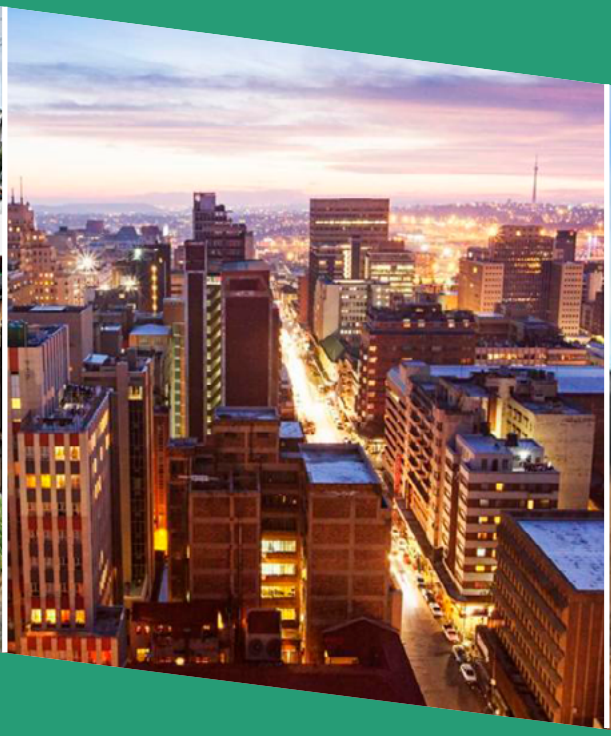

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ENSURING **RIGHTS** MAKE REAL **CHANGE**

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Contents

Editorial

Welcome to the third issue of the ESR Review in 2018, where the spotlight falls on issues linked to the right to health: restricted access to abortion services in Uganda, poor prison conditions in Mozambique, and a constitutional court case limiting that right's scope of application.

The first feature, by Lucía Berro Pizzarossa, deals with the Universal Periodic Review (UPR). This is a process which by nature aims to be 'non-confrontational' and 'non-politicised', and is thus an ideal opportunity to assess states' compliance with their international obligations on the right to sexual and reproductive health – specifically, the right to access abortion services.

Pizzarossa examines the UPR recommendations concerning abortion. These have increased significantly in number, which points to the growing visibility and importance of abortion issues. In particular, the call for decriminalisation requires that states review the criminal consequences women face when seeking abortions. Pizzarossa argues that a state's acceptance of the UPR recommendations is a clear expression of its commitment to supporting and engaging with UN monitoring mechanisms in advancing these rights.

In our second feature, Bright Sefah assesses the right to health of prisoners in Mozambique and delves into factors contributing to their deplorable living conditions. He maintains that although an incarcerated person's liberty has been taken away by virtue of serving a sentence, this person does not lose the entirety of his or her human rights and must continue to enjoy certain basic entitlements.

In a case-review article, Robert Doya Nanima critiques the way in which courts in Uganda use the so-called 'political question doctrine' when making rulings on what the highest attainable standard of health is in the country. The centrepiece of his analysis is *Centre for Health Human Rights & Development & 3 Others v Attorney General*. In this case, the Constitutional Court uses the political question doctrine to strike down an application testing the constitutionality of various aspects of the right to health.

In the events section, we report on a roundtable discussion on Human rights and Governance Implications of the Water Crisis in the City of Cape Town, held 6 March 2018, and a side event hosted as a Panel Session at the African Commission on Human and Peoples' Rights on the Social Security as a Human Right Imperative (30 April 2018).

We thank our guest contributors, and hope you enjoy this issue.

Gladys Mirugi-Mukundi

Co-editor

The UPR is an ideal opportunity to assess states' compliance with their international SHR obligations

FEATURE

Peer-Reviewing Abortion Laws: Lessons from the Universal Periodic Review

Lucía Berro Pizzarossa

In May 2018 the Universal Periodic Review (UPR) held its 30th Working Group session. More than 50,000 recommendations have been made since the UPR was established in 2006 by the General Assembly. This 'unique' process involves a periodic review of the human rights records of all 193 member states of the United Nations (UN). The mechanism is, by nature and by structure, a state-driven process, and is meant to be 'objective, transparent, non-selective, constructive, non-confrontational and non-politicised'.

The UPR assesses the extent to which states respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) the human rights treaties that the state concerned has ratified; (4) voluntary pledges and commitments made by the state (for example, national human rights policies and/or programmes implemented); and (5) applicable international humanitarian law. The UPR is also significant for the scope and content of its reporting procedure, given that all countries, and not merely those that affirmatively ratify a particular treaty, are required to report on their human rights obligations.

The UPR process envisages three different outcome documents: (1) recommendations made to the 'state under review' by the reviewing states; (2) the state's response to each recommendation; and (3) any voluntary pledges the state wishes to make. Document number 2 – which requires states to express their views about the recommendations either by 'accepting' or 'noting' them – adds an extra layer of commitment by the state and enhances accountability. The acceptance of UPR recommendations is, in other words, a clear expression of a state's political commitment to, and active engagement with, the UN monitoring mechanisms in the advancement of human rights.

Human rights standards and legal barriers to abortion services

The evidence is overwhelming that restrictive abortion laws are associated with a high incidence of unsafe abortions and negative health consequences (Ashford, Sedgh & Singh 2012). Abortions in restrictive legal settings contribute significantly to maternal mortality rates and preventable deaths worldwide.

Liberalising abortion laws is thus a human rights imperative, and the UPR can play a crucial role in this regard. There are important human rights obligations that necessitate legal reform around abortion; the scope and content of these obligations have been evolving rapidly and ought to be an integral component of the UPR. In their peer-led assessment,

states should be guided not only by international human rights instruments but the work done by UN treaty monitoring bodies. The very nature of the UPR process as one that aims to be 'non-confrontational' and 'non-politicised' makes it an ideal opportunity to assess states' compliance with their international obligations related to the right to sexual and reproductive health, specifically the right to access abortion services.

This section briefly outlines the standards against which states are measured. To begin with, the UN human rights system has repeatedly confirmed that sexual and reproductive rights are human rights, having first enshrined them under the right to health in the International Covenant on Economic, Social, and Cultural Rights. Thereafter, the International Conference on Population and Development (ICPD) (Cairo 1994) shifted the discourse on these rights from an emphasis on reproductive control as a strategy to meet demographic targets and control population growth to a more comprehensive and positive approach to sexuality and reproduction. The ICPD forged a link between sexuality and health as human rights, stressing that women's agency over their own bodies and sexuality is an inherent part of their sexual and reproductive health (SRH) rights. The Beijing Platform for Action then expanded the ICPD definition to cover both sexuality and reproduction, doing so by upholding the right to exercise control over and make decisions about one's sexuality.

Among their many achievements, these documents recognised the duty of governments to legislate on the matter and thereby translate international commitments into national laws and policies. In March 2016, the Committee of Economic, Social, and Cultural Rights adopted General Comment 22 (GC 22) with the aim of assisting state parties in implementing their international obligations in regard to SRH. Among other things, GC 22 affirms that states have an obligation to adopt 'appropriate legislative' measures to achieve the full realisation of SRH.

The Comment affirms that the right to SRH is an integral part of the right to health, which has enjoyed longstanding recognition based on already existing international human rights instruments. In addition, GC 22 recognises abortion services as a component of the right to health (sections 56-57) and notes that states have an obligation to repeal or eliminate laws, policies and practices that criminalise, obstruct or undermine an individual or group's access to health facilities, services, goods and information, including abortion (section 35).

The obligation to undertake legal reform on abortion is twofold. On the one hand, GC 22 affirms that states are under an 'immediate obligation' to eliminate discrimination against individuals and groups and guarantee their equal right to SRH. The GC explains that the realisation of women's rights and gender equality requires states to repeal or reform any discriminatory laws, policies, and practices in this area – for instance, laws that criminalise or restrict abortion must be repealed. On the other hand, states are required to refrain from enacting laws and policies that create barriers in access to sexual and reproductive services. GC 22 explicitly addresses the duty to remove all barriers interfering with women's access to reproductive health services.

Abortion in the UPR: What the numbers show

This article investigates UPR recommendations on the topic of abortion. As part of this, in December 2017 and February 2018 the author searched the UPR Info database of recommendations (accessible at https://www.upr-info.org/database) for the keywords 'abortion' and 'termination of pregnancy'.

As at 8 February 2018, the UPR Info database showed 140 recommendations and one voluntary pledge making specific reference to 'abortion'. Of these 140, 99 were 'noted' by the states under review and 41 were 'accepted'. Moreover, there were five recommendations on 'termination of pregnancy'. A total of 45 countries worldwide received recommendations related to abortion. Ireland and Nicaragua received the most: 19 and 24, respectively. Twenty-nine countries made recommendations. Andorra made a voluntary pledge during the UPR in which it committed, in the 'medium term', to examine the necessary legislative amendments to its restrictive abortion law.

The recommendations on abortion showed a significant increase, which highlights the growing visibility and importance of the topic. In the first

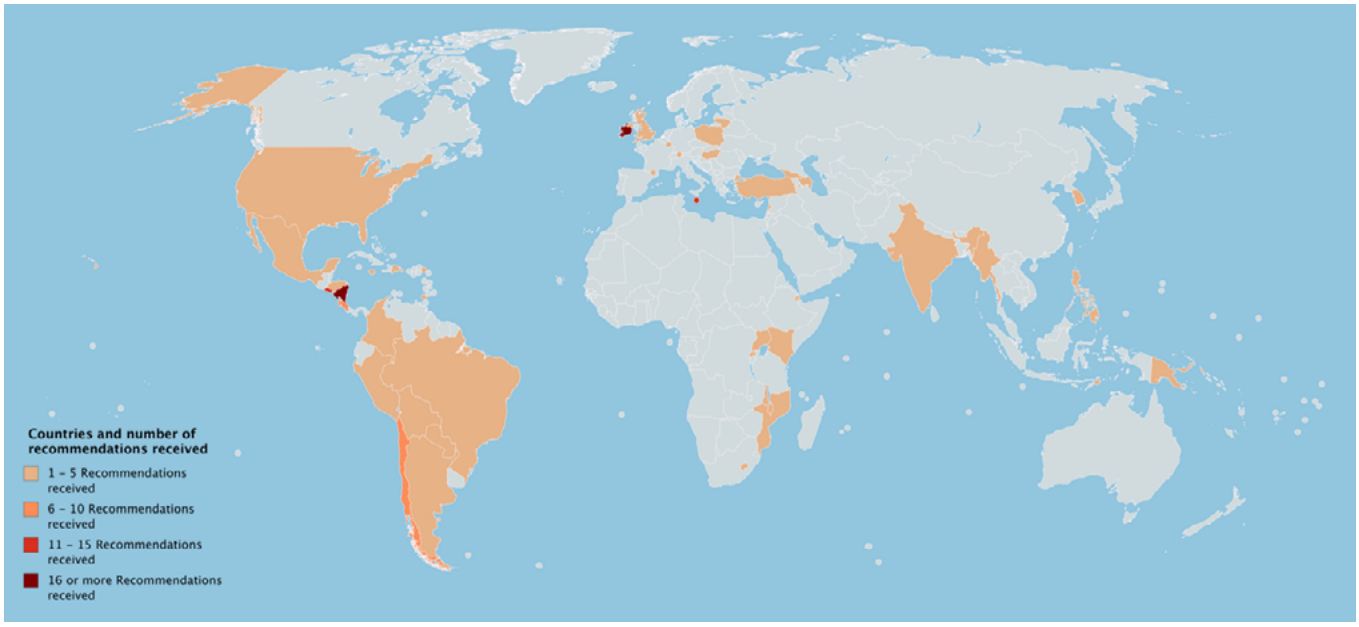

Figure 1: Countries that received recommendations on abortion and the number of recommendations received

cycle (2008-2011) there were 30 recommendations on abortion; in the second cycle (2012-2016), there were 115 – almost four times the number registered for the first cycle.

Of the 145 recommendations on abortion, 100 were 'noted' and 45, 'accepted' – that is to say, 31 per cent of the recommendations were accepted. This data requires further analysis, however, because the classification 'noted' or 'accepted' has room for improvement. The database indicates that when a recommendation is accepted partially or 'in principle', it is classified as 'noted'.

All of the recommendations made to the states under review on the topic of abortion urge that procedures for accessing abortion services should be liberalised; conversely, there are no recommendation to further criminalise or restrict access to these services. The recommendations thus send a coherent message which is consistent with the international human rights norms described above.

In broad terms, the recommendations require states (1) to decriminalise abortion, or at least in cases where the pregnancy involves a risk to the life or health of the pregnant women, the pregnancy is the result of rape or incest, or the foetus is non-viable; (2) to remove barriers to accessing abortion services – legal barriers, but so too barriers in terms of education, training of medical personnel, and so on; and (3) to free women who have been criminalised for seeking abortion services and to expunge their criminal records.

One hundred and twenty-eight out of 145 recommendations ask states to undertake legal reform in order to liberalise access to abortion. For example, it was recommended that Andorra '[a]mend legislation in order to decriminalize abortion under certain circumstances, such as pregnancies that are the result of rape' (UPR, Second Cycle, Session 9). Chile was asked to '[r]epeal all laws criminalizing women and girls for abortion and take all necessary measures to ensure safe and legal abortion in cases of rape or incest and in cases of serious danger for the health'; in addition, it was encouraged to '[m]ake further efforts to ensure that the abortion laws are brought in line with Chile's human rights obligations' (UPR, Second Cycle, Session 18).

Out of the 128 recommendations that require legal reform, 30 specifically urge states to decriminalise abortion. For instance, it was recommended that El Salvador '[m]ake the necessary constitutional and legislative amendments in order to decriminalize and remove the ban on abortion' (UPR, Second Cycle, Session 20).

Various recommendations ask states to bring their legislation on abortion in line with international human rights norms. For example, it was recommended that El Salvador and Ireland, respectively, '[a]dopt legislation on abortion that is in line with its international human rights obligations' (UPR, Second Cycle, Session 20) and '[c]onsider revising its relevant legislation on

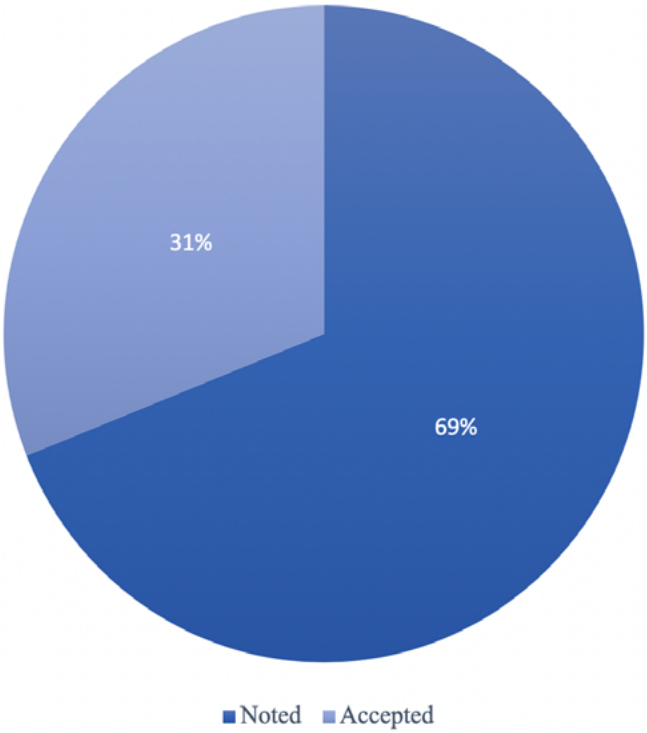

Figure 2: Percentage of 'noted' and 'accepted' recommendations

abortion in line with international human rights standards on sexual and reproductive health and rights' (UPR, Second Cycle, Session 25).

This highlights the conviction among recommending states that an essential part of a state's international human rights obligations is the duty to liberalise abortion and guarantee its access. What makes the trend especially relevant is that it is based on the states' own direct interpretation of human rights obligations.

As mentioned, it has been recommended that countries 'review', 'revise' or 'amend' laws to guarantee women's right to access abortion services, at least 'in cases when pregnancies are due to rape or incest, or when it is established that the foetus is not viable, or when the life or the health of the mothers is at risk' (UPR, Paraguay, Second Cycle, Session 24). In recommendations to Argentina and Ireland, the recommending states explicitly recognise a 'right to abortion' (UPR, Ireland, Second Cycle, Session 25 and UPR, Argentina, Second Cycle, Session 14).

The call for the decriminalisation of abortion requires that states review the criminal consequences women face when they seek abortions. For instance, the recommendations urge El Salvador to '[f]ree all women and girls incarcerated for having undergone an abortion, or for having endured one spontaneously, and also remove their criminal records for these motives' (UPR, El Salvador, Second Cycle, Session 20).

Recommendations are usually specific enough to allow for follow-up. States have been clear on the obligation to decriminalise and give states under review clear guidelines on the type of amendments that are needed. For example, it was recommended that Bolivia 'eliminate the requirement for prior judicial authorisation for abortion' (UPR, Bolivia, Second Cycle, Session 20).

Conclusion

The UPR recommendations build on international human rights norms and the pivotal work UN monitoring mechanisms and bodies have done in contributing slowly but steadily to defining the scope and content of the states' obligations regarding SRH, including abortion (Gilmore et al. 2015). The recommendations refer explicitly to decisions adopted by UN monitoring bodies, to recommendations made by the CEDAW committee, and even to domestic judgements seeking to unpack the right to abortion and the obligation to undertake legal reform efforts in order to guarantee it.

Although only one-third of the recommendations were 'accepted' by the states under review, a clear trend is evident: all recommending states – together with some of the states under review – agree that the international human rights norms call for liberalised abortion. By the same token, no state has issued any recommendation calling for further criminalisation of abortion or restriction of access to it.

States have demonstrated their engagement in the review process both as reviewers and reviewees, showing considerable willingness to accept human rights and this new, sometimes challenging, peer review process. Accountability is one of the foundational principles of the UPR. Furthermore, the recommendations on abortion seem to break the pattern – criticised in the literature – of being formulated so

vaguely that any follow-up process is extremely difficult (Abebe 2009). Generally speaking, these recommendations make a clear case for law reform and specify the type of legislation required.

The UPR results, and the strong political support states have given to the UPR process, show that this mechanism should not be underestimated as an important forum to monitor and interpret international law. First, the recommendations themselves – regardless of their acceptance or not by the state under review – reflect goals which the international community wishes states to strive for. Secondly, the dialogue required by the UPR presents a crucial opportunity for states to share best practices. It has been noted that 'sharing good practices among peers, as well as offering constructive technical assistance and other forms of capacity building, are cornerstones of the process' (Smith 2013).

The UPR relies on cooperation rather than confrontation. This is particularly relevant in the case of sexual and reproductive rights, which require concerted efforts to guarantee their enjoyment. For instance, the recommendations touch upon issues that can be addressed only via international cooperation, such as the right to abortion in cases of rape in cross-border conflicts, and through international funding assistance to provide abortion services.

Thirdly, the UPR's review of human rights compliance is universal. That is, it aims to monitor states' compliance with international human rights obligation emanating from different sources – from treaties to voluntary pledges – which has not been the case for the treaty bodies. As the right to access abortion is interwoven with many other rights, namely the right to health, bodily autonomy and non-discrimination, the UPR mechanism clearly provides added value in addressing a multidimensional issue.

Fourth, the impact of the recommendations goes beyond the specific state under review: they are an opportunity for states to develop a state-driven process of interpretation of the provisions of treaties. Since the ICPD, the UN has developed a large body of knowledge on the interpretation and scope of the obligation to guarantee the right to abortion, the effects of which come into focus upon consideration of the countries that have explicitly cited international treaties or TMB decisions when changing their abortion laws. By making recommendations and either accepting or noting them, states are contributing directly to the clarification, delimitation, interpretation and continuing development of human rights standards.

Lucía Berro Pizzarossa is a Fellow at the Global Health Law Groningen Research Centre and a PhD candidate at the International Law Department at the University of Groningen in the Netherlands. She works as a legal advisor for MYSU (Women & Health), where she coordinates a strategic litigation project focused on sexual and reproductive health rights.

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FEATURE

Forgotten or Embraced? A Critical Look at the Right to Health of Prisoners in Mozambique

Sefah Bright

Governments usually have a strong concern in the health of their country's citizens irrespective of age, gender, economic status, and so on. However, the same cannot be said of prisoners. They may be confined for years in overcrowded and 'dirty quarters with insufficient food allocations, unhygienic conditions as well as no clothing and lack of other amenities' (Sarkin 2008).

It is no different in the case of prisoners in Mozambique, who are often forgotten when it comes to the provision of health care and recognition of the right to health (Lorizzo 2012). Y et the fact that their liberties are restricted obligates the government all the more to ensure their enjoyment of that right.

This article investigates the causes of the deplorable situation in Mozambican prisons and the reasons why access to health has been neglected, and goes on to make recommendations for improvement.

The right to health

Article 10 of the International Convention on Civil and Political Rights (ICCPR) entreats states to provide equal health treatment and respect for persons with legally restricted liberties and to ensure their enjoyment of rights set out in international law. Furthermore, article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment, while article 10 calls for better treatment of prisoners and respect for their human dignity. This is reiterated in article 10 of the Universal Declaration of Human Rights (UDHR); article 25(1) of the same calls for adequate and healthy living standards, including food and medical care, for prisoners.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also provides for the rights mentioned above. In addition, article 12(1)-(2) recognises the maximum standard of mental and physical health attainable for all citizens. It calls for steps to improve environmental hygiene and prevent, control and treat endemic and epidemic diseases through access to medical services for citizens.

The General Assembly's Resolution 45/111 on the Basic Principles for the Treatment of Prisoners calls for respect of prisoners' dignity and their enjoyment of all rights set out in the International Bill of Rights as well as other treaties and protocols, excluding restrictions necessitated by their incarceration. Article 9 of the Basic Principles for

the Treatment of Prisoners seeks to give prisoners equality of health care with other citizens, stating that the detainment of prisoners should not be a reason for the inaccessibility of available health services.

In its preamble, the 2004 Constitution of Mozambique recalls that the aim of the country's independence is to realise citizens' fundamental rights. The Constitution reiterates the importance of fundamental human rights, stating in article 43 that they shall be interpreted and incorporated in accordance with the UDHR and African Charter. Article 89 of the Constitution obligates the state to promote and protect public health, and grants citizens the right to access the best medical and health care as the law provides. Citizens shall also benefit from the National Health System of Mozambique, which is accessible free of charge in terms of article 116. Furthermore, article 40(1) prohibits torture or cruel and inhuman treatment of any citizen.

Conditions in Mozambique's prison system

The prison apparatus in Mozambique was renamed the National Penitentiary Service (SERNAP) as part of a shift from a retributive to a restorative system of justice. Mozambique currently has about 184 places of detention, six of which are located in Maputo (Institute for Criminal and Policy Research 2015). Eighty-one of these facilities are under the aegis of the Ministry of Justice, with the Ministry of Interior taking care of the rest of them. The 184 facilities have an official capacity of 8,188 inmates, but the *World Prison Brief* estimates that they house 15,976 of them – in other words, an excess of 195 per cent, with 3.9 per cent of inmates being female and 0.9 per cent, foreigners (Institute for Criminal and Policy Research 2015).

In the study that informed this article, the methodology which was used to assess prison conditions included visits to the headquarters of SERNAP, Central Hospital in Maputo, and the Human Rights Commission, as well as interviews with a range of role-players. Among them were released prisoners, officials of the Ministry of Health, prison officials, civil society organisations, and representatives of the National AIDS Council and National Human Rights Commission. The interviews were conducted in April 2016 and the transcripts are available from the author.

1. Prison facilities

Article 12(2b) of the ICESCR provides for improvement in the environment of citizens regardless of their legal situation. However, a respondent from SERNAP and a former detainee said the prisons are very old buildings and remain in a poor condition despite several renovations. Facilities were said to lack basic amenities such as adequate water supplies, toilets, and beds and mattresses, with the result that some prisoners sleep on floors and in toilets and bathrooms.

The respondent from SERNAP said that 90 per cent of prisons were built before the 1950s under colonial rule and are out of keeping with modern trends. Lamenting the woeful health conditions,

> **Prisons are very old buildings and remain in a poor condition**

the former detainee said prisoners believe they have been neglected by the government due to their incarceration. Overcrowding was mentioned several times. Increases in the number of prisoners have not been met with new facilities, leading to overcrowding and aggravating the inadequacy of the amenities.

In a report to Parliament covering the period April 2015-March 2016, Mozambique's ombudsman also drew attention to prison overcrowding as well as

> **It is the duty of public authorities to care for prisoners, who cannot, by reason of their deprived liberties, care for themselves**

infrastructural problems such as leaking roofs, lack of ventilation, and toilets with no running water (Frey 2016).

In the *Kudla v Poland* case, the European Court of Human Rights ruled that states have a duty to ensure that prisoners are held in conditions compatible with respect for their human dignity and that the way in which sentences are executed should not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

2. Access to health care

The Basic Principles for the Treatment of Prisoners call for a country's available health services to be accessible to people without discrimination on the grounds of their legal situation. The provision of health care is further enshrined in the ICCPR. However, interview respondents painted a gloomy picture on this front too.

The former inmate, as well as officials from SERNAP and the Ministry of Health, revealed there was only one small clinic and one nurse at Maputo Central Prison to attend to the overpopulation of inmates. The SERNAP official explained that SERNAP has provided small clinics with one nurse in a few of the major prisons in Maputo and that it was hoping to increase this provisioning.

According to the official, there is a memorandum of understanding (MOU) between the Ministry of Justice, the Ministry of Health and various civil society organisations (CSOs). The MOU aims to give ministries and CSOs access to prison facilities to enable them to play an active role in addressing reported increases in mental health challenges.

However, the respondent from the health ministry claimed that they are given hardly any access to prisons; as a result, they have little idea of what happens there and prisoners are deprived of their rights to health. A report by the US Department of State (2016) supports these claims, stating that NGOs continue to encounter difficulties in visiting detention facilities run by the Ministry of the Interior, particularly its facilities in police stations.

The former detainee gave an account of how he chanced upon other inmates who were seriously sick and found them lying on bare floors, where they received treatment from other inmates who had little to no medical knowledge. Drips had to be put in the mouths of the sick before they could drink water, indicating the low level of health access in prisons.

In this regard, in United States' case of *Estelle v Gamble,* where prisoners were intentionally denied medical care, the court ruled that since it is the duty of public authorities to care for prisoners, who cannot, by reason of their deprived liberties, care for themselves, deliberate indifference to the serious medical needs of prisoners constitutes unnecessary and unwarranted infliction of pain, which is prohibited by the American constitution.

3. Screening prisoners' health status

In terms of article 9 of the Basic Principles for the Treatment of Prisoners, the health status of incoming prisoners should be checked before admission to control outbreaks of diseases such as tuberculosis, HIV/AIDS and hepatitis.

The respondent from SERNAP said prisoners are screened for any ailments to avoid these risks to health, but the former detainee denied this was so. Officials from the Ministry of Health and Human Rights Commission said they did not know much about the screening exercise. The respondent from the Human Rights Commission added that in her periodic visits she has seen many prisoners suffering from skin disease. In this vein, a report by Dr Crimilda Anly, the SERNAP National Director of Health Care, revealed that 51 prisoners died in the first quarter of 2016, most of them from HIV/AIDS and tuberculosis (AllAfrica 2016).

One major cause of the spread of diseases is overcrowding. A 2001 report by the Special Rapporteur on Prisons and Conditions of Detention in Africa, Dr Vera Chirwa, indicated that overcrowding was a key factor in the spread of disease and recommended the establishment of new prison facilities. However, Human Rights Watch (2017) points out that while the prison population keeps increasing, there is scant improvement in the number of detention facilities. The Office of the Attorney General of Mozambique noted in 2015 that problems with hygiene, food and medical assistance are aggravated by overcrowding, which was at an unprecedented level (US Department of State 2016).

4. HIV/AIDS in prisons

The prevalence of HIV/AIDS in Mozambican prisons was also investigated. SERNAP informed media in April 2016 that its statistics showed an estimated 20 per cent of 15,000 prisoners were HIV-positive, compared with an estimated 11 per cent of the country's total population (US Department of State 2016). In 2017, UNAIDS reported an increase of 24 per cent in the prevalence of HIV/AIDS in prisons, largely a result of unprotected sex (mostly anal and between males), rape, sex bartering, and 'prison marriages' (UNAIDS 2017).

> **51 prisoners died in the first quarter of 2016**

The respondent from the National AIDS Council confirmed that they do not have direct access to the prisons, but rather deliver whatever they have to SERNAP; as such, they do not have accurate information about HIV/AIDS in prisons. The same respondent said the Council regularly provided prisoners with HIV/AIDS drugs, a claim disputed by the respondent from the National Human Rights Commission and the former detainee. As proof, the AIDS Council respondent showed the author medication, condoms and lubricants, but these had expired more than seven years ago.

In the *Salakhov and Another v Ukraine* case, the government neglected to provide medication to prisoners with HIV/AIDS. The court found violations of the rights of the prisoners on account of the inhuman and degrading treatment and inadequate medical care provided to them.

5. Access to food

The UDHR in article 25(1) provides for, among other things, the right to food. This is further enshrined in article 11 of the ICESCR. By contrast, the majority of the respondents highlighted the poor state of nutrition in prisons. The former detainee said that they sometimes ate only once a day, with the food typically being unhygienic and causing diarrhoea. The respondent from the National Human Rights Institution stated that in her last visit to Maputo Central Prison, inmates were being poorly fed once a day. Similarly, the Attorney General expressed dissatisfaction with food and hygiene conditions in Mozambican prisons (US Department of State 2016).

Most of the respondents attributed the frequent illnesses to the quality of the food. In *Moisejevs v Latvia,* the court ruled that Moisejevs's rights had been violated by the meagre diet he received during his detention, finding that a slice of bread,

> **Restriction of liberties does not extinguish human rights**

an onion and a piece of grilled fish or a meatball was insufficient to meet the body's functional needs and was, as such, degrading treatment.

Contributory factors to poor health conditions

The right to health is not primarily about health status per se but the availability and accessibility of health care. In this sense, the right to equal health is best construed as a demand for equality of access or entitlement to health services (Daniels 1985).

The research found that Mozambican prisoners' poor health conditions and access to health services are part of a multifaceted situation. Overcrowding was often mentioned as a major cause of the spread of diseases. The majority of respondents said the government lacks the political will to address prisoners' problems and wider issues in the country's justice system. New prison facilities need to be built to accommodate prisoners and reduce overcrowding. The respondent from SERNAP, however, stated that the government recognises the problem and is negotiating with partners to provide new prison facilities at district level.

The criminal justice system also contributes to overcrowding in that delays in adjudicating cases leave numerous people in remand – in this regard, several respondents referred to difficulties in applying for bail. In addition, the lack of coordination between the Ministry of Health and SERNAP was evident. SERNAP has refused to give access to CSOs who could provide health support to prisoners. The health ministry said that in spite of its MOU with SERNAP, it is given little access to prisons to provide health care.

The respondent from the National Human Rights Commission believed that the country's adoption of the Kampala Declaration on Prison Conditions in Africa came a result of pressure from the Centre for Human Rights at Edwardo Mondlane University, which suggests that CSOs would push for better health conditions if they were given access to prisons. He also believed that the periodic access given to the Human Rights Commission will help improve matters.

Most of the respondents bemoaned prison officers' lack of training in being able to meet prisoners' right to health. The officers lack know-how on first aid mechanisms and should give health professionals access to prisons to enable them to conduct regular screenings and attend to sick inmates. The unavailability of adequate clinics, health practitioners and medications is a major impediment to prisoners' access to health.

Conclusion

Prisoners in Mozambique comprise a small percentage of the national population but record a very high percentage of disease prevalence. While Mozambican citizens benefit from free access to health and enjoy rights enshrined in the Constitution, this is not the case for prisoners. It must be emphasised that restriction of their liberties does not extinguish their human rights but instead makes it all the more imperative for the government to provide for rights that they cannot access personally due to their incarceration. As Nelson Mandela put it, 'No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.'

This study recommends the following:

1. Overcrowding must be addressed by providing

more infrastructure to house prisoners. The government should also decentralise the prison system to district level to avoid putting pressure on the main prison facilities in Maputo.

2. The justice system should adopt alternative measures of punishment for minor crimes that do not warrant incarceration. This system must be accessible to citizens, and bail application procedures should be improved to accelerate processing of pretrial detainees and rid prisons of remand inmates.

3. SERNAP must improve the quality and amount of prison food rations. CSOs must be given greater access to prisons. SERNAP must also partner with CSOs to receive appropriate assistance in regard to food, infrastructure, medication and the servicing of other basic needs of prisoners.

4. Prison officers must be trained regularly on health and rights issues. They must also be given training in first aid to be able to attend to inmates when necessary. Other personnel must be trained on HIV/AIDs and communicable diseases so as to conduct regular prison visits and attend to inmates.

5. SERNAP must give better recognition to the MOU with the Ministry of Health and ensure that health professionals have regular access to prisons to provide services. This should include screening prisoners before admission into facilities, as well as regular screening of prisoners to avoid outbreaks of disease. The government must also provide more health facilities in prisons and increase the number of health practitioners available in prisons to attend to emergencies.

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CASE REVIEW

Using the 'Political Question Doctrine' in Adjudicating the Right to Health: A Review of Centre for Health Human Rights & Development and 3 Others v Attorney General (2011)

Robert Doya Nanima

In Centre for Health Human Rights & Development and 3 Others v Attorney General (CEHURD) (2011), the petitioner questioned the constitutionality of the Ugandan government's failure to provide basic maternal health services in the context of the right to health. While the Constitutional Court qualified the use of the 'political question doctrine' (PQD) in the CEHURD case, the Supreme Court indicated why the doctrine cannot be used. The case is thus back at the Constitutional Court for consideration of the constitutionality of the right to health, yet there is no clear test that follows the application of the PQD. Scholars disagree about the scope of the PQD. Some contend that it does not apply to human rights violations and that any attempt to do so is a judicial intrusion into the realm of the executive or legislature (ISER 2012; Dennison 2014). Others argue that the PQD's applicability depends on which organ of government is best suited to offer a viable solution to a problem, or that it comes into effect where a court is ill-equipped to deal with the matter before it (Juma & Okpaluba 2012).

In the course of applying a legal principle or doctrine, the courts are required to consider its origin and context as well as the facts that require its application (Hertogen 2015). As such, an evaluation of a legal principle should have recourse to its factual or legal context as a way of illuminating clarity to the parties (Davis 2003; Roth 2004; Weil 1998). It follows that applying a principle without reflecting on the facts or the reasons for its adoption may affect the decision, given that the judicial officer risks applying a principle without appreciating its context.

In addition, the courts have to relate the nature of the right and the alleged violation. For instance, the Committee on the Economic, Social and Cultural Rights (CESCR) requires that the fulfilment of a right should show progressive realisation by the state. A specific right, such as the right to health, has to be referred to as the highest attainable standard of health, with its minimum core as the basis (Forman, Caraoshi, Chapman & Lamprea 2016; O'Connell 2015). An application of a legal principle to the enjoyment of a right has to be tagged to the interpretation of the right from an international perspective (General Comment 14, 2000; General Comment 24, 2017).

While there is a move from a stringent application of the minimum core to the reasonableness test, it does not tarnish the fact that the minimum core still forms a basis of the interpretation of the right to the highest attainable standard of health (Forman et al. 2016). On this foundation, it is prudent to revisit the CEHURD case.

The CEHURD case in summary

In 2011 the Center for Health, Human Rights and Development and three others petitioned the Constitutional Court of Uganda, alleging that the state's failure to provide basic maternal health services in government health facilities, coupled with health workers' unethical behaviour towards expectant mothers, was unconstitutional (CEHURD 2011). The basis of these allegations was that relatives of the third and fourth petitioners had died as a result of negligence by staff in government health units (CEHURD 2011).

The state sought to have the petition dismissed on the grounds that it was speculative and had no bearing on questions of constitutional interpretation. This position was reiterated in a preliminary objection to the effect that the acts the petitioners complained of were beyond the mandate of the Constitutional Court. It was contended, furthermore, that this issue would require the Court to intrude into the sphere of the executive and the legislature in disregard of the principle of separation of powers.

The Constitutional Court's judgment

The Constitutional Court dismissed the petition on the basis that it concerned the way in which the executive and the legislature conduct their affairs, which is a matter left to their discretion *(Marbury v Madison).* The Court formed the opinion that to avoid breaching the doctrine of separation of powers, it was barred from determining questions of a political nature (CEHURD 2011; Black's 1990).

It is significant to note that in arriving at this decision, the Constitutional Court defined a political question, qualified its application and indicated where it had been relevant in Uganda's past (Black's 1990). The Court's qualification of this doctrine, however, did not speak to the doctrine's origin or context. An engagement of the principle without appreciating its context may be misleading. It should be recalled that an evaluation of a legal principle should have recourse to its factual or legal context as a way of bringing clarity to the parties (Hertogen 2015; Roth 2004; Weil 1998). As such, the application of this principle without relating the facts or the reasons leading to its adoption may affect the conclusion insofar as the judicial officer risks applying a principle without appreciating its context.

This decision by the Constitutional Court confirmed the position in *Attorney General v Major David Tinyenfuza* and *Uganda v Commissioner of Prisons Ex Parte Matovu,* in which the Court of Appeal upheld the application of the PQD. The point of departure was the failure by the Constitutional Court to evaluate the context and the application of the principle in CEHURD.

The appeal in the Supreme Court

The petitioners appealed against the decision of the Constitutional Court. The main issue for the appeal was whether the PQD was applicable in Uganda, and if so, whether it was applicable in this case. The Supreme Court held that although the PQD had limited application in Uganda, it was misapplied by the Constitutional Court (CEHURD 2013). The Supreme Court indicated that the PQD was of limited application insofar as the Constitutional Court had a duty to tow the thin line between ensuring separation of powers and upholding the Constitution of the Republic of Uganda (CEHURD 2013).

The misapplication of the PQD was evident in the Constitutional's Court decision not to act on its mandate to hold the state accountable for the failure to provide maternal services for the general population (CEHURD 2013). The Supreme Court departed from the Constitutional Court's use of *Tinyefuza* as far as it distinguished it with regard to its context other than the fact that it applied the PQD. As such, the Supreme Court held that the Court in *Tinyefuza* agreed to the existence of a duty to review legislative measures or administrative decisions that violated the rights of individuals.

Furthermore, it drew on persuasive jurisprudence from South Africa's *Minister of Health and others v Treatment Action Campaign*, in which the South African Constitutional Court gave detailed orders to ensure that the state took steps to ensure the progressive realisation of socio-economic rights.

Evaluating the Supreme Court's approach

The Supreme Court's distinction of *Tinyefuza and Ex parte Matovu* was a departure from the Constitutional Court's confirmation of the two decisions insofar as the Supreme Court engaged the origins and context of the PQD. First, in the context of *Marbury v Madison, Baker v Carr and Ex parte Matovu*, the PQD was to be applied on the basis of the appropriateness or inappropriateness of the Court's deciding on the subject matter, not on the basis of its lack of jurisdiction. Secondly, cases within the scope of the PQD included cases of a political nature that were the preserve of other organs of state by virtue of their constitutional mandates. Citing *Tinyefuza,* the Supreme Court noted that the exception to this position was where there was a violation of human rights or a lack of constitutional mandate for the respective organs to remedy the issues before the Court.

The discussion above shows that the Supreme Court correctly appreciated the context of the PQD before applying it to the facts. However, the second part of the application was not adequately addressed. In its decision, the Supreme Court hinted at the nature of the right to health by basing its argument on the requirement that the state had to ensure equal enjoyment of the right to medical services (CEHURD 2013). Further engagements with regard to the right to health were evident in the recognition of the rights of women and children under articles 33 and 34 of the Constitution.

In the light of the correct application of the PQD, the Court ought to appreciate the nature of the right and the alleged violation. In this case, it has to appreciate the interpretation of the right to health. It should be stated at the outset that the Supreme Court had no obligation to engage the second aspect as the matter was not substantively brought before it for adjudication. Nevertheless, the fact that the case was referred back to the Constitutional Court for determination on its merits is an indication that the latter court will have to address this issue in its judgment. It is in the fact that the two courts have dealt with the nature of the right to health that this comment seeks to propose a framework for the adjudication of the rights in the wake of the PQD.

The political question doctrine and the right to health

The decisions by the Supreme Court and the Constitutional Court in *CEHURD* show that the PQD is still applicable in Uganda. It is true that, according to the Supreme Court, it application is limited. While the ruling distinguishes between various decisions to conclude that the doctrine is not applicable, this position is based on the constitutional questions that arise. The trend is for the PQD to be applied unevenly: whereas it was not applied in *Ex parte Matovu*, it took centre-stage in *Tinyefuza*, was imputed in *Severino Twinobusingye v AG*, and arose in CEHURD before the Supreme Court quashed the judgment of the applicant.

The cumulative effect of the decisions in the two cases by *CEHURD* questions that mode of application of the PQD. This trend suggests that despite its limited application, the PQD is bound to rear its head again, as will be illustrated shortly.

First, the reasoning of the Supreme Court shows that in the absence of a de facto human rights violation, and with the possibility of appropriate relief from executive or legislative organs other than the judiciary, the PQD may be applied. This position poses further interpretational challenges, given that the Supreme Court does not indicate whether the court that seeks to apply this doctrine should use a subjective or objective test. A subjective test would require that the court make a decision based on the facts and merits of the case (Bassiouni 2011). An objective test, on the other hand, requires that the court hears any matter that requires a constitutional interpretation and then subjects it to the Supreme Court's principle in CEHURD as the basis (Apio 2012). It is correct to say that the uneven application of the PQD in Uganda's jurisprudence shows a lack of judicial consensus.

Secondly, determining the standard to use requires that one consider the obligations that arise from the state's duty to promote, protect and provide an enabling environment for the enjoyment of socio-economic rights. As such, there is a need to interpret the right to health in the light of the international and regional instruments to which Uganda is a party: because it is a party to them, the country is obliged

to follow their jurisprudence. An appreciation of these obligations will inform the development of any given standard.

The Constitution does not provide for the right to health. However, it has provisions that speak to the rights of women and children within the context of this right. For instance, the national objectives and principles of state policy require the government to ensure that all Ugandans enjoy equal rights to health. Also, women are entitled to rights under the Constitution on account of their maternal functions in society. As for children, they are not supposed to be deprived of medical treatment on any discriminatory grounds.

Furthermore, Uganda is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples, Rights (ACHPR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as being a member of the United Nation's World Health Organisation. All these bodies interpret the right to health as the right to the highest attainable standard of health. In this regard, the state has a duty to ensure the progressive realisation of this right (Fact Sheet 31, 2008) by respecting, protecting, fulfilling and promoting it (Forman 2016). The latter four obligations are instructive in identifying the minimum core of the right to health.

From a general socio-economic perspective, the nature of the right to health shows the application of a minimum core concept. This concept refers to the obligation on states to ensure that no significant number of individuals are deprived of the minimum essential levels of socio-economic rights (African Commission 2010). In its General Comment 3, the CESCR refers to the minimum core obligations as the basic minimum level of subsistence which is required for the enjoyment of a dignified human existence with regard to a particular right (General Comment 3, 1990). Furthermore, it is clear that the CESCR and the African Commission recognise the existence of the minimum core obligation without regard to the availability of resources (African Commission 2010; CECSR 1990). It should be noted that the various provisions that provide for the right to health create a rich context for its realisation in Uganda. This is evident in the numerous policy documents that underpin the right to health as an amalgamation of various rights.

So, although Uganda is resource-constrained, it still has the obligation to implement the minimum essential levels of each right for vulnerable and disadvantaged groups through the prioritisation of their welfare in legislative and policy interventions (Mbazira 2009). Insights can be drawn from the 1986 Limburg Principles on the Implementation of the ICESCR. They require state parties to ensure respect for minimum subsistence rights by using available resources to accord everyone the satisfaction of subsistence requirements and the provision of essential services (Limburg Principles 1986). The requirement is in disregard of the state's level of socio-economic development. It follows that the failure of the state to meet a generally accepted international minimum standard of achievement, which is within its powers to meet, is a violation of the minimum core requirement.

Tasioulas (2017) argues that to arrive at the minimum core of any right, one has to follow five steps. The first is to identify the right in a covenant, then the scope or appropriate subject matter of that right. The third step involves identifying the content of the obligations associated with a given right in view of considerations such as feasibility and burden. This is followed by the identification of the sub-set of obligations associated with the right that must be fully complied with immediately by all states as the 'minimum core obligations'. The evaluation of these minimum core obligations is evident in the identification of the consequences of their non-fulfilment by the state party. It should be recalled that the introduction this article advocated for the need to appreciate the nature of the right and its violation as an aspect that informs the adjudication of socio-economic rights.

It is submitted that such an engagement amounts to the judicial interpretation and application of a minimum core of a socio-economic right. In this regard, at the consideration of the preliminary objection on the issues that lacked the need for constitutional interpretation, the Constitutional Court did not follow the five steps. It chose to dismiss the petition on the basis of the PQD. The Supreme Court, on the other hand, went to great lengths to re-engage the PQD within its origins and context before applying its principle.

Conclusion

Since the matter is due for hearing before the Constitutional Court, two cardinal issues inform the

various issues that need to be decided. The first is the question of whether the right to the highest attainable standard of health is a constitutional right in terms of article 45 of the Constitution. The second issue is whether the inadequacy of human resources for maternal health and the lack of essential drugs are an infringement of the right of health.

The Constitution contains provisions that provide an environment that speaks to the need for the progressive realisation of the right to the highest attainable standard of health. These include the provision of the right to life, the right to welfare of women and children, the right to human dignity, and the corresponding duty of the state to promote, respect and uphold these rights. In addition, the national objectives of state policy implore the state to ensure the fulfilment of all fundamental rights to ensure the enjoyment of the rights and access to the right to health services.

Furthermore, according to the Constitution, this respect extends to the need to respect international law and treaty obligations. An examination of these provisions in the course of the constitutional interpretation will open the way to the creation of a hybrid standard in the application of the PQD, insofar as the Constitutional Court will deal with the questions of constitutionality which arise, giving regard to the minimum core of the right to health. As such, it will evaluate the applicability of doctrine on the basis of the minimum core.

Post-script: At the time this article was written, the Constitutional Court had not delivered its judgment on the merits of the petition in CEHURD.

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EVENT

Human rights and Governance Implications of the Water Crisis in the City of Cape Town: Roundtable Discussion (6 March 2018)

Gladys Mirugi-Mukundi

The Dullah Omar Institute (DOI) at the University of the Western Cape, in conjunction with the Konrad-Adenauer-Stiftung (KAS), hosted a roundtable discussion on the human rights and governance implications of the water crisis in the City of Cape Town, on 6 March 2018 at the Pepper Club Hotel, Cape Town.

The City of Cape Town might have to turn off the taps come what is controversially known as 'Day Zero' – the day water runs out and residents begin queuing for water. Debate is centred increasingly on when rather than if water dries up completely. The City gradually pushed back the expected Day Zero from 16 April to 9 July 2018 when city water-users managed to save water and relief came from farmers who reduced consumption or reached their capped allocation.

Against a backdrop of nationwide drought, the roundtable discussion was organised as a contribution to policy debate about the water crisis in Cape Town and South Africa. A recurring question in the public domain is whether local government is handling the crisis effectively.

Accordingly, the aim of the roundtable discussion was to interrogate the legal and human rights implications of the water crisis and, in particular, a possible Day Zero. Such debate was timely and necessary for making politicians and policymakers aware that, in crafting strategies to avert crisis, all efforts should be taken to uphold the Bill of Rights and prevent the violation of human rights.

The roundtable discussion brought together a variety of stakeholders, including academic, activists, human rights lawyers and representatives of civil society organisations involved in the water crisis affecting the City of Cape Town. About 30 people attended the event.

After Christina Teichmann, Project Manager at KAS Cape Town, delivered a goodwill message from KAS, Gladys Mirugi-Mukundi of the DOI introduced the proceedings by setting out the background to the roundtable discussion and the governance challenges posed by the water crisis.

How did the City find itself in such an unprecedented predicament? This is a key question for policy-makers, citizens, and global observers. The answers ranged from climate change and the effects of population growth to the fact that southern Africa at large has often endured prolonged drought. However, claims have also been made that poor governmental planning, mismanagement and even negligence are to blame (Davis 2018; Zille 2018).

Prof. Jaap de Visser, Director of DOI, anchored the panel discussion session, the aim of which was to consider the water crisis from a human rights perspective. He began by asking an overarching question: What do we have to do in the water crisis, and what do we need to do to make sure human rights standards are maintained?

Prof. De Visser noted that while households in affluent suburbs adjust to the water crisis by buying bottled water or drilling boreholes, those in townships and informal settlements and townships struggle to cope. How the City manages the water crisis is a reflection of how it is tackling inequality and water scarcity for its residents.

Dr Khulekani Moyo of the Mandela Institute, University of the Witwatersrand, highlighted the human rights implications of the water crisis, saying that the right of access to water as guaranteed in section 27 of the Constitution implies that water is a basic human right.

He said the Constitutional Court, in *Mazibuko v City of Johannesburg* (2009), shied away from pronouncing the normative content of the right to water. The Court ruled that the right of access to sufficient water does not require that the state provide every person upon demand and with more than sufficient water – nor does the obligation confer on any person a right to claim 'sufficient water' from the state immediately.

Dr Moyo intimated that this was a missed opportunity to develop jurisprudence on the state's obligations regarding the right of access to sufficient water, but noted that in spite of legislation that had been passed, the implementation of free basic water services is uneven across the country.

Alderman Ian Neilson, Deputy Mayor of Cape Town, looked at the crisis from a different perspective, saying that supply and demand are the two major issues. He said that Cape Town faced serious water shortages due to poor rainfall in the winters of 2015, 2016 and 2017 and that although Day Zero might be postponed to 2019, the drought's threat to the water supply remains a reality. The City has a contingency plan in place, in the form of a critical water shortages disaster plan, along with accompanying measures to mitigate the impact of drought.

From a supply perspective, he said, dam levels are critical for Cape Town's water supply. To avert the crisis, the City has been investing in augmentation projects such as large-scale desalination plants to help increase water supply. Cape Town has also invested in water filtration plants and drilling for underground water.

Turning to issues of demand, Alderman Neilson said demand for water is steadily increasing every year due to climate change and the Western Cape's rapidly growing population and economy. He pointed out, however, that significant gains had been made through water restrictions, public communication, advanced pressure management, and the installation of almost 37,500 water management devices at the properties of high-volume water-users to curb household water use.

Water restrictions are a key part of the City's water-demand management strategy. In February 2018, tighter restrictions were introduced, decreasing the previous limit of 87 litres per person per day to 50 litres, with households facing substantial fines if this quota were exceeded.

> **The water crisis had become a political football**

Alderman Neilson said that, through these initiatives, Cape Town had seen a reduction in water demand. He believed the City and wider Western Cape could avert Day Zero in 2018 by means of these initiatives, though he acknowledged that the situation changes daily depending on the consumption of water.

Despite these gains, the City had been criticised for its stricter water restrictions to reduce consumption. Alderman Neilson said at the time that the City of Cape Town needed the national government to declare a national state of disaster as a result of the drought.

In response, participants at the panel discussion expressed appreciation for the City's efforts to manage the crisis, but criticised its roll-out of water management devices in poor communities, saying the process had not been transparent and that those affected were not properly consulted.

Prof. Nico Steytler, NRF SARChI Chair in Multilevel Government, Law and Policy at the DOI, highlighted the blame-game that had been played during the crisis and interrogated the division of responsibilities between national, provincial and municipal government.

He pointed out that the handling of the water crisis had been turned into a political football, revealing serious problems in Cape Town's governance, and said the blame-shifting between different spheres of government had prevented the City from finding a solution. He referred to an apparent feud between

the Western Cape premier, Helen Zille, and the Minister of Water Affairs, Nomvula Mokonyane, concerning the water crisis generally and, more particularly, the point at which the province's water problems would be declared a disaster. who had been forced out of their ancestral lands and were living in deplorable conditions, the Court said the state had failed to adopt the positive measures that were necessary to ensure the community lived under dignified conditions while its was without its land. The Court concluded that the state has the obligation to adopt positive measures promotive of a dignified life; this is particularly so when high-risk, vulnerable groups are at stake – their protection then becomes a priority.

Prof. Steytler said the governance crisis in Cape Town was aggravated by uncertainty about leadership. It was unclear, in other words, who was in charge of the City's response to the water crisis. Different actors often made conflicting statements about how the water crisis was to be addressed, as happened, for instance, when the national leader of the Democratic Alliance (DA), Mmusi Maimane, relieved the City's mayor, Patricia de Lille, of her water-related responsibilities.

Moreover, there had been political infighting in the Cape Town Metropolitan Council, as a result of which Mayor De Lille was removed from the City's response to the water crisis.

The situation revealed confusion and inconsistency in policy direction, with some of the solutions proposed to the water crisis having astronomical cost implications. Water desalination and drilling into aquifers, for example, have significant costs, to which city residents would have to contribute. Other proposals would create logistical and security challenges at communal water-collection points.

It emerged, furthermore, that there were overlaps between national, provincial and local government – these ambiguously defined mandates were impeding decision-making on Cape Town's water management.

Prof. Steytler observed in conclusion that the blame-game as to who was responsible for the water crisis would persist for the foreseeable future unless the governance crisis in the City were resolved.

During the open discussion, some participants suggested that Cape Town's water crisis is driven more by politics than drought. They agreed nevertheless that drought conditions had profoundly negative consequences for the economy, particularly so for tourism, one of Cape Town's major industries.

Representing Chapter 9 institutions, Advocate Lloyd Lotz, the Western Cape Provincial Manager of the South African Human Rights Commission (SAHRC), highlighted the Commission's role in ensuring accountability for the realisation of the right to water. He said that it had received complaints from individuals and organisations regarding the water crisis in Cape Town and that it was continuing to monitor the situation. Of particular concern was the amount of conflicting information that was in circulation.

Participants expressed fears that a lack of water means a lack of sanitation, which in turn creates a breeding ground for horrendous diseases. They wanted to know how the SAHRC and City would manage risks to public health.

Prof. Ebenezer Durojaye concluded the roundtable discussion by noting that the water crisis was not unique to the Western Cape – other provinces, such as the Northern Cape and Eastern Cape, were also showing signs of severe water shortage. He said that measures to address these shortages had to be grounded in respect for the right to dignity of the people concerned.

Gladys Mirugi-Mukundi is a researcher at the Dullah Omar Institute, where she focuses on socio-economic rights.

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EVENT

Social Security as a Human Right Imperative: Panel Session at the African Commission on Human and Peoples' Rights (30 April 2018)

Oluwafunmilola Adeniyi

During the 62nd Ordinary Session of the African Commission on Human and Peoples' Rights, held in April in Nouakchott, Mauritania, the Dullah Omar Institute (DOI) convened a Panel Session on Social Security as a Human Right Imperative on 30 April 2018, an event organised in conjunction with the Initiative for Social and Economic Rights (ISER), the Global Coalition on Social Protection Floors, and the Working Group on Economic, Social and Cultural Rights of the African Commission (the Working Group).

The panel session aimed at raising awareness among states and other stakeholders on the human-rights importance of social protection measures; educate them on the relevance of International Labour Organisation (ILO) Recommendation 202 on social protection Floors in addressing poverty and inequality; and stimulate debate on the provisions of the Draft Protocol to the African Charter on the Right to Social Security/Protection.

The panel was moderated by Commissioner Jasmine King, the Chairperson of the Working Group. In her opening remarks on the relevance of social security and its protection as a human rights imperative in Africa, she emphasised the need for states to embrace a rights-based approach to social security in Africa, as the goals of Agenda 2063 could not be achieved without social protection.

Commissioner King noted that the ILO welcomed the draft Protocol on social security for the continent and looked forward to its implementation. She also noted if that the Protocol is to make a difference to the people of Africa, states have to play a pivotal role in implementing and monitoring redress mechanisms. The political will to implement the Protocol was crucial to its successful impact on the livelihoods of many across the continent.

The first presentation, by Allana Kembabazi of ISER, was entitled 'Draft Protocol to the African Charter on Social Security and Protection: Lessons for Uganda', and explained why the Protocol was a welcome development in that country. In turn, the second presentation, by Oluwafunmilola Adeniyi, a joint representative of the DOI and Global Coalition for Social Protection Floors, dealt with the relevance of ILO Recommendation 202 on Social Protection Floors in addressing poverty and inequality on the continent.

The presentation discussed the ILO's approach to social protection floors, focusing on the basic principles of universality of protection; non-discrimination; adequacy and predictability of benefits; social inclusion; respect for the dignity of persons; progressive realisation; transparency and accountability; sustainability: diversity of methods and approaches; monitoring; and participation and consultation.

In its conclusion, Adeniyi's presentation noted that member states are obliged to report to the African Commission on their progress in realising human rights, including socio-economic rights. Taking into account that the majority of member states

are also members of the ILO, the implementation of national social protection floors under the ILO 202 recommendations is subject to other international obligations, among them the regional obligations in terms of the Protocol. It was therefore recommended that the Commission require that states, in meeting their reporting duties, use the ILO 202 recommendations as a basis for reporting on progress made in ensuring social protection for their residents.

In summary, the presentations emphasised the parameters of a rights-based approach to social security and how the draft Protocol entrenches this. They also highlighted the need for African states to move from a piecemeal, welfarist approach to social protection to a coordinated, rights-based one.

In response to the presentations, several state representatives foregrounded their efforts towards social protection for vulnerable groups, but a common thread was that coordination among these efforts seemed to be missing; likewise, in some instances the right-based approach appeared to be missing too.

More widely, participants questioned whether the draft Protocol contained funding mechanisms, including minimum budgetary allocations, that states could employ to ensure the sustenance of social protection measures they adopted. Participants also questioned whether the draft Protocol included provisions to combat corruption and the diversion of resources allocated for social protection.

> **Presentations highlighted the need for a rights-based approach**

The panel discussion was timely as it set the scene for further discussion among stakeholders, including civil society groups and state representatives, about the draft Protocol on Social Security and Protection. It is hoped that some of the issues raised in the discussion are taken into consideration when the Protocol is finalised.

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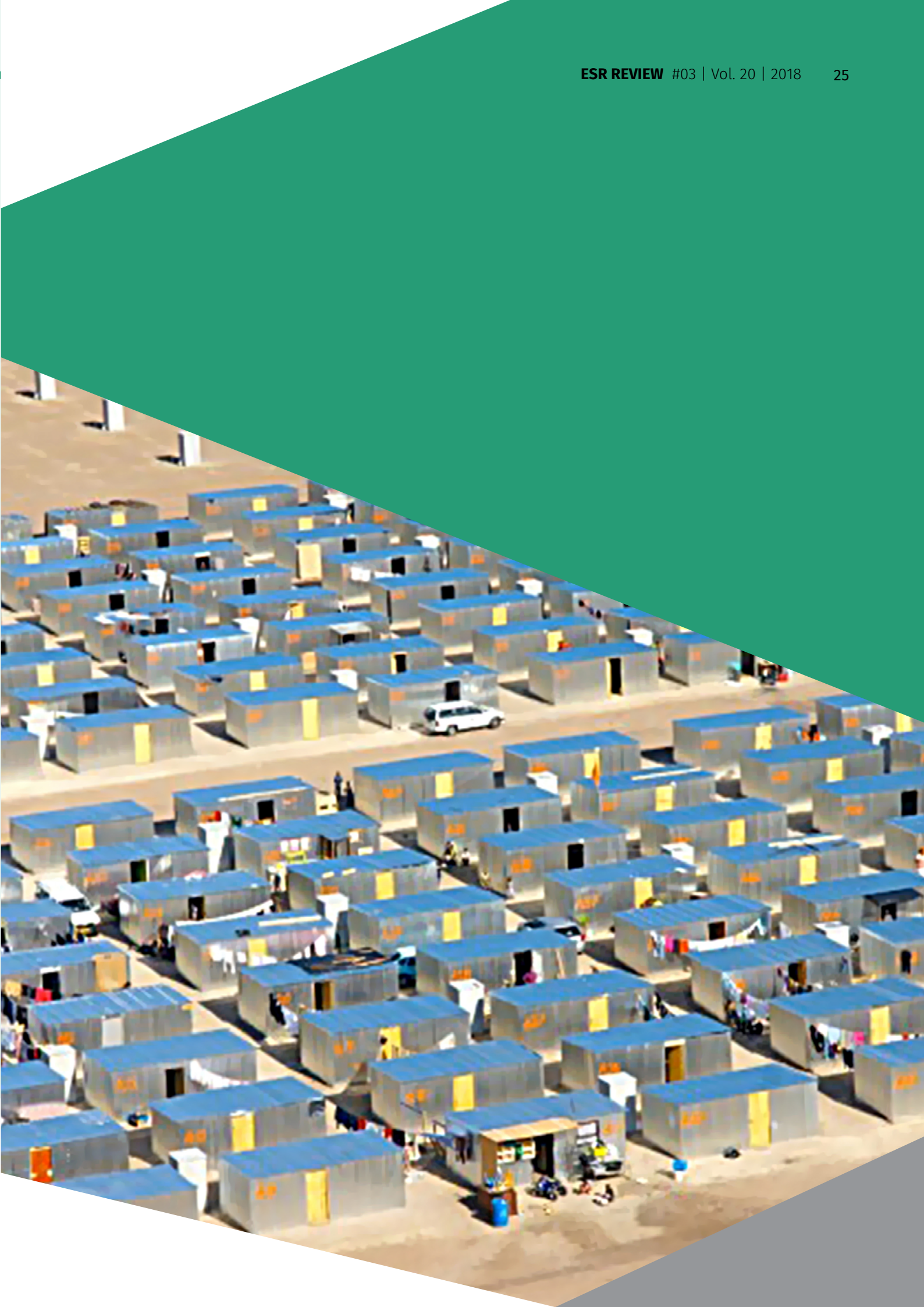

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