

# **Kindred Strangers: Is the Constitutional Court of South Africa Snubbing the African Court on Human and Peoples' Rights?**

Constitutional Court Review Conference IX

Symposium IV: 'Ubuntu & the Influence of African Moral  
Theory on the Constitution'

Johannesburg, 2-3 August 2018

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## **Abstract**

Is the Constitutional Court of South Africa snubbing the African Court on Human and Peoples' Rights? The two courts appear to be natural allies, having both elaborated a robust jurisprudence promoting civil-political and socio-economic rights, accountability, political participation, and good governance. However, despite the African Court having issued a raft of landmark merits judgments since June 2013, the South African Constitutional Court has yet to cite its jurisprudence. This paper attempts to account for this apparent lacuna in South African case-law, placing it against the Constitutional Court's overall approach to citing international law and courts, and arguing that it cannot be simply explained by the fact that South Africa has yet to make the special declaration required to permit individual and NGO petitions to the African Court, or that the African Court has not issued any judgment regarding South Africa. Rather, a range of other possible explanatory factors appear to be at play, including: the State's position as a 'reluctant regionalist'; institutional factors (primarily, the Constitutional Court's possible preference to retain constitutional supremacy and adjudicative autonomy, and the African Court's youth); and broader structural factors (such as a lack of citations in submissions to the Court and a civil society view of the African Court as an alien entity). The paper's main claim is that this matters for two reasons: first, it deprives South African jurisprudence of sources that could enrich it and anchor it in the developing regional human rights system; and second, because the South African Constitutional Court is in a uniquely influential position to support the development of the African Court as a key site for the elaboration of a transregional community centred on the African Charter of Human and Peoples' Rights; by far the most widely ratified rights treaty in the African Union.

## INTRODUCTION: AN ODD PROPOSITION?

At first blush, it may seem an odd proposition to enquire about the relationship between the Constitutional Court of South Africa and the African Court on Human and Peoples' Rights (hereinafter, 'the African Court'). After all, South Africa as a state has limited engagement with the African Court. Despite having ratified the Protocol establishing the Court in 2002, the State has not made the special declaration required to permit individuals and non-governmental organisations (NGOs) to petition the Court. The African Court has not yet issued any judgment in a case against South Africa.

Those issues, however, relate solely to the formal relationship between the State as a whole and the African Court, and are not the main focus here. What drives the enquiry in this paper is to explore why the South African Constitutional Court itself has not fostered a particularly strong relationship with the African Court, and what this tells us about the self-perception of the South African Court and its perception of, or attitude toward, international judicial power within its own region, as well as the structural barriers to a closer relationship. The weakness of the relationship is evidenced, in particular, by the fact that the South African Court has not cited the African Court's jurisprudence even once in the five years since the latter's first merits judgment in June 2013.<sup>1</sup> It is also reflected in the literature on the South African Court: even the most recent works on the Court make no mention of the African Court.<sup>2</sup>

This paper attempts to account for this apparent lacuna in South African case-law, placing it against the Constitutional Court's overall approach to citing international law and courts, and arguing that it cannot be simply explained by the fact that South Africa has yet to make the special declaration required to permit individual and NGO petitions to the African Court, or that the African Court has not issued any judgment regarding South Africa. Rather, a range of other possible explanatory factors appear to be at play, including: the State's position as a 'reluctant regionalist'; institutional factors (primarily, the Constitutional Court's possible preference to retain constitutional supremacy and adjudicative autonomy, and the African Court's youth); and broader structural factors (such as a lack of citations in submissions to the Court and a civil society view of the African Court as an alien entity).

The paper's main claim is that this matters for two reasons: first, it deprives South African jurisprudence of sources that could enrich it and anchor it in the developing regional human rights system; and second, because the South African Constitutional Court is in a uniquely influential position to support the development of the African Court as a key site for the elaboration of a transregional community centred on the African Charter of Human and Peoples' Rights; by far the most widely ratified rights treaty in the African Union (53 of 55 AU states to date).

The paper contains four parts. Part I briefly examines the odd relationships between 'leading' constitutional courts and regional human rights courts in Latin America and Europe, showing that these can involve clear communication (including disagreement as well as agreement) or a general silence, which can be harder to characterise clearly. Part II examines the development and purposes of the South African Constitutional Court and the African Court, highlighting the commonalities and divergences between them, and arguing that the two are 'natural allies' with similar approaches. Part III examines the South African Constitutional Court's existing approach to the citation of international law and jurisprudence, highlighting that its openness to international norms is partial and skewed towards certain courts, and has made relatively little room for African human rights instruments and jurisprudence. Finally, Part IV canvasses the possible reasons why the South African Constitutional Court has not developed a strong relationship with the African Court.

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<sup>1</sup> This is discussed below, in Part 3.

<sup>2</sup> See e.g. J Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016).

## 1. ODD COUPLES: NATIONAL COURT-REGIONAL HUMAN RIGHTS COURT RELATIONSHIPS IN COMPARATIVE PERSPECTIVE

Before beginning to discuss the relationship between the South African Constitutional Court and the African Court, it is useful to briefly discuss the relationships between national apex courts and regional human rights courts elsewhere. In the two other world regions which contain a pan-regional human rights court – the Americas and Europe – the relationship between ‘leading’ national courts and the regional human rights court is often far from straightforward. The category of ‘leading’ national courts here is used in a rather loose manner to denote national courts that are broadly considered the most influential in their region (e.g. the constitutional courts of Germany and Colombia), or which are the apex court of a powerful state, or even hegemonic state, in the region (e.g. the supreme courts of Brazil and the UK). This section briefly describes the ‘odd couples’ that exist across both regions, with the aim of dispelling any notion from the outset that the relationships between leading national courts and regional human rights courts are generally close, complementary and largely friction-free. This is necessary given that dominant depictions of these relationships in existing scholarship skew towards more positive accounts.

### The German and UK Courts’ Relationships with the European Court of Human Rights

Established in 1959, the European Court of Human Rights (hereinafter, ‘ECtHR’), after a gradual march of progress in its early decades, truly hit its stride in the 1980s, and became the sole adjudicative organ of the rights protection system centred on the European Convention on Human Rights in the reforms of 1998, with jurisdiction over a vastly expanded membership following the accession of post-Communist and post-Soviet states, and Turkey. Today, the Convention exerts a strong influence on national legal orders through thousands of judgments annually (20,000 in total to date<sup>3</sup>), through the requisite domestic ‘incorporation’ of the Convention (i.e. according the Convention clear status in domestic law, whether at the constitutional or statutory level), and through use of the European Court’s case-law as a legal standard for State activity and judicial interpretation of domestic law.

The European Court developed three key doctrines by the 1980s which enhanced its standing and power in Europe: (i) ‘evolutive interpretation’, by which the Court interprets the ECHR dynamically ‘in light of present-day conditions’, allowed for progressively expansive readings of Convention rights; (ii) the principle that Convention rights should be ‘practical and effective’, which precludes states from relying on the existence of purely formal rights guarantees in domestic law; and (iii) the ‘margin of appreciation doctrine’, by which the Court calibrates the extent to which a state is to be afforded discretion on a rights matter, with the determination often based on the extent to which there is European consensus on the matter (as assessed by the Court).

With the rise of the ECHR regional system (and the European Union) domestic courts have become ‘European’ courts, when they apply norms of the ECHR (and in the separate EU context, apply EU law and request definitive interpretations of EU law from the Court of Justice under the preliminary reference procedure: Article 267, TFEU). The European Court of Human Rights and the Court of Justice of the EU (CJEU) have, in turn, have become ‘constitutional’ courts, as the judicial arms of the ‘constitutionalised’ orders of the ECHR and EU systems, respectively.

These developments, in the post-war decades, have gradually acclimatised domestic apex courts to the sharing of judicial supremacy. In the European Convention context, courts at each level are required to operate in a pluralist context where neither they nor the ECtHR can fully control the overall legal space. It has been suggested that a “fruitful dialogue has developed between the Strasbourg institutions and domestic courts whose respective case law mutually support and enrich each other”.<sup>4</sup> That said, the relationship between the ECtHR and national

<sup>3</sup> See p.3, ‘Overview 1959-2017: ECHR’ on the Court’s website at <https://bit.ly/2IoJMQx>.

<sup>4</sup> D Shelton, *The Regional Protection of Human Rights* (Oxford University Press, 2010) p.20.

courts is not entirely harmonious. The German Federal Constitutional Court has raised the threat of profound normative conflict on occasion, epitomised in the *Görgülü* judgment in 2004,<sup>5</sup> which asserted the Court's role as ultimate guardian of fundamental rights as against the ECtHR, although a principled German independence from the ECtHR operates within a general praxis of adherence to the ECtHR's rulings. The ECtHR has also been challenged by the UK Supreme Court on occasion, notably in the Supreme Court's *Horncastle* decision of 2009, where Lord Phillips took great pains to explain why the Court refused to follow a decision of the ECtHR, leading the latter to subsequently modify its position to accommodate the Supreme Court's decision.<sup>6</sup> In general, the ECtHR has shown itself willing to accommodate and respond to such occasional challenges to its jurisprudence by domestic courts.<sup>7</sup> As Krisch has observed, interaction between constitutional courts and regional courts in Western Europe operates, not as a 'constitutional' order with a clear hierarchy, but as a plural legal order in which judicial strategy and judicial politics at both sides of the divide allow the system as a whole to function without degenerating into an outright *zero sum* tussle for supremacy.<sup>8</sup>

### **The Colombian and Brazilian Courts' Relationships with the Inter-American Court of Human Rights**

The Inter-American Court of Human Rights (hereinafter, 'IACtHR'), established in 1979, is the most powerful international court in Latin America, with almost all Latin American states (20 states) having acceded to its jurisdiction. The Court, like the European Court and the African Court, is empowered to interpret a regional bill of rights (the American Convention on Human Rights), has contentious and advisory jurisdiction, and the power to order provisional measures, and broad powers to order reparations. Unlike the African or European human rights courts, there is no provision for direct individual petitions to the Court: cases may solely be referred by the Inter-American Commission of Human Rights or State parties. To date it has issued over 200 judgments, developing a robust jurisprudence on amnesty laws, forced disappearance, anti-terrorism laws, freedom of expression, and the 'right to truth', among others.

The Court enjoys a significant international profile and the relationship between domestic courts and the Inter-American Court of Human Rights is the most intense and fully-developed in the region, compared to the courts of MERCOSUR, the Andean Community and the Central American Integration System (SICA). The relationship between the IACtHR and domestic courts has been conditioned by three judicial doctrines across the domestic and Inter-American levels, which have fundamentally transformed and deepened the inter-court relationship: (i) the 'block of constitutionality' doctrine at the domestic level, which in a wide array of states tends to characterise constitutional, Inter-American, and universal norms (e.g. the Universal Declaration of Human Rights) as combined parameters for assessing the constitutionality of law and state actions, or – in the stricter sense of a 'constitutional block' – according international norms formal constitutional status; (ii) the IACtHR doctrine of conventionality control, which places an obligation on public authorities in all state parties to the ACHR to interpret any domestic legal norm (e.g. constitution, law, decree, court judgment) in a manner compatible with the ACHR, as interpreted by the IACtHR; and (iii) the IACtHR 'block of conventionality' doctrine, which (in a similar manner to

<sup>5</sup> *Görgülü v. Germany*, Eur. Ct. H. R. (February 26, 2004). See M Hartwig, 'Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights' (2005) 6(5) German Law Journal 869.

<sup>6</sup> See *R v. Horncastle* [2009] UKSC 14 (SC); and *Al-Khawaja and Tahery v. United Kingdom* (2012) 54 EHRR 23.

<sup>7</sup> See e.g. W Thomassen, 'The vital relationship between the European Court of Human Rights and national courts' in SI Phlogaitēs, T Zwart & J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (Edward Elgar Publishing, 2013).

<sup>8</sup> N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010) chapter 4.

the domestic ‘block of constitutionality’ doctrine) extends the legal standards that domestic authorities (including courts) must take into account when carrying out conventionality control by including not only the ACHR but also a range of other treaties and instruments that together comprise the ‘inter-American *corpus iuris*’ (e.g. Inter-American treaties on torture and violence against women).

This relationship transformation has led scholars to go beyond the language of ‘judicial dialogue’, to speak of the relationship as transcending the courts’ respective spheres and creating a transnational legal space, based on an ‘Inter-Americanization’ of domestic law and the creation of a *Ius Constitutionale Commune* or pan-regional common constitutional law.<sup>9</sup> Some national courts have been key to this transformation, principally the Constitutional Court of Colombia, whose ‘block of constitutionality’ doctrine has not only enhanced the status of Inter-American jurisprudence and norms within Colombia, but has also been highly influential across the region, spurring many other apex courts to adopt a version of the doctrine.<sup>10</sup>

Other courts have shown far more reticence regarding the Inter-American system and Inter-American Court. In particular, while the Supreme Federal Tribunal of Brazil (*Supremo Tribunal Federal*) has accorded the ACHR ‘infraconstitutional’ status (i.e. above statutory law but below constitutional law), most judges at the Supreme Court appear to jealously guard their constitutional supremacy, generally avoiding any citation of IACtHR case-law.<sup>11</sup> The Brazilian Supreme Court has ignored relevant IACtHR jurisprudence in key cases, most notably in its 2010 decision upholding the constitutionality of the 1979 Amnesty Law in clear contravention of established IACtHR case-law on the invalidity of such amnesties under the American Convention. The IACtHR found the law to be in violation of the ACHR mere months later in *Gomes Lund (Guerrilha do Araguaia) v Brazil*.<sup>12</sup> Various possible factors underlie the Supreme Court’s reticence, although its general silence renders analysis difficult:

opposition to the international court’s regional hegemony, an aversion to the Inter-American Court’s lack of deference toward domestic courts, skepticism toward the international court’s pedigree, a resistance to interference by *any* international adjudicative body, a mere preference for citing ‘Western’ courts, a slow adjustment by a Court unaccustomed to sharing normative supremacy, or merely yet another example of Brazilian exceptionalism as compared to its regional neighbours?<sup>13</sup>

What is clear is that the Supreme Court’s stance does not result from any fundamental resistance toward citing international and foreign law: the Court widely cites foreign courts, including the European Court of Human Rights.<sup>14</sup> As discussed in Part 3, the South African Constitutional Court broadly mirrors the Brazilian ‘silence’ scenario, with the central difference that it has never once cited African Court jurisprudence. The Brazilian scenario also informs the discussion of possible explanations for the South African Constitutional Court’s non-citation of African Court case-law in Part 4.

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<sup>9</sup> See A von Bogdandy, E Ferrer, M Morales and F Piovesan (eds), *Transformative Constitutionalism in Latin America: A New Latin American Ius Commune* (Oxford University Press, 2017).

<sup>10</sup> See ME Góngora-Mera, ‘The Block of Constitutionality as the Doctrinal Pivot of a *Ius Commune*’ in A von Bogdandy, EF Mac-Gregor, M Morales Antoniazzi, and F Piovesan (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017).

<sup>11</sup> In very rare cases individual judges of the Court have drawn heavily on Inter-American case-law; e.g. in the judgment R.E. 511.961 (17 June 2009).

<sup>12</sup> IACtHR, (Ser. C) No. 219 (24 November 2010).

<sup>13</sup> See TG Daly, ‘Brazilian Supremacy and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship’ in P Fortes, L Boratti, A Palacios Lleras and TG Daly (eds), *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (Palgrave MacMillan, 2017) 15.

<sup>14</sup> See TG Daly, ‘The Differential Openness of Brazil’s Supreme Federal Court to External Jurisprudence’, International Association of Constitutional Law (IACL) World Congress, Oslo, 17 June 2014.

## 2. KINDRED SPIRITS: COMPARING THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE AFRICAN COURT

In many ways, the design and development of the South African Constitutional Court and the African Court mark them out as kindred spirits. Both are charged with a similar (though not identical) function to interpret a central document strongly focused on human rights and good governance, and both have energetically seized their mandate to elaborate a jurisprudence that does not shy away from taking assertive stances and speaking truth to power. However, the courts are of different vintages: the South African Constitutional Court is more than 20 years older than its regional peer. This places them in different positions of recognition and power, and has clear implications for their relationship. This section briefly provides an account of each court's trajectory to date, and its position within its own institutional setting, as well as its regional impact.

### The South African Constitutional Court

From the very beginnings of South Africa's transition to democratic rule after minority governance under *apartheid* in the early 1990s, the Constitutional Court has been a central institution. The permanent Constitution, produced by a Constituent Assembly after the 1994 elections and which entered into force in December 1996, enshrined a number of countermajoritarian mechanisms aimed at placing constitutional fetters on the African National Congress (ANC) and providing guardrails for the fledgling democratic order. The constitutional text expressly states the political system to be based on the values of human dignity, equality, human rights, the supremacy of the Constitution and the rule of law, and a "multi-party system of democratic government, to ensure accountability, responsiveness and openness".<sup>15</sup>

Much ink has been spilled on the placement of Constitutional Court as a central actor in the democratic constitutional order, with a wide range of powers aimed at constraining political powers, guarding the separation of powers, and upholding a long raft of fundamental rights. As a constitutional design option, the Court was designed to act as a constraint on the electoral dominance of the ANC and as protector of the white minority's rights in the new black-majority political system, and, as such, constituted a central guarantee in the political settlement underlying the democratic transition and the new constitutional order—as well as indicating concrete commitment to the grand ideals in new democratic constitution for a more just and equal society.<sup>16</sup> As Klug has observed, the Court 'has been called upon to address issues and to face challenges that would be considered extraordinary for any judiciary'.<sup>17</sup>

The Court quickly cemented its reputation for assertiveness in the 1990s with decisions holding the death penalty to be unconstitutional, ordering the enactment of laws on same-sex marriage in line with the Constitution, and upholding prisoners' voting rights.<sup>18</sup> The Court also developed an innovative, and internationally recognised, jurisprudence aimed at striking an extremely difficult balance between attempting to deliver on the promises of democracy and social justice in the 1996 Constitution, and avoiding overstepping the bounds of possible (and democratically proper) action in South Africa's democratic system – although it has been criticised

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<sup>15</sup> Article 1, Constitution of 1996.

<sup>16</sup> See e.g. T Roux, *Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013), and J Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016).

<sup>17</sup> H Klug, 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision Making' (2010) 3 *Constitutional Court Review* 1, 1.

<sup>18</sup> Roux, *Politics of Principle* (n 16) 235–364.

for taking a less robust approach to upholding social and economic rights than other courts, such as the Colombian Constitutional Court.<sup>19</sup>

The Court has repeatedly insisted that human dignity, equality, freedom, and individual rights, repeatedly proclaimed within the text, are to be viewed not as subtracting from the democratic principle, but rather, lying in ‘constructive tension’ with majority rule.<sup>20</sup> The Court has also indicated its rejection of any winner-takes-all conception of majority rule and has emphasised the need for a deliberative democracy where the minority as well as the majority are included in public decision-making.<sup>21</sup> The successes of the Constitutional Court in constraining the government, and the government’s apparent willingness to abide by the Court’s rulings, have been central to the perception of a positive trajectory in the crafting of a functioning democratic order underpinned by a robust rule of law.<sup>22</sup>

More recent judgments in the *Democratic Alliance*,<sup>23</sup> *Glenister*,<sup>24</sup> and *Nkandla*<sup>25</sup> cases, pushing back against perceived attacks on the Constitution by the Zuma administration – focused on anti-corruption agencies and presidential corruption in particular – have cemented the Court’s reputation as a defender of the constitutional system and a key guarantor of the separation of powers.<sup>26</sup> Internationally, as Law and Chang have noted, the Court is one of the few courts of the Global South that have entered the pantheon of globally-recognised and cited courts, alongside other ‘premier’ courts such as the US Supreme Court, Canadian Supreme Court, and the Federal Constitutional Court of Germany.<sup>27</sup> The South African Constitutional Court is also a judicial leader in its own region, having a significant influence on the jurisprudence of other courts, such as those of Kenya and Uganda,<sup>28</sup> and also serving as an institutional model for newer apex courts, such as the Constitutional Court of Zimbabwe.

## The African Court on Human and Peoples’ Rights

Following a long period of advocacy by academics and NGOs the African Union adopted a protocol in 1998 to establish an African Court on Human and Peoples’ Rights.<sup>29</sup> The protocol did not enter into force until January 2005, and the Court was finally established on 2 July 2006, as its first eleven judges were sworn in before a summit meeting of African leaders in the Gambian capital, Banjul.<sup>30</sup> It is based in Arusha, in northern Tanzania.

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<sup>19</sup> See U Baxi, ‘Preliminary Notes on Transformative Constitutionalism’ in O Vilheira, F Viljoen and U Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013).46.

<sup>20</sup> T Roux, ‘The Principle of Democracy in South African Constitutional Law’ in S Woolman & M Bishop (eds), *Constitutional Conversations* (Pretoria University Law Press, 2008) 82.

<sup>21</sup> Roux, *ibid*.

<sup>22</sup> See e.g. Fowkes, *Building the Constitution* (n 2).

<sup>23</sup> *Democratic Alliance v. President of the Republic of South Africa and Others* 2013 (1) SA 248 CC (S. Afr.).

<sup>24</sup> *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 CC (S. Afr.).

<sup>25</sup> *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* [2016] ZACC 11.

<sup>26</sup> See a recent article: N Parpworth, ‘The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers’ (2017) 61(2) *African Law Journal* 273.

<sup>27</sup> Although, as Law and Chang show, the Court is still cited far less by the main courts that it cites frequently (such as the Supreme Court of Canada: see DS Law & WC Chang, ‘The Limits of Global Judicial Dialogue’ (2011) 86 *Washington Law Review* 523.

<sup>28</sup> See JM Isanga, ‘African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics’ (2017) 49 *Geo. Wash. Int’l L. Rev.* 749, 764.

<sup>29</sup> RGV Cole, ‘The African Court on Human and Peoples’ Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions?’ (2010) 43 *The Comparative and International Law Journal of Southern Africa* 23, 26.

<sup>30</sup> Formally, the Court was established on 25 January 2004, with the entry into force of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights.

To date, 30 states have recognised the Court's jurisdiction—more than half of the AU's 55 member states.<sup>31</sup> However, to date a mere nine states have made the requisite declaration to allow direct individual and NGO petitions to the Court,<sup>32</sup> and one, Rwanda, rescinded this recognition in early 2016.<sup>33</sup> This slow uptake has significantly limited the scope of the Court's material jurisdiction, and is one factor in the seven-year wait for its first merits decision in a contentious case.<sup>34</sup> The Court has generally been reliant on the referral of cases by the African Commission on Human and Peoples' Rights, which appeared to evince considerable reluctance in the early years—referring only two cases before 2012.<sup>35</sup> That the African Court has been somewhat overlooked in the South African context is therefore, in one way, unsurprising.

However, the African Court has quickly developed a robust, high-quality and assertive jurisprudence in the five years since its first merits judgment. This summary focuses on the 17 merits judgments issued by the Court at the time of writing, which can be divided into four broad themes:<sup>36</sup>

(i) *political participation*: In its first merits judgment, issued in June 2013 in *Mtikila v. Tanzania*,<sup>37</sup> the Court unanimously found the ban on independent electoral candidacies in Tanzania's national constitution to constitute a violation of the African Charter. In late 2016 the Court ruled in *APDH v. Côte d'Ivoire*<sup>38</sup> that a new law on the Electoral Commission violated both the right to equal protection of the law in Article 3(2) of the African Charter on Human and Peoples' Rights and Article 10(3) of the African Charter on Democracy, Elections and Governance for placing opposition electoral candidates at a disadvantage by packing the body with representatives of the President, government ministers and the President of the National Assembly (parliament).

(ii) *freedom of expression*: In March 2014, in *Zongo v. Burkina Faso*<sup>39</sup> the Court found the State in violation of rights to judicial protection and free speech for failing to investigate and prosecute the killers of a journalist and his companions in 1998. In December 2014, in *Konaté v. Burkina Faso*<sup>40</sup> the Court unanimously ruled a 12-month sentence of imprisonment for criminal defamation imposed on the applicant journalist in 2012 (for having accused a public prosecutor of corruption) to be a violation of the Charter right to freedom of expression. In November 2017 in *Ingabire v. Rwanda*,<sup>41</sup> the Court deemed Rwanda in violation of the free speech rights in the African Charter (Article 9(2)) and the ICCPR (Article 19) and rights to an adequate defence under Article 7 of the African Charter due to a 15-year sentence of imprisonment imposed on the applicant, an opposition leader, for crimes including spreading genocide ideology, complicity in acts of terrorism, sectarianism, and terrorism in order to undermine the authority of the State.

<sup>31</sup> See <http://bit.ly/2uCmo6e>. The most reliable statistics on the African Court are available the ACTHPR Monitor ([www.acthprmonitor.org](http://www.acthprmonitor.org)).

<sup>32</sup> Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia.

<sup>33</sup> See Centre for Human Rights University of Pretoria, 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016 <http://bit.ly/2sFPMam>.

<sup>34</sup> To date, only Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania have made the required declaration. Rwanda has since withdrawn its declaration.

<sup>35</sup> M Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' 2(1) *International Human Rights Law Review* 17 (2013) at 51-54.

<sup>36</sup> Other judgments that do not clearly fit within these four themes are: *Kouma and Diabaté v Mali*, ACHPR, App. No. 040/2016 (21 March 2018); and *Anudo v Tanzania*, ACHPR, App. No. 012/2015 (22 March 2018) (deportation and right to citizenship).

<sup>37</sup> ACHPR, App. 009/2011 and 011/2011 (14 June 2013).

<sup>38</sup> ACHPR, App. No. 001/2014 (18 November 2016).

<sup>39</sup> ACHPR, App. No. 013/2011 (28 March 2014).

<sup>40</sup> ACHPR, App. No. 004/2013 (5 December 2014).

<sup>41</sup> ACHPR, App. No. 003/2014 (24 November 2017).



(ii) *fair trial, liberty, and equal protection before the law*: In the *Thomas*,<sup>42</sup> *Onyango*<sup>43</sup> and *Abubakari*<sup>44</sup> cases against Tanzania, decided in 2015 and 2016, the Court found the State in violation of the right to a fair trial in Article 7 of the African Charter in each case. In the *Saif Al-Islam Gaddafi*<sup>45</sup> judgment of June 2016 – the first referred by the African Commission – the Court found the secret detention and criminal proceedings against the second son of former Libyan President Gaddafi in violation of articles 6 (right to personal liberty, security and protection from arbitrary arrest) and 7 (right to fair trial). In late 2017 the Court issued three further merits decisions. In *Jonas v. Tanzania*<sup>46</sup> and *Onyachi v. Tanzania* the Court again found the State in violation of the rights to, respectively, fair trial (Article 7 of the African Charter) and liberty (Article 6). Adding to its previous judgments in the *Thomas*, *Abubakari* and *Onyango* cases, the Court's case-law has developed a pattern of sustained criticism of the deficiencies Tanzania's criminal justice system, concerning free legal aid, timely issuance of trial judgements, organisation of identification parades, and appropriate consideration of defences forwarded by the defendant.<sup>47</sup> However, it has not found a violation in every case: in *Isiaga v. Tanzania*,<sup>48</sup> for instance, it found no violation where the applicant alleged his fair trial right was breached due to erroneous visual identification and rights against discrimination arising from the refusal of legal aid; and in *Viking and Nguza v. Tanzania*<sup>49</sup> it found no violation due to a lack of sufficient evidence of bias and collusion in the applicant's trial for sexual offences.

(iv) *social and economic rights of indigenous communities*: In the landmark *Ogiek*<sup>50</sup> case against Kenya in May 2017 – referred to the Court by the Commission on the basis that it concerned serious and massive rights violations – the Court held that the Kenyan government had violated no less than seven articles of the African Charter, including collective rights, in a far-reaching dispute concerning the ancestral lands of the Ogiek community. Building on, and largely agreeing with, previous African Commission decisions in similar cases, the Court found violations of the rights to non-discrimination (Article 2), culture (Article 17(2) and (3)), religion (Article 8), property (Article 14), natural resources (Article 21) and development (Article 22). The judgment has been interpreted as recognising, in practical terms, a right to land, a right to food, and, potentially, a right to free prior and informed consent regarding State interference with ancestral lands.<sup>51</sup>

The Court's jurisprudence is also notable for aspects beyond the sheer number of violations found, such as its broad comparative approach (drawing in particular on – but not slavishly following – the case-law of the Inter-American and European human rights courts, and the Human Rights Committee), as well as the way in which it has mitigated many of the starker deficiencies of the African Charter (compared to the American and European rights conventions). Most notably, in its first merits judgment in *Mtikila* the Court reduced the impact of so-called 'clawback clauses' in the Charter through recourse to proportionality analysis – effectively establishing a 'restriction on restrictions'. The Court has also clearly stated its power to order investigations and damages where necessary. In line with its ability to interpret any rights treaty ratified by a respondent State, the Court has interpreted treaties such as the International Covenant on Civil and Political Rights

<sup>42</sup> ACHPR, App. No. 005/2013 (20 November 2015).

<sup>43</sup> ACHPR, App. No. 006/2013 (18 March 2016).

<sup>44</sup> ACHPR, App. No. 007/2013 (3 June 2016).

<sup>45</sup> *African Commission on Human and Peoples' Rights v. Libya*, ACHPR, App. No. 002/2013 (03 June 2016).

<sup>46</sup> ACHPR, App. No. 011/2015 (28 September 2015).

<sup>47</sup> See further, A Possi A, 'It is better that ten guilty persons escape than that one innocent suffer: the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 African Human Rights Yearbook 311; and Windridge O (2017) An emerging framework for all of Africa: the right to a fair trial at the African Court, The ACtHPR Monitor, 7 November. Available at <http://bit.ly/2ENigXv> (accessed 26 July 2018).

<sup>48</sup> ACHPR, App. No. 032/2015 (21 March 2018).

<sup>49</sup> ACHPR, App. No. 006/2015 (23 March 2018).

<sup>50</sup> *African Commission on Human and Peoples' Rights v. Kenya*, ACHPR, App. No. 006/2012 (26 May 2017).

<sup>51</sup> R Roesch, 'The Ogiek case of the African Court on Human and Peoples' Rights: not so much news after all?' EJIL: Talk! 26 June 2017. Available at <http://bit.ly/2E3yNoT> (accessed 26 July 2018).

(ICCPR) and the African Charter on Democracy, Elections, and Good Governance, as well as recognising the latter as a justiciable human rights instrument, bolstering its capacity to deal with sensitive electoral and governance issues in respondent states. The Court has met with clear successes, such as the agreement of the State to open an investigation in compliance with the Court's order in *Zongo*, the recent judgment of the Lesotho Constitutional Court striking down domestic criminal defamation laws in line with the African Court judgment in *Konaté*.<sup>52</sup>

That said, the Court has faced serious and multi-dimensional resistance to its authority, not least widespread refusal by respondent states to implement its decisions, including its host state, Tanzania. In addition, instruments geared towards institutional reform have left the African Court in a state of institutional insecurity, unsure whether it will be radically transformed: the Malabo Protocol adopted in 2014, if ratified, would merge the Court with the AU's (not yet established) Court of Justice to create an African Court of Justice and Human Rights, and would expand the new court's remit to international criminal jurisdiction.<sup>53</sup>

### 3. A LIMITED OPENNESS: THE CONSTITUTIONAL COURT'S APPROACH TO INTERNATIONAL LAW

This section explores the Court's practice of citing international law and courts, in two parts. The first part provides a broad overview of the Court's practice of citing international law and courts, highlighting the partial and somewhat superficial recourse to international law in much of the Court's jurisprudence. The second part sets out data demonstrating the Court's non-citation of the African Court, and considers areas where African Court jurisprudence could provide 'added value' to the Constitutional Court's case-law.

#### Overview: the Constitutional Court's Citation of International Law and Courts

If the first hallmark of South Africa's 1996 Constitution was the establishment of a powerful domestic constitutional court, the second significant hallmark of South Africa's was surely the formal place accorded to international law by the constitutional text. The now-famous Section 39 states expressly mandates reference by South African courts to international law in interpreting the Bill of Rights, stating:

1. When interpreting the Bill of Rights, a court, tribunal or forum-
  - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - b. must consider international law; and
  - c. may consider foreign law.<sup>54</sup>

The main approach, then, was to focus on an 'inside-out' approach, where the South African judiciary would reach out to international law norms in interpreting the Bill of Rights, with much less focus on an 'outside-in' approach that would entail intervention by international judicial actors: indeed, at the time the 1996 Constitution was being drafted, and entered into force, the prospect of an African Court on Human and Peoples' Rights was yet a mere possibility.

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<sup>52</sup> See O Windridge, 'A Cause for Optimism: Lesotho Strikes Down Criminal Defamation', ACtHPR Monitor 23 May 2018 <https://bit.ly/2uSvoqy>.

<sup>53</sup> For a full account of the challenges faced by the African Court, see TG Daly and M Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court' (2018) 14(2) *International Journal of Law in Context* 294.

<sup>54</sup> A similar provision was found in the 1993 Interim Constitution. Article 35 stated: "(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

As Dire Tladi has observed, the South African Constitution is “reputed to be one of the most international law-friendly constitutions in the world.”<sup>55</sup> One can find many statements to this effect in the Constitutional Court’s jurisprudence. For instance, in the *Glenister* decision of 2011, Ngcobo J offered:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.<sup>56</sup>

Yet, Tladi also emphasises that South African courts, including the Constitutional Court, have struggled to set out a sound and systematic methodology for addressing and interpreting international law, with the result that references to international law and adjudication on complex matters of international law can be quite superficial.<sup>57</sup>

At times, the Constitutional Court’s recourse to international law has also been viewed as highly instrumental; used as a part of judicial strategy to achieve certain adjudicative ends while attempting to shield the Court from executive opprobrium. In *Glenister*<sup>58</sup> the Court was called to intervene to stymie legislation affecting the independence of the National Prosecuting Authority (NPA), viewed by the applicants as attenuating the capacity of prosecutorial agencies to address official corruption.<sup>59</sup> In a careful judgment, delivered in March 2011, the Court, recognised that transfer of some anticorruption powers to the police and disbandment of a particular anticorruption unit within the NPA were, in principle, permissible, but that the amendment removed important protections of prosecutorial independence by placing power in the hands of political actors who might themselves be subject to prosecution.

As Issacharoff recounts, in *Glenister* the Court eschewed the option of basing its judgment on democratic principles within the Constitution, choosing instead to invoke Section 39 (as well as Sections 231(2) and 7(2)) to ground its holding that international conventions to which South Africa is a party require member states to maintain anticorruption agencies with a sufficient level of independence, with the result that a failure to meet this requirement could not be considered reasonable.<sup>60</sup> Issacharoff argues (rightly) that the reasoning was not entirely convincing, but it is clear that the Court’s recourse to international obligations allowed it to escape a more uncomfortable ruling that challenged the Zuma government head-on:

Placing responsibility for its decision on international law is an interesting judicial expedient. It has the effect of avoiding a direct confrontation with the constitutional underpinnings of democratic authority and instead turning attention to the commands of foreign engagements. The court could sidestep any engagement with the hard questions of the one-party weight of the ANC and instead purport to act as the simple messenger of international law. It was the South African government that entered into the international covenants and the court could act as if its hands were tied.<sup>61</sup>

Certainly, *Glenister* sits a little oddly alongside other decisions such as the *Azanian Peoples’ Organisation* case,<sup>62</sup> in which the South Court emphasised that, while domestic amnesty legislation violated various provisions of international humanitarian law and the right of access to court, the

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<sup>55</sup> D Tladi, Dire ‘Interpretation and International Law in South African courts: The Supreme Court of Appeal and the Al Bashir Saga’ (2016) 16(2) *African Human Rights Law Journal* 310.

<sup>56</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) para. 97.

<sup>57</sup> Tladi, ‘Interpretation and International Law’ (n 55) 338.

<sup>58</sup> *Ibid*,

<sup>59</sup> See Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015). Chapter 11 260ff.

<sup>60</sup> *Ibid*. 261.

<sup>61</sup> *Ibid*. 262.

<sup>62</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

fundamental question was not the legality of amnesty according to international law, but within the terms of the South African Constitution itself.<sup>63</sup>

## Exploring the Constitutional Court's (Non-)Citation of African Court Jurisprudence

It is against the brief overview above of the Constitutional Court's general approach to citing international law and courts that we turn to the Court's approach to African Court case-law, and the African Charter more broadly.

First, it is worthwhile to note that, unlike the strong and region-wide domestic judicial practice of referring to international human rights law, in both Latin America and Europe, the highest domestic courts across AU Member States refer relatively rarely to international law. Although common law courts appear to show a greater openness than courts in civil-law systems (e.g. Chad, Senegal), even within the common-law category there is wide diversity: for instance, the courts of Ghana and Botswana have made use of international law in adjudication, while Zambian courts tend to avoid it.<sup>64</sup> Of most relevance here, domestic courts tend not to refer to the jurisprudence of the African Court (or other international courts in the AU). As one scholar has recently observed, despite increasing reference to the decisions of the African Commission by national courts, there is

little evidence of the use of the jurisprudence of other regional and sub-regional courts or bodies such as the African Court and the African Children's Committee. This is perhaps owing to the fact Africa's supranational courts and tribunals, apart from the African Commission, are relatively young compared to their European counterparts.<sup>65</sup>

The South African Constitutional Court is no exception in this regard and, if anything, appears more reluctant than many other courts to embrace African Court case-law. In order to assess whether, and how, the Constitutional Court cites African Court jurisprudence, and the African Charter more generally, this section relied on a relatively simple methodology. Every judgment of the Constitutional Court since 14 June 2013 (the date of the African Court's first merits judgment) has been searched on the South African Legal Information Institute (SAFLII) database<sup>66</sup> using four search terms: "African Court", "African Charter", "charter", and "Banjul" (to catch any reference to the African Charter as the "Banjul Charter").<sup>67</sup> This exercise produces three key insights and provokes one broader reflection, as follows.

First, despite the African Court's growing corpus of case-law, the Constitutional Court in 237 judgments during this period has not yet cited African Court jurisprudence, even once.<sup>68</sup> No mention of any of the African Court's 17 decisions to date could be found in the case-law search.

Second, and relatedly, in the five-year period covered by this research, only sporadic references to the African Charter can be found, as well as isolated references to other African Union rights instruments, such as the Protocol to the African Charter on the Rights of Women in

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<sup>63</sup> A O'Shea, 'A Critical Reflection on the Proposed African Court on Human and Peoples' Rights' (2001) 1(2) African Human Rights Law Journal 285, 288.

<sup>64</sup> M Killander and H Adjolohoun, 'International Law and Domestic Human Rights' in M Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, 2010).

<sup>65</sup> B Ramadi Dinokopila, 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in CM Fombad (ed), *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 236.

<sup>66</sup> <http://www.saflii.org/za>.

<sup>67</sup> At the time of writing, the most recent judgment of the Constitutional Court on SAFLII was *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* (CCT 182/17; CCT 240/17) [2018] ZACC 21 (17 July 2018). The database indicates that the last update was 24 July 2018.

<sup>68</sup> The breakdown by year is: 32 (2013); 39 (2014); 40 (2015); 55 (2016); 49 (2017); 22 (2018).

Africa<sup>69</sup> the African Charter on the Rights and Welfare of the Child,<sup>70</sup> and the AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa.<sup>71</sup> In most cases, reference to the African instrument is rather cursory and no extended interpretation is provided: see, for instance, the fleeting reference to the Charter in the *Nkabinde* case<sup>72</sup> concerning the best interests of the child, or regarding the meaning of the phrase “freedom, and security of the person” in *AB v Minister of Social Development*.<sup>73</sup> Rare examples of slightly more extended analysis include reference to Charter Article 18 on the family in *DE v RH*, concerning a spouse’s right of action in delict against a third party for adultery under national law.<sup>74</sup>

Third, in contrast to the complete absence of references to African Court case-law, the Constitutional Court appears far more open to citing other international courts during this period, especially the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). In the five-year period covered, one finds a raft of references to the ECtHR,<sup>75</sup> and various references to the CJEU.<sup>76</sup> This is alongside citation of customary international law,<sup>77</sup> United Nations standards,<sup>78</sup> Council of Europe standards<sup>79</sup> – and of leading charters and national courts worldwide, especially the Canadian Supreme Court and the Canadian Charter of Rights and Freedoms.<sup>80</sup>

The broader reflection these three key insights prompt is what, if anything, is missing from the Constitutional Court’s case-law due to its failure to cite African Court jurisprudence, or the African Charter more broadly. For some cases, it appears evident that African Court jurisprudence

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<sup>69</sup> See *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16 (14 June 2018) para. 60.

<sup>70</sup> *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) (27 September 2013)

<sup>71</sup> *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016) para. 34.

<sup>72</sup> *Nkabinde and Another v Judicial Service Commission and Others* (CCT122/16) [2016] ZACC 25; 2016 (11) BCLR 1429 (CC); 2017 (3) SA 119 (CC) (24 August 2016) para.20.

<sup>73</sup> *AB and Another v Minister of Social Development* (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC) (29 November 2016) para. 309.

<sup>74</sup> *DE v RH* (CCT 182/14) [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) (19 June 2015).

<sup>75</sup> See *De Vos N.O. and Others v Minister of Justice And Constitutional Development and Others* (CCT 150/14) [2015] ZACC 21; 2015 (2) SACR 217 (CC); 2015 (9) BCLR 1026 (CC) (26 June 2015) para. 22, para. 37; *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (30 June 2015) para. 18, para. 63, para. 111, para. 153; *Legal Aid South Africa v Magidiwana and Others* (CCT188/14) [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) (22 September 2015) para. 111; *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015) para. 84; *Nkabinde and Another v Judicial Service Commission and Others* (CCT122/16) [2016] ZACC 25; 2016 (11) BCLR 1429 (CC); 2017 (3) SA 119 (CC) (24 August 2016) para. 8; *Hotz and Others v University of Cape Town* (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) (12 April 2017) para. 30; *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC 9; 2018 (7) BCLR 856 (CC) (24 April 2018) para. 32

<sup>76</sup> See, in particular, *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* (CCT214/15) [2016] ZACC 37; 2017 (1) BCLR 64 (CC); (2017) 38 ILJ 295 (CC); [2017] 3 BLLR 258 (CC) (1 November 2016) para. 2, para. 22 et seq;

<sup>77</sup> See e.g. *Saidi v Minister of Home Affairs* (n 75).

<sup>78</sup> See e.g. *De Vos v Minister of Justice* (n 75) para. 29 (*UN Convention on the Rights of Persons with Disabilities*); and *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) para. 15 (*UN Convention Against Corruption*).

<sup>79</sup> *McBride v Minister of Police* (n 71) para. 34 (Council of Europe’s Commissioner for Human Rights’ Opinion on the Independent and Effective Determination of Complaints Against the Police).

<sup>80</sup> See e.g. *AB v Minister of Social Development* (n 73) para. 136, para. 305; and *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) (1 December 2017) footnotes to paras. 98 and 99.

is largely irrelevant: in cases concerning company law, trusts, tenancy law, employment law, and succession law, for instance.<sup>81</sup>

However, in other cases existing African Court case-law appears highly relevant. Two examples will suffice here. First, in *Democratic Alliance v African National Congress*,<sup>82</sup> decided on 19 July 2015, the Constitutional Court addressed the right to freedom of expression and the right to vote in free and fair elections, in a case concerning the Democratic Alliance (DA)'s issuance of an SMS to 1.5 million voters concerning then President Jacob Zuma and the Nkandla Report (on the president's corrupt use of public monies) ahead of the 2014 elections. However, despite its clear relevance, the Court makes no reference in its decision to the African Court's existing judgments, including its landmark judgment in *Mtikila v. Tanzania* over eighteen months earlier, concerning the right to political participation, nor its free speech judgments in the *Zongo* and *Konaté* cases against Burkina Faso. Nor does the Constitutional Court make any reference to the relevant rights in the African Charter (Article 9(2) right to freedom of expression and Article 13 right to political participation). The same could be said of *Kham v Electoral Commission*,<sup>83</sup> decided in November 2015, which concerned the Electoral Commission's duty to register voters in the correct voting district.

Even in some cases that appear entirely rooted within the particularities of the South African historical, social, political and constitutional context – such as cases concerning the legacy of apartheid<sup>84</sup> – reference to African Court jurisprudence and the African Charter could enrich the analysis and place it in a wider context. After all, the preamble to the African Charter expressly refers to the Charter of the Organization of African Unity statement that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”, and refers to the need to eliminate apartheid (as well as colonialism, neo-colonialism and other forms of domination). This may seem itself superficial, but it is worthwhile to emphasise that there is no comparable statement in any other international human rights treaty.

This is not to make the argument for a generalised citation of African Court jurisprudence, and of the African Charter itself, but rather, to make the point that in many instances it appears that these sources could enrich the South African Constitutional Court's jurisprudence and anchor it more firmly within the developing regional system of human rights protection. In some cases, as seen above, highly relevant African Court decisions have not been cited. What accounts for this? Is the Constitutional Court snubbing its regional counterpart, or is there a wider array of explanatory factors at play?

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<sup>81</sup> See e.g. *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* (CCT106/16) [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) (23 May 2017); *Genesis Medical Scheme v Registrar of Medical Schemes and Another* (CCT139/16) [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC) (6 June 2017); *Mokone v Tassos Properties CC and Another* (CCT113/16, CCT291/16) [2017] ZACC 25; 2017 (10) BCLR 1261 (CC); 2017 (5) SA 456 (CC) (24 July 2017); *September and Others v CMI Business Enterprise CC* (CCT279/16) [2018] ZACC 4; 2018 (4) BCLR 483 (CC); (2018) 39 ILJ 987 (CC); [2018] 5 BLLR 431 (CC) (27 February 2018); and *Moosa NO and Others v Minister of Justice and Correctional Services and Others* (CCT251/17) [2018] ZACC 19 (29 June 2018).

<sup>82</sup> *Democratic Alliance v African National Congress and Another* (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (19 January 2015).

<sup>83</sup> *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015).

<sup>84</sup> See e.g. *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (8 November 2016); *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) (1 December 2017); and *AfriForum and Another v University of the Free State* (CCT101/17) [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (29 December 2017).



#### 4. IS THE CONSTITUTIONAL COURT SNUBBING THE AFRICAN COURT? ‘IT’S COMPLICATED’

At one level, one could approach the Constitutional Court’s non-citation of African Court jurisprudence as simply one of institutional preference – or individual judicial preference which happens to be shared by all eleven judges across the Court. One could also frame it as an issue of supremacy: having accreted an appreciable level of hard-won constitutional supremacy since the mid-1990s, the Constitutional Court may be unwilling to cede a share to an international court, or may fear losing a significant level of adjudicative autonomy if it tethers itself too closely to its regional counterpart. We might also characterise it as just one dimension of a general propensity to cite case-law outside Africa: for instance, regarding citation of foreign courts (rather than international law and courts) Joseph Isanga suggests that the Constitutional Court’s tendency to cite US and European courts reflects a more general tendency – seen also in other “successful” courts in Botswana, Ghana, Malawi, and Namibia – to rely unduly on “non-African jurisprudence” to validate judgments.<sup>85</sup> Although various Constitutional Court judges, such as Justice Sachs, have expressed support for comparative African jurisprudence, Isanga states: “the South African Constitutional Court has referenced more non-African jurisprudence than African jurisprudence in its judicial review.”<sup>86</sup>

However, a range of additional explanatory factors can be considered for the Constitutional Court’s failure to cite the African Court, which suggest that responsibility cannot be laid entirely at the Constitutional Court’s door. This section canvasses seven such factors, ranging from macro-political factors, to strategic institutional factors, to broad structural factors.

First, the broad macro-political environment does not incentivise the Constitutional Court to look to the regional level. It is important to recall that the Organisation of African Unity (OAU) was not replaced by the African Union (AU) until 2002 and judicial or quasi-judicial mechanisms at the regional level had made little impact at the national level as the Constitutional Court out its role in the new democratic dispensation. The African Commission on Human and Peoples’ Rights, for instance, created as a stand-alone institution in 1987, and faced with almost universally undemocratic regimes,<sup>87</sup> had at the time found little room to manoeuvre following its establishment. It had adopted a more deferential posture to states than its counterparts in other regions, through a focus on ‘positive dialogue’, inconsistent use of provisional measures, and reluctance to follow up its decisions, and it had yet to issue its most assertive decisions.<sup>88</sup>

More fundamentally, it may be offered that the ANC, in the grand political settlement underlying South Africa’s transition from minority rule under *apartheid* to majority rule under the new democratic dispensation, had submitted to a very particular form of domestic judicial power—embodied in the Constitutional Court—not to judicial power in any form. In addition, the ANC was eager to place the state within the mainstream of international law, to end South Africa’s status as a pariah state in the international community under apartheid, as evidenced in its ratification of a raft of international human rights treaties throughout the 1990s (e.g. the International Covenant on Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination).<sup>89</sup> However, post-apartheid South Africa was, as Peter Vale puts it, a “reluctant regionalist” in economic affairs, which may also explain its approach to regional human rights protection, an issue discussed in more depth below:

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<sup>85</sup> See JM Isanga, ‘African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics’ (2017) 49 *Geo. Wash. Int’l L. Rev.* 749, 752 note 24.

<sup>86</sup> *Ibid.*

<sup>87</sup> The only electoral democracies in the late 1980s were Botswana, The Gambia, and Mauritius.

<sup>88</sup> See G Bekker, ‘The African Commission on Human and Peoples’ Rights and Remedies for Human Rights Violations’ (2013) 13 *Human Rights Law Review* 499.

<sup>89</sup> A useful list of treaty ratifications is provided by the University of Minnesota’s Human Rights Library: <http://bit.ly/2t9tEZw>.

For all the pageantry, pomp and pronouncements of South Africa's new place in the order of regional things, the country was a reluctant regionalist. Not only were the bureaucrats responsible for making the first links into the region's multilateralism drawn from the country's apartheid past, but economic discourse within South Africa had turned its attention away from the region. As a 1994 report issued by the African Development Bank noted: 'What is clear is that for South Africa national interests are paramount, while regional issues are secondary and likely to remain so.' This emphasis on South Africa's own interests, rather than on developing a common regional purpose, ended any hope that the region could become more than the sum of its separate sovereign pieces.<sup>90</sup>

The almost exclusive focus on domestic countermajoritarian institutions in South Africa's democratic transition lies in significant contrast to democratic transitions in Central and Eastern Europe and South America throughout the 1980s and 1990s. In the latter transitions, the sweeping region-wide shift from authoritarianism to democratic rule provided a sound basis for action by a regional human rights court. In Europe it required the re-making of the European Court of Human Rights as an aid in preventing the re-emergence of totalitarian regimes. In South America it provided the Inter-American Court of Human Rights with the space to carve out a rule in assisting pushback against reconsolidation of military governments or extreme right-wing regimes with strong ties to the military. The African scenario was different. There was no sweeping region-wide democratic transformation. South Africa, albeit a totemic and era-defining transition to democracy, was part of a much patchier and more atomised set of African democratic transitions during the 1990s, with the result that, although it was a highly internationalised process, it was not a regionalised process.

Second, there may very well be a sense that the successes of the Constitutional Court render an international human rights court obsolete in the South African context. As Andreas O'Shea has observed, various arguments had been made to this effect before the African Court was established:<sup>91</sup>

This argument rests on the premise that there are adequate mechanisms for the protection of human rights on a national level. It may be said that at national level a constitution with a bill of rights exists. That bill of rights reflects all the important provisions of human rights treaties and may be enforced through a constitutional court that will give primacy to the constitution and the bill of rights. What need is there then for yet another body to perform this identical judicial function? The South African Constitutional Court may serve as an example. The Constitutional Court applies the Constitution that incorporates most of the content of the African Charter and arguably goes further. Other decisions, rulings and legislation may be declared unconstitutional if they infringe the Bill of Rights. The Court itself operates in a very similar fashion to the proposed African Court. It consists, like the African court, of 11 judges, its decisions are final and binding and its judges are in practice selected from personalities that have struggled for the protection of human rights and fundamental freedoms.

Third, a number of rational strategic considerations – beyond mere preference, discussed above – may inform the Constitutional Court's approach to citation of international law. If a central aim of such citation is to bolster its jurisprudence, it is understandable that the Court would cite more venerable courts such as the US Supreme Court, the Canadian Supreme Court, and the ECtHR, rather than younger courts. The objective of shielding the Constitutional Court may have become more acute in recent years, as it weathered periodic attacks from the Zuma administration, including the government's announcement of a review of the Court's powers in 2012.<sup>92</sup>

Fourth, the fact that the South African government has not made the optional declaration to permit individual and NGO petitions to the African Court may be viewed as a barrier to freely citing the latter's case-law. However, such an argument (if entertained within the Constitutional

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<sup>90</sup> P Vale, *Whatever happened to the post-apartheid moment? Past hopes and possible futures for southern Africa* (CIIR, 2004) 17.

<sup>91</sup> O'Shea, 'A Critical Reflection' (n 63) 287-288.

<sup>92</sup> S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 288.



Court) does not hold up when one considers the Constitutional Court's liberal citation of other courts, even those interpreting normative instruments to which South Africa is not a party (such as the European Convention on Human Rights and EU law).

Fifth, seniority or vintage may play a broader part here. From a comparative perspective, it is notable that the national courts that have evinced most resistance (even if mainly principled) to the regional human rights court in other world regions were all established *before* the regional court, i.e. the constitutional courts of Germany (1951) and Italy (1956), the UK Supreme Court (successor of the centuries-old Judicial Committee of the House of Lords), and the Brazilian Supreme Court (first established in republican Constitution of 1891). The fact that the South African Constitutional Court was established twenty years before its regional peer may be significant.

Sixth – and building on the lack of incentives to cite the African Court – it appears that there is no countervailing force pushing the Constitutional Court to cite African Court jurisprudence. It is clear from the case-law review in Part 3, above, that in many cases it is the applicants' submissions that direct the Court toward specific sources of international law.<sup>93</sup> In this respect, it is notable that knowledge of the African Court in South Africa – and indeed, across the African Union – remains minimal. As the Court's former president observed, even in the Court's permanent seat, the city of Arusha in northern Tanzania, “there are people who are wondering if there is such a court in the city.”<sup>94</sup> A 2015 interview with Lenser Anyango of the Network of African National Human Rights Institutions (NANHRI)–which brings together 44 national human rights institutions from across the region (including the South African Human Rights Commission (SAHRC))–revealed a strong sense among human rights activists across the continent that the Court is an “alien institution” and that most rights bodies are “detached, disinterested and disconnected from the African Court process.”<sup>95</sup> It is likely, then, that applicants are not citing African Court jurisprudence or the African Charter when petitioning the South African Constitutional Court.

Seventh, and finally, other practical considerations may also be at play: judges on the Constitutional Court may have limited familiarity with the African Court's case-law; links between the two courts may be underdeveloped (despite the biennial African Judicial Dialogue organised by the African Court, other visits, and plans for an African Judicial Network); and there is currently no South African judge on the African Court (the only South African judge, Justice Bernard Makgabo Ngoepe, served two terms, a two-year term and six-year term, from 2006-2014).

## CONCLUSION: WHY DOES THIS RELATIONSHIP MATTER?

This paper has picked over the odd relationship between the South African Constitutional Court and the African Court on Human and Peoples' Rights, attempting to divine the reasons why a national court with such a strong affinity – in principle – to its regional counterpart would ignore the latter's jurisprudence. While it is not possible to say with any certainty why this is the case, by canvassing a variety of possible explanations, and considering the question from a comparative perspective, the aim of this paper was to provide some light to a dimly-lit area of research on the much-studied Constitutional Court.

This does not simply matter as an academic exercise. Rather, the paper has argued that the ongoing failure of the Constitutional Court to cite African Court jurisprudence means that it is foregoing an opportunity to genuinely enrich its own case-law, and to anchor it more firmly in the

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<sup>93</sup> See e.g. *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* (CCT214/15) [2016] ZACC 37; 2017 (1) BCLR 64 (CC); 2017 38 ILJ 295 (CC); [2017] 3 BLLR 258 (CC) (1 November 2016) para. 2, para. 22.

<sup>94</sup> ‘African rights court unknown to many’ *The Citizen* (23 August 2016) <http://bit.ly/2u9oVs0>.

<sup>95</sup> ‘An alien institution: a Q&A with the Network of African National Human Rights Institutions’ *The ACtHPR Monitor* 24 November 2015 <http://bit.ly/2uBZxYL>.

developing pan-regional human rights system. Moreover, as the African Court's jurisprudence grows, failure by the South African Constitutional Court will seem increasingly incongruous; what now seems curious will start to seem like a deafening silence. There is no doubt that the African Court's case-law is set to rapidly expand in the near future: its website lists over 100 cases pending before the Court (admittedly, 80 of these concern the Court's host state, Tanzania).

More importantly, it appears that the South African Constitutional Court is in a uniquely influential position – as against its national peers – to provide support to the development of the African Court as a key site for the elaboration of a transregional community centred on the African Charter of Human and Peoples' Rights; by far the most widely ratified rights treaty in the African Union. The argument, then, is not for citation and support from the South African Court as an act of judicial courtesy or even judicial charity, but rather, because the African Court has shown itself, through its high-quality, well-reasoned and robust jurisprudence, to merit support, and to be capable of pushing forward the development of the human rights agenda at the pan-regional level. There is no pretence here that the African Court is not beset by numerous challenges, but that is all the more reason to support its work. Only time will tell if the kindred strangers can become kindred spirits.