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Kindred Strangers: Why has the Constitutional Court of South Africa Never Cited the African Court on Human and Peoples' Rights?

TOM GERALD DALY

ABSTRACT: Why has the Constitutional Court of South Africa never cited 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 Constitutional Court has yet to cite its jurisprudence. This article 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 suggesting a range of possible explanatory factors, including: the state's position as a 'reluctant regionalist'; institutional factors (such as the Constitutional Court's possible preference to retain constitutional supremacy and adjudicative autonomy, and tendency to more readily cite non-African jurisprudence); and broader structural factors (such as a lack of citations in submissions to the Court). It is argued that this matters for two reasons. First, it may possibly deprive the Constitutional Court of sources that could enrich its jurisprudence and anchor it in the developing regional human rights system. Second, as perhaps the two most important courts on the entire continent as regards rights protection, it seems desirable that the relationship between the Constitutional Court and the African Court should be developed and deepened – which does not mean they will always agree.

KEYWORDS: Constitutional Court of South Africa; African Court on Human and Peoples' Rights; constitutional law; international human rights; good governance; judicial dialogue

AUTHOR: Assistant Director, Melbourne School of Government.
Email: thomas.daly@unimelb.edu.au

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I INTRODUCTION: A STRANGE PROPOSITION?

At first blush, it may seem a strange proposition to enquire about the relationship between the Constitutional Court of South Africa and the African Court on Human and Peoples' Rights ('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 article 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 almost six years since the latter's first merits judgment in June 2013.[1] 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.[2] In fact, no account of the Constitutional Court's citation of the African Court yet exists – nor any full account of the wider relationship between the Constitutional Court and the African Court, or the Constitutional Court's relationship more broadly with the wider African human rights system.[3] This represents a significant gap in the literature.

This article 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 structural factors, including the fact that South Africa has yet to make the special declaration required to permit individual and NGO petitions to the African Court (which greatly limits the state's interaction with the 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, tendency to more readily cite non-African jurisprudence, 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 article's main claim is that this matters for two reasons. First, it may possibly deprive South African jurisprudence of sources that could enrich it and anchor it in the developing regional human rights system. Second, as perhaps the two most important courts on the entire continent as regards rights protection, it seems desirable that the relationship between the Constitutional Court and the African Court should be developed and deepened. The South

[1] This lacuna in the jurisprudence is discussed below in part IV.

[2] J Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016).

[3] A limited number of events have focused on the relationship between the South African courts and African regional human rights instruments. 'Colloquium on the Application of the African Charter on Human and Peoples' Rights by South African Courts' (2013) 14(1) *Economic and Social Rights in South Africa* 10–11.

African Constitutional Court has a uniquely influential position in the African Union (AU), as regards other apex national courts, while the African Court has growing importance as the final judicial interpreter of the African Charter of Human and Peoples' Rights – which, as the most widely ratified rights treaty in the AU (54 of the 55 AU member States to date, except the Kingdom of Morocco, which re-joined the AU in January 2017), may arguably be viewed as the primary pan-continental human rights instrument.[4]

The article contains four substantive parts. Part II briefly sets out the methodology followed and necessary caveats. Part III examines the development and purposes of the South African Constitutional Court and the African Court, highlighting the commonalities and divergences between the two institutions, and arguing that the two are 'natural allies' with similar approaches. Part IV 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 V canvasses the possible reasons why the South African Constitutional Court has not developed a strong relationship with the African Court.

II METHODOLOGY AND NECESSARY CAVEATS

In order to assess whether, and how, the Constitutional Court cites African Court jurisprudence, and the African Charter more generally, this article has utilised a relatively simple methodology. Every judgment of the Constitutional Court since 14 June 2013 (the date of the African Court's first merits judgment) until the time of writing (25 February 2019) has been searched on the South African Legal Information Institute (SAFLII) database[5] using four search terms: 'African Court', 'African Charter', 'charter', and 'Banjul' (the latter to catch any reference to the African Charter as the 'Banjul Charter').[6] The initial aim was to simply identify how many times the Constitutional Court had cited the case-law of the African Court, and then analyse these instances in more depth. Finding that the Constitutional Court had not yet cited any African Court judgment was unexpected, and sent the analysis in a different direction.

The broader methodological thrust of this enquiry is comparative, in the sense that it is couched in an understanding of experiences in other world regions with continental human rights courts – namely, Latin America and Europe – where, despite dominant positive accounts of regional judicial interaction,[7] national courts have often difficult relationships with the regional international human rights court.[8] These inter-court relationships run the gamut from highly engaged, to patchy, to even hostile or acutely undeveloped. The approach in this article might also be called 'thinly' normative, in the sense that it suggests that the Constitutional Court should, at least, pay greater attention to the case-law coming from the African Court

[4] The African Charter on the Rights and Welfare of the Child has been ratified by 48 state parties. However, its breadth does not quite compare with that of the Banjul Charter.

[5] South African Legal Information Institute (SAFLII) at http://www.saflii.org.za.

[6] At the time of writing, the most recent judgment of the Constitutional Court on SAFLII was *Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* [2019] ZACC 9.

[7] A von Bogdandy, E Ferrer Mac-Gregor, M Morales Antoniazzi & F Piovesan (eds) *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (2017).

[8] For a discussion of this common tension between domestic courts and international tribunals, see part V below.

in Arusha given its position as the final judicial interpreter of the African Charter on Human and Peoples' Rights as well as a range of other international instruments.

A number of caveats are required here. First, there is no attempt to crudely analyse the African context through Inter-American and European lenses. The African context must be analysed on its own merits. Nor is there any form of inchoate teleology underlying this analysis, suggesting that the African human rights multi-level judicial system does – or ought to – develop in a manner similar to either the Inter-American and European systems. Each of those systems evidently has its own strengths and weaknesses, based on the wider historical, socio-political and regional context in which it has developed.[9] Nor should the analysis be understood as suggesting a unidirectional flow of norms from the international to the domestic level: the exchange is not only bidirectional, but tends to be multidirectional, with national courts influencing human rights courts (eg, Colombian and US Supreme Court case-law influencing the Inter-American Court),[10] and some national courts (eg, the constitutional courts of South Africa, Colombia, and Germany) influencing how apex courts in other states approach, and give effect to, international human rights jurisprudence. There is also no argument here that the Constitutional Court should slavishly or uncritically follow African Court jurisprudence or 'shoehorn' the latter's case-law into analysis of the domestic Constitution. Nor can there be any facile analysis of one court's jurisprudence necessarily being superior to the other. These courts have different missions, audiences and resources, operate in different contexts, and under different political pressures and constraints.

That said, it is worthwhile to acknowledge that the African Court has itself made repeated references to both the Inter-American and European human rights systems and courts in its jurisprudence[11] and has pursued inter-regional judicial collaboration in various ways beyond its case-law, especially through organising face-to-face meetings with judges from each system.[12] It also may be argued that, while remaining cognisant of the differences between the African continental human rights system and the Inter-American and European systems, the variety of relationships between national courts and human rights courts in these other regions is illuminating in itself, emphasising that there is no one model for ideal interaction.

Analysis in other regions, by scholars such as Alexandra Huneeus (Latin America) and Nico Krisch (Europe) highlights that many different factors come into play in shaping how national courts interact with, and perceive, international human rights courts. Krisch highlights, in particular, that broadly positive interaction in Europe is not achieved through any formal design, but by each court engaging in 'judicial diplomacy' and strategy across the national/international divide to allow the overall system to function without excessive

[9] T Daly *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (2017) chapter 3.

[10] One can discern the influence of the Colombian 'block of constitutionality' doctrine on the Inter-American Court's 'block of conventionality' doctrine. E Ferrer-MacGregor 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' in *Transformative Constitutionalism* (note 7 above). See also E Carter, 'Actual Malice in the Inter-American Court of Human Rights' (2013) 18 *Communication Law and Policy* 395 (2013).

[11] This proposition has held true since the Court's first judgment. *Mtikila v Tanzania* ACHPR, App. 009/2011 and 011/2011 (14 June 2013).

[12] In its second 'Continental Judicial Dialogue' in 2015 the African Court invited judges from the Inter-American Court to share their experiences. O Windridge '2015 at the African Court on Human and Peoples' Rights – A Year in Review' The ACtHPR Monitor 25 January 2016, available at www.acthprmonitor.org/2015-at-the-african-court-on-human-and-peoples-rights-a-year-in-review.

friction.[13] Huneeus suggests that these relationships are strongly conditioned by judicial culture and domestic courts' self-perception of the ambit of their role, judicial attitudes to regional (judicial) oversight and a wish to retain the 'final say' in constitutional matters, executive influence (eg, in Venezuela), the overall ideological leanings of the state, the formal status of international law under the constitution, and even familiarity with regional jurisprudence and international law.[14] While in no way determinative, these insights are useful in discussing the relationship between the Constitutional Court and the African Court in this article (bearing in mind also that the IACtHR operates alongside a regional commission on human rights while the ECtHR does not).

Finally, it may be argued that this enquiry should focus equally on the African Commission on Human and Peoples' Rights: the Commission has been in operation since 1987 – seven years before the South African Constitutional Court was established – and it has co-equal footing with the African Court. However, the aim here is to focus more squarely on the distinct relationship between the Constitutional Court and the African Court as judicial institutions. The Commission, for all its powers and centrality within the African Union's human rights system, remains a quasi-judicial institution that is neither formally, nor in full practice, a court. Needless to say, the enquiry here could usefully be expanded to discussion of the Commission in further research. This article also forms the basis for potentially illuminating comparison between the Constitutional Court's record of citing African Court jurisprudence and that of comparable courts, such as the Constitutional Court of Benin or the Supreme Court of Kenya, which cannot be pursued here.

III 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 mandates 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.

A 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 final 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)

[13] N Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010) chapter 4.

[14] A Huneeus 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493.

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'.[15]

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.[16] 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.'[17]

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.[18] 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 for taking a less robust approach to upholding social and economic rights than other courts, such as the Colombian Constitutional Court .[19]

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.[20] 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.[21] 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.[22]

[15] Constitution s 1.

[16] T Roux *Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

[17] 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.

[18] Roux (note 16 above) at 235–364.

[19] See U Baxi 'Preliminary Notes on Transformative Constitutionalism' in O Vilheira, F Viljoen & U Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 46.

[20] T Roux 'The Principle of Democracy in South African Constitutional Law' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 82.

[21] Ibid.

[22] Fowkes (note 2 above).

More recent judgments in the *Democratic Alliance*,[23] *Glenister*,[24] and *Nkandla*[25] 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.[26] Internationally, as Law and Chang have noted, the Constitutional Court is one of the few apex 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.[27] 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,[28] and also serving as an institutional model for newer apex courts, such as the constitutional courts of Zambia and Zimbabwe.[29]

B The African Court on Human and Peoples' Rights

Following a long period of advocacy by academics and NGOs the AU adopted a protocol in 1998 to establish an African Court on Human and Peoples' Rights.[30] 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.[31] It is based in Arusha, in northern Tanzania.

To date, 30 states have recognised the Court's jurisdiction – more than half of the AU's 55 member states.[32] However, to date a mere nine states have made the requisite declaration to allow direct individual and NGO petitions to the Court,[33] and one, Rwanda, rescinded this recognition in early 2016.[34] 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

[23] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

[24] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

[25] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC).

[26] N Parpworth, 'The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers' (2017) 61(2) *African Law Journal* 273.

[27] As Law & Chang show, the Court is still cited far less by other apex courts that those it chooses to cite frequently. D Law and W Chang 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523.

[28] See J Isanga 'African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics' (2017) 49 *George Washington International Law Review* 749, 764.

[29] O Kaaba '"South Africa Look What You Have Done to Us": Exploring the Reasons for the Likely Failure of the South African Constitutional Court Model in Zambia'. Paper delivered at *Constitutional Court Review* Conference IX, 2–3 August 2018, on file with author.

[30] R 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.

[31] 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.

[32] The most reliable statistics on the African Court can be found at ACtHPR Monitor (www.acthprmonitor.org). Statistics on ratification of the protocol establishing the African Court are available at http://bit.ly/2uCmo6e.

[33] Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia.

[34] 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, available at http://bit.ly/2sFPMam.

contentious case.[35] 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.[36] 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 almost six years since its first merits judgment. This summary focuses on the 23 merits judgments issued by the Court at the time of writing, which can be divided into four broad themes:[37]

(i) *Political Participation*: In its first merits judgment, issued in June 2013 in *Mtikila v Tanzania*,[38] 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*[39] that a new law on the Electoral Commission violated both the right to equal protection of the law in art 3(2) of the African Charter on Human and Peoples' Rights and art 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*[40] 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*[41] the Court unanimously ruled a twelve-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*,[42] the Court deemed Rwanda in violation of the free speech rights in the African Charter (art 9(2)) and the ICCPR (art 19) and rights to an adequate defence under art 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.

(iii) *Fair trial, Liberty, and Equal Protection before the Law:* In the *Thomas*,[43] *Onyango*[44] and *Abubakari*[45] cases against Tanzania, decided in 2015 and 2016, the Court found the state in violation of the right to a fair trial in art 7 of the African Charter in each case. In the *Saif Al-Islam Gaddafi*[46] judgment of June 2016 – the first referred by the African Commission – the Court found

[35] 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.

[36] 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) 51–54.

[37] Other judgments that do not clearly fit within these four themes are *Kouma and Diabaté v Mali*, ACHPR, App. Nop. 040/2016 (21 March 2018)(classification of a criminal offence) and *Anudo v Tanzania*, ACHPR, App. No. 012/2015 (22 March 2018)(deportation and right to citizenship).

[38] ACHPR, App. 009/2011 and 011/2011 (14 June 2013).

[39] ACHPR, App. No. 001/2014 (18 November 2016).

[40] ACHPR, App. No. 013/2011 (28 March 2014).

[41] ACHPR, App. No. 004/2013 (5 December 2014).

[42] ACHPR, App. No. 003/2014 (24 November 2017).

[43] ACHPR, App. No. 005/2013 (20 November 2015).

[44] ACHPR, App. No. 006/2013 (18 March 2016).

[45] ACHPR, App. No. 007/2013 (3 June 2016).

[46] *African Commission on Human and Peoples' Rights v Libya*, ACHPR, App. No. 002/2013 (03 June 2016).

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*[47] and *Onyachi v Tanzania* the Court again found the State in violation of the rights to, respectively, fair trial (art 7 of the African Charter) and liberty (art 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.[48] However, it has not found a violation in every case: in *Isiaga v Tanzania*,[49] for instance, it found no violation where the applicant alleged his fair trial right had been breached due to erroneous visual identification and rights against discrimination arising from the refusal of legal aid; and in *Viking and Nguza v Tanzania*,[50] it found no violation due to a lack of sufficient evidence of bias and collusion in the applicant's trial for sexual offences. The Court's focus on fair trial and due process issues, especially in Tanzania (eg, free legal aid, retrospective legislation), now forms a routine and central part of its jurisprudence, as seen in more recent decisions.[51]

(iv) *Social and Economic Rights of Indigenous Communities:* In the landmark *Ogiek*[52] 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 (art 2), culture (art 17(2) and (3)), religion (art 8), property (art 14), natural resources (Article 21) and development (art 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.[53]

The Court's jurisprudence is notable for a range of reasons. In particular, compared to the comparatively more quiescent (albeit far from universally quiescent) African Commission on Human and Peoples' Rights, the Court's jurisprudence shows a marked willingness to

[47] ACHPR, App. No. 011/2015 (28 September 2015).

[48] A Possi '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; O Windridge 'An Emerging Framework for all of Africa: The Right to a Fair Trial at the African Court' *ACtHPR Monitor* (7 November 2017), available at http://bit.ly/2ENigXv.

[49] ACHPR, App. No. 032/2015 (21 March 2018).

[50] ACHPR, App. No. 006/2015 (23 March 2018).

[51] *William v Tanzania*, ACHPR, App. No. 006/2015 (21 September 2018)(Finding a violation of art 7 of the Charter for failure to provide free legal aid or hear defence witnesses, and convicting the applicant on the basis of insufficient evidence); *Paulo v Tanzania* ACHPR App. No 020/2016 (21 September 2018)(Finding no violation); *Evarist v Tanzania*, ACHPR App. No. 027/2015 (21 September 2018)(Finding an art 7 violation for failure to provide free legal aid); *Makungu v Tanzania*, ACHPR, App. No. 006/2016 (7 December 2018) (Finding an art 7 violation for failure, for over two decades, to provide the Applicant with copies of the records of proceedings and judgments in his criminal trial); *Werema v Tanzania*, ACHPR, App. No. 024/2015 (7 December 2018)(Finding no art 7 violation); *Guehi v Tanzani*, ACHPR, App. No. 001/2015 (7 December 2018)(Finding an art 7 violation for unreasonable delay in criminal proceedings and violation of art 5 of the Charter (right to dignity) for deprivation of food).

[52] *African Commission on Human and Peoples' Rights v Kenya*, ACHPR, App. No. 006/2012 (26 May 2017).

[53] 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.

vindicate the rights in the African Charter and other instruments, particularly evidenced by the sheer number of violations found – and, in *Mtikila*, the Court's willingness to find even a provision of a national Constitution incompatible with the Charter. The Court's jurisprudence is also valuable for 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),[54] 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'.[55] 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 (ICCPR) and the African Charter on Democracy, Elections, and Good Governance, as well as recognising the latter as a justiciable human rights instrument, which has bolstered its capacity to deal with sensitive electoral and governance issues in respondent states.[56] The Court has also, at times, read different rights instruments jointly. In *Zongo*, for instance, the Court read art 66(2)(c) of the Revised ECOWAS Treaty (on journalists' rights in general) in conjunction with art 9 of the African Charter (on the right to freedom of expression).[57] These interpretations have given the Charter 'teeth' and amplified its strength as a human rights instrument for the entire African Union.

The Court has met with clear successes, such as the agreement of the Burkinabé authorities to open an investigation in compliance with the Court's order in *Zongo*, and the recent judgment of the Lesotho Constitutional Court striking down domestic criminal defamation laws in line with the African Court judgment in *Konaté*.[58] *Konaté* was also cited in a February 2017 High Court of Kenya judgment holding the law on criminal defamation to be unconstitutional.[59] All of these developments, taken together, mark the African Court's jurisprudence out as increasingly important, and as worthy of attention. It must be noted here, of course, that the Court in its work has often been building on the decisions of the African Commission.

Adem Abebe suggests that the court has indicated a willingness to act as, effectively, a 'constitutional court for Africa', although he observes that this has clear potential to provoke political backlash.[60] Certainly, 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

[54] *Mtikila v Tanzania* (note 38 above) paras 103–107.3.

[55] Ibid at paras 106.1–106.5. It should be noted that the Court largely adopted the Commission's approach in this regard.

[56] *APDH v Côte d'Ivoire* (note 39 above) at paras 51–65.

[57] *Zongo* (note 40 above) at para 180 (South Africa is not a party to the ECOWAS Treaty).

[58] *Peta v Minister of Law, Constitutional Affairs and Human Rights* [2017] LSHC 3 (18 May 2018). See also O Windridge, 'A Cause for Optimism: Lesotho Strikes Down Criminal Defamation' *ACtHPR Monitor* (23 May 2018), available at https://bit.ly/2uSvoqy.

[59] *Jacqueline Okuta v Attorney General* [2017] eKLR 3.

[60] A Abebe 'Taming Regressive Constitutional Amendments: The African Court as a Continental (Super) Constitutional Court' – (2019) 17(1) *International Journal of Constitutional Law* 89.

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.[61]

IV A LIMITED OPENNESS: THE CONSTITUTIONAL COURT'S APPROACH TO INTERNATIONAL LAW

This section explores the Constitutional 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 Court's case-law.

A Overview: the Constitutional Court's citation of international law and courts

If the first hallmark of the Constitution was the establishment of a powerful domestic Constitutional Court, its second significant hallmark was surely the formal place accorded to international law by the constitutional text. The now-famous s 39 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.[62]

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 Constitution was being drafted, and entered into force, the prospect of an African Court on Human and Peoples' Rights was yet a mere possibility.

As Dire Tladi has observed, the South African Constitution is 'reputed to be one of the most international law-friendly constitutions in the world'.[63] One can find many statements to this effect in the 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.

[61] T Daly & 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.

[62] A similar provision can found in the 1993 Interim Constitution. Section 35(1) stated: '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.'

[63] D Tladi '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.

> These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.[64]

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.[65] Similarly, Daniel Abebe has observed, regarding the African Charter on Human and Peoples' Rights and other international rights treaties:

> The South African Constitutional Court has held that they should be directly applicable in South African courts without domestic implementing legislation, but the record is unclear.[66]

At times, the Constitutional Court's recourse to international law has also been viewed as highly instrumental; used in part as a judicial strategy to achieve certain adjudicative ends while attempting to shield the Court from executive opprobrium. In *Glenister*,[67] 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.[68] 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, the *Glenister* Court eschewed the option of basing its judgment on democratic principles within the Constitution. It chose instead to invoke s 39, as well as ss 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.[69] Issacharoff argues that although the reasoning was not entirely convincing, 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.[70]

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[64] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) para 97.

[65] Tladi (note 63 above) at 338.

[66] D Abebe 'Does International Human Rights Law in African Courts Make a Difference?' (2017) 56(3) *Virginia Journal of International Law* 527, 570.

[67] Note 64 above.

[68] S Issacharoff *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015) 260.

[69] Ibid at 261. Section 231(2) of the Constitution states: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).' Section 7(2) of the Constitution states: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[70] Ibid at 262.

Glenister sits a little uneasily alongside other decisions such as the *Azanian Peoples' Organisation* (*AZAPO*).[71] The *AZAPO* Court emphasised that, while domestic amnesty legislation violated various provisions of international humanitarian law and the right of access to court, the fundamental question was not the legality of amnesty according to international law, but within the terms of the Constitution itself.[72]

B Exploring the Constitutional Court's (non-)citation of African Court jurisprudence

It is against the brief overview above of the 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 (eg, 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.[73] 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.[74]

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. As discussed in Part II, in order to assess whether, and how, the 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) until 25 February 2019 (the time of writing) has been searched on the South African Legal Information Institute (SAFLII) database using four search terms: 'African Court', 'African Charter', 'charter', and 'Banjul' (the latter to catch any reference to the African Charter as the 'Banjul Charter'). 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 277 judgments during this period has not yet cited African Court jurisprudence even once.[75] No mention of any of the African Court's 23 merits decisions to date could be found in the

[71] *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16, 1996 (8) BCLR 1015, 1996 (4) SA 672 (CC).

[72] 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.

[73] M Killander & H Adjolohoun 'International Law and Domestic Human Rights' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010).

[74] B Dinokopila 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in CM Fombad (ed) *Constitutional Adjudication in Africa* (2017) at 236.

[75] The breakdown by year is: 32 (2013); 39 (2014); 40 (2015); 55 (2016); 49 (2017); 53 (2018); 9 (2019).

case-law search. This is, in itself, an unexpected finding. In the earlier years covered by this enquiry – say, from the African Court's first judgment in June 2013 until the end of 2016 – this is perhaps more understandable, as there was a mere trickle of judgments, and there may have been a time-lag in the Constitutional Court becoming aware of key judgments. However, as the African Court's volume of jurisprudence has grown this seems less viable as an explanatory factor.

Second, and relatedly, in the almost six-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 Africa;[76] the African Charter on the Rights and Welfare of the Child;[77] and the AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa.[78] 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* judgment[79] 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*.[80] Rare examples of slightly more extended analysis include reference to Charter art 18 on the family in *DE v RH*, concerning a spouse's right of action in delict against a third party for adultery under common law.[81]

This might be starting to change. In two recent judgments – *Gavric v Refugee Status Determination Officer*[82] (September 2018) and *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*[83] (October 2018) – the Court placed significant emphasis on the African Charter, and the African Commission's landmark decisions in *FIDH v Senegal*[84] and *Enderois.*[85] These cases, respectively, concerned the validity of amnesty for political crimes and the necessity to ensure the free, prior and informed consent of local communities for development and investment projects. It is hard to predict whether the Court's references to Commission decisions will become more common: it has been observed that since its establishment the Court's references to, and reliance on, the African Charter and other AU instruments and norms have been rather inconsistent; for instance, placing strong reliance on the Charter in some early decisions but very little reliance in decisions such as the 'striking' neglect of the Charter in the Court's *First Certification* judgment in 1996.[86]

[76] *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* [2018] ZACC 16, 2018 (8) BCLR 921 (CC) at para 60.

[77] *Mail and Guardian Media Ltd and Others v Chipu NO and Others* [2013] ZACC 32, 2013 (11) BCLR 1259 (CC), 2013 (6) SA 367 (CC).

[78] *McBride v Minister of Police and Another* [2016] ZACC 30; 2016 (2) SACR 585 (CC), 2016 (11) BCLR 1398 (CC) at para 34.

[79] *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZACC 25, 2016 (11) BCLR 1429 (CC), 2017 (3) SA 119 (CC) at para 20.

[80] *AB and Another v Minister of Social Development* [2016] ZACC 43, 2017 (3) BCLR 267 (CC), 2017 (3) SA 570 (CC) para 309.

[81] *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC).

[82] [2018] ZACC 38, 2019 (1) SA 21 (CC), 2019 (1) BCLR 1 (CC).

[83] [2018] ZACC 41, 2019 (1) BCLR 53 (CC).

[84] (2006) AHRLR 119 (ACHPR 2006).

[85] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009)('*Endorois*').

[86] F Viljoen, *International Human Rights Law in Africa* (2012) 538–539.

Third, in contrast to the complete absence of references to African Court case-law, the 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,[87] and various references to the CJEU.[88] This is alongside citation of customary international law,[89] United Nations standards,[90] Council of Europe standards[91] – and of leading charters and national courts worldwide, especially the Canadian Supreme Court and the Canadian Charter of Rights and Freedoms.[92] This, it must be said, has been a feature of the Constitutional Court's jurisprudence since its founding: in the first two years of its operation, for instance, we find very regular and substantial references to the Canadian Charter and Canadian Supreme Court case-law compared to a mere handful of fleeting references to the African Charter.

The broader reflection these three key insights prompt is what, if anything, is missing from the 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 is largely irrelevant: in cases concerning company law, trusts, tenancy law, employment law, and succession law, for instance.[93]

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*,[94] decided on 19 July 2015, the Constitutional Court addressed the right to freedom of expression and

[87] *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21, 2015 (2) SACR 217 (CC), 2015 (9) BCLR 1026 (CC) at paras 22 and 37; *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23, 2015 (6) SA 125 (CC), 2015 (9) BCLR 1052 (CC) at paras 18, 63, 111 and 153; *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28, 2015 (6) SA 494 (CC), 2015 (11) BCLR 1346 (CC) at para 111; *Kham and Others v Electoral Commission and Another* [2015] ZACC 37, 2016 (2) BCLR 157 (CC), 2016 (2) SA 338 (CC) at para 84; *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZACC 25, 2016 (11) BCLR 1429 (CC), 2017 (3) SA 119 (CC) at para 8; *Hotz and Others v University of Cape Town* [2017] ZACC 10, 2017 (7) BCLR 815 (CC), 2018 (1) SA 369 (CC) at para 30; *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9, 2018 (7) BCLR 856 (CC) at para 32.

[88] *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* [2016] ZACC 37, 2017 (1) BCLR 64 (CC), (2017) 38 ILJ 295 (CC), [2017] 3 BLLR 258 (CC) at paras 2, 22ff.

[89] *Saidi v Minister of Home Affairs* (note 87 above).

[90] *De Vos v Minister of Justice* (note 87 above) at para 29 (UN Convention on the Rights of Persons with Disabilities) and and *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para 15 (UN Convention Against Corruption).

[91] *McBride v Minister of Police* (note 78 above) at para 34 (Council of Europe's Commissioner for Human Rights' Opinion on the Independent and Effective Determination of Complaints Against the Police).

[92] *AB v Minister of Social Development* (note 80 above) paras 136 and 305; and *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42, 2018 (2) BCLR 119 (CC), 2018 (2) SA 327 (CC) footnotes to paras 98 and 99.

[93] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2017] ZACC 15, 2017 (7) BCLR 916 (CC), 2017 (5) SA 9 (CC); *Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16, 2017 (9) BCLR 1164 (CC), 2017 (6) SA 1 (CC); *Mokone v Tassos Properties CC and Another* [2017] ZACC 25, 2017 (10) BCLR 1261 (CC), 2017 (5) SA 456 (CC) (24 July 2017); *September and Others v CMI Business Enterprise CC* [2018] ZACC 4, 2018 (4) BCLR 483 (CC), (2018) 39 ILJ 987 (CC), [2018] 5 BLLR 431 (CC); and *Moosa NO and Others v Minister of Justice and Correctional Services and Others* [2018] ZACC 19, 2018 (5) SA 13 (CC).

[94] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1, 2015 (2) SA 232 (CC), 2015 (3) BCLR 298 (CC).

the right to vote in free and fair elections, in a case concerning the Democratic Alliance (DA)'s issuance of a short messaging service (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 salience, 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 Court make any reference to the relevant rights in the African Charter (art 9(2) right to freedom of expression and art 13 right to political participation).

Specific aspects of the African Court's case-law resonate with the Constitutional Court's judgment. For instance, concerning the ANC's allegation that the Democratic Alliance party's SMS constituted a breach of the Electoral Act and/or the Electoral Code of Conduct issued under that Act, the joint judgment of Cameron, Froneman and Khampepe JJ (with Moseneke DCJ and Nkabinde J concurring) emphasised that penal provisions should be interpreted restrictively, on the basis that 'freedom of expression is the cornerstone of democracy', and as a longstanding principle of the rule of law, the common law and of the Court's own case-law.[95] This chimes with the African Court's holding in *Mtikila* that the 'claw-back' clauses in the African Charter, which textually provide a wide basis for rights restriction, should not be interpreted against the Charter and that regulation of rights and freedoms 'may not be allowed to nullify the very rights and liberties they are to regulate',[96] and its judgment in *Konaté v Burkina Faso*, holding that restrictions on freedom of expression must be proportionate, and noting the specific rule laid down in the African Commission's Declaration of Principles on Freedom of Expression that 'sanctions should never be so severe as to interfere with the exercise of the right to freedom of expression'.[97]

Contextual factors further amplifying the relevance of the African Court's judgment in *Mtikila* include the fact that this case, at its core, centred on the disentrenchment of one-party rule and entrenchment of a multiparty system in Tanzania, with the African Court placing emphasis on the need for the electorate to be accorded sufficient choice, questioning whether sufficient choice existed 'if in order to even choose a representative of one's choice one is compelled to choose only from persons sponsored by political parties, however unsuitable such persons might be.'[98] This is an issue of clear resonance for South Africa's dominant-party system. In *Democratic Alliance* the Court not only began by noting that the applicant was the official opposition party in Parliament, but the joint judgment of Cameron J et al similarly emphasised the structural basis for according generous free speech rights within the electoral context, stating: 'The right individuals enjoy to make political choices is made more meaningful by challenging, vigorous and fractious debate.'[99]

These are just quick illustrations of relevant aspects of the African Court's case-law, which would also have had potential relevance in other cases such as *Kham v Electoral Commission*,[100] decided in November 2015, which concerned the Electoral Commission's duty to register

[95] Ibid at paras 121–122, 129.
[96] Ibid at para 109.
[97] Ibid at paras 125–150, 151.
[98] Ibid at para 109.
[99] Ibid at paras 6, 135.
[100] *Kham and Others v Electoral Commission and Another* [2015] ZACC 37, 2016 (2) SA 338 (CC).

voters in the correct voting district, and *Maledu*,[101] discussed above, where the Court cited the African Commission decision in the *Enderois* case, but not the African Court judgment in *Ogiek*, in a case concerning free, prior and informed consent for development projects. 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[102] – reference to African Court jurisprudence and the African Charter on Human and Peoples' Rights 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 (OAU) 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, neocolonialism 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 necessarily to make the argument for a generalised citation of African Court jurisprudence, and of the African Charter itself, or for citing the African Court in cases that can be decided within the four corners of the domestic Constitution. Rather, it is to at least raise the point that in many instances these sources might enrich the South African Constitutional Court's jurisprudence and anchor it more firmly within the developing regional system of human rights protection, adding to an already well-established practice of analysing foreign and international norms and jurisprudence. In some cases, as seen above, clearly 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?

V IS THE CONSTITUTIONAL COURT SNUBBING THE AFRICAN COURT? 'IT'S COMPLICATED'

At one level, the Constitutional Court's non-citation of African Court jurisprudence could be approached 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.[103] We might also characterise it as just one dimension of a general propensity to cite case-law from 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.[104] Although various

[101] *Maledu* (note 83 above).

[102] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19, 2016 (9) BCLR 1133 (CC), 2016 (6) SA 279 (CC); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38, [2017] 1 BLLR 8 (CC), (2017) 38 ILJ 97 (CC), 2017 (1) SA 549 (CC), 2017 (2) BCLR 241 (CC); *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42, 2018 (2) BCLR 119 (CC), 2018 (2) SA 327 (CC); and *AfriForum and Another v University of the Free State* [2017] ZACC 48, 2018 (2) SA 185 (CC), 2018 (4) BCLR 387 (CC).

[103] Roux (note 16 above)(On the Constitutional Court's hard-won authority).

[104] Isanga (note 28 above) at 752, fn 24.

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.'[105] It is important here to acknowledge that this appears often related to the limited availability of, and familiarity with, jurisprudence from other African states, including the limited availability of secondary sources to contextualise which judgments are accessible and fully understand their place in the case-law of courts in other African states.[106]

A range of additional explanatory factors can also be considered for the Court's failure to cite the African Court, which suggest that responsibility cannot be laid entirely at the 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 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 until 2002 and judicial or quasi-judicial mechanisms at the regional level had made little impact at the national level as the Constitutional Court worked 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 a more challenging context of post-colonial states running the gamut from authoritarianism to tentatively consolidating democracy,[107] found little room to manoeuvre in its first decades. It 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 at the time the South African Constitutional Court was established the Commission had yet to issue its most assertive decisions.[108]

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. It did not submit 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 (eg, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination).[109] 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:

[105] Ibid.

[106] I am grateful to Advocate Michael Bishop for this insight. He further notes that while there is interesting jurisprudence coming from Kenya, Tanzania, Uganda, Nigeria and other states, secondary materials on this case-law would more readily facilitate its citation. Advocate Bishop observes that a recent collection of translated and annotated excerpts of the Colombian Constitutional Court's judgments has greatly increased his ability to draw down upon Colombian case-law. M Cepeda Espinosa & D Landau *Colombian Constitutional Law: Leading Cases* (2017).

[107] The only states considered by Freedom House to be electoral democracies in the late 1980s were Botswana, the Gambia, and Mauritius.

[108] G Bekker 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 *Human Rights Law Review* 499.

[109] A useful list of treaty ratifications is provided by the University of Minnesota's Human Rights Library, available at 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.[110]

The almost exclusive focus on domestic counter-majoritarian 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 to prevent 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. Despite a much greater focus on democratic rule and constitutionalism in the 1990s, there was no sweeping or universal region-wide democratic transformation.[111] 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, 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 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).

Third, 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:[112]

> 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

[110] P Vale *Whatever Happened to the Post-Apartheid Moment? Past Hopes and Possible Futures for Southern Africa* (CIIR, 2004) 17.

[111] C Fombad 'Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitution Governance & Constitutionalism' in A Nhema & P Tiyambe Zeleza (eds) *The Resolution of African Conflicts: The Management of Conflict Resolution & Post-Conflict Reconstruction* (2008).

[112] O'Shea 'A Critical Reflection' (note 72 above) at 287–288.

> 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.

Fourth, 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 the authority of 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 has weathered periodic attacks from the Zuma administration, including the government's announcement of a review of the Court's powers in 2012. [113]

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, ie the greatest challenges to the ECtHR, which began functioning in 1959, has come from the constitutional courts of Germany (1951) and Italy (1956), and the UK Supreme Court (successor of the centuries-old Judicial Committee of the House of Lords). The Brazilian Supreme Court (first established in the republican Constitution of 1891) has taken a distinctly frosty attitude toward the IACtHR, which began operating in 1979.[114] The fact that the South African Constitutional Court was established twenty years before its regional peer may be significant. More broadly, the 'judicial maturity' of the African regional courts system as a whole has been cited by Daniel Abebe as a key factor hindering its impact at the domestic level.[115]

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 IV, above, that in many cases it is the applicants' submissions that direct the Court toward specific sources of international law.[116] In this respect, it is notable that detailed 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.'[117] 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

[113] S Gardbaum 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 288.

[114] W Thomassen, 'The Vital Relationship between the European Court of Human Rights and National Courts' in S Flogaiti, T Zwart & J Fraser (eds) *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013); T Daly 'Brazilian Supremocracy and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship' in P Fortes, L Boratti, A Palacios Lleras & T Daly (eds) *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (2017).

[115] Abebe (note 66 above) at 572–573.

[116] *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality* [2016] ZACC 37, 2017 (1) BCLR 64 (CC) at paras 2, 22.

[117] 'African Rights Court Unknown to Many' *The Citizen* (23 August 2016), available at http://bit.ly/2u9oVs0.

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.'[118] It is likely, then, that applicants are not citing African Court jurisprudence or the African Charter when petitioning the South African Constitutional Court. That said, limited evidence exists that even when applicants have included reference to African Court case-law in their submissions to other superior courts in South Africa, these references do not make their way into the Court's judgment.[119] Of course, it is possible that the Constitutional Court does analyse African Court jurisprudence without explicitly citing it in its judgments: this practice is found in a variety of courts.[120]

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[121]); and there is currently no South African judge on the African Court (the only South African judge, Bernard Makgabo Ngoepe J, served two terms, a two-year term and six-year term, from 2006–2014). This may all compound the common lack of in-depth knowledge across domestic courts, concerning the African Court and how it operates. As Abebe notes:

> Whether the African court system could catalyze improved human rights enforcement by domestic courts is an open question, but the lack of knowledge about the [African Commission on Human and Peoples' Rights] and its operations by domestic courts, for example, is not promising evidence.[122]

VI CONCLUSION: WHY DOES THIS RELATIONSHIP MATTER?

This article 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 article was to throw some light on a dimly-lit area of research on the much-studied Constitutional Court.

This relationship matters. The South African Constitutional Court's lack of engagement with African Court jurisprudence means that it may possibly be foregoing an opportunity to genuinely enrich its own case-law, and to anchor it more firmly in the developing pan-regional

[118] 'An Alien Institution: A Q&A with the Network of African National Human Rights Institutions' *The ACtHPR Monitor* (24 November 2015), available at http://bit.ly/2uBZxYL.

[119] I am grateful to Advocate Michael Bishop for this insight. He had cited the African Court's *Ogiek* judgment in heads of argument submitted to the Supreme Court of Appeal. *Ogiek* does not appear in the Court's final judgment. *Gongqose v Minister of Agriculture, Forestry and Others* [2018] ZASCA 87, 2018 (5) SA 104 (SCA).

[120] For instance, at an event at the Honorable Society of King's Inns (Ireland) on 12 February 2019 marking the 15th anniversary of the Human Rights Act 2003, the Chief Justice of Ireland remarked that while ECtHR jurisprudence is not always addressed in written judgments at the domestic level, it may influence outcomes. This unrecorded but palpable influence affects the decisions of the Taiwanese Constitutional Court. D Law & W-C Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523, 558ff.

[121] T Daly *An African Judicial Network: Building Community, Delivering Justice* (2017), available at https://bit.ly/2Cmep65.

[122] Abebe (note 66 above) at 570.

human rights system. Moreover, as the African Court's jurisprudence grows, failure by the Constitutional Court to cite it 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 epistemic community centred on the African Charter of Human and Peoples' Rights; the most widely ratified rights treaty in the African Union, and the primary instrument capable of providing a focal point for national and international courts across the AU. Were the Court to invest energy in developing familiarity with, and a practice of citing, African Court jurisprudence, it would likely encourage other domestic courts to do the same. The African Court, for its part, could also engage more readily with Constitutional Court case-law.

The argument, it should be emphasised again, is not for citation and support from the South African Court as an act of judicial courtesy or even judicial charity, nor for artificial recourse to African Court case-law when it is not directly relevant. Rather, as perhaps the two most important courts on the entire continent as regards rights protection, it seems desirable that their relationship should be developed and deepened. Evidently, this does not mean they will always agree, but communication is preferable to the development of parallel lines of jurisprudence in isolation from one another. Only time will tell if the kindred strangers can become kindred spirits.