majority in parliament (61 per cent of the 220 seats). Also, since the adoption of the 2010 Constitution the head of state is no longer directly elected (Freedom House 2018). Rather, the President is nominated by the party that obtains the most votes in elections without any confirmation process by the elected parliament (Freedom House 2018). This state of affairs until recently had suggested that Dos Santos would continue to influence government decisions. However, current political developments in Angola provide a glimmer of hope that the system is beginning to change. Dos Santos had been forced to stand down as president of the MPLA despite his desire to delay the

process (Pauron 2018). Key leaders of parastatal enterprises, mainly sons and daughters of Dos Santos, cabinet ministers and some government officials have been dismissed by the new President (France 24 2017).

Several issues, particularly with regard to human rights and the independence of the judiciary, need to be addressed by the current President. In 2017 Angola was ranked as 'not free' because of increasing violations of individual rights and freedoms including those of opposition parties, the prevalence of corruption and the absence of an independent justice system (Freedom House 2017). With regard to the judiciary, the Constitutional Court dismissed the 2017 election petition filled by four political parties on the grounds that the alleged irregularities and abnormalities had not been supported by evidence. The opposition parties were seeking a recount of the votes 'on the basis that the National Electoral Commission did not follow procedure when tallying ballots in 15 of the country's 18 provinces' (Mendes 2017). The elections once again produced a 'monolithic parliament' in Angola, thereby diminishing the prospects of having open and democratic debates in parliament.

2.1.4 Rwanda

Rwanda's presidential elections followed its regular pattern of landslide victories for the incumbent Paul Kagame who won 98.63 per cent of the votes (Burke 2017). The AU Electoral Observation Mission to Rwanda reported that although six individuals filed applications with the National Electoral Commission (NEC), only three were confirmed by the NEC to contest the election (African Union 2017a). Diana Rwigara, Fred Sekikubo Barafinda and Gilbert Mwendata were barred by the NEC from running for not having gathered the required number of signatures to support their candidacy and allegedly presenting invalid signatures (Human Rights Watch 2017). Thomas Nahimana, another self-proclaimed candidate, was denied access to Rwandan territory (*The East African* 2016). Ever since her declaration of intent to run for President, Diane Rwigara, along with her mother and sister, were held in custody and tried on charges of incitement to insurrection and forging signatures that were supposed to endorse her candidacy (Jeune Afrique and Agence France-Presse 2017).

The Rwigara trial and the continuous shrinkage of political and democratic spaces in Rwanda put into question the commitment of Paul Kagame, as the new AU Assembly Chairperson, to 'democratic principles, human rights, the rule of law' that he is expected to further in Africa. It also highlights the sharp contrast between Rwanda's commitment to democracy as one of the only 10 state parties to the 2007 African Charter on Democracy, Elections and Governance (African Democracy Charter) and the day-to-day lives of political dissidents. This suggests that Rwanda's ratification of the African Democracy Charter was largely cosmetic, seeking to improve its image on the continent. This may also be evidenced by the amendment of the country's Constitution in 2015, affording a third seven-year term to Paul Kagame (Human Rights Watch 2015). Free speech and political participation are of the utmost importance in the consolidation of democracy and are much needed in the era of political instability and unconstitutional change of government in Africa.

2.1.5 *Somalia/Somaliland*

In the Republic of Somalia, the electoral process that started in 2016 with the elections for the Upper House (Senate) and Lower House (House of the People) culminated in the election of Mohamed Abdullahi Mohamed Farmajo, who was indirectly elected as the President of Somalia for a four-year term by the two Houses of Parliament, in 2017 (EU Election Expert Mission 2017). The elections were supposed to have been held under universal and direct suffrage. However, as argued by EU observers, security concerns, mainly because of the protracted civil war in the country, the lack of an institutional and legislative framework as well as the reluctance of political leaders, did not create an environment conducive to universal suffrage. It is expected that the 2020 general elections will be organised under universal direct suffrage. However, there are no signs that by that time obstacles to universal direct suffrages will have been overcome since Somalia remains plagued by sporadic terrorist attacks. The fact that the government does not control the entire territory of Somalia is an impediment to universal suffrage. EU observers have noted the lack of electoral campaign timelines and 'the general conditions of insecurity, intimidation and limited transportation infrastructure constrained the exercise of freedoms of movement, assembly and expression for delegates and candidates' (EU Election Expert Mission 2017: 3).

Despite these challenges, the 2016-2017 general elections in Somalia were a democratic milestone for a number of reasons. The incumbent President, Hassan Sheikh Mohamud, who was seeking re-election, conceded defeat after a runoff, a move that is yet to be anchored in broader African political culture. Such a concession and the peaceful transfer of power were necessary in Somalia considering that any further political wrangling would have exacerbated the ongoing civil war. The second unique feature of the Somali elections was the nomination of delegates (electoral college) both for presidential elections and the election of members of the House of the People by clan and sub-clan leaders (EU Election Expert Mission 2017: 15). In total, 14 025 delegates were nominated to elect 275 members of the House and 54 senators. This is justified by the fact that parliamentary seats, including political power, are more readily allocated to the four major clans of Somalia and a 'half share for minority clans'. The third most important achievement was the increase in female representation from 14 per cent of seats in 2012 to 24 per cent of seats in 2017, representing a total of 67 women elected to the House of the People and 13 women in the Upper House (EU Election Expert Mission 2017). This in fact is the result of affirmative action policies such as the inclusion of a 30 per cent quota for women in parliamentary elections; the fact that fees for the registration of the candidacy of women were reduced by up to 50 per cent; and the requirement that 16 out of 51 delegates ought to be women (EU Election Expert Mission 2017). While the 30 per cent target was not reached, it is a marked improvement that should be safeguarded and further pursued in subsequent elections. The failure to reach the intended target has been attributed to the fact that the clan leaders who nominate candidates are predominantly male, leaving the participation of women at the mercy of the clan leaders rather than the general population. The absence of a legal mechanism to constrain the government to comply with the 30 per cent quota may be cited as another reason, because of the fact that Somalian

society and customary practices exclude women's participation (Carver 2017).

During the same period, the self-proclaimed independent Republic of Somaliland, an autonomous region of Somalia with no international recognition as a state or government, held its third presidential elections in November 2017 (the first and second elections took place in 2003 and 2010) (Felter 2018). Historically, Somaliland had politically evolved separately from the rest of Somalia. Until 1960, the state of Somaliland was a British Protectorate (British Somaliland). It was, however, merged with the Trust Territory of Somaliland which was under Italian rule during colonisation (Italian Somaliland), to form what was known as the Somali Republic or Federal Republic of Somalia (Adan 2015: 3; Gonnelli 2013: 8-10; Felter 2018). In 1991 Somaliland self-proclaimed its independence. Even though Somaliland is not recognised as a state, the 2017 elections were observed by France, the United Kingdom, the United States and the European Union (EU). Somaliland maintains informal commercial and political relationships with neighbouring Djibouti and Ethiopia.

The 2017 Somaliland presidential elections were a safe seat for the ruling party as the incumbent President Ahmed Mohamed Mahamoud decided not to run for a second term, thereby paving the way for a peaceful alternation of power with a nominee from his party, Muse Bihi Abdi. Two other candidates, Adbirahman Mohamed and Faisal Ali Warabe, contested these elections, but lost to Bihi Abdi. The Republic of Somalia and Somaliland remain examples of respect for presidential term limits, even in the midst of conflict, along with other progressive African countries. War-torn and post-conflict countries, such as the DRC and Burundi, that justify the elongation of presidential terms with the quest of political stability, may learn from their experiences.

2.2 Democratic crises

2.2.1 Zimbabwe

Zimbabwe witnessed a dramatic regression in democracy following what many have described as a military *coup* that compelled President Robert Mugabe to resign. The plotters of the *coup*, which included senior leaders of the army and members of the Zimbabwe African National Union Patriotic Front (Zanu-PF), accused Mugabe of attempting to pave the way for his wife to take over the reign of the country. Mugabe led a kleptocratic, 'despotic, corrupt and dysfunctional' regime for 37 years since the country's independence in 1980 (Ngwena 2017). Many Zimbabweans, therefore, applauded the move of the army with the hope that the new leadership would address 'poverty, inequality and social injustice' (Ngwena 2017). This dream may be regarded as legitimate, given the suffering of many Zimbabweans under the stewardship of Mugabe. Nonetheless, the resignation of Mugabe under the threat of force and the swearing in of Emerson Mnangagwa as acting head of state contravene basic democratic principles that people have to elect their leaders, and that the impeachment of a sitting president needs to follow laid-down constitutional principles.

Both the resignation and the removal from office of the President are stipulated in sections 97 and 98 of the 2013 Zimbabwean Constitution,

which do not contemplate any role to be played by defence forces in these matters. A reading of section 97 suggests that the resignation is a personal unilateral decision taken by the President, while his removal may be decided by half the members of the Senate and National Assembly upon the conviction that the President is guilty of 'serious misconduct'; a 'failure to obey, uphold or defend' the Constitution; its voluntary violation; or an 'inability to perform the functions of the office because of physical or mental capacity' (2013 Zimbabwe Constitution, section 98). No parliamentary or judiciary processes were commenced regarding the fitness of President Mugabe to remain in office. We submit that section 212 of the Zimbabwean Constitution that allows defence forces to uphold the Constitution should be read with sections 97 and 98 as well as the principles that underlie a democratic state to exclude any interference whatsoever by the military in civil politics. The 2017 military intervention in Zimbabwe is a move that should not be tolerated by the AU as it is reminiscent of erstwhile violent overthrows of African presidents, military interference in and control of politics, which might set a negative precedent on the continent.

2.2.2 *Democratic Republic of the Congo*

Joseph Kabila retained his grip on power despite the fact that his second and last presidential term ended in December 2016. Kabila, his ruling coalition and the National Independent Electoral Commission (CENI), backed by a ruling of the Constitutional Court, insist that he should remain in power until such time as the government has mobilised funds to conduct elections and a new President has been sworn-in. On the one hand, pro-democracy groups and the political opposition have suggested that Kabila should have handed over power in December 2016 to the Chairperson of the Senate who, according to the Constitution, should lead the country pending the election of a new President between 60 and 90 days following the vacancy in the office of the President (2006 DRC Constitution, article 76). The political manipulations of Kabila, in spite of the clear constitutional provision, provide credence to suspicions that the failure to conduct elections in the DRC has little to do with the lack of financial resources to hold elections or a matter of inconsistency in the interpretation of presidential tenure. There has been growing suspicion that President Kabila intends seeking an additional term in office. As a consequence, Kabila and his allies have mounted a myriad of strategies that would resort to a *de facto* or *de jure* elongation of his presidential term. These include the organisation of political dialogues, the recruitment of opposition leaders and prominent civil society activists into the government and the appointment of his sympathisers to the CENI and the Constitutional Court (Kibangula 2017; Makunya 2017).

Hope for a peaceful alternation of power was regained at the end of 2016 when the ruling coalition, opposition leaders and civil society agreed to hold presidential, national and provincial legislative elections in December 2017 (Accord Global de la Saint Sylvestre 2016). What was known as the Saint Sylvestre political deal, brokered by Catholic bishops, in addition stipulated that the opposition party, the *Rassemblement*, was entitled to propose to the President a Prime Minister and to chair the national mechanism tasked with following up on the implementation of the Accord. As previously argued, Kabila had no prospect of running for President in such a difficult political and legal environment. Therefore, he

decided to buy more time by offering the coveted position of Prime Minister, cabinet ministers and the Chairperson of the follow-up mechanisms to the *Rassemblement*, in exchange for their political acceptance of the prolongation of his term. Elections subsequently were postponed to December 2018, prompting protests in many parts of the country, mostly led by the Catholic Church.

3 Increasing securitisation: Demonstrations and internet shutdowns

Incidents of protests, recurrent internet shutdowns and interference with the freedom of expression and right of access to information were reported in various African countries including Cameroon, Ethiopia, Tanzania, the DRC and Egypt. In 2017 the north-western and south-western regions (Anglophone regions) of the Republic of Cameroon were regularly subjected to restrictions 'to social media and messaging applications' for more than 150 days combined. The first internet blackout in the Anglophone regions of Cameroon that started in January ended on 20 April 2017. Shutdowns were informed by the fact that the internet was (and continues to be) used as a medium to send pictures and videos related to torture, brutality, extra-judicial killings and numerous other rights violations recurrently perpetrated by state agents in those regions (Dahir 2017). Similar reasons were invoked for the shutdown of the internet in the DRC, Ethiopia and Togo. Human rights groups have argued that 'by its actions and omissions, the government of Cameroon has failed to protect its citizens and as such stands in violation of obligations imposed upon it by the Preamble to the Constitution of Cameroon and provisions of the African Charter' (Centre for Human Rights 2017), and further argued that '[a]ny interference with the freedom of expression should be provided by law, serve a legitimate aim and is such that is necessary and proportionate in a democratic society' (Centre for Human Rights 2017).

These legal arguments remain valid for the situation in Ethiopia where the government interrupted access to the internet on 30 May ahead of the national examinations to prevent examination leaks that had occurred in 2016. The government contended that its action was meant to allow young students to focus on the examinations. Two months before this interruption, an Ethiopian court sentenced Yonatan Tesfaye, spokesperson of the opposition party, the Semayawi Blue Party, to six and a half years' imprisonment on terrorism charges for a Facebook comment in which he called for the destruction of '[the ruling party's] oppressive materials' and declared that it was 'time to make our killers lame' (BBC May 2017). In December, access to Facebook, Twitter and YouTube was denied following protests that resulted in the death of 16 people and injuries in Oromia region (Dahir December 2017).

In the DRC, demonstrations coupled with internet shutdowns increased in 2017 in the main cities of Kinshasa, Lubumbashi, Kananga, Bukavu, Goma, Kisangani and Uvira. Demonstrations were mainly aimed against President Joseph Kabila's continued stay in power after his last constitutional term had expired in December 2016. Over 600 violations of the rights to freedom of peaceful assembly, freedom of movement and freedom of expression were reported to have been committed by the

national police, the intelligence bureau, administrative and political authorities and protesters (Makunya 2017: 31-34; Human Rights Watch 2018a). A commission that inquired into human rights violations committed during the December 2017 (and early January 2018) demonstrations in the DRC notes the killing of 14 people and the detention and torture of 40 Congolese (Ministère des droits humains 2018: 13-15). Violations occurred amid protests aimed at urging President Kabila to step down. Victims mainly were political opponents, members of pro-democracy groups and other civil society organisations as well as the civilian population that took part in different protests. Protesters were also alleged to have attacked, injured or killed police officers and burnt down police stations to retaliate against police brutality and the unlawful or excessive use of force. On the eve of each demonstration, access to internet and short message services was completely restricted to deter people from mobilising countrywide. With such a record of human rights violations, it was astonishing that AU member states confirmed the candidature, and later contributed to the election of the DRC as a member of the Human Rights Council (2017-2020), highlighting the reluctance with which African leaders are willing to censure one of their own, even those in clear breach of democratic rules.

The increasing shrinkage of digital space in countries such as Tanzania, Egypt, Algeria, Togo, Equatorial Guinea and Morocco are evocative of government securitisation measures to protect the interests of political leadership in the name of state security (Appigjeyi-Atua 2017: 328). Tanzania in 2017 proposed the Electronic and Postal Communications Regulation that would require blogs and online forums to be registered. The regulation broadens the definition of 'hate speech' and 'indecent material' with the potential of limiting the right to freedom of expression and access to information provided for by article 18 of the Constitution of Tanzania (CIPESA Policy Brief 2017). This over-securitisation of the country was further evidenced by the arrest of activists who called for protests against an 'authoritarian government' in Tanzania and the statement by the police chief of the Central Dodoma region, who promised that protestors would end up with 'a broken leg and go home as cripples' (ENCA March 2018).

In September 2017, WhatsApp and short message services were blocked in Togo on the eve of protests organised by opposition parties to register their displeasure at a proposed Bill to prolong the presidential term of the incumbent, Fauré Gnassingbé, and calling on him to relinquish power (Dahir December 2017). Fauré had assumed power in 2005 following the death of his father, Gnassingbé Eyadema, who had ruled Togo for 38 years. In Equatorial Guinea the internet was completely shut down during the parliamentary elections on 12 November 2017. Access to Facebook was blocked since the beginning of political campaign in October.

In Egypt, the government sought to implement technology that facilitates the restriction of access to internet, prevent calls made through social media and ban numerous national and foreign websites in April 2017 (Dahir December 2017). All these restrictions in various countries were aimed at circumventing individual rights and uphold the interest of ruling elites.

4 Accountability for mass atrocities

Accountability for mass atrocities remains a thorny issue especially with regard to the contentions between the AU and the International Criminal Court (ICC). Within the framework of the AU, not much progress was recorded in relation to accountability for mass human rights violations during 2017. As at the end of 2017, no African state had ratified the Protocol on Amendments to the African Court of Justice and Human Rights (Malabo Protocol), which seeks the establishment of a three-chamber court: a chamber for international crimes, for the prosecution of the most egregious violations international human rights and humanitarian law; one for the adjudication of human rights violations; and one for inter-state disputes. Notwithstanding the lack of progress within the AU's own mechanisms, the AU continued its campaign of non-cooperation with the ICC. Specifically, the AU Assembly of Heads of State and Government continued to call on member states not to comply with the warrants issued by the ICC against Sudanese President Omar Al-Bashir. The Assembly also expressed its full support for the withdrawal of Burundi, The Gambia and South Africa from the ICC and called on member states to consider implementing the ICC withdrawal strategy (African Union 2017b). This is an unfortunate occurrence, given the Assembly's own recognition of the reluctance of member states to ratify the Malabo Protocol, establishing the criminal chamber. The continued calls for African states to withdraw from the ICC, in the absence of a clear indication of when the criminal chamber of the African Court will come into existence (if ever), is a serious threat to accountability for mass human rights violations on the continent given the accountability gap that will be created should African states withdraw. While there would still be the possibility of setting up *ad hoc* tribunals to prosecute such crimes, *ad hoc* tribunals are financially and technically costly and would clearly be quite wasteful especially in situations where the ICC would have had concurrent jurisdiction had the state not withdrawn.

The AU's position regarding the ICC is confusing given that, despite its calls for African states to withdraw from the ICC, the AU Assembly requested African state parties to the ICC 'in collaboration with the [African Union] Commission to actively participate in the deliberations of the [ICC] Working Group on Amendments to ensure that African proposals are adequately considered and addressed' (African Union 2017b). The Working Group on Amendments was established in 2009 (ICC 2009, para 4) and mandated to consider 'amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be forwarded to the Assembly of States Parties ... for consideration' (ICC 2012). While it is important that appropriate concerns be taken into consideration by the Working Group on Amendments, the AU needs to clarify its position on whether it seeks the complete withdrawal of member states from the ICC or to procure amendments to the ICC Statute. As it now stands, it appears that the AU is using the threat of withdrawal as a means of negotiating for its desired amendments. The current position begs questions about the good faith with which the AU is pressing forward with these proposals for amendments. It is important that the AU, if indeed it wants to press forward with the amendments, restrains itself from continuing its calls for withdrawals or openly supporting African states that withdraw.

Withdrawal would appear to be less beneficial than pressing for amendments. As Gumedde notes, African countries form the majority bloc of ICC state parties, which presents an opportunity 'in partnership with other developing countries and sympathetic industrial countries, to influence international law to become more equitable, fairer and transparent' (Gumedde 2018). It, therefore, is imperative that the AU focuses more on creating alliances than on encouraging the withdrawal of African state parties.

The withdrawal of African states from the ICC seems quite inconsequential in light of the UN Security Council's authorisation to refer situations in non-member states to the ICC. The Security Council can through a referral compel all member states of the UN to cooperate with the ICC in the execution of any processes subsequent to the referral (Wenqui 2006; Akande 2009; Trahan 2013; Tladi 2015; Asaala 2017). Consequently, the withdrawal from the ICC would not necessarily exonerate African states from their obligation to cooperate with the Court when expressly authorised through a Security Council referral. Additionally, since the Al-Bashir warrant, which seems to be the major factor causing the rift between the ICC and the AU, was issued pursuant to a Security Council Resolution, perhaps the more prudent course of action for the AU is to continue petitioning the Security Council to withdraw its referral, rather than to persist with its current onslaught against the ICC.

While The Gambia and South Africa rescinded their withdrawal from the ICC Statute, The Gambia following the change of government and South African subsequent to a High Court ruling that the withdrawal was illegal without prior parliamentary approval¹ (Nyarko 2017), the threat of withdrawals has not completely disappeared. For instance, the ruling African National Congress (ANC) government recently indicated its intention to withdraw from the ICC subject to prior parliamentary approval (Fabricius 2017). Although this was decided under the leadership of President Jacob Zuma, this decision was taken by the ANC governing body and not by President Zuma or his cabinet as such. Consequently, while Jacob Zuma has subsequently resigned paving the way for his then deputy, Cyril Ramaphosa, to ascend to the presidency, it is not clear whether the ANC has discarded its initial plans of withdrawal. However, the departure of Jacob Zuma presents an opportunity for Cyril Ramaphosa to lead the ANC away from the previous policies spearheaded by Zuma. It is imperative that the Ramaphosa-led administration moves away from the Zuma era policies of non-cooperation with the ICC, especially with regard to the ICC's request for the arrest and surrender of President Omar Al-Bashir. South Africa as a regional political and economic powerhouse needs to demonstrate leadership regarding accountability for mass human rights violations and work with the ICC on necessary reforms rather than withdrawing from the ICC Statute, which will effectively make it impossible for South Africa to engage with the ICC towards reforms, if indeed there are genuine concerns for reform.

In a related development, the ICC had the opportunity to pronounce itself on South Africa's failure to arrest President Omar Al-Bashir who

1 *Democratic Alliance v Minister of International Relations and Co-operation & Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

visited South Africa during the 2015 AU Summit, which was held in Johannesburg in June 2015. Omar Al-Bashir had been the subject of two international arrest warrants issued by the ICC in 2009 and 2010 for war crimes, crimes against humanity and genocide, allegedly committed in Darfur between 2003 and 2008, following a 2005 referral of the situation in Darfur by the UN Security Council to the ICC for investigation. The ICC had consequently requested South Africa to arrest Al-Bashir and surrender him to the Court when it became clear that he would be attending the AU Summit in South Africa. In South Africa, a local non-governmental organisation (NGO), the Southern Africa Litigation Centre, petitioned the Pretoria High Court to order the arrest of Al-Bashir. The High Court ordered the state not to allow Al-Bashir's departure from the country until such time as it had ruled on the application. However, contrary to the request of the ICC and the order of the Pretoria High Court, the South African authorities allowed Al-Bashir to leave the country without arresting and surrendering him to the ICC. Both the Pretoria High Court² and the Supreme Court of Appeal³ subsequently held that South Africa had an obligation to arrest and surrender Al-Bashir to the ICC.

Subsequent to these events, Pre-Trial Chamber II 'requested the competent authorities of South Africa to submit their views on the events surrounding Omar Al-Bashir's attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al-Bashir, for the purposes of the Chamber's determination pursuant to article 87(7) of the Statute'.⁴

The issues that were set down for determination by Pre-Trial Chamber II were whether South Africa had breached its obligations under the ICC Statute by its failure to arrest and surrender Al-Bashir to the Court despite having received a request under articles 87 and 89 of the ICC Statute and whether such non-compliance warrants a referral of South Africa to the Assembly of State Parties or the UN Security Council, in terms of article 87(7) of the ICC Statute.

South Africa, among others, submitted:⁵

Omar Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise, the Court was precluded by article 98(1) of the Statute from requesting South Africa to arrest and surrender Omar Al-Bashir and, consequently, South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.

South Africa also submitted that in terms of the Host Agreement it had concluded with the African Union, it had an obligation to respect the immunities of Al-Bashir and further that Security Council Resolution 1593, in the absence of an explicit waiver, could not be interpreted as waiving the immunities of Al-Bashir as a head of state and, consequently, only Sudan could waive his immunities.

2 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* (27740/2015) [2015] ZAGPPHC 402.

3 *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre & Others* (867/15) [2016] ZASCA 17.

4 *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-302 06-07-2017, para 17.

5 *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (n 6) para 32.

The Office of the Prosecutor submitted that, in terms of the relationship between articles 27(2) and 98(1) of the ICC Statute, the Court was not required to seek the consent of a state party for the waiver of immunities of officials in the execution of a request for surrender, since the acceptance of article 27(2) already operates as a waiver of such immunities. In relation to Sudan, which is a not a state party to the Rome Statute, the Prosecutor submitted that the Security Council request that Sudan fully cooperate with the Court placed it in the same position as a state party and, consequently, the immunities of Al-Bashir would be deemed as having been waived in terms of article 27(2). Consequently, third states such as South Africa had no conflicting obligations that would prevent them from complying with a request for arrest and surrender. In terms of immunities under the Host Agreement concluded between South Africa and the AU, the Prosecutor submitted that Resolution 1593 waived any immunities granted by an international agreement and, therefore, the Host Agreement could not purport to grant Al-Bashir immunity.

Pre-Trial Chamber II held that Al-Bashir did not enjoy immunity on the basis of the Host Agreement because the relevant provisions on immunities only applied to members of the AU Commission, the Commission's staff members and other delegates or representatives of inter-governmental organisations. Since Al-Bashir, being head of state of Sudan, did not fall into this category, the Pre-Trial Chamber concluded that he did not enjoy immunity from arrest under the Host Agreement and, consequently, deemed it unnecessary to make any further pronouncement on the treaty-based immunity arguments made by South Africa.

In terms of South Africa's submissions based on customary international law, the Court acknowledged that under customary international law, heads of state enjoy immunity from arrest by other states. However, the Court held that this immunity was waived by virtue of article 27(2) of the Rome Statute. By ratifying the ICC Statute, state parties accept that immunities based on official capacities are irrelevant when it comes to the exercise of the Court's jurisdiction. The Court proceeded to elaborate that the article 27(2) waiver operates both vertically – between the Court and state parties – and horizontally between state parties. Vertically, a state party cannot refuse to cooperate with the Court on the basis of immunities belonging to the state party, including that of its head of state. This would require a state party to arrest and surrender its own head of state upon a request by the Court. In similar terms, the horizontal application of article 27(2) precludes a state party from invoking the immunities of another state party as the basis for non-cooperation with the Court. A state party, therefore, cannot ignore a request to arrest and surrender the head of state of another state party on the basis of immunities claimed by the latter state party. Consequently, as between state parties, since article 27(2) waives immunity on the basis of official capacity, the possibility of state or diplomatic immunity, which would impede the arrest and surrender of an individual as contemplated by article 98(1), does not apply.

The Court further elaborated that non-state parties had no obligation to cooperate with the Court and the waiver of immunity of officials in terms of article 27(2) did not apply. Consequently, the contemplation of article 98(1) only relates to non-state parties. In this regard, the Court may not request a state party to arrest and surrender the head of state of a non-state

party without first procuring the waiver of immunities by the latter state. However, the situation is quite different when it comes to Security Council referrals of non-state parties to the Court. Such a referral places the non-state party in the same position as if it was a state party and, consequently, the article 27(2) waiver applies in equal measure to a non-state party subject to a Security Council referral. Thus, the effect of the Security Council referral of the situation in Darfur to the Court places Sudan in an analogous position with a state party to the Statute, conferring on Sudan the same rights and obligations of a state party for the purposes of the referral. This, according to the Court, meant that Sudan could not claim immunity before the Court and had an obligation to arrest and surrender Al-Bashir; and that Sudan could not claim immunity from prosecution of its head of state from other state parties. Therefore, as a state party to the Statute, South Africa had an obligation to arrest and surrender Al-Bashir to the Court. The Court also clarified that, once the Security Council triggers the Court's jurisdiction by way of a referral, the article 27(2) waiver kicks in as a 'necessary, un-severable' consequence of the referral, without the need for the Security Council to explicitly or implicitly express such waiver in the referral resolution (para 95).

The Court further clarified that article 98 of the Statute did not grant state parties a right to refuse to comply with a request of the Court because article 98 is addressed to the Court and not to state parties. Consequently, while it acknowledges the potential for conflicts between an obligation of a state party to cooperate with the Court and other international obligations relating to immunities, the Statute leaves the duty to the Court and not to state parties to address the issue. It is for the requested state to provide the Court with relevant information so that the Court can make an informed decision on whether or not to proceed with a request. South Africa, therefore, was not entitled to unilaterally apply its understanding of the Statute to refuse to cooperate with the Court regarding the request to arrest and surrender Al-Bashir. Consequently, Pre-Trial Chamber II concluded that South Africa had breached its obligation to arrest and surrender Al-Bashir to the Court. The Court, however, decided not to refer South Africa's non-compliance to the Security Council for two reasons: First, the Court considered that it was significant that South Africa is the first state party that made efforts to seek a final determination from the Court on its obligations to arrest and surrender Al-Bashir. Pre-Trial Chamber II also took into account the fact that the domestic courts of South Africa had already made significant rulings censuring the South African authorities for non-compliance amounting to a breach of both its obligations under the Statute and domestic law. Second, previous referrals to the Security Council in similar cases of non-compliance had not yielded any significant measures being taken by the Security Council and, therefore, referring South Africa to the Security Council was not an effective means of obtaining cooperation (paras 127-138).

The decision of the Court is important for various reasons. First, it is important for clarifying the relationship between article 27(2) and article 98 as the apparent ambiguity or conflict between the two provisions has been a source of confusion for both state parties and commentators. The decision finally clarifies that there is no conflict between the two provisions in relation to state parties to the Statute or states referred to the Court by the Security Council, as in both instances immunities are waived in terms of article 27(2). Second, it is important for clarifying that a

consultation requested by a state party in terms of its obligations pursuant to a request by the Court does not operate as a suspension of the Court's request. This is necessary to prevent state parties from using the consultation process as a delaying tactic in a bid to plan the departure of the subject of the arrest warrant which, as the Office of the Prosecutor argued, was what South Africa in this case did. Third, this ruling highlights the complementary role played by the ICC in relation to local judicial processes. It is significant that the Court recognised that national judicial processes had already censured South Africa for its non-compliance and, therefore, warranted no further action by the Court in terms of referring South Africa to the Security Council. This supports the complementary role played by the Court, which requires it not to intervene unless local judicial institutions are either unable or unwilling to enforce the Statute. Forth, one of the important outcomes of this case is the Court's expression of its seeming frustration with the reluctance by the Security Council to take action against non-compliant states, therefore deeming it unnecessary to refer South Africa to the Security Council. The Security Council needs to take non-compliance by state parties more seriously if states are to take their obligation to cooperate with the Court seriously.

Another important development relating to accountability for massive human rights violations is the establishment of the Special Criminal Court (SCC) in the Central African Republic (CAR). The law establishing the SCC was promulgated in 2015 pursuant to a memorandum of understanding signed between the then transitional government of the CAR and the UN (Human Rights Watch 2018b; Labuda 2018). The SCC is mandated to investigate and prosecute 'grave violations of human rights and international humanitarian law committed on the territory of the Central African Republic since January 1st, 2003, as defined by the Central African criminal code and under international law obligations of the Central African Republic, notably the crimes of genocide, crimes against humanity and war crimes' (Human Rights Watch 2018). The SCC's mandate spans a period of five years, which may be renewed. The SCC enjoys priority over the regular national courts in terms of the selection of cases, but the ICC is given priority where both the SCC and the ICC desire to work on the same case. The various chambers of the SCC are structured in a manner that ensures that there is a power balance between national and international judges (Labuda 2018). After having stagnated for two years, the Court finally gained momentum during 2017 with the appointment of key staff including the appointment of 11 international and national magistrates to serve as prosecutors, investigating judges, judges of the indictment chamber and the registrar of the court (Human Rights Watch 2018). A strategy on witness and victim protection has also been developed (Bussey 2017).

The establishment of the SCC marks an important step towards accountability for massive human rights violations and presents an important avenue for access to redress by victims. This is because while ICC investigations focus on the prosecution of senior officials, the SCC will investigate and prosecute many other grave human rights violations committed during the period (FIDH 2017). The establishment of the SCC also marks the first time a hybrid court will be in operation in a country already subject to an ICC investigation and may highlight an important

innovation, especially if the SCC and the ICC are able to effectively coordinate (Bussey 2017).

5 Women's rights

At the continental level, some progress was recorded in the realisation of women's rights both in terms of normative and jurisprudential developments. Some of the most significant normative developments within the AU include the adoption the Joint General Comment on Ending Child Marriage (Joint General Comment) and the Guidelines on Combating Sexual Violence and its consequences in Africa (Guidelines).

The Joint General Comment marks the first time the two quasi-judicial bodies of the AU have collaborated to provide normative elaboration on an issue of mutual concern to both institutions. It elaborates on the obligations of states in terms of article 6(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and article 21(2) of the African Charter on the Rights and Welfare of the Child (African Children's Charter), both of which stipulate the minimum age of marriage as being 18 years. Regrettably, even though both provisions prohibit child marriage, the prevalence of child marriage in Africa continues to be higher than the global average (Centre for Human Rights 2017), necessitating the need to provide guidance on how to combat this issue. The Joint General Comment describes legislative, institutional and other measures that should be taken by state parties to give effect to the prohibition and to protect the rights of those at risk or affected by child marriage' (Joint General Comment 2017, para 2).

The adoption of the Joint General Comment marks an important milestone of collaboration between the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (Africa Children's Committee). While these two institutions have different mandates, the practical implications of their mandates result in issues of mutual concern, especially regarding the rights of women under the African Women's Protocol, over which the African Commission has supervisory jurisdiction, and the rights of girls under the African Children's Charter, which is supervised by the African Children's Committee. This reality makes it imperative that the two institutions work together to address issues of mutual concern. Not only does such collaboration eliminate unnecessary duplication that could lead to a wastage of scarce resources, but it also enables the sharing of expertise and experience, which will potentially lead to discussions that are more comprehensive, leading to well-informed solutions to common problems. In terms of substance, the Joint General Comment provides an instructive guide to the prevention, protection and support for children at risk and victims of child marriage. If effectively implemented, it has the potential to significantly contribute towards ending child marriage and its attendant consequences.

The Guidelines aim to 'guide and support member states of the African Union in effectively implementing their commitments and obligations to combat sexual violence and its consequences' (Guidelines 2017: 6). The development of the Guidelines was necessitated by the high prevalence of

sexual violence in both conflict and crisis situations and during peacetime. It comprehensively elaborates on the legal framework on sexual violence, the obligations of states towards combating sexual violence, the practical measures that should be taken to prevent sexual violence, to protect and support victims, to investigate and prosecute perpetrators and to provide reparations to victims of sexual violence. Together with the Joint General Comment, the Guidelines provide an important tool towards combating gender-based discrimination in Africa.

In terms of jurisprudence, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) had the opportunity of being the first international court to pronounce itself on the African Women's Protocol in the case of *Dorothy Njemanze & Others v Nigeria*.⁶ The complainants in this case, all citizens of Nigeria, alleged that they had been sexually, physically and verbally assaulted and unlawfully detained on accusations of engaging in prostitution on various occasions between 2011 and 2013. The only evidence that formed the basis for this treatment at the hands of Nigerian security officials was the fact that they were found on the streets at night. Complaints to various state agencies, including the National Human Rights Commission, about the violations they had suffered yielded no results, prompting the complainants to approach the ECCJ. The complainants alleged that the treatment they suffered at the hands of agents of the Nigerian government amounted to gender-based violence contrary to articles 3, 4(2) and 5; gender-based discrimination contrary to articles 2 and 8; cruel, degrading and ill-treatment contrary to articles 3 and 4(1); and a violation of the right to a remedy contrary to articles 5, 8 and 25 of the African Women's Protocol. The complainants also alleged violations of commensurate provisions of the African Charter on Human and Peoples' Rights (African Charter); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Convention on Civil and Political Rights (ICCPR); and the Convention against Torture (CAT).

In response the Nigerian government submitted that the Court had no jurisdiction to entertain the suit on the grounds that the complainants were prostitutes and their actions could not be justified under the African Charter. In this regard, article 6 of the African Charter, which prohibits the deprivation of liberty and security of the person, provides an exception where the conditions have previously been laid down in law. Thus, since prostitution is prohibited by Nigerian law, the arrest and detention of the complainants for prostitution could not be a basis for invoking the jurisdiction of the Court. Consequently, the Nigerian government submitted that the complaint was inadmissible as it would culminate in the Court granting the complainants the right to violate Nigerian law.

Regarding jurisdiction, the Court held that it had jurisdiction in all cases in which complainants allege violations of human rights enshrined in international instruments or community obligations of a member state. The complainants' allegations that their rights to freedom from deprivation of liberty had been violated, therefore, came within the jurisdiction of the Court. On the merits, the Court held that even though the Nigerian government disputed the fact that the complainants were ever arrested, the

6 ECW/CCJ/JUD/08/17.

government had failed to lead any evidence to controvert or disprove the testimony of the complainants. In this regard, while the government submitted that the records of the police station did not bear witness to the complainants' detention, the government had failed to submit the register of detention on the date in question for perusal by the Court. Of particular note is the Court's holding that where a complainant alleges to have been arrested and detained, it usually is difficult for the complainant to have a record of such arrest and detention, since such records would be within the knowledge and in the custody of the arresting officer. Consequently, the Court will presume the alleged arrest and its unlawfulness to be factual unless the government produces credible evidence to rebut the presumption, and a general denial by the government without more will not suffice as a rebuttal. On this basis, the Court accepted the complainants' testimony that they had on various dates been arrested by security officials. However, the Court held that the complainants were unable to prove the allegations of physical violence because, even though one of the complainants alleged that she had gone to the hospital after the abuse and another had purchased medication from a pharmacy subsequent to the abuse, neither submitted any documentation to back up these allegations.

Regarding the verbal abuse of the complainants by the security officials, including by calling them prostitutes, the Court concluded that the government in its defence admitted this claim and even proceeded to submit that the complainants were well-established prostitutes. Consequently, there was no need for the complainants to provide any further proof that agents of the government had verbally abused and degraded them. The Court then turned its attention to examining whether any evidence had been led by the government to warrant the branding of the complainants as prostitutes. The only submission made by the government in this regard was that the complainants were found on the streets at night. Since there is no law prohibiting women from staying outside at night, the Court concluded that the government could not simply consider the complainants to be prostitutes for merely staying out late, without any further evidence. On the import of government agents calling the complainants prostitutes, the Court held that it was 'humiliating, derogatory and degrading' for government agents to call the complainants prostitutes without any justification (*Dorothy Njemanze & Others v Nigeria* 2017: 37). The Court further held that the nature of the sting operation purportedly conducted to combat prostitution was inherently discriminatory as only women found on the streets at night were arrested, while similar treatment was not meted out to men found on the streets at night. On these bases, the Court held that the treatment meted out to the complainants by the government agents and the failure or refusal by the government to investigate the alleged violations and bring the perpetrators to justice amounted to violations of the complainants' rights not to be subjected to arbitrary arrest and to degrading treatment; not to be discriminated against; and to have access to a remedy, contrary to articles 2, 3, 4(1) and (2), 5, 8 and 25 of the African Women's Protocol and commensurate provisions of the African Charter, CAT, CEDAW and ICCPR. The Court awarded the first, third and fourth complainants monetary compensation in the sum of 6 million Naira each.

The findings of the Court are significant not only for being the first pronouncement of an international court on the African Women's

Protocol, but also for upholding the obligation of states to adopt legislation, policies and practical measures to prevent gender-based discrimination. The judgment could also have positive implications for commercial sex workers, especially those who work at night. While the Court did not directly pronounce itself on the (il)legality of sex work, it is important that it came to the conclusion that women commit no crime by being on the streets at night and, therefore, cannot be subjected to arbitrary arrest merely on that basis. The Court's denunciation of gender stereotyping of women found on the streets at night as prostitutes (as being against their dignity) may also help in the fight against such stereotypes, even though it unfortunately could have the counter-effect of perpetuating the stigma usually attached to sex work. The findings of the Court further exemplify the difficulty of providing proof of the crime of prostitution without invading the right to privacy of the accused and, therefore, may provide a further opportunity for challenging the criminalisation of prostitution as a violation of the right to privacy (Reprohealthlaw 2017).

Another important judicial pronouncement on women's rights was made by the Pretoria High Court in the case of *Rahube v Rahube & Others*.⁷ This case involved a 68 year-old woman, Mary Rahube, who was facing eviction by her brother, Hendrine Rahube, from the house she had lived in and maintained for over 32 years. Mary and her extended family had moved into the property in Mabopane around 1970 when they were removed by the apartheid government from the area known as Lady Selbourne. In all, eight people occupied the property at the time, including Mary, her grandmother, her uncle, her three brothers and two children. While the occupants of the property varied over the years, she and her immediate family had exclusively occupied the property since 2000. When the family moved into the property around 1970, apartheid laws at the time prevented black people from having title to landed property and, therefore, the family was issued with a certificate of occupation in the name of her brother, Hendrine, as only an adult male could hold occupational rights in property. Hendrine moved out of the property in 1990 and since then had not resided there nor contributed to the maintenance of the property. It was not until 2009 when Hendrine commenced eviction proceedings against her that Mary discovered that her brother had been granted a deed of grant in 1988 under Proclamation R293 of 1962 in accordance with the Native Administration Act of 1927 (subsequently renamed the Black Administration Act) by the erstwhile Republic of Bophuthatswana.

The enactment of the Upgrading of Land Tenure Rights Act (ULTRA) in 1991, section 2(1) of which automatically converted deeds of grant relating to certain properties, including the property in dispute in this case, into ownership rights, meant that Hendrine became the legal owner of the property, although he no longer lived there. Mary applied to the High Court to declare section 2(1) of ULTRA unconstitutional as it indirectly discriminated against women in the manner in which it automatically converted deeds of grant (held only by men because of gender discriminatory laws under apartheid) into ownership rights without notice to the occupiers of the property, who may also wish to

7 101250/2015 [2017] ZAGPPHC 651.

claim ownership. The Court held that although ULTRA was well-intentioned to provide ownership rights to previously-prohibited groups, section 2(1) indirectly discriminates against women and 'it perpetuates the exclusion of women, such as the applicant, from the rights of ownership in so far as it provided for automatic conversion and failed to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination be made' (para 51). According to the Court, this was contrary to the right to equality and right to access courts guaranteed in sections 9 and 34 of the 1996 Constitution of South Africa respectively and, therefore, unconstitutional. The order of constitutional invalidity was suspended for 18 months to allow parliament to make the necessary amendments to ULTRA to bring it in conformity with the Constitution. Hendrine was also enjoined from selling the property until parliament had passed the necessary amendments to ULTRA. The Court further ruled that persons in similar positions could commence similar proceedings in court until parliament has enacted the necessary amendments.

This case is important not only because it provided relief to Mary who was facing imminent eviction from the property she had lived in and maintained for many decades and other women similarly placed who may rely on this precedent to mount legal action, but also because it recognises the gendered impacts that even well-intentioned legislation such as ULTRA can have due to the discriminatory historical past of apartheid, which was both pervasively racist and sexist, and the need for legislation in democratic South Africa to not rubber stamp nor condone these. This case comes at an opportune time when there is much talk about land reform and the possible amendment of section 25 of the Constitution to allow for expropriation without compensation in some instances, as a means of redressing the injustices of apartheid. It is, therefore, imperative that while the land reform initiatives should address racial injustices of the past, such initiatives should be fully aware of the gendered context of land ownership under apartheid in order to ensure that women's access to land is duly protected (Kariseb & Muhumuza).

6 Conclusion

The year 2017 recorded modest gains in human rights and democratisation even though the threat of powerful leaders holding onto power, either through constitutional or electoral manipulation, and the danger of democratic backsliding remains. Democratic gains were made in Liberia, Angola and Somalia where elections resulted in changes of government, bringing in new leadership, evidencing the potential for democratic consolidation in these countries. While the elections in Kenya did not result in a change of government and generally were marred by violence, the decision of the Supreme Court to nullify the election of a sitting president brought hope that independent judiciaries can play and have played an important role in the democratic consolidation of Africa. In other jurisdictions, such as the DRC and Togo, political elites seem bent on holding onto power regardless of the consequences.

Many states continued to use internet shutdowns and over-securitisation to quell protests. These have a significant impact on various

human rights and require the urgent attention of human rights groups and other relevant stakeholders.

With regard to accountability for mass atrocities, the AU's campaign for withdrawal from the ICC continued even though African states have generally shown reluctance to subject themselves to the AU's proposed International Crimes Chamber of the African Court of Justice and Human Rights. More than three years after its adoption, no African state has ratified the Malabo Protocol. The campaign for withdrawal from the ICC seems rather futile in light of the powers of the Security Council to refer situations in non-member states to the ICC and the recent ruling of Pre-Trial Chamber II that such referral imposes the same obligations on the referred state to cooperate with the ICC in the manner that state parties are required to. On a positive note, the Special Criminal Court of the Central African Republic finally started to gain momentum with the appointment of key officers of the Court, which has since 2003 been mandated to prosecute violations of human rights and international humanitarian law.

As far as women's rights are concerned, significant normative and jurisprudential gains were recorded, including the adoption of the Joint General Comment on ending child marriage, which marked the first time the African Commission and African Children's Committee have worked together to provide normative elaboration on a problem of mutual concern. The Joint General Comment provides instructive guides on the legislative, policy and practical measures that state parties to the African Women's Protocol and African Children's Charter need to take towards ending child marriage. In a similar vein, the African Commission adopted Guidelines on combating gender-based violence and its consequences, which elaborates on the measures that African states need to take to prevent, investigate and prosecute incidences, protect those at risk of and provide reparations to victims of sexual violence. These normative developments, combined with the decision of the ECCJ against Nigeria denouncing gender-based discrimination as a violation of the right to dignity and non-discrimination, provide important tools towards combating gender-based discrimination in Africa. In another important judicial decision concerning women's rights, the Pretoria High Court decision in *Rahube* highlights the gendered nature of property rights in South Africa and should put policy makers on notice that the recent land reform efforts should not only focus on past racial injustices, but should also be fully cognisant of the disadvantaged position of women concerning land ownership due to historically sexist legislation coupled with certain customary practices.

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