Editorial

This issue is diverse. It carries items on Burundi, Cameroon, Kenya, Uganda, and Zambia as well as on the African Union, African Commission on Human and Peoples’ Rights, and the United Nations Human Rights Committee (Committee). It has something on the right to food, another on international criminal law, yet another on intellectual property, and another on municipal criminal law, and on public international law. Some African Union developments are reviewed, Kenya’s nascent Health Act as well. There is a critique of Kenya’s Court of Appeal, and a review of the Committee cases. We are honoured to present ten contributions, constituting five full-length peer reviewed articles, two recent developments, a speech, a case review, and a book review.

Nicholas Orago’s piece contends that commodification of food is one of the many causes of food insecurity as it occasions the inability of poor households to access the available food because of high prices and dysfunctional markets. He suggests a change of approach from commodification to commonification to deal with food insecurity at the national, regional and global level. He contends that as commodification of food is a social construct adopted as a result of deliberate societal policy-making, commonification can similarly be adopted through legal and institutional design at the local, national and international levels; creating polycentric systems for the management of food-producing resources for the local communities. With commonification, decisions relating to the use of local resources for the production, processing, distribution and consumption of food are made at the local level, to ensure that other socio-economic and cultural aspects of food are taken into account in the decision-making processes. He isolates the integrated aspects of the right to food and food democracy as critical components of the commonification approach to food security.

Joe Oloka-Onyango’s article zeroes in on the troubled relationship between the International Criminal Court (ICC) and the governments of Uganda and Kenya as a result of the manner in which the cases of the Lord’s Resistance Army (LRA) and President Uhuru Kenyatta, and Deputy President William Ruto found their way to the ICC and the subsequent developments. While acknowledging that the actions of Uhuru Kenyatta and Yoweri Museveni in castigating the ICC reveal that the institution has been effective, Oloka argues that the African backlash to international criminal justice in general and to the ICC in particular, lies in
a combination of structural, historical and operational factors, and is illustrative of the strengths and the inherent weaknesses of international law today. Further, the author postulates that as long as there are ‘political and economic imbalances in terms of the relations between states, so too will the legal regimes that are designed by the international community be held hostage to them’ and hence the over-politicisation of Africa’s response to the ICC.

In her article, Cynthia Amutete discusses the Kenyan superior courts’ decisions in the Royal Media Services case considering the legal framework on copyright in broadcasts. Amutete argues that the superior courts missed an opportunity to discuss and authoritatively settle the law on the nature of copyright in broadcasts and the effect of the must carry rule in light of digital broadcasting in Kenya. She argues that the Supreme Court, in arriving at its decision, failed to be guided by Kenyan law on copyright in broadcasts and the must carry rule in three key areas. First, the Supreme Court relied on the Philippines’ decision on the definition of a broadcasting organisation without considering the provisions of the Copyright Act (Chapter 130) and the Kenya Information and Communication Act (Chapter 411). Second, the Supreme Court relied on the doctrine of fair use as envisaged in the Philippines copyright regime, yet Section 26 of the Kenyan Copyright Act provides for fair dealing. Third, the Supreme Court relied on the public interest defence without discussing its basis and establishing its parameters, especially since public interest is not provided for in Copyright Act. Ultimately, the author concludes that the Supreme Court erred in determining that rebroadcasting of local broadcasts by subscription television licencees was not an infringement of copyright in broadcasts.

Ewang Sone Andrew examines habeas corpus and bail in the unique context of Cameroon. He notes that the incorporation of habeas corpus and bail in the Cameroonian Criminal Procedure Code has not only entrenched them in law, but has also widened and deepened their scope, with a view to obtaining, as far as possible, the respect for human rights and the rule of law in order to ensure a more functional criminal justice system in Cameroon. He also argues that the incorporation of habeas corpus and bail in the Cameroon criminal trial process will restrain the arbitrary and illegal use of the powers of the judicial police officers and ensure respect of human rights. Although there are some challenges in the application of habeas corpus and bail such as misuse of the remedies by some overzealous authorities, defiance of court orders in the enforcement of the writ of habeas corpus by administrative authorities, and erosion of confidence in the Judiciary, the author is optimistic about the conscious efforts being made to
ensure that habeas corpus and bail are properly applied so that the Cameroonian Criminal Procedure Code attains its full potential.

Allan Mukuki’s article explores whether international law has an obligation for the UN to prevent genocide, and whether the UN can be held responsible for failure to comply with any such obligation. The article looks at the Responsibility to Protect (R2P), which elicits an obligation to prevent genocide first to states and then to the UN. In the end, Mukuki establishes that the obligation to prevent genocide is a customary international law obligation, which binds the UN. However, the contribution shows that it is difficult to hold the UN to this obligation because it has absolute immunity. That said, the contribution offers recommendations regarding how the UN can play a role in ensuring accountability for failures within its ambit.

Under the recent developments section, Migai Akech evaluates the role of regional mechanisms (RMs) in managing intra-state conflicts under the African Union’s (AU) normative order, consisting of a two-pronged institutional framework. Akech argues that the AU member states remain deeply attached to the old-order principles of sovereignty and non-interference and are consequently exceedingly reluctant to embrace and implement the new-order principle of non-indifference. As a result, Akech additionally argues, little effort has been put towards implementing regional norms on democracy, governance and human rights with the result that the AU has not properly addressed the increasingly common case of conflicts caused by incumbent regimes retaining power by manipulating the law, the electoral process, or the judicial process. Akech uses the recent experiences of Burundi and Uganda to illustrate this point.

Claire Adionyi’s update reviews Kenya’s newly-enacted Health Act in a bid to assess whether it complies with the requirements of the right to health in terms of the ‘availability, accessibility, acceptability and quality’ (AAAQ) threshold under General Comment 14 of the Committee on Economic, Social and Cultural Rights. Adionyi finds that the AAAQ framework’s elements are predominant in the Health Act through provisions on state obligations, accountability and regulatory apparatuses, and complaints redress mechanisms, among others. However, she criticises the Health Act, for instance, for lacking express provisions on discrimination and gender equality.

This issue also carries a presentation Elisha Ongoya made to Court of Appeal judges in Kisumu, Kenya. The scholar-advocate laments a situation whereby the superior court has issued conflicting decisions arguing that such confusion
can lead to judicial chaos. The presentation urges further research on the issue to create robust and consistent jurisprudence. Ongoya also attempts to clarify the application of certain sentences under the Sexual Offences Act (Act No 3 of 2006) and the jurisdiction of the Environment and Land Court, which the 2010 Constitution establishes.

Zonke Majodina reviews the jurisprudence of the Committee on the death penalty. Through Zambia’s perspective, the case review highlights the Committee’s emerging jurisprudence that death penalty should only be applied in the most exceptional circumstances.

Finally, Brian Sang reviews Orde Kittre’s book, *The strategic utility of lawfare*. His verdict is that his object ‘is an in-depth and engaging book that will go a long way to induce all states to give serious thought to lawfare as an increasingly relevant aspect of modern military strategy. Broad in scope, meticulous in documentation, clear in explanation, and consistent in argument, *Lawfare* is poised to be a valuable resource for military and civilian policymakers, and for practicing lawyers and their academic counterparts’.

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Francis Kariuki

Issue Editor