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Divisive political strategies and the right to peace and security in armed conflict under Article 23(1) of the African Charter on Human and Peoples' Rights

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Abstract

Divisive political strategies are commonly used in politics as a form of political opportunism. During non-international armed conflict, divisive political strategies are a violation of the State's responsibility to protect civilians and the right to peace and security. Emerging from Security Council resolutions and codified in the Banjul Charter, civilians are owed a right to peace and security even during armed conflict. In African jurisprudence security is understood as the collective protection of each person and should not be perceived as the protection of government. Therefore, the government has an obligation to protect civilians and can only derogate for the security of the people. As divisive political strategies entrench intercommunal tensions, targeting a 'outer group' of their civilians, these strategies would be breaching a State's obligation to respect and protect peace and security.

1. Introduction

The use of divisive strategies in politics is not innovative, as these strategies increase political support (McIntosh and Mendoza-Denton 2020). Although political speeches directed towards an 'enemy' of the State amid conflict are by nature adversarial, however, this has serious consequences in a non-international armed conflict (**NIAC**). In intercommunal conflicts, war is being waged between competing groups within the State rather than an external enemy. Subsequently, divisive political strategies in intercommunal conflicts are directed towards a people within the State itself, which is at variance with the State's responsibility to protect civilians. These forms of strategies have been widespread throughout Africa entrenching intercommunal divides. For example, in South Sudan the majority-Dinka government has been using ethnically divisive rhetoric (UN Human Rights Council 2017, [26]), denoting the

Nuer community as '*nyagat*' or traitors to South Sudan (Dolan and Ferroggiaro 2019, 324-325). This can also be observed in Ethiopia with dehumanizing language such as "cancer", "devil", and "weed" being used by Ethiopian politicians regarding the Tigrayan people (Nderitu 2021). Consequently, divisive political strategies in intercommunal conflicts polarises and divides the State itself, further entrenching intercommunal divisions.

In this paper, *divisive political language* is any communication by an official of the State to isolate, segregate, or dehumanise a group of nationals who are ethnically, religious or culturally connected to create an 'enemy', or 'outer group' of the State (Pierce et al. 2022). For the purposes of this paper, divisive political language must be distinguished from legitimate security discourse. Governments are entitled to criticise armed groups, condemn criminal activity, and advocate for the defence of the State. Rather, divisive political language arises where State officials extend hostility beyond those participating in hostilities and attribute disloyalty, or collective responsibility to a broader ethnic, religious, cultural, or social community. The defining characteristic is therefore not opposition to an armed group itself, but the construction of a civilian 'outer group' by associating civilians with that threat on the basis of communal identity.

Divisive political language becomes relevant during times of armed conflict, as politicians aspire to organise their supporters to increase their political power. For within political theory a byproduct of divisive rhetoric is increased political polarisation and the neutralisation of political opponents (Piazza 2020, 436). When politicians foster hostile attitudes against an *enemy* or an *outer group*, they nurture unity and submission among the *inner group* (Piazza 2020, 436).

In political theory, this form of strategy is known as 'opportunism', and in essence, political opportunists attempt to cement their authority by utilising the fears and prejudices of certain

groups within society (Pierce et al. 2022, 12). Research has shown that employing divisive strategies does lead to political benefits (Pierce et al. 2022, 19). While this form of language falls below the threshold of hate speech and inciting violence, it would violate the right to peace and security of those communities.

In a NIAC divisive political language needs to be legally examined as it entrenches social divisions, prolonging an insecure environment for civilians (Jacob and Kanth 2023, 242-243). Therefore, these strategies exacerbate the tension and hostilities of intercommunal conflict and breaches the State's responsibility to ensure the people's right to peace and security. The right to peace and security is codified in Article 23(1) of the *African Charter on Human and Peoples' Rights* (**Banjul Charter**) that 'all people have a right to national and international peace and security'.

As human rights are relational concepts, an examination of the *enjoyment* of the right to peace and security must be conducted with an appreciation of the differing jurisprudential realities within States. As such, in examining the effects of divisive political language on the right to peace and security, it is necessary to comprehend the legal and jurisprudential understanding within African States.

The reinforcement and entrenchment of intercommunal divisions in political strategies have a serious consequence to the outer group's enjoyment to peace and security, and thus, the security of the State under an African understanding. While human rights law allows derogation for national security, governments are not permitted to isolate civilians that are culturally, religiously or ethnically associated with armed groups in order to bolster their political support.

To reach this conclusion, this paper will firstly outline the understanding of human rights through an African jurisprudential understanding. It will be concluded that African

jurisprudence frames human rights in the communal, and therefore, the security of the nation is analogous to the security of the person. Secondly, this paper will discuss the interpretation of the right to peace and security in the Banjul Charter. Using Security Council resolutions mandating peace and security, it will be concluded that African States have a positive obligation to guarantee a secure environment for civilians not participating in hostilities. Finally, with an understanding of the right to peace and security, it will be concluded that political strategies entrenching intercommunal divisions are a violation of the people's right to peace and security. For to protect the State is to protect the people, and therefore, any political strategies isolating a group of civilians, and prolonging the conflict is a violation of the State's obligations.

2. Jurisprudence and the interpretation of rights

Human rights are a legal reality regardless of a State's jurisprudential perspective (UN World Conference on Human Rights 1993). While in the past moral philosophy has been employed to examine the formation and rationalisation of human rights, Jurisprudential perceptions are fundamental as a 'right' does not exist for its own sake, rather for the *enjoyment* of a concept (Haas 2013, 2). A right is related to its substance, that is, what is *actually* being experienced, for example 'life' or 'security'. Consequently, for governments to perfect their human rights obligations, the substance of those rights must also be perfected.

It must be noted that human rights obligations are observed differently to other international law obligations, as they "deal with the obligations of states towards individuals rather than between states." (Mégret 2010, 127). At the very heart of human rights law, is the obligation of States to empower people within their jurisdiction. As human rights is a body of the law concerned with this association, the adjudication of a right cannot be assessed without appreciating the jurisprudential relationship and the responsibility of governments.

While legal positivism outlines the existence of human rights, legal positivism cannot be used to adjudicate the content and application of human rights (Gardner 2013, 29-31; Kelsen 1967, 323). In examining the content of human rights, it is misguided to rely on legal positivism to contend that there is a universal jurisprudence. While legal positivism announces the removal of morality in the formation of norms, legal positivism cannot be utilised to assess the substance of those norms, and the insistence of a collective morality. As contended by Gardner (2013, 46), legal positivism is associated with the "law-making stage" as opposed to "the interpretation of legal norms belong[ing] exclusively to the law-applying stage of legal reasoning."

As stated by Harold J. Laski his response to UNESCO's survey of the philosophical foundations of human rights in 1947:

> … any attempt by the United Nations to formulate a Declaration of Human Rights in individualist terms would quite inevitably fail… Nothing, in fact, is gained, and a great deal may be lost, unless a Declaration of this character notes the fact of important ideological differences between political societies and takes full account of their consequences in the behaviour both of persons and institutions.

As legal text is intertwined with its jurisprudence, the consistent use of English in legal scholarship has shaped international law with Western jurisprudence. As legal interpretation is rooted in the "constructive interpretation of the legal history of the community" (Endicott 2000, 160), consequently, Western jurisprudence has dominated international law and the interpretation of human rights. However, as international law is a multi-lingual system, there is nothing in the law indicating that its interpretation must be achieved through Western jurisprudence. Anthropologists examining human rights in differing cultures refer to this as 'relative universalism' (Dahre 2017, 622). That is, each group perceives the substance and

enjoyment of their right anthropologically, even though universally all accept the existence of the right.

In examining a right to security and its formulation, European human rights scholars general begin with Hobbes' *Leviathan* (1651). Hobbes suggests that security is the desired object gained when individuals sacrifice autonomy by their obedience to the State; for the "end of obedience is protection." For Hobbes, individuals are obedient to a sovereign, as that sovereign has the power and ability to eradicate conflict and the threat of violence to them. Hobbes' *Leviathan*, is expanded by Locke's 'self-autonomy', Rousseau's 'civil commitments of individuals', and Grotius' commentaries, proposing that individuals come together sacrificing parts of their autonomy to form a society in order to increase their individual utility.

In assessing the right to security, Western jurisprudence bases its views in the conception of individualism (For example, Fagan 2011; Pustorin 2023, 9-26; Verdirame 2014, 42-47), that is, the consent of separate individuals to be bound by a sovereign. In Western political philosophy, governmental power needs to be confined in order not to impact individual autonomy. Expanding on the concept of individualism, Nietzsche (1887) suggests that the conception of rights is the strategy of the 'powerless' to control the 'powerful'. That is, rights are a way of restricting the powerful as a tactic by the powerless. While it is simple to disregard Nietzsche's claims, his understanding that the conception of rights grants minimal protection against the 'strong' is echoed throughout Western thought. While Nietzsche's aversion to rights is based on his belief that rights are enabling the powerless, in Western jurisprudence, human rights are generally characterised as a limitation on authority to protect the individual (Campos 2022, 96).

It should be emphasised that neither ‘African jurisprudence’ nor ‘Western jurisprudence’ is presented here as a homogeneous shared body of thought. Both traditions encompass diverse and often competing philosophical, political, and legal perspectives, and there are significant areas of overlap between them. Indeed, concepts of community, solidarity, and positive obligations are not absent from Western legal thought, just as strands of individualism and personal autonomy can be found within African philosophical traditions. The purpose of this discussion is therefore not to construct a rigid dichotomy between two systems of thought, but rather to identify dominant jurisprudential tendencies that have influenced the interpretation of human rights within their respective contexts (Jones 2000; Lõhmus 2015; Spiker 2003). In this sense, references to African jurisprudence denote a broadly communal orientation repeatedly identified in African philosophical and legal scholarship, while references to Western jurisprudence denote the more prominent emphasis on individualism that has shaped much of contemporary human rights discourse (Jones 2000; Lõhmus 2015; Spiker 2003). These categories are employed as analytical tools to illuminate differing approaches to the relationship between the individual, the community, and the State, (Young 2022, 129) rather than as universal descriptions of all legal thought within either tradition.

The Western conception of rights as an individualistic privilege drives Western legal theory to conceive human rights in a prohibitive light, that is, a *limitation* on governmental power or individual autonomy. Consequently, positive obligations are identified by Western scholars as a positive obligation of governments to restrain and limit individuals from infringing the rights of others. For example, the duty of governments assessed under the right of education as an ‘empowering’ right, focus on *compulsory* education as it “is an important means by which the state protects children against their parents and all forms of economic exploitation” (Nowak 2021, 262).

This understanding naturally envisages a conflict of rights within the body of law - State versus individual, or individual versus individual. Not surprisingly, Marx's (1843) criticism of human rights was based on this very reasoning, that the "establishment of the political state and the dissolution of civil society into independent individuals… [p]olitical emancipation is the reduction of man, on the one hand, to a member of civil society, to an egoistic, independent individual, and, on the other hand, to a citizen, a juridical person." This inherent conflict of rights stems from the starting point of individualism, or as Marx identifies the 'social structures', rather than the law itself. In other words, the concept of *individualism* is sociological in nature rather than legal. Therefore, independent of Western jurisprudence, a legal assessment of the content of human rights does not need to be founded in individualism.

In African jurisprudence, the concept of the person is considered synonymously with community. For example, African scholars in consideration of 'personhood' see it as "an individual-with-his-community" (Ekei 2022, 33). In other words, a person is not an individual but a communal being, as stated by Mbiti (1970, 141), "I am because we are, and since we are, therefore, I am." In contrast to individualism, African jurisprudence as 'communalism' does not observe rights as a limitation on the powerful State but rather a mutual beneficial obligation to empower all. This is illustrated in Chapter II of the Banjul Charter that articulates the "duties" owed by each person, particularly Article 27(2), that the "rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

Using African jurisprudence to examine the substantial content of rights, the enjoyment of one's rights is dependent on the community's rights, for one cannot exist without the other. While rights are vested in the person, the enjoyment of the right can only come to fruition in the communal. As Al-Farabi (1985) contends the complete and perfect States are those who aim for السعادة (felicity), which can only be reached if the State functions as an organism in

which different parts work together for the greater good. As such, in African jurisprudence a right is the claim of the people, in which each person participates for the greater good of all, including themselves. Therefore, human rights can be perceived through an African lens as a positive responsibility of the government to empower their people, rather than a prohibition on their authority and the autonomy of others.

It must be emphasised, that African jurisprudence does not negate the individual in preference to the community, rather personhood is only manifested in relationship with the communal. For the person cannot exist without the collective, as the "individual's existence is intricately interwoven with the existence of other members of the community, including those of past generations" (Ochieng'-Odhiambo 2023, 15). Within African jurisprudence, if the right of one is removed then it is removed for all, for the enjoyment of a right can only be achieved when the *community* are equally participating.

This discussion of African jurisprudence can be criticised as being 'idealistic', particularly as there are numerous examples of human rights violations within African States. However, human rights violations by States do not negate their jurisprudential foundations, nor its application. Conversely, when Western States breach human rights, the idealism of Western jurisprudence is not questioned; instead, those violations are judged according to those standards. For the principled nature of jurisprudence does not dissolve when governments act in contradiction to it. In applying African jurisprudence, human rights are norms and responsibilities of the State to strengthen and empower the community. Therefore, African jurisprudence observes the people as the State, and the government as their representative (Al-Farabi 1995). Instead of perceiving the government as the power, African jurisprudence observes the people as the power and therefore, the people as the sovereign. This concept is theorised in Wiredu's (1997, 304) 'consensual democracy', that outlines a participatory form of political consultation and decision-making in traditional Africa. In other words, instead of

human rights being a relationship between the power (State) and the powerless (individual), it is perceived as the formal expression of the interconnection of the people (the beneficiaries) and the organ that represents them (the trustees).

As the right to peace and security is concerned with the relationship between the State and the people (Short 2009, 92), it must be first understood that African jurisprudence conceives the sovereignty of the State as belonging to the people, which is exercised by the government on their behalf. In other words, any violation of the rights of the people must be perceived as a violation of the sovereignty of the State.

This African construction that security of the person is jurisprudentially related to the security of the State is echoed by the Security Council, under the responsibility to maintain peace and security. As stated in the Resolution 2624 (2022, op.para 12) regarding the NIAC in Yemen,

> *Reaffirms* that sexual violence in armed conflict, or violations against children in armed conflict such as the recruitment or use of children in armed conflict in violation of international law… and therefore a sanctionable act of engaging in or providing support for acts that threaten the peace, security or stability of Yemen, as described in paragraph 17 of that resolution.

African jurisprudence can also be clearly observed in human rights law, as outlined in the preamble of the *International Covenant on Civil and Political Rights* (**ICCPR**),

> Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

It must be noted, however, that *community* is not always synonymous with the *State* in an African understanding. The philosophical reality on the ground is that people may place what they identify as their ‘community’ over the ‘State’. Particularly as in postcolonial Africa, “the

state is an artificial creation, a progeny of colonial tinkering" (Jeng 2012, 280). A key challenge in the African jurisprudential framework lies in the tendency to exclude persons perceived as outside one's community, as will be evident when discussing divisive political language. Since African philosophy is grounded in community-based obligations, this can be exploited by governments as these duties are often only respected for those considered within the community.

2.1. Securitisation of human rights

An appreciation of differing jurisprudence, in particular to the right of security, can be observed in the criticism of the 'securitization' of human rights (Lazarus 2012, 103; Loader and Walker 2009, 168). It is contended that a security-driven society will begin to examine all rights through the lens of *security*, forcing their ultimate reduction. However, this fear of securitisation of rights is based on the concept that 'security' is a political vessel in support of restrictive governmental practices. Specifically, after the rise of counterterrorism, the concept of 'security' has been amalgamated with 'national security' and the limitation of individual rights (Bhatt 2019, 261). Consequently, discussions of the right of security have caused much concern with human rights advocates, as the use of security may be employed to reduce human rights against the individual (Lazarus 2019, 327-8).

This conflict between national security and personal security arises primarily in Western social constructs. When considering a right to security, Western theory naturally observes a conflict between an individual's right and the security of the State. As such, Western scholars in examining the concept of security must separate the notion between the individual and the State (Sørensen 1996; Ramesh Babu 2016; Arden 2015). In contrast, in African jurisprudence, national security is not perceived as a defence of the 'State' as a legal construct, but the security of people who form that State. For national security does not need

to be considered as a separate concept to the security of the people, especially as the *people* are the *State* (Al-Farabi 1985). When a State is authorised under human rights to derogate or limit a right for the protection of the nation, this should not be considered as the protection of governmental power. Governments are not authorised to derogate or limit a right in order to protect their administration and sustain power under the disguise of security.

Remarkably, unlike other human rights instruments, the Banjul Charter does not contain a derogation clause. The omission of a derogation clause in the Banjul Charter has been widely discussed (Tolera 2014), in particular, there is contention amongst legal scholars whether this forbids or allows derogation under the Charter. This contention has yet to be resolved by African Commission on Human and People's Rights' (**African Commission**), as they themselves have been inconsistent in either forbidding any derogation[1] or allowing it.[2] Notwithstanding this inconsistency, even when allowing derogation, the African Commission has not accepted the protection of government as an element of 'security' under the Charter.[3]

This leads to an understanding that national security and personal security are not in enmity with each other but rather can be considered interconnected under an African understanding. As such, under an African construction, 'national security' in human rights law denotes the security of the people, rather than the security of a government. This is fundamental in the context of a NIAC, when the government is in conflict with their people, and therefore, inherently generating an insecure environment.

[1] *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Communication 74/92, (2000) AHRLR 66; *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria* - 105/93-128/94-130/94-152/96 (1998).
[2] *Summary of Zimbabwe's First Report to the African Commission on Human and Peoples' Rights*, p.11.
[3] For example, *Concluding Observations and Recommendations - Egypt: 9th to 17th Combined Periodic Report, 2001-2017*; *Commission Africaine des Droits de l'Homme et des Peuples 76e Session Ordinaire Juillet 2023*.

3. The interpretation of the right to peace and security in Article 23(1)

To appreciate the right to peace and security in international law, the right to security, in isolation, must first be discussed. The right to security must be understood as a "relational concept" (Powell 2019, 62) and must be examined in "contextual information" (Powell 2019,63). While the literature on the right to security is vast (von Tigerstrom 2007, 68-71; Varaei 2007; Cohen 2025; Powell 2019, 10; Lazarus 2015, 423; Ramcharan 2003, 7-14), there is limited discussions regarding its relationship with peace.

Taking a legal positivist approach, the right to security can be found within multiple human rights instruments. The ICCPR, Article 9 states that "Everyone has the right to liberty and security of person." Scholars examining the right to security usually compare Article 9 of the ICCPR with Article 5 of the *European Convention on Human Rights* (Lazarus 2012, 90; Powell 2019). In particular, reference is made to the European Court of Human Rights' jurisprudence that the right to security is perceived synonymously with 'liberty' and detention. For example, in *East African Asians v United Kingdom,* the terms 'liberty' and 'security' was read together by the court (para 222), and as reaffirmed in *Bozano v France* that the right to security should be read as the prevention of arbitrary detention. As such, many Western scholars conclude that the right to security is confined to freedom from arbitrary detention (Lazarus 2012, 90; Powell 2019). Conversely, the UN Human Rights Committee in *General Comment 35* on Article 9 of ICCPR (2014, para 9), considers the security of the person separately to the right to liberty, for the "right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained."

Shue (1997), in his works on human rights suggests that there are basic rights, explicitly the right to security, that "need to be established securely before other rights can be secured." For without security of the person, the enjoyment of other rights will be prevented. Therefore, the customary norm of security is to ensure the enjoyment of other human rights, as reiterated by UN Human Rights Council "… the right to security is an inherent human right of all and underpins the enjoyment of other human rights."[4] The right to security is at times included with the broader concept of 'human security', with the existence of the customary right being observed by the General Assembly in 2012, and referenced in the ICJ, which outlined the right as:

> The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.[5]

The General Assembly's recognition of the right has been referenced in the ICJ,[6] notably by Judge Cançado, that human security "has become a matter of concern in contemporary international law. The debate on *human* security has echoed in the UN General Assembly throughout the last decade, reminding States that theirs is the duty *to protect and to empower* their inhabitants"[7]

The right to security as a relational concept can be illustrated with the right to security and liberty in Article 6 of the Banjul Charter in comparison with Article 23(1). Article 23(1) confirms the right of security to peace, that is, "All peoples shall have a right to national and

[4] UN Human Rights Council, *Annual report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, 1 July 2013, para 54.
[5] General Assembly, *Follow-up on paragraph 143 on human security of the 2005 World Summit*, [3(a)].
[6] Declaration of Judge Bennouna, *Frontier Dispute (Burkina Faso/Niger)*, Judgment, I.C.J. Reports 2013, 55.
[7] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Rep 403 (Separate Opinion of Judge Cançado Trindade), para. 171, [177].

international peace and security." While the Banjul Charter in Article 6 links security with the right to liberty, in Article 23(1) the right to security is in relation to a right to peace.

Article 23(1) of the Banjul Charter refers to the right of *national* and *international* peace and security, imposing a positive obligation on States to their people and to other States.[8] While, Ouguergouz (2003, 204) has contended that Article 23(1) imposes no positive obligation on African States, this is not consistent with the findings of the African Commission.

In examining the African Commission's application of Article 23(1), the positive obligation to peace and security cannot be rigidly defined, as setting strict boundaries would limit the application of the right (Baldwin and Morel 2008, 247). The right to peace and security must be considered in context, as such, it requires a degree of deliberate vagueness to be considered on a case-by-case basis. Nevertheless, Article 23(1) has been used for the insecurity of journalists;[9] the "the loss of life and human suffering as well as the worsening humanitarian situation resulting in unabating displacement of people";[10] and "cases of enforced disappearance, arbitrary detention under deplorable conditions, prohibition of peaceful demonstrations, and constant insecurity leading to the displacement."[11] In particular, in the *Mauritania* case, the African Commission concluded that the unprovoked attacks on villages violated the right to peace and security, regardless of whether the State had control over the attackers.[12] Accordingly, from the African Commission's jurisprudence Article 23(1) is an obligation of the State to ensure and promote a 'secure' environment for a specific

[8] For example, African Commission, *Concluding Observations and Recommendations - Nigeria: 6th Periodic Report, 2015 – 2016*, para 29; African Commission*, Concluding Observations and Recommendations on the Combined Report of the Sahrawi Arab Democratic Republic on Implementation of the African Charter on Human and Peoples' Rights (2002-2012)*, para 38.
[9] *Resolution on the Safety of Journalists and Media Practitioners in Africa*, ACHPR/ Res.185, 12 May 2011. *Resolution on the Attacks against Journalists and Media Practitioners in Somalia*, ACHPR/ Res.221, 2 May 2012.
[10] *Resolution on the urgency for undertaking Fact- finding Mission to Burundi*, ACHPR/ Res.310, 18 November 2015.
[11] *Press Release on the human rights situation in Cameroon*, 29 January 2018.
[12] African Commission Communication No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, [140].

group within the State or the entire population of a State (Ssenyonjo 2012, 116), albeit within a conflict situation (Murray 2020, 541).

Although the African Commission has recognised that Article 23(1) requires States to respect and protect peace and security, it has not methodically defined the content of that right. Rather, the Commission has approached Article 23(1) by identifying violations through factual circumstances of insecurity without establishing a legal framework outlining a State's obligation. This interpretive gap makes it necessary to evaluate other sources concerning the meaning of peace and security in situations of armed conflict. In this regard, the Security Council's practice and intervention is particularly instructive. As the primary organ empowered to maintain international peace and security, the Security Council has repeatedly articulated the responsibilities of States towards civilians during armed conflict. While these resolutions are not an interpretation of Article 23(1) as such, they provide persuasive evidence of the contemporary international understanding of what the maintenance of peace and security requires in practice. Therefore, the Security Council's treatment of peace and security can assist in identifying the positive obligations that flow from Article 23(1) of the Banjul Charter.

3.1. The Security Council's role in shaping peace and security

The Security Council, as an international legal entity, has influenced the customary laws in armed conflict more than any other body (Fox et al. 2018, 664; Roscini 2010). It would only be for special circumstances that the Security Council does not discuss or attempt to influence an ongoing NIAC under their responsibility for maintaining international peace and security. Consequently, States engaged in a NIAC consistently depend on Security Council resolutions, conferring the Security Council significant influence on State behaviour in modern NIACs.

While resolutions adopted by the Security Council are not legal documents, they do have the ability to affect State practice. In particular, as articles 24 and 25 of the UN Charter binds all Member States 'to accept and carry out the decisions of the Security Council', the Security Council is "a political organ having legal consequences" (de Brichambaut 2001, 268). Under a traditional view, the Security Council cannot create 'new' legal norms, rather can only rely on existing obligations in the UN Charter or customary international law (Droubi 2014, 2–3). However, in practice the Security Council's decisions do eventually affect legal norms, as their decisions are legally binding on Member States (Öberg 2005, 881–882). Subsequently, the Security Council's repeated language has 'normative' significance to the development of customary law (Saul 2008, 215). The Security Council's capability in influencing customary international law is not unknown to them, as the Council itself will explicitly state that certain decisions "shall not be considered as establishing customary international law."[13]

As the Security Council makes binding decisions on specific situations, and in this case NIACs, Security Council resolutions have "precedential effects" (Saul 2008, 215). Consequently, Security Council resolutions on NIACs contribute to "the stream of authoritative decisions which are looked to as a source of law" (Hulsroj 2002, 70). As a party's obligation in a NIAC is generally governed by customary international law, the Security Council's impact on customary law in NIACs has been recognised by the ICRC (Henckaerts and Doswald-Beck 2009, iii) and the ICTY.[14]

As the Security Council's binding power is entrenched in its responsibility to maintain peace and security, the Security Council's language and expression can be utilised to outline the

[13] UNSC Resolution 2184 (2014), op para 14; UNSC Resolution 2182 (2014), op para 21; UNSC Resolution 2125 (2013), op para 13; UNSC Resolution 2077 (2012), op para 13; UNSC Resolution 2020 (2011), op para 10; UNSC Resolution 1950 (2010), op para 8; UNSC Resolution 1897 (2009), op para 8; UNSC Resolution 1851 (2008), op para 10.
[14] *Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1 (2 October 1995), 133.

obligation of African States to ensure peace and security. The Security Council in adopting binding decisions concerning specific NIACs, consistently proclaims that the State has 'the primary responsibility to protect civilians'. While the primary responsibility to maintain peace and security as a legal norm is emphasised by the Security Council,[15] this language has extended beyond the Security Council. In particular, the UN Human Rights Council has also emphasised the State's obligation to maintain peace and security amid armed conflict.[16]

This terminology of the 'primary responsibility to protect civilians' emerges from the Security Council's protection of civilians doctrine.[17] Conceived within Security Council's UN peacekeeping mandate to protect civilians, there is a proposition that the protection of civilians mandate is the content of the legal obligation of the State. Explicitly, the Security Council consistently suggests that States, albeit engaged in internal conflict, have a responsibility for peace and security in order to protect civilians. For example, in Resolution 2640 (2022) on Mali, the Security Council emphasised "that the Malian authorities have primary responsibility for the provision of stability, security and protection of civilians throughout the territory of Mali."

As the Security Council insists that the responsibility of the State does not shift to the international community, the protection of civilians mandate in UN peacekeeping becomes the content of the State's obligation to peace and security (Morris 2024). In other words, the Security Council's mandate to protect civilians outlines the State's obligations to peace and security. This is evidenced with the Security Council mandating peacekeepers in order for the

[15] For example, *Security Council 9855th meeting*, 5 February 2025, 15 and 20; *Security Council 9757th meeting*, 22 October 2024, 20; *Security Council 9740th meeting*, 3 October 2024, 8 and 16.
[16] *Situation of Human rights in the Syrian Arab Republic*, Human Rights Council, 17 October 2012, op para 5; *Situation of Human Rights in Burundi*, Human Rights Council, 12 October 2023, preamble.
[17] UNSC Resolution 1265 (1999).

State to 'assume' these responsibilities. As peacekeepers are mandated in the Mali in Resolution 2584 (2021), op para 30(c)(ii),

> to take mobile, flexible, robust and proactive steps to protect civilians, including through the set-up of a Mobile Task Force, prioritizing the deployment of ground and air assets, as available, in areas where civilians are most at risk, while expecting Malian authorities to assume their responsibilities in the respective areas.

Part of this responsibility is the States obligation to positively provide peace and security,

> the need to address the gaps and strengthen links between the United Nations peace and security in the field, human rights and development work as a means to address root causes of conflict and threats to the security of women and girls in the pursuit of international peace and security.[18]

A State's obligation to peace and security is further repeated by the Security Council when it references this responsibility in connection to specific tasks, for example in Resolution 1820 (2008), op para 1, '…affirms in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security'.

As part of a State's obligation under the Security Council's understanding, the protection of civilians is not only physical protection but encompasses all forms of protections owed to civilians, in particular, human rights protections (Morris 2024). Since Resolution 1509 (2003), the Security Council has explicitly inserted human rights protections as a norm in protection of civilians mandates. The Security Council has mandated the obligation to "protect and promote human rights";[19] implement "mechanisms to threats and attacks against

[18] UNSC Resolution 2122 (2013), preamble.
[19] UNSC Resolution 1509' (2003), op para 3(l).

civilians that may involve violations and abuses of human rights";[20] and"… the protection of civilians from abuses and violations of human rights and violations of international humanitarian law…"[21] within the gambit of the protection of civilians mandate.

It is important to note that this responsibility to protect civilians is not the same as the Responsibility to Protect doctrine (**R2P**). The R2P doctrine attempts to protect against genocide, war crimes, ethnic cleansing, and crimes against humanity.[22] However, the protection of civilians doctrine is broader than the protections offered by R2P. The protection of civilians doctrine is protection against all violence in armed conflict for the maintenance of peace and security. Therefore, the protection of civilians doctrine is broader than the R2P doctrine, as an insecure environment would be a contravention of the State's responsibility to protect. Accordingly, while a government's use of divisive language to isolate a group within their territory would not violate R2P, the effects of such language would violate their responsibility to protect and to maintain peace and security within their territory.

Comparable to the understanding of Article 23(1) of the Banjul Charter, the obligations of States to peace and security should not be rigidly perceived. As the Security Council interprets the obligation to peace and security in context of the factual scenario at hand. In essence, from the Security Council's understanding, the content of the obligation of peace and security is to create a secure environment for the protection of civilians, even in times of armed conflict. Consequently, the Security Council demands an obligation on the States to ensure a secure environment for civilians not participating in hostilities (Morris 2023, 373).

The obligation for peace and security, from the language of the Security Council, observes the conflict itself as a threat to civilian protection (Morris 2023, 373). As such, the sovereign

[20] UNSC Resolution 2406 (2018), op para 7(a)(iii).
[21] UNSC Resolution 2666 (2022), op para 24(i)(e).
[22] UN General Assembly, *2005 World Summit Outcome*, para 138.

State should take all reasonable means to conclude the conflict, for the obligation of the State is to protect the "welfare of its own peoples" (UNGA 2004, para 29). This has been echoed by the African Commission when it has called upon States and civil society in violation of Article 23 to "adhere to the peaceful settlement of their differences and to give priority to the national interest of maintaining the unity and integrity…"[23] of the State.

Although IHL does not prohibit divisive language and the continuation of conflict, this does not equate to its permissibility as codified in the Banjul Charter and consistently decided by the Security Council, for the State has a legal obligation for peace and security during a NIAC (Morris 2023).

4. Divisive political language and outer group's right to peace and security

Divisive language in armed conflict is not novel, however, unlike an international armed conflict, in a NIAC governments are polarising those who they have a responsibility to protect. In particular, this language entrenches intercommunal divisions prolonging the conflict and generating an insecure environment, in violation of the State's responsibility to maintain peace and security. It is therefore imperative to first outline the impact of divisive political language to understand how such rhetoric fosters an insecure environment violating a group's right to peace and security.

While the majority of this form of divisive language falls below the threshold of 'hate speech', the position of political leaders enhances the effect of the language on the listener (Kalmoe 2014, 547; Kalmoe et al. 2018, 334). Given the position of 'elites' in society, their words have a degree of authority and the ability to "shape public opinion and behavior, this

[23] *Resolution of the Peace and National Reconciliation Process in Somalia*, ACHPR/ Res.46, 11 May 2000.

could have the effect of altering interpersonal relations in society" (Newman et al. 2021, 1142). The conclusion to be reached is that politicians' words can directly impact the security of the outer group (Piazza 2020, 449).

While divisive strategies may not have a direct link to tangible action, nevertheless, research does show that political speeches using divisive language do result in aggression amongst the listeners (Kalmoe 2014; Kalmoe et al. 2018; Piazza 2020). Kalome (2014, 556) in his experiment regarding violent metaphors in political speeches concluded that "citizens with aggressive personality traits expressed significantly greater support for political violence, and their support doubles when they were exposed to political messages infused with violent metaphors." In aggression research, the use of violent cues in political speeches, "makes people *feel, think,* and *act* more aggressively" (Kalmoe et al. 2018, 335). As such, divisive language targeting an outer group increases the hostility and aggression towards that group by those identifying as the inner group (Gubler and Kalmoe 2015, 651). States where politicians utilise hostile language are more likely to encounter a surge in domestic terrorism (Piazza 2020, 433), consequently, fostering an insecure environment in violation of the right to peace and security.

In armed conflict, this polarisation of the outer group is prevalent as governments attempt to bolster their support by targeting a common enemy of the State. It would be reasonable to expect that these political strategies during intercommunal conflicts would build an insecure environment towards the 'enemy' group, in violation of their right to peace and security. For example, in exploring the Ethiopian conflict in the Tigray region, the political language employed during the conflict has placed the Tigrayan people in an insecure environment. To appreciate the context of the language, the Tigray People's Liberation Front (**TPLF**) is the administrative body in the Tigray region advocating for the Tigrayan people. With conflict erupting between the TPLF and the federal government in November 2020 in regards to the

status of the Tigray region, the continuous use of political language has associated people of Tigrayan ethnicity to the TPLF and their cause (Human Rights Watch 2022). Further, violent political language against the TPLF, in the context of the intercommunal conflict, has led to further discrimination against ethnic Tigrayans. Consequently, when Prime Minister Abiy Ahmed posted on Facebook for all Ethiopians to "take up arms and bury" TPLF, inciting all citizens to "organise and march through [any] legal manner with every weapon and power... to prevent, reverse and bury the terrorist TPLF" (Human Rights Watch 2021), this post was viewed as an incitement to violence against the Tigrayan people themselves (BBC 2021a). Subsequently after the Prime Minister's comments, mass arrests, including citizen arrests, took place against Tigrayans in Addis Ababa for "suspicion" of supporting the TPLF (BBC 2021b). During the conflict, it has been reported that Tigrayans in the capital are attempting to hide their accents and identities out of fear of retribution (BBC 2021b). The use of divisive political language in the Ethiopian conflict has polarised and isolated the civilians sharing Tigrayan ethnicity, increasing hostilities and discrimination towards them (Ochab 2023). For this reason, the language utilised by Ethiopian politicians has been identified by the UN Human Rights Council as "indicators and triggers contained in the 2014 UN Framework for Analysis of Atrocity Crimes."[24] This type of political strategy breaches Ethiopia's obligation to "restore calm, security, and peace as soon as possible,"[25] creating an insecure environment for the Tigrayan people in violation of Ethiopia's obligations to respect and protect safeguard peace and security.

This form of divisive political language has also been observed in the Democratic Republic of the Congo (**DRC**). Focusing on the recent escalation of violence in South Kivu since 2017,

[24] UN Human Rights Council, *Report of the International Commission of Human Rights Experts on Ethiopia*, 19 September 2022, para 127.
[25] *Resolution on the Human Rights Situation in the Republic of Cameroon* - ACHPR/Res. 395 (LXII) 2018, op para 5.

the conflict is primarily fought by a loose coalition of domestic armed militias associated with the Babembe, Bafuliiru, and Banyindu ethnic communities (**Mai Mai group**) (Ndahinda and Mugabe 2024, 50). The Mai Mai group openly states their aim to cleanse Banyamulenge people from the DRC, as they are opposed to the invasion of Rwandan forces.[26] Although the Banyamulenge people are ethnically distinct from the Tutsi people in North Kivu, the rhetoric during the conflict assumes that these communities are synonymous. Due to the political dynamics of the region, the anti-Banyamulenge language used in South Kivu is associated anti-Tutsi and anti-Rwandan rhetoric (Frère 2007, 41). While hate speech is being used by the Mai Mai group, divisive political language has also been employed by politicians to exploit the conflict. For example, in 2019 elections in South Kivu, Bitakwira, in his campaign speech stated:

> The war we are currently waging against the Tutsi is getting in high gear! You should know that our struggle has already weakened the forces of the Rwandans who were welcomed by our ancestors. They befriended us in the same way a snake befriends a partridge, until they turned against us, pretending that they are no longer Rwandans...if you are on the side of those who want to solve our problem, we will collaborate. But if you say no, if you have Tutsi blood but hide among the Bafuliiru, you will then take your own path and follow those people...the days of anyone who goes against our struggle are numbered on the land of the Bafuliiru.[27]

While this language falls below the threshold of Article 20 of the ICCPR, it violates the right to peace and security of those communities under Article 23(1) of the Banjul Charter. For these tactics garner political support by placing a community within an insecure environment.

[26] UN Security Council, The Situation in the Democratic Republic of the Congo Seventy-Sixth year, 8873rd meeting, 5 October 2021, 3.
[27] As cited in Ndahinda and Mugabe 2024.

Divisive political language is graver in areas of armed conflict, as those societies are more receptive to the violent cues. For violent words and divisive language in political speeches "can call up threats that change the way listeners treat members of the opposing group, even or especially among the outgroup's most likely allies, with consequences that reverberate in the contentious policies supported by citizens and adopted by states" (Gubler and Kalmoe 2015, 662). Therefore, even though the hostilities are coming from the inner group, governments are still responsible for the incitement of that hostility. This can be observed by the reactions of the inner groups to the outer group in Ethiopia,[28] Sudan,[29] and the DRC.[30] As stated by the African Commission in the *Mauritania case*, "the responsibility for protection is incumbent" on each State, and as such, divisive strategies and language that encourage violence to a certain group "constitute a denial of the right to live in peace and security."[31]

Governmental agents engaged in political opportunism to increase their own power rather than the security of their people would be in violation of their responsibility to protect and the maintenance of peace and security. Furthermore, opportunistic politicians using these divisive tactics will incidentally distract the people from actual problems, and therefore, limit the potential strategies to addressing the underlying issues to resolve the conflict (Pierce et al. 2022, 12). As has been observed by Stedman that a risk to peace settlements and peacebuilding "comes from spoilers – leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it" (Stedman 1997, 5).

In perceiving the government as the representation of the people, the power of the State belongs to the people, and a government should only consider the protection of their people.

[28] DFR Lab, "Influential Ethiopian social media accounts stoke violence along ethnic lines", 18 December 2021.
[29] Rights for Peace, *Countering discrimination and hate speech in Sudan*, March 2021, 15-17.
[30] UN News, "Escalating violence in Democratic Republic of Congo exacerbating humanitarian crisis, special representative warns Security Council, urging durable political solution", 20 February 2024.
[31] African Commission Communication No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, [140].

Reiterating the Security Council's repetition of the responsibility of the State, politicians in their official capacity must guarantee the protection of civilians. Consequently, governments' use of divisive political language undermines national security, as they are dividing and isolating their people violating their right to peace and security.

The violation does not arise merely because polarising language is used. Rather, divisive political language becomes relevant under Article 23(1) where, viewed in its factual context, the language foreseeably contributes to an insecure environment for civilians by identifying a broader ethnic, religious, cultural, or communal group with a threat posed by belligerents. The greater the intercommunal tensions, the authority of the speaker, and the likelihood that the language will encourage hostility, discrimination, or violence against civilians, the stronger the connection between the rhetoric and the State's obligations under the right to peace and security.

Consequently, States engaged in a NIAC have a responsibility to warrant peace and security for their people, regardless of the politicisation of the conflict. From this responsibility, no group of civilians within their territory should be targeted as the *enemy* in political speeches forcing further division. Therefore, applying the Security Council understanding, States must take all reasonable steps to create a secure environment, this would include ensuring that their language do not further entrench the conflict.

While this does not preclude the States from defending themselves against belligerent groups and those participating in hostilities, the State is not permitted to isolate civilians that are ethnically, socially, or religiously related to those groups. Therefore, under the right to peace and security, States should only engage in conflict to protect all their people, and therefore, cannot further entrench intercommunal segregation.

To target an outer group in political speeches is to violate the right of peace and security of all the people. For this reason, the responsibility of States to create a secure environment for the sake of international peace and security, would include not imbedding discrimination and segregation in political speeches to divide the people. Accordingly, as the UN Human Rights Committee (2023) consistently reports on the use of divisive language, that to "incite communities against each other and perpetuate conflict", is the "root causes of violations."

While this paper has focused on divisive political language during armed conflict, the right to peace and security would also apply in times of peace. From Article 23(1) of the Banjul Charter, States have the responsibility to *protect* peace and security, therefore, any steps threatening that security or heightening tensions would be a violation of the right to peace and security. However, as discussed, this right is a contextual right, therefore, political strategy in times of peace must be examined with the contextual scenario and intercommunal tensions. Nevertheless, politicians using divisive strategies at times of peace that lead to further tensions enabling the eruption of conflict, would be in breach of their responsibility to maintain peace and security.

5. Conclusion

By its very nature, intercommunal conflicts are between the multiple communities within the State. However, the permissibility of defending the State does not validate a government's derogation of their obligations owed to civilians, in particular, their responsibility to protect civilians. Therefore, States engaged in armed conflict must ensure their obligation not to incite further hostilities and divisions within the community under their obligation to ensure peace and security.

As the State has the primary responsibility to protect their civilians in an armed conflict, this would include the maintenance of a secure environment for all people within their

jurisdiction. Therefore, as implied from the Security Council, and codified in the Banjul Charter, civilians are owed a right to peace and security even within intercommunal conflicts. To respect the right to peace and security the government, as the representation of the sovereignty of the people, cannot use pre-existing intercommunal divisions to bolster their political support and entrench their power.

The reinforcement and entrenchment of intercommunal divisions in political speeches is a violation of the right to peace and security by creating an insecure environment for an 'outer group'. Although, the government is in conflict with a non-State group within their territory, they cannot victimise civilians that are associated with that group to further entrench the conflict. While the State is permitted to protect the nation, the security of the State must be considered analogously with the security of the people. Therefore, politicians are in violation of national security by further imbedding intercommunal tensions, although they are in conflict with civilians participating in hostilities.

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